

RESEARCH ARTICLE



Protection from forced eviction: what rights do social housing tenants have under human rights charters?

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ABSTRACT

This article examines the rights of social housing tenants under Australian human rights charters. Victoria, Queensland and the Australian Capital Territory (ACT) have charters which include the right to home and which place obligations on public authorities. However, only in the ACT are these duties enforceable in eviction proceedings. In Victoria and Queensland, social housing tenants must commence separate judicial review proceedings to raise human rights arguments. This article outlines the scope and importance of the right to home in international law, and it uses this framework to provide suggestions on how the right to home could be made accessible and effective for social housing tenants.

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Introduction

Secure housing is essential to human well-being and dignity, as it supports participation in employment, education, healthcare and civil society. A secure place to call home also supports family formation and community involvement. States are obliged under international human rights law to protect, respect and fulfill the right to secure housing, and this obligation has particular significance for people living in public or community housing (collectively, social housing tenants),¹ who often experience various forms of vulnerability and disadvantage.² Many social housing tenants are elderly, have a non-English speaking background, have health issues or a disability, and have a low income, meaning it is difficult for them to enter or remain in the private rental market.³ A large proportion of public housing tenants were born in countries other than Australia, with many arriving as refugees.⁴

All Australian States and Territories have residential tenancy laws, and three states (Australian Capital Territory ('ACT'), Victoria and Queensland) now have human rights

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¹Social housing includes public housing (provided directly by a government authority) and community housing (provided by various not-for-profit organisations): see Housing Victoria, 'Social housing' (16 July 2019) <www.housing.vic.gov.au/social-housing> accessed 31 May 2023.

²Kevin Bell, 'Protecting Public Housing Tenants from Forced Evictions' (2013) 39(1) Monash University Law Review 1, 6. See also Tamara Walsh, 'Social Housing, Homelessness and Human Rights' (2022) 45(2) University of New South Wales Law Journal 688.

³Australian Institute of Health and Welfare, *Housing Assistance in Australia – Occupants* (29 June 2022) <www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia/contents/occupants> accessed 31 May 2023.

⁴Anna Ziersch, Clemence Due, and Moira Walsh, 'Housing in Place: Housing, Neighbourhood, and Resettlement for People from Refugee and Asylum Seeker Backgrounds in Australia' (2023) *Journal of International Migration and Integration* 1.

charters. This article examines the relationship between the right to home and statutory human rights charters. It examines the nature and importance of security of tenure, or freedom from arbitrary eviction, which is one aspect of the right to home under international law.⁵ Security of tenure prohibits the state from evicting a person from their home, unless eviction is demonstrably justified in the circumstances.

Notably, the Victoria and Queensland human rights charters do not allow human rights arguments to be made at the point of eviction. Rather, social housing tenants may raise human rights issues only by commencing proceedings for judicial review, which is expensive, time-consuming and largely inaccessible. Unlike the ACT, Victoria and Queensland human rights charters do not currently ensure that social housing tenants are protected from arbitrary eviction.

This article aims to promote greater understanding of the importance of security of tenure under international law. Clearly, enacting human rights legislation does not in itself operate to protect human rights. Rather, government decision-makers at all levels need to be aware of the significance of protecting human rights, including the right to home, when making and interpreting legislation, and when making decisions. With this awareness, government decision-makers are more likely to consider the consequences of eviction on vulnerable populations, rather than treating social housing merely as property to be managed.

This article proceeds in the following way. First, it outlines the nature, scope and importance of the right to home under international law. Second, it examines relevant provisions in Australian human rights charters. Third, the article compares the level of protection social housing tenants have from arbitrary eviction in Victoria and the ACT.⁶ Finally, this article argues for a human rights-based approach to housing and compares this to approaches which consider housing as a commodity or a privilege. A human rights-based approach requires all government decision-makers to consider human rights when making and interpreting laws and when making decisions which impact on the right to home.

The nature, scope and importance of the right to home

The right to home is set out in various international instruments and has been articulated in court decisions and commentary. This section outlines the nature, scope and importance of this right by examining these instruments and decisions, and by focusing on the situation of social housing tenants. It also briefly examines whether the right to home interferes with a landlord's property rights.

International instruments, domestic court decisions and commentary

The *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')⁷ and the *International Covenant on Civil and Political Rights* ('ICCPR')⁸ both impose duties on

⁵The right to home has other aspects, as explained later in this article.

⁶The situation in Queensland is not examined separately in this article, as its charter was enacted recently. However, the Queensland Civil and Administrative Tribunal has indicated that it will follow Victorian decisions concerning the interpretation of the charter: *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152, [39]–[40] (Member Stepniak).

⁷International Covenant on Economic, Social and Cultural Rights (opened for signature 19 December 1966, entered into force 3 January 1976) 993 UNTS (ICESCR) art 11(1).

⁸International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

state parties, including Australia, regarding protection of the home. The ICESCR recognises ‘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’.⁹ State parties are obliged to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation’ of the right to housing.¹⁰

The ICCPR obliges state parties to:

respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹

Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ...
2. Everyone has the right to the protection of the law against such interference ...¹²

The nature and scope of these rights have been articulated by United Nations committees,¹³ by domestic courts¹⁴ and by scholars. The Constitutional Court of South Africa states that:

[A] home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure place of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.¹⁵

Similarly, the UN Committee on Economic, Social and Cultural Rights states that:

... the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity ... the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. Thus ‘the inherent dignity of the human person’ from which the rights in the Covenant are said to derive requires that the term ‘housing’ be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources.¹⁶

⁹ICESCR (n 7), art 11(1).

¹⁰ibid art 2. See UN Committee on Economic, Social and Cultural Rights, ‘General Comment 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23 [1] (‘General Comment 4’).

¹¹ICCPR (n 8), art 2(1). The right to home entails both positive and negative obligations on the state—the duty to pass legislation giving effect to the right, and the duty not to forcibly evict a person in breach of the right.

¹²See also European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS (European Convention) art 8.

¹³The Human Rights Committee (HRC) is a panel of independent experts appointed to monitor the implementation of the ICCPR by state parties. The HRC has published a general comment on the nature, scope and significance of art 17: see UN Committee on Civil and Political Rights, ‘General Comment 16: Article 17 (Right to Privacy)’ in *The Right to Respect for Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (8 April 1988) UN Human Rights Committee (‘General Comment 16’).

¹⁴Art 17 has been incorporated for example into the Bill of Rights in the Constitution of the Republic of South Africa 1996: see s 26.

¹⁵*Port Elizabeth Municipality v Various Occupiers* (2005) (1) SA 217 (CC) [17]. This case concerns the interpretation of s 26 of the Constitution of the Republic of South Africa 1996, which prohibits arbitrary eviction from one’s home.

¹⁶General Comment 4 (n 10) [7].

Writing extrajudicially, a Victorian judge describes the significance of home as:

Much more than a shelter, a dwelling, and a place to inhabit ... 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.¹⁷

As mentioned above, ICCPR art 17 prohibits the state from unlawfully or arbitrarily interfering with the listed rights.¹⁸ This duty applies to all branches and organs of the state—legislative, administrative and judicial, and both ‘unlawful’ and ‘arbitrary’ interference is prohibited. This means that interference can only take place ‘on the basis of law’,¹⁹ and any interference must be ‘in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.’²⁰

The term ‘home’ is understood broadly, as ‘the place where a person resides’.²¹ This does not require a pre-existing right to live or remain in a particular place but is established simply by the fact of residence. However, the duration of a person’s residence at a place, and their connection to the area (such as the use of local services, schools, etc.) may assist in establishing a place as a person’s home.

Security of tenure, or freedom from arbitrary eviction, is a crucial aspect of the right to home.²² Therefore, regardless of whether a person owns or rents their home, ‘all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.’²³ In this respect, the right to home departs fundamentally from traditional notions of property and contract law, under which a residential tenancy may be terminated quickly and easily.²⁴ Rather than characterising the relationship as one of landlord and tenant, human rights law regards social housing providers as organs of the state, with consequent legal duties, and social housing tenants as holders of a legal right not to be forcibly evicted.

Freedom from forced evictions does not mean that social housing tenants can never be evicted. Rather, eviction may occur when it is reasonable and justified, ‘such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause’.²⁵ Further, eviction, even when it is justified, must be done in accordance with the relevant principles of international law.²⁶ Therefore, appropriate procedural protections are ‘especially pertinent in relation to forced evictions’ which directly impact many human rights. These protections include the provision of adequate and reasonable notice for all affected persons prior to the scheduled date of eviction, information on the proposed eviction, and restriction on the circumstances of eviction (such as prohibitions on evictions taking place in particularly bad weather or at night). Further, the state should provide legal remedies and, where possible, legal aid to persons who need it to seek

¹⁷Bell (n 2).

¹⁸The state is obliged to pass legislation prohibiting interferences by natural or legal persons other than state actors: see General Comment 16 (n 13) [1]–[2]. However, this article focuses on the duties of the state, as opposed to non-state actors such as private landlords.

¹⁹General Comment 16 (n 13) [3].

²⁰*ibid* [4].

²¹*ibid* [5].

²²General Comment 4 (n 10) [8(a)].

²³*ibid*.

²⁴Bell (n 2) 5.

²⁵*ibid* 11.

²⁶General Comment 4 (n 10) [18].

redress from the courts.²⁷ States must ensure that evictions do not result in individuals being rendered homeless. Where evicted persons cannot secure alternative accommodation, states must take 'all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing ... is available'.²⁸

Vulnerable groups and eviction

The UN Committee on Economic, Social and Cultural Rights emphasises the importance of the right to home for members of vulnerable groups. In its comment on forced eviction, the Committee states:

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.²⁹

In particular, the Committee emphasises that:

Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.³⁰

Social housing tenants constitute a significant proportion of the Australian community,³¹ and they are 'amongst the most vulnerable people in society'.³² This includes a large proportion of people who are elderly, who have a non-English speaking background, who have health issues or a disability, and who have a low income.³³

Protection from arbitrary eviction is particularly important for refugees and former refugees, due to their 'vulnerability ... and the suffering they have endured, [and] the trauma and insecurity associated with persecution and flight'.³⁴ Due to the vulnerability of members of this group, the state has a 'special responsibility' not to arbitrarily uproot them and potentially break important connections with local communities, family, work, neighbours, health services and schools.³⁵

²⁷UN Committee on Economic, Social and Cultural Rights, 'General comment No. 7: The right to adequate housing (art 11 (1) of the Covenant): Forced evictions' (20 May 1997) UN Doc E/1998/22 [15] ('General Comment 7').

²⁸ibid [16].

²⁹ibid [10].

³⁰ibid [16]. The reference to 'resettlement' and 'access to productive land' may suggest that the General Comment only concerns large-scale clearances of housing and does not apply to eviction from social housing. However, the Committee on Economic, Social and Cultural Rights has confirmed that the right to adequate housing applies to all types of housing, including private rental accommodation: Committee on Economic, Social and Cultural Rights, Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015* (Djazia and Bellili v Spain) (20 June 2017) UN Doc E/C.12/61/D/5/2015.

³¹In 2020-1, around 790,000 Australians lived in social housing in over 440,000 dwellings across the country': Australian Institute of Health and Welfare, 'Housing Assistance in Australia' (29 June 2022) <www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia/contents/about> accessed 31 May 2023.

³²Bell (n 2) 4. See also Walsh (n 2).

³³Australian Institute of Health and Welfare, 'Housing Assistance in Australia – Occupants' (29 June 2022) <www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia/contents/occupants> accessed 31 May 2023.

³⁴*Kituo Cha Sheria v Attorney-General* [2013] eKLR [68].

³⁵ibid [69].

Interference with property rights

Property rights are an important part of human rights law, and this is reflected in the *Universal Declaration of Human Rights*.³⁶ The *Universal Declaration* provides that ‘everyone has a right to own property’ and it prohibits arbitrary deprivation of property.³⁷ Protecting tenants from arbitrary eviction may interfere with a landlord’s property rights. In *City of Cape Town v Rudolph*,³⁸ a South African court considered whether legislation regulating evictions in South Africa constitutes an arbitrary deprivation of property, contrary to the South African Constitution.³⁹

The court held that the legislation *interfered* with property rights, as it prevented land-owners from seeking immediate possession of land in certain circumstances. However, the court held that the legislation was not ‘arbitrary’, as it sought to ‘afford respondents in eviction proceedings a better opportunity ... to put all the circumstances they allege to be relevant before the court’.⁴⁰ The court regarded this as a legitimate governmental purpose, particularly considering the ‘calamitous’ consequences of eviction and the need for the ‘fullest enquiry’ before eviction is ordered.⁴¹

Australian charters of rights—which are examined in the next part of this article—include property rights.⁴² However, these charters also provide that all rights can be limited in certain circumstances.⁴³ Therefore, although protection from arbitrary eviction may limit a landlord’s property rights, this can be justified under human rights law.

As outlined below, social housing providers have duties under human right charters which private landlords do not have. Private tenants may also experience various forms of vulnerability and disadvantage, and the state has a role to ensure, through appropriate policy, legislation and funding, that they have adequate housing. However, due to their often-acute vulnerability, social housing tenants are entitled to protection from arbitrary or unjustified eviction, beyond the minimal protection provided to other tenants. As the Special Rapporteur on adequate housing noted, housing is not ‘mere[ly] [a] commodity’ or a ‘privilege, it is a human right’.⁴⁴ Therefore, this article focuses on the rights of social housing tenants, and the duties of social housing providers under human rights charters.⁴⁵

Statutory charters of human rights and residential tenancy laws

Three jurisdictions in Australia currently have statutory human rights charters.⁴⁶ Unlike other comparable countries, Australia has no national charter or bill of rights. Indeed,

³⁶Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (‘Universal Declaration’).

³⁷The Universal Declaration is not binding under international law. Further, the right to property is not contained in either the ICCPR or the ICESCR.

³⁸*City of Cape Town v Rudolph and Forty-Nine Others* (2003) 11 BCLR 1236 (C).

³⁹The relevant legislation, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998* (South Africa) (‘PIE Act’) is examined later in this article.

⁴⁰*Cape Killarney Property Investments Pty Ltd v Mahamba* (2001) 4 SA 1222 (SCA) [21].

⁴¹*City of Cape Town* (n 38) [32].

⁴²*Charter of Human Rights and Responsibilities 2006* (Vic) s 20.

⁴³*ibid* s 7(2).

⁴⁴United Nations ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living – Mission to Australia’ (2007) A/HRC/4/18/Add.2 [65] (‘Special Rapporteur Report’).

⁴⁵The Special Rapporteur stated in 2007 that Australia has a ‘serious national housing crisis’ which has ‘a critical and direct impact on the most vulnerable groups of the population’: *ibid* [52].

⁴⁶*Human Rights Act 2004* (ACT) (‘HRAACT’), *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Charter’) and *Human Rights Act 2019* (Qld) (‘HRAQ’).

there is much ambivalence and even antipathy in Australia regarding the value of human rights.⁴⁷ The following section of the article examines the provisions in Australian human rights charters relating to eviction from one's home.

Statutory charters of human rights

All three Australian charters of human rights include the right to protection of the home, in virtually identical terms to the ICCPR. For example, the Victorian *Charter* relevantly provides:

A person has the right—

- (a) Not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.⁴⁸

As mentioned above, the right to home is intimately linked to the protection of the family. All three charters provide that 'families are the fundamental group unit of society and are entitled to be protected by society and the state.'⁴⁹ The charters also protect certain cultural rights.⁵⁰

The human rights charters provide that rights may be limited. For example, the Victorian *Charter* states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- a) the nature of the right; and
- b) the importance of the purpose of the limitation; and
- c) the nature and extent of the limitation; and
- d) the relationship between the limitation and its purpose; and
- e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.⁵¹

These provisions suggest that human rights charters provide reasonably robust human rights protection in that rights can be limited only where this is 'reasonable' and 'demonstrably justified'. This is consistent with the interpretation of ICCPR art 17, under which forced eviction is allowed only when justified in the circumstances. In terms of duties, the human rights charters require public authorities 'to act compatibly with human rights and give proper consideration to human rights in making decisions.'⁵² Thus, the state has a duty to protect and uphold human rights.

An important consideration in whether an interference with rights is justified is 'the nature and extent of the limitation' of the right.⁵³ The European Court of Human Rights has highlighted that eviction or 'loss of one's home is a most extreme form of

⁴⁷Kevin Dunn and Rachel Sharples, 'Do Australians Care about Human Rights? Awareness, Hierarchies of Sympathy and Universality' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (vols 1 & 2, Lawbook Co 2021).

⁴⁸Charter, s 13. See also HRAACT, s 12 and HRAQ, s 25.

⁴⁹Charter, s 17. See also HRAACT, s 11 and HRAQ, s 26.

⁵⁰Charter, s 19. See also HRAACT, s 27 and HRAQ, s 27.

⁵¹Charter, s 7(2). See also HRAACT, s 28 and HRAQ, s 13.

⁵²Charter, s 38(1). See also HRAACT, s 40B and HRAQ, s 58.

⁵³Charter, s 7(2)(c).

interference with the right'.⁵⁴ This is because eviction is a complete and permanent extinguishment of the connection between a person and their home.

However, the charters vary dramatically regarding enforcement and remedies, with the Victorian *Charter* being the most limited. Although it is 'unlawful' for a public authority to act incompatibly with human rights or to fail to consider human rights in making a decision, this does not provide an independent ground for a victim of this breach to claim a remedy. Rather, a legal challenge can only be made if a cause of action apart from the *Charter* is available.⁵⁵ In the ACT, however, a person may rely on their rights in the *Human Rights Act 2004* (ACT) ('HRAACT') in 'legal proceedings'.⁵⁶ As we will see below, this provision provides much greater protection to social housing tenants in the ACT.

Finally, the Victorian *Charter* provides that, 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.⁵⁷ This is a clear directive to interpret Victorian laws compatibly with the rights in the charter.⁵⁸ Further, 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.⁵⁹ Therefore, foreign and international law relevant to the right to home—as discussed above—may be applied by courts in interpreting legislation in Victoria, Queensland and the ACT.

Residential tenancy laws and eviction

All Australian States and Territories have residential tenancy legislation.⁶⁰ These laws were enacted to provide a quick, efficient process for eviction, and they provide little protection from forced eviction.⁶¹ This section outlines the process for terminating a tenancy and evicting a tenant in Victoria, under the *Residential Tenancies Act 1997* (Vic) ('Victorian RTA').⁶² First, a landlord may give a notice to vacate, in response to which the tenant may vacate, which terminates the tenancy. If the tenant remains in possession, the landlord may apply to the tribunal⁶³ for a possession order, which orders the tenant to vacate by a specific date.⁶⁴ If the tenant remains in possession, the landlord may purchase a warrant of possession, which authorises police to remove the tenant.⁶⁵

Historically, the possession order hearing is the only opportunity for a tenant to raise any legal issues concerning the eviction. Further, until recently, residential tenancy

⁵⁴*McCann v United Kingdom* App no 19009/04 (ECtHR, 13 May 2008) [50].

⁵⁵*Charter*, s 39. Usually, this will be judicial review proceedings, commenced in the Supreme Court. See also HRAQ s 59, which is in similar terms to *Charter* s 39.

⁵⁶*Human Rights Act 2004* (ACT) s 40C(2)(b).

⁵⁷*Charter*, s 32(1). See also HRAACT, s 30 and HRAQ, s 48(1).

⁵⁸*Momcilovic v The Queen* (2011) 245 CLR 1.

⁵⁹*Charter*, s 32(2). See also HRAACT, s 31 and HRAQ, s 48(3).

⁶⁰*Residential Tenancies Act 1997* (Vic) ('Victorian RTA'); *Residential Tenancies Act 2010* (NSW); *Residential Tenancies Act 1997* (ACT) ('ACT RTA'); *Residential Tenancies Act 1999* (NT); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); *Residential Tenancies Act 1987* (WA); *Residential Tenancies Act 1995* (SA).

⁶¹Lack of security of tenure is common to all Australian States and Territories: see Nathalie Wharton and Lucy Craddock, 'A Comparison of Security of Tenure in Queensland and in Western Europe' (2011) 37(2) *Monash University Law Review* 16.

⁶²As outlined previously, this article focuses on Victoria, the ACT and Queensland—the only Australian jurisdictions which currently have human rights charters.

⁶³The Victorian Civil and Administrative Tribunal, or 'VCAT'.

⁶⁴RTA (Vic), s 322.

⁶⁵*ibid* s 351.

legislation did not allow tribunal members to consider the circumstances of a tenant or the impact of eviction on them. The possession order hearing is concerned only with the formal validity of the notice to vacate, such as whether it was correctly served and whether it contains the required details. If these formal requirements are satisfied, the tribunal must grant a possession order.⁶⁶

In 2018, the Victorian RTA was amended to provide that the tribunal must be satisfied that it is 'reasonable and proportionate' in the circumstances to make a possession order, taking into account the interests and the impact on the landlord, tenant, co-tenants and neighbours.⁶⁷ This provision provides some protection from arbitrary eviction of public and private tenants in Victoria.⁶⁸ In the ACT, the tribunal may terminate a public housing or community housing tenancy only if satisfied that this is 'reasonable and proportionate'.⁶⁹ In Queensland, the tribunal has no discretion to refuse termination.

However, the 2018 amendment falls short of comprehensive protection, as the provision defining 'reasonable and proportionate'⁷⁰ focuses mainly on the tenant's conduct, and it does not list factors which may make the tenant vulnerable.⁷¹ Significantly, the provision 'does not refer to the impact of the order on the renter',⁷² although the Victorian Supreme Court has stated that this is 'a fundamental aspect of the analysis required'.⁷³

Comprehensive protection from forced eviction exists in South Africa, under the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998* (South Africa) ('PIE Act'). This Act regulates all evictions and provides that occupiers may challenge the grounds of eviction in court.⁷⁴ Further, the court must consider all relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.⁷⁵

Residential tenancy legislation in Victoria and Queensland does not distinguish between social and private tenants. Uniquely, the *Residential Tenancies Act 1997* (ACT) allows the tribunal to terminate a public housing or community housing tenancy only if satisfied that this is 'reasonable and proportionate'.⁷⁶ This is significant, as social housing tenants are more likely to be vulnerable due to circumstances such as low income, disability and their cultural and linguistic background.⁷⁷ However, in Victoria and Queensland, all tenants are subject to the same eviction process.⁷⁸

⁶⁶ibid s 330.

⁶⁷ibid s 330(1)(f). Inserted by the *Residential Tenancy Amendment Act 2018* (Vic) s 236.

⁶⁸In *Hanson v Director of Housing* [2022] VSC 710 ('Hanson') the court set aside a possession order on the ground that VCAT failed to consider the likely impact of the order on the public housing tenant. VCAT must also consider the impact of granting a possession order on a private tenant; see *Danrell v Morris* [2022] VCAT 1303.

⁶⁹*Residential Tenancies Act 1997* (ACT) s 47(1)(d).

⁷⁰RTA (Vic), s 330A.

⁷¹In contrast, *Residential Tenancies Act 1997* (ACT) s 47(3)(d) list such factors, including financial hardship, impacts on the tenant's health, risk of homelessness and difficulties in finding suitable alternative accommodation.

⁷²*Hanson* (n 68) [53].

⁷³ibid [44].

⁷⁴PIE Act, s 4(5).

⁷⁵ibid s 4(6)–(7).

⁷⁶*Residential Tenancies Act 1997* (ACT), s 47(1)(d).

⁷⁷Bell (n 2) 1–4.

⁷⁸Walsh notes that social housing tenants often have less security of tenure than private tenants, due to punitive policies and legislation: Walsh (n 2) 711. For example, the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) provides that the tribunal 'must not refuse to terminate the tenancy merely because the [landlord] is a community housing provider' (s 349A (1)). See also Australian Housing and Urban Research Institute, 'Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families' (AHURI Final Report 314, Australian Housing and

In summary, the three statutory human rights charters in Australia all incorporate the right to home as articulated in the ICCPR, and public authorities are required to give proper consideration to this right when making a decision and to act compatibly with the right when exercising powers. This includes when exercising apparently ‘private’ powers such as issuing a notice to vacate or seeking a possession order. In this regard, public landlords such as the Director of Housing have duties under human rights charters which private landlords do not. This raises the possibility that public housing tenants may have real protection from forced eviction under human rights charters, which will be examined in the following part.

Contrasting Victoria and the ACT

The definition of ‘public authority’ in the human rights charters is quite broad, and it includes ‘entities with functions of a public nature’.⁷⁹ Clearly, public housing providers in each jurisdiction are bound by the respective charters. Further, community housing providers are most likely bound by the charters, as they receive government funds and they perform functions of a public nature.⁸⁰ Therefore, these public authorities are required to ‘to act compatibly with human rights and give proper consideration to human rights in making decisions.’⁸¹

However, the important practical issue concerns the legal obligations of social housing providers regarding eviction, and the respective rights of tenants to challenge an eviction on human rights grounds.⁸² The next section examines the *Sudi* decision in Victoria and contrast the court’s decision with the situation of social housing tenants facing eviction in the ACT. This section also examines the implications of the *Sudi* decision.

Victorian Civil and Administrative Tribunal (VCAT) decision in *Sudi*

In 2010, the President of VCAT held that tribunal members have jurisdiction to examine the decisions of the Director of Housing, when an application is made for a possession order.⁸³ Further, if the Director has not acted compatibly with the *Charter* or given proper consideration to human rights, the tribunal can and must dismiss the application. To evict a tenant, the Director therefore must have valid grounds for eviction under the Victorian RTA and show that the eviction was compatible with the *Charter* and that proper consideration had been given to human rights. This made the eviction process potentially more onerous for the Director. However, Justice Bell held that this what the *Charter* and proper respect for human rights required.

Urban Research Institute Limited, Melbourne 2019) <www.ahuri.edu.au/research/final-reports/314> accessed 31 May 2023.

⁷⁹Charter, s 4. See also HRAACT, s 40 and HRAQ, s 9.

⁸⁰*Metro West v Sudi* [2009] VCAT 2025 (9 October 2009). See also *Goode v Common Equity Housing* [2016] VCAT 93 (21 January 2016). However, in *Durney v Unison Housing Ltd* (2019) 57 VR 158, Garde J held that a community housing provider is not subject to judicial review, as it is ‘a private body, and was not acting under any statutory power’: at [65]. Walsh argues, convincingly, that this decision is incorrect: see Walsh (n 2) 715–18. Community housing currently comprises 24% of social housing in Australia—double the proportion it was a decade ago: *ibid* 691–92.

⁸¹Charter, s 38(1).

⁸²In an early decision, *Director of Housing v IF* [2008] VCAT 2413, VCAT determined that it had no jurisdiction to hear and determine issues concerning the Director’s compliance with the Charter.

⁸³*Director of Housing v Sudi* (Residential Tenancies) [2010] VCAT 328 (31 March 2010).

The circumstance of the tenant and his family in this proceeding illustrates the importance of protection from forced eviction. Mr Sudi, a Somalian refugee, and his three-year-old son occupied a small apartment owned by the Director in the west of Melbourne. The original tenant was Mr Sudi's mother, who died from cancer. Mr Sudi's sole income was government benefits, and he had few assets. After caring for his sick mother, Mr Sudi and his son continued to occupy the premises. Although Mr Sudi was eligible for public housing and was on the waiting list, the Director applied for a possession order to evict them.⁸⁴ Mr Sudi and his son had strong connections to the local Somalian community, schools and health services.

Court of Appeal decision in Sudi

The Director appealed Justice Bell's decision and in November 2011 the decision was overturned.⁸⁵ The Victorian Court of Appeal accepted that the Director is a public authority and is bound to act compatibly with the *Charter* and to give proper consideration to human rights, including when seeking a possession order and evicting a tenant from their home. There was no dispute that the rental premises were Mr Sudi's home.

However, rather than focusing on the situation or rights of tenants facing eviction from public housing, the court focused almost exclusively on the limited jurisdiction of the tribunal.⁸⁶ Ultimately, all three judges held that the tribunal had no power to determine whether an application by the Director of Housing to evict a tenant from public housing complied with the *Charter*.⁸⁷ Rather, the court held that VCAT must *assume* the validity of the Director's application for possession, unless it has been set aside by a court in relevant proceedings. In other words, tenants can challenge an application for possession in the Supreme Court, but not in eviction proceedings at VCAT.

The court's decision rests on three premises. First, the court held that raising human rights issues in eviction proceedings at VCAT amounts to 'collateral review' of an administrative decision, which is available only when authorised by relevant legislation. The court held that allowing such review would be inconsistent with the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) which prioritises the quick, efficient and inexpensive resolution of tribunal proceedings. It was also inconsistent with the Victorian RTA, which provides a streamlined process for obtaining possession of rented premises, and which does not distinguish between private and public landlords.⁸⁸

Second, the court emphasised the limited jurisdiction of statutory tribunals such as VCAT, compared to the broad jurisdiction of courts. Significantly, superior courts such as the Supreme Court have inherent power to review administrative decisions, which tribunals have only when this is expressly or impliedly conferred by legislation. In the court's reasoning, maintaining VCAT's limited jurisdiction was necessary to maintain its quick, efficient resolution of disputes.

⁸⁴Under s 344(1) of the *Residential Tenancies Act 1997* (Vic).

⁸⁵*Director of Housing v Sudi* [2011] VSCA 266; (2011) 33 VR 559.

⁸⁶Scholar Nathalie Wharton describes the Court's decision as based on 'legal technicalities' concerning the tribunal's jurisdiction, rather than security of tenure under international law: Nathalie Wharton, 'Security of Tenure in the State of Victoria' (2012) *Global Tenant* 9.

⁸⁷*Sudi* (n 85) [43] (Warren CJ), [62] (Maxwell P), [281] (Weinberg J).

⁸⁸*ibid* [73].

Third, the court framed its approach as based on statutory interpretation, which enabled it to attribute the outcome to parliament rather than the judge's interpretation.⁸⁹ Several judges stated that 'social policy' was irrelevant to their decision,⁹⁰ and that, in any case, tenants could raise *Charter* arguments in the Supreme Court, but not at the tribunal.

Justice Weinberg was the only judge who engaged, albeit tentatively, with the policy and practical implications of the court's decision. His Honour stated that requiring tenants to commence proceedings in the court was:

... hardly likely to be catastrophic. The legal profession in this State has shown a ready willingness to provide assistance, often through legal aid or pro bono, in proceedings that give rise to legitimate Charter issues.⁹¹

His Honour also stated that:

... the threat of costs being awarded against a tenant who fails in proceedings for judicial review may be more apparent than real. Particularly, in 'test' cases, such as the present, there is no reason to assume that the court will necessarily make costs orders against the unsuccessful applicant.⁹²

Justice Weinberg also made revealing statements about human rights and about tenants. His Honour stated that 'Human rights law is still in its infancy in this country. It can be extraordinarily contentious, and highly complex.'⁹³ He referred to the 'vast body of case law' in other jurisdictions, and the 'voluminous jurisprudence',⁹⁴ concluding that '[t]he Charter is not an easy instrument to apply.'⁹⁵ These statements were used to support his Honour's conclusion that the *Charter* should be reserved for courts rather than tribunal members.

Justice Weinberg also highlighted the 'significant potential for the Charter to be used to thwart the processes laid down for eviction by the RTA.'⁹⁶ His Honour provided 'some examples of how such abuse might occur',⁹⁷ suggesting that tenants are likely to frequently, and illegitimately, raise *Charter* arguments to frustrate eviction proceedings. Justice Weinberg argued that the tribunal should instead determine eviction proceedings 'quickly, efficiently and sensibly'.⁹⁸

Each judge in *Sudi* cursorily rejected as irrelevant a recent and significant decision of the United Kingdom (UK) Supreme Court, *Manchester City Council v Pinnock*,⁹⁹ which held that public housing tenants may raise human rights arguments in eviction proceedings. Each member of the court regarded the decision as irrelevant as it was based on different legislation,¹⁰⁰ or it related to the jurisdiction of an inferior court rather than a

⁸⁹ibid [283] (Weinberg J).

⁹⁰ibid [300] (Weinberg J).

⁹¹ibid [303].

⁹²ibid [304]. Despite Justice Weinberg's optimism, there is no rule preventing a costs order being made against an unsuccessful tenant in the Supreme Court.

⁹³ibid [211].

⁹⁴ibid [295].

⁹⁵ibid [212]. Of course, this is true of many areas of law over which the tribunal currently has jurisdiction, such as state taxes, statutory planning, and anti-discrimination law.

⁹⁶ibid [291].

⁹⁷ibid [292].

⁹⁸ibid [294]. The purposes of the RTA include 'to provide for the inexpensive and quick resolution of disputes': RTA (Vic) s 1(d).

⁹⁹[2010] UKSC 45 (3 November 2010).

¹⁰⁰*Sudi* (n 85) [103] (Maxwell P).

tribunal.¹⁰¹ However, the *Pinnock* decision considered important matters of principle, which are examined later in this article.

In summary, Justice Bell's decision in *Sudi* emphasised the importance of the right to home and the need for effective protection of rights. This is consistent with the principle that where there is a right, there must be a remedy. In other words, rights must be enforceable to be effective, and legal redress must be available when rights are infringed. Procedures for enforcing rights must be reasonably accessible, without prohibitive costs or delay. Justice Bell's decision promoted access to justice by enabling social housing tenants to enforce their rights easily and inexpensively.

On the other hand, the Court of Appeal's decision effectively limits tenants from enforcing their rights under the *Charter*. Tenants were not only denied the right to protection from forced eviction; they were also denied an effective remedy when those rights are violated. Further, the court's decision in *Sudi* is not consistent with the articulation of the right to home under international law. This right has been interpreted as involving a two-step analysis. First, public authorities examine the scope, nature and importance of the right to home, and the extent to which eviction may 'limit' this right. Second, the authority must examine the issue of proportionality or reasonable limitations on rights, and whether the eviction may be justified in the circumstances.¹⁰²

The situation in the ACT

As noted above, in contrast to the Victorian *Charter*, in the ACT a person may rely on their rights in the HRAACT in 'legal proceedings'.¹⁰³ In the ACT, therefore, parliament has explicitly conferred jurisdiction on the tribunal to consider human rights issues in eviction proceedings. In the ACT, tenants can rely on the right to home in eviction proceedings in the tribunal. In *Canberra Fathers and Children Services Inc v Michael Watson*,¹⁰⁴ Senior Member Lennard refused to grant an eviction application because it would result in the tenant and his sons being made homeless or breaking up the family unit in order to obtain separate housing. The tribunal has followed this decision on several occasions.¹⁰⁵

The ACT tribunal has affirmed that 'The concept of proportionality is central to consideration of the application of the [HRAACT]' to eviction proceedings.¹⁰⁶ The tribunal also noted that 'Human rights need to be considered ... in most cases where there is an eviction'.¹⁰⁷ Therefore, in contrast to Victoria, social housing tenants in the ACT may raise human rights in eviction proceedings. In Victoria, on the other hand, social housing tenants may raise human rights arguments only by commencing judicial review proceedings in the Supreme Court.

¹⁰¹ *ibid* [42] (Warren CJ).

¹⁰² Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn, N P Engle 2005); Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, Oxford University Press 2004).

¹⁰³ *Human Rights Act 2004* (ACT) s 40C(2)(b). This provision was inserted by the *Human Rights Amendment Act 2008* (ACT).

¹⁰⁴ *Canberra Fathers and Children Services Inc v Michael Watson* [2010] ACAT 74 (29 October 2010).

¹⁰⁵ See *Commissioner for Social Housing v Cook (Residential Tenancies)* [2020] ACAT 36 (28 May 2020).

¹⁰⁶ *The Tenant v Commissioner for Social Housing* [2016] ACAT 49 [117].

¹⁰⁷ *ibid* [118].

Post-Sudi judicial review proceedings in Victoria

As mentioned above, the Court of Appeal in *Sudi* held that social housing tenants could not raise *Charter* arguments at VCAT but could make such arguments in the Supreme Court in judicial review proceedings. Following the *Sudi* decision, tenants have commenced such proceedings and have on occasion been successful in having a proposed eviction set aside on *Charter* grounds. However, for the reasons outlined below, commencing judicial review proceedings is not as accessible and effective as a review on *Charter* grounds at first instance by a tribunal.

In *Burgess v Director of Housing*,¹⁰⁸ the Supreme Court set aside a warrant of possession based on grounds including unlawfulness under the *Charter*. In part, the Director was prevented from evicting a tenant because the Director had failed to consider the effect of eviction on the tenant and her son.¹⁰⁹ This decision has been considered as a ‘game changer’ by tenant advocate groups.¹¹⁰ However, close examination of the decision illustrates the complexities and difficulties of tenants successfully challenging eviction on human rights grounds in judicial review proceedings.

In *Burgess*, the court drew a sharp distinction between the availability of remedies regarding the notice to vacate, on the one hand, and the warrant of possession on the other.¹¹¹ The court held that, once a possession order is issued, the decision to issue the notice to vacate cannot be set aside.¹¹² This is due to the limited nature of remedies in judicial review, and particularly certiorari (which quashes a decision). The court held that, once a possession order is issued, the notice to vacate has no ongoing power to affect any relevant outcome.¹¹³

The court held that the decision to purchase a warrant of possession is amendable to certiorari, as it can independently terminate a tenancy.¹¹⁴ However, this must be done in a short period of time before the warrant is executed, as execution of a warrant ends the tenancy.¹¹⁵ Commentators note that in practice ‘[t]his further limits the accessibility of a meaningful mechanism for ensuring the human rights compliance of social housing providers in eviction proceedings.’¹¹⁶ Further, in *Burgess*, the court indicated that a tenant could commence judicial review proceedings *before* the tribunal hearing for a possession order and that this may be preferable to waiting until after a possession order is issued.¹¹⁷ In addition, the tenant would need to apply for a stay of any tribunal proceedings, pending the outcome of court proceedings.¹¹⁸

¹⁰⁸*Burgess v Director of Housing* [2014] VSC 648 (17 December 2014).

¹⁰⁹The court focused on s 17 (family), rather than s 13 (home) of the Charter.

¹¹⁰Walsh (n 2) 709.

¹¹¹As mentioned above, in Victoria, a landlord may apply for a possession order if the tenant does not vacate the premises following a notice to vacate. However, a warrant of possession is needed to actually evict a tenant from the premises, and this involves a separate application to the tribunal.

¹¹²*Burgess* (n 108) [104].

¹¹³*ibid* [129].

¹¹⁴*ibid* [142].

¹¹⁵*ibid* [61]. See RTA (Vic) ss 216 and 334.

¹¹⁶Human Rights Law Centre, ‘Supreme Court of Victoria finds Director of Housing failed to consider human rights when deciding to evict mother and son’ (14 December 2014) <www.hrlc.org.au/human-rights-case-summaries/supreme-court-of-victoria-finds-director-of-housing-failed-to-consider-human-rights-when-deciding-to-evict-mother-and-son> accessed 31 May 2023.

¹¹⁷*Burgess* (n 108) [88]–[91], [94], [240].

¹¹⁸*ibid*.

Overall, the *Burgess* decision illustrates the complexity of judicial review proceedings and the inability of such proceedings to quickly and effectively determine matters concerning the right to home.¹¹⁹ The tenant in this case was assisted pro bono by three solicitors and two barristers.¹²⁰ However, social housing tenants cannot be assumed to have the knowledge or other resources to access legal representation, which is crucial to success in such proceedings.¹²¹ The *Burgess* decision achieved some vindication of the tenant's rights, and the Director was held accountable—to a degree—for various breaches. However, following *Sudi*, the Victorian *Charter* offers only very limited protection from arbitrary eviction for social housing tenants.

Taking a human rights approach to housing

In her 2007 report on Australia, the United Nations Special Rapporteur on adequate housing called for a 'human rights' approach to housing, rather than 'persisting mindsets' which considered housing as 'mere[ly] [a] commodity' or a 'privilege'.¹²² The report encompassed all organs of government—legislative, executive and judicial—and it gave significant attention to forced evictions, which 'are considered to be a gross violation of a wide range of human rights'.¹²³ It noted that '[n]o laws exist in Australia [regulating] forced evictions in accordance with international human rights standards'.¹²⁴

Australia's reluctance to fully implement international human rights is both political and cultural.¹²⁵ Although Australia proudly promotes human rights standards on the international stage, it has been slow to implement these standards domestically.¹²⁶ This section outlines ways in which Australian legislators, policy makers and decision makers could adopt a human rights approach to housing. First, it outlines amendments needed to the Victorian and Queensland charters, to ensure that they provide enforceable rights for social housing tenants. Second, it outlines how a contextual approach to the right to housing is more likely to protect rights than a purely formal approach. Third, it argues that courts and tribunals should consider and give more weight to jurisprudence from other jurisdictions regarding the right to housing. Finally, changing persisting mindsets requires re-evaluating how human rights are understood and the obligations of the state towards social housing tenants.¹²⁷

Amending the Victorian and Queensland charters

A human rights approach to housing requires that the Victorian and Queensland charters be amended so that human rights arguments can be made at first instance, rather than

¹¹⁹The court took seven months, from the hearing date, to publish a decision. The court hearing commenced twelve months after the tribunal made a possession order.

¹²⁰*Burgess* (n 108) [46].

¹²¹Walsh notes that many social housing tenants do not attend eviction proceedings, and that self-represented tenants are rarely successful in defending eviction proceedings: Walsh (n 1) 718–20.

¹²²Special Rapporteur Report (n 44) [65].

¹²³*ibid* [67].

¹²⁴*ibid* [69].

¹²⁵Dunn and Sharples (n 47).

¹²⁶See Jon Piccini, *Human Rights in Twentieth-century Australia* (Cambridge 2019).

¹²⁷These changes would avoid the need for tenants and their supporters to physically resist eviction, as has happened for example in South Africa: see eg. Ashwin Desai, *We Are the Poors: Community Struggles in Post-Apartheid South Africa* (Monthly Review Press 2002).

requiring judicial review proceedings to be commenced in a court. This would enable social housing tenants to make such arguments in an informal, no costs jurisdiction, rather than risk an adverse costs order and face the procedural complexity of judicial review proceedings.

This would involve amending the Victorian and Queensland charters, so that human rights arguments may be made in ‘any legal proceedings’.¹²⁸ This amendment would enable social housing tenants in Victoria and Queensland to raise human rights arguments directly, rather than through the complex framework of judicial review and associated remedies.¹²⁹ The Human Rights Consultation Committee report, which preceded the enactment of the Victorian *Charter*, recommended the inclusion of tribunal review of human rights matters.¹³⁰ However, the draft Bill which became the Act contained no independent cause of action. As Moshinky notes, neither the Second Reading Speech nor the Explanatory Memorandum shed any light on this change.¹³¹ He concludes that ‘the changes were intended to ensure that the introduction of the Charter did not lead to an increase in litigation.’¹³²

In 2008, the HRAACT was amended to create a direct cause of action, flowing from the duty on public authorities to comply with human rights.¹³³ This was in response to a review of the HRAACT and widespread community support for a direct right of action.¹³⁴ The absence of a direct cause of action when the HRAACT was enacted in 2004 was merely to enable relevant authorities ‘time to adapt policies and practices’.¹³⁵ The right to home is dynamic and evolving, and state’s compliance should likewise continuously improve.¹³⁶ This indicates that the Victorian and Queensland charters should be amended to allow human rights to be enforced in any proceedings. The *Human Rights Act 1998* (UK), on which the Australian charters are based, allows proceedings against a public authority based on breach of its duties under the Act.¹³⁷

Despite the concerns of Weinberg J in *Sudi*, there is no indication that tribunal members cannot properly hear and determine human rights matters, whether due to their apparent complexity or due to the volume of human rights case law from other jurisdictions.¹³⁸ Further, allowing tenants to raise human rights arguments should not be

¹²⁸This amendment has implications for proceedings other than evictions proceedings. This article does not examine the implications for other proceedings. An independent review in 2015 recommended that the Charter be amended to grant VCAT jurisdiction to hear and determine human rights matters: Michael Brett Young, ‘From Committee to Culture: The 2015 Review of the Human Rights and Responsibility Charter’ (2015) Recommendation 27(a) (‘Charter review’). See also Legal and Social Issues Committee, Parliament of Victoria, ‘Inquiry into Homelessness: Final Report’ (2021) Recommendation 33.

¹²⁹The Queensland Civil and Administrative Tribunal has indicated that it will follow Victorian decisions concerning the interpretation of the charter: *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 [39]–[40] (Member Stepniak).

¹³⁰Human Rights Consultation Committee, ‘Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee’ (2005) 126.

¹³¹Mark Moshinsky, ‘Charter Remedies’ in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press 2017) 72.

¹³²*ibid.*

¹³³*Human Rights Amendment Act 2008* (ACT).

¹³⁴Australian Capital Territory Parliament, Legislative Assembly, 6 December 2007, Mr Corbell (Attorney-General) 4028.

¹³⁵*ibid.*

¹³⁶Kevin Bell and Jean Allain, ‘Homelessness and Human Rights in Australia’ in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (vol 2, Lawbook Co 2021).

¹³⁷*Human Rights Act 1998* (UK) s 7.

¹³⁸As argued later in this article, clarity regarding the scope and nature of the right to home may in fact be *increased* by courts giving more weight to decisions from other jurisdictions regarding the interpretation of this right. This is contrary to Weinberg J’s assumption that considering these decisions would necessarily result in confusion or lack of clarity.

seen as ‘thwarting’ the eviction process. Rather, it ensures that this process complies with international human rights standards.

Allowing tenants to raise human rights arguments at first instance would ensure that the process is quick, efficient, inexpensive and accessible for tenants. This is appropriate, given the potential vulnerabilities of social housing tenants, and the vast resources of the state.¹³⁹ A human rights approach prioritises the perspective and interests of rights-holder, and it takes their vulnerable status into account.

Clarity is also needed regarding the human rights obligations of social housing providers. As mentioned above, a single judge of the Victorian Supreme Court has held that the decision to give a notice to vacate by a community housing provider was not amenable to judicial review at common law.¹⁴⁰ This decision did not consider whether the housing provider was a public authority under the *Charter*. However, considering the growing significance of community housing providers in delivering social housing on behalf of the state,¹⁴¹ human rights charters should be amended to expressly apply to them.¹⁴²

Adopting a contextual approach

Taking a human rights approach to housing necessarily involves government decision-makers taking context into account. This contrasts with a formal approach, where decision-makers ignore financial, historical and practical matters in favour of abstract legal concepts. In *Sudi*, the court implicitly adopted a purely formal approach to statutory interpretation, in two ways. First, it failed to properly account for the practical effect of its decision on public housing tenants, and in particular, the impracticality of tenants commencing judicial review proceedings to enforce their rights. This includes the risk of an adverse costs order, the need for legal representation, and the complexity of the law and procedure concerning judicial review. Second, the court in *Sudi* prioritised the maintenance of a court hierarchy, and the efficiency of tribunal proceedings, over the protection of human rights. The decision prioritises legal and institutional factors, rather than focusing on human rights or the protection of vulnerable members of society.

Critical legal scholars including critical race scholars emphasise the importance of perspective in judicial decision-making.¹⁴³ The court’s decision in *Sudi* emphasised the importance of an orderly court system and an efficient process for evicting tenants. The decision effectively maintains power in the hands of judges, rather than tribunal members, by casting doubt on tribunal member’s capacity to decide human rights matters properly. It also maintains power in the hands of landlords, rather than tenants. This reinforces the traditional values on which tenancy law is based—freedom of contract and the primacy of property rights.¹⁴⁴

¹³⁹The 2015 Review found the benefit of VCAT being able to address Charter claims include that it is low-cost, experienced in such claims, already conducts merits-review for various government decisions, conducts alternative dispute resolution and mediation, and would it fit well within its Human Rights Division: Charter Review (n 128) 128–29.

¹⁴⁰*Durney v Unison Housing Ltd* (2019) 57 VR 158.

¹⁴¹Walsh (n 2) 691–92.

¹⁴²Legal and Social Issues Committee, Parliament of Victoria, ‘Inquiry into Homelessness: Final Report’ (2021) Recommendation 32.

¹⁴³Mari Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323.

¹⁴⁴Bell (n 2) 5.

However, a human rights approach requires courts and other government decision-makers to take a broader frame of reference. Regarding eviction of social housing tenants, for example, 'the public housing provider is not just a landlord but a public authority with human rights obligations.'¹⁴⁵ In other words, the traditional landlord/tenant relationship is not the appropriate frame of reference. When the human rights of public housing tenants are involved, a more appropriate lens is the relationship between the state and the citizen. This lens emphasises the power of the state, and the duty to act in the interests of citizens. It emphasises the vulnerability of citizens to misuse of the power by the state, and that the 'dwelling is not just property but a home'.¹⁴⁶

The court's formal approach to interpretation in *Sudi* rendered the *Charter* protections largely inaccessible for social housing tenants. However, human rights charters are intended to be legally enforceable mechanisms by which public authorities are held accountable. Similar to constitutional and administrative law, human rights charters seek to make certain government decisions subject to review. An important part of human rights protection is ensuring accountability for decisions regarding eviction, and other matters regarding social housing.¹⁴⁷ A contextual approach to decision-making is, therefore, more supportive of human rights than the formal approach taken by the court in *Sudi*.

Giving more weight to decisions in other jurisdictions

Other jurisdictions have human rights legislation, some of which expressly protect housing rights. As explained above, there is a wealth of jurisprudence and commentary giving shape and meaning to these rights. On the other hand, 'Human rights law is still in its infancy in this country.'¹⁴⁸ In *Sudi*, however, the court summarily dismissed as irrelevant court decisions from other jurisdictions. This is consistent with the narrow, formalist approach taken by the court; because the foreign court decision considered different legislation, this was sufficient grounds to consider the entire decision irrelevant.

Less than 12 months prior to the *Sudi* decision, the UK Supreme Court in *Pinnock* held that public housing tenants may raise human rights arguments in eviction proceedings.¹⁴⁹ Indeed, the court emphasised the importance of tenants being able to raise these arguments at first instance. Unlike the court in *Sudi*, the UK Supreme Court held that judicial review proceedings were not a suitable alternative to the ability to raise issues at first instance.

Like the VCAT decision in *Sudi*,¹⁵⁰ the court in *Pinnock* emphasised that evicting a tenant from public housing is prima facie violation of the right to home under international law.¹⁵¹ Therefore, the substantive issue is whether the eviction is proportionate or justified in the circumstances. This depends primarily on the reason for the eviction,

¹⁴⁵ibid 36.

¹⁴⁶ibid.

¹⁴⁷For example, the Victorian Ombudsman found that the Victorian government's sudden and severe lockdown of several public housing towers in Melbourne in July 2020 breached human rights (Victorian Ombudsman, 'Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 "Hard Lockdown" in July 2020' (2020)).

¹⁴⁸*Sudi* (n 85) [211].

¹⁴⁹*Manchester City Council v Pinnock* [2010] UKSC 45 (3 November 2010).

¹⁵⁰VCAT *Sudi* [34].

¹⁵¹*Pinnock* (n 149) [132].

and whether the reason can be substantiated before an independent decision-maker. This requires evidence to be adduced and factual findings to be made.

In *Pinnock*, the court emphasised that courts exercising judicial review cannot hear and test evidence and cannot make conclusive findings of fact.¹⁵² Therefore, judicial review proceedings are not well-suited to determine the central issue in matters involving the right to home, which is whether an eviction is reasonable and proportionate. Further, the court regarded requiring tenants to commence separate proceedings as undesirable, as this would cause delay and fragment proceedings. In the *Sudi* decision, the court emphasised the importance of speed and efficiency in resolving disputes. However, it emphasised this factor only regarding tribunal proceedings (rather than the entire process, including potential court proceedings). If tenants are required to commence separate proceedings in the Supreme Court to raise *Charter* arguments, this does not promote quick and efficient resolution of all issues between the parties.

The court's decision in *Pinnock* was significant in that it overturned previous decisions of the House of Lords, which limited the circumstances in which tenants could raise human rights arguments in eviction proceedings.¹⁵³ Rather, the *Pinnock* decision followed the jurisprudence of the European Court of Human Rights, which emphasised the importance of tenants being able to challenge eviction proceedings on human rights grounds in an accessible forum.¹⁵⁴

In summary, considering and giving weight to court decisions from other jurisdictions can assist courts in taking a human rights approach to housing. Indeed, Australian human rights charters provide that courts may consider 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right'.¹⁵⁵ These decisions may also be relevant to government policy makers and legislators, as they consider policy and practical issues concerning the enforcement and effective implementation of rights.

Taking a human rights approach on all levels of government

In her 2007 report, the UN Special Rapporteur urged Australia to take an integrated all-of-government approach to protecting the right to housing, stating that this may require changing some 'persisting mindsets'.¹⁵⁶ Taking a human rights approach involves prioritising people-centred values, such as human well-being and dignity. Rather than prioritising legal abstractions such as an orderly court system, human rights focus on the actual circumstances of people affected by government decisions. Protecting human rights is indeed a matter of 'high principle', as Weinberg J stated in *Sudi*.¹⁵⁷

A human rights approach requires government decision-makers at all levels to critically evaluate their values and priorities. It requires legislators to consider human rights when

¹⁵²*ibid* [74].

¹⁵³*Doherty v Birmingham City Council* [2008] UKHL 57 (30 July 2008).

¹⁵⁴*Kay v United Kingdom* [2010] ECHR 1322 (21 September 2010). In *Sudi*, the Court of Appeal held that the *Pinnock* decision concerned the interpretation of the *Human Rights Act 1998* (UK), which differed from the terms of the Victorian Charter. Therefore, the Court held that the decision had no application in Victoria: *Sudi* (n 85) [42] (Warren CJ), [99]–[103] (Maxwell P).

¹⁵⁵Charter, s 32(2). See also HRAACT, s 31 and HRAQ, s 48(3).

¹⁵⁶Special Rapporteur Report (n 44) [65].

¹⁵⁷*Sudi* (n 85) [294].

passing legislation.¹⁵⁸ Finally, it requires courts to interpret legislation compatibly with human rights and to consider relevant foreign and international law.¹⁵⁹

More broadly, taking a human rights approach requires government decision-makers to be cognisant of the vulnerable situation of citizens regarding actions by the state. In most cases, the state commands ‘huge resources’, including legal knowledge, financial resources and political experience.¹⁶⁰ The citizen—particularly one who depends on government services—is often extremely disadvantaged in their dealings with the state. Mr Sudi, for example, is a vulnerable tenant from a refugee background with limited resources, a low income and health issues. Evicting such tenants from their home should require cogent reasons and strong supporting evidence.

One of the ‘persisting mindsets’ referred to by the Special Rapporteur may include the statement by Weinberg J in *Sudi* that public tenants may seek to ‘thwart’ the eviction process by raising human rights arguments. This statement indicates a misunderstanding of the purpose and importance of human rights charters, which seek to hold the state accountable for the impact of its decisions on individuals. It also indicates an implicit prioritisation of a quick, efficient eviction process over proper human rights protection for tenants. It is these mindsets, and others,¹⁶¹ which must be reviewed and perhaps reconsidered for a human rights approach to take hold.

The provision of human rights education, particularly in schools, is essential for the creation and maintenance of a human rights culture.¹⁶² Education is a major part of the Australia’s Human Rights Framework, which was released in 2010 in response a National Human Rights Consultation. This includes education for the general community and public sector training.¹⁶³ However, a lack of political commitment and reduced funding for human rights commissions has limited the reach and effectiveness of these educational initiatives.

Education can raise awareness and assist in changing attitudes. For example, in the ACT it is common practice for tribunals and courts to anonymise tenant’s names in published decisions, although this is not commonly done in other States and Territories. As the President of the ACT tribunal noted, anonymisation protects tenants and particularly children from unnecessary publicity and stigmatisation.¹⁶⁴ Human rights matters necessarily involve consideration of sensitive personal information, such as health, financial and family information. However, in decisions such as *Burgess*, the court published the tenant’s full names and the residential address.

Conclusion

This article examined the human rights of social housing tenants in Victoria, Queensland and the ACT. These jurisdictions all have human rights charters which seek to protect the

¹⁵⁸Charter, s 28.

¹⁵⁹*ibid* s 32.

¹⁶⁰Geir Ulfstein, ‘Individual Complaints’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 90.

¹⁶¹Similarly, there is little reason to assume that human rights law is too complex or voluminous for tribunal members to understand and apply.

¹⁶²See Paula Gerber and Annie Pettit, ‘Are Students in Australian Schools Learning about Human Rights?’ in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (vols 1 & 2, Lawbook Co 2021).

¹⁶³National Human Rights Consultation Committee, ‘Report of the National Human Rights Consultation’ (2009).

¹⁶⁴*The Tenant v Commissioner for Social Housing* [2016] ACAT 49 [7].

right to home as understood under international law. Further, the charters require public authorities to 'act compatibly with human rights and give proper consideration to human rights in making decisions.'

However, only in the ACT does human rights legislation give social housing tenants effective protection from arbitrary eviction. In Victoria and Queensland, social housing tenants cannot raise human rights issues at the point of eviction; they can raise these issues only in separate proceedings for judicial review. Protection from arbitrary eviction is particularly important for social housing tenants, who often experience multiple forms of disadvantage and vulnerability. This article argues that amendments are needed to the Victoria and Queensland charters, to enable social housing tenants to raise human rights arguments at eviction hearings.

However, broader changes are needed for a human rights approach to be embedded in government policy and decision-making. This article argues that government policy makers and administrative decision-makers need to take a practical, contextual approach to the right to housing, rather than considering housing as merely a commodity or a privilege. Also, tribunals and courts should consider and give weight to jurisprudence from other jurisdictions regarding the right to housing. Changing persisting mindsets takes time and requires re-evaluating the importance of human rights and the obligations of the state towards social housing tenants.

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