

Examining *BA v The King*: Can a 'home' provide security from domestic violence?

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Abstract

This article examines the High Court decision in *BA v The King*, which involved the relationship between tenancy law and the criminal offence of burglary. It argues that the Court should have given greater weight to the safety of victims of domestic violence, rather than privileging the rights of the accused under tenancy law.

Keywords

Home, human rights, statutory interpretation, housing rights

This article examines the High Court decision in *BA v The King*,¹ which involved the 'not uncommon'² occurrence of a man forcibly entering premises occupied by his former partner and assaulting her. Ultimately, a majority of the High Court held that the charge of breaking and entering did not apply, as the accused had a right of entry under a tenancy agreement. This article argues that the Court should have given greater weight to the safety of the female occupant, rather than privileging the rights of the accused under tenancy law.³

Housing scholars such as Lorna Fox O'Mahony and Samuel Tyrer highlight the significance of home *for occupants*, rather than as a purely legal or commercial concept.⁴ Thus, they distinguish between a home and a house, and between occupancy and ownership. They highlight the importance of home in promoting personal security,

identity and intimate relationships such as family. Fox O'Mahony emphasises the importance of legal recognition of the significance of home, given that it provides 'the foundation for our lives'.⁵

Fox O'Mahony and Tyrer seek to articulate the meaning and importance of the experience of home, and to elevate the interests of occupants in relation to other legal interests, such as proprietary and contractual rights.⁶ Fox O'Mahony's approach is rights-based and 'person-centered',⁷ and it seeks to influence law and policy, and the interpretation of laws.⁸

This article brings a feminist perspective to the concept of home and emphasises the importance of home in providing security, particularly for victims of domestic violence. Thus, it emphasises the power of violent co-tenants to undermine the security and wellbeing of victims of domestic

¹*BA v The King* [2023] HCA 14 (10 May 2023).

²*R v BA* [2021] NSWCCA 191 [68].

³A similar argument could be made based on the interpretative provisions in the human rights legislation in Victoria, the ACT and Queensland. However, that argument is not examined in this article.

⁴Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580 ('Chimerical concept'); Samuel Tyrer, 'Home in Australia: Meaning, values and law?' (2020) 43(1) *UNSW Law Journal* 340 ('Home in Australia'). See also Kevin Bell, 'Protecting Public Housing Tenants in Australia from Forced Eviction: The fundamental importance of the human right to adequate housing and home' (2013) 39(1) *Monash University Law Review* 1, 5.

⁵Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 158, 158 ('Meaning of home').

⁶Lorna Fox, 'The Idea of Home in Law' (2005) 2(1) *Home Cultures* 25, 604–7 ('Idea of home').

⁷Fox O'Mahony, 'Meaning of Home' (n 5) 160. Similar, Jeremy Waldron argues that homelessness can entail the denial of fundamental human rights, as it prevents people from performing essential bodily functions, such as washing. Therefore, housing is associated with human dignity: Jeremy Waldron, 'Homelessness and the Issue of Freedom' (2019) 1 *Journal of Constitutional Law* 27, 50.

⁸See, eg, Fox O'Mahony, 'Meaning of Home' (n 5), in which Fox O'Mahony critiques a decision of the House of Lords concerning eviction.

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violence, which was overlooked by the High Court in *BA v The King*.

Home, security and domestic violence

The *International Covenant on Civil and Political Rights* (ICCPR)⁹ prohibits States Parties from arbitrarily or unlawfully interfering with a person's home,¹⁰ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides a right to adequate housing.¹¹ In this context, 'home' is interpreted broadly as meaning 'the place where a person resides', regardless of whether they have a pre-existing right to live or remain in that place.¹² The right to adequate housing contained in the ICESCR requires more than just having shelter but rather it means the 'right to live somewhere in security, peace and dignity'.¹³

Home – and similar expressions such as dwelling, residence and occupancy – find expression in other areas of law, such as residential tenancy law,¹⁴ criminal law¹⁵ and tax law.¹⁶ However, judges in domestic courts often neglect the interests of occupants in favour of other legal interests and, in particular, property rights. In other words, judges neglect the significance of a person's home and instead privilege ownership and other proprietary interests. These interests come into conflict for example where a tenant is evicted by a landlord, or a mortgagee is evicted by a mortgagor.

Fox O'Mahony articulates significant aspects of home and seeks to elevate the assessment of these interests by judges, in cases when they conflict with other legal interests. She argues that a person's interest in maintaining their home should be fairly weighed and balanced against other interests, rather than being automatically trumped by contractual or property rights.¹⁷ Her work seeks to counter established notions of property law, under which a person has the 'sole and despotic dominion' to exclude others from their land and other property.¹⁸ She argues that home is (or can be) equally significant, as it supports human dignity and wellbeing.¹⁹

Fox O'Mahony emphasises three central aspects of home – security, identity and relationships. These aspects, which overlap, and which may vary from person to person, are outlined below.

Security relates to the physical structure of home, which provides shelter from the elements and a degree of privacy for occupants.²⁰ The physical structure provides a barrier to external threats and intrusions. Fox O'Mahony describes this aspect as providing exclusive territory for occupants, which provides a form of refuge or sanctuary.²¹

This aspect assumes the existence of external threats and intrusions, and that these are more significant than internal threats. The prevalence of domestic violence in Australia,²² or violence against women and children in the home by partners or family members, challenges the notion that home provides protection from threats or violence.²³ However, this article will argue below that home may provide some security for members of vulnerable groups, even in the context of domestic violence.

Identity refers to less tangible but still significant aspects of home, such as the environment it provides for the growth and development of occupants. Home is where people can express themselves and their values, feelings and ideas.²⁴ Thus, home supports raising a family, the nurturing of children and fostering intimate relationships.²⁵ Personal growth and development is nurtured in other ways, such as through school, work and hobbies. However, home provides a secure basis or 'foundation of our lives'.²⁶

Finally, home supports the nurturing of *relationships*, with family (which may include intimate partners, children and extended family), neighbours and the wider community.²⁷ Home supports access to essential services such as schools, employment and shops, which are necessary for the development and wellbeing of its occupants. Thus, the aspects of security, identity and relationships overlap and are mutually supporting.²⁸

The security provided by home is particularly important for people who are vulnerable, for example due to youth or

⁹*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹⁰*Ibid* art 17. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8, as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('European Convention').

¹¹*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976) ('ICESCR').

¹²*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol 1) (27 May 2008) 194 [5].

¹³*Ibid* 12 [7].

¹⁴See Tyrer (n 4).

¹⁵As outlined below, the offences of break and enter, and common law burglary, require a person to enter a dwelling house or home.

¹⁶See, eg, Capital Gains Tax exemption for a person's primary place of residence.

¹⁷Fox, 'Idea of home' (n 6) 32.

¹⁸William Blackstone, *Commentaries on the Laws of England in Four Books* (1753).

¹⁹Fox, 'Idea of home' (n 6) 41–2.

²⁰Fox, 'Chimerical concept' (n 4) 592. Home and privacy are listed together in the ICCPR (n 9) art 17.

²¹Fox, 'Chimerical concept' (n 4) 594.

²²Australian government, *Family, domestic and sexual violence data in Australia* (Web Page, Australian Institute of Health and Welfare, 9 Nov 2022) <https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-data/contents/about>.

²³Fox, 'Chimerical concept' (n 4) 594.

²⁴Fox O'Mahony, 'Meaning of Home' (n 5) 163.

²⁵Home and family are listed together in ICCPR (n 9) art 17.

²⁶Fox O'Mahony, 'Meaning of Home' (n 5) 158.

²⁷Tyrer, 'Home in Australia' (n 14) 372. On the other hand, in the context of domestic violence, the physical space of a house does not provide safety or security particularly for women and children.

²⁸*Ibid* 341.

old age, or disability.²⁹ Additionally, children and persons with a disability often have greater developmental and support needs.

Tyrer argues that two conditions – stability and control – are necessary to realise the three aspects of home outlined above.³⁰ Stability concerns protection from arbitrary eviction, as this undermines a person's security, wellbeing and relationships. Stability provides continuity and a sense of permanence, enabling people to plan their lives and develop a sense of belonging.³¹ Control has several aspects, including the ability to determine who can enter and remain in the premises.³² This supports the security aspect of home discussed above, as it may protect occupants from both external and internal threats to their safety (including, for example, domestic violence). Fox O'Mahony highlights that there is often a significant power imbalance between occupants (such as tenants), on the one hand, and those with competing interests (such as landlords and banks), on the other.³³ Landlords and banks commonly have greater financial resources and institutional support to vindicate their interests, whereas occupants generally have less resources and support.³⁴ Therefore, Tyrer argues that residential tenancy laws in Australia should provide greater protection from the serious consequences of eviction.³⁵ Similarly, Fox O'Mahony examines a decision of the House of Lords concerning the interpretation of the *European Convention on Human Rights*³⁶ and protections against eviction for public housing tenants.³⁷ She concludes that the court privileged the interests of local councils over the interests of tenants in maintaining their home, with some judges suggesting that protecting the home would have a negative impact on society.³⁸

The importance of home does not depend on the type of tenure held by the occupants, such as their pre-existing legal rights for example under property or contract law.³⁹ However, courts commonly neglect the significance of

home as a distinct legal interest, in favour of more established property law interests.⁴⁰ For example, in proceedings concerning eviction, courts tend to favour the interests of creditors over occupants, and landlords over tenants.⁴¹ Tyrer argues that the significance of home does not depend on the tenure type of the occupant, and that the significance commonly given to home ownership over renting is merely cultural.⁴² He argues that laws should adapt to society's needs, and that laws favouring landlords' interests over tenants are merely a 'policy choice'.⁴³

Feminist scholars highlight the gendered and unequal power relations which often exist *within a household*. For example, threatened or actual violence by one household member gives that person power over other household members, although all occupants are treated as formally equal by tenancy law.⁴⁴ Further, threats and violence severely undermine the wellbeing of women and children who are victims of such conduct.

Domestic violence is a major cause of homelessness in Australia, particularly for women.⁴⁵ However, victims of violence – typically women – often remain in violent and unsafe 'homes' rather than risk homelessness for themselves and their children.⁴⁶

All Australian states and territories have legislation prohibiting domestic or family violence.⁴⁷ Broadly speaking, these laws allow victims or police to apply for a protective order which prohibits the respondent from doing certain things, such as contacting the applicant or going to or near certain locations, including their former home. Orders are usually made *ex parte* on the balance of probabilities, and breach of an order is a criminal offence.⁴⁸

Domestic violence in the context of co-tenancy raises difficult legal and practical issues.⁴⁹ At common law, co-tenants are jointly and severally liable under the tenancy, for example for rent and damage. Most Australian states and territories allow for an occupant of rented premises to

²⁹Fox, 'Idea of home' (n 6) 42–3; Fox O'Mahony, 'Meaning of Home' (n 5) 167.

³⁰Tyrer, 'Home in Australia' (n 14) 363.

³¹Fox, 'Chimerical concept' (n 4) 598.

³²Tyrer, 'Home in Australia' (n 14) 370.

³³Fox O'Mahony, 'Meaning of Home' (n 5) 167.

³⁴*Ibid.*

³⁵Tyrer, 'Home in Australia' (n 14) 379.

³⁶*European Convention* (n 10).

³⁷*Harrow London Borough Council v Qazi* [2004] 1 AC 98.

³⁸Fox, 'Idea of home' (n 6) 37.

³⁹Fox O'Mahony, 'Meaning of Home' (n 5) 160; Tyrer, 'Home in Australia' (n 14) 342.

⁴⁰Similarly, feminist scholars such as Graycar and Morgan demonstrate that judges and lawmakers often neglect the interests of women in favour of men: see, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990).

⁴¹Fox, 'Idea of home' (n 6) 37. Fox O'Mahony speculates on why courts favour these interests, arguing that 'legal analysis tends to favour the rational, the objective and the tangible': 34.

⁴²Tyrer, 'Home in Australia' (n 14) 372.

⁴³*Ibid.* 377.

⁴⁴Co-tenants are jointly and severally liable under a tenancy, subject to the domestic violence provisions outlined below.

⁴⁵Jess Hill, See *What You Made Me Do: Power, Control and Domestic Abuse* (Black Inc, 2020). See also Justice Connect Homeless Law, *Keeping Women and Children Housed: Women's Homelessness Prevention Project* (Report, 2018) 5 <https://justiceconnect.org.au/our-services/homeless-law/homeless-law-reports-and-submissions/>.

⁴⁶Hill (n 45) ch 8.

⁴⁷*Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Family Violence Act 2016* (ACT); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Domestic and Family Violence Act 2007* (NT); *Restraining Orders Act 1997* (WA); *Family Violence Act 2004* (Tas); *Domestic and Family Violence Protection Act 2012* (Qld).

⁴⁸As Suk notes, these orders have severe consequences for respondents, including immediate exclusion from their home: Jeannie Suk, 'Criminal Law Comes Home' (2006) 116(1) *Yale Law Journal* 2.

⁴⁹*Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol IV, 111–12.

apply to a tribunal to have a co-tenant removed from the tenancy where a final family violence order excluding the person has been made.⁵⁰ These provisions recognise the separate interests of co-tenants in the context of domestic violence. They represent a significant legal development, given that the home and domestic arrangements have traditionally been regarded as unsuitable for regulation or intervention by the State.⁵¹

The High Court decision in *BA v The King*

The article now examines a significant decision of the High Court of Australia in the light of the earlier discussion of home, security and domestic violence. The decision is significant for several reasons. First, it involves the 'not uncommon'⁵² occurrence of a person forcibly entering premises occupied by their former partner and assaulting them, and what protection the criminal law provides in these circumstances. This situation would likely involve the commission of minor charges of common assault, intimidation and destruction of property, and it may involve breach of an intervention order or equivalent.⁵³ The question addressed by the High Court was whether this situation constituted the more serious offence of break and enter.⁵⁴ The majority of the High Court⁵⁵ held that the offence was not committed *where the offender is a tenant (or co-tenant) at the premises*.

Second, the dissenting judges in *BA v The King* emphasised the 'special status of a dwelling-house'⁵⁶ in relation to the protection of occupants from violence and other external threats. This analysis is consistent with the concept of home outlined above. The dissenting judgment is more attuned to the protective function of the criminal law, and the importance of higher courts strongly condemning violence against people 'in their own homes'.⁵⁷

On a narrow view, the High Court's decision in *BA v The King* simply concerned the interpretation of the *Crimes Act*

1900 (NSW) ('NSW Act') and the arcane language of that statute.⁵⁸ Specifically, the decision concerned the meaning of 'break' in s 112. Other Australian states and territories have more modern versions of this offence.⁵⁹ However, the crime of burglary is symbolically significant, as it involves a 'home invasion' with serious criminal intent.⁶⁰

In summary, BA was in a domestic relationship with the complainant, and both were co-tenants of the premises. At the time of the alleged offence, BA had removed most of his belongings, had ceased paying rent and had returned keys. The alleged offence occurred when the appellant demanded to be let into the locked apartment while the complainant was home. When the complainant refused him entry, the appellant kicked in the door, grabbed the complainant by the shoulders, shook her, yelled at her, seized her mobile phone and threw it on the floor.⁶¹

The word 'break' has been interpreted as requiring either a forcible entry involving actual violence, or a 'constructive' break, where the accused uses trickery or a threat to gain entry. It is established law in New South Wales that there can be no 'break' if the accused has a proprietary or contractual right to enter.⁶²

The High Court majority held that 'break' requires a trespass, which is entry to premises of another without lawful authority.⁶³ The majority held that BA had lawful authority to enter the apartment by virtue of his status as a tenant under the tenancy agreement.⁶⁴ In their words, he had a 'liberty to enter' the premises,⁶⁵ and that no 'break' had occurred even though he did not occupy the premises, he used force to enter, and entry was without the consent of the occupant.⁶⁶ The majority decision supports the notion that a person cannot break into their own home, or premises to which they have an immediate right of entry.⁶⁷ Implicitly, the majority appeared to indicate that the complainant was wrong in refusing BA entry, and that he was justified in using force to enter the premises.

⁵⁰*Residential Tenancy Act 1997 (Vic)* s 91V; *Residential Tenancy Act 1997 (ACT)* s 85A; *Residential Tenancies Act 1995 (SA)* s 89A; *Residential Tenancies Act 1987 (WA)*; *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* s 245. In NSW, the making of a final apprehended violence order automatically terminates the excluded person's tenancy: *Residential Tenancies Act 2010 (NSW)* s 79. In Tasmania and the Northern Territory, a court may terminate or create a tenancy agreement after making a family violence order: *Family Violence Act 2004 (Tas)* s 17; *Domestic and Family Violence Act 2007 (NT)* s 23.

⁵¹Suk (n 48).

⁵²*R v BA* [2021] NSWCCA 191 [68].

⁵³All Australian States and Territories provide for intervention or family violence orders.

⁵⁴Contrary to *Crimes Act 1900 (NSW)* s 112. This offence carries a maximum penalty of 14 years imprisonment, or 20 years if aggravated. Break and enter is derived from the common law offence of burglary.

⁵⁵*BA v The King* [2023] HCA 14 [69] (Gordon, Edelman, Steward and Gleeson JJ).

⁵⁶*Ibid* [23] (Kiefel CJ, Gageler and Jagot JJ).

⁵⁷*Ibid* [33]. The dissenting judges did not examine the gendered aspect of the decision or otherwise refer to domestic violence.

⁵⁸In *Ghamrawi v R* (2017) 95 NSWCCA 405, Leeming JA referred to the 'somewhat clumsy language of the 1861 English Act, adopted verbatim in this respect in New South Wales in 1883 and preserved to this day' (at 421 [88]).

⁵⁹*Crimes Act 1958 (Vic)* s 76(1) (burglary); *Criminal Code 2002 (ACT)* s 311(1) (burglary); *Criminal Law Consolidation Act 1935 (SA)* s 168(1) (serious criminal trespass); *Criminal Code Act 1983 (NT)* s 221 (burglary); *Criminal Code Act Compilation Act 1913 (WA)* s 401(1) (burglary); *Criminal Code Act 1924 (Tas)* s 244 (burglary); *Criminal Code 1995 (Qld)* s 170 (burglary).

⁶⁰Suk (n 48) 10.

⁶¹*BA v The King* [2023] HCA 14 [5].

⁶²*Ghamrawi v R* (2017) 95 NSWCCA 405.

⁶³*BA v The King* [2023] HCA 14 [42] (Gordon, Edelman, Steward and Gleeson JJ).

⁶⁴*Ibid*.

⁶⁵*Ibid*.

⁶⁶*Ibid*. The majority also regarded as irrelevant that the entry was in breach of the *Residential Tenancies Act 2010 (NSW)* s 59 ('RTA') in that it involved intentional damage to the rented premises. For one judge of the Court of Criminal Appeal – Adamson J – this breach of the RTA by the accused meant that he had no right of entry to the apartment and therefore could be guilty of break and enter: *R v BA* [2021] NSWCCA 191 [64].

⁶⁷*BA v The King* [2023] HCA 14 [62].

Three High Court judges dissented, arguing that BA's status as a tenant did not provide a defence to the charge.⁶⁸ The dissenting judges stated that the 'fundamental rationale' for the offence is to protect the peaceful occupation of a dwelling-house, rather than mere possession.⁶⁹ The judges referred to precedents which emphasised the 'special status of a dwelling-house' in relation to providing protection and security for occupants.⁷⁰ They quoted Blackstone's commentary that burglary

has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature.⁷¹

The dissenting judges argued that 'break and enter' in the NSW Act means the use of force or fraud, or unauthorised entry by a non-occupier which is against the will of an occupier.⁷² The dissenting judges emphasised the importance of occupation, as opposed to the holding of proprietary rights.⁷³ These judges highlighted that BA did not reside at or occupy the apartment at the time of the alleged offence.

Significantly, the dissenting judges emphasised the importance of the permission or consent of the occupier to the entry,⁷⁴ as did Brereton JA⁷⁵ and Fullerton J⁷⁶ in the NSW Court of Criminal Appeal (NSWCCA). The former stated that the purpose of the offence is to 'protect the security of occupants of dwelling-houses',⁷⁷ rather than protecting property rights per se.⁷⁸ Therefore, according to these judges, a person with a legal right to enter under property law may nevertheless commit the offence of break and enter.⁷⁹

The dissenting judgment in the High Court, and the two CCA judgments outlined above, are consistent with the concept of home as outlined earlier in this article. First, the judgments emphasise the significance of *occupancy* of a dwelling or home, rather than other legal or proprietary

rights attaching to the house. Second, the judgment highlights the important function of the home in providing security from external threats and violence. Particularly for members of vulnerable groups, such as women and children, the home can provide physical protection from such threats.

The dissenting High Court judges argued that prioritising actual occupation over property rights reflects the 'values of a contemporary civilised society' and particularly the protective function of the criminal law.⁸⁰ Although BA was convicted of the lesser offences of common assault, intimidation and destroying property, this did not appear to reflect the seriousness of his conduct. As noted by a NSWCCA judge, the court's decision provides necessary guidance to judges in future cases.⁸¹ It also provides assurance to the public that higher courts condemn violence against people in their home.⁸²

The majority judgment suggested that relying on concepts such as occupation and particularly consent may lead to undesirable uncertainty in the law.⁸³ For example, can one occupier lawfully exclude another occupier in the absence of a credible threat? The majority's concerns reflect the traditional hesitancy of courts to intervene in 'private' matters, such as disputes between tenants or between domestic partners.⁸⁴ As with other areas of law, there will be borderline cases. However, the significance of the dissenting judgment is its emphasis on occupancy, rather than mere proprietary or other legal rights. In this proceeding, it was clear that BA was not an occupant of the rented premises, and the factors relevant to occupation (not living at the premises, having few belongings there, returned keys) were relatively clear.⁸⁵

Significantly, the complainant in *BA v The King* did not have a family violence order or an order removing BA from the lease. The latter order would result in BA no longer being a tenant or having a right to enter the premises, and he therefore could be guilty of breaking or entering. The High Court majority noted that New South Wales residential tenancy law provides for a tenant to be removed

⁶⁸Ibid [3], [16] (Kiefel CJ, Gageler and Jagot JJ).

⁶⁹Ibid [15], [21].

⁷⁰Ibid [23].

⁷¹Ibid [20], quoting William Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 16 at 223.

⁷²Ibid [25], [30].

⁷³Ibid [14].

⁷⁴Ibid [25].

⁷⁵*R v BA* [2021] NSWCCA 191 [10].

⁷⁶Ibid [40].

⁷⁷Ibid [34].

⁷⁸Ibid [17].

⁷⁹Ibid [28].

⁸⁰*BA v The King* [2023] HCA 14 [33].

⁸¹*R v BA* [2021] NSWCCA 191 [68] (Adamson J).

⁸²The right to home is contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2006 s 13(a) ('Charter'), *Human Rights Act 2004* (ACT) s 12(a) ('HRAACT') and *Human Rights Act 2019* (Qld) s 25(a) ('QHRA'). This legislation requires all laws to be interpreted compatibly with human rights: see Charter s 32(1), HRAACT s 30 and QHRA s 48(1). This legislation does not apply to the interpretation of the NSW laws considered here.

⁸³*BA v The King* [2023] HCA 14 [75].

⁸⁴See Suk (n 48) for a strong argument for non-intervention by the state in domestic arrangements and the home. For example, Suk argues that burglary only applies to 'strangers' and not to co-owners or co-tenants.

⁸⁵Further, the majority's reliance on property law, and particular the RTA, does not necessarily provide certainty. This is because they invoked the RTA selectively, prioritising BA's right as a tenant to exclusive possession of the premises (at [42]), however regarding his duty as a tenant not to intentionally damage the premises as irrelevant.

where an intervention order has been made relating to the rented premises.⁸⁶ As the complainant in this case had not applied for or obtained either order, she was relatively unprotected from the violence which ensued.

The majority's conclusion in a sense respects the choice and autonomy of the complainant – that if she was concerned about violence then she could have obtained an intervention order and removed BA from the lease. In the context of domestic violence, however, many complainants legitimately fear the escalation of violence if they take action to enforce their rights.⁸⁷ Further, provisions enabling victims of domestic violence to terminate a lease are 'not well-known and [are] underutilised'.⁸⁸ Thus, the State has an important protective role in this regard.⁸⁹

Conclusion

This article has examined the concept of home as outlined by Fox O'Mahony and Tyrer. These scholars describe the significance of home for occupiers in terms of the support provided for physical security, personal growth and development, and supporting relationships. They also highlight that these interests are often neglected by judges in favour of more established values such as property and contractual rights. This analysis can be applied to many areas of law, including residential tenancies.

As a case study, this article examined the situation of a person forcibly entering premises occupied by a former partner and assaulting the occupant, and considered what protection the criminal law provides in these circumstances. Particularly, it examined whether being a tenant or

co-tenant should provide a defence to serious criminal charges. The article concluded that the dissenting judgment of the High Court in *BA v The King* provides more protection to occupiers than the majority judgment. Although this decision strictly only applies to NSW, it highlights judges' neglect of the security which home potentially provides for occupiers, particularly regarding domestic violence. As housing scholars argue, the law should protect the fundamental human interests associated with having a home, rather than merely protecting established property rights.

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⁸⁶*R v BA* [2021] NSWCCA 191 [75].

⁸⁷See, eg, Victoria Police, *Code of Practice for the Investigation of Family Violence* (2022) 38 <https://www.police.vic.gov.au/code-practice-investigation-family-violence>. The Code notes that 'some victims do not want the perpetrator ... charged' for reasons including 'fears of retribution', adding that it 'is the responsibility of Victoria Police to decide whether a perpetrator is charged, even if the victim is reluctant for charges to be pursued'.

⁸⁸*Royal Commission into Family Violence* (n 49), 112.

⁸⁹Cf Suk (n 48).