SOCIAL HOUSING, HOMELESSNESS AND HUMAN RIGHTS

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Social housing is reserved for the most vulnerable tenants, yet social housing tenants are subject to the same residential tenancy laws as private tenants and may even be held to a higher standard of behaviour. As a result, social housing tenants are at high risk of eviction. This article reports on the results of a mixed methods study on eviction proceedings involving social housing tenants. The study involved textual analysis of 98 published judgments and focus group research with 43 tenants' advocates. It was found that the very factors that make someone eligible for social housing in Australia simultaneously put them at risk of eviction. This research suggests that the law provides limited protection against eviction to homelessness. Despite the importance of individuals' interests in having a home, rights-based arguments are generally ineffective in this context.

I INTRODUCTION

Since the turn of the century, social housing in Australia has been increasingly reserved for the most vulnerable of tenants, most of whom are highly disadvantaged.[1] Half of the people who are allocated social housing are homeless, and most are in a category of 'greatest need'.[2] However, it seems that social housing may not offer security of tenure to all tenants.[3] In 2020–21, 34,538 Australians living in social

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1 Australian Institute of Health and Welfare, *Housing Assistance in Australia* (Web Report, 30 June 2021) 29 ('*Housing Assistance*'); 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, 3.

2 Being 'in greatest need' means that the person is experiencing homelessness, is at risk of homelessness, or their life or safety is threatened within existing accommodation: *Housing Assistance* (n 1) 29.

3 Eviction statistics are not made publicly available. In response to a question on notice tabled in Parliament in June 2018, the Queensland Minister for Housing and Public Works reported that, from 2012 to 2018, between 44 and 74 public housing tenants were evicted for disruptive behaviour each year: Michael De Brenni, 'Question on Notice No 528' (Answer to Question on Notice, Parliament of Queensland, 3 May 2018). The Western Australian Auditor General reported in 2019 that 0.2% of social housing households (n=63) were evicted between July 2016 and April 2018: Caroline Spencer, *Managing Disruptive Behaviour in Public Housing* (Report No 12, Office of the Auditor General Western Australia, 20 December 2018) 17. As to 'security of tenure': see generally Kath Hulse and Vivienne Milligan, 'Secure Occupancy: A New Framework for Analysing Security in Rental Housing' (2014) 29(5) *Housing*

housing approached a specialist homelessness service for assistance, which may suggest that their housing-related needs remain unmet.[4]

Social housing providers are 'landlords of last resort',[5] so one might expect that every effort would be made to support their tenants to remain housed. Recent research suggests that, in some jurisdictions, social housing providers do attempt to sustain tenancies, and sometimes a 'single substantial contact' with support staff is enough to 'address a minor problem'.[6] However, where tenants do not take up referrals, or fail to 'engage' with service providers, eviction proceedings are generally initiated.[7] Social housing providers tend to ascribe blame to the tenant in such cases, even though vulnerable tenants face significant barriers to 'engaging' with social services.[8] Feelings of shame and fear, stigma, and the belief that workers are unempathetic or judgemental, all influence the extent to which individuals choose to engage with social services.[9] Failure to engage may not indicate belligerence or indolence.

Eviction proceedings are extremely distressing for tenants, but they are also time and resource intensive for the landlord. Sustaining the tenancy is preferable in most instances, particularly for vulnerable tenants who are likely to be rendered homeless if the tenancy is terminated.[10] Yet, there are competing interests and concerns. Social housing providers are responsible for the allocation of scarce public resources and are required to balance the rights and needs of individual tenants against the rights and needs of potential tenants who may be equally vulnerable. In 2020, there were 436,300 social housing dwellings in Australia, and over 228,900 households on the waiting list across the country.[11] A 'troublesome'

Studies 638 <https://doi.org/10.1080/02673037.2013.873116>; Suzanne Fitzpatrick and Hal Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to "Ambulance Service" Social Housing?' (2014) 29(5) *Housing Studies* 597 <https://doi.org/10.1080/02673037.2013.803043>.

4 Australian Institute of Health and Welfare, *Data Tables: Specialist Homelessness Services Annual Report 2020–21* (Web Report Data Tables, 7 December 2021) 'Table Clients 11: Clients, by Housing Situation at First Presentation, 2020–21', cell F11 (although, note that specialist homelessness services provide associated support services as well as accommodation). Travia and Webb argue that all tenants (not just social housing tenants) lack security of tenure: see Ben Travia and Eileen Webb, 'Can Real Property Law Play a Role in Addressing Housing Vulnerability? The Case of Older Women Experiencing Housing Stress and Homelessness' (2015) 33(2) *Law in Context* 52, 73 <https://doi.org/10.26826/law-in-context.v33i2.55>.

5 See, eg, *Commissioner for Social Housing in the ACT & Canham* [2012] ACAT 41, [67] (Senior Member Anforth).

6 Chris Martin et al, *Social Housing Legal Responses to Crime and Anti-Social Behaviour: Impacts on Vulnerable Families* (Australian Housing and Urban Research Institute Final Report No 314, June 2019) 38–9, 42–3 <https://doi.org/10.18408/ahuri-7116301>.

7 Ibid.

8 Ibid 39–40.

9 Ibid 43; Mark Smith et al, 'Engaging with Involuntary Service Users in Social Work: Findings from a Knowledge Exchange Project' (2012) 42(8) *British Journal of Social Work* 1460 <https://doi.org/10.1093/bjsw/bcr162>; Donald Forrester, David Westlake and Georgia Glynn, 'Parental Resistance and Social Worker Skills: Towards a Theory of Motivational Social Work' (2012) 17(2) *Child and Family Social Work* 118 <https://doi.org/10.1111/j.1365-2206.2012.00837.x>.

10 As to pathways from eviction to homelessness: see Padraic Kenna et al (eds), *Promoting Protection of the Right to Housing: Homelessness Prevention in the Context of Evictions* (Report, FEANTSA, 19 May 2016) 103–8 <https://doi.org/10.2767/463280>.

11 *Housing Assistance* (n 1) 3, 32–3.

tenant may therefore be taking the place of another, perhaps more 'deserving', tenant and this may be taken into account by social housing providers when determining whether or not to commence eviction proceedings.[12]

Social housing tenancies are governed by residential tenancies legislation in all Australian states and territories, so for the most part, social housing tenants will be treated in the same way as a person renting privately.[13] Indeed, in some instances, social housing tenants may actually be held to a higher standard of behaviour and live under constant threat of eviction as a result.[14]

Internationally, human rights law has operated to protect vulnerable tenants from eviction. For example, in South Africa, the constitutional right to housing has been used to successfully resist evictions and prevent homelessness.[15] The European Court of Human Rights ('ECtHR') has determined that forced eviction may violate the right to freedom from unlawful or arbitrary interference with a person's home,[16] and the right to life has supported the maintenance of tenancies in India and Latin America.[17] There is no right to housing in Australian law,[18] however some Australian states and territories (Australian Capital Territory ('ACT'), Victoria and now Queensland) have human rights legislation which protects the

12 As to 'deservedness' and social housing: see Beth Watts and Suzanne Fitzpatrick, *Welfare Conditionality* (Routledge, 1st ed, 2018) 68 <https://doi.org/10.4324/9781315652047-1>. Jones et al argue that perceptions of deservingness may also influence the outcome of those proceedings: see Angela M Jones et al, 'Perceptions of Access to Justice Among Unrepresented Tenants: An Examination of Procedural Justice and Deservingness in New York City Housing Court' (2019) 19(1) *Journal of Forensic Psychology Research and Practice* 72 <https://doi.org/10.1080/24732850.2018.1532191>. Note that discrimination is experienced by marginalised tenants in the private rental market as well, particularly amongst Indigenous people: see Tammy Solonec, 'Racial Discrimination in the Private Rental Market: Overcoming Stereotypes and Breaking the Cycle of Housing Despair in Western Australia' (2000) 5(2) *Indigenous Law Bulletin* 4; and other ethnic minority groups: see Heather MacDonald, George Galster and Rae Dufty-Jones, 'The Geography of Rental Housing Discrimination, Segregation and Social Exclusion: New Evidence from Sydney' (2018) 40(2) *Journal of Urban Affairs* 226 <https://doi.org/10.1080/07352166.2017.1324247>.

13 Bell (n 1) 33.

14 Ibid 5; Martin et al (n 6) 4; Travia and Webb (n 4) 74; Kathleen McEvoy, 'Building Secure Communities: Delivering Administrative Justice in Public Housing' [2011] (65) *Australian Institute of Administrative Law Forum* 1, 19.

15 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 (Yacoob J) (Constitutional Court); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1 (Yacoob J) (Constitutional Court) ('*Occupiers of 51 Olivia Road*').

16 *Kay v The United Kingdom* (European Court of Human Rights, Chamber, Application No 37341/06, 21 September 2010) ('*Kay*'); *Popov v Russia* (European Court of Human Rights, Chamber, Application No 44560/11, 6 May 2019) ('*Popov*'); *Yordanova v Bulgaria* (European Court of Human Rights, Chamber, Application No 25446/06, 24 September 2012) ('*Yordanova*'); *Winterstein v France* (European Court of Human Rights, Chamber, Application No 27013/07, 17 October 2013) ('*Winterstein*').

17 In India: see *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 ('*Olga Tellis*'). In Latin America: see *Villagrán Morales et al (The 'Street Children') v Guatemala (Judgment)* (Inter-American Court of Human Rights, Series C No 63, 19 November 1999) [139], [144]; *Sawhoyamaxa Indigenous Community v Paraguay (Judgment)* (Inter-American Court of Human Rights, Series C No 146, 29 March 2006) [145]–[180].

18 The *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1) recognises the right to an adequate standard of living, including housing, however this has not been incorporated into Australian domestic law.

right to protection of the family unit, the rights of children, cultural rights, and the right to protection from arbitrary interference with one's home.[19]

Very few Australian higher court cases have considered these rights in a social housing context,[20] and there is limited legal research on social housing eviction proceedings.[21] This article presents the results of a mixed methods study on social housing eviction proceedings in four Australian states and territories: the ACT, New South Wales ('NSW'), Queensland and Victoria. A content analysis of reported case law was supplemented by focus group research with lawyers and tenants' advocates in each of those jurisdictions. Of the four jurisdictions investigated, two had human rights Acts at the time the research was conducted (ACT and Victoria), and two did not (NSW and Queensland). The *Human Rights Act 2019* (Qld) subsequently came into effect in 2020.

The analysis presented here focuses on the circumstances under which social housing tenants are evicted, the role lawyers play in eviction proceedings, the legal arguments that may be raised in tenants' defence, and whether a rights-based approach to advocacy is effective in this context.

II SOCIAL HOUSING LAW AND TENANT'S RIGHTS IN AUSTRALIA

Social housing in Australia includes public housing, community housing and Indigenous housing.[22] For public housing tenancies, the landlord is a government department or statutory authority. For community housing tenancies, the landlord is a private provider, generally a non-profit organisation, however their properties are owned or subsidised by the government.[23] Indigenous housing is managed by Indigenous organisations, cooperatives and land councils, and is targeted at Indigenous individuals and households.[24] Currently, 24% of social housing in

19 *Human Rights Act 2004* (ACT) ss 11–12, 27 ('*ACT Human Rights Act*'); *Human Rights Act 2019* (Qld) ss 25–8 ('*Qld Human Rights Act*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 13, 17, 19 ('*Vic Charter Act*').

20 There is no High Court jurisprudence on this point, however there have been some notable Victorian Supreme Court decisions, including: *Burgess v Director of Housing* [2014] VSC 648 [221]–[222] ('*Burgess*') (Macaulay J held that the Director of Housing did not consider the rights of a mother and her son to protection of the family unit and the child's best interests under *Vic Charter Act* (n 19) s 17 when issuing a notice to vacate); *Re Director of Housing and Sudi* (2010) 33 VAR 139 ('*Sudi VCAT*') (Bell J held that the Director of Housing breached a father and son's right to family and home under *Vic Charter Act* (n 19) section 13(a) in circumstances where they would be evicted to homelessness). However, this decision was overturned by the Victorian Court of Appeal: see *Director of Housing v Sudi* (2011) 33 VR 559 ('*Sudi VSCA*'). These cases are discussed further below.

21 This fact was noted recently by Martin et al (n 6) 5.

22 *Housing Assistance* (n 1) 9.

23 *Residential Tenancies Act 2010* (NSW) s 136 ('*NSW Tenancies Act*'); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 527B ('*Qld Tenancies Act*'); *Residential Tenancies Act 1995* (SA) s 3 ('*SA Tenancies Act*').

24 See generally Vivienne Milligan et al, *Urban Social Housing for Aboriginal People and Torres Strait Islanders: Respecting Culture and Adapting Services* (Report, Australian Housing and Urban Research Institute, August 2011) 11–13.

Australia is community housing, which is double the proportion a decade ago, 7% is Indigenous housing, and the remainder is public housing.[25] Social housing tenants pay rent that is below market value and calculated based on their household income or their imputed Centrelink income.[26]

Social housing is jointly funded by the Commonwealth and the states and territories under the National Housing and Homelessness Agreement.[27] Each state and territory has a housing Act which governs the administration of social housing programs. The objects of those Acts, variously stated, include facilitating the provision of housing assistance to those in need, and ensuring that resources are allocated efficiently and equitably.[28] Across the country, housing stock is insufficient to meet demand and waiting lists are lengthy; only around half of all applicants are housed within two years.[29] Most social housing tenants are highly vulnerable people: 35% of social housing households have a tenant with a disability, 15% of social housing households have an Indigenous member, and 21% of public housing occupants are children aged under 15 years.[30]

Regardless of the high needs of social housing tenants, and the important role that social housing plays within the broader social welfare system,[31] all social housing tenancies are considered residential tenancies and are regulated under general provisions of the residential tenancies Acts in all states and territories. This means that social housing tenants are held to the same legal standard as private tenants even though, by definition, they have been unable to obtain or sustain a private tenancy without support. In most states and territories, the legislation allows for 'no cause' evictions, that is, a tenant can be evicted for no reason whatsoever, provided the notice requirements are met.[32] Whilst recent

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25 *Housing Assistance* (n 1) 12. There is some variance between states. For example, NSW and Tasmania have a particularly high proportion of community housing dwellings and in the Northern Territory, more than half of all social housing is Indigenous housing.

26 Rent amounts are capped at 25% of income. If a person has no income, the department will calculate their income based on the Centrelink payment that most closely aligns with their circumstances, even if they are not receiving it.

27 Created under the *Federal Financial Relations Act 2009* (Cth).

28 *Housing Assistance Act 2007* (ACT) s 6; *Housing Act 2001* (NSW) s 5; *Housing Act 1982* (NT) s 15(a); *Housing Regulations 1983* (NT) reg 4; *Housing Act 2003* (Qld) ss 4–6; *South Australian Housing Trust Act 1995* (SA) s 5; *Homes Act 1935* (Tas) ss 2, 6B; *Housing Act 1983* (Vic) s 6; *Housing Act 1980* (WA) s 4.

29 *Housing Assistance* (n 1) 29. In some jurisdictions, wait times are much longer than this, eg in Sydney, wait times may exceed 10 years: Department of Communities and Justice (NSW), 'Guide to Waiting Times for Social Housing at 30 June 2021', *Expected Waiting Times* (Webpage) <https://www.facs.nsw.gov.au/housing/help/applying-assistance/expected-waiting-times>.

30 *Housing Assistance* (n 1) 18, 21.

31 Torgersen described housing assistance as the 'wobbly pillar' of the social welfare system: see Ulf Torgersen, 'Housing: The Wobbly Pillar under the Welfare State' (1987) 4(1) *Scandinavian Housing and Planning Research* 116 <https://doi.org/10.1080/02815737.1987.10801428>. See also Jonathan Bradshaw, Yekaterina Chzhen and Mark Stephens, 'Housing: The Saving Grace in the British Welfare State?' in Suzanne Fitzpatrick and Mark Stephens (eds), *The Future of Social Housing* (Shelter, 2008) 7.

32 See *Residential Tenancies Act 1997* (ACT) s 47 ('*ACT Tenancies Act*'); *NSW Tenancies Act* (n 23) s 85; *Residential Tenancies Act 1999* (NT) s 89 ('*NT Tenancies Act*'); *Qld Tenancies Act* (n 23) s 291; *SA Tenancies Act* (n 23) s 83; *Residential Tenancies Act 1997* (Vic) s 263 ('*Vic Tenancies Act*'); *Residential Tenancies Act 1987* (WA) s 64 ('*WA Tenancies Act*'). Note that the equivalent Tasmanian provision was

research suggests they are rarely applied in NSW and Victoria,[33] these provisions can be (and often are) used elsewhere to evict social housing tenants who are 'difficult' or 'troublesome'.[34]

Some residential tenancies Acts include provisions that apply only to social housing tenancy agreements.[35] Generally, these provisions impose additional obligations on social housing tenants rather than operating to protect tenants or preserve social housing tenancies.[36] One exception to this operates in NSW where, in some circumstances, the NSW Civil and Administrative Tribunal ('NCAT') is not required to make a termination order in respect of a social housing tenancy if this is likely to result in 'undue hardship' to a child, a person who is the subject of an apprehended violence order, a person with a disability, or there are other 'exceptional circumstances'.[37]

In NSW, Queensland and Western Australia, there are 'antisocial' or 'objectionable' behaviour provisions that apply only to social housing tenancies.[38] Antisocial or objectional behaviour is broadly defined to include littering, defacing property, harassment or intimidation, or interfering with the 'reasonable peace, comfort or privacy' of a person nearby.[39] In NSW and Western Australia, a 'three strike' system applies whereby, if a tenant breaches their 'acceptable behaviour

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repealed in 2014, and during the study period, legislation was passed to abolish no cause evictions in Victoria: *Residential Tenancies Amendment Act 2018* (Vic) s 240 ('*Vic Tenancies Amendment Act*').

33 Martin et al (n 6) 10–11.

34 See, eg, *Re Magistrate Steven Malley; Ex parte The Housing Authority* [2017] WASC 193 ('*Re Magistrate Steven Malley*') (where the housing authority used the 'without ground' provision to evict a tenant because they did not have sufficient evidence to prove objectional behaviour); *Wilks v Integrated Family and Youth Service Ltd* [2015] QCAT 322 (where the housing provider used the 'without ground' provision to evict a young person who had been accused of using offensive language and engaging in intimidating behaviour). See also Jemima Mowbray, 'Reconsidering Evictions Without Grounds: "No Grounds" Evictions and the Risks of Homelessness' (2016) 29(10) *Parity* 19.

35 Some provisions create additional grounds for termination that apply only to social housing tenancies, such as where damage has been or is likely to be caused to the premises (*Qld Tenancies Act* (n 23) section 296A); drug-related conduct has occurred within the premises (*Vic Tenancies Act* (n 32) section 91ZR); the tenant is no longer eligible to receive social housing (*NSW Tenancies Act* (n 23) section 143); or the tenant has been offered alternative premises (*NSW Tenancies Act* (n 23) section 148; *Qld Tenancies Act* (n 23) section 335).

36 Indeed, the Queensland Act includes a section that explicitly states that the tribunal must not refuse to terminate a tenancy merely because the person is a social housing tenant: *Qld Tenancies Act* (n 23) s 349A.

37 *NSW Tenancies Act* (n 23) s 154D(3). Note this applies only to applications for termination orders under sections 90 (serious damage or injury by tenant or other occupant) and 91 (use of premises for illegal purposes). In NSW there are also different notice periods for termination of periodic social housing tenancies; 60 days instead of 28: *NSW Tenancies Act* (n 23) s 146.

38 *NSW Tenancies Act* (n 23) ss 138, 153; *Qld Tenancies Act* (n 23) ss 297A, 345A; *WA Tenancies Act* (n 32) s 75A. As to antisocial behaviour laws in the context of social housing: see Hal Pawson and Carol McKenzie, 'Social Landlords, Anti-Social Behaviour and Countermeasures' in John Flint (ed), *Housing, Urban Governance and Anti-Social Behaviour: Perspectives, Policy and Practice* (Policy Press, 2006) 155 <https://doi.org/10.2307/j.ctt9qgs9f.14>; Christopher Martin, 'Law and Order in Public Housing: The *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW)' (2004) 16(2) *Current Issues in Criminal Justice* 226 <https://doi.org/10.1080/10345329.2004.12036318>; John Flint, 'The Responsible Tenant: Housing Governance and the Politics of Behaviour' (2004) 19(6) *Housing Studies* 893 <https://doi.org/10.1080/0267303042000293991>; Alan Deacon, 'Justifying Conditionality: The Case of Anti-Social Tenants' (2004) 19(6) *Housing Studies* 911 <https://doi.org/10.1080/0267303042000293008>.

39 *NSW Tenancies Act* (n 23) s 138(6); *Qld Tenancies Act* (n 23) s 297A(1); *WA Tenancies Act* (n 32) s 75A(1).

agreement' three times within a 12 month period, the landlord may issue a termination notice.[40]

In Australia, eviction proceedings generally involve a two-step process.[41] A landlord may issue a notice to vacate (or equivalent) in response to a breach of the tenancy agreement, but only a court or tribunal can make a termination order (or equivalent), which will have the effect of forcibly evicting the tenant.[42] Australian residential tenancies legislation rarely directs a decision-maker to consider 'hardship' to a tenant when making a termination order, and when it does, the hardship of the tenant must usually be balanced against any hardship that may be caused to the landlord.[43] Sometimes, the judicial officer will retain the discretion to determine whether or not to make the termination order, for example where the provision states that the court or tribunal 'may' make a termination order if it is satisfied that certain criteria are met.[44] In these cases, the judicial officer has the power to make an alternative order which has the effect of keeping the tenancy on foot, such as an adjournment, a stay of proceedings or injunctive relief.[45] At this point, it may also be open to the judicial officer to consider the tenant's individual circumstances, including any hardship that an eviction would cause to a tenant.[46] Individual circumstances may also be considered when a

40 In NSW: see *NSW Tenancies Act* (n 23) s 154C. In WA: see Department of Communities and Housing (WA), 'Housing Authority Rental Policy Manual' (Policy Manual, Government of Western Australia Housing Authority, February 2021) 65–6 <https://web.archive.org/web/20220124233406/https://www.housing.wa.gov.au/HousingDocuments/Rental_Policy_Manual.pdf>. Queensland's 'three strikes' Antisocial Behaviour Management Policy was abolished in 2016: Zoe Walter, Cameron Parsell and Lynda Cheshire, *Evidence for the Mental Health Demonstration Project: A Mixed Methods Study* (Report, November 2017) 7.

41 In Victoria, it is more accurately characterised as a three-step process: (1) Director issues a notice to vacate; (2) the Victorian Civil and Administrative Tribunal ('VCAT') may make a possession order; and (3) the Director may apply for a warrant of possession, which the Principal Registrar of the VCAT is required to issue: *Vic Tenancies Act* (n 32) ss 322, 330, 351. See also Martin et al (n 6) 26, 28; Bell (n 1) 33.

42 *ACT Tenancies Act* (n 32) ss 36, 41; *NT Tenancies Act* (n 32) ss 104, 106; *Qld Tenancies Act* (n 23) ss 293–300; *SA Tenancies Act* (n 23) s 95; *Residential Tenancy Act 1997* (Tas) ss 41, 45 ('*Tas Tenancy Act*'); *WA Tenancies Act* (n 32) s 60(1). In Victoria, the onus is placed on the tenant to challenge a notice to vacate: *Vic Tenancies Act* (n 32) s 91ZZS (but see also ss 498ZZZP, 322, 323A regarding possession orders).

43 *ACT Tenancies Act* (n 32) s 47(2)(b); *NSW Tenancies Act* (n 23) s 114; *Vic Tenancies Act* (n 32) ss 91W, 352. As noted above, *NSW Tenancies Act* (n 23) s 154D(3)(b) provides an exception to this (ie there is no consideration of hardship to the landlord under this provision).

44 See, eg, *ACT Tenancies Act* (n 32) ss 47–9, 50–55B; *NSW Tenancies Act* (n 23) s 87(4); *Qld Tenancies Act* (n 23) ss 337–42; *SA Tenancies Act* (n 23) ss 87–90, 93–4. In some instances, there will be no residual discretion and the court or tribunal will be directed to issue a termination order, eg in the ACT, where a person fails to comply with a payment order: *ACT Tenancies Act* (n 32) ss 49B–49C. Also in NSW, where the property has been used in the commission of certain offences or where the tenant has been found guilty of certain offences: *NSW Tenancies Act* (n 23) ss 154D, 154FA. See also *NT Tenancies Act* (n 32) ss 97–100A, 104; *Vic Tenancies Act* (n 32) s 330; *WA Tenancies Act* (n 32) s 71(2). As to the relevance of the term 'may': see also *Cain v New South Wales Land and Housing Corporation* (2014) 86 NSWLR 1, 6 [19]–[21] (Basten JA).

45 This was noted in *Burgess* (n 20) [90]–[91] (Macaulay J).

46 See, eg, *NSW Tenancies Act* (n 23) s 154E(2) (which allows the tribunal to take into account 'any other matter' when exercising their discretion to make a termination order). See also Bell (n 1) 33.

decision-maker is directed to determine whether or not a particular breach is 'sufficient' or 'serious' enough to justify termination.[47]

Rights-based arguments may also be raised. In jurisdictions with human rights legislation – the ACT, Victoria and now Queensland – decision-makers may be required to consider tenants' human rights before making an order that has the effect of evicting a tenant.[48] There is no right to housing in Australian law, however the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2019* (Qld) all protect the right to non-interference with a person's home.[49] These three Acts are similar in the sense that they all require public authorities to act or make decisions in a way that is compatible with human rights.[50] Yet, the capacity for an aggrieved person to enforce their rights is limited. In Victoria and Queensland, an aggrieved person is only able to bring legal proceedings against a public authority for an alleged breach of their human rights if they have another cause of action available to them, such as an application for judicial review.[51] In the ACT, there is a stand-alone cause of action for human rights complaints: a person who claims that a public authority has contravened their human rights may start a proceeding in the Supreme Court against the public authority.[52]

Whether or not human rights arguments can be raised in tribunal proceedings is not clearly outlined in the legislation. Courts and tribunals are only considered public authorities when they are acting in their administrative capacity, and it has been held that when determining an application for possession, tribunals are acting judicially.[53] In *Director of Housing v Sudi*, the Victorian Court of Appeal determined that in tenancy proceedings, the Victorian Civil and Administrative Tribunal ('VCAT') does not have the power to undertake collateral review of an administrative decision on the basis that the decision was made in contravention of a person's human rights: the VCAT must consider an administrative decision to be valid unless it has been set aside by a court.[54] The effect of this decision is that if a person wishes to resist an eviction on the basis that their human rights have been contravened (for example, by a decision of the Director of Housing to apply for possession), they will need to seek relief in the Supreme Court.[55] Early indications are that the Queensland Civil and Administrative Tribunal ('QCAT') will take the same approach,[56] however the

47 *NSW Tenancies Act* (n 23) s 87(4)(b); *Qld Tenancies Act* (n 23) s 345A.

48 That is, in cases where the decision-maker is a public entity: see *ACT Human Rights Act* (n 19) s 40A(3)(b)(vi); *Vic Charter Act* (n 19) s 4; *Qld Human Rights Act* (n 19) s 9, 10(3)(b)(iv).

49 *ACT Human Rights Act* (n 19) s 12(a); *Vic Charter Act* (n 19) s 13(a); *Qld Human Rights Act* (n 19) s 25(a).

50 *ACT Human Rights Act* (n 19) s 40B(1); *Vic Charter Act* (n 19) s 38(1); *Qld Human Rights Act* (n 19) s 58(1).

51 *Vic Charter Act* (n 19) s 39(1); *Qld Human Rights Act* (n 19) s 59(1).

52 *ACT Human Rights Act* (n 19) s 40C(1)–(2).

53 *Sudi VSCA* (n 20) 559, 584 [127], 595 [204], 595 [208] (Maxwell P); *Sudi VCAT* (n 20) 164 [119] (Bell J). As to the distinction between acting in an administrative and judicial capacity: see *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 68–9 [283]–[288].

54 *Sudi VSCA* (n 20) 559, 567 [34]–[35] (Warren CJ), 575 [74]–[75], 576 [79] (Maxwell P), 607 [281] (Weinberg JA).

55 This is what occurred in *Burgess* (n 20) (Macaulay J).

56 See, eg, *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152, [39]–[40] (Member Stepniak).

ACT Civil and Administrative Tribunal ('ACAT') does not consider itself to be constrained in the same way. In *The Tenant v Commissioner for Social Housing* ('*The Tenant*'), an ACAT member was quoted as saying that human rights 'need to be considered in most cases where there is an eviction'.[57]

Importantly, human rights legislation in ACT, Victoria and Queensland requires that laws be interpreted – by both courts and tribunals[58] – in a way that is compatible with human rights, to the extent this is possible to do so consistently with their purpose.[59] Whilst the equivalent provision in the *Human Rights Act 1998* (UK) has allowed for interpretations that depart from the intention of the legislature,[60] in *Momcilovic v The Queen* a majority of the High Court determined that the Australian provisions merely codify the principle of legality.[61] The principle of legality is the 'presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language'.[62] This principle applies in all jurisdictions regardless of whether they have human rights legislation or not. In jurisdictions with human rights legislation, a declaration of incompatibility (or inconsistent interpretation) may be issued in cases where a legislative provision cannot be interpreted consistently with human rights.[63] This does not have the effect of invalidating the law; rather a copy of the declaration is provided to the Attorney-General and the relevant Minister must table a written response to the declaration in Parliament.[64]

Common law rights and statutory rights, such as the right to a fair trial and the right to procedural fairness, may also assume relevance in tenancy matters, for example where a tenant has not been provided with a reasonable opportunity to address adverse evidence, or where the decision-maker has failed to follow its own

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57 *The Tenant v Commissioner for Social Housing* [2016] ACAT 49, [118] (Crebbin P) ('*The Tenant*'). See also *Commissioner for Social Housing v CC* [2017] ACAT 17, [8], [73] (Senior Member Anforth) ('*CC*'); *Commissioner for Social Housing v Lysle* [2016] ACAT 26, [15], [17] (Senior Member Lennard). Indeed, such an approach may be required under *ACT Human Rights Act* (n 19) s 40C(2)(b).

58 *ACT Human Rights Act* (n 19) s 29; *Vic Charter Act* (n 19) s 6(2)(b); *Qld Human Rights Act* (n 19) s 5(2)(a).

59 *ACT Human Rights Act* (n 19) s 30; *Vic Charter Act* (n 19) s 32(1); *Qld Human Rights Act* (n 19) s 38(1).

60 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571 [30] (Lord Nicholls). Loveland notes, and criticises, the continued application of the deference principle in this regard (ie judges deferring to the legislature's purpose) saying that 'the principle will oftentimes rest on a wholly false premise': Ian Loveland, 'The Impact of the *Human Rights Act* on Security of Tenure in Public Housing' (2004) (Autumn) *Public Law* 594, 608 ('Security of Tenure').

61 (2011) 245 CLR 1, 50 [51] (French CJ), 83–7 [146] (Gummow J), 217 [565] (Crennan and Kiefel JJ) ('*Momcilovic*'); see also Benedict Coxon, 'Learning from Experience: Interpreting the Interpretive Provisions in Australian Human Rights Legislation' (2020) 39(2) *University of Queensland Law Journal* 253.

62 *Momcilovic* (n 61) 46–7 [43].

63 Only the Supreme Court can issue a declaration of incompatibility/inconsistent interpretation: *ACT Human Rights Act 2004* (n 19) s 32(2); *Vic Charter Act* (n 19) s 36(2); *Qld Human Rights Act 2019* (n 19) s 53(2). To date, these provisions have seldom been used in Australia: see, eg, Coxon (n 61); Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340 <https://doi.org/10.2139/ssrn.2603929>.

64 *ACT Human Rights Act* (n 19) s 33 (Attorney-General must prepare and table the written response); *Vic Charter Act* (n 19) s 37; *Qld Human Rights Act* (n 19) s 56(1).

policies.[65] In *Parsons v Director of Housing*, the Supreme Court of Tasmania held that a social housing tenant was denied procedural fairness because the court failed to recognise it had the discretion to consider the tenant's individual circumstances when determining whether the reason for serving the notice to vacate was 'genuine or just'.[66] Geason J noted that were such discretion not retained, the court would merely be engaged in a 'rubber-stamp[ing]' exercise and there would be no protection against 'capricious and arbitrary action'.[67]

Since superior court jurisprudence on social housing is scarce, and few studies have been undertaken on the application of laws and legal processes that relate to social housing evictions in Australia, only limited information is available regarding the circumstances in which tenants are evicted, the legal arguments that may be raised in their defence and the likelihood of their success. The empirical research reported on here addresses these issues.

III THE STUDY

This mixed methods study on social housing eviction proceedings involved textual analysis of published cases and focus group interviews with housing lawyers and advocates.

First, textual analysis of all publicly available judgments on social housing eviction proceedings from 2016, 2017 and 2018 in four Australian states and territories (ACT, NSW, Queensland and Victoria) was undertaken. All cases were obtained from the AustLII case law database. Three researchers (the author and two research assistants) separately conducted searches of the database to ensure that all relevant cases were identified and included in the analysis.

A total of 98 published decisions, concerning 94 tenancies, were included in the data set.[68] Most of these matters (n=93) were heard by a state or territory administrative appeals tribunal: ACAT, NCAT, QCAT and VCAT. The remaining five cases in the sample were heard by the Supreme Court.[69] To maintain consistency, and to facilitate a reliable comparison between jurisdictions, only social housing tenancy matters were included. Different legislative provisions can apply to different types of occupancy arrangements across the various jurisdictions, so cases

65 *Burgess* (n 20) [145] (procedural fairness), [147]–[149] (misapplication of policy guidelines may amount to failure to take into account a relevant consideration).

66 [2018] TASSC 62 [35], [39]–[41] (Geason J) ('*Parsons*').

67 Ibid [58]–[59].

68 Five of the matters involved subsequent appearance of the tenant and concerned the same facts.

69 *Tatana v Director of Housing* [2016] VSC 73; *Maiga v Port Phillip Housing Association Ltd* [2017] VSC 441 ('*Maiga*'); *Parslow v NSW Land & Housing Corporation* [2018] NSWSC 843; *NSW Land & Housing Corporation v Parslow [No 2]* [2018] NSWSC 983; *Simonova v Department of Housing and Public Works* [2018] QCA 60 ('*Simonova 2018 Appeal*') (note these five cases concerned only four tenants).

concerning co-operative housing associations, caravan parks, rooming houses, and retirement villages were excluded.[70]

Content analysis[71] was conducted on each judgment, and quantitative and qualitative information was extracted from each judgment. For the qualitative analysis, coding categories were developed and information corresponding to each code was manually entered into a spreadsheet. The data recorded for each matter included (where available):

- the reason for the threatened eviction, including the nature of the breach and the surrounding factual circumstances;
- characteristics of the tenant, including gender, family circumstances, whether the person was noted to have a disability and any diagnoses mentioned;
- whether or not the tenant had any legal representation and the nature of that representation;
- the legal arguments advanced by the tenant;
- any rights of the tenant that were considered by the decision-maker; and
- the outcome of the matter.

In addition to this, the judgments were entered into NVivo and manually coded according to five themes – human rights, hardship, homelessness, disability and children – using the keywords listed in Table 1. Paragraphs that included each of these keywords were extracted for analysis.

Table 1: Search terms (keywords) used for textual analysis

Theme	Search terms (keywords)
Human rights	Human rights, rights, Human Rights Act, Charter
Hardship	Hardship, financial, vulnerability
Homelessness	Homeless, homelessness
Disability	Disability, illness, medical, carer
Children	Child, parent, child protection, child safety, caring

70 See, eg, *Common Equity Housing Ltd v Stokes* [2018] VCAT 999 (co-operative housing association); *The Vasey Housing Association NSW v Baume* [2017] NSWCATCD 102 (retirement village); *Commissioner for Social Housing v Arndt* [2016] ACAT 119 (caravan park); *Prahran Malvern Community Housing v Ferris* [2016] VCAT 157 (rooming house); *Yarra Community Housing v Durney* [2016] VCAT 493 (rooming house); *YWCA Housing v Macovski* [2016] VCAT 353 (rooming house); *YWCA Housing v Waters* [2018] VCAT 1066 (rooming house); *Gholinezhad v YWCA Housing* [2017] VCAT 996 (rooming house). Two Queensland matters – *Foster v Horizon Housing Company* [2016] QCATA 75; *Grimshaw v Horizon Housing Company* [2017] QCATA 40 – were excluded because Horizon Housing Company manages both social housing and affordable housing tenancies, and it could not be concluded from the published decision that the tenancy in question was a social housing tenancy.

71 See generally Klaus Krippendorf, *Content Analysis: An Introduction to its Methodology* (SAGE Publications, 4th ed, 2018) 216–20.

Research focusing solely on published case law has its limitations. Published decisions represent only a very small percentage of social housing matters.[72] In many cases, the matter will not proceed to trial, and often the matter will be determined in the tenant's absence. For 'minor' matters, reasons will generally be provided orally by tribunals rather than in writing, which accounts for the very low number of published decisions. Also, whilst published decisions may provide insight into the arguments raised before judicial officers, they do not provide any information on advocacy that goes on outside the courtroom, through negotiation and correspondence between the parties.

With this in mind, focus group research was conducted to supplement the information obtained from the case law analysis. It was determined that tenants' advocates and housing lawyers would provide the richest source of information as they deal with social housing tenancy matters daily, and possess significant legal expertise as well as local knowledge in respect of the issues being investigated.[73] Whilst focus groups are an efficient means of collecting data from time-poor participants,[74] there are also limitations associated with focus group research. In particular, group dynamics may result in collusion and exaggeration of views. It must also be remembered that any conclusions reached are based on the opinions of a homogenous group of professionals, who may not have lived experience of the issues discussed.[75]

Ten group interviews involving 43 participants were conducted at organisations that provide legal and paralegal assistance to social housing tenants. Three focus groups were held in Brisbane, three in Sydney, three in Melbourne and one in Canberra. The interviews were semi-structured in nature. Participants were invited to reflect on the challenges faced by their clients, the role that lawyers and advocates play in social housing tenancy matters, the kinds of legal arguments that can be advanced to prevent an eviction, and the extent to which legal argument can result in a positive outcome for social housing clients.

72 By way of example, between 2015–16 and 2017–18, more than 150,000 residential tenancies cases were lodged in the VCAT alone: Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 9. See also Martin et al (n 6) 9.

73 Tobias Nyumba et al, 'The Use of Focus Group Discussion Methodology: Insights from Two Decades of Application in Conservation' (2018) 9(1) *Methods in Ecology and Evolution* 20, 21 <https://doi.org/10.1111/2041-210X.12860>.

74 Sue Wilkinson, 'Focus Group Methodology: A Review' (1998) 1(3) *International Journal of Social Research Methodology* 181, 186 <https://doi.org/10.1080/13645579.1998.10846874>.

75 See ibid 187, 192.

IV TENANT CHARACTERISTICS AND REASONS FOR EVICTION

Of the reported cases included in the textual analysis, 61% involved female tenants. A high proportion of tenants had a disability (42%) or were caring for someone with a disability (10%). Most often, the disability was psychiatric in nature (n=36). Other disabilities included medical conditions (n=15), physical and sensory disabilities (n=5), cognitive and intellectual impairments (n=5) and neurological conditions (n=3). In 35% of the cases, children resided at the property.[76] In one third of cases (n=33), it was noted that the household would be rendered homeless if evicted.

Table 2: Characteristics of the tenant/applicant by state/territory

	QLD (n=7)	NSW (n=34)	ACT (n=24)	VIC (n=34)	Total (n=98)
Female	5	19	14	23	61 (62%)
Disability (including medical condition or mental illness)	5	14	10	12	41 (42%)
Parent or carer	2	11	8	13	34 (35%)
Imminent risk of homelessness was put before the court	1	5	3	10	19 (19%)
Incarcerated or a recently released prisoner	0	1	6	7	14 (14%)
Aboriginal and/or Torres Strait Islander household	2	1	4	0	7 (7%)
Evidence of domestic violence	1	3	2	5	11 (11%)

The most common breaches alleged by landlords in the published cases were: rent arrears; interference with the peace and quiet enjoyment of neighbours; antisocial behaviour; and the possession, supply or trafficking of drugs on the premises.

76 Although note that in three cases, there was no confirmation that those children were under 18 years of age. And in one of the cases, the child was unborn.

Table 3: Alleged breach(es) of social housing tenancy agreements by state/territory

	QLD (n=7)	NSW (n=34)	ACT (n=24)	VIC (n=34)	Total (n=98)
Rent arrears	0	8 (24%)	12 (50%)	6 (18%)	26 (27%)
Interference with peace, enjoyment of neighbours or neighbourhood dispute	0	9 (26%)	2 (8%)	8 (24%)	19 (19%)
Antisocial behaviour that led to criminal charges	7 (100%)	3 (9%)	0	3 (9%)	13 (13%)
Drugs: possession, supply, trafficking	0	9 (26%)	0	3 (9%)	12 (12%)
Non-tenant is seeking to have the tenant evicted, or to establish new tenancy	0	0	3 (13%)	9 (26%)	12 (12%)
Tenant abandoned property; including due to incarceration	0	1 (3%)	3 (13%)	4 (12%)	8 (8%)
Mess; hoarding; creating a fire hazard	0	2 (6%)	2 (8%)	3 (9%)	7 (7%)
Dispute with housing authority, including verbal abuse/refusing entry	0	5 (15%)	0	1 (3%)	6 (6%)
Landlord proposes to renovate or redevelop	0	2 (6%)	0	1 (3%)	3 (3%)
No reason/no fault eviction	0	0	2 (8%)	1 (3%)	3 (3%)

NB: The amounts do not add up to 100% because in some matters, more than one reason/breach was alleged.

The focus group research confirmed the findings of the case law analysis that social housing tenants at risk of eviction experience high and complex needs. In all of the focus groups, social housing tenants were described by participants as 'the most vulnerable people in our society'. Participants also confirmed the association between vulnerability and risk of eviction, observing that 'the reasons they're eligible for public housing are the reasons they're evicted from their public housing'. Participants in all jurisdictions said that their clients were 'breached for conduct they can't control because of their mental health, or situations of violence that they might be in, or disability that they might have'. For example, in relation to noise complaints, one participant said:

> [i]t'll come back to a mental health issue, or a tenant who's got children who have issues around that sort of thing as well, or a disability such as autism and making a lot of noise.

Regarding breaches for property damage and mess, participants made similar observations. One participant said:

> Something quite simple could occur. They don't take their medication, they are going to have an episode. I think that that's quite challenging. And there isn't those supports in place, making sure that they're taking their medication on a daily basis.

Another said:

> [A client] was evicted because the house wasn't clean enough and when I delved into why the house wasn't clean enough, he had two children with really high-level disability.

Participants also confirmed that social housing tenants would 'invariably be evicted to homelessness'. They said that their evicted clients were subject to a lengthy waiting period before they could apply for public housing again, in fact participants in Sydney said that an eviction could effectively result in a person's exclusion from social housing 'for life'. Participants in Queensland and Victoria noted that eviction can have child protection implications, and that children may be removed and placed in out of home care if a family is evicted to homelessness. Participants agreed that the 'ever-present threat of eviction' impacts upon tenants' wellbeing and this 'undermines the ability of a person to use that housing for what it's intended for … a base to start addressing some of the physical and mental health issues'.

Participants emphasised that the role social housing providers play as a 'landlord of last resort' should be acknowledged, and there should be some sense of 'mutual obligation'. One participant said:

> I think it should be a legislative requirement that if you are a landlord and you're housing a whole bunch of really vulnerable, really messed up people, maybe you should be required to give them adequate support … I think you should be legislatively required to give them a safe, appropriate environment with adequate support.[77]

In respect of community housing providers, participants made similar comments. One participant said:

> At what point are they required to act differently to a private agent? ... I hope there's something in the funding contract which would require that, but I don't know if that's the case.

Another said:

> The regular response any time we question them is, 'we have a waiting list of thousands of people. We have to move these people on because there's always other people to be housed' … there's always an appeal for the community housing providers to just take the subset of that larger group that are eligible, the subset that have less needs, that are less trouble, less difficult to work with.

V 'DEFENDING' EVICTION PROCEEDINGS: LAWYERS AND LEGAL ARGUMENT

The case law analysis indicated that not every social housing tenant facing eviction had the benefit of legal representation at their court or tribunal hearing.

77 For a description of the deplorable and unsafe conditions experienced by social housing tenants, see *Merritt and Commissioner for Housing* [2004] ACTAAT 37, [10]–[11] (Member McMichael).

Most tenants who had legal representation were represented by community legal centres (43%) or Legal Aid (10%).[78] Counsel appeared in 22% of cases, but most of these (17 out of 22) were in NSW. 14% of tenants in the published cases had no legal representation, and a further 7% were accompanied by a non-legal advocate, such as a family member or lay advocate. 2% failed to appear. This suggests very high rates of self-representation in social housing eviction proceedings overall.

The focus group participants confirmed this finding. They said that often their clients failed to attend their court appearance because they 'did not know of the [hearing] dates or [receive] paperwork' or were 'simply too afraid to turn up'. Participants in all jurisdictions said that social housing tenants often choose to 'walk away' from a tenancy to avoid legal proceedings. This means that a significant proportion of social housing evictions occur ex parte. Participants said:

> [I have] sat in a room and seen one particular member terminate tenancy after tenancy after tenancy of clients who weren't there.

And:

> Usually it happens within 15 to 20 minutes, their tenancy is terminated. And I just think it's ridiculous that a person can be made homeless within that short space of time without any legal advice or opportunity to file evidence.

Participants agreed that legal representation at the earliest possible stage of eviction proceedings was a necessity. Participants said that 'most' of their social housing clients were unable to advocate for themselves, and that 'without an advocate in the room' they 'don't stand a chance' in eviction proceedings. Participants said that 'representation can make a very significant difference to the outcome' of eviction proceedings because lawyers are often able to expose situations where the decision-maker 'just hasn't considered the things they need to under the law' or 'the evidence doesn't match up'. Participants in NSW, Victoria and Queensland said that the evidence put before the tribunal by landlords was often of poor quality and included 'unsworn affidavits' and 'random statements from unidentified people'. Often police reports were missing, even where criminal behaviour was alleged, or 'police reports that the client is unaware of' were tendered. Participants said that if the quality or probative value of the evidence is not challenged by a lawyer, it is most often 'accepted by the tribunal … with no forensic consideration of those things'. Indeed, one participant remarked that it 'is striking … how often we win cases not because we've made a stunning argument but because the other side hasn't prepared their application properly'.[79]

Participants said that they routinely put evidence of hardship before the court, but most participants said that evidence of hardship rarely influenced the decision of the court or tribunal, and indeed they observed that tribunal members were 'very resistant' to hardship arguments. This was the case even in NSW, where the legislation allows hardship to vulnerable tenants to be considered as well as any other exceptional circumstances. One participant in NSW remarked:

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78 A further 2% were represented by the 'duty lawyer', who could have been employed by Legal Aid or a community legal centre.

79 See further the discussion on procedural fairness below: *Burgess* (n 20).

> I think there is a bit of desensitisation when you're dealing with homelessness all day every day. I've had the other side saying things like 'other than the usual homelessness, there's nothing exceptional' about my client's matter, which seems absurd.

The analysis of the published cases also indicated that considerations of hardship rarely influence the decision of the judicial officer. In the NSW case of *Kelly v NSW Land and Housing Corporation*, the tribunal noted that 'many social housing tenants suffer circumstances of personal hardship' and that this should not 'mean the tenancy cannot be terminated'.[80] As noted above, the court or tribunal must usually weigh this against any hardship that would be incurred by the landlord and on this basis, judicial officers considered the impact of the tenants' behaviour on neighbours,[81] individuals who are on the public housing waiting list,[82] the administrative burden that maintaining the list placed on the Department,[83] and the debt to the Department as a result of unpaid rent.[84] Homelessness was not considered to be a 'bar to the making of … [a] termination order'.[85] In the ACT case of *Commissioner for Social Housing v Black* ('*Black*'), the tribunal commented that 'even if eviction does leave some tenants homeless, questions may be raised as to whether the Tribunal is or should be the appropriate body to regulate that'.[86]

Similarly, disability was not considered to be a 'lawful excuse' for antisocial behaviour or a 'defence' to an application for termination.[87] In the Queensland case of *Department of Housing and Public Works v Simonova* ('*Simonova*'), the tenant had chronic paranoid schizophrenia, post-traumatic stress disorder and polyps on her vocal chords, the combination of which had led to noise complaints from her neighbours because of her yelling.[88] In that case, since the behaviour

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80 [2018] NSWCATAP 154, [51]–[52] (Principal Member Pearson and Senior Member Perrignon).

81 *Director of Housing v Bucci* [2017] VCAT 1392, [61]–[63] (Deputy President Lulham); *NSW Land & Housing Corporation v Martin* [2017] NSWCATCD 100, [24] (Principal Member Pearson); *Ciccone v NSW Land and Housing Corporation* [2016] NSWCATAP 120, [113] (Senior Members Harris SC and Goldstein); *Reilly v Brisbane Housing Company* [2017] QCATA 7, [11] (Senior Member Stilgoe). Although, in *Truong v Director of Housing* [2018] VCAT 1369, [21] (Member Liden) and *Director of Housing v PGA* [2018] VCAT 1940, [82] (Member Boddison), the VCAT concluded that it was not permitted to consider any hardship to a person other than the landlord.

82 *Community Housing (Vic) Ltd v WMP* [2018] VCAT 810, [64] (Member Campana); *Simonova 2018 Appeal* (n 69) 5 (McMurdo JA); *Commissioner for Social Housing v Kennedy* [2018] ACAT 22, [45] (Senior Member Robinson) ('*Kennedy*'); *Giuliano v Director of Housing* [2018] VCAT 1779, [34]–[35], [47] (Member Thomas).

83 *LPB v Director of Housing* [2018] VCAT 684, [53]–[63] (Member Tang); *PJO v Director of Housing* [2018] VCAT 361, [33]–[35] (Member Boddison) ('*PJO*'); *Re RT 732/2017* [2017] ACAT 86, [64] (Senior Member Robinson) ('*RT*').

84 *Director of Housing v Patkas* [2016] VCAT 1062, [41] (Member Campana).

85 *Department of Housing and Public Works v Simonova* [2017] QCAT 328, [17] (Magistrate Tonkin) ('*Simonova 2017 Tribunal*'). See also *Hollins v NSW Land and Housing Corporation*, where the Tribunal Member commented that 'the likelihood of homelessness' has 'limited relevance in cases where there is a history of breach': *Hollins v NSW Land and Housing Corporation* [2018] NSWCATAP 206, [18]–[19], but see [30] (Principal Member Titterton).

86 [2017] ACAT 20, [52] (Senior Member Robinson) ('*Black*').

87 *Lawler v Department of Housing and Public Works* [2017] QCATA 21, [29] (Senior Member O'Callaghan and Member Traves) ('*Lawler*').

88 *Simonova 2017 Tribunal* (n 85) [10], [47] (Magistrate Tonkin).

was not likely to stop, and there was an 'objective [breach]', the tenancy was terminated.[89] In *Commissioner for Social Housing v CC*, both tenants had substantial intellectual impairments and were 'incapable … [of] managing their flat together' – the flat was 'unhygienic and in a state of disrepair'.[90] Regardless of the fact that the tenants would most likely be unable to find alternative housing, the ACAT concluded it had 'little option' but to confirm the termination order because the condition of the property made it unhabitable.[91] The Tribunal stated that the Commissioner should have provided support, but that the Tribunal had no power to order that support be given to the tenants.[92]

As for hardship to children of the household, whilst some tribunal members recognised the desirability of maintaining children's 'stability',[93] they also maintained that this was 'not the only consideration which may be relevant' when determining whether or not to terminate a tenancy.[94] Child disability was raised in six of the published cases, and in seven cases there was some suggestion that a child had engaged in the 'antisocial' or objectionable behaviour that had contributed to the decision to evict. In the ACT case of *The Tenant*, neighbours had complained that the tenant's children were throwing stones and had been verbally abusive.[95] At least two of the children had mental health issues or autism, and they had spent some time in out of home care.[96] Regardless, the 'adverse impact of on-going breaches on neighbours' were held to outweigh considerations related to the children.[97] In the Victorian case of *Director of Housing v NES*, the tenant mother and her 10 year old son were complained about by neighbours because they would scream and argue, and the son would smash a ball against a fence when he became frustrated.[98] The Tribunal concluded that the tenancy agreement had been breached 'numerous times' by the tenant, and a possession order was made.[99]

89 Ibid [25]; *Simonova v Department of Housing and Public Works* [2018] QCATA 33, [68] (Carmody J). See also *Lawler* (n 87) (Senior Member O'Callaghan and Member Traves) (objectionable behaviour as a result of mental illness); *State of Queensland through the Department of Housing and Public Works v Gray* [2017] QCAT 475, [48] (Member Collier) ('*Gray*') (objectionable behaviour as a result of domestic violence and psychological issues).

90 *CC* (n 57) [2] (Senior Member Anforth).

91 Ibid [78].

92 Ibid [75]–[77].

93 *Gray* (n 89) [43] (Member Collier). See also *INI v Director of Housing* [2018] VCAT 1738, [27], [29] (Member Treble); *Maiga* (n 69) [57] (Digby J); *PJO* (n 83) [25] (Member Boddison).

94 *Fabrizio v NSW Land and Housing Corporation* [2016] NSWCATAP 21, [16] (Deputy President Westgarth).

95 *The Tenant* (n 57) (Appeal President Crebbin).

96 Ibid [73], [75].

97 Ibid [114].

98 [2017] VCAT 989, [6], [41] (Member Galvin).

99 Ibid [53].

In the focus groups, participants tended to agree that eviction was almost inevitable for their clients. In some circumstances, participants said that there was no legal argument they could raise to prevent an eviction from occurring, for example, because the relevant provision did not provide the tribunal with any discretion. Even in situations where they were able to achieve a positive outcome in the short-term, 'to be honest, in our business, we are often buying time'. Participants said that an adjournment was often the best outcome that could be achieved. Whilst ultimately this did just 'delay the agony,' it also had 'the benefit of keeping that person in the housing for a significant period of time,' enabling them 'to put in place and to seek the supports they need' and 'try and find alternative accommodation'.

VI RIGHTS-BASED ARGUMENTS IN EVICTION PROCEEDINGS

Having human rights legislation in place was not associated with better outcomes for social housing tenants in the eviction proceedings included in this dataset (see Table 4). In fact, human rights arguments were rarely raised in the published eviction cases. Common law rights, such as procedural fairness and the right to a fair hearing, were much more commonly raised than legislated human rights (see Table 5).

Table 4: Total decisions and outcome by state/territory

State/Territory Queensland New South Wales		Total decisions included	Outcome favourable to the tenant	Outcome favourable to the landlord	Outcome favourable to a third party*
States without human rights Acts	Queensland	7	2 (29%)	5 (71%)	0 (0%)
	NSW	34	12 (35%)	22 (65%)	0 (0%)
States with human rights Acts	ACT	24	16 (67%)	7 (29%)	1 (4%)
	Victoria	34	7 (21%)	22 (65%)	5 (15%)
	Total	98	38 (38%)	56 (57%)	6 (6%)

NB: The percentages may be misleading due to the low sample size. They may not add up to 100 due to rounding.
* Third parties include people who were not listed on the tenancy agreement but resided in the social housing property and sought to have a tenancy agreement created, or transferred into their name; eg where the tenant listed on the agreement had died or had been excluded from the premises as a result of a domestic violence order.

Table 5: Rights-based arguments raised by tenants by state/territory

	QLD (n=7)	NSW (n=34)	ACT (n=24)	VIC (n=34)	Total (n=98)
Procedural fairness; natural justice (under common law or statute)	1	14	9	2	26
Right to a fair trial/ fair hearing (under common law or statute)	0	3	4	1	8
Right to a fair hearing (under human rights law)	0	0	1	0	1
Right to non-interference with one's home (under human rights law)	0	0	6	4	9
Right to protection of the family unit (under human rights law)	0	0	0	1	1
Total	**1**	**17**	**14**	**6**	**39**

Human rights legislation was referred to in 10 of the Victorian judgments (29% of the Victorian cases) and 9 of the ACT judgments (38% of the ACT cases).[100] The human right most commonly referred to in those cases was the right to non-interference with family and home.[101] In *Alsindi v Director of Housing*, the VCAT held that the applicant's right to protection of the family unit was engaged because if she was evicted, her son might not be able to continue living with her,[102] and in *Commissioner for Social Housing v Hutchings*, the right to a fair trial was raised because the tenant was unable to access legal representation.[103] Another human rights issue that arose in the cases was that of 'no cause' evictions. In two ACT cases, *Commissioner for Social Housing v Jones* ('*Jones*') and *Commissioner for Social Housing v Kennedy* ('*Kennedy*'), the tenants were incarcerated and at risk of eviction for abandonment.[104] Their legal representatives argued before the ACAT

100 Neither the *Vic Charter Act* (n 19) nor the *ACT Human Rights Act* (n 19) were mentioned in any of the NSW or Queensland cases.

101 *Alsindi v Director of Housing* [2017] VCAT 1882, [49] (Member Daly) ('*Alsindi*'); *Director of Housing v VWM* [2017] VCAT 369, [53] (Member Murphy) ('*VWM*'); *Director of Housing v Hayes* [2016] VCAT 694, [70]–[71] (Member Sweeney) ('*Hayes*'); *Kennedy* (n 82) [30], [63] (Senior Member Robinson); *Little v Commissioner for Social Housing* [2017] ACAT 11, [38] (Presidential Member Symons); *Commissioner for Social Housing v Trpcevski* [2016] ACAT 77, [12] (McCarthy P) ('*Trpcevski*'); *Commissioner for Social Housing v Jones* [2016] ACAT 75, [21] (Senior Member Lennard) ('*Jones*'); *Miller v Commissioner for Social Housing* [2017] ACAT 10, [6], [94]–[128] (Member Symons P) ('*Miller*').

102 *Alsindi* (n 101) [49]–[53] (Member Daly).

103 [2016] ACAT 88 (Senior Member Robinson) ('*Hutchings*'). The ACAT concluded that a lack of representation 'would not necessarily have compromised the respondents' capacity to receive a fair hearing': at [44], [90]. This was because this did not involve a 'single failure to attend', rather the tenants had made the 'poor choice to not attend or participate' at all material times: at [61], [91], [100]. The ACAT also noted that the processes of the tribunal were 'designed to facilitate access by unrepresented parties': at [92].

104 *Jones* (n 101) (Senior Member Lennard); *Kennedy* (n 82) (Senior Member Robinson).

that no cause evictions were 'inherently arbitrary' and thus necessarily breached the tenants' rights to non-interference with their home.[105] The ACAT did not accept this argument, instead finding that no cause evictions were not unlawful, provided that the procedural requirements were met,[106] and were not arbitrary unless the eviction was 'disproportionate or unreasonable', 'capricious … [or] unpredictable'.[107] In *Kennedy*, the eviction was held not to be arbitrary because it was not clear when Kennedy would be released from prison and the 'chronic shortage of housing' justified the decision to allocate the home to another person.[108] However, in *Jones* the eviction was found to be arbitrary because Jones was due for imminent release and it was important that he remained housed and close to support services to support his rehabilitation.[109]

Importantly, in most of the 19 cases that considered human rights legislation, the Act was only briefly mentioned, was not substantively discussed, or did not influence the outcome. In fact, there were only four cases in which a human right was found to have been breached and the tenant avoided eviction as a result.[110]

By way of comparison, the common law right to procedural fairness was raised in 26 of the cases in the dataset (27%), most often in NSW (n=14, 41% of NSW cases). In 8 of these matters, the court or tribunal held that there had been a failure to accord procedural fairness, or there would be if the matter was heard on that day, and the tenant avoided eviction as a result.[111] Statutory or common law rights to a fair hearing were raised in 8 cases (8%), and the majority of these cases were in the ACT (n=5).[112] In 5 of these cases, it was held that the tenant had been denied a fair hearing, or would be if the proceedings were not adjourned, and the tenant avoided eviction as a result.[113] Therefore, across the dataset, common law rights were raised more frequently than human rights arguments, and arguments based on common law rights were more likely to result in a favourable outcome for tenants than human rights arguments.

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105 *Jones* (n 101) [23] (Senior Member Lennard); *Kennedy* (n 82) [30] (Senior Member Robinson).

106 *Kennedy* (n 82) [66] (Senior Member Robinson).

107 *Jones* (n 101) [25] (Senior Member Lennard); *Kennedy* (n 82) [68]–[69].

108 *Kennedy* (n 82) [72]–[74] (Senior Member Robinson).

109 *Jones* (n 101) [33] (Senior Member Lennard).

110 In Victoria: *VWM* (n 101). In the ACT: *Little* (n 101); *Miller* (n 101); *Jones* (n 101). In an additional six cases, the judicial officer found that rights were engaged but there was no breach, or the limitation on rights was justified. In Victoria: *Alsindi* (n 101); *Hayes* (n 101). In ACT: *Kennedy* (n 82); *The Tenant* (n 57); *Hutchings* (n 103); *Trpcevski* (n 101).

111 Four of these matters were in NSW: *Forrest v NSW Land and Housing Corporation* [2016] NSWCATAP 156; *Franken v NSW Land and Housing Corporation* [2016] NSWCATAP 154; *Pusell v NSW Land and Housing Corporation* [2016] NSWCATAP 215; *Ross v New South Wales Land and Housing Corporation* [2016] NSWCATAP 150 ('*Ross*'). Three were in the ACT: *Black* (n 86); *Commissioner for Social Housing v Bradnam* [2016] ACAT 143 ('*Bradnam*'); *Hutchings* (n 103). One was in Victoria: *Director of Housing v Murphy* [2016] VCAT 1007.

112 In the ACT: *Black* (n 86); *Bradnam* (n 111); *Hutchings* (n 103); *RT* (n 83); *Mooney-Pursell v Commissioner for Social Housing* [2016] ACAT 151. In NSW: *Ross* (n 111); *Kostov v Ecclesia Housing Ltd [No 2]* [2018] NSWCATAP 215. In Victoria: *Maiga* (n 69). Note that in these cases, the right to a fair trial or fair hearing was discussed without reference to human rights or the *ACT Human Rights Act* (n 19) or the *Vic Charter Act* (n 19).

113 *Black* (n 86); *Bradnam* (n 111); *Hutchings* (n 103); *RT* (n 83); *Ross* (n 111).

The focus group participants offered several explanations as to why human rights arguments tend not to be raised in social housing eviction matters. Participants in Victoria reported that they were reluctant to raise human rights arguments before the VCAT because tribunal members have shown 'some resistance to entertaining *Charter* arguments'. Indeed, some participants said that tribunal members had 'got really angry with me' for raising human rights arguments, and that this '[changed] the dynamic of the hearing'. Lawyers in all jurisdictions were reluctant to raise rights-based arguments with respect to community housing tenancies because they were uncertain about whether community housing providers were public authorities for the purpose of human rights legislation, or were susceptible to judicial review. Participants said they chose not to raise these arguments because 'there's a risk that it would set a bad precedent'.

The focus group participants said that the value in human rights arguments – and indeed, in legal advocacy generally – was in the 'behind the scenes' negotiations with social housing providers. Participants in Victoria and the ACT said that 'there's lots of negotiation that happens in the shadow of the *Charter*' and that even where the tenant has been unsuccessful in litigation, lawyers may still be able to negotiate a favourable outcome outside the courtroom. One participant from the ACT explained:

> An example from yesterday … I assisted her to draft an appeal that included human rights arguments. The tribunal didn't accept her arguments, but Housing then didn't go ahead with the action. And I suspect it had a lot to do with the way her application was worded. So, I do think there is impact, even where it's not necessarily accepted by the tribunal.

Participants in Victoria and the ACT said that they have seen evidence of a 'cultural shift' amongst decision-makers within housing departments and they attributed this to the operation of human rights legislation. They observed that human rights legislation has had an 'indoctrinating' effect, however they emphasised that in the absence of successful Supreme Court litigation, changes to policy would not have occurred.[114] Participants remarked that housing departments only act in a rights-compliant way 'if there's advocates who are pushing them to make sure that they do'. In respect of individual clients, participants agreed that without a legal advocate, human rights legislation did little to 'level the playing field' because 'people wouldn't know how to use it'. They concluded, therefore, that human rights legislation was 'not a legal trump card'.

VII DISCUSSION

The results of this research indicate that social housing eviction proceedings are often prompted by behaviour that is associated with tenants' complex needs – the very things that made them eligible for social housing in the first place. The results also suggest that rights-based arguments are of limited usefulness to tenants

114 The case of *Burgess* (n 20) was described by participants in Victoria as a 'game changer' because it resulted in substantial changes to policy and practice.

defending eviction proceedings. In jurisdictions with human rights legislation, rights-based arguments were seldom raised and rarely resulted in a positive outcome for tenants appearing before courts and tribunals. Arguments based on common law principles such as the right to procedural fairness and the right to a fair hearing were more effective but even then, delay was often all that could be achieved. In the vast majority of cases, eviction was a legal inevitability. Three key conclusions may be drawn from these findings.

A Residential Tenancy Laws Place Unrealistic Expectations on Social Housing Tenants

The lack of security of tenure experienced by social housing tenants, particularly those with mental illness, has been observed elsewhere in the developed world.[115] Indeed, the United Nations Special Rapporteur for Adequate Housing has said that the increased risk of eviction experienced by people who display 'abnormal' or 'antisocial' behaviour demonstrates the 'devastating consequences' that deinstitutionalisation 'without adequate housing and community support' can have for people with psychosocial disabilities.[116] If the same behaviour that renders them eligible for social housing may also result in 'technical' breaches of their tenancy agreements, then tenants are being set up to fail.

Judicial officers seem to consider themselves unable to 'order' that support be given to tenants and tend to conclude that they therefore have 'little option' but to forcibly evict tenants.[117] Yet, in many instances, tribunal members do have the discretion to impose an order other than an eviction order, such as an adjournment or a stay. Courts and tribunals could use these powers creatively to impose obligations on social housing landlords to support vulnerable tenants. The United Nations Committee on Economic, Social and Cultural Rights has encouraged Member States to use injunctions in this way to prevent evictions,[118] and there are some examples in international case law of courts delaying evictions until alternative accommodation has been secured for the tenants.[119] The United States District Court granted an injunction to two subsidised housing tenants with

115 See, eg, Kenna et al (eds) (n 10) 104; Hulse and Milligan (n 3) 649–50. Although, note that Robinson and Walshaw have reported in England that tenants consider social housing to offer greater security of tenure than private rental: David Robinson and Aimee Walshaw, 'Security of Tenure in Social Housing in England' (2014) 13(1) *Social Policy and Society* 1, 9–11 <https://doi.org/10.1017/S1474746413000183>.

116 Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, 72nd sess, UN Doc A/72/128 (12 July 2017) [13], [19].

117 *CC* (n 57), [77]–[78] (Senior Member Anforth).

118 Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) [17]. See also Leilani Farha, *Access to Justice for the Right to Housing: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/61 (15 January 2019) 6 ('*Right to Housing Report*').

119 See, eg, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33 [96]–[97] (van der Wethuizen J) ('*Blue Moonlight*'); Human Rights Committee, *Views: Communication No. 2073/2011*, 106th sess, UN Doc CCPR/C/106/D/2073/2011 (27 November 2012) [16]–[17]; *Olga Tellis* (n 17).

paranoid schizophrenia and bipolar disorder so that they could obtain mental health treatment to address the behaviour that prompted eviction proceedings.[120] The court noted that there was a 'causal connection' between their disabilities and the eviction proceedings, and the tenants were granted a 'probationary period' so they could address their mental health needs.[121] Courts and tribunals in Australia could similarly force the hand of landlords to ensure that psychosocial supports are made available; at present, there is no incentive for social housing landlords to provide or broker the support that their tenants require. Martin and colleagues explain that some housing providers may offer support to tenants at risk of eviction, however if tenants fail to 'engage', providers often respond punitively and the eviction proceeds.[122] In their recent study, they found that social housing providers may use breach proceedings as 'leverage' to force 'behavioural change' even where the tenant's behaviour results from mental illness.[123]

In some instances, judicial officers can decide not to make a termination order on the grounds of hardship, however the case law and focus group data presented here indicate that when hardship to the tenant is balanced against hardship to the landlord, tenants rarely prevail. This 'balancing of hardships' exercise may be justified in situations where the landlord is a private individual, but in social housing tenancy matters, the landlord is a government department, or a government funded service. When assessing hardship to the landlord, decision-makers often consider the long waiting list, but as one tribunal member from the ACT has commented, any 'indirect prejudice' to those on the waiting list 'is difficult to properly assess' in the absence of any evidence that allows for an 'assessment of the relative merits of any such person, when compared with the tenant'.[124] Consistent with this view, the ECtHR has held that any competing claims in eviction proceedings must be sufficiently individualised; that is, the 'personal circumstances' of any individuals concerned must be balanced against one another.[125] Vague references to 'the waiting list' will not justify an eviction where the landlord is not a private party, because this does not allow for any individuals' personal circumstances to be balanced against those of the current tenant.[126]

Focus group participants insisted that additional legislative protections were required for social housing tenants. One participant summarised the consensus position: 'I think there should be a formal onus on the housing providers to attempt to engage support services for their tenants before taking these formal steps towards eviction.' This is not a naïve suggestion; such provisions do exist in legislation

120 *Sinisgallo v Town of Islip Housing Authority*, 865 F Supp 2d 307 (ED NY, 2012).

121 Ibid 341–2.

122 Martin et al (n 6) 38–9.

123 Ibid. Arden observes that social housing providers thereby act as 'policeman', 'moral guardian' and 'educator' as well as housing manager: Andrew Arden, 'The Role of Social Housing' (2013) 16(1) *Journal of Housing Law* 1.

124 *Black* (n 86) [54] (Senior Member Robinson); *Commissioner for Social Housing v Carter (A Pseudonym)* [2018] ACAT 16, [128] (Senior Member Robinson).

125 *Popov* (n 16) [45].

126 *Gladysheva v Russia* (European Court of Human Rights, Chamber, Application No 7097/10, 6 December 2011) [95].

both in Australia and elsewhere. In Tasmania, for example, a court is required to consider whether the reason for serving the notice to vacate was 'genuine and just' when deciding whether or not to order an eviction.[127] This would seem more appropriate than a 'balancing hardships' exercise. Also, when determining whether or not to order the eviction of a social housing tenant, Tasmanian courts must consider whether vacating the premises would result in 'unreasonable financial disadvantage, or unreasonable social disadvantage, to a tenant'.[128] In England and Wales, social housing tenants must not be evicted to homelessness, and must be provided with suitable alternative accommodation prior to eviction.[129] In Scotland, landlords seeking possession must provide tenants with advice on their eligibility to receive housing benefits and other types of financial assistance.[130] They must also make 'reasonable efforts' to agree to a 'reasonable plan' for future payments where tenants are in arrears.[131] In the ACT, the tribunal is now empowered to make a payment order instead of a termination and possession order if it is satisfied that the tenant is reasonably likely to be able to pay.[132] By providing for alternative orders such as these, tenancies may be sustained.

Another potentially positive development is the recent introduction of a 'reasonable and proportionate' requirement for possession orders in Victoria.[133] Before making a possession order, the tribunal must now be satisfied that it is reasonable and proportionate to make a possession order in the circumstances, taking into account the interests, and impact of the order, on the landlord, the tenant, any co-tenants and neighbours.[134] This provision was not yet in force when the focus groups took place, but Victorian participants were optimistic about it, and

127 *Tas Tenancy Act* (n 42) s 45(3)(b). Note that s 45(3)(b) says 'genuine *or* just' (emphasis added). Geason J took the view that this must be a drafting error, and that the section should instead read 'genuine and just': *Parsons* (n 66) [55].

128 *Tas Tenancy Act* (n 42) s 45(3)(ca). Note that the circumstances in which this consideration is to be taken into account are limited: see *Tas Tenancy Act* (n 42) s 42(1)(da)–(dc). In Canada, courts will expect a 'helping hand' to be given to high needs tenants before moving straight to eviction: see, eg, *Harry Sherman Crowe Housing Co-Operative Inc v Benjamin* [2014] ONSC 3744, [45] (Mew J).

129 *Housing Act 1988* (UK) s 7(5), sch 2 ground 9. An exception to this where a person is considered to be 'intentionally homeless': see also Ian Loveland, 'The Politics, Law and Practice of "Intentional Homelessness": 1 Housing Debt' (1993) 15(2) *Journal of Social Welfare and Family Law* 113 <https://doi.org/10.1080/09649069308413593>; Ian Loveland, 'The Politics, Law and Practice of "Intentional Homelessness": 2 Abandonment of Existing Housing' (1993) 15(3) *Journal of Social Welfare and Family Law* 185 <https://doi.org/10.1080/09649069308412389>.

130 *Housing (Scotland) Act 2001* (Scot) s 14A(3), (4) ('*Scotland Housing Act*').

131 Ibid s 14A(5). Also, the tribunal must consider whether non-payment of rent is the result of delay or failure in the payment of a social security benefit: *Private Housing (Tenancies) (Scotland) Act 2016* (Scot) s 51, sch 3 para 12 sub-para 4. This issue arose in this case analysis: see *Fraser v Argyle Community Housing* [2017] NSWCATAP 27.

132 *ACT Tenancies Act* (n 32) s 49A. This is the result of a recent legislative amendment: see *Residential Tenancies Amendment Act 2018* (ACT); *Residential Tenancies Amendment Act 2020* (ACT).

133 *Vic Tenancies Amendment Act* (n 32) s 245. Reasonableness requirements also exist under the *Scotland Housing Act* (n 130) s 16(2) (before making an order for recovery of possession, the court must be satisfied that 'it is reasonable to make the order').

134 *Vic Tenancies Act* (n 32) s 330(1)(f). For the purpose of deciding whether it is reasonable and proportionate to make a possession order, the Tribunal must have regard to the nature of the tenant's conduct including whether or not it is a recurring breach; whether the breach is trivial; whether the breach was caused by anyone other than the tenant; and whether family violence or personal violence was involved: *Vic Tenancies Act* (n 32) s 330A.

were hopeful that it would assist them to advocate for their clients' tenancies to be maintained.[135] However, since the interests of the tenant must still be balanced against those of the landlord, there is a risk that this will descend into the same kind of balancing exercise that was observed in this study.

B Human Rights Law Offers Limited Protection to Social Housing Tenants at Risk of Eviction

Legislative developments that provide optimism for lawyers do not always deliver. The results of this study suggest that, in the context of social housing evictions, human rights legislation has had limited effect, despite the lofty goal that human rights considerations become 'a "common or garden" activity for persons working in the public sector, both senior and junior'.[136]

As has been noted, human rights legislation in ACT, Victoria and Queensland includes a right to non-interference with a person's home.[137] According to the ECtHR, this right is engaged whenever a forced eviction is proposed because the loss of one's home is 'the most extreme form of interference with the right'.[138] When the right is engaged, public authorities may be obliged to find 'effective solutions for the individual' to prevent a breach.[139] However, human rights are subject to reasonable limits that can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[140] In the context of forced evictions, international courts have determined that, to be considered reasonably justified, eviction must be a proportionate or necessary response in light of the personal circumstances of the affected parties, and reasonable efforts should have been made to find alternative accommodation for the affected persons.[141]

It has been observed that human rights legislation remains under-utilised in Australian courts,[142] and the results of this research confirm this in respect of social housing eviction proceedings. Judges have tended to blame practitioners

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135 See also Katie Ho, 'Making Evictions into Homelessness a Last Resort: A "Reasonableness" Framework and a Focus on Prevention' (2017) 30(7) *Parity* 39.

136 *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [185] (Emerton J).

137 *ACT Human Rights Act* (n 19) s 12(a); *Vic Charter Act* (n 19) s 13(a); *Qld Human Rights Act* (n 19) s 25(a).

138 *Kay* (n 16) [68]. See also Loveland, 'Security of Tenure' (n 60) 598–9.

139 *Vinnychuk v Ukraine* (European Court of Human Rights, Chamber, Application No 34000/07, 20 October 2016) [48].

140 *ACT Human Rights Act* (n 19) s 28; *Vic Charter Act* (n 19) s 7; *Qld Human Rights Act* (n 19) s 13.

141 *Kay* (n 16); *Popov* (n 16); *Winterstein* (n 16); *Yordanova* (n 16). In *Southend-on-Sea BC v Armour* [2014] HLR 23, the court held that improvements in behaviour should be taken into account when determining whether or not eviction was a disproportionate response: at [30] (Lewison LJ). South African courts have held that the likelihood of homelessness is a relevant consideration when determining whether an eviction is lawful: *Occupiers of 51 Olivia Road* (n 15), [43], [46] (Yacoob J); *Blue Moonlight* (n 119), [96]–[97] (van der Westhuizen J).

142 Julie Debeljak, 'The Rights of Prisoners under the Victorian *Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) *University of New South Wales Law Journal* 1332, 1333 ('Rights of Prisoners under the *Charter*'). As to Australia's general 'reluctance about rights': see Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195; Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to the Domestic Implementation of Human Rights' (2001) 26(5) *Alternative Law Journal* 219 <https://doi.org/10.1177/1037969X0102600502>; David Kinley and Penny Martin, 'International Human Rights at Home: Addressing the Politics of Denial' (2002) 26(2) *Melbourne University Law Review* 466.

for not raising human rights arguments,[143] but the results of this analysis indicate that judicial officers may discourage submissions on human rights. If tribunal members are 'resistant' to human rights arguments, and this can change the tone of the hearing, inevitably lawyers will be hesitant to raise them.[144] There are also jurisdictional issues at play. As noted above, in *Director of Housing v Sudi*, the Victorian Court of Appeal determined that the VCAT can only take human rights into account when it is exercising its review jurisdiction and is 'standing in the shoes' of the original decision-maker.[145] When the VCAT is exercising its original jurisdiction, it does not have the power to quash an administrative decision.[146] To have the decision of the Director of Housing to apply for possession overturned, the person will need to bring judicial review proceedings in the Supreme Court.[147] The results of this research confirm that this has a stifling effect on human rights arguments being raised in the lower courts and tribunals. The cost of bringing proceedings in the Supreme Court can be prohibitive for indigent clients, and the non-profit legal centres that tend to represent them, so the result is that human rights arguments are rarely dealt with in any depth in social housing cases.[148]

The legislative schemes in Victoria and Queensland also have the effect of limiting aggrieved persons' capacity to bring human rights arguments before the courts. Whilst a person in the ACT may launch proceedings in the Supreme Court against a public authority arguing a contravention of their human rights,[149] in Victoria and Queensland, an aggrieved person can only complain about a breach of their human rights in legal proceedings if they are seeking relief or remedy for some other reason, for example in judicial review proceedings.[150] Human rights legislation in Victoria and Queensland does not create a new cause of action. However, the interpretative provisions could still be applied to advocate for rights-compliant interpretations of residential tenancy Act provisions. For example, in situations where the legislation states that the tribunal 'must' or 'shall' issue a notice to vacate in certain circumstances (leaving the tribunal with no discretion to examine the individual circumstances of the case), it could be argued that Parliament could not have intended the tribunal merely to act as a 'rubber stamp' of housing providers' decisions to evict tenants.[151] Alternatively, if no rights-compliant interpretation is possible, Supreme Courts could issue declarations of incompatibility, thereby inviting parliaments to reconsider their laws.[152]

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143 Chief Justice Marilyn Warren and Justice Pamela Tate, 'Editorial' (2014) 2 *Judicial College of Victoria Online Journal* 2, 3 quoted in Debeljak, 'Rights of Prisoners under the *Charter*' (n 142) 1333.

144 Debeljak also acknowledges this 'avoidance and minimisation of *Charter*-based arguments' by certain members of the judiciary: Debeljak, 'Rights of Prisoners under the *Charter*' (n 142) 1333.

145 *Sudi VSCA* (n 20) [43], [53] (Warren CJ), [62]–[63] (Maxwell P). See also *Burgess* (n 20) [55]–[56] (Macaulay J).

146 *Sudi VSCA* (n 20) [43] (Warren CJ), [98] (Maxwell P), [281] (Weinberg JA).

147 Ibid [56] (Warren CJ).

148 This was noted in *Burgess* (n 20) [47] (Macaulay J).

149 *ACT Human Rights Act* (n 19) s 40C(2)(a).

150 *Vic Charter Act* (n 19) s 39(1); *Qld Human Rights Act* (n 19) s 59(1).

151 As in the case of *Parsons* (n 66) [58] (Geason J).

152 As to the 'dialogue' model of human rights: see Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9.

Focus group participants identified another important limitation on social housing tenants' capacity to bring human rights arguments before the courts: the uncertainties regarding whether community housing providers are 'public authorities' under human rights law. Whilst there is no doubt that government administrators of public housing are 'public authorities',[153] the situation in respect of community housing providers is less clear.[154] Most community housing providers are not for profit organisations, but the properties they manage are either provided or funded by the state and territory governments. It could be argued that they come within the definition of a 'public authority' because they perform public functions.[155] As Bell J remarked in *Metro West v Sudi*, providing housing assistance 'is a function of government of fundamental importance' and is at the very 'centre of what the community generally expects governments to do'.[156] In *Goode v Common Equity Housing Ltd*, the VCAT held that the community housing provider was a public authority under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) because it was exercising functions of a public nature, it received considerable public funding, and it played a 'valuable role in the provision of affordable housing'.[157] In *Thornthwaite and Commissioner for Social Housing*, the ACAT likewise had no hesitation in deciding that community housing providers came 'within the purview' of the public authorities provision of the *Human Rights Act 2004* (ACT).[158] These decisions remain unchallenged.

However, in *Durney v Unison Housing* ('*Durney*'), a single judge of the Victorian Supreme Court held that a decision of a community housing provider to issue a notice to vacate was not subject to judicial review.[159] Garde J took the view that for the purpose of enforcing its property rights – including by issuing a notice to vacate – Unison was exercising its powers under the *Residential Tenancies Act 1997* (Vic) in the same way a private landlord would.[160] His Honour determined that the decision to evict the tenant was therefore not made in the performance of a public duty, and was not subject to judicial review.[161] Focus group participants said that this judgment discouraged them from arguing that community housing providers were subject to judicial review (in NSW), or were public authorities for the purpose of human rights legislation (in Victoria).

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153 They are 'core' public authorities as opposed to 'functional' public authorities: *Goode v Common Equity Housing Ltd* [2016] VCAT 93, [14] (Deputy President Nihill) ('*Goode*'). See also *Harris v Commissioner for Social Housing* (2013) 8 ACTLR 98, 130 [148] (Master Mossop).

154 Kathleen McEvoy and Chris Finn, 'Private Rights and Public Responsibilities: The Regulation of Community Housing Providers' (2010) 17(3) *Australian Journal of Administrative Law* 159, 159–62.

155 Ibid 160.

156 [2009] VCAT 2025, [15] (Bell J).

157 *Goode* (n 153) [53], [56] (Deputy President Nihill). This was not challenged on appeal: see *Goode v Common Equity Housing Ltd* [2019] VSC 841. See also *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, [113] (Hollingworth J).

158 *Thornthwaite and Commissioner for Social Housing in the ACT* [2012] ACAT 11, [18] (Appeal President Stefaniak, Member Thompson).

159 (2019) 57 VR 158, [66] (Garde J) ('*Durney*'). Note the *Charter* was not discussed in detail because the (unrepresented) plaintiff did not 'articulate how these references are relevant or bear on the issues in dispute in this proceeding': at [83].

160 Ibid [64]–[65].

161 Ibid [65]–[66].

Community housing providers' susceptibility to judicial review is an important issue in jurisdictions with and without human rights legislation. In jurisdictions without human rights legislation, the only form of redress available to community housing tenants issued with a notice to vacate may be judicial review.[162] In Victoria and Queensland, which do have human rights legislation, judicial review proceedings may provide the cause of action upon which human rights arguments may be 'piggy-backed'.[163]

The extent to which the definition of 'public authority' and an organisation's susceptibility to judicial review overlap has not yet been considered by an Australian court.[164] Public authorities are defined broadly in human rights legislation to include government entities, public service employees, and entities performing functions of a public nature for the state or a public entity.[165] It may well be that a community housing provider is a 'public authority' for the purpose of human rights legislation,[166] but is not subject to judicial review: the two should not yet be conflated. With respect, Garde J in *Durney* could reasonably have been expected to engage in a more detailed analysis of this issue, given the significant implications of the decision and the legal uncertainty in this area.[167] The boundary between public and private for the purpose of judicial review is far from clear in the case law to date.[168]

The precise tests for whether a decision is susceptible to judicial review vary between the states and territories – some are governed by common law, others by statute.[169] However, Allars has observed that all of the tests require consideration of the source of the power to make the decision, and the nature or character of the decision.[170] In *Griffith University v Tang*, a majority of the High Court suggested that

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162 For example, on the basis that the decision-maker took an irrelevant consideration into account or failed to take into account a relevant consideration: see *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372, [49] (Basten JA); *Giotopoulos v Director of Housing* (2011) 34 VAR 60, [49]–[50] (Emerton J).

163 *Vic Charter Act* (n 19) s 39(1); *Qld Human Rights Act* (n 19) s 59(1).

164 This issue has been discussed in the United Kingdom: see for example *R (Weaver) v London & Quadrant Housing Trust* [2010] 1 WLR 363. Duxbury states in passing that since the reach of the Australian human rights Acts extends to bodies that undertake public functions, they are 'potentially encompassing a broader range of bodies than are traditionally encompassed within the notion of the executive government': Alison Duxbury, 'Human Rights and Judicial Review: Two Sides of the Same Coin?' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 70, 89 <https://doi.org/10.1017/CBO9781107445734.005>.

165 *ACT Human Rights Act* (n 19) s 40A; *Vic Charter Act* (n 19) s 4; *Qld Human Rights Act* (n 19) s 9.

166 Creyke et al assume that public housing authorities are subject to judicial review, but make no comment on community housing providers: Robin Creyke et al, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 6th ed, 2021) 454. But see *King v Director of Housing* (2013) 23 Tas R 353 where a decision to evict a public housing tenant was held to be based on contract and was not provided for in the legislation.

167 *Durney* (n 159). Notably, the tenant was unrepresented in those proceedings.

168 See Margaret Allars, 'Public Administration in Private Hands' (2005) 12(2) *Australian Journal of Administrative Law* 126; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (LawBook, 6th ed, 2017) 143–4.

169 See also Matthew Groves, 'Should We Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?' (2010) 34(3) *Melbourne University Law Review* 736.

170 Allars (n 168) 127–9.

when determining whether or not a decision was 'made … under an enactment', two criteria needed to be satisfied: the decision must be 'expressly or impliedly required or authorised by the enactment'; and the decision must 'confer, alter or otherwise affect legal rights'.[171] There is little doubt that the decision to evict a tenant drastically affects their legal rights, so the key question is whether or not the decision was authorised by an enactment. This must certainly be the case: the legal relationship between community housing providers and tenants is governed by residential tenancies legislation,[172] and when community housing providers issue a notice to vacate, they do so in reliance upon the provisions of the relevant residential tenancies Act.

The complicating factor is that community housing providers are not government entities. This might support the conclusion that their power to evict is not 'public'. Garde J's view might be considered consistent with that of McHugh, Callinan and Hayne JJ in *NEAT*: their Honours held that a private company's power to refuse to approve the export of wheat derived from 'applicable companies legislation' rather than public law functions, and therefore the decision was not 'made under an enactment' and not subject to judicial review.[173] This suggests that the source of the power is determinative, however in *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc*, Lloyd LJ was of the view that the nature of the power being exercised should also be considered.[174] The decision-maker in that case was also a non-government entity, yet Lloyd LJ considered whether there had been an 'implied devolution' of governmental power, and whether the decision might actually amount to the exercise of governmental power 'behind the scenes'.[175] Allars has noted that Australian courts also consider 'whether … [the body] operates as an integral part of a system which has a public law character, is supported by public law… and performs what might be described as public law functions' when determining whether or not a decision is susceptible to judicial review.[176]

Community housing providers may consider themselves to be private bodies, but they exercise a vital function of government,[177] they are responsible for administering a public service, and their decisions have public consequences.[178] Indeed, they often rely on 'public considerations' – such as the long waiting lists, and the fair allocation of public resources – to justify their decision to evict.[179] Whilst

171 (2005) 221 CLR 99, [78]–[80], [89] (Gummow, Callinan and Heydon JJ) ('*Tang*').

172 As Le Miere J states in *Re Magistrate Steven Malley* (n 34), the *WA Tenancies Act* (n 32) 'limits freedom of contract and sets out rights and obligations that cannot be varied by the parties': at [32].

173 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 298 ('*NEAT*').

174 [1987] 1 QB 815.

175 Ibid 847–9. In *R v Insurance Ombudsman Bureau; Ex parte Aegon Life Insurance Ltd* [1994] CLC 88 ('*Aegon Life Insurance*'), Rose LJ similarly considered whether or not the decision-making body was a 'surrogate organ of government': at 93.

176 Allars (n 168) 130. See also Stephen Thomson, 'Judicial Review and Public Law: Challenging the Preconceptions of a Troubled Taxonomy' (2017) 41(2) *Melbourne University Law Review* 890.

177 And 'but for … [their] existence, a governmental body would assume control': *Aegon Life Insurance* (n 175) 93.

178 McEvoy and Finn (n 154) 160, 173.

179 McHugh, Hayne and Callinan JJ specifically said that was not the case in *NEAT* (n 173) 299. See also Aronson, Groves and Weeks (n 168) 151.

community housing providers may make housing allocation decisions based on their own organisational goals and values, the existence of private law duties does not determine the issue of justiciability. Public duties may be 'superimposed' upon private law duties: the two are not necessarily inconsistent with one another.[180] There are also important issues of accountability at play. Community housing providers are recipients of 'large amounts of public funds'.[181] If community housing providers are not subject to accountability mechanisms that normally apply to the allocation of public assets, they may well be inclined to offer housing to 'easier' tenants, rather than those most in need, as the focus group participants in this research suggested. Additional judicial consideration is required for legal certainty.

C Housing-Related Rights Are Ineffective without Legal Representation

Irrespective of the forgoing discussion, one of the key points that was made by the focus group participants in this study was that, without a lawyer, social housing tenants will find it impossible to advocate for themselves in eviction proceedings. This is confirmed in the international literature.[182] For example, US research has found that tenants are overwhelmingly unrepresented in eviction proceedings, and that there is a statistical association between having representation and obtaining a favourable outcome.[183] The situation is no different in Australia, indeed most tenancy matters are dealt with ex parte without any submissions being made on the tenant's behalf.

Tenants are not aware of the relevant provisions and policies, so they are not able to make effective legal arguments in their own defence. Even in jurisdictions where provisions exist that are protective of tenants, such as NSW with its 'undue hardship' provision,[184] focus group participants said tenants still need a lawyer because '[the tribunal] won't say, can you please bring me some evidence that shows that you have a disability or whatever it might be'. Similarly, human rights legislation will only benefit litigants if they are aware of their rights and have the capacity to advocate for themselves to enforce them. Considering the jurisdictional complexities, this will be impossible for someone without legal training, let alone a vulnerable tenant with complex needs.

Tribunal members and judges should provide assistance to vulnerable tenants who appear without legal representation in eviction proceedings to ensure the right to a fair trial is upheld.[185] This assistance may extend to providing information about

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180 Allars (n 168) 141–3; Aronson, Groves and Weeks (n 168) 147–8; WB Lane and Simon Young, *Administrative Law in Australia* (LawBook, 2007) 78–9; McEvoy and Finn (n 154) 161.

181 *Tang* (n 171) 158–9 [170] (Kirby J). See also McEvoy and Finn (n 154) 173–4.

182 Farha, *Right to Housing Report* (n 118) [76]; Kathryn A Sabbeth, 'Housing Defense as the New *Gideon*' (2018) 41(1) *Harvard Journal of Law and Gender* 55 <https://doi.org/10.2139/ssrn.2931102>; Lucy A Williams, 'The Right to Housing in South Africa: An Evolving Jurisprudence' (2014) 45(3) *Columbia Human Rights Law Review* 816, 844–5. In Australia, see McEvoy (n 14) 18.

183 Risa E Kaufman, Martha F Davis and Heidi M Wegleitner, 'The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel' (2014) 45(3) *Columbia Human Rights Law Review* 772, 775, 784.

184 See above n 37 and accompanying text.

185 In respect of the common law right to a fair trial: see *Tomasevic v Travaglini* (2007) 17 VR 100, 119 [89] (Bell J) ('*Tomasevic*'); *Santamaria v Secretary to Department of Human Services* [1998] VSC 107, [28]

the legal process, providing information about the applicable legal tests and the legal requirements they are required to satisfy, and providing such other assistance as is required to 'ensure as far as possible that a level playing field is maintained' whilst remaining, and appearing to remain, impartial.[186] The results of this research suggest that tribunal members are not consistently rendering disadvantaged self-represented tenants such assistance, despite the gravity of the consequences of eviction for them.

The right to housing is often described as a fundamental right because the realisation of other rights depends upon it, particularly 'your right to health, your ability to access proper healthcare, your right to safety, [and] your ability to feel safe and secure' (as one of the focus group participants said in this study).[187] However, Fitzpatrick and Watts argue that legalistic approaches to housing rights are 'fundamentally flawed' because they place the onus on the 'rights holders' to demand their enforcement.[188] They contend that whilst rights-based approaches to housing are 'intuitively appealing', it is 'sheer folly' to expect vulnerable tenants to be able to effectively enforce any legal rights they have.[189] In an Australian context, this is particularly true of Indigenous tenants who often avoid seeking assistance, are unsure of their rights, and have insufficient access to legal help.[190]

Kaufman et al have argued that that the right to housing cannot be separated from the right to legal representation – and that any right to housing will be ineffective without a corresponding right to legal representation.[191] Participants in this research made similar observations: a just outcome, they said, should not be 'dependent on them getting to the tribunal and seeing a duty lawyer to exercise their rights'. Participants said that tenants require timely access to legal assistance, and that they should be provided with contact details for legal services at the earliest possible stage, preferably on the original notice to vacate. Many participants said that duty lawyers should be available to all tenants at the tribunals because they are 'just so vulnerable and they're up against a lawyer from the government'. Others noted that whilst duty lawyers are necessary and often effective, 'for many of our

(Balmford J) ('*Santamaria*'). In respect of the rights to a fair trial and equality before the law under the *Vic Charter Act* (n 19): see *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 659 [108], 667 [129]–[130] (Bell J) ('*Matsoukatidou*').

186 *Tomasevic* (n 185) 125 [120], 130–1 [146] (Bell J); *Santamaria* (n 185) [28] (Balmford J); *Matsoukatidou* (n 185) 670–1 [134]–[136] (Bell J).

187 See also Committee on Economic, Social and Cultural Rights, *General Comment No 7: The Right to Adequate Housing (Art 11.1)*, 16th sess, UN Doc E/1998/22 (20 May 1997); Niall Crowley and Rachel Mullen, 'Framing the Right to Housing: A Values-Led Approach' (2019) 13(2) *European Journal of Homelessness* 95, 102. Cunneen, Allison and Schwartz agree that lack of access to stable, secure housing impacts tenants' capacity to enjoy the right to family and they argue that this has special significance for Indigenous families because a lack of adequate housing will place them at high risk of child protection intervention: Chris Cunneen, Fiona Allison and Melanie Schwartz, *The Civil and Family Law Needs of Indigenous People in Queensland: A Report of the Australian Indigenous Legal Needs Project* (Report, 2014) 27, 29.

188 Suzanne Fitzpatrick and Beth Watts, '"The Right to Housing" for Homeless People' in Eoin O'Sullivan et al (eds), *Homelessness Research in Europe* (FEANTSA, 2010) 105, 116.

189 Ibid 106, 116.

190 Cunneen, Allison and Schwartz (n 187) 10. See also McEvoy and Finn (n 154) 159.

191 Kaufman, Davis and Wegleitner (n 183).

clients, unless they're supported before the hearing, they just won't turn up, so the duty lawyer misses that opportunity'. Many participants concluded that residential tenancies legislation should be redrafted to provide stronger protections for tenants. As one participant said: '[g]ood legislative drafting, whatever its format, will look at driving a policy to change.'

VIII CONCLUSION

The results of this mixed methods study suggest that social housing tenants in eviction proceedings are highly vulnerable, yet they are unlikely to obtain a favourable outcome regardless of the jurisdiction they live in. Common law rights and human rights provide limited assistance in the context of residential tenancies legislation that is not sufficiently protective of their interests.

Scholars have noted that the law does not recognise an interest in a home – it only recognises a legal tenancy.[192] The law, therefore, may not be well placed, or well-equipped, to balance the interests concerned, or to ensure that the most vulnerable people in our society have their most basic needs met. Rights-based approaches to housing may prove ineffective unless the right to legal representation is also prioritised. Vulnerable tenants are not able to advocate effectively for themselves, regardless of the legislative protections that are in place.

In *Black*, a case included in this analysis, the Tribunal Member questioned whether the Tribunal was 'the appropriate body to regulate' the allocation of social housing and the consequences of eviction.[193] This may be the crux of the issue. Policies that mandate the provision of support for vulnerable tenants prior to initiating eviction proceedings are required so that decision-makers think of themselves as the 'landlord of last resort'. They must always be mindful that social housing tenants are likely to be evicted to homelessness, and that shifting the cost burden from one government department to another does not address the underlying issues that cause evictions, such as disability, caring responsibilities and poverty.

The COVID-19 pandemic has demonstrated that radical reform is possible. Moratoriums on evictions were introduced in all Australian states and territories for those who experienced financial hardship during the early pandemic lockdowns.[194] Housing was found for those who would otherwise be homeless, and long-term

192 Margot Strauss and Sandra Liebenberg, 'Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa' (2014) 13(4) *Planning Theory* 428, 441–2, 445 <https://doi.org/10.1177/1473095214525150>; Bell (n 1) 5.

193 *Black* (n 86), [52] (Senior Member Robinson).

194 *Residential Tenancies Amendment (COVID-19) Regulation 2020* (NSW); *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020* (Qld); *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic); *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (Vic); *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020* (Vic); *COVID-19 Emergency Response Act 2020* (SA); *Residential Tenancies (COVID-19 Response) Act 2020* (WA); *Tenancies Legislation Amendment Act 2020* (NT); *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (ACT).

commitments are now being made to fund permanent housing in many states and territories.[195] The Special Rapporteur's call for a moratorium on the forced evictions was globally ignored in 2019, just one year prior.[196] The pandemic has demonstrated in this, and in many other areas of social policy, that law reform may not be the best or only means of realising human rights; public sympathy and political will are key drivers of change.

195 Gemma Wilson, 'COVID-19 Gave These Homeless People Housing, Here's How They Could Keep It', *SBS Insight* (online, 8 June 2020) <https://www.sbs.com.au/news/insight/covid-19-gave-these-homeless-people-housing-here-s-how-they-could-keep-it>.

196 Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, 74th sess, UN Doc A/74/183 (17 July 2019), 24. This statement pertained to Indigenous peoples.