

**A RIGHT TO HOUSING FOR THE VICTORIAN  
CHARTER OF HUMAN RIGHTS AND  
RESPONSIBILITIES? ASSESSING POTENTIAL  
MODELS UNDER THE INTERNATIONAL COVENANT  
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS;  
THE EUROPEAN SOCIAL CHARTER; AND THE  
SOUTH AFRICAN CONSTITUTION**

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*In the face of a homelessness crisis in the State of Victoria, the Legislative Council Legal and Social Issues Committee of the Parliament of Victoria recommended in March 2021 that the State include a right to housing within the Charter of Human Rights and Responsibilities Act (2006) (Vic). But what should such a right to housing look like, and what will it protect within its scope? This article analyses three examples of a right to housing that Victoria might take as inspiration: the International Covenant on Economic, Social and Cultural Rights; the European Social Charter (Revised); and the Constitution of the Republic of South Africa Act 1996 (South Africa). It turns specific attention to the scope of the right; the interplay of its normative content and state obligations; and its interpretation. I argue that it is crucial to appreciate the interpretation of the right in each of these jurisdictions, in order to understand the potential consequences entailed in adopting a specific model for a right to housing. The article assesses the strengths, weaknesses and suitability of each potential right, to inform a robust discussion over the shape a right to housing could take in Victoria, and by extension, Australia.*

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## I INTRODUCTION

Following an *Inquiry into Homelessness in Victoria* ('*Inquiry into Homelessness*'), which released its final report in March 2021,<sup>1</sup> the Legal and Social Issues Committee of the Victorian State Parliament recommended that the State include a right to housing within the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').<sup>2</sup> The Committee considered that such a step would be important in addressing high levels of homelessness in the State, contributing 'to the consideration of the right to housing in future policy and legislative decisions'.<sup>3</sup>

Victoria's homelessness crisis is longstanding, and while the State has taken targeted action, the scale of homelessness remains troublingly high.<sup>4</sup> Although a number of civil and political rights have the potential to protect important aspects of people's relationships with their housing,<sup>5</sup> current provisions of the *Victorian Charter* have done little to protect the homeless or those in precarious housing.<sup>6</sup> Including a right to housing in the *Victorian Charter* thus offers a potentially important new avenue of protection.

The Legal and Social Issues Committee, however, gave no direction as to what such a right to housing would look like if codified into the *Victorian Charter*. It is vital that whatever form a potential future right takes in Victoria, the content and scope of the right is well thought out, and the implications of its potential interpretation are understood. This is particularly relevant in Australia, where the right to housing is not currently justiciable. It is not included in any state or territory human rights charter, and despite the fact that Australia accepted international obligations to respect, protect and fulfil the right when it ratified the *International*

1 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria* (Final Report, March 2021) ('*Inquiry into Homelessness*').

2 Ibid xxii, xxxvi; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'). The *Inquiry's* recommendation was prompted by the Hon Kevin H Bell: see Transcript, *Inquiry into Homelessness in Victoria* (Legislative Council Legal and Social Issues Committee, 2 July 2020) 27 (Kevin H Bell).

3 *Inquiry into Homelessness* (n 1) 197.

4 See *ibid* ch II.

5 See, eg, Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4(1) *Melbourne Journal of International Law* 139; Human Rights and Equal Opportunity Commission, 'Homelessness is a Human Rights Issue' (Paper, Human Rights and Equal Opportunity Commission, 2008) <<https://humanrights.gov.au/our-work/publications/homelessness-human-rights-issue-2008>>; Kevin Bell and Jean Allain, 'Homelessness and Human Rights in Australia' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Lawbook, 2021) vol 2, 255–65 [10.50]–[10.70].

6 See, eg, *Director of Housing v Sudi* (2011) 33 VR 559; Justice 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, 34–5. But see *Burgess v Director of Housing* [2014] VSC 648, in which the *Victorian Charter* was found relevant in Macaulay J's decision to evict a public housing tenant.

*Covenant on Economic, Social and Cultural Rights* ('ICESCR') in 1975,<sup>7</sup> the right has not been incorporated into domestic law. The right to housing as a human right has seldom been used in domestic advocacy as a legal, discursive or political claim.<sup>8</sup> This means that there is little public — and sometimes even legal professional — awareness of what a right to housing requires as a matter of law.<sup>9</sup>

In this article, I canvass three international examples that offer options for how Victoria might proceed in codifying a right to housing into its *Charter*. The first is the right as included in *ICESCR*. The second is as contained in the *European Social Charter (Revised)* ('*Social Charter*').<sup>10</sup> The third is as codified under the *Constitution of the Republic of South Africa Act 1996* (South Africa) ('*South African Constitution*').<sup>11</sup> Each of these offers both benefits and drawbacks, as I analyse below. The article turns specific attention to the scope of the right, and the interplay of its normative content and state obligations. Although choosing to model a domestic right on one from another jurisdiction does not necessarily mean that it will be interpreted identically, or even similarly, under the *Victorian Charter*, the interpretation is likely to be a persuasive starting point for legal argument. For this reason, it is crucial to understand the interpretation of the right in each of these jurisdictions, in order to appreciate the potential consequences entailed in adopting a specific provision.

Before turning to flesh out these potential models, I first offer a brief discussion of the scale and nature of homelessness in Victoria as a pressing social problem to which the right seeks to respond. I then briefly sketch out the scheme of rights protection under the *Victorian Charter*. Following this, I turn to the three potential rights that might serve as models, before offering a conclusion.

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

8 But see Dianne Otto and Philip Lynch, 'Housing, Homelessness and Human Rights' (2004) 10(2) *Australian Journal of Human Rights* 1, 2; Human Rights and Equal Opportunity Commission (n 5). For a more recent viewpoint, see Jessie Hohmann 'Toward a Right to Housing for Australia: Reframing Affordability Debates through Article 11(1) of the International Covenant on Economic, Social and Cultural Rights' (2020) 26(2) *Australian Journal of Human Rights* 292 ('Toward a Right to Housing for Australia'); Bell and Allain (n 5) 266 [10.80]. A number of Australian and international NGOs have begun to engage with the reporting process under the *ICESCR* in recent years: see, eg, Department of Foreign Affairs and Trade (Cth), *Australia's Fifth Report under the International Covenant on Economic, Social and Cultural Rights (ICESCR): 2010–2014* (Report No 5, 1 February 2016) app 2.

9 The opinion on the constitutional issues raised by the *Victorian Charter*, provided by Stephen Gageler and Henry Burmester as part of the National Human Rights Consultation in 2009 demonstrates a striking lack of understanding of the interpretation and judicial consideration of economic and social rights not only under the *ICESCR*, but in other systems with legally opposable economic and social rights: Human Rights Consultation Committee (Cth), *National Human Rights Consultation* (Report, September 2009) app E ('*Human Rights Consultation*'). Cf Peter Hanks et al, 'Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights' (Memorandum of Advice, Human Rights Law Centre, 8 December 2009).

10 *European Social Charter (Revised)*, opened for signature 3 May 1996, ETS No 163 (entered into force 1 July 1999) ('*Social Charter*').

11 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 26 ('*South African Constitution*').

## II HOMELESSNESS CRISIS AND THE VIOLATION OF THE RIGHT TO HOUSING IN VICTORIA

The scale of homelessness in Victoria over the past decades is a cause for serious concern. The 2016 census recorded 24,817 people experiencing homelessness in Victoria.<sup>12</sup> The Legislative Council’s *Inquiry into Homelessness* heard that ‘one in every 57 Victorians [had] presented to a homeless service in 2018–19’,<sup>13</sup> but it is likely that about two thirds of people who experience homelessness do not seek assistance from homelessness service providers.<sup>14</sup> It is also likely that statistics — including the census — seriously under-count homelessness.<sup>15</sup> Street homelessness and rough sleeping are the visible manifestations of homelessness, but represent only one facet of the experience.<sup>16</sup> There are a high number of homeless persons housed in severely overcrowded accommodation, living in inadequate temporary accommodation, and living within other households, sometimes expressed as ‘couch surfing’.<sup>17</sup> The recurrent and episodic nature of homelessness means that individuals and families may cycle through various forms of homelessness, or repeatedly fall back into homelessness, but not be counted as homeless on the relevant day.<sup>18</sup> The Legislative Council report found the lack of access to adequate and affordable long term housing was a major impediment to overcoming homelessness.<sup>19</sup> While research shows that Victoria’s targeted response to

- 12 Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness*, 2016 (Catalogue No 2049.0, 14 March 2018) (‘Estimating Homelessness’).
- 13 *Inquiry into Homelessness* (n 1) 32, quoting Department of Health and Human Services (Vic), Submission No 423 to Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria* (10 June 2020) 9.
- 14 *Inquiry into Homelessness* (n 1) 32, citing Department of Health and Human Services (Vic) (n 13) 9.
- 15 Ibid 33–5. See also Australian Bureau of Statistics, *Information Paper: Methodology for Estimating Homelessness from the Census of Population and Housing* (Catalogue No 2049.0.55.001, 5 September 2012).
- 16 Definitions of homelessness in Australia are contentious. The Australian Bureau of Statistics includes within homelessness those who lack one or more of the elements that represent *home*. This includes those rough sleeping and housed in temporary accommodation; those housed in inadequate housing; those who have no tenure or tenure that is short or not extendable; those who do not experience personal living space where they have privacy and safety — including those in overcrowded dwellings and who are experiencing domestic violence: Australian Bureau of Statistics, *Information Paper: A Statistical Definition of Homelessness* (Catalogue No 4922.0, 4 September 2012) ch 4 (‘*Statistical Definition of Homelessness*’). The Australian Institute of Health and Welfare on the other hand, uses a narrower definition — rough sleepers; and those living in temporary accommodation due to lack of other options (including those living with friends or family, ‘couch surfing’, living in refuges or emergency accommodation or in boarding houses or caravan parks for example): Australian Institute of Health and Welfare, *Specialist Homelessness Services Annual Report 2019–20* (Report, 11 December 2020) 123 <<https://www.aihw.gov.au/reports/homelessness-services/shs-annual-report-2019-20/contents/clients-services-and-outcomes>>.
- 17 *Estimating Homelessness* (n 12).
- 18 See, eg, Kesia Reeve, Rosalind Goudie and Rionach Casey, *Homeless Women: Homelessness Careers, Homelessness Landscapes* (Crisis, 2007) 5–10.
- 19 *Inquiry into Homelessness* (n 1) ch 6.

homelessness has been positive compared to the growth in homelessness nationally,<sup>20</sup> homelessness remains high, responses to it are often draconian, and it remains a major social problem in the State as the legislative *Inquiry* indicates. The background context to homelessness in Victoria includes rapidly increasing housing prices, real-terms reduction in welfare benefits, and the over-reliance by all levels of government on the private market to provide housing.<sup>21</sup>

High levels of homelessness contradict the common perception of equality in Australia and undercut frequent claims that Melbourne ranks among the most ‘liveable’ cities in the world.<sup>22</sup> The experience of homelessness represents a major trauma<sup>23</sup> and is often accompanied by the loss of enjoyment of other rights: rights to privacy, to freedom of association, to health and to family life for example.<sup>24</sup> High levels of homelessness in Victoria are a jarring reminder of social and economic inequality and exclusion.

As noted above, targeted action can reduce levels of homelessness and the harms that it causes. Such action, as the Legislative Council report states, might encompass the inclusion of a right to housing in the *Victorian Charter*. I turn next to sketch out the *Victorian Charter*’s scheme of rights protection.

### III THE VICTORIAN CHARTER’S RIGHTS PROTECTION SCHEME

The scheme of rights protection under the *Victorian Charter* is no doubt well understood by readers of this journal.<sup>25</sup> However, I sketch out the most notable

- 20 Hal Pawson et al, *Australian Homelessness Monitor 2018* (Report, 2018) 69.
- 21 Ibid 14. The Victorian context is largely shared across Australia: see Hal Pawson, Vivienne Milligan and Judith Yates, *Housing Policy in Australia: A Case for System Reform* (Palgrave Macmillan, 2020); Chris Chamberlain, Guy Johnson and Catherine Robinson (eds), *Homelessness in Australia: An Introduction* (UNSW Press, 2014). On lack of affordability of housing as a violation of the right to housing in itself see Hohmann, ‘Toward a Right to Housing for Australia’ (n 8).
- 22 See James Petty and Alison Young, ‘Visible Homelessness in a “Liveable City”’: Municipal Responses to Homelessness in Melbourne’ (2020) 79(2) *American Journal of Economics and Sociology* 401.
- 23 Kathleen M Guarino, ‘Trauma-Informed Care for Families Experiencing Homelessness’ in Mary E Haskett, Staci Perlman, and Beryl Ann Cowan (eds), *Supporting Families Experiencing Homelessness: Current Practice and Future Directions* (Springer, 2014) 121.
- 24 See, eg, Bell and Alain (n 5); Lynch and Cole (n 5).
- 25 See, eg, 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 (‘Parliamentary Sovereignty and Dialogue’); Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momicilovic* Litigation and Beyond’ (2014) 40(2) *Monash University Law Review* 340; Bruce Chen, ‘Section 32(1) of the *Charter*: Confining Statutory Discretions Compatibly with *Charter* Rights?’ (2016) 42(3) *Monash University Law Review* 608 (‘Section 32(1)’ of the *Charter*). See also John Tobin, ‘Should Discrimination in Victoria’s Religious Schools be Protected: Using the Victorian *Charter of Human Rights and Responsibilities Act* to Achieve the Right Balance’ (2010) 36(2) *Monash University Law Review* 16. On the *Charter* and its rights protection

features here to contextualise the human rights landscape within which any right to housing would sit.

The *Victorian Charter* is an un-entrenched human rights Act. It is built around the concept of dialogue among the branches of government,<sup>26</sup> but ensures parliamentary sovereignty through providing, in s 32(3), that inconsistency does not affect the validity or continuing operation of any act or statutory provision. It includes only those rights normally classed as ‘civil and political rights’, drawn, but in some cases distinguished from, the rights in the *International Covenant on Civil and Political Rights* (‘ICCPR’).<sup>27</sup> The *Charter* also includes a limitations clause in s 7(2), which sets out that the *Charter* rights may be limited only in prescribed circumstances. In summary, the Act requires Parliament to take human rights into account in making laws; it ensures that public authorities act compatibly with rights, and take relevant human rights into account in decision making; and states that courts must interpret and apply laws compatibly with human rights.

Under s 28, any bill introduced into Parliament must be accompanied by a statement of compatibility, setting out that in the member’s opinion it complies with the rights under the *Charter*, or the extent and nature of any inconsistency. The Scrutiny of Acts and Regulations Committee must also report to Parliament on the compatibility of any legislation or statutory rule (under s 30). It is possible for Parliament to use the override provision in s 31 to signal its intention to act explicitly in contravention of *Charter* rights, a power it has exercised a handful of times to date.<sup>28</sup>

Once legislation is enacted, it must be interpreted by all public authorities ‘in a way that is compatible with human rights’,<sup>29</sup> and any public authority must give ‘proper consideration’ to human rights in making any decision.<sup>30</sup> Public authorities include those acting in that capacity, but exclude the courts (other than in their administrative functions) and Parliament.<sup>31</sup> This obligation exists to the extent that ‘the public authority could not reasonably have acted differently or made a

scheme, see also George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2006) 30(3) *Melbourne University Law Review* 880; Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the *Victorian Charter of Human Rights and Responsibilities Act 2006*’ (2008) 32(2) *Melbourne University Law Review* 422.

- 26 Debeljak, ‘Parliamentary Sovereignty and Dialogue’ (n 25) 15, 25–39; Williams (n 25) 901–3.
- 27 *Victorian Charter* (n 2) pt 2; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 28 *Legal Profession Uniform Law Application Act 2014* (Vic) s 6; *Corrections Amendment (Parole Reform) Act 2013* (Vic) ss 4–5; *Corrections Amendment (Parole) Act 2018* (Vic). See especially Victoria, *Parliamentary Debates*, Legislative Assembly, 24 July 2018, 2236 (Lisa Neville, Minister for Police).
- 29 *Victorian Charter* (n 2) s 32(1).
- 30 *Ibid* s 38(1).
- 31 *Ibid* s 4.

different decision' under the law.<sup>32</sup> In other words, where an inconsistent law compels a rights-infringing decision, the public authority will remain bound by that law to act in a way contrary to rights. This means that the power of public authorities is limited where Parliament has chosen to act inconsistently, or has not yet remedied inconsistent law.

Courts and tribunals must construe a provision as consistent with human rights so long as it is possible to do so in conformity with the intention of Parliament<sup>33</sup> and have discretion to make a '[d]eclaration of inconsistent interpretation'.<sup>34</sup> Such a declaration can be made if a 'Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right'.<sup>35</sup> The declaration does not affect the validity or continuing operation of the inconsistent law, and it does not give rise to a legal right or cause of civil action.<sup>36</sup>

To date judges have been reluctant to use ss 32 or 36, undermining the potential of the *Charter* in the courts.<sup>37</sup> However, this reluctance gives added weight to the human rights obligations placed on other public authorities, and on Parliament's obligation to enact legislation that is consistent with human rights. While the timid stance of the courts does undermine the operation of the *Charter*, it remains potentially powerful as an obligation on public authorities and on lawmakers. It is in these arenas where forward-looking, protective uses can be made, rather than only remedial, after the fact, protections.

This is the rights-protection framework within which any domestic right to housing would sit. I turn now to discuss three examples of the right which might serve as inspiration for a right to housing to be included in the *Charter*.

#### IV THE RIGHT TO HOUSING: THREE MODELS

The final report of the Legislative Council *Inquiry into Homelessness* recommended the inclusion of a right to housing in the *Victorian Charter*, but it did not venture to suggest the form that such a right might take. Yet it is important that the content and scope of the right be clear and well delineated. First of all, s 38(1) of the *Charter* requires public authorities to give 'proper consideration' to *Charter* rights in any decision. That obligation 'must demand that public authorities consider and articulate what they understand the requirements of a relevant *Charter* right to be'.<sup>38</sup> The requirement for a clear understanding of a

32 Ibid s 38(2).

33 Ibid s 32(1).

34 Ibid s 36.

35 Ibid s 36(2).

36 Ibid ss 36(5)(a)–(b).

37 See, eg, Bruce Chen, 'The Quiet Demise of Declarations of Inconsistency under the *Victorian Charter*' (2021) 44(3) *Melbourne University Law Review* 928, 944.

38 Roger Masterman, 'Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' [2009]

right's scope and content extends to Parliament in its lawmaking capacity, the executive in its execution of those laws, and the judiciary in its interpretation of them. This, as the Hon Kevin Bell notes, is 'critical to the dialogic purposes of the *Charter* because all parties to the dialogue need to speak a language that reflects a common understanding'.<sup>39</sup> In addition, the right's scope is a *prior* consideration to its limitation, which means that a right's normative content needs to be fully analysed before any moves to consider whether it can justifiably be limited.<sup>40</sup> The problems inherent in failing to follow this sequence are demonstrated in the approach of the South African courts, discussed further below.

Second, a weak or poorly drafted human right to housing can do more harm than good. A poorly expressed right may be vague or difficult to claim, particularly by people without access to expensive legal representation.<sup>41</sup> And, if rights are not firmly tethered to social justice aims, they can be coopted by powerful interests and can end up protecting the already empowered: as Upendra Baxi has written with respect to the right to housing, it is all too easy for the '[s]truggle against homelessness' to be turned into 'a series of mandates' for the 'construction industries and urban developers'.<sup>42</sup>

Below, I canvass three options for codifying a right to housing into the *Victorian Charter*. I discuss not only the scope of each right, but the interplay of scope and obligation, as well as its interpretation by the relevant court or monitoring body. That interpretation is likely to be the starting point in any discussion of how the right should be understood under the *Victorian Charter*, and may thus already suggest that Victoria is accepting a more limited, or more expansive, right than appears on the face of the provision. And while the *Victorian Charter* imposes its own specific scheme of obligations, the analysis of the right to housing below demonstrates that the interplay of scope and obligation is highly relevant to understanding — and potentially claiming or enforcing — the right.

## **A The Right to Housing under the ICESCR**

The right to housing as included in the *ICESCR* is an important point of reference for a right to housing under the *Victorian Charter* for several reasons. First, Australian governments already bear international legal obligations for the right under *ICESCR*, having ratified it in 1975. Although the *ICESCR* rights have not

(January) *Public Law* 112, 118. See also Kevin Bell, 'Certainty and Coherence in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*' (Research Paper, Monash University Faculty of Law, 5 August 2021) 4–5 ('Certainty and Coherence').

39 Bell, 'Certainty and Coherence' (n 38) 5.

40 *Ibid* 6–7.

41 In the context of South Africa, see, eg, Stuart Wilson, Jackie Dugard and Michael Clark, 'Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court' (2015) 31(3) *South African Journal on Human Rights* 472.

42 Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 250. See also Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing, 2013) 241 ('*The Right to Housing*').



been incorporated into domestic law, officially, the government's position is that it complies with the right to housing under the *Covenant*.<sup>43</sup> Second, it provides an important and widely accepted statement on the scope and content of the right. The right to housing under *ICESCR*, as interpreted by the expert monitoring body, the Committee on Economic, Social and Cultural Rights ('CESCR'), is the international standard against which other rights to housing will be measured.

However, the right is crafted at a level of generality that can apply to all of the world: to states with enormously varying levels of housing need, natural and economic resources, and infrastructure. For these reasons, it is very broadly drafted, and state obligations for it are subject to a progressive standard of realisation.<sup>44</sup> That said, accepting the normative content of the right under *ICESCR* as a domestic legal standard for a right to housing need not mean accepting attenuated obligations domestically. A stricter standard of obligation could be adopted. I turn now to further explain the content and scope of the right under the *ICESCR*.

### 1 *The Content and Scope of the Right under the ICESCR*

A right to housing is included in the *ICESCR* as an aspect of the right to an adequate standard of living in art 11(1). 'The States Parties to the present *Covenant* recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions.'<sup>45</sup>

As an aspect of the right to an adequate standard of living, housing is protected as a foundation for a life in community with others. This is a right to *adequate housing*, not mere shelter, and is defined as a place to live in dignity, peace and security.<sup>46</sup> To give more specific contours to adequate housing, the CESCR's *General Comment No 4* is the authoritative starting point for understanding the right under the *ICESCR*.<sup>47</sup> It represents a sophisticated attempt to capture the complex aspects that make up housing, identifying seven crucial features that must be present. These 'seven elements' are: (i) 'security of tenure'; (ii) 'availability of services, materials, facilities and infrastructure'; (iii) 'affordability'; (iv) 'habitability'; (v) 'accessibility'; (vi) 'location'; and (vii) 'cultural adequacy'.<sup>48</sup>

43 Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Fifth Periodic Reports of States Parties Due in 2014*, UN Doc E/C.12/AUS/5 (16 February 2016) 5–6 [24]–[27].

44 *ICESCR* (n 7) arts 2(1), 11(1).

45 *Ibid* art 11(1) (emphasis added).

46 Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, UN Doc E/1992/23 (13 December 1991) [7] ('*General Comment No 4*').

47 *General Comment No 4*, UN DOC E/1992/23 (n 46).

48 *Ibid* [8] (emphasis omitted). For a discussion of the seven elements by the CESCR, see Hohmann, *The Right to Housing* (n 42) 20–9.

First, security of tenure protects people's rights in their housing, and shields against 'forced eviction, harassment and other threats'.<sup>49</sup> It applies to all forms of tenure — including owner occupied, public and private rental, and other forms of tenure often considered as marginal.<sup>50</sup> Security of tenure is often thought of as the 'cornerstone' of the right to housing, as it ensures the *right* to live in one's dwelling, rather than to reside at the largesse or sufferance of another.<sup>51</sup> Security of tenure as an aspect of the right to housing means that forced evictions may only be undertaken in a very limited range of circumstances.<sup>52</sup> Evictions<sup>53</sup> must not be undertaken as a punitive measure, or in a discriminatory manner.<sup>54</sup> Forced eviction must be a last resort and carried out with a minimum degree of force.<sup>55</sup> Due process and procedural safeguards must be followed.<sup>56</sup> Of key importance is the CESCR's requirement that evictions should not negatively affect the evictees' other human rights, particularly by rendering persons homeless.<sup>57</sup> In several cases heard under the *Optional Protocol* to the *ICESCR*,<sup>58</sup> the Committee has interpreted this to require that where states evict, they may be required to provide alternate adequate housing to the evictees to ensure that they are not left in situations of destitution.<sup>59</sup>

49 *General Comment No 4*, UN DOC E/1992/23 (n 46) [8(a)].

50 Such as tenure in caravan parks or boarding houses: see *ibid*.

51 Hohmann, *The Right to Housing* (n 42) 21. A number of scholars have argued that homelessness 'is a distinctive condition constituted not by a lack of goods or access to goods but by a lack of rights': see, eg, Christopher Essert, 'Property and Homelessness' (2016) 44(4) *Philosophy and Public Affairs* 266, 266. See also Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39(1) *UCLA Law Review* 295.

52 *General Comment No 4*, UN DOC E/1992/23 (n 46) [8(a)]. See also Committee on Economic, Social and Cultural Rights, *General Comment No 7: The Right to Adequate Housing (Art 11.1): Forced Evictions*, UN Doc E/1988/22 (20 May 1997) ('*General Comment No 7*').

53 Defined as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection': *General Comment No 7*, UN DOC E/1998/22 (n 52) [3].

54 *Ibid* [10], [12].

55 *Ibid* [13]. For a detailed analysis of the Committee's interpretation of forced evictions, see Michel Vols and Erna Dyah Kusumawati, 'The International Right to Housing, Evictions and the Obligation to Provide Alternative Accommodation: A Comparison of Indonesia and the Netherlands' (2020) 21(2) *Asia-Pacific Journal on Human Rights and the Law* 237, 243–50.

56 *General Comment No 7*, UN DOC E/1998/22 (n 52) [14]–[15].

57 *Ibid* [16].

58 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UN Doc A/RES/63/117 (5 March 2009, adopted 10 December 2008).

59 Committee on Economic, Social and Cultural Rights, *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with Regard to Communication No 5/2015*, UN Doc E/C.12/61/D/5/2015 (21 July 2017) 11 [15.1]–[15.3] ('*Djazia and Bellili v Spain*'); Committee on Economic, Social and Cultural Rights, *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Concerning Communication No 37/2018*, UN Doc E/C.12/66/D/37/2018 (29 November 2019) 10 [9.1]–[9.4] ('*López Albán v Spain*').

This can extend to eviction under a private rental contract, or where people were illegally or irregularly present on private property.<sup>60</sup>

The second element, '[a]vailability of services, materials, facilities and infrastructure', ensures the adequacy of housing by requiring that 'facilities essential for health, security, comfort and nutrition' are present.<sup>61</sup> These include safe drinking water, energy (for cooking, heating, and lighting), sanitation and refuse disposal, means of food storage, and access to emergency services when needed.<sup>62</sup> This element recognises housing's embeddedness in the built environment and social fabric.

Third, housing must be affordable. This is a crucial aspect of housing adequacy. Housing constitutes a large portion of household expenditure, and often, at the same time, represents the household's largest asset. In many countries, including Australia, an owned home is an important means of savings and financial security.<sup>63</sup> Where housing is unaffordable, dwellers are pushed into substandard, overcrowded and unsafe housing; or into homelessness. While what constitutes affordability is contested,<sup>64</sup> the CESCR states that affordability means that the costs associated with housing should not compromise a household's ability to satisfy other basic needs.<sup>65</sup> This may require housing subsidies for those unable to access housing in the market, and state housing financing should reflect need.<sup>66</sup> Tenants should be protected from 'unreasonable rent levels' or increases.<sup>67</sup> Affordability is a major challenge in Australia, with high and rapidly rising housing prices across tenure types, and a serious shortfall in alternatives, such as social housing, to temper the rampant housing market.<sup>68</sup>

Habitability, as a fourth necessary element, requires the physical safety of the dwellers in their home.<sup>69</sup> Basic standards must be met to ensure that dwellers are protected from excessive heat or cold, damp, rain, wind and threats to health such

60 See, eg, *López Albán v Spain*, UN Doc E/C.12/66/D/37/2018 (n 59) 12 [11.7].

61 *General Comment No 4*, UN Doc E/1992/23 (n 46) [8(b)] (emphasis omitted).

62 *Ibid.*

63 See, eg, Val Colic-Peisker, Rachel Ong and Gavin Wood, 'Asset Poverty, Precarious Housing and Ontological Security in Older Age: An Australian Case Study' (2015) 15(2) *International Journal of Housing Policy* 167, 168. See also Hohmann, 'Toward a Right to Housing for Australia' (n 8) 299–301.

64 See, eg, Matt Padley, Lydia Marshall and Laura Valadez-Martinez, 'Defining and Measuring Housing Affordability Using the Minimum Income Standard' (2019) 34(8) *Housing Studies* 1307; Hohmann, 'Toward a Right to Housing for Australia' (n 8) 297–8.

65 *General Comment No 4*, UN Doc E/1992/23 (n 46) [8(c)].

66 *Ibid.*

67 *Ibid.*

68 Hohmann, 'Toward a Right to Housing for Australia' (n 8) 300–1.

69 *General Comment No 4*, UN Doc E/1992/23 (n 46) [8(d)].

as disease.<sup>70</sup> Habitability may also require protection from internal threats such as violence perpetrated in the home,<sup>71</sup> an important recognition given that violence in the home is a leading cause of homelessness across Australia, particularly of women and children.<sup>72</sup>

The fifth element of adequate housing is accessibility. This means that housing must be accessible to disadvantaged groups, such as those living with disability, older persons, children, or those who have been affected by natural disasters.<sup>73</sup> These groups ‘should be ensured some degree of priority consideration in the housing sphere’.<sup>74</sup> Accessibility is tied to non-discrimination and equality in housing.<sup>75</sup> Notably, accessibility also entails ‘access to land’, an element with significant implications for Indigenous Australian communities and their ability to enjoy a meaningful right to housing.<sup>76</sup>

A sixth element, location, recognises that housing is not divorced from its surroundings. The spatial relationship of a home to other houses; to the local area and community, employment and education; and to kin networks are important to the adequacy of housing.<sup>77</sup> Location recognises that there must be an element of choice and individuality in housing allocation, that people should not be ghettoised, and that an otherwise adequate dwelling may be inadequate if it is isolated from social, economic, and community opportunities.<sup>78</sup> Location also encompasses the need to ensure housing is not built on polluted or dangerous sites.<sup>79</sup>

The final element is cultural adequacy. Cultural adequacy ensures that the diversity of housing is not sacrificed and that cultural factors and needs are given expression

70 Ibid.

71 Leilani Farha, ‘Is There a Woman in the House: Re/Conceiving the Right to Housing’ (2002) 14(1) *Canadian Journal of Women and the Law* 118, 129; Giulia Paglione, ‘Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing’ (2006) 28(1) *Human Rights Quarterly* 120, 130. The Australian Bureau of Statistics’ definition of homelessness also recognises that those who cannot be safe in their housing include those subject to domestic violence: Australian Bureau of Statistics, *Statistical Definition of Homelessness* (n 16) 15.

72 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (Report, 5 June 2019) 44.

73 *General Comment No 4*, UN Doc E/1992/23 (n 46) [8(e)].

74 Ibid.

75 *ICESCR* (n 7) art 2(2).

76 *General Comment No 4*, UN Doc E/1992/23 (n 46) [8(e)]. See also 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*, UN Doc A/74/183 (17 July 2019).

77 Jim Kemeny, *Housing and Social Theory* (Routledge, 1992) 159.

78 *General Comment No 4*, UN Doc E/1992/23 (n 46) [8(f)].

79 Ibid.

and protection.<sup>80</sup> This has particular importance for minority communities and Indigenous peoples whose traditional forms of housing and community have often been denigrated, or prohibited. At the same time, the CESCR notes that ‘cultural adequacy’ does not provide an excuse to delay or deny appropriate modernisation or technological innovation in housing for these communities.<sup>81</sup>

Bringing together these seven elements helps build a picture of adequate housing that is contextual and that captures the nature of housing as a personal, familial and social need, nested within broader social relations and the material infrastructure of our communities. It is however, a complex picture of housing, which can make it difficult to distil the legal requirements in claiming the right in specific situations.

With the coming into force of the *ICESCR’s Optional Protocol*, the CESCR is developing a nascent body of jurisprudence, significantly clarifying how the right can be claimed in situations of violation. *Djazia and Bellili v Spain* concerned the eviction into homelessness of a family with very young children.<sup>82</sup> Although the eviction, from private rental accommodation, was found to be justified,<sup>83</sup> the CESCR held that the Spanish authorities’ failure to provide adequate alternative accommodation was a breach of their obligation for the right to housing.<sup>84</sup> The Committee rejected the State’s argument that fault lay with the family for failing to improve their financial situation so as to be able to afford market rents, noting that ‘the lack of housing is often the result of structural problems, such as high unemployment or systemic patterns of social exclusion, which it is the responsibility of the authorities to resolve ... to the maximum of their available resources’.<sup>85</sup> The facts showed that the Madrid housing authorities had received 8,000 annual requests for public housing places, and were able to allocate only 260 units, revealing a severe lack of public housing.<sup>86</sup> *Djazia and Bellili* had applied for public housing on numerous occasions over more than a decade.<sup>87</sup> Yet, even in this situation the State had decided to sell off social housing to private investment funds ‘in the middle of a severe economic crisis’ reducing supply even further below need,<sup>88</sup> a fact the Committee was highly critical of. The Committee held that the State failed to demonstrate that it had taken all reasonable measures, to the maximum of available resources, to prevent the violation of the right to housing.<sup>89</sup>

80 Ibid [8(g)].

81 Ibid.

82 *Djazia and Bellili v Spain*, UN Doc E/C.12/61/D/5/2015 (n 59).

83 Ibid 12 [16.2].

84 Ibid 15 [18].

85 Ibid 13 [17.2].

86 Ibid 14 [17.4].

87 Ibid 3 [2.11].

88 Ibid 8–9 [12.2].

89 Ibid 14 [17.5].

In *López Albán v Spain*,<sup>90</sup> the family — a single mother and six children — had attempted to access social housing but were barred from doing so because they were occupying their home without legal title: they claimed to have unwittingly paid rent to a fraudster, only later becoming aware that their flat was in fact owned by a financial entity.<sup>91</sup> The Spanish courts held López Albán was guilty of trespass, and ordered an eviction.<sup>92</sup> The family were placed into a series of emergency shelters, in the process of which the mother was separated from her eight year old twins due to the shelter’s gender restrictions.<sup>93</sup> The Committee found the State breached its obligations for the right to housing by evicting without providing adequate alternative accommodation: while an eviction might in some cases be justified, in this case it was disproportionate and unreasonable, particularly given that the rental unit served as a *home*, while the property interest of the bank owning the apartment served neither its need for a home, nor a ‘vital’ source of income.<sup>94</sup> The Committee also held that Spain could not place an automatic ban on illegal occupiers accessing social housing: such a measure was stigmatising and draconian.<sup>95</sup> Furthermore, they noted, ‘since the lack of affordable, available housing is rooted in growing inequality and housing market speculation, States parties have an obligation to resolve these structural problems ... to the maximum of their available resources’.<sup>96</sup>

As revealed by these cases, the nature and scope of the right is also complemented — and clarified — by the scheme of obligations under the *ICESCR*, to which I now turn. The scheme is relevant to the content of the right in that it provides a concrete platform for legislation and policy action for the right, and the scope given to the right has been in light of the scheme of obligations.

## **2 The Scheme of Obligations under the ICESCR**

The right to housing under the *ICESCR* is not an entitlement to state-provided or subsidised dwellings for everyone. Rather, art 11(1), coupled with art 2(1) provides a sophisticated mix — of negative and positive; immediate and longer-term obligations — which aim to realise improvement in peoples’ living conditions in connection with their housing.

Before turning to set out the obligations under the *ICESCR*, I note here that the scheme of obligations under the *Victorian Charter* would continue to govern any right to housing inserted into that *Charter*. However, the *Charter* is not the exclusive source of human rights in Victoria, as recognised in s 32(2). As a matter of international law, international legal obligations for human rights continue to

90 *López Albán v Spain*, UN Doc E/C.12/66/D/37/2018 (n 59).

91 *Ibid* 8 [7.2].

92 *Ibid* 2–3 [2.7]–[2.8].

93 *Ibid* 7 [5.7].

94 *Ibid* 11–12 [11.5]–[11.7].

95 *Ibid* 11 [10.1].

96 *Ibid* 11 [10.2], citing *Djazia and Bellili v Spain*, UN Doc E/C.12/61/D/5/2015 (n 59) 13 [17.2].

run in parallel with any domestic law, in fact ‘trumping’ domestic human rights law.<sup>97</sup> This means that in order to comply with existing obligations under the *ICESCR* for the right to housing, the *Charter* would need to be interpreted as complying with at least the minimum obligations under the *ICESCR*.

States’ obligations for realising the rights in the *ICESCR* are set out in art 2(1):

Each State Party to the present *Covenant* undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present *Covenant* by all appropriate means, including particularly the adoption of legislative measures.

The CESCR has taken pains to carefully clarify both immediate and progressive obligations for the right to housing. First, in ensuring the right, each of the seven elements must be present at a ‘minimum core’ level in order to meet a state’s threshold obligation for the right, and this obligation is immediate.<sup>98</sup> The Committee has held that if a significant number of people are denied basic housing or shelter this constitutes a violation of the minimum core of the right.<sup>99</sup> Other immediate obligations include those which do not impose significant resource commitments on the state: the progressive realisation standard is explicitly tied to instances where resources are lacking.<sup>100</sup> These immediate obligations would include repeal of discriminatory laws and appropriate regulation of private sector actors, for example the construction or real estate industry. That redressing homelessness is an immediate obligation under the *Covenant* indicates that the *ICESCR* provides a strong standard of rights protection to address the immediate issue that provides the impetus for the Legislative Council’s proposal for a right to housing under the *Victorian Charter*.

Beyond immediate obligations, the obligation is for movement in the direction of better rights protection: the state is to take appropriate steps *toward the full realisation* of the right. Deliberate retrogressive steps constitute a *prima facie* violation of the *ICESCR*, which states have the burden of proof to discharge.<sup>101</sup> For instance if housing is *increasingly* unaffordable or if the quality of housing falls below an adequate standard for more people over time this would be *prima facie* retrogression and serious evidence that the state is not meeting its core obligations for the right. Excuses for such retrogression are limited to a narrow set

97 As a matter of international law, state obligations undertaken in human rights treaties bind the state, regardless of inconsistent domestic law or the non-incorporation of those rights: Malcolm N Shaw, *International Law* (Cambridge University Press, 8<sup>th</sup> ed, 2017) 70, 76–7, 100.

98 Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties’ Obligations* (Art 2, Para 1, of the Covenant), UN Doc E/1991/23 (14 December 1990) [10] (*‘General Comment No 3’*).

99 *Ibid.*

100 *Ibid* 1 [1]. See also M Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 128–31, 174–7.

101 *General Comment No 3*, UN Doc E/1991/23 (n 98) [9].

of circumstances: situations of natural disaster or war, as well as serious economic crisis.<sup>102</sup>

Third, in pursuit of full enjoyment of the right, the state must use all available resources.<sup>103</sup> While this will require allocating sufficient funds to housing in the budget, it should not be construed narrowly. Other dimensions of public finance are relevant, and encompass ‘human; technological; organisational; natural and informational resources’.<sup>104</sup> The CESCR has clarified that states will be scrutinised closely for policy or budgetary decisions that are arbitrary or discriminatory in nature, or that fail to consider the disadvantaged, marginalised, and most vulnerable, or those in situations of grave risk.<sup>105</sup> Where there are options, the state should choose legislation and policy which is least detrimental to the fulfilment of human rights.<sup>106</sup>

As this analysis shows, the right to housing under art 11(1) of the *ICESCR*, and according to the obligations under art 2, is not a right for each person to be given a house. Rather, it opens up options for all people to access adequate housing — adequate across all seven elements. This is to be achieved by legislative and policy changes that will allow and empower individuals to access and to maintain adequate housing, in many instances through ‘negative’ obligations, such as the repeal of discriminatory laws, and the regulation of the private sector. The main positive obligation remains to take action to ensure that adequate housing is available to *all*, and this may require the provision of subsidised housing, innovative housing finance schemes, and support services for those who cannot otherwise access housing.

Australia is in a favourable position to fully realise the right to housing as set out under the *ICESCR*, with all necessary infrastructure, a robust economic position, and the legal, financial and institutional means to ensure the right. Yet Australia

102 Commission on Human Rights, *Note Verbale Dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights*, 43<sup>rd</sup> sess, Provisional Agenda Items 8 and 18, UN Doc E/CN.4/1987/17 (8 January 1987) annex (‘*The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights*’) 8 [72]; Ariranga G Pillay, Chairperson of the Committee on Economic, Social and Cultural Rights, *Letter to All States Parties to the International Covenant on Economic, Social and Cultural Rights*, UN Doc CESCR/48th/SP/MAB/SW (16 May 2012).

103 *General Comment No 3*, UN Doc E/1991/23 (n 98) [10].

104 Diane Elson, Radhika Balakrishnan and James Heintz, ‘Public Finance, Maximum Available Resources and Human Rights’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, 2013) 14.

105 Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant*, UN Doc E/C.12/2007/1 (21 September 2007) [8].

106 *Ibid* [8(d)].



has been criticised both by the CESCR,<sup>107</sup> and by the United Nations Special Rapporteur on housing,<sup>108</sup> for its failure to comply with the *Covenant*. Compliance with the *ICESCR* obligations should be within reach both at, and potentially well beyond, the minimum core content of the right.

The right under the *ICESCR* remains the international standard for the right to housing, and the one that Australia already bears obligations for. However, it is not the only legal codification of the human right to housing which might serve as a model for Victoria. I turn now to the right under the *European Social Charter* as a second possible exemplar.

## **B The Right to Housing under the European Social Charter**

The *European Social Charter* is a relatively little known treaty of the Council of Europe,<sup>109</sup> the sister covenant to the much more prominent *Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>110</sup> Originally mainly oriented to labour rights, it was revised in 1996 to include a broader range of economic and social rights, including a right to housing. The *Social Charter* is unique as a human rights instrument in that it contains a list of core rights, and a further list of ‘non-core’ rights from which states must select a minimum number.<sup>111</sup> This provides a ‘pick and mix’ approach to economic and social rights obligations under it.

The *Social Charter* is overseen by the European Social Committee, which interprets the rights and monitors states’ compliance, as well as making decisions in contentious cases under the collective complaints mechanism, in which

- 107 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017). The Committee noted the persistent shortage of affordable housing, increases in homelessness, criminalisation of homelessness, and overcrowded housing for Indigenous peoples: at 8 [41]. See also at 5 [21].
- 108 Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari, 4<sup>th</sup> sess, Provisional Agenda Item 2, UN Doc A/HRC/4/18/Add.2 (11 May 2007) annex (*Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia (31 July to 15 August 2006)*). Kothari found ‘that there is a serious national housing crisis in Australia, especially given that it is one of the wealthiest developed countries, with a comparatively small population. This crisis affects many sections of the population, and though having a critical and direct impact on the most vulnerable groups of the population, it impacts other segments of Australian society, especially low-income households and, increasingly, middle-income households’: at 2.
- 109 *European Social Charter*, opened for signature 18 October 1961, 529 UNTS 89 (entered into force 26 February 1965); *Social Charter* (n 10).
- 110 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*‘ECHR’*).
- 111 For further explanation of the system of rights protection under the *European Social Charter*, see Holly Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretive Methods of the European Committee of Social Rights’ (2009) 9(1) *Human Rights Law Review* 61; Robin R Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic, Social and Cultural Rights?’ (2004) 15(3) *European Journal of International Law* 417, 445–54.

registered bodies — trade unions and NGOs for example — can challenge states for their compliance with the *Social Charter*.<sup>112</sup> The *Social Charter's* scheme for rights protection is innovative, and might provide interesting food for thought for Australian human rights legislation more generally. However, for the purpose of this paper, the focus is the scope of the right to housing and its interpretation by the Social Committee. These can be used as examples for human rights legislation in a domestic legal system, leaving behind some of the flexibility mechanisms that the *Social Charter* necessarily includes for the purpose of gaining wide ratification as an international treaty.

## **1 The Content and Scope of the Right and Scheme of State Obligations**

The right to housing is included in art 31 of the *Social Charter*:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- (1) to promote access to housing of an acceptable standard;
- (2) to prevent and reduce homelessness with a view to its gradual elimination;
- (3) to make the price of housing accessible to those without adequate resources.

This right recognises, rather than creates, a right to housing for Council of Europe states, and places obligations on the state to move toward its realisation. It imposes three obligations. The first, under art 31(1), is to promote access to housing that is of an acceptable standard. The second, under art 31(2), is an obligation for the prevention of homelessness, and its reduction over time, with the ultimate aim being its elimination. Homeless persons are defined as those persons ‘who legally do not have at their disposal a dwelling or another form of adequate housing in the terms of Article 31(1)’.<sup>113</sup> The third obligation, corresponding to art 31(3), is specifically concerned with affordability for those without adequate resources. The Committee has stressed that while art 31 does not, on its face, impose on states an obligation of ‘results’, the state must give the rights a ‘practical and effective’ and not ‘purely theoretical, form’.<sup>114</sup>

Given its focus on obligations, art 31 remains abstract in its definition of, or content for, the right to housing. However, the Social Committee has taken notable steps

112 *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, opened for signature 9 November 1995, 2045 UNTS 224 (entered into force 1 July 1998) art 1.

113 *Confederation of European Churches (CEC) v the Netherlands (Merits)* (European Committee of Social Rights, Complaint No 90/2013, 1 July 2014) 21 [135] (*‘CEC v the Netherlands’*), citing European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2003* (Council of Europe Publishing, 2003) vol 1, 225 (*‘Conclusions’*); *European Federation of National Organisations Working with the Homeless (FEANTSA) v the Netherlands (Merits)* (European Committee of Social Rights, Complaint No 86/2012, 2 July 2014) 17 [106] (*‘FEANTSA v the Netherlands’*), citing *Conclusions* (n 113) vol 1, 225.

114 *International Movement ATD Fourth World v France (Merits)* (European Committee of Social Rights, Complaint No 33/2006, 5 December 2007) 22 [59], citing *By the International Commission of Jurists v Portugal (Merits)* (European Committee of Social Rights, Complaint No 1/1998, 9 September 1999) [32].

to explain the scope of the right to housing in its collective complaints jurisprudence.<sup>115</sup> It has defined adequate housing as ‘a dwelling which is safe from a sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure; not overcrowded; and with secure tenure supported by the law’.<sup>116</sup> The definition has been applied and further defined subsequently to include access to fresh water.<sup>117</sup>

Adequate housing under the *Social Charter* is distinguished from emergency shelter. Emergency shelter does not constitute adequate housing for the purpose of fulfilling art 31.<sup>118</sup> However, given that housing is a prerequisite for human dignity, when a state denies shelter to people (even those irregularly or ‘illegally’ present) it may be a contravention of the *Social Charter* when a particularly vulnerable category of persons are involved.<sup>119</sup> When emergency shelter is provided, it must meet basic standards of safety and decency, including being equipped with basic amenities such as access to ‘clean water, sufficient lighting and heating’ in order to ensure that the dignity of the persons sheltered is respected. Another basic requirement is the ‘security of the immediate surroundings’.<sup>120</sup>

In its decisions the Committee has also defined affordable housing. Housing is affordable if the household can afford to pay, first, initial costs such as a deposit or advance rent; second current costs such as rent or mortgage payments and utilities on a continuing basis; and finally, can do so without compromising minimum standards of living as defined within the society in question.<sup>121</sup> Subsequently, the

- 115 The Committee has implied the standards of adequate housing into other provisions of the *Social Charter* that have a more marginal reference to housing, including art 16’s protection of the family. See *European Roma Rights Centre v Greece (Merits)* (European Committee of Social Rights, Complaint No 15/2003, 8 December 2004) 8 [24] (*ERRC v Greece*); *Centre on Housing Rights and Evictions (COHRE) v Italy (Merits)* (European Committee of Social Rights, Complaint No 58/2009, 25 June 2010) 30 [115] (*COHRE v Italy*). This bold interpretive move, as Khaliq and Churchill write, made an ‘almost peripheral’ reference to housing a central housing rights provision under the *Social Charter*: Urfan Khaliq and Robin Churchill, ‘The European Committee of Social Rights: Putting Flesh on the Bare Bones of the European Social Charter’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 428, 448.
- 116 *European Federation of National Organisations Working with the Homeless (FEANTSA) v France (Merits)* (European Committee of Social Rights, Complaint No 39/2006, 5 December 2007) 23 [74] (*FEANTSA v France*).
- 117 *European Roma Rights Centre v Portugal (Merits)* (European Committee of Social Rights, Complaint No 61/2010, 30 June 2011) 9 [36].
- 118 *CEC v the Netherlands* (n 113) 22 [140].
- 119 *Defence for Children International (DCI) v the Netherlands (Merits)* (European Committee of Social Rights, Complaint No 47/2008, 20 October 2009) 7 [19], 16 [63] (*DCI v the Netherlands*). See also *CEC v the Netherlands* (n 113); *FEANTSA v the Netherlands* (n 113) 12 [60], 17 [110].
- 120 *DCI v the Netherlands* (n 119) 15–16 [62], quoting Commissioner for Human Rights, Council of Europe, *Recommendation of the Commissioner for Human Rights on the Implementation of the Right to Housing* (CommDH(2009)5, 30 June 2009) 13.
- 121 *FEANTSA v France* (n 116) 32–3 [124], quoting *Conclusions* (n 113) vol 2, 655.

Committee has noted that affordability should not be measured with reference to the average person, but the poorest.<sup>122</sup>

With regard to eviction and the right to housing, the Committee has held that evictions must be undertaken in conformity with ‘the dignity of the persons concerned’.<sup>123</sup> Procedural guarantees are necessary.<sup>124</sup> Even where evictions are undertaken in the public interest the state has an obligation to rehouse, or to financially assist, those evicted.<sup>125</sup>

The Committee has clarified that the state must take a number of steps to demonstrate compliance with the right under the *Social Charter*. First, it must adopt any necessary legal, financial or other operational methods needed to work toward achieving the rights in the *Social Charter*.<sup>126</sup> Second, it must keep appropriate and meaningful statistics.<sup>127</sup> Third, the state must undertake periodic reviews of implementation.<sup>128</sup> Fourth, there must be a timeline for realising the right that does not ‘defer indefinitely’ its full enjoyment for all.<sup>129</sup> Finally, the effects of programs on the most vulnerable must be carefully considered at all points.<sup>130</sup>

In my view, the Social Committee has provided a coherent and workable definition of adequate housing, including a delineation of affordability. This definition overcomes some of the complexities of the CESCR’s ‘seven elements’, discussed above, but succeeds in recognising the multifaceted nature of housing. Similar to obligations under the *ICESCR*, states parties are required to move toward full realisation of adequate, affordable housing, and ensure that their legislative and policy frameworks promote access to housing for all. Where people are unable to access housing in the market, the state may need to subsidise or otherwise provide housing through positive measures.

122 *Fédération européenne des Associations nationales travaillant avec les Sans-abri (FEANTSA) v Slovenia (Merits)* (European Committee of Social Rights, Complaint No 53/2008, 8 September 2009) 18 [72].

123 *COHRE v Italy* (n 115) 21 [67].

124 *Centre on Housing Rights and Evictions (COHRE) v France (Merits)* (European Committee of Social Rights, Complaint No 63/2010, 28 June 2011) 13 [41]–[42].

125 *ERRC v Greece* (n 115) 14 [51]. Note that the Committee follows the obligations to rehouse or provide alternative accommodation or funds to support alternative accommodation under the *ICESCR*, see *COHRE v Italy* (n 115) 9–10 [21].

126 *FEANTSA v France* (n 116) 20 [56].

127 *Ibid.*

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

### C *The Right to Housing under the South African Constitution*

South Africa included a fully justiciable right to housing in its 1996 post-apartheid *Constitution*.<sup>131</sup> This ‘transformative’ *Constitution* explicitly sought to include — politically, economically, socially and spatially — those who had been marginalised and whose rights had been systematically denied in the apartheid era.<sup>132</sup> Given the international influence of the South African approach to constitutionally protected socio-economic rights, it is likely to be a model seriously considered for Victoria.<sup>133</sup>

However, it will not only be the constitutional provisions on their face that are relevant, but also the interpretation of the right by the courts. For this reason, it is necessary to look carefully at the jurisprudence. The courts’ approach to socio-economic rights has been as influential as the constitutional codification itself, if not more so,<sup>134</sup> and it is important to understand the ways that courts have limited the right to housing in the process of interpreting it. At the same time, it must be recognised that in South African housing rights cases claimants have been largely successful,<sup>135</sup> and the constitutional right to housing has therefore proven an important avenue for redress.

The relevant section of the *South African Constitution* is s 26:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

131 *South African Constitution* (n 11) s 26.

132 Justice Albie Sachs, ‘The Creation of South Africa’s Constitution’ (1997) 41 *New York Law School Law Review* 669, 671–2; Pierre De Vos, ‘Grootboom: The Right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17(2) *South African Journal on Human Rights* 258, 259. See also Sandra Liebenberg, ‘Needs, Rights and Transformation: Adjudicating Social Rights’ (2006) 17(1) *Stellenbosch Law Review* 5, 6, citing Karl E Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14(1) *South African Journal on Human Rights* 146.

133 On the canonical status of the South African approach, with specific reference to the right to housing, see Katharine Young, ‘The Canons of Social and Economic Rights’ (Research Paper No 553, Boston College Law School, 7 April 2021). See also Cass R Sunstein, ‘Social and Economic Rights: Lessons from South Africa’ (2000) 11(4) *Constitutional Forum* 123; Hohmann, *The Right to Housing* (n 42) 94–5.

134 Sunstein (n 133) 123.

135 As Wilson, Dugard and Clark (n 41) note, in all the cases under s 26, the claimants were ultimately granted ‘substantially what they approached the court to ask for’: at 472.

In addition, under s 28(1)(c), every child has the right ‘to basic nutrition, shelter, health care services and social services’.<sup>136</sup> Section 1 of the *South African Constitution* sets out the requirement that the state respect, protect, promote and fulfil the constitutional rights, in light of the underlying constitutional commitment to human dignity, the achievement of equality, and the advancement of human rights and freedoms set out in s 7. Section 26 binds both the state and private persons, the South African Bill of Rights having horizontal effect.<sup>137</sup>

On its face, and within the context of the *South African Constitution* as a whole, s 26(1) provides for a ‘right to have access to adequate housing’. The key words are *access* and *adequacy*. The courts have interpreted access and adequacy as intertwined in some aspects.

First, ‘access’ protects existing access rights to housing. As such, deprivation of existing tenure will be a deprivation of the right to access adequate housing and require justification. For example, where homes were sold in execution of outstanding debts, the Constitutional Court held that any measure that removes from people their pre-existing access to adequate housing limits the right to housing under the *South African Constitution*.<sup>138</sup> A proportionality exercise will be involved, measuring the interests of the parties against the loss of a constitutionally protected right.<sup>139</sup> Second, the courts have held that access under s 26 does not protect ownership per se, but occupation.<sup>140</sup> Third, they have specified that security of tenure forms part of the negative aspect of the right to access to adequate housing.<sup>141</sup>

However, in *Minister of Health v Treatment Action Campaign (TAC) [No 2]*,<sup>142</sup> the Constitutional Court rejected the argument that s 26(1) imposed any positive obligation on the government. Instead, the Court held that the right conferred by s 26(1) is ‘to have access to the services that the state is obliged to provide in terms of [s] 26(2)’.<sup>143</sup> The rights in s 26(1) and obligations in s 26(2) could not, the Court held, be read independently of each other to give rise to positive obligations under

136 *South African Constitution* (n 11) s 28(1)(c). See *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46, 80–1 [73] (Yacoob J for the Court) (Constitutional Court) (*‘Grootboom’*). Here, the claimants argued for an immediate right of children to shelter under s 28. This was not accepted by the Constitutional Court. The right to shelter under s 28 has not subsequently been used as a significant platform for housing or shelter rights claims.

137 *South African Constitution* (n 11) s 8.

138 *Jaftha v Schoeman* [2005] 2 SA 140, 156 [34] (Mokgoro J) (Constitutional Court) (*‘Jaftha’*).

139 See *South African Constitution* (n 11) s 36.

140 *Jaftha* (n 138) 147–8 [13] (Mokgoro J).

141 *Ibid* 153 [25], 155 [29].

142 [2002] 5 SA 721 (Constitutional Court).

143 *Ibid* 740 [39] (Chaskalson CJ, Langa DCJ, Ackermann, Goldstone, Kriegler, Madala, Ngcobo, O’Regan and Sachs JJ, Du Plessis and Skweyiya AJJ).

s 26.<sup>144</sup> As Danie Brand has written, the Court appears to see the positive aspects of s 26(1) as ‘contained in their totality’ in s 26(2).<sup>145</sup>

Following this reluctance to give effect to a positive obligation in s 26(1), when it comes to *adequacy*, the South African courts have done little to flesh out what adequacy means or how it could be measured.<sup>146</sup> As Stuart Wilson, Jackie Dugard and Michael Clark write, while the ground-breaking *Government of the Republic of South Africa v Grootboom* (*‘Grootboom’*) judgment ‘stated that access to housing requires land, services and financing — more than mere “bricks and mortar” — these attributes of the good remain merely aspirational. They are not — under any conditions — immediately claimable’.<sup>147</sup> As a result, s 26(2) — which places an obligation on the state to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right’ — has become the key legal provision under the *Constitution*. It turns attention squarely onto the question of what constitutes a reasonable housing policy; or its flipside: when the state has acted unreasonably.

In the foundational *Grootboom* case, the Constitutional Court held that the State had breached s 26.<sup>148</sup> The case concerned a community who were living in crisis conditions after having been evicted from the informal settlement they had occupied while waiting for the provision of public housing.<sup>149</sup> In elaborating its role with respect to reasonableness, Yacoob J for the unanimous Court stated:

The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. ... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.<sup>150</sup>

144 Ibid. See also at 738 [30]; *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] 6 SA 417, 434–5 [52]–[53] (Harms ADP) (Supreme Court of Appeal).

145 Danie Brand, ‘The Proceduralism of South African Socio-Economic Rights Jurisprudence, or “What are Socio-Economic Rights For?”’ in Henk Botha, André van der Walt, and Johan van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press, 2003) 38 (citations omitted). See also at 46.

146 See Wilson, Dugard and Clark (n 41) 476. See also Hohmann, *The Right to Housing* (n 42) 99–102. There is an additional interplay between adequacy and access: courts have held that a right to access to housing does not turn on housing’s adequacy. This means that even those in inadequate housing enjoy rights to it under the *South African Constitution*. In *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] 1 SA 78 (High Court), the Court held that ‘[t]he right of access to adequate housing includes a duty on the State, as well as other relevant players ... to respect the access to housing (albeit inadequate) of those who presently enjoy it’: at 95 [54] (Jajbhay J).

147 Wilson, Dugard and Clark (n 41) 476, quoting *Grootboom* (n 136) 66–7 [35] (Yacoob J for the Court).

148 *Grootboom* (n 136).

149 Ibid 53–4 [4] (Yacoob J for the Court).

150 Ibid 68–9 [41].

The Court held that the state's housing policy did not provide for the worst off, and was thus unreasonable.<sup>151</sup>

In later cases the Court has held that as aspects of what is reasonable under s 26(2), the *South African Constitution* requires the following. First, that the State of South Africa consult meaningfully with those who will be affected by housing policy. This has been termed the requirement of 'meaningful engagement'.<sup>152</sup> Second, that it provide alternative accommodation in cases of forced eviction, as eviction, even of 'unlawful' occupiers, should not lead to homelessness.<sup>153</sup> In some cases, the courts have refused to grant an eviction order,<sup>154</sup> or imposed conditions that ultimately made the eviction impossible, leading to lengthy negotiations for in situ upgrading, as in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*.<sup>155</sup>

Section 26(3) provides a legal framework for regulating evictions. Evictions were a punitive and draconian apartheid measure,<sup>156</sup> and as a result, the constitutional prohibition of arbitrary eviction is immensely symbolic and of important practical effect in South Africa.<sup>157</sup> The courts have clarified that evictions will seldom be 'just and equitable' unless the state has taken reasonable measures to ensure that evictees who are unable to do so under their own initiative are able to access reasonable alternative housing, even if that is as an interim, temporary measure.<sup>158</sup> The effect of s 26(3) is that 'normal ownership rights of possession, use and occupation' must also be balanced against s 26(3)'s recognition of an 'equally relevant right not arbitrarily to be deprived of a home'.<sup>159</sup> This will be the case even where the party seeking the eviction is a private actor.<sup>160</sup>

151 Ibid 79 [66].

152 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* [2008] 3 SA 208, 214–15 [9]–[13] (Yacoob J) (Constitutional Court); *Melani v Johannesburg City* [2016] 5 SA 67, 74 [44]–[45] (Strauss AJ) (High Court).

153 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2010] 3 SA 454, 522–3 [209]–[210] (Ngcobo J) (Constitutional Court) ('*Joe Slovo*'); *Mathale v Linda* [2016] 2 SA 461, 474 [50] (Khampepe J) (Constitutional Court).

154 See, eg, *Ekuhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* [2014] 3 SA 23 (Supreme Court of Appeal).

155 See *Joe Slovo* (n 153); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2011] 7 BCLR 723 (Constitutional Court).

156 See the analysis of the apartheid-era eviction regime in *Port Elizabeth Municipality v Various Occupiers* [2005] 1 SA 217, 224 [12] (Sachs J). See also Gustav Muller, 'The Legal-Historical Context of Urban Forced Evictions in South Africa' (2013) 19(2) *Fundamina* 367.

157 See, eg, the sustained judicial discussion of eviction and the status of 'unlawful occupier' in South Africa in *Joe Slovo* (n 153) 515–7 [191]–[197] (Ngcobo J), 562–3 [354] (Sachs J).

158 *Port Elizabeth Municipality* (n 156) 233 [28] (Sachs J). See also Liebenberg (n 132) 26.

159 *Port Elizabeth Municipality* (n 156) 229 [23] (Sachs J).

160 Although the rights in the *South African Constitution* have horizontal effect, this approach to evictions from the property of private owners is also the case under the *ICESCR* and *Social*



Finally, the South African courts have emphasised that a right to dignity underlies s 26 of the *South African Constitution*.<sup>161</sup> As such, the rights under s 26 extend to access to emergency shelter even for those non-citizens irregularly present in South Africa.<sup>162</sup>

The South African constitutional right to housing (and its interpretation by the courts) has undoubtedly been the most influential of any constitutional codification of the right, particularly in the common law, Anglophone world.<sup>163</sup> As such, it is likely to be a reference point for any *Charter* reform in Victoria. Indeed, the South African model of constitutional protection of socio-economic rights has already been mooted in debates over a charter of rights in Australia<sup>164</sup> and raised in cases in Victoria.<sup>165</sup> Yet the approach the South African courts have taken to socio-economic rights is highly specific, and not necessarily the one suggested on the face of the constitutional provisions, which has implications for it as a model in the Victorian context.

As Stuart Wilson, Jackie Dugard and Michael Clark write, ‘the right of access to adequate housing has been expansively developed, not to define what adequate housing actually is, but to control the exercise of public and private power when interfering with, or attempting to give effect to, the right itself’.<sup>166</sup> This, as they show, has resulted in a number of meaningful ‘wins’ for poor and marginalised people claiming a right to access to adequate housing. However, the approach has drawbacks.

First, the courts’ unwillingness to give any content to adequate housing under s 26(1) renders the right highly procedural. Much turns on the reasonableness of the steps taken, rather than the reasonableness of the result.<sup>167</sup> This approach can be argued to move beyond the procedural to the programmatic: that is, a right intrinsically tied to a programme of government action for its realisation and

*Charter*, indicating that it is not horizontal effect that underpins this reasoning, but a state’s responsibility for the right to housing: see above n 146.

161 See, eg, *Jaftha* (n 138) 157–8 [39] (Mogoro J).

162 *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew* [2017] 1 SA 403, 424 [72] (Spilg J) (High Court).

163 Young (n 133). Young argues that other constitutional rights to housing deserve more attention, and that a number of factors that have little to do with the right as codified, and its legal interpretation, have led the South African example to prominence. The right to housing has in fact been codified in over 50 national constitutions. See Michelle L Oren and Rachel Alterman, ‘The Right to Adequate Housing around the Globe: Analysis and Evaluation of National Constitutions’ in Sandeep Agarwal (ed), *Rights and the City: Problems, Progress, and Practice* (University of Alberta Press, 2022) 159.

164 See *Human Rights Consultation* (n 9).

165 *Re Director of Housing and Sudi* (2010) 33 VAR 139, 156–8 [75]–[82] (Bell J).

166 Wilson, Dugard and Clark (n 41) 477.

167 See, eg, the discussion of *Joe Slovo* in Hohmann, *The Right to Housing* (n 42) 102. See also at 129–34.

enjoyment, and it has involved the courts deeply in overseeing this policy program.<sup>168</sup> As Sandra Fredman has argued, this may render the right to housing a right to an act, rather than a right to a good.<sup>169</sup> There may be merits in such an approach,<sup>170</sup> but they should be fully considered rather than stumbled upon by jurisdictions following the South African model.

Second, and relatedly, the South African courts' approach empties the right of normative content.<sup>171</sup> Deference to the state owed under s 26(2) appears to have extended to deference to the state on the content of the right — deference that is not supported by s 26(1) itself. The approach, however, has not in the end prevented the courts from becoming entangled in state housing policy. In fact, cases often turn on in-depth judicial monitoring of reasonable state action, including detailed oversight of eviction and relocation plans, and in situ upgrading proposals.<sup>172</sup> This is arguably less appropriate in the Victorian jurisdiction, subject as it is to an overriding Australian Commonwealth constitutional framework,<sup>173</sup> than a right to housing which would impose some form of positive obligation for adequate housing for those who cannot otherwise access it.

Third, since the content and scope of the right to access to adequate housing remain vague, the right is difficult to understand and hence, claim.<sup>174</sup> This vagueness and complexity has been a problem that has dogged economic, social and cultural rights as a category.<sup>175</sup> While the work of both the European Social Committee and of the CESCR have done much to clarify the specific normative content of the right in the relevant instruments, the South African courts have not yet done so.

Fourth, the approach can be criticised as cases appear often to turn on the mobilisation of judicial sympathy for claimants, rather than on legal principle.<sup>176</sup> This last issue is particularly problematic from a *Victorian Charter* perspective: the South African right to access to adequate housing appears a compelling model partly because of the way the courts have limited possible positive obligations

168 Ibid 132.

169 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 88–90.

170 See *ibid.*

171 See Hohmann, *The Right to Housing* (n 42) 99; Wilson, Dugard and Clark (n 41) 502.

172 See, eg, the order in *Joe Slovo* (n 153), in which the Court set out the specific criteria for reasonable or adequate engagement between the State and the claimants: at 459–61 [7]. This included detailed standards for the temporary accommodation to be provided in any relocation; including size of dwelling, provisions of materials, facilities and infrastructure, and what would constitute an adequate location; as well as a timeline for the engagement process to take place.

173 On issues of the constitutionality of the *Victorian Charter* more broadly, see Chen, 'Section 32(1) of the *Charter*' (n 25) 627, 633.

174 Wilson, Dugard and Clark (n 41) 502.

175 See, eg, *Human Rights Consultation* (n 9) app E, 12 [30].

176 Wilson, Dugard and Clark (n 41) 502.

under s 26(1), and have deferred to the legislative role in the creation of law and policy.<sup>177</sup> However, an approach that in fact rests on judicial sympathy rather than legal principle is ill suited to the judicial function under the *Australian Constitution* and under the *Victorian Charter* itself, as well as moving far from the kernel of a *right* to housing, toward housing as charitable or welfare provision. For these reasons, the South African example may be less compelling than it initially appears.

With these three important, if imperfect, models in mind, I turn now to consider the path toward a right to housing under the *Victorian Charter* in the concluding section.

## V CONCLUSION

All three of the rights to housing explored above are examples on which Victoria can draw. Each has its drawbacks and its advantages. In all three examples, the legal context in which the right is embedded is distinct to the Australian — and specifically Victorian — context. In Victoria, homelessness constitutes a crisis set against a background of significant wealth, a developed welfare system, and a built environment capable of housing each Victorian in safe, secure and adequate housing with little financial or logistical hardship to the State. This must be contrasted with the South African context, which is one of radical inequality and massive housing need. At the same time, the South African context shares common elements with the Victorian. Notably, these include state-supported processes of accelerated gentrification and the displacement of the poor,<sup>178</sup> as well as unresolved housing injustices stemming from racially discriminatory laws that have resulted in the dispossession of the Indigenous inhabitants of the land.<sup>179</sup>

The right to housing under the *Social Charter* and the *ICESCR* are, on the other hand, pitched at a level of generality — in both scope and with regard to state obligation — designed to work for states of significant economic power and capacity, right through to those with extremely limited resources, infrastructure and capacity to fulfil a right to housing for all even in the longer term.<sup>180</sup> For this reason, and to facilitate the consensus needed to conclude such a multilateral human rights treaty in the first place, the rights are broadly drawn and the obligations are progressive in nature. However, since Australia has the infrastructure and resources to ensure the right to adequate housing for all, the progressive obligations for realising the right in the above three models are arguably too lenient for Australia. If any right to housing under the *Victorian*

177 This has been crucial to the support of Anglo-American scholars for the *South African Constitution*. See Sunstein (n 133). See also Young (n 133) for critical analysis of this attention.

178 See Wilson, Dugard and Clark (n 41) 482. See also Alison Young and James Petty, 'On Visible Homelessness and the Micro-Aesthetics of Public Space' (2019) 52(4) *Australian and New Zealand Journal of Criminology* 444.

179 Aboriginal Housing Victoria, *Mana-na woorn-tyeen maar-takoort: Every Aboriginal Person Has a Home* (Report, 2020) 21–3.

180 See, eg, Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford University Press, 2015) 11.

*Charter* were to include an obligation of progressive realisation, it should be crafted in a time-limited way and the state should be given very little discretion or flexibility to argue that it cannot meet significant obligations in the short term. Such arguments are unconvincing in the Australian context, and likely to lead to weak protection of the right.

All three examples of the right to housing analysed above demonstrate that housing rights litigation can be remedial in important ways, but that a housing policy underpinned at the outset by a human right to housing is preferable. Fortunately, this suits the scheme of rights protection in the *Victorian Charter* ideally. As George Williams has argued, '[t]he real focus of the *Victorian Charter of Rights* is upon ensuring that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy'.<sup>181</sup> This means that the *Charter* is a highly appropriate human rights vehicle for the protection of the right to housing, a right that (at least by dint of legal culture) appears difficult for courts to deal with after the fact of violation. Making sure that housing as a right, rather than as an asset or investment vehicle, sits at the heart of legislation and policy, from its earliest stages, is the greatest contribution that a right to housing under the *Charter* can make, although the ability to come before a court in the case of violation remains undeniably important.

In following a path toward the inclusion of a right to housing in the *Victorian Charter*, it is open to the State to draw on any of these examples, to combine them, or to chart its own course with a wholly new expression of the right. The three models presented above are likely to be important starting points for any project of law reform. It is vital to understand their scope, how that scope is interlaced with state obligations, and the way they have been interpreted, so that the potential breadth, or conversely restrictiveness, of the right is clearly understood. It is to be hoped that these examples provide an opening for a robust and thoughtful discussion of what a right to housing under the *Victorian Charter* should entail, and how it can be realised.

181 Williams (n 25) 903.