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# **Older Persons and the Right to Adequate Housing**

*Submission to the Independent Expert on the enjoyment of all human rights by older persons*

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## Part 1: Background

### 1.1 About the Castan Centre for Human Rights Law

The [Castan Centre for Human Rights Law \(Castan Centre\)](#), based in the Faculty of Law at Monash University in Australia, is a research, education, and policy centre which aims to create a more just world where human rights are respected, protected, and fulfilled, allowing all people to flourish in freedom and dignity. The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia. It was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, [Ron Castan AM QC](#).

The Castan Centre has a strong commitment to advancing the human rights of older persons. The Centre is proud to have supported the work of the United Nations Independent Expert on the enjoyment of all human rights by older persons (**Independent Expert**) in two thematic areas to date. In 2021, the Centre, together with our colleagues at the Prof Joe Aged Care Advocacy Group, authored a submission analysing the impact of COVID-19 on older persons living in residential aged care in Australia.<sup>1</sup> Later that year the Centre, in conjunction with the Health Law and Ageing Research Unit (Monash University), authored a submission on the impact of sexual violence against older women in residential aged care.<sup>2</sup> In June 2021, we were proud to host the Independent Expert in our 'Change Makers: The Human Rights of Older Persons in Aged Care' event, which discussed international and Australian perspectives on the enjoyment of human rights by older persons.<sup>3</sup>

The Centre has also been very active in advocating for human rights in law and policy on housing and homelessness. In 2020, we provided written submissions to the Australian Parliament's *Inquiry into Homelessness in Australia*, and both a written submission and oral evidence to the Victorian Parliament's *Inquiry into Homelessness in Victoria*.<sup>4</sup> The Castan Centre, together with our colleagues at Better Governance and Policy (Monash University), also hosted a webinar on 'Housing, Homelessness and Human Rights in Australia' that same

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<sup>1</sup> Castan Centre for Human Rights Law and Prof Joe Aged Care Advocacy Group, 'A Human Rights Analysis of the Impacts of COVID-19 on Persons in Australian Aged Care Facilities', Submission to the United Nations Independent Expert on the enjoyment of all human rights by older persons (February 2021).

<sup>2</sup> Castan Centre for Human Rights Law and the Health, Law and Ageing Research Unit, 'The Impact of Sexual Violence in Residential Aged Care on the Rights of Older Women', Submission to the United Nations Independent Expert on the enjoyment of all human rights by older persons (March 2021).

<sup>3</sup> 'Change Makers: The Human Rights of Older Persons in Aged Care', *Castan Centre for Human Rights Law* (Web Page, 8 June 2021) <<https://www.monash.edu/law/events/archive/change-makers-the-human-rights-of-older-persons-in-aged-care>>.

<sup>4</sup> Castan Centre for Human Rights Law, 'The Rights of Homeless Persons: A Framework for Understanding Australia's Human Rights Obligations', Submission No 154 to Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Homelessness in Australia* (29 June 2020) ('*Submission to the Federal Homelessness Inquiry*'); Castan Centre for Human Rights Law, Ensuring Human Rights by Ending Homelessness: A Framework for Understanding the Human Rights Implications of Homelessness', Submission No 429 to Victorian Parliament Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (2 July 2020) ('*Submission to Victorian Homelessness Inquiry*'); Evidence to Legislative Council Legal and Social Issues Committee, Victorian Parliament, 2 July 2020, 26-7 (Professor the Hon Kevin Bell, Director, Castan Centre for Human Rights Law).

year.<sup>5</sup> In 2021, the Castan Centre, alongside lawyers from community legal centre Inner Melbourne Community Legal, jointly authored a submission to the United Nations Special Rapporteur on the right to adequate housing (**Special Rapporteur**), on the subject of housing discrimination.<sup>6</sup> In July 2021, we were proud to dedicate a session at the Annual Human Rights Conference 2021 to ‘Ending Homelessness by Human Rights-Based Approach’, featuring experts including former Special Rapporteur Leilani Farha.<sup>7</sup> In 2022, Castan Centre academics also published a chapter on ‘Housing and Homelessness in Australia’, in the current Castan Centre Director’s co-edited book on *Critical Perspectives in Human Rights in Australia*.<sup>8</sup>

## 1.2 Terms of Reference

We recognise the mandate of the Independent Expert to, inter alia, strengthen the protection of the human rights of older persons and to continue and further the implementation of national, regional, and international standards relevant to the rights of older persons and to promote best practices on the rights of older persons.

We recognise also that the Independent Expert in her present report seeks to examine existing international and regional legal standards applicable to older persons’ right to adequate housing, and analyse the challenges and barriers faced by older persons in accessing adequate and affordable housing. We note that the Independent Expert further seeks to identify and analyse good practices and highlight initiatives which promote the full enjoyment of the right to adequate housing by older persons.

This submission will seek to address questions 1-2, 4-6, and 9-10 of the questionnaire as provided by the Independent Expert as part of the call for input on this subject. We prioritise these questions in our submission because of our expertise as a leading academic human rights research and teaching Centre.

<i>The following terms of reference relevant to our submission</i>	<i>Part/ Section</i>
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<sup>5</sup> ‘Housing, Homelessness and Human Rights in Australia’, *Castan Centre for Human Rights Law* (Web Page, 9 November 2020) <<https://www.monash.edu/law/research/centres/castancentre/public-events/events/2020/housing.-homelessness-and-human-rights-in-australia>>;

<sup>6</sup> Castan Centre for Human Rights Law and Inner Melbourne Community Legal, ‘Housing Discrimination’, Submission to the United Nations Special Rapporteur on the Right to Adequate Housing (May 2021).

<sup>7</sup> ‘Ending Homelessness by Human Rights-Based Approach’, *Castan Centre for Human Rights Law* (Web Page, 23 July 2021) < <https://www.monash.edu/law/events/archive/castan-centre-human-rights-law-conference>>.

<sup>8</sup> Kevin Bell and Jean Allain ‘Homelessness and Human Rights in Australia’ (August 30, 2021). Paula Gerber and Melissa Castan, *Critical Perspectives on Human Rights Law in Australia*, Vol 2, Ch 10 (Thomson Reuters, 2022).

Q1: What are <b>the local and national legal, policy and institutional frameworks</b> protecting and promoting the right to adequate housing of older persons?	<b>Part 4</b> <i>Section 4.2</i>
Q2: What are the <b>existing local and national action plans, development plans</b> and support programmes for advancing the right to adequate housing for older persons?	<b>Part 4</b> <i>Section 4.3</i>
Q4: What <b>challenges, barriers and forms of discrimination</b> are faced by older persons in fulfilling their right to adequate housing?	<b>Part 3</b> <i>Sections 3.3-3.4</i>
Q5: How do <b>other factors</b> (i.e., gender, sex, race, ethnicity, indigenous identity, disability, sexual orientation, gender identity, religion, social status, place of origin and immigration status) intersect and impact the enjoyment of older persons' right to adequate housing?	<b>Parts 2, 3</b> <i>Sections 2.1, 3.4</i>
Q6: What impact has <b>the COVID-19 pandemic</b> had on older persons' right to adequate housing in your country (e.g., has the pandemic caused any policy shift away from institutions and more emphasis on community supports)? What measures have been taken to minimize its impact?	<b>Part 3</b> <i>Section 3.1-3.2</i>
Q9: How does the <b>State fulfil its obligations</b> to ensure older persons' access justice, and to obtain remedies and reparations, when their right to adequate housing have been violated?	<b>Part 4</b> <i>Section 4.2</i>
Q10: What are the <b>lessons learned</b> from advocacy, legal, and policy actions undertaken to combat ageism and to access of adequate and affordable housing by older persons?	<b>Part 5</b>

### 1.3 Submission Structure

This submission begins by providing key background information in **Part 1**. In **Part 2** we outline the importance of adopting an intersectional approach in addressing the human right to adequate housing generally and in relation to older persons specifically (Q5) and outlining the features of a human rights-based approach to ending homelessness and ensuring adequate housing for older persons. We also here consider climate change action as a cross-cutting priority (Q8).

In **Part 3**, we provide an overview of housing in Australia, and of older persons experiences of housing in the country. We highlight some of the key barriers to the enjoyment of the right to adequate housing, both for older persons generally, and for older women in particular. We highlight especially the situation of older persons living in aged care or those waiting to access publicly funded aged care services (Q4). We also consider the impact of the COVID-19 pandemic on older persons' right to housing and the innovative strategies adopted early in the

pandemic to temporarily seek to end homelessness as a protective measure to stop the spread of the pandemic and protect persons experiencing homelessness (Q6).

In **Part 4**, we examine the protection of the right to adequate housing of older persons at the international level and focus on the protection of the right to adequate housing at a national level in Australia and also at a provincial level, focussing on the state of Victoria in which the Castan Centre is based (Q1, 9, 10). In this part we also consider existing strategies and action plans for ending homelessness and ensuring adequate housing for older persons at a national level and in Victoria (Q2, 7) and the extent to which older persons are involved and participating in the development of these strategies (Q3).

In **Part 5**, we set out our recommendations for Australia to improve law and policy to facilitate the full enjoyment of the right to adequate housing for older persons.

*\*Note that all references to dollar amounts in this submission refer to Australian dollars (AUD).*

## Part 2: An Intersectional, Human Rights-Based and Climate Sensitive Approach

### 2.1 An Intersectional Approach

The enjoyment of adequate housing is impacted by numerous factors including age, sex, disability, culture and personal circumstances. These characteristics, and the intersections thereof, can affect access to and affordability of housing, and can also impact upon what is required of housing in order to appropriately meet the needs of its occupants (i.e. location, physical accessibility etc.).

Intersecting characteristics and experiences of vulnerability have been clearly linked to some of Australia's most concerning housing issues, such as widespread homelessness.

Persons at risk of, and experiencing, homelessness are 'among Australia's most socially and economically disadvantaged'.<sup>9</sup> The drivers of homelessness are primarily structural, and include factors such as low income, insufficient social support, as well as unaffordable and inadequate housing.<sup>10</sup> Structural drivers of homelessness are also gendered. For example, older women are at greater risk of homelessness due to financial insecurity arising from lower lifetime wages (impacted by the gender pay gap, often working part-time in order to facilitate providing unpaid and informal care to relatives and friends, and accruing less superannuation over the course of their life, as compared to men).<sup>11</sup> Personal factors can also contribute to, and exacerbate homelessness, including mental illness or physical illness, disability, family violence and other trauma, substance misuse, low education and unemployment or underemployment.<sup>12</sup>

A number of groups in Australia are disproportionately impacted by homelessness.<sup>13</sup> These include older persons, women, children and youth, persons with disabilities and lived experience of mental illness, persons with substance abuse issues, First Nations peoples, as well as migrants, refugees and asylum seekers.<sup>14</sup> These groups can often experience discrimination on the basis of their inherent characteristics (and the intersection of these characteristics), which excludes or limits their access to adequate housing, healthcare,

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<sup>9</sup> 'Homelessness and Homelessness Services', *Australian Government, Australian Institute of Health and Welfare* ('AIHW') (Web Report, 11 December 2020) <<https://www.aihw.gov.au/reports/australias-welfare/homelessness-and-homelessness-services>> ('AIHW, *Homelessness and Homelessness Services*').

<sup>10</sup> Ibid.

<sup>11</sup> See eg, Housing for the Aged Action Group ('HAAG'), *At Risk: 405,000 Older Women Risk Homelessness without Urgent Policy Reform* (Report, August 2020) 3 <[https://www.older tenants.org.au/sites/default/files/at\\_risk\\_policy\\_snapshot\\_and\\_key\\_findings\\_web.pdf](https://www.older tenants.org.au/sites/default/files/at_risk_policy_snapshot_and_key_findings_web.pdf)> ('*Older Women at Risk of Homelessness*'); Kate Raynor, 'Protecting Older Australian Women from Homelessness', *University of Melbourne Pursuit* (Blog 15 September 2015) <<https://pursuit.unimelb.edu.au/articles/protecting-older-australian-women-from-homelessness>>; 'Housing in Australia is in Desperate Need of a Gender Lens', *YWCA Australia* (Web Page) <<https://www.ywca.org.au/news/housing-in-australia-is-in-desperate-need-of-a-gender-lens/>>.

<sup>12</sup> AIHW, 'Homelessness and Homelessness Services' (n 9).

<sup>13</sup> Australian Human Rights Commission ('AHRC'), *Homelessness is a Human Rights Issue* (Report, 2008) 3-7.

<sup>14</sup> Ibid. See also 'Alcohol, Tobacco and Other Drugs in Australia', *Australian Government, Australian Institute for Health and Welfare* (Web Report, 15 December 2021) <<https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/contents/priority-populations/homeless-people>>.

education and employment, and thereby heightens their risk and experience of homelessness.<sup>15</sup>

Understanding the nature and impact of these intersectional factors is crucial to determining and addressing the systemic and structural inequalities that can give rise to and prolong housing issues such as homelessness.<sup>16</sup>

**This submission will focus on both issues that impact older persons generally, as well as the intersection of age and gender in particular, examining barriers to the enjoyment of the right to adequate housing by older women in Australia** (see Part 3.4). In doing so, we note that certain groups of women, including older First Nations women and older trans women are likely to face particularly acute barriers to accessing housing and homelessness supports, including crisis accommodation for domestic violence which may be focussed on cisgender women.

## 2.2 A Human Rights-Based Approach

A human rights-based approach to ending homelessness is 'based on respect for the fundamental dignity and humanity of all people' and is framed 'in terms of justice and rights'.<sup>17</sup> While there is no universal definition of a human rights-based approach, such approaches tend to have the following common elements: the participation of rights-holders in decision-making processes; clear links to human rights; accountability for duty-bearers with respect to human rights; respect for principles of equality and non-discrimination of rights-holders; the empowerment of rights-holders to understand and enjoy their human rights, and participate in decision-making; the formulation of laws, policies, and practices that impact upon them; and transparency for all stakeholders involved.<sup>18</sup>

A key aspect of a human rights-based approach in this context is that it re-frames persons experiencing homelessness as rights-holders. This moves beyond seeing persons experiencing homelessness as mere victims; transforming them into autonomous human rights-bearers, empowered to see that their right to housing be realised. So understood, human rights-based approach seek to 'promote, protect and fulfil human rights' in practice and enable the integration of international human rights norms, standards, and principles into the development of law, policy, and practice at a domestic level.<sup>19</sup> Importantly, human rights-

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<sup>15</sup> Philip Lynch, 'Homelessness, Poverty and Discrimination: Improving Public Health by Realising Human Rights' (2005) 10(1) *Deakin Law Review* 233, 240.

<sup>16</sup> Committee on Economic Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20 (2 July 2009) paras 17, 27. See also, Leilani Farha, *Guidelines for the Implementation of the Right to Adequate Housing*, UN Doc A/HRC/43/43 (26 December 2019) paras 43-48, especially para 44 ('*Guidelines on the Right to Adequate Housing*').

<sup>17</sup> Bell and Allain (n 8) 1-27, 26.

<sup>18</sup> See, Swedish International Development Agency ('SIDA'), 'Human Rights Based Approach' (Web Page) <<https://www.sida.se/en/for-partners/methods-materials/human-rights-based-approach>>; AHRC, 'Human Rights Based Approaches' (Web Page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-based-approaches>>; Scottish Human Rights Based Approach', *Scottish Human Rights Commission* (Web Page) <<https://www.scottishhumanrights.com/projects-and-programmes/human-rights-based-approach/>>.

<sup>19</sup> See SIDA (n 18).



based approaches recognise that ‘unequal power relations and social exclusion deny people their human rights’ and seek to directly overcome this imbalance.<sup>20</sup> Further, human rights-based approaches prioritise consideration of, and meaningful engagement with, disadvantaged and vulnerable groups and is therefore interwoven with an intersectional approach.<sup>21</sup>

### 2.3 A Climate Sensitive Approach

The lives, health, and dignity of persons is inextricably linked to the conditions of their physical environment.<sup>22</sup> Climate change is already affecting our physical environment, including ‘temperatures and the weather, the quality of air, food and water’ and our interactions with animals and pathogens, all of which are ‘fundamental factors for human flourishing’.<sup>23</sup>

Australia is already experiencing the impacts of climate change, and it is estimated that Australia's future climate will be typified by more intense and heavy rainfall, longer fire seasons and more dangerous fire weather, and warmer average temperatures with more heatwaves and fewer cool days.<sup>24</sup> Two recent events can powerfully illustrate the impact of climate change on Australians' lives, including access to safe and adequate housing. The 2019-20 bushfire season (known colloquially as ‘Black Summer’) attracted then unprecedented worldwide attention as the world watched devastating bushfires across the eastern coast of Australia. Black Summer claimed the lives of 33 people, with many more succumbing to smoke inhalation.<sup>25</sup> Over 3,000 homes were destroyed, and more than 23 million hectares of land was burned.<sup>26</sup> The current floods across much of eastern coast of Australia are also described as being unprecedented. These events have been described (somewhat misleadingly) as a one-in-1,000 year event.<sup>27</sup> An early assessment of the destruction caused by the inundation estimates that over 2,000 homes in the Northern Rivers region of New South Wales will be uninhabitable, exacerbating an already serious housing crisis in the area.<sup>28</sup> Thousands of people have been displaced as a result of these floods, with many sleeping in their cars, caravans, tents, evacuation centres, and friends’ houses because their homes are not habitable.<sup>29</sup> The full impact of this flooding is as yet unknown, as the rainfall and flooding continues.

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<sup>20</sup> See SIDA (n 18).

<sup>21</sup> See SIDA (n 18).

<sup>22</sup> Andrea L Phelan, ‘The Environment, a Changing Climate and Planetary Health’ in Lawrence O Gostin and Benjamin Mason Meier (eds), *Foundations of Global Health & Human Rights* (Oxford University Press, 2020) 417, 417.

<sup>23</sup> Ibid 417.

<sup>24</sup> CSIRO and Australian Bureau of Meteorology, *State of the Climate 2020* (Report, 2020) 2, 22.

<sup>25</sup> *Royal Commission into National Disaster Arrangements* (Final Report, 28 October 2020) 5.

<sup>26</sup> Ibid.

<sup>27</sup> Adam Morton and Graham Redfeam, ‘Are Eastern Australia’s Catastrophic Floods really a One-in-1,000 Year Event?’, *The Guardian Australia* (online, 4 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/04/are-eastern-australias-catastrophic-floods-really-a-one-in-1000-year-event>>.

<sup>28</sup> Conal Hannah and Michael McGowan, ‘More than 2,000 Premises Deemed Uninhabitable in NSW Region Already Beset by “Beyond Dire” Housing Crisis’, *The Guardian Australia* (online, 7 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/07/beyond-dire-how-the-queensland-and-nsw-floods-are-worsening-the-rental-crisis>>.

<sup>29</sup> Natassia Chrysanthos, ‘Housing Crisis Worsens as Locals Turn to Cars, Floors to Sleep’, *The Age* (online, 13 March 2022) <<https://www.theage.com.au/national/nsw/housing-crisis-worsens-as-locals-turn-to-cars-floors-to-sleep-20220311-p5a3um.html>>.

Older persons are particularly at risk of the impacts of climate change, including heat stress, and it is well-documented that deaths of older persons rise during extreme heat events.<sup>30</sup> As it is expected that approximately 23 percent of the Australian population will be older than 60-years by 2050, older persons will disproportionately bear the impacts of an increase in extreme heat events as a result of climate change.<sup>31</sup> Persons experiencing homelessness, particularly street homelessness, are also heavily impacted by events such as extreme cold, rain, and flooding events, which can limit the availability of dry and warm spaces, and can increase the risk of illness.<sup>32</sup> For older persons experiencing homelessness, these impacts are further compounded.

The intersection of climate change and the right to adequate housing has attracted significant attention, including on the role that a human rights-based approach can both address and ensure access to adequate housing and see mitigation against climate change.<sup>33</sup> The current Special Rapporteur on the right to adequate housing, Balakrishnan Rajagopal, has identified climate change as '[p]erhaps the most important challenge at a global level for the right to housing' and has urged the adoption of climate-resilient housing as a priority.<sup>34</sup> The United Nations (UN) Human Rights Council has also called upon States 'to take the right to adequate housing into account in strategies for adaption to and mitigation of climate change' and 'to work with affected communities and individuals to develop and promote environmentally sustainable and sound housing design, construction and maintenance to address the effects of climate change while ensuring the right to adequate housing'.<sup>35</sup> In her *Guidelines for the Implementation of the Right to Adequate Housing*, the former Special Rapporteur on the right to housing, Leilani Farha, emphasised the impact of climate change on the right to housing and called upon the integration of adequate housing strategies and climate change mitigation and adaptation strategies.<sup>36</sup>

We therefore seek to incorporate a climate change-sensitive approach in our work at the Castan Centre and in this submission are mindful of the need to consider the interrelated and interconnected challenges of climate change and adequate housing at the forefront of human rights-based approaches to ending homelessness and ensuring adequate housing.

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<sup>30</sup> Claudia Baldwin, Jason Byrne and Tony Matthews, 'How Do We Save Ageing Australians from the Heat? Greening Our Cities is a Good Start', *The Conversation* (online, 1 March 2019) <<https://theconversation.com/how-do-we-save-ageing-australians-from-the-heat-greening-our-cities-is-a-good-start-112613>>.

<sup>31</sup> Ibid.

<sup>32</sup> Claire Lindsay, 'More Natural Disasters Are Affecting Rough Sleepers in the City and Regions', *ABC News* (online, 17 April 2021) <<https://www.abc.net.au/news/2021-04-17/homeless-rough-sleeping-in-disaster-zones/100069526>>.

<sup>33</sup> See, Raquel Rolnik, *Report of the Special Rapporteur on the Right to Adequate Housing*, UN Doc A/64/ 255 (6 August 2009).

<sup>34</sup> Balakrishnan Rajagopal, *Report of the Special Rapporteur on the Right to Adequate Housing*, UN Doc A/HRC/47/43 (12 July 2021) paras 69-70.

<sup>35</sup> *Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context*, HRC Res 43/14, UN Doc A/HRC/RES/43/14 (6 July 2020, adopted 19 June 2020) paras 1(d), (e). See also, *Human Rights and Climate Change*, HRC Res 41/21, UN Doc A/HRC/RES/41/21 (23 July 2019).

<sup>36</sup> Farha, *Guidelines on the Right to Adequate Housing* (n 16) paras 70-72 (Guideline No 13).

## Part 3: Housing and Older Persons in Australia

### 3.1 Overview of Housing in Australia

Housing in Australia is conceptualised more as a commodity than a right,<sup>37</sup> and is centred largely around the private market, with some public housing available for certain eligible persons.<sup>38</sup> While the results of the latest national census, which took place on the 10 August 2021, are yet to be released,<sup>39</sup> data from the 2016 census indicates that around 67 percent of Australians are homeowners, and 32 percent are renters from either private landlords (27 percent) or public landlords (4.5 percent).<sup>40</sup> Over 116,000 persons were estimated to be experiencing homelessness, 20 percent of whom were Aboriginal and Torres Strait Islanders.<sup>41</sup>

As the UN recognised as early as 2006, Australia is in the midst of a 'serious national housing crisis'.<sup>42</sup> Australia is among the most expensive housing markets in the world, with significant increases in housing prices since the early 2000s, particularly in major cities such as Sydney and Melbourne.<sup>43</sup> Increasingly unaffordable house prices have given rise to widespread 'housing stress', a term which refers to situations where individuals spend a significant portion of their income on housing costs (30 percent), leaving less income for basic necessities.<sup>44</sup> Between 2017-2018, 11.5 percent of households spent between 30-50 percent of their income on housing costs, while another 5.5 percent spent 50 percent of their income or more on housing costs.<sup>45</sup>

In addition, the public housing system in Australia is 'under great pressure and facing multiple challenges' including insufficient dwellings, demand exceeding supply, and long public housing waitlists.<sup>46</sup> Across Australia, government investment in public housing dwellings decreased by 11 percent between 2006-2019, resulting in the sale of public housing, and the transfer of public housing stock to community housing providers (non-profits supported by the government to run such housing).<sup>47</sup> This did not match demand for public housing, which sustained high levels across the same period.<sup>48</sup>

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<sup>37</sup> Russell Solomon, *Australia's Engagement with Economic and Social Rights* (Springer, 2021) 114.

<sup>38</sup> Ibid.

<sup>39</sup> '2021 Census data release timeline', *Australian Bureau of Statistics* (Web Page) <<https://www.abs.gov.au/census/2021-data-releases>>.

<sup>40</sup> 'Home Ownership and Housing Tenure', *Australian Government, Australian Institute of Health and Welfare* (Snapshot, 30 June 2021) <<https://www.aihw.gov.au/reports/australias-welfare/home-ownership-and-housing-tenure>>.

<sup>41</sup> AIHW, 'Homelessness and Homelessness Services' (n 9).

<sup>42</sup> Miloon Kothari, Special Rapporteur, *Preliminary Observations: Mission to Australia 31 July – 15 August 2006* (15 August 2006) 5 ('Kothari 2006'); Miloon Kothari, Special Rapporteur, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (11 May 2007) 13 ('Kothari 2007').

<sup>43</sup> Solomon (n 37) 121.

<sup>44</sup> Solomon (n 37) 123.

<sup>45</sup> 'Housing Affordability', *Australian Government, Australian Institute of Health and Welfare* (Snapshot, 30 June 2021) <<https://www.aihw.gov.au/reports/australias-welfare/housing-affordability>>.

<sup>46</sup> Debbie Faulkner et al, *Ageing Well in Public Housing* (Report, November 2021) 1-2, 9-10.

<sup>47</sup> Ibid 9-10.

<sup>48</sup> Ibid 8-10.

Furthermore, homelessness in Australia is an issue that is both 'persistent and pervasive'.<sup>49</sup> Persons at risk of, or experiencing homelessness, are 'among Australia's most socially and economically disadvantaged'.<sup>50</sup> Homelessness in Australia 'takes many forms, and affects individuals in varying and complex ways', from sleeping without a roof over one's head (termed 'rough sleeping'), to persons living without a permanent place of residence, to persons living in overcrowded, unsafe or otherwise inadequate housing.<sup>51</sup>

## Background to Housing Policy in Australia

Australia's system of government is based around a federation in which power is shared between the federal government (also known as the Commonwealth) and eight provincial governments (six state and two territory governments). The legal and policy framework on housing in Australia is 'complicated by the shared jurisdiction between national and state governments'.<sup>52</sup> While the federal government provides some funding for housing and homelessness services (see Part 4.3), it is state and territory governments that are primarily responsible for regulating housing and homelessness and ensuring the provision of relevant support services – including social housing.<sup>53</sup>

States and territories typically establish government agencies to oversee and implement housing and homelessness policy. For example, in the state of Victoria, general information about housing and assistance is managed by HousingVic,<sup>54</sup> and public housing is managed by Homes Victoria,<sup>55</sup> both of which are agencies of the Victorian Government Department of Families, Fairness and Housing.<sup>56</sup> Other agencies, such as the Victorian Government Department of Health (**Vic DOH**) also provide services related to health and housing.<sup>57</sup>

## Impact of the COVID-19 Pandemic on Housing

The onset of the COVID-19 pandemic triggered renewed focus on housing policy, with increased federal and state level policy initiatives to protect the housing market and support persons experiencing vulnerability. Measures largely varied between jurisdictions, and included increased income support, rental eviction moratoriums, prohibitions on rental increases, frameworks to negotiate rental reductions, temporary accommodation of rough sleepers, and measures to transition into longer term housing.<sup>58</sup> There were however limited

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<sup>49</sup> Bell and Allain (n 8) 1.

<sup>50</sup> AIHW, 'Homelessness and Homelessness Services' (n 9).

<sup>51</sup> Kevin Bell, 'Homelessness as a Human Rights Issue', *Monash University* (Editorial, 2020) <<https://www.monash.edu/research/better-governance-and-policy/policy-insights/housing-and-homelessness/homelessness-as-a-human-rights-issue>>.

<sup>52</sup> Solomon (n 37) 100.

<sup>53</sup> In Australia, 'social housing' encompasses two forms of housing: public housing (government funded and operated) and community housing (government subsidised and operated by community organisations).

<sup>54</sup> 'About HousingVic', *HousingVic* (Web Page) <<https://www.housing.vic.gov.au/about-housingvic>>.

<sup>55</sup> 'Housing Support', *Homes Victoria* (Web Page) <<https://www.vic.gov.au/housing-support>>.

<sup>56</sup> 'Housing and Homelessness', *Victorian Government Department of Families, Fairness and Housing* (Web Page) <<https://www.dffh.vic.gov.au/housing-and-homelessness>>.

<sup>57</sup> 'Ageing and Aged Care', *Victorian Government Department of Health* (Web Page) <<https://www.health.vic.gov.au/ageing-and-aged-care>>.

<sup>58</sup> See eg Hal Pawson, 'Chapter 5: COVID-19 Effects on Housing and Homelessness: The Story to Mid-2021' in Australian Institute for Health and Welfare, *Australia's Welfare 2021: Data Insights* (Report, 16 September 2021) <[https://www.aihw.gov.au/getmedia/d468c175-2b22-40c3-abfd-d6b81dc446a5/aihw-aus-236\\_Chapter-5.pdf.aspx](https://www.aihw.gov.au/getmedia/d468c175-2b22-40c3-abfd-d6b81dc446a5/aihw-aus-236_Chapter-5.pdf.aspx)>;

mechanisms to ensure protections and the prioritisation of adequate housing in the longer term.<sup>59</sup> Issues such as homelessness in Australia are accordingly expected to rise again as the country grapples with the economic impacts of the COVID-19 pandemic.<sup>60</sup>

It should also be noted that persons living in public housing were particularly at risk during the COVID-19 pandemic, in large part due to the severe overcrowding of public housing residences and the difficulties practising physical distancing.<sup>61</sup> Of particular concern was the 'hard lockdown' of public housing residences in inner-city Melbourne, Victoria, which took place in July 2020.<sup>62</sup> The lockdowns saw some 3,000 public housing residents detained in their homes by the Victorian Government, without advance notice and with inadequate explanation of directives to isolate in the interest of preventing 'exponential spread' of the COVID-19 virus.<sup>63</sup> An independent investigation into the incident by the Victorian Ombudsman (**Ombudsman**) found that:

Despite the best efforts of those on the ground, the early days of the lockdown were chaotic: people found themselves without food, medication and other essential supports. Information was confused, incomprehensible, or simply lacking. On the ground few seemed to know who was in charge. No access to fresh air and outdoor exercise was provided for over a week. In a particularly unfortunate act, temporary fencing for an exercise area was erected one night, surrounded by police, and although quickly taken down, reinforced the residents' sense of being imprisoned.<sup>64</sup>

Notwithstanding the above, the Ombudsman concluded that 'the continued limitation of rights...was likely a justified and reasonable response to the ongoing outbreak of COVID-19' though aspects of the implementation were deficient from a human rights perspective.<sup>65</sup>

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Nicholas Biddle, Ben Edwards, Matthew Gray and Kate Sollis, *COVID-19 and Mortgage and Rental Payments: May 2020* (Report, 30 June 2020) 1.

<sup>59</sup> See eg, Luke Henriques-Gomes, 'Stranded: Horror Month for Australian Homeless Services as Omicron Ravages Sector', *The Guardian* (online, 20 January 2022) <<https://www.theguardian.com/australia-news/2022/jan/30/stranded-horror-month-for-australian-homelessness-services-as-omicron-ravages-sector>>; Jewel Topsfield, 'I'd Rather be on the Street': Homeless Face Return to Unsafe Rooming Houses', *The Age* (online, 10 October 2021) <<https://www.theage.com.au/politics/victoria/i-d-rather-be-on-the-street-homeless-face-return-to-unsafe-rooming-houses-20211007-p58y4l.html>>.

<sup>60</sup> David Mackenzie, 'Homeless Numbers Set to Rise Again, but Inquiry Can be a Turning Point if We Get Smarter about Housing People', *The Conversation* (online, 31 March 2021) <<https://theconversation.com/homeless-numbers-set-to-rise-again-but-inquiry-can-be-a-turning-point-if-we-get-smarter-about-housing-people-156945>>; Nathan Morris, Jeremy Story Carter, 'Regional Services Brace for More Homelessness as JobKeeper Welfare Payments Dry Up', *ABC News* (online, 30 March 2021) <<https://www.abc.net.au/news/2021-03-30/regional-homeless-fears-jobkeeper-and-jobseeker-supplement-ends/13279522>>; Chloe Booker, 'Spike in Poverty-Induced Homelessness During Lockdown', *The Age* (online, 16 September 2021) <<https://www.theage.com.au/national/victoria/spike-in-poverty-induced-homelessness-during-lockdown-20210914-p58rfw.html>>.

<sup>61</sup> Caitlin Buckle et al, *Marginal Housing During COVID-19* (Report No 348, December 2020) 1.

<sup>62</sup> Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (Report, December 2020) 4.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 84.



## 3.2 Older Persons in Australia

We recognise that there is no universally accepted definition of ‘older persons’, and that the UN typically uses the term to refer to those aged 60 years and older.<sup>66</sup> We note however that the Australian Government defines ‘older persons’ as those aged 65 years and older.<sup>67</sup> Further, in recognition of the ongoing impacts of colonisation, including social dislocation, economic disadvantage, poorer health and lower life expectancy experienced by First Nations peoples, the Australian Government defines First Nations older persons as those aged 50 and over.<sup>68</sup> This submission uses the term ‘older persons’ in accordance with the definitions adopted by the Australian Government.

Older persons are a significant group within Australia’s population, with an estimated 4.2 million people aged 65 and over in the country as at June 2020 (1 in 6 persons).<sup>69</sup> Australia’s ageing population is rapidly increasing, expected to more than double by 2057.<sup>70</sup> This is due in large part to increasing life expectancy, and sustained low fertility in the country.<sup>71</sup> Importantly, older persons in Australia are not a homogenous group, and have differing socioeconomic, cultural and linguistic backgrounds, life experience and lifestyles,<sup>72</sup> and education and employment.<sup>73</sup> Older persons most commonly live in major cities (66 percent), with others living in inner regional areas (23 percent) and outer regional, remote and very remote areas (11 percent).<sup>74</sup> According to the latest available data, around 2.6 million older Australians are recipients of the Age Pension (62 percent of the population aged 65 and over).<sup>75</sup> The Age Pension is the *main source of income* for an estimated 52 percent of older persons, followed by superannuation, annuity or private pensions (21 percent) and wages or salary (8 percent).<sup>76</sup> The ‘widespread dependence’ on the Age Pension means that the cost

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<sup>66</sup> See eg, ‘Human Rights of Older Persons’, *United Nations Office of the High Commissioner for Human Rights* (Web Page) <<https://www.ohchr.org/EN/Issues/OlderPersons/Pages/OlderPersonsIndex.aspx>>; ‘Older Persons’, *UNHCR* (Web Page) <<https://emergency.unhcr.org/entry/43935/older-persons>>; ‘Ageing’, *World Health Organisation* (Web Page) <<https://www.who.int/health-topics/ageing>>. We note that this may vary between UN agencies.

<sup>67</sup> ‘Older People’, *Australian Government, Australian Institute of Health and Welfare* (Web Page) <<https://www.aihw.gov.au/reports-data/population-groups/older-people/overview>>.

<sup>68</sup> ‘Older Australians: Older Aboriginal and Torres Strait Islander People’, *Australian Government, Australian Institute of Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diverse-groups-of-older-australians/aboriginal-and-torres-strait-islander-people>>.

<sup>69</sup> ‘Older Australians: About’, *Australian Government, Australian Institute for Health and Welfare* (Web Page, 30 November 2021) <<https://www.aihw.gov.au/reports-data/population-groups/older-people/overview>>.

<sup>70</sup> *Ibid.*

<sup>71</sup> ‘Older Australians: Demographic Profile’, *Australian Government, Australian Institute of Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/demographic-profile>>.

<sup>72</sup> ‘Older Australians: Summary’, *Australian Government, Australian Institute for Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/summary>>. See also ‘Older Australians: Culturally and Linguistically Diverse Older People’ (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/feature-articles/culturally-and-linguistically-diverse-older-people>> (‘AIHW, *Older Australians – Summary*’).

<sup>73</sup> *Ibid.*

<sup>74</sup> ‘Older Australians: Older Australians Living in Rural and Remote Communities’, *Australian Institute for Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/feature-articles/older-australians-living-in-rural-and-remote-communities>>.

<sup>75</sup> ‘Age Pension’ *Australian Institute for Health and Welfare* (Web Report, 16 September 2021) <<https://www.aihw.gov.au/reports/australias-welfare/age-pension>>.

<sup>76</sup> ‘Older Australians: Income and Finances’, *Australian Institute for Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/10-income-and-finances>>.

of accommodation for many older persons 'is a key factor determining their ability to live a decent life' – the greater the dependence on the Age Pension, and the greater the proportion of their Age Pension spent on housing, the less that older persons can spend on basic necessities and living costs.<sup>77</sup>

### Impact of the COVID-19 Pandemic on Older Persons

The COVID-19 pandemic disproportionately impacted upon older persons in Australia, with this age group at the highest risk of contracting the disease and developing serious illness as a result.<sup>78</sup> Older persons in aged care facilities were particularly at risk, given the challenges to practising social distancing in shared spaces, between older persons and their carers, and for older persons with cognitive impairments.<sup>79</sup>

Given this heightened risk, COVID-19 spread rapidly through residential aged care facilities on numerous occasions between 2020-2022.<sup>80</sup> The spread was exacerbated by staffing shortages, undelivered staff trainings and inadequate personal protective equipment.<sup>81</sup> Many older residents experienced prolonged 'voluntary lockdowns' by some aged care providers, which saw increased social isolation for older residents, with visitors banned for extended periods.<sup>82</sup> As reported by Human Rights Watch, older persons who found themselves 'unexpectedly alone without control over their circumstances [were] at particular risk for a variety of severe, even life-threatening, physical and mental health conditions, including cognitive decline.'<sup>83</sup> Visitor bans in residential aged care facilities also reportedly resulted in the increasingly poor treatment in residential aged care facilities, including through overmedication of residents.<sup>84</sup> Older persons were also impacted by Melbourne's 'hard' lockdown of public housing (see Part 3.1). According to the Ombudsman's report, older persons were among those detained during the lockdown, with accounts of older public housing residents experiencing long delays in accessing necessary medications and health and social support.<sup>85</sup>

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<sup>77</sup> Alan Morris, 'Housing Tenure and an Ageing Society' in *The Australian Dream: Housing Experiences of Older Australians* (CSIRO Publishing, 2016) 10.

<sup>78</sup> 'Coronavirus (COVID-19) Advice for Older People and Carers', *Australian Government Department of Health* (Web Page) < <https://www.health.gov.au/node/18602/coronavirus-covid-19-advice-for-older-people-and-carers>>.

<sup>79</sup> Joseph E Ibrahim et al, 'Characteristics of Nursing Homes Associated with COVID-19 Outbreaks and Mortality Among Residents in Victoria, Australia' (2021) *Australasian Journal on Ageing* 00:1–10, 2.

<sup>80</sup> See eg Royal Commission into Aged Care Quality and Safety, *Aged Care and COVID-19: A Special Report* (Report, 30 September 2020) 3. Melissa Davey, "COVID has Spread Like Wildfire": 703 Aged Care Homes Across Australia Battle Fresh Outbreaks', *The Guardian* (online, 26 January 2022) < <https://www.theguardian.com/australia-news/2022/jan/26/covid-has-spread-like-wildfire-703-aged-care-homes-across-australia-battle-fresh-outbreaks>>.

<sup>81</sup> Bethany Brown and Nicole Tooby, 'Covid-19's Devastating Impact on Older People in Australia Failing Aged Care Facilities Risk Lives of Residents and Staff', *Human Rights Watch* (online, 6 August 2020) < <https://www.hrw.org/news/2020/08/06/covid-19s-devastating-impact-older-people-australia>>.

<sup>82</sup> Human Rights Watch, Submission to the Australian Royal Commission, *Inquiry into Aged Care Quality and Safety on the Impact of Coronavirus (COVID-19) on the Aged Care Sector* (5 August 2020) < <https://www.hrw.org/news/2020/08/05/submission-australian-royal-commission>>.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Victorian Ombudsman (n 62) 84, 140, 144, 188.

### 3.3 Older Persons and Barriers to the Enjoyment of the Right to Adequate Housing

Housing has been recognised as critical for the physical, mental and emotional health and wellbeing of older Australians.<sup>86</sup> As highlighted by academic Alan Morris, older persons face a 'greater likelihood of ill health, disability, widowhood and living alone', generally have an increased vulnerability to environmental challenges, and often spend an extensive amount of time in their home.<sup>87</sup> Accordingly, adequate housing is vital to older persons' quality of life, and can be a determinative factor in their capacity to live independently, receive appropriate care, and participate in social engagement.<sup>88</sup> Importantly, the appropriateness of housing for older persons can be affected by 'their changing needs, the scope for home modification, the availability and cost of home care, and the availability of suitable alternative accommodation within the local community'.<sup>89</sup>

Older persons in Australia face significant barriers to the enjoyment of the right to adequate housing, including decreasing home ownership, unaffordable rental prices, inadequate and underfunded residential aged care facilities, the shortage of adequate public housing for disadvantaged older persons, and rising homelessness across the country. The following section will examine these key issues, before delving on the particular barriers faced by older women in Australia.

#### Increasing indebtedness of homeowners

While traditionally older persons in Australia have had high rates of home ownership, the number of older persons who own their home outright is decreasing (falling from 96 percent of persons aged 65+ in 2006, to 90 percent of persons in this age group in 2016).<sup>90</sup> According to a report by the Australian Housing and Urban Research Institute (**AHURI**), this indebtedness is driven by severe increases in mortgage debt between 1987 and 2015 (approximate increases of 600 percent), lagging income growth over the same period, and rising house prices.<sup>91</sup> Home ownership can also be detrimentally impacted by marital and relationship breakdowns in older age.<sup>92</sup>

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<sup>86</sup> 'Older Australians: Housing and Living Arrangements', *Australian Government, Australian Institute of Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/housing-and-living-arrangements>>.

<sup>87</sup> Morris (n 77) 8-9.

<sup>88</sup> Australian Government Productivity Commission, *Housing Decisions of Older Australians* (Report, December 2015) 3-4 <<https://www.pc.gov.au/research/completed/housing-decisions-older-australians/housing-decisions-older-australians.pdf>>.

<sup>89</sup> Ibid 6.

<sup>90</sup> It should be noted that figures for soon to be older persons (those aged 55-65) are also concerning – falling from 80% of this age group being mortgage free in 2006, to only 56% of this age group being mortgage free in 2016. See Rachel Ong ViforJ, Gavin Wood, Melek Cigdem-Bayram and Silvia Salazar, 'Fall in Ageing Australians' Home-ownership Rates Looms as Seismic Shock for Housing Policy', *The Conversation* (online, 27 August 2019) <<https://theconversation.com/fall-in-ageing-australians-home-ownership-rates-looms-as-seismic-shock-for-housing-policy-120651>>.

<sup>91</sup> Rachel Ong, Gavin Wood, Melek Cigdem and Silvia Salazar, Australian Housing and Urban Research Institute, *Mortgage Stress and Precarious Home Ownership: Implications for Older Australians* (Report, August 2019) 105 ('*Mortgage Stress and Home Ownership for Older Australians*'). See also Aged and Community Services Australia, *Housing for Older Australians* (Discussion Paper, June 2020) 8-9.

<sup>92</sup> Ibid 8, 108.



This is problematic because home ownership has been described as ‘the fourth pillar supporting Australia’s retirement income policies’, due to its ability to reduce the risk of housing cost poverty in older age.<sup>93</sup> As described by academics Judith Yates and Bruce Bradbury, ‘older households who miss out on home ownership are multiply disadvantaged in that they also have lower non-housing wealth, lower disposable incomes and higher housing costs in retirement’.<sup>94</sup> Some studies also suggest that the high levels of mortgage indebtedness for older persons are increasing the practice of older persons utilising their superannuation to pay off mortgage debt, adding further pressure on the Age Pension system.<sup>95</sup>

### Increased Reliance on Renting and Rising Rent Unaffordability

Older persons are now often turning to renting, ‘out of necessity rather than choice’.<sup>96</sup> This can be particularly challenging due to unaffordable private rental prices, risks of, or experience of unemployment, and limited income support through the Age Pension.<sup>97</sup> Single older persons are more likely to privately rent than older couples.<sup>98</sup> According to non-profit Anglicare Australia’s *Rental Affordability Snapshot 2021*, less than 1 percent of private rental properties are affordable for single persons on the Age Pension, and less than 2 percent for couples on the Age Pension.<sup>99</sup>

High housing costs and lack of security of accommodation can lead to social exclusion of older persons by limiting their ability to ‘participate in key aspects of human activity’ such as consumption, social interaction and social connection.<sup>100</sup> Social exclusion can contribute to poor physical and mental health and can become further entrenched over time where issues like depleted savings, fear of rental price increases and general housing insecurity occur.<sup>101</sup>

### Inadequate Residential Aged Care facilities

As discussed above, many older persons live in residential aged care facilities. The Australian residential aged care system has been the subject of significant inquiries over a number of years, with the most recent inquiry—the Royal Commission into Aged Care Quality and Safety—reporting to the Government in 2021.<sup>102</sup>

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<sup>93</sup> Ibid. See also Judith Yates and Bruce Bradbury, ‘Home Ownership as a (Crumbling) Fourth Pillar of Social Insurance in Australia’ (2010) 25 *Journal of Housing and the Built Environment* 193, 194.

<sup>94</sup> Yates and Bradbury (n 93) 194.

<sup>95</sup> Ong, Wood, Cigdem and Salazar, *Mortgage Stress and Home Ownership for Older Australians* (n 91) 52.

<sup>96</sup> ‘Older Australians: Housing and Living Arrangements’, *Australian Government, Australian Institute of Health and Welfare* (Web Report, 30 November 2021) <<https://www.aihw.gov.au/reports/older-people/older-australians/contents/housing-and-living-arrangements>> (‘AIHW, *Housing and Living Arrangements*’).

<sup>97</sup> ‘Specialist Homelessness Services: Older Clients’, *Australian Government, Australian Institute of Health and Welfare* (Web Report, 7 December 2021) <<https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-annual-report/contents/older-clients>> (‘AIHW, *Homelessness Services – Older Clients*’). See also Amity James, Sharon Parkinson, Steven Rowley and Wendy Stone, ‘What Sort of Housing Do Older Australians Want and Where Do They Want to Live?’, *The Conversation* (online, 7 August 2019) <<https://theconversation.com/what-sort-of-housing-do-older-australians-want-and-where-do-they-want-to-live-120987>>.

<sup>98</sup> AIHW, *Older Australians: Housing and Living Arrangements* (n 96) 12-13.

<sup>99</sup> Anglicare Australia, *Rental Affordability Snapshot* (Report, April 2021) 7, 11.

<sup>100</sup> Morris (n 77) 12-3.

<sup>101</sup> Ibid.

<sup>102</sup> AIHW, *Older Australians: Housing and Living Arrangements* (n 96)

The aged care system was described by the Chair of the Royal Commission as being typified by ‘systemic problems’ and ‘unacceptable outcomes’, including underfunding.<sup>103</sup> The quality of aged care is regulated in principle by the *Aged Care Act 1997* (Cth) (***Aged Care Act***) an object of which is ‘to facilitate access to aged care services by those who need them, regardless of race, culture, language, gender, economic circumstance or geographic location’.<sup>104</sup> In allocating aged care services, the *Aged Care Act* specifies a number of persons as having ‘special needs’ in accessing aged care, including ‘people who are homeless or are at risk of becoming homeless’ and First Nations people.<sup>105</sup> The Royal Commission identified that ‘the current system is largely failing those Australians who are identified by the current legislation itself as having “special needs” ... People experiencing homelessness, and those at risk of homelessness, are ... poorly served by the current arrangements - mainly because of a lack of integration between aged care and other support services’.<sup>106</sup>

The relationship between homelessness and aged care services is particularly acute in relation to First Nations people who may not have access to culturally sensitive aged care options,<sup>107</sup> and younger people with disabilities who are not able to obtain funding for residential support services on the National Disability Insurance Scheme and hence are forced to turn to aged care or else face homelessness where social housing is insufficient to respond to their needs.<sup>108</sup> Contributing to these issues, and making understanding of the full scope of the problem more difficult, is the limited availability of data on older persons experiencing homelessness or at risk of homelessness and their interaction with the aged care system.<sup>109</sup>

### Challenges in public housing

Older persons make up a significant proportion of public housing tenants, with over 150,000 older persons living in public and community housing in 2021.<sup>110</sup> Older persons may have been public housing tenants for a number of years or decades, while others ‘have entered public housing following difficult and challenging personal circumstances’ such as separation, divorce, domestic or family violence and elder abuse.<sup>111</sup>

This number of older persons in public housing is expected to more than double in the coming decades,<sup>112</sup> due in large part to the rapidly ageing population, the rise in older persons living in poverty, the lack of affordable housing options in the housing market, the inappropriateness and unaffordability of the rental market, and the increased risk of homelessness for this cohort.<sup>113</sup>

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<sup>103</sup> *Royal Commission into Aged Care Quality and Safety* (Final Report, 2021) vol 1, 7 (*‘Aged Care Royal Commission Final Report’*).

<sup>104</sup> *Aged Care Act 1997* (Cth) s 2.1(1)(e).

<sup>105</sup> *Ibid* s 11.3.

<sup>106</sup> *Aged Care Royal Commission Final Report* (n 103) vol 1, 9; 71.

<sup>107</sup> *Ibid* vol 1, 67.

<sup>108</sup> *Ibid* vol 1, 123.

<sup>109</sup> *Ibid* vol 2, 224.

<sup>110</sup> AIHW, *Older Australians: Housing and Living Arrangements* (n 96).

<sup>111</sup> Debbie Faulkner et al, *Ageing Well in Public Housing* (Report, November 2021) 55.

<sup>112</sup> *Ibid* 10.

<sup>113</sup> *Ibid* 8-9

While experiences of older persons with public housing tenancies vary, some older persons have reported that living in public housing ‘has been detrimental to their quality of life’, citing issues such as fears that they would be required to move, fears around their personal safety in their respective neighbourhoods, and liveability issues with the design, size and modifications to the home.<sup>114</sup> Older persons living in public housing also face challenges modifying housing to ensure ageing and/or disability access.<sup>115</sup> Issues of concern identified by older tenants include the physical features of housing such as stairs, split level dwellings, and steep properties; administrative requirements for housing modifications such as proof of medical need for adjustments; and lack of responsiveness or long delays for maintenance requests.<sup>116</sup> Older public housing tenants have also reported experiencing stigmatisation associated with living in public housing.<sup>117</sup>

### Rising Homelessness

In Australia, the number of persons experiencing homelessness aged 55-years and over has increased over the course of the last three reported censuses (from 2011-16) by 28%.<sup>118</sup> This increase has been driven by a number of factors, including lower rates of home ownership, inflated rent prices, greater levels of mortgage debt, inadequate social housing, and insufficient social support for retirees. At census night in 2016, 18,600 people aged 55 and over were experiencing homelessness, and a further 13,600 older people were living in ‘marginal housing’ (i.e. caravan parks, overcrowded housing, improvised dwellings).<sup>119</sup>

Homelessness has been identified as a ‘growing problem for older Australians’, with certain groups at particularly high risk, including First Nations older persons, older persons from culturally and linguistically diverse backgrounds, veterans and older women.<sup>120</sup> The main factors that give rise to homelessness for older persons include housing unaffordability, housing crisis (i.e. evictions), inadequate housing conditions, financial difficulties, critical life events (i.e. relationship breakdowns)<sup>121</sup> and family and domestic violence.<sup>122</sup>

### 3.4 Older Women and Barriers to the Enjoyment of the Right to Adequate Housing

In this section we consider three barriers to achieving adequate housing for older women. These are: systemic inequalities in women’s superannuation and the effects of the gender pay gap, older women’s’ experience of domestic violence, and the heightened risk of homelessness for older women.

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<sup>114</sup> Ibid 3-4

<sup>115</sup> Ibid 38.

<sup>116</sup> Ibid 37-43

<sup>117</sup> Ibid 53.

<sup>118</sup> ABS, *Census of Population and Housing: Estimating Homelessness - 2016* (Web Page, 14 March 2018) <<https://www.abs.gov.au/statistics/people/housing/census-population-and-housing-estimating-homelessness/latest-release>>. The most recent census data from 2021 is yet to be published.

<sup>119</sup> AIHW, *Older Australians: Housing and Living Arrangements* (n 96).

<sup>120</sup> Ibid.

<sup>121</sup> AIHW, *Homelessness Services: Older Clients* (n 97).

<sup>122</sup> AIHW, *Older Australians: Housing and Living Arrangements* (n 96).

## Systemic drivers of housing insecurity

Older women are particularly at risk of housing insecurity due to factors including lower lifetime incomes and less accumulated superannuation due to age and sex discrimination,<sup>123</sup> longer periods outside of paid employment (i.e. taking on informal care responsibilities), experiencing relationship breakdown, being single or living alone;<sup>124</sup> experiencing family or domestic violence; the loss or absence of family and social supports; mental and physical health issues, and loss of employment.<sup>125</sup> These issues are further exacerbated by rental unaffordability. As mentioned above, in its 2021 Rental Affordability Snapshot, the charity organisation Anglicare found that of the more than 74,000 rental listings across Australia only 0.5 percent of properties were affordable for individuals of retirement age in receipt of the Age Pension or for individuals living on the Disability Support Pension.<sup>126</sup>

## Less accrued superannuation

Australia's retirement system seeks 'to provide an adequate income to all retirees' from three income 'pillars'. These are: (1) the publicly funded, means-tested Age Pension; (2) mandatory superannuation; and (3) voluntary savings.<sup>127</sup> The following section will focus on the second of these pillars.

Australia has a compulsory superannuation system in which part of a person's income is put aside for their future retirement. The Superannuation Guarantee (implemented in 1992, covering 73% of workers) requires employers to make prescribed contributions on behalf of their employees to a complying superannuation fund.<sup>128</sup> Contributions started out at 3 percent, increasing to 9 per cent in the period 1992-2002,<sup>129</sup> and are currently set at 10 percent of income after an employee earns more than \$450 a month. For those who do not meet the income, assets and other means-testing thresholds for the Aged Pension, superannuation may be the only income that an individual has during their retirement.

Many older Australian women would not have benefited from compulsory superannuation at the beginning of their working lives, and when compounded by the lower rates of pay than their male counterparts and the likelihood that they would have taken time out of the paid

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<sup>123</sup> Mercy Foundation, *Older Women and Homelessness* (Web Page) <<https://www.mercyfoundation.com.au/our-focus/ending-homelessness/older-women-and-homelessness/>>.

<sup>124</sup> See, Institute for Social Science Research, *Older Women's Pathways Out of Homelessness in Australia* (Report, October 2013).

<sup>125</sup> 'Older Persons: Australia's Third UPR, 2021', *Australian Human Rights Commission* (Web Factsheet, 2021) <[https://humanrights.gov.au/sites/default/files/2020-10/older\\_persons\\_-\\_australias\\_third\\_upr\\_2021.pdf](https://humanrights.gov.au/sites/default/files/2020-10/older_persons_-_australias_third_upr_2021.pdf)>; AIHW, *Homelessness Services: Older Clients* (n 97).

<sup>126</sup> Anglicare Australia, *Rental Affordability Snapshot* (Report, April 2021) 8.

<sup>127</sup> Australian Government Workplace Gender Equality Agency, *Women's Economic Security in Retirement* (Research Paper, 2017) 3.

<sup>128</sup> Amy Chen-Yu Wang, 'Australia's Superannuation System Explained', *SBS News* (online, 18 June 2021) <<https://www.sbs.com.au/language/english/australia-s-superannuation-system-explained>>; Australian Taxation Office, 'Super Guarantee Percentage', *Key Superannuation Rates and Thresholds* (Web Page) <<https://www.ato.gov.au/rates/key-superannuation-rates-and-thresholds/?anchor=Superguaranteepercentage#Superguaranteepercentage>>.

<sup>129</sup> Leslie Nielson and Barbara Harris, 'Chronology of Superannuation and Retirement Income in Australia', *Australian Parliamentary Library* (Web Page, 1 June 2010) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0910/ChronSuperannuation](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/ChronSuperannuation)> .

workforce to fulfil unpaid labour roles including caring for children or older parents, the financial position of older women is often precarious.<sup>130</sup> It is estimated that, on average, ‘women retire with around half the superannuation of men’.<sup>131</sup> Additionally, the superannuation system does not take into account the unpaid labour that falls disproportionately upon women throughout their lives and which often requires them to move in and out of the workforce, or to alter the amount of paid labour they perform.<sup>132</sup> So understood, the ‘superannuation system was not designed with women in mind’ and therefore requires re-design to account for the realities facing women.<sup>133</sup> Women who retire without sufficient funds in their superannuation savings ‘fall back on ... staying with friends or family, living in their care or couch surfing in crowded homes’.<sup>134</sup>

The COVID-19 pandemic has had a ‘disproportionate impact’ on women’s financial security. Women are over-represented in service roles which were shut down for lengthy periods of time during the pandemic, particularly in Victoria.<sup>135</sup> Some women were removed from the workforce entirely during this period and became reliant on another income earner in their household or on government support payments introduced in response to the pandemic.<sup>136</sup>

In response to the economic impacts of the COVID-19 pandemic, the Australian Government introduced the Superannuation Early Access Scheme which allowed individuals to withdraw a maximum of \$20,000 from their superannuation.<sup>137</sup> Per Capita’s research shows that, based on current average superannuation balances, women who withdrew the maximum \$20,000 from their superannuation accounts would reduce the balance ‘by roughly 50% more than men’s’, resulting in even greater inequalities in retirement nest eggs due to the multiplier effect of the loss of that compound interest’.<sup>138</sup> It is therefore possible that without significant structural changes to the superannuation system, the financial precarity of older women in retirement will continue to increase their experience and risk of homelessness.

## Experiences of Domestic Violence

Family and domestic violence is a key driver of homelessness amongst older women.<sup>139</sup> In its report into homelessness in Australia, the House of Representatives Standing Committee on Social Policy and Legal Affairs identified domestic violence ‘as both a cause of homelessness, [as well as] creating a particularly vulnerable group of people at risk of or experiencing homelessness’ and as ‘the most common driver of housing instability amongst women and

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<sup>130</sup> National Older Women’s Housing and Homelessness Working Group, ‘Retiring into Poverty - A National Plan for Change: Increasing Housing Security for Older Women’ (Report, August 2018) 4.

<sup>131</sup> Ibid 9.

<sup>132</sup> National Older Women’s Housing and Homelessness Working Group, Submission to Australian House of Representatives Committee on Social Policy and Legal Affairs, *Inquiry into Homelessness in Australia* (June 2020) 4.

<sup>133</sup> Ibid.

<sup>134</sup> Leigh Sales, Kirsten Robb and Laura Francis, ‘Lyn Retired with Little Super and Unable to Pay the Rent: Her Story is Not Uncommon’, *ABC News* (online, 30 August 2021) <<https://www.abc.net.au/news/2021-08-30/women-financially-disadvantaged-from-start-superannuation-income/100412948>>.

<sup>135</sup> Per Capita, ‘The “Herstory” of Superannuation’ (Discussion Paper, August 2020) 37-8

<sup>136</sup> Ibid.

<sup>137</sup> Ibid 38.

<sup>138</sup> Ibid.

<sup>139</sup> AHRC, *Older Women’s Risk of Homelessness: Exploring a Growing Problem* (Background Paper, April 2019) 14.

children, and the dominant reason women and children sought housing services assistance'.<sup>140</sup> The Committee emphasised 'the importance of appropriate short- and long-term housing solutions for victim-survivors'.<sup>141</sup> The Victorian Legislative Council Legal and Social Issues Committee further identified family violence as a key driver of homelessness, particularly for older women. Indeed, the Committee found that '[f]amily violence against older people, commonly referred to as elder abuse, is one of the key causes of homelessness for older women. A total of 46.9 percent of women over the age of 55 who access specialist homelessness services reported family violence as their primary reason for seeking support'.<sup>142</sup> In an effort to respond in part to this increasing phenomenon, the Committee recommended that the Victorian Government trial a scheme in which perpetrators of domestic violence were required to leave the home rather than the victim-survivor (as has traditionally been the case).<sup>143</sup>

### Fastest growing group at risk of homelessness

Older persons, and older women in particular, are at risk of homelessness because they face greater financial and housing insecurity as a result of systemic factors, including discrimination on the basis of age and/or sex, a lack of superannuation savings to have a financially secure retirement, and domestic violence.<sup>144</sup>

According to the latest available census data the number of older women aged over 55-years experiencing homelessness in Australia increased by 31% between 2011-2016.<sup>145</sup> For women between the ages of 65-75 there was a 70.8% increase in this same period.<sup>146</sup> It is important to note that these figures do not necessarily reflect the full extent of the issue due to the 'hidden' nature of older women's homelessness (many older women do not self-identify as experiencing homelessness, and may stay with friends and family, and live in improvised or overcrowded dwellings).<sup>147</sup> In 2020 it was estimated that 405,000 women aged over 45 years were at risk of homelessness, including 240,000 women aged 55 years and over.<sup>148</sup>

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<sup>140</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Homelessness in Australia* (Final Report, July 2021) 99.

<sup>141</sup> Ibid 100.

<sup>142</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria* (Parliamentary Paper No 208, March 2021) 56 ('*Inquiry into Homelessness in Victoria*').

<sup>143</sup> Ibid 133-5 (Recommendation 10).

<sup>144</sup> Mercy Foundation (n 123)

<sup>145</sup> Mercy Foundation (n 123); ABS, *Census of Population and Housing: Estimating Homelessness - 2016* (Web Page, 14 March 2018) <<https://www.abs.gov.au/statistics/people/housing/census-population-and-housing-estimating-homelessness/latest-release>>.

<sup>146</sup> Housing for the Aged Action Group, Submission No 130 to Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (January 2020) 5.

<sup>147</sup> Australian Human Rights Commission, *Older Women's Risk of Homelessness* (Background Paper, April 2019) 6 <[https://humanrights.gov.au/sites/default/files/document/publication/ahrc\\_ow\\_homelessness2019.pdf](https://humanrights.gov.au/sites/default/files/document/publication/ahrc_ow_homelessness2019.pdf)>.

<sup>148</sup> HAAG, *Older Women at Risk of Homelessness* (n 11) 3.



## Part 4: The Human Rights Protections of the Right to Adequate Housing of Older Persons and Strategies for Fulfilment

### 4.1 International Human Rights Law

While we note the Independent Expert's knowledge and expertise in international human rights law,

the purpose of the following section is to highlight Australia's clear international obligations relating to non-discrimination and housing - obligations which Australia is not fulfilling through its existing law and policy in these areas.

This section focuses in particular on the right to adequate housing, and the rights to equality and non-discrimination under the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of Persons with Disabilities*. We recognise that many other rights are also relevant in the context of older persons and housing, including the rights to life, liberty and security and health, among others. However, an in-depth discussion of these rights is beyond the scope of this submission.

### International Covenant on Economic, Social and Cultural Rights

#### *Right to Adequate Housing*

Australia ratified the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* on 10 December 1975.<sup>149</sup> The right to adequate housing is protected under Article 11(1) of ICESCR, which includes the right to both adequate housing and the 'continuous improvement of living conditions' as foundational components of the overarching right to an adequate standard of living.<sup>150</sup>

The Committee on Economic, Social and Cultural Rights (**ICESCR Committee**), has emphasised that this right should not be interpreted narrowly, as a right to mere physical shelter, but instead should encompass the broader right 'to live somewhere in security, peace and dignity.'<sup>151</sup> Article 11(1) requires housing to be *adequate*, which can generally be determined with reference to 'social, economic, cultural, climatic, ecological and other factors'.<sup>152</sup> ICESCR Committee has identified the following seven characteristics intrinsic to housing adequacy *at a minimum*:

- a. Legal security of tenure;

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<sup>149</sup> 'Ratification Status for Australia', *United Nations Human Rights Treaty Bodies Database* (Web Page) <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN)> ('OHCHR, *Ratification Status for Australia*').

<sup>150</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, UNTS 3 (entered into force 3 January 1976) art 11(1) ('ICESCR').

<sup>151</sup> Committee on Economic, Social and Cultural Rights ('ICESCR Committee'), 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) para 7 ('ICESCR Committee, *General Comment No. 4*').

<sup>152</sup> *Ibid* para 8.

- b. Availability of services, materials, facilities and infrastructure;
- c. Affordability;
- d. Habitability;
- e. Accessibility;
- f. Location; and
- g. Cultural adequacy.<sup>153</sup>

While the right to adequate housing can be ‘achieved progressively’, it is important to note that States have an obligation to ‘move as expeditiously and effectively as possible towards that goal’.<sup>154</sup> ICESCR Committee has made clear that ‘[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations’ in ICESCR.<sup>155</sup> States should utilise ‘all appropriate means, including particularly the adoption of legislative measures’, as well as administrative, financial, educational and social measures, in order to fulfil their obligations under the Covenant.<sup>156</sup>

As with all other rights contained within the ICESCR, States must endeavour to ensure the right to adequate housing using the ‘maximum of its available resources’.<sup>157</sup> The ICESCR Committee has clarified that even where available resources are ‘demonstrably inadequate’, States must still guarantee the ‘widest possible enjoyment’ of the rights in the given circumstances.<sup>158</sup> The Committee has further stressed that States must prioritise disadvantaged social groups when facilitating access to adequate housing.<sup>159</sup>

### *Rights to equality and non-discrimination*

The rights to equality and non-discrimination are also protected under ICESCR, as well as other key international human rights treaties such as the *International Covenant on Civil and Political Rights (ICCPR)*, and the *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*, among others.<sup>160</sup>

Under Article 2(2) of ICESCR, States have an obligation to undertake to guarantee the rights in the Covenant without ‘discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>161</sup> The inclusion of ‘other status’ makes clear that the list of grounds is non-exhaustive, a point which has been clarified by the ICESCR Committee to include disability, age, nationality, marital and

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<sup>153</sup> Ibid para 8(a)–(g).

<sup>154</sup> ICESCR Committee, *General Comment No. 3: The Nature of States Parties’ Obligations (Art 2, Para 1, of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990) para 9 (*General Comment No 3*).

<sup>155</sup> Ibid para 11.

<sup>156</sup> Ibid paras 3-7.

<sup>157</sup> ICESCR (n 150) art 2(1).

<sup>158</sup> ICESCR Committee, *General Comment No 3* (n 154) para 10.

<sup>159</sup> Ibid para 11.

<sup>160</sup> ICESCR (n 150) art 2(2). See also eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, UNTS 1249 (entered into force 3 September 1981) (*CEDAW*) arts 1-2.

<sup>161</sup> ICESCR (n 150) art 2(2).



family status, sexual orientation and gender identity, health status, place of residence, as well as economic and social situation.<sup>162</sup>

The ICESCR Committee has defined 'discrimination' to constitute:

any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.<sup>163</sup>

Importantly, ICESCR protects against both direct and indirect forms of discrimination, cumulative and intersectional experiences of discrimination, as well as systemic discrimination.<sup>164</sup>

The ICESCR Committee has emphasised that 'non-discrimination is an immediate and cross-cutting obligation'.<sup>165</sup> States themselves must refrain from discriminatory actions, as well as 'take concrete, deliberate and targeted measures to ensure that discrimination...is eliminated', including through legislation, policies, plans and strategies, and providing for remedies and accountability.<sup>166</sup>

### Convention on the Elimination of All Forms of Discrimination against Women

The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* was ratified by Australia on 27 August 1983.<sup>167</sup> Among other rights, CEDAW requires States parties to end discrimination against women in law, policy, and practice and to adopt sanctions for such discrimination, and requires States parties to take measures 'to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'.<sup>168</sup>

The Committee on the Elimination of All Forms of Discrimination against Women (**CEDAW Committee**) has recognised that older women are not a homogenous group and have emphasised that the 'elimination of all forms of discrimination against older women can only be achieved by fully respecting and protecting their dignity and their right to integrity and self-determination'.<sup>169</sup> The CEDAW Committee has specifically raised its 'concern about the multiple forms of discrimination experienced by older women', and has recognised that 'age is one of the grounds on which women may suffer multiple forms of discrimination'.<sup>170</sup> This can

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<sup>162</sup> ICESCR Committee, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2, Para 2 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C12/GC/20 (2 July 2009) ('*General Comment No 20*') paras 27-35.

<sup>163</sup> *Ibid* para 7.

<sup>164</sup> *Ibid* paras 17, 27.

<sup>165</sup> ICESCR Committee, *General Comment No 20* (n 156) para 7.

<sup>166</sup> *Ibid* paras 26-40.

<sup>167</sup> OHCHR, *Ratification Status for Australia* (n 143).

<sup>168</sup> CEDAW (n 160) arts 2, 3.

<sup>169</sup> Committee on the Elimination of All Forms of Discrimination against Women ('CEDAW Committee'), *General Recommendation No 27 On Older Women and Protection of their Human Rights*, 47th sess, UN Doc CEDAW/C/GC/27 (16 December 2010).

<sup>170</sup> *Ibid* paras 1-2.

result in older women experiencing discrimination by way of 'unfair resource allocation, maltreatment, neglect and limited access to basic services'.<sup>171</sup> Such discrimination can be compounded by discrimination on the basis of intersecting identities including characteristics of ethnic origin, disability, poverty, sexual orientation and gender identity among others.<sup>172</sup>

The CEDAW Committee has specifically recognised that, '[i]n many countries, the lack of ... access to adequate social housing ... pose problems for older women'.<sup>173</sup> The Committee has reminded States parties of their obligation to

take necessary measures to ensure older women have access to adequate housing that meet their specific needs, and all barriers, architectural and other, that hinder the mobility of older persons and lead to forced confinement should be removed. States parties should provide social services that enable older women to remain in their homes and live independently for as long as possible. Law and practices that negatively affect older women's right to housing, land and property should be abolished. States parties should also protect older women against forced evictions and homelessness.<sup>174</sup>

### Convention on the Rights of Persons with Disabilities

While we acknowledge that not all older persons are persons with disability, we also recognise that there is often an intersection between older age and disability. For example, in Australia, the 2018 National Survey of Disability, Ageing and Carers found that the prevalence of disability increased with the process of ageing.<sup>175</sup> The survey also found that one in every two older persons in Australia had a disability, compared to one in every nine persons aged under 65-years old.<sup>176</sup> This in mind, consideration of the *Convention on the Rights of Persons with Disability (CRPD)*<sup>177</sup> is a relevant to the present discussion.

The CRPD builds upon existing human rights protections in the context of disability. The Convention provides an inclusive definition of disability which includes individuals 'who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.<sup>178</sup>

Australia ratified the CRPD on 17 July 2008 and accordingly bears responsibility for fulfilling its enumerated rights, including the right to adequate housing.<sup>179</sup> In its interpretive declaration

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<sup>171</sup> Ibid para 11.

<sup>172</sup> Ibid para 12.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid para 48.

<sup>175</sup> 'Disability, Ageing and Carers, Australia: Summary of Findings', *Australian Bureau of Statistics* (Web Page, 24 October 2019) <[www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release](http://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release)>.

<sup>176</sup> 'Disability, Ageing and Carers, Australia: Summary of Findings', *Australian Bureau of Statistics* (Web Page, 24/10/2019) <[www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release](http://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release)>.

<sup>177</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

<sup>178</sup> CRPD (n 177) art 1.

<sup>179</sup> 'Ratification Status for Australia', *United Nations Human Rights Treaty Bodies Database* (Web Page) <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN)>.

to the CRPD, Australia (inter alia) confirmed its recognition of the right of persons with disability to choose their place of residence.<sup>180</sup>

Article 28(1) of the CRPD recognises the right of persons with disabilities ‘to an adequate standard of living for themselves and their families, including adequate ... housing, and to the continuous improvement of living conditions’. This mirrors ICESCR art 11(1) in that it includes the right to both adequate housing and the ‘continuous improvement of living conditions’ as core components of the overarching right to an adequate standard of living. The CRPD also moves beyond the ICESCR in recognising additional housing- and living-specific protections. One objective of the CRPD is to enable greater individual autonomy for persons with disabilities.<sup>181</sup> This is reflected in art 19 on living independently and being included in the community, which requires States Parties to ensure that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.<sup>182</sup>

The Committee on the Rights of Persons with Disabilities (**CRPD Committee**) has clarified that, ‘[a]ccess to housing means having the option to live in the community on an equal basis with others.’<sup>183</sup> To this end, art 19 is only properly implemented when housing is geographically dispersed as opposed to limiting housing options for persons with disability to specific buildings or locations where they are likely to be segregated from the wider community.<sup>184</sup> The CRPD Committee has further stressed the importance of ‘ensuring the availability of a sufficient number of accessible and affordable housing units’, and that ‘access to housing should not be made conditional upon requirements that reduce the autonomy and independence of persons with disabilities.’<sup>185</sup> The CRPD further requires States parties to ‘ensure access by persons with disabilities to public housing programmes’,<sup>186</sup> including subsidised housing programmes, since it is ‘considered contrary to the Convention for persons with disabilities to pay for disability-related expenses by themselves.’<sup>187</sup>

The CRPD Committee has also recognised the particular barriers faced by women and girls with disabilities in enjoying their right to adequate housing. In its *General Comment on Women and Girls with Disabilities*, the Committee has stated that:

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<sup>180</sup> ‘Convention on the Rights of Persons with Disabilities’, *United Nations Treaty Collection* (Web Page, 22 March 2022) <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-15&chapter=4&clang=en>>.

<sup>181</sup> CRPD (n 177) preamble para 14.

<sup>182</sup> Ibid art 19(a)–(b).

<sup>183</sup> Committee on the Rights of Persons with Disabilities (‘CRPD Committee’), *General Comment No 5: Living Independently and Being Included in the Community*, UN Doc CRPD/C/GC/5 (27 October 2017) para 34 (‘*General Comment No 5*’).

<sup>184</sup> Ibid para 43.

<sup>185</sup> Ibid para 59.

<sup>186</sup> CRPD (n 177) art 28(2)(d).

<sup>187</sup> CRPD Committee, *General Comment No 5* (n 183) para 92. .

As a consequence of discrimination, women represent a disproportionate percentage of the world's poor, which leads to a lack of choice and opportunities, especially in terms of formal employment income. Poverty is both a compounding factor and the result of multiple discrimination. Older women with disabilities especially face many difficulties in accessing adequate housing, are more likely to be institutionalized and do not have equal access to social protection and poverty reduction programmes.<sup>188</sup>

## 4.2 National and Provincial Human Rights Protections

Despite the above commitments under international human rights law, and condemnation from UN experts for the failure to protect and ensure the right to adequate housing,<sup>189</sup> Australia has not embedded this right in domestic law. This means that many, including older persons, continue to face barriers to the full enjoyment of the right to adequate housing, and are increasingly at risk of homelessness.

Australia does have a patchwork of legislation that is relevant to older persons and housing, including some related human rights protections in the jurisdictions of Victoria, Queensland, and Australian Capital Territory (**ACT**), as well as federal legislation to prevent discrimination on the basis of age. The following section will focus on protection at the federal level, as well as in the State of Victoria. This latter jurisdiction has been selected both because it is where the Castan Centre is based, and because Victoria is one of the only Australian jurisdictions with a Charter of Rights.

### Australian Human Rights Law

#### *Absence of a National Charter of Rights*

It is important to note that at present, there is no national-level Charter of Rights in Australia, nor are there specific constitutional provisions relating to housing.<sup>190</sup> This places it out of step with many similar liberal democracies,<sup>191</sup> and effectively means that there is no 'mechanism to allow for the direct legislative implementation of rights, direct litigation, or even empower individuals and groups to enforce their rights'.<sup>192</sup> Accordingly, with the exception of some protections under state/territory human rights law (albeit limited protections) housing in Australia operates predominantly through policy implementation and service delivery.<sup>193</sup>

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<sup>188</sup> CRPD Committee, *General Comment No 3: Women and Girls with Disabilities*, UN Doc CRPD/C/GC/3 (25 November 2016) para 59.

<sup>189</sup> Miloon Kothari, *Preliminary Report of the Special Rapporteur on the Right to Housing Preliminary: Mission to Australia 31 July – 15 August 2006*, UN Doc A/HRC/4/18/Add.2 (11 May 2007) paras 6-15; Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (11 May 2007) 13, 33.

<sup>190</sup> Solomon (n 37) 119.

<sup>191</sup> 'How are Human Rights Protected in Australian Law?', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>>.

<sup>192</sup> Solomon (n 37) 19. See also Bret Thiele, 'The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health' (2002) 92(5) *American Journal of Public Health* 713, 714.

<sup>193</sup> Solomon (n 37) 119.

Human rights organisations, lawyers and activists—including the Castan Centre—continue to strongly advocate for the enactment of a national Charter of Rights to clearly articulate human rights protections and provide avenues for redress where rights are violated.<sup>194</sup>

### *State Human Rights Law - the Victorian Charter*

While there is human rights legislation in the jurisdictions of Victoria, (*Charter of Rights and Responsibilities Act 2006 - Victorian Charter*), Queensland (*Human Rights Act 2020 - Queensland Act*) and the ACT (*Human Rights Act 2004 - ACT Act*), none of these instruments include a right to adequate housing as provided for under ICESCR.

The Victorian Charter enshrines 20 civil and political rights into Victorian law, but does not include economic, social and cultural rights, including the right to adequate housing.<sup>195</sup> The Charter does however contain some provisions that are relevant to the discussion of older persons, housing, and homelessness, including the right to recognition and equality before the law;<sup>196</sup> the right to protection from cruel, inhuman or degrading treatment;<sup>197</sup> the right not to have privacy, family or home arbitrarily interfered with,<sup>198</sup> the protection of families and children,<sup>199</sup> and the right to liberty and security.<sup>200</sup>

The Charter requires ‘public authorities’<sup>201</sup> to act consistently with and give proper consideration to these rights in decision-making (section 38).<sup>202</sup> In addition, the Charter provides that draft legislation introduced into the Victorian Parliament must be accompanied by a statement of compatibility with the Charter,<sup>203</sup> and Victoria’s courts and tribunals must seek to interpret law consistently with the Charter.<sup>204</sup> There have been a number of cases where individuals have sought to rely on rights within the Charter with respect to decisions relating to public housing, with limited success.<sup>205</sup>

The utility of the Charter is undermined in particular by the process requirements for reviewing Charter claims. Firstly, section 38 of the Charter (obligations of public authorities) must be

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<sup>194</sup> See eg, *Charter of Rights* (Web Page) <<https://charterofrights.org.au/>>.

<sup>195</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3 div 4 (‘Victorian Charter’). See also, ‘About the Charter’, *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter/>>.

<sup>196</sup> Victorian Charter (n 195) s 8.

<sup>197</sup> Ibid s 10.

<sup>198</sup> Ibid s 13.

<sup>199</sup> Ibid s 17.

<sup>200</sup> Ibid s 26. See further, Human Rights Law Centre, *Protecting Human Rights for Victorians who are Homeless or at Risk of Homelessness using Victoria’s Human Rights Charter: Your Advocacy Guide* (Report, June 2018)

<sup>201</sup> Victorian Charter (n 195) s 4. It should be noted that the Director of Housing (‘DOH’) is considered to be a core public authority under the Charter, because it a

<sup>202</sup> Victorian Charter (n 195) 3.

<sup>203</sup> Ibid pt 3 div 1.

<sup>204</sup> Ibid pt 3 div 3.

<sup>205</sup> See, eg, *Giotopoulos v Director of Housing* [2011] VSC 20; *Goode v Common Equity Housing Ltd* [2014] VSC 585; *Burgess v Director of Housing* [2014] VSC 648.

read alongside section 39 of the Charter which is 'conditional and supplementary'.<sup>206</sup> A claim under section 39 is *conditional* on whether a person is able to seek relief 'in respect of an act or decision of a public authority on the ground that the act or decision is unlawful' independently of the Charter. If they can, the person can seek relief on a *supplementary* Charter ground.<sup>207</sup> This means that complaints cannot directly be brought before courts and tribunals for breaches of the Charter alone.<sup>208</sup>

Secondly, the Victorian Civil and Administrative Tribunal (**VCAT**) - which resolves disputes and makes decisions in certain areas (including residential tenancies) and is intended to be a 'forum for speedy and inexpensive resolution' of such disputes<sup>209</sup> - does not have jurisdiction to consider the compliance of administrative decisions with the Victorian Charter.<sup>210</sup> For example, in the case of *Director of Housing v Sudi*<sup>211</sup> before the Victorian Civil and Administrative Tribunal (**VCAT**),<sup>212</sup> Mr Sudi, a public housing tenant was evicted from public housing by the Director of Housing (**DOH**) without reason.<sup>213</sup> Justice Kevin Bell, then President of VCAT held that:

Evicting people living in public housing is a severe infringement of their human rights, especially those which protect the family and the home. Unless interference is demonstrably justified, it breaches human rights and is 'unlawful' under the Charter of Human Rights and Responsibilities Act 2006. The onus is on the person seeking to uphold the infringement to establish this justification.<sup>214</sup>

This decision was however overturned by the Victorian Supreme Court (**VSC**), on the grounds that VCAT does not have jurisdiction to carry out a judicial or collateral review of administrative decisions under the relevant legislation in this case.<sup>215</sup> As a result, challenges to administrative decisions of the DOH under the Victorian Charter must generally be heard in the VSC, which is 'an expensive and complex jurisdiction' - raising further barriers to access to justice for applicants already facing disadvantage, such as public housing tenants.<sup>216</sup>

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<sup>206</sup> See, Judicial College of Victoria, '3.3. Proceedings for breach of the Charter (s 39)' in *Charter of Human Rights Bench Book* (Judicial College of Victoria, 2016-208) <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57277.htm>>.

<sup>207</sup> Victorian Charter (n 195) s 39. See explanatory notes Judicial College of Victoria (n 206).

<sup>208</sup> 'Charter Complaints and Remedies', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-public-sector/charter-complaints-and-remedies>>.

<sup>209</sup> See 'What VCAT does', *Victorian Civil and Administrative Tribunal* (Web page) <<https://www.vcat.vic.gov.au/what-vcat-does>>.

<sup>210</sup> See, *Director of Housing v Sudi* (2011) 33 VR 559 ('Sudi appeal')

<sup>211</sup> *Director of Housing v Sudi* [2010] VCAT 328.

<sup>212</sup> Ibid [19].

<sup>213</sup> Ibid [2], [7]-

<sup>214</sup> Ibid [1].

<sup>215</sup> Note that VCAT derives its jurisdiction from the *Victorian Civil and Administrative Tribunal Act* (Vic) ('VCAT Act') as well as 'subject-specific legislation granting further jurisdiction'. The VSC found however that no express provision can be found in the VCAT Act, the *Residential Tenancies Act* ('RTA') or the Victorian Charter that confers upon VCAT jurisdiction to carry out judicial review of administrative decisions: *Sudi* appeal (n 210) 564 [19]-[21] (Warren CJ). See also explainer of key case at 'VCAT did not have human rights jurisdiction in public housing matter: Court of Appeal strikes "collateral" blow to Victorian Charter', *Human Rights Law Centre* (Case Summary, 6 September 2011) <<https://www.hrlc.org.au/human-rights-case-summaries>>.

<sup>216</sup> Samuel Tyrer, 'Home in Australia: Meaning, Values and Law?' (2020) 43(1) *UNSW Law Journal* 340, 370.



An additional barrier arose following the decision in *Burgess and Anor v Director of Housing and Anor*. In that case, the plaintiffs (a mother and teenage son who were public housing tenants) challenged (a) the decision of the DOH to issue a notice to vacate, (b) the decision of VCAT to grant possession of the premises following the notice to vacate; (c) the decision of the DOH to apply for a warrant of possession of the premises; and finally (d) the decision of VCAT to issue the warrant of possession.<sup>217</sup> The plaintiffs argued in particular that the DOH, in the making of his decisions, failed to give proper consideration to their human rights to not to have their family or home ‘unlawfully or arbitrarily interfered with’ (s 13) and to provide for the protection of families and children (s 17).<sup>218</sup>

Importantly, Justice Cameron Macaulay held that the DOH in this case *had* failed to consider the human rights of the plaintiff under s 17 of the Charter in making the notice decision, and the application for the warrant of possession, making the Director’s decisions unlawful under s 38 of the Charter.<sup>219</sup> This reinforced the need for DOH to take human rights under the Charter into consideration in its decision making, and increased accountability for decisions on forced evictions.<sup>220</sup>

However, Justice Macaulay also held that the decision of DOH to issue the notice to vacate *ceased to have ongoing legal effect* once VCAT had made the possession order, and so was not able to be quashed (*certiorari*).<sup>221</sup> In effect, this requires public housing tenants challenging forced evictions to commence legal proceedings relating to the Charter *after* DOH has issued a notice to vacate, but *before* VCAT has issued a possession order.<sup>222</sup> This may not always be possible, particularly for low income tenants facing other vulnerabilities, and ultimately limits even further the utility of the Charter as a meaningful mechanism to protect human rights in the context of housing.<sup>223</sup>

Notably, the Victorian Parliament recently conducted an inquiry into housing and homelessness in the state.<sup>224</sup> At the conclusion of that inquiry, the Victorian Legislative Council Legal and Social Issues Committee (**LSIC**), drawing on testimony and the submissions by the Castan Centre and other organisations, recommended the inclusion of a right to adequate housing in the Victorian Charter.<sup>225</sup> The inclusion of a right to housing in the Charter would firstly have symbolic significance, that is to say, it would demonstrate that the right to adequate housing ‘is so important that it ought to be enshrined...in Victorian law through statutes that

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<sup>217</sup> *Burgess and Anor v Director of Housing and Anor* [2014] VSC 648 [3]-[4] (*‘Burgess’*).

<sup>218</sup> *Ibid* [216].

<sup>219</sup> *Ibid* [245].

<sup>220</sup> See ‘Supreme Court of Victoria finds Director of Housing Failed to Consider Human Rights When Deciding to Evict Mother and Son’, *Human Rights Law Centre* (Web Page, 14 December 2014) <<https://www.hrlc.org.au/human-rights-case-summaries/supreme-court-of-victoria-finds-director-of-housing-failed-to-consider-human-rights-when-deciding-to-evict-mother-and-son>>.

<sup>221</sup> *Burgess* (n 217) [245].

<sup>222</sup> ‘Legal Update: Supreme Court Decisions’, *Justice Connect* (Web Page, 23 December 2014) <<https://justiceconnect.org.au/fairmatters/legal-update-supreme-court-decisions/>>.

<sup>223</sup> *Ibid*.

<sup>224</sup> Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (n 142) 200 (Recommendation 34) .

<sup>225</sup> *Ibid* 195-200.

we make ourselves'.<sup>226</sup> Further, the inclusion of a right to adequate housing would have significant practical implications, and would require the Victorian Government to take the right into account in the formulation of policy, in the enactment of law, and in the exercise of discretion.<sup>227</sup> Although the Victorian Government was required to respond to the Committee's report within six-months of it being tabled before the Parliament, it appears that no such response has been provided to date.<sup>228</sup>

The Victorian Greens party have introduced the *Human Rights and Housing Legislation Amendment (Ending Homelessness) Bill 2022* which would establish a right to adequate housing in the Charter and amend the *Housing Act 1983* (Vic) to set a target of ending homelessness in Victoria by 2030 and to require a plan to be developed to meet this target, progress on which would be required to be reported annually.<sup>229</sup> However, at the time of writing neither of the two major parties in the Victorian Parliament, including the Government, have supported including a right to adequate housing in the Victorian Charter.

## Anti-discrimination Law

### *Age Discrimination Act*

The *Age Discrimination Act 2004* (Cth) (**ADA**) prohibits direct and indirect discrimination on the basis of age in areas such as employment, education, access to premises, provision of goods, services and facilities and other areas.<sup>230</sup> Among its key aims is ensuring that 'everyone has the same rights to equality before the law, regardless of age' and promoting community acceptance of the principle that persons of all ages have the same fundamental rights.<sup>231</sup> The ADA specifically states as a purpose the removal of barriers faced by older people participating in society, and changing negative stereotypes about older persons.<sup>232</sup>

Relevantly for present purposes, the ADA prohibits age based discrimination in the area of accommodation (including both residential and business accommodation).<sup>233</sup> The ADA makes it unlawful for a person to discriminate on the basis of age by refusing a person's application for accommodation, in the terms or conditions on which the accommodation is offered to a person, or by deferring or placing in a lower order of precedence a person's application for that accommodation.<sup>234</sup> It is also unlawful to deny a person access, limit any benefit associated with accommodation, evict someone from accommodation they are occupying, or subject a person to any detriment in relation to the accommodation based on their age.<sup>235</sup>

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<sup>226</sup> Ibid 196. See Evidence to Legislative Council Legal and Social Issues Committee, Victorian Parliament, 2 July 2020, 26-7 (Professor the Hon Kevin Bell, Director, Castan Centre for Human Rights Law).

<sup>227</sup> Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (n 142) 197. See Evidence to Legislative Council Legal and Social Issues Committee, Victorian Parliament, 2 July 2020, 26-7 (Professor the Hon Kevin Bell, Director, Castan Centre for Human Rights Law).

<sup>228</sup> 'Inquiry into Homelessness in Victoria: Government Response', *Parliament of Victoria Committees* (Web Page, 3 March 2021) <<https://www.parliament.vic.gov.au/lsc-lc/inquiries/article/4288>> .

<sup>229</sup> *Human Rights and Housing Legislation Amendment (Ending Homelessness) Bill 2022* (Vic) cl 3-4.

<sup>230</sup> *Age Discrimination Act 2004* (Cth) pt 3, s 3 ('ADA').

<sup>231</sup> Ibid s 3(b), (d).

<sup>232</sup> ADA (n 230) s 3(e).

<sup>233</sup> Ibid s 29(4).

<sup>234</sup> Ibid s 29(1).

<sup>235</sup> Ibid s 29(2).



Exceptions apply where the provider of accommodation or a near relative resides or intends to continue to reside on the premises, and the accommodation is for no more than three persons other than the provider/near relative.<sup>236</sup> The *ADA* also prohibits a person to discriminate against another person based on age by refusing or failing to dispose of an interest in land to the other person, or in the terms or conditions on which the interest in land is offered to the person.<sup>237</sup> This does not include disposals by will or gift.<sup>238</sup>

Despite the protections above, unless expressly provided (see below) nothing in the *ADA* makes it an *offence* to do an act that is considered unlawful because of a provision in the *ADA*.<sup>239</sup> This significantly limits the enforceability of the *ADA*, as the protections listed in the previous sections carry no immediate financial or criminal penalty. Therefore, when unlawful age discrimination has occurred, the aggrieved party is left to pursue the complaints procedure under the *Australian Human Rights Commission Act 1986 (AHRC Act)*.<sup>240</sup>

The *AHRC Act* permits aggrieved persons to make a complaint to the Australian Human Rights Commission (**AHRC**) of unlawful discrimination based on age.<sup>241</sup> The Act empowers the *AHRC* to inquire into and attempt to resolve complaints of unlawful discrimination through conciliation between the parties.<sup>242</sup> Following this, the complaint can be conciliated, withdrawn,<sup>243</sup> or terminated by the President of the *AHRC*.<sup>244</sup>

If the complaint has been terminated or unresolved post conciliation, the aggrieved party can then make a complaint to the Australian Federal Court or Federal Circuit Court alleging unlawful discrimination.<sup>245</sup> If the court is satisfied there has been unlawful discrimination, the court may make such orders as it thinks fit, including declaring that the respondent has committed unlawful discrimination and directing the discriminator not to repeat or continue such action,<sup>246</sup> requiring the discriminator to perform an action to redress any loss or damage suffered,<sup>247</sup> or pay damages by way of compensation for loss or damage suffered due to the discrimination.<sup>248</sup>

The *ADA* does have two specific offences which carry penalties for breach. Firstly, it is an offence to display an advertisement that indicates an intention to do an act which would be unlawful under the *ADA*.<sup>249</sup> In the context of housing of older persons, it would be an offence to place a housing advertisement that stated only people below the age of 60 years could apply. This carries a penalty of 10 penalty units (currently \$1,817.40).<sup>250</sup>

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<sup>236</sup> Ibid s 29(3).

<sup>237</sup> Ibid ss 30(1)(a)-(b).

<sup>238</sup> Ibid s 30(2).

<sup>239</sup> Ibid s 49.

<sup>240</sup> *Australian Human Rights Commission Act 1986 (Cth)* ('*AHRC Act*') s 46P.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid s 11(1)(aa).

<sup>243</sup> Ibid s 46PG.

<sup>244</sup> Ibid s 46PH.

<sup>245</sup> Ibid s 46PO.

<sup>246</sup> Ibid s 46PO(4)(a).

<sup>247</sup> Ibid s 46PO(4)(b)-(c).

<sup>248</sup> Ibid s 46PO(4)(e).

<sup>249</sup> *AHRC Act* (n 240) s 50.

<sup>250</sup> Ibid.

Secondly, there are victimisation offences. The ADA prohibits a person from engaging in conduct that would threaten or cause detriment to another, because the second person has made, or has proposed to make, a complaint under the *AHRC Act*.<sup>251</sup> If a person is found to have committed a victimisation offence, the penalty is 6 months imprisonment.<sup>252</sup>

### *The Equal Opportunity Act 2010 (Vic)*

The *Equal Opportunities Act 2010 (Vic)* (**EO Act**) is Victoria's anti-discrimination legislation which aims to, inter alia, eliminate discrimination to the greatest extent possible and to promote and protect the right to equality set out in the Victorian Charter.<sup>253</sup> The EO Act also recognises the causal relationship between insidious discrimination and social and economic disadvantage which stymies equal participation.<sup>254</sup>

The EO Act prohibits discrimination in various areas of public and private life, prohibits sexual harassment, and prohibits victimisation and other forms of discrimination including requesting certain information on a discriminatory basis. Discrimination prohibited under the EO Act can be direct or indirect discrimination but must be on the basis of a protected attribute (including stereotypes surrounding those protected attributes).<sup>255</sup>

The EO Act provides for 20 protected attributes for which discrimination is protected.<sup>256</sup> This includes **age**, gender identity, disability, marital status, race, sex, sex characteristics, and sexual orientation, among others.<sup>257</sup> These protected attributes interlink with the Victorian Charter, which defines 'discrimination' as meaning discrimination on the basis of a protected attribute set out in the EO Act.<sup>258</sup> The Victorian Equal Opportunity and Human Rights Commission has criticised the EO Act for not adequately protecting persons experiencing homelessness from discrimination.<sup>259</sup>

In particular, the EO Act prohibits discrimination in accommodation.<sup>260</sup> More specifically, the Act prohibits discrimination by refusing, or failing to accept, a person's application for accommodation; discrimination in the processing of a person's application for housing; and discrimination in the terms on which accommodation is offered.<sup>261</sup> The Act also prohibits discrimination in evicting a person from accommodation or refusing to renew the provision of

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<sup>251</sup> Ibid s 51.

<sup>252</sup> Ibid.

<sup>253</sup> *Equal Opportunity Act 2010 (Vic)* s 3(a),(b) ('EO Act').

<sup>254</sup> Ibid s 3(d)(i).

<sup>255</sup> Ibid ss 7-9.

<sup>256</sup> Ibid s 6.

<sup>257</sup> Ibid.

<sup>258</sup> Victorian Charter (n 195) s 3 (definition of 'discrimination').

<sup>259</sup> 'Strengthening Protections for Victorians under the Equal Opportunity Act', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/legal-and-policy/advocacy-and-law-reform/strengthening-protections-under-the-equal-opportunity-act/>>.

<sup>260</sup> EO Act (n 253) pt 4 div 5.

<sup>261</sup> Ibid s 52.

accommodation.<sup>262</sup> 'Accommodation' is defined broadly to mean, inter alia, a house or flat, a boarding house, a caravan or caravan site and a mobile home.<sup>263</sup>

Complaints about unlawful discrimination in contravention of the EO Act may be made to the Victorian Equal Opportunity and Human Rights Commission who can conduct investigations and seek to resolve disputes through voluntary and informal mechanisms.<sup>264</sup> Whether or not a dispute has been brought to the Victorian Equal Opportunity and Human Rights Commission, a person may also bring an application to Victoria's small claims tribunal, the Victorian Civil and Administrative Tribunal, in relation to unlawful discrimination.<sup>265</sup> In practice, such applications may be made in conjunction with claims arising under other laws regulating housing.

### **4.3 Strategies, Actions Plans, and Support Programmes for the Fulfilment of the Right to Adequate Housing of Older Persons**

Strategies and action plans for the fulfilment of the right to adequate housing are diffused across each level of government. Under Australia's federal system, the State and Territory governments have the primary responsibility for housing and homelessness. In this section, we analyse the strategies and action plans adopted by the Federal and Victorian governments. We focus on these two jurisdictions because of the Castan Centre's experience in recent inquiries in each of these jurisdictions into homelessness, and because the Castan Centre is based in Victoria.

We note that neither the Australian Government nor the Victorian Government has a specific strategy on ensuring adequate housing for older persons, nor indeed even a strategy providing for the needs of older persons generally.<sup>266</sup>

#### **Federal Strategies and Actions Plans**

The Federal Government 'recognises that homelessness is an important issue which affects many Australians' and which 'requires a long-term and systematic effort across agencies, sectors, and the community'.<sup>267</sup> In 2020-21, the Federal Government expected 'to spend around \$8.4 billion in housing support and homelessness services', including 'around \$5.5 billion in Commonwealth Rent Assistance, to assist eligible Australians meet their rental costs ... [and] around \$1.6 billion through the National Housing and Homelessness Agreement (NHHA)'.<sup>268</sup>

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<sup>262</sup> Ibid s 53(c), (d).

<sup>263</sup> Ibid s 3 (definition of 'accommodation').

<sup>264</sup> Ibid pt 8 div 1, pt 9.

<sup>265</sup> Ibid pt 8 div 2.

<sup>266</sup> 'A Home for Life: Towards an Older Persons Housing Strategy', *Housing for the Aged Action Group* (Web Page) <<https://www.olderrenters.org.au/publications/home-life-towards-and-older-persons-housing-strategy>>

<sup>267</sup> 'Housing Support', *Australian Government Department of Social Services* (Web Page) <<https://www.dss.gov.au/housing-support/programmes-services/homelessness>> ('Australian Department of Social Services, *Housing Support*').

<sup>268</sup> Ibid.

## *National Housing and Homelessness Agreement*

The NHHA is the principal avenue through which the Federal Government addresses homelessness and housing. The NHHA is a series of bilateral agreements between the State and Territory governments and the Federal Government entered into in 2019 with the goal of 'improv[ing] housing and homelessness outcomes for all Australians across the housing spectrum, particularly those in need'.<sup>269</sup> The NHHA prioritises particular cohorts, including 'women and children affected by family and domestic violence, children and young people, Indigenous Australians [sic], people experiencing repeat homelessness, people exiting institutions and care into homelessness, and older people'.<sup>270</sup> The agreement is set to expire by no later than 30 June 2023 or may be replaced by a further agreement of up to five years.<sup>271</sup>

It is intended that the Federal Government will provide \$4.6 billion in funding to the States and Territories over the current term of the NHHA, including \$375 million for homelessness services. The State governments and Territory governments are required to match this level of funding.<sup>272</sup>

Other than providing funding, the Federal Government's other responsibilities under the NHHA include monitoring and assessing the performance of the agreement. Additionally, the NHHA notes the shared responsibilities between the Commonwealth and the States and Territory governments on matters such as housing and affordability policy, and rental supports. The NHHA further notes that social housing and homelessness services are a responsibility of State and Territory governments.<sup>273</sup>

The NHHA is also intended to improve accountability by requiring each State and Territory government 'to have publicly available housing and homelessness strategies and contribute to improve data collection and reporting'.<sup>274</sup> The NHHA is currently the subject of a review by the Australian Productivity Commission who is to report to the Federal Government before 31 August 2022 into the future of the NHHA.<sup>275</sup>

## *Absence of a National Strategy on Homelessness*

Australia has not had a national homelessness strategy since 2008, reflecting a dearth of coordination national political will to end homelessness. The 2008 homelessness strategy, titled 'The Road Home: A National Approach to Reducing Homelessness', aimed to halve homelessness by 2020,<sup>276</sup> which was broadly unsuccessful and was ultimately abandoned.

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<sup>269</sup> Australian Government, 'National Housing and Homelessness Agreement: Key Fact Sheet' <<https://treasury.gov.au/sites/default/files/2019-03/National-Housing-and-Homelessness-Agreement.pdf>> ('NHHA Factsheet')

<sup>270</sup> Australian Department of Social Services, *Housing Support* (n 267).

<sup>271</sup> 'The National Housing and Homelessness Agreement', *Federal Financial Relations* (Web Page) <<https://federalfinancialrelations.gov.au/agreements/national-housing-and-homelessness-agreement-0>>.

<sup>272</sup> NHHA Factsheet (n 269).

<sup>273</sup> Ibid.

<sup>274</sup> Australian Department of Social Services, *Housing Support* (n 267).

<sup>275</sup> 'Housing and Homelessness Agreement Review', *Australian Government Productivity Commission* (Web Page) <<https://www.pc.gov.au/inquiries/current/housing-homelessness#report>> .

<sup>276</sup> See, Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness* (Report, 2008).

The Commonwealth Parliament's House of Representative Standing Committee on Social Policy and Legal Affairs, in its *Inquiry into Homelessness in Australia* noted that much of the evidence before it supported the development of a national strategy on housing and homelessness.<sup>277</sup> In the Committee's view, 'there is a role for the Australian Government to work with the states and territories and others to identify opportunities for a more integrated approach to prevention [of homelessness] ... This should include the development of a strategic framework for prevention and early intervention, and work to identify what structural supports may be required ...'.<sup>278</sup> Accordingly, the Committee recommended that the Federal Government work with State, Territory, and local governments to design and implement such a framework.<sup>279</sup> In particular, the Committee recommended 'that the Australian Government, in consultation with state, territory and local governments, develop and implement a ten-year national strategy on homelessness'.<sup>280</sup> The Committee also specifically recommended that 'the Australian Government establish a comprehensive strategy to address the financial insecurity of older women', noting the high levels of older women experiencing, or at risk of, homelessness.<sup>281</sup>

In its response to the Committee's report, the Federal Government indicated that it did not support the Committee's recommendation to implement a ten-year homelessness strategy.<sup>282</sup> Instead, the Federal Government noted that the NHHA 'is the current Australian Government mechanism to deliver housing and homeless funding to states'.<sup>283</sup> This response fails to recognise the long-term nature of homelessness and housing reform and the reality that funding alone will not solve structural drivers for housing and homelessness. The Federal Government also 'noted' the Committee's recommendation regarding a strategy for the financial security of older women, pointing to government policies including 'the Age Pension and Commonwealth Rent Assistance, subsidised health care and concessions on a range of goods and services, as well as measures to assist women to build their retirement savings throughout their lifetime ... inclu[ding] the low income superannuation tax offset and a Government co-contribution for low or middle income earners who make after-tax superannuation contributions'.<sup>284</sup>

## Victorian Strategies and Action Plans

As a party to the NHHA, the Victorian Government is required to have a publicly accessible and up-to-date housing strategy (see above). The Victorian Government has two action plans to address issues of housing and homelessness in Australia. These are the *Homes for Victorians* strategy and the *Homelessness and Rough Sleeping Action Plan*.

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<sup>277</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, *Inquiry into Homelessness in Australia* (Final Report, July 2021) 199 [4.195].

<sup>278</sup> Ibid 206 [4.230]-[4.231].

<sup>279</sup> Ibid 207 [4.234] (Recommendation 27).

<sup>280</sup> Ibid 214 [4.276] (Recommendation 35).

<sup>281</sup> Ibid 156 [3.306] (Recommendation 25).

<sup>282</sup> *Australian Government Response to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs' Inquiry into Homelessness in Australia* (February 2020) 26 ('Australian Government, *Response to National Homelessness Inquiry*).

<sup>283</sup> Ibid.

<sup>284</sup> Australian Government, *Response to National Homelessness Inquiry* (n 282) 20.

## *Homes for Victorians*

The *Homes for Victorians* strategy commenced in 2017 in response to concerns about the affordability of housing in Victoria.<sup>285</sup> It is the largest housing package in the history of Victoria.<sup>286</sup> While the strategy is primarily centred around first-home-buyers, the strategy also provides significant funding towards social and affordable housing to address homelessness.<sup>287</sup> The strategy focuses on five objectives: (1) supporting people to buy their own home; (2) increasing the supply of housing through faster planning; (3) promoting stability and affordability for renters; (4) increasing and renewing social housing stock; (5) improving housing services for Victorians in need.<sup>288</sup>

The strategy includes a \$1 billion investment in a 'Social Housing Growth Fund' to increase the supply of social and affordable housing, a \$1.1 billion investment in the social housing sector, a \$152 million 'Family Violence Housing Blitz' to increase housing for survivors of family violence, 913 additional social housing dwellings, \$109 million 'to help homeless Victorians into stable housing' and \$185 million to renew existing public housing.<sup>289</sup> According to the Victorian Government *Homes for Victorians* 'should result in ... [a]round 6,000 new social housing homes'.<sup>290</sup>

The *Homes for Victorians* strategy does not however include specific policy initiatives or references to older persons. Nevertheless, it is anticipated that older persons will benefit from the strategy's initiatives targeted at increasing the supply of social housing and in addressing concerns around housing affordability. No audit has, as yet, been undertaken by the Victorian Government into the effectiveness of the *Homes for Victorians* strategy in delivering on its goals or as to whether the Victorian Government has met its funding commitments as part of the strategy.<sup>291</sup>

## *Homelessness and Rough Sleeping Action Plan*

The Victorian Government's *Homelessness and Rough Sleeping Action Plan* was released in 2018 and focusses in particular on persons recently homeless, persons sleeping rough for an extended period of time, and persons at risk of chronic homelessness and rough sleeping.<sup>292</sup>

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<sup>285</sup> 'Homes for Victorians', *Housing Victoria* (Web Page) <<https://www.housing.vic.gov.au/homes-victorians>> ('Homes for Victorians') ('Housing Victoria, *Homes for Victorians*')

<sup>286</sup> Victorian Government, *Homes for Victorians: Affordability, Access and Choice* (Strategy, March 2017) 43.

<sup>287</sup> *Ibid* 3.

<sup>288</sup> *Ibid* 5.

<sup>289</sup> Housing Victoria, *Homes for Victorians* (n 285).

<sup>290</sup> *Ibid*.

<sup>291</sup> The most recent audit conducted by the Victorian Auditor-General into public housing was delivered in June 2017 and while it considers the *Homes for Victorians* strategy in some detail it does not provide an evaluation of the program as it was only released some three months prior. The prior Auditor-General's report into public housing was published in 2012. If this timeline is indicative, a new report is to be expected in 2022: Victorian Auditor-General's Office, *Managing Victoria's Public Housing* (Report, 21 June 2017) <<https://www.audit.vic.gov.au/report/managing-victorias-public-housing?section=>>>.

<sup>292</sup> Victorian Government, *Victoria's Homelessness and Rough Sleeping Action Plan* (Strategy, January 2018) 7 ('*Victoria's Homelessness and Rough Sleeping Action Plan*').

A key direction of the Plan is to introduce a 'Housing First approach' under which the Victorian Government seeks to provide housing to individuals as a matter of first priority and in doing so help individuals 'become resilient to future housing loss' and then assist people through 'integrated, flexible and multi-disciplinary' and responsive ways to address and prevent drivers of homelessness and to connect individuals with their community to prevent social isolation.<sup>293</sup>

The plan notes that while homelessness and rough sleeping 'can be experienced by anyone', some groups are 'more vulnerable such as [First Peoples], young people, older people and LGBTIQ+ people'.<sup>294</sup> To address the intersectional impacts of homelessness, the Victorian Government committed \$8.2 million 'to fund three community-sector projects that will build long-term housing options for vulnerable client groups including women and children escaping family violence and young people leaving-out-of-home care ... deliver[ing] an additional 86 units of accommodation'.<sup>295</sup> As part of the NHHA, the Victorian Government has also committed to allocate 10 percent of its required homelessness spending towards older people.<sup>296</sup>

However, the *Homelessness and Rough Sleeping Action Plan* appears to have been poorly implemented with extremely modest results. In a 2020 report, the Victorian Auditor-General's Office found that the Department of Health and Human Services (now, Department Families, Fairness and Housing) 'does not know whether [*Homelessness and Rough Sleeping Action Plan*] programs are reducing the incidence and impacts of rough sleeping in Victoria'.<sup>297</sup> The Auditor-General highlighted '[p]oor planning, a lack of agreed goals and limited performance monitoring' causing 'some people who could have been housed' to remain sleeping rough.<sup>298</sup> Critically, the Auditor-General also found that the Victorian Government 'had no plans to publicly report on the results of the evaluation of new homelessness initiatives'.<sup>299</sup>

In its report on its Inquiry into Homelessness, the Victorian Parliament's Legal and Social Issues Committee considered both the *Homes for Victorians* strategy and the *Homelessness and Rough Sleeping Action Plan*, but did not make criticisms or recommendations in respect of either strategy.<sup>300</sup> However, the Committee did recommend (inter alia) that 'the Victorian Government undertake comprehensive mapping of services to ascertain gaps and overlaps in service delivery across Victoria';<sup>301</sup> to 'prioritise early intervention activities';<sup>302</sup> provide 'ongoing funding for the Private Rental Assistance Program in recognition of its key role in preventing entry into homelessness' and ensure that it meets demand,<sup>303</sup> and 'work with the Real Estate Institute of Victoria and the Victorian Equal Opportunity and Human Rights Commission to

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<sup>293</sup> Ibid 24. See also, Victorian Auditor General's Office, *Victoria's Homelessness Response: Independent Assurance Report to Parliament* (Report, September 2020) 3 ('*Victoria's Homelessness Response*').

<sup>294</sup> Victorian Government, *Victoria's Homelessness and Rough Sleeping Action Plan* (n 292) 6.

<sup>295</sup> Ibid 19.

<sup>296</sup> Victorian Government, *National Housing and Homelessness Agreement – Victorian Statement of Assurance for the 2020-21 Financial Year* (Bilateral Schedule Reporting, 2021) 3.

<sup>297</sup> Victorian Auditor-General's Office, *Victoria's Homelessness Response* (n 293) 1.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid 71.

<sup>300</sup> See, Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (n 142).

<sup>301</sup> Ibid 96 (Recommendation 2).

<sup>302</sup> Ibid 125 (Recommendation 7).

<sup>303</sup> Ibid 139 (Recommendations 11, 13).

develop and roll out mandatory education to real estate agents regarding their obligations to ensure that people at risk of, or experiencing, homelessness are afforded equal opportunity to access private rental tendencies'.<sup>304</sup>

### *Victoria's Big Housing Build*

In 2020, the Victorian Government announced its 'Big Housing Build' to boost the availability of social housing (public and community housing) by 10 percent between 2020-2024.<sup>305</sup> The Victorian Government is investing 5.3 billion to deliver over 12,000 new homes across metropolitan and regional Victoria, including 2,900 new affordable homes (for first home buyers and renters), and more than 9,300 new social housing dwellings.<sup>306</sup> Homes Victoria bears responsibility for delivering this policy.<sup>307</sup> Some housing is dedicated to particular groups, including 2,000 homes for persons with mental illness.<sup>308</sup> Notably, this includes a co-design process with persons with lived experience of mental illness, as well as their carers and families.<sup>309</sup> The Victorian Government has also announced that 400 new homes will be built for the Victorian Aboriginal Community,<sup>310</sup> and that the project will house as many as 1000 victim survivors of family and domestic violence.<sup>311</sup>

Older persons generally have not been identified as a priority group for this project. Nevertheless, older persons are still likely to benefit from this project, particularly where they are low-income, are residents of public housing (or on a waitlist for public housing) or have intersecting characteristics such as being mental health consumers, Aboriginal Victorians or victim survivors of family or domestic violence.

### *Other Funding for Affordable Homes*

In mid-February 2022, the Victorian Government also announced an \$800 million per year levy 'to fund an extra 1700 social and affordable homes each year'.<sup>312</sup> To be known as the 'Social and Affordable Housing Contribution', the levy was to apply to Melbourne and three large regional towns and would impose a 1.75 percent on the expected project value of 'all newly built developments with three or more dwellings or lot subdivisions' from 2024 to ensure long-term continuity of funding for social and affordable housing in Victoria.<sup>313</sup> However, the proposal attracted heavy criticism from the property sector and the Opposition and, at the start of an election year, the Victorian Government announced—less than two weeks after

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<sup>304</sup> Ibid 310 (Recommendation 49).

<sup>305</sup> See Homes Victoria, *Victoria's Big Housing Build* (Report, November 2020).

<sup>306</sup> Ibid 2.

<sup>307</sup> Ibid.

<sup>308</sup> 'Supporting Housing for People Living with Mental Illness', *Homes Victoria* (Web Page) <<https://www.vic.gov.au/supported-housing-people-living-mental-illness>>.

<sup>309</sup> Ibid.

<sup>310</sup> Jack Latimore, 'Victoria Pledges \$150m to Ease Tenfold Rise in Aboriginal Homelessness', *The Age* (online, 10 February 2022) <<https://www.theage.com.au/politics/victoria/victoria-pledges-150m-to-ease-tenfold-rise-in-aboriginal-homelessness-20220209-p59v2u.html>>. See also 'A Place to Call Home', *Homes Victoria* (Web Page) <<https://www.vic.gov.au/a-place-to-call-home>>.

<sup>311</sup> Homes Victoria, *Victoria's Big Housing Build* (n 305) 2.

<sup>312</sup> Josh Gordon, 'Developers to Face a New \$800 million Social Housing Levy', *The Age* (online, 18 February 2022) <<https://www.theage.com.au/national/victoria/developers-to-face-a-new-800-million-social-housing-levy-20220218-p59xn0.html>>.

<sup>313</sup> Ibid.



announcing it—that the policy would not proceed and would never be a policy of the current government.<sup>314</sup>

We consider that the Victorian Government has a significant opportunity to implement a comprehensive strategy to address homelessness, including older persons experiencing homelessness, through a human rights-based approach which is currently not canvassed in either of its key strategies to address homelessness and housing affordability.

## Federal and State Support Programs

A number of support programs current exist to support some aspects of older persons access to adequate housing.

For example, at the federal level, the Australian Government Department of Health funds and manages the ‘Commonwealth Home Support Program’ (**CHSP**).<sup>315</sup> Through the program, the Department subsidises a number of organisations within states and territories to provide eligible older persons with services, including housing services. This includes for example services to make changes to older persons’ homes to increase accessibility, home maintenance services, home cleaning services, homelessness support services, and other support services (i.e. aids to stay independent, meals and food preparation support, bathing and hygiene support, health services, and more).<sup>316</sup>

The Department also operates ‘Home Care Packages’ (**HCP**), through which it subsidises organisations within states and territories to provide more intensive services to older persons with complex needs.<sup>317</sup> HCPs coordinate a *combination* of number of services listed above, including those relating to housing. Eligible recipients are assigned a ‘package level’ based on their care needs, ranging from ‘basic’ (\$9,026.35 per year) to ‘high’ (\$52,377.50 per year).<sup>318</sup> Notably funding for an HCP cannot be used for the payment of accommodation such as mortgage payments or rent.<sup>319</sup>

Notably, eligible persons are expected to contribute to the payment of these services – for CHSP this depends on the type of support and each provider.<sup>320</sup> For HCPs, eligible recipients pay one of three types of fees: a basic daily fee (\$11.26 per day), and income-tested care fee (up to \$32.30, with annual and lifetime caps applicable) and additional fees (amounts for additional care services not covered by the HCP).<sup>321</sup>

In addition, in Victoria, HousingVic provides important information around housing, and available housing support and related services.<sup>322</sup>In addition, the VDOH currently subsidises

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<sup>314</sup> Paul Sakkal, ‘Social Housing Package Off the Table for Good, Says Pallas’, *The Age* (online, 1 March 2022).

<sup>315</sup> ‘Commonwealth Home Support Programme’, *Australian Government: My Aged Care* (Web Page) <<https://www.myagedcare.gov.au/help-at-home/commonwealth-home-support-programme>> (‘Australian Government, CHSP’).

<sup>316</sup> *Ibid.*

<sup>317</sup> ‘Home Care Packages’, *Australian Government: My Aged Care* (Web Page) <<https://www.myagedcare.gov.au/help-at-home/home-care-packages>>.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> Australian Government, CHSP (n 315).

<sup>321</sup> *Ibid.*

<sup>322</sup> HousingVic, *About HousingVic* (n 54)

organisations to provide housing related support to older persons through three low-cost accommodation programs to support older persons to live independently.<sup>323</sup> These are targeted programs to provide support to adults and older persons who are socially isolated, have complex needs such as disability and mental illness, acquired brain injury, alcohol or drug dependence, chronic health issues, and/or have a history of homelessness and social marginalisation.<sup>324</sup>

The first of these programs is the 'Community Connection Program',<sup>325</sup> which supports adults (including older persons) living in low-cost accommodation to engage with support services they may need and can provide funding to help individuals overcome crisis situations or pressing needs.

The second is the 'Housing Support for the Aged Program', which specifically supports older persons as they enter public or community housing, and those already in such housing where their tenancies are at risk.<sup>326</sup> Program providers engage in monitoring, case management services, and deliver practical assistance to enable older persons to get to appointments and engage in social and recreational activities.<sup>327</sup> Program providers can also support older persons to overcome crises (such as evictions) and respond to pressing needs not able to be met by other services).<sup>328</sup>

Finally the 'Older Persons High Rise Support Program' monitors and supports older tenants who are vulnerable and isolated and are residents of high-rise public housing estates in inner Melbourne. Program providers link tenants experiencing vulnerability to appropriate services, and work to 'to help them feel safe, independent, secure and connected to the community'.<sup>329</sup>

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<sup>323</sup> 'Low-Cost Accommodation Programs', *Victorian Government Department of Health (Web Page)*  
<<https://www.health.vic.gov.au/supporting-independent-living/low-cost-accommodation-support-programs>>.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

## Part 5: Conclusion and Recommendations

The housing situation in Australia is complex but is based primarily on the flawed conception that housing is a commodity, rather than a right, and has been detrimentally impacted by key issues including housing unaffordability (for both homeownership and rentals), a strained public housing system, and rapidly increasing homelessness. This has only been exacerbated by COVID-19 and climate change-related natural disasters.

Adequate housing is critical to the health and wellbeing of older persons, who have unique housing needs. The current housing and social support system in Australia is, however, preventing older persons from full enjoyment of the right to adequate housing. Indeed, older persons face deeply entrenched barriers to adequate housing, including ownership and rental unaffordability, increasing reliance on rentals, and persistent financial insecurity. These issues are further exacerbated by inadequate residential aged care facilities, a public housing system that does not appropriately provide for the needs of older persons, and a heightened risk of homelessness in later life, particularly for single older persons and older women.

The barriers to adequate housing are also gendered, with older women disproportionately impacted by issues such as financial insecurity (arising from lower lifetime incomes, less accumulated superannuation, longer periods of taking on informal and unpaid care responsibilities), experiencing family and domestic violence, and increasingly being at risk of, or experiencing, homelessness.

Australia's ability to provide for the enjoyment of the right to adequate housing is 'not impeded by lack of resources'.<sup>330</sup> However, at present, Australian law, policy and practice does not adequately respect, protect, or fulfill the right to adequate housing. Notwithstanding Australia's obligations under international human rights law, and in particular the ICESCR, CEDAW and the CRPD - Australia still has no national statutory or constitutional stand-alone human rights protection, and only has human rights legislation in three of its eight State and Territory jurisdictions.

While State and Territory human rights legislation, such as the Victorian Charter, go some way to enhancing human rights protections in Australia, it has been of limited utility in protecting the rights of persons facing challenges relating to housing. Notably, the Charter recognises only civil and political rights, and accordingly does not expressly include the right to adequate housing. Discrimination law in Australia provides some further protections against discrimination on the basis of sex and age in areas such as housing and access to land, however, to date these instruments have been of limited utility in empowering older persons experiencing discrimination in housing to obtain appropriate remedies in the context of housing issues.

As regards strategies for facilitating the enjoyment of the right to housing for older persons, at present there are no dedicated strategies to ensure adequate housing for older persons specifically at either the national level or in the state of Victoria. At a national level, the NHHA

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<sup>330</sup> Kevin Bell, 'Protecting Public Housing Tenants in Australia from Forced Eviction: The Fundamental Importance of the Human Right to Adequate Housing and Home' (2012) 39(1) *Monash University Law Review* 1, 9.

establishes a framework for the Australian Government to provide funding for improving housing and homelessness outcomes, but there is no current national homelessness strategy, notwithstanding the rise in homelessness that is expected in the coming years. Under the NHHA, states and territories also match funding for housing and homelessness, and bear responsibility for developing law and policy in these areas. The state of Victoria accordingly has two action plans to address issues of housing and homelessness, however, to date these have been poorly implemented with modest results.

Additionally, the Australian Government and the Federal Government have either recalcitrantly engaged with, or not responded to, recent inquiries into homelessness in these jurisdictions. This reflects a disappointing lack of political will for a human rights-based approach to housing and homelessness.

We recognise that both the Australian Government and the Victorian Government have in place some support programmes that contribute to certain aspects of adequate housing – such as providing financial support for home modifications to allow for age and disability accessibility, and increased efforts to constructing adequate social housing, and allocate such housing to groups experiencing vulnerability. However, these measures are not in and of themselves sufficient to provide for adequate housing for older persons. Instead, strong human rights protections enshrined in law both at the national and state/territory level, as well as a commitment to adopting human rights-based approaches to the development of housing legislation and policy are vital.

With these considerations in mind, the Castan Centre for Human Rights Law makes the following recommendations for the strengthening of law and policy to better provide for the enjoyment of the right to adequate housing for older persons in Australia.

We would be grateful for the Independent Expert's support in conveying these recommendations to the Australian Government.

**Recommendation 1:** The Australian Government should enact a comprehensive, national level Charter of Rights which includes in particular the rights to adequate housing, equality and non-discrimination.

**Recommendation 2:** At the state/territory level, existing state/territory human rights instruments such as the Victorian Charter should be amended to include the right to adequate housing and strengthen protections against forced evictions.

**Recommendation 3:** The Australian Government, as well as state and territory governments should take immediate action to develop comprehensive housing and homelessness strategies, which include a specific focus on delivering adequate housing for older persons, including those particularly at risk of homelessness such as older women. Australian governments should also provide increased funding to housing and homelessness on an ongoing basis.

**Recommendation 4:** In the development of such strategies, Australian governments should engage in meaningful consultation with older persons and advocacy groups

promoting the rights of older persons, to co-design effective housing strategies to meet the unique needs of older persons.

**Recommendation 5:** Australian governments should also go further to address some of the key contributors to housing insecurity and develop a comprehensive strategy to address financial and housing insecurity experienced by older persons, in particular older women.

**Recommendation 6:** Australian governments should take clear, immediate and deliberate measures to increase the availability and adequacy of public housing.

**Recommendation 7:** Australian governments should increase support for civil society organisations to facilitate the provision of information and support services relating to housing for older persons

**Recommendation 8:** Australian governments should seize the opportunity to learn from the lessons gained through the COVID-19 pandemic and prioritise the provision of adequate housing to all persons, including in particular those experiencing disadvantage, such as older persons facing housing insecurity.

**Recommendation 9:** Australian governments should learn from the lessons learned through the experience of natural disasters such as bushfires and flooding to provide climate-sensitive approaches to housing law and policy. This includes effective support to emergency services and dedicated recovery systems for persons affected by extreme weather events as a result of climate change.