Response to Questions on Notice to the authors of Submission No 86 – C Clark, B Goldblatt, J Hohmann, G Wilkinson; Parliamentary Joint Committee on Human Rights, 20 October 2023 (Responses, 9 November 2023)

Question on Notice, Senator Burns (Chair) (page 2). *What is the value of a Federal or national human right to housing if the constitution gives the primary power over housing to states?*

Response by **Dr. Hohmann**, adding to the responses given in evidence by Drs Goldblatt and Wilkinson.

There are several points that need to be made in response to Senator Burns' important question.

1 Australia's legal obligations in international law.

The first important point is that under international law, obligations for international human rights extend to all levels of government, from the Federal to the local. As set out in the Committee on Economic, Social and Cultural Rights' General Comment No 31 (2004) on the nature of the general legal obligation imposed on States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) 'all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party" (para 9). However in international law, it is the Australian Federal Government that must account for compliance with the treaty obligations it has taken on. These include obligations to respect, protect and fulfil the right to housing, which Australia bears obligations for as a treaty party to the ICESCR.

As such, the lack of a Bill or Charter of Rights at the federal level does not lessen Australia's responsibility for the right to housing, or excuse it from failing to comply with the right, it simply makes it extremely difficult for ordinary Australians to claim their rights or to hold the government to account for the obligations it already bears.

2 Local, State and Federal competence for housing under constitutional law

It is very common in Federal systems *that all the levels of government* will have some competence or responsibility for housing, and this does prevent the successful constitutional protection of the right to housing at the national level. In a 2015 report of the United Nations Special Rapporteur on the Right to Housing on the responsibilities of local and supranational governments for the right to housing, the Rapporteur noted that constitutional arrangements where states or regional governments have primary responsibility for housing provision do not lessen the responsibility of the Federal Government to transfer resources which include not only money, but knowledge, capacity and accountability for their human rights obligations (para 5).

The Special Rapporteur's Report points to the fact that national governments can often act most effectively to ensure the right to housing *at the macro level*, including through a national housing strategy or plan, fair distribution of resources, development of national standards, financing, mortgage and credit regulation, the appropriate support of other social rights (eg the right to social security in the form of income support) and taxation (para 12).

This points to the fact that the right to housing is not only made effective and realised through the provision of housing units or even through housing policy per se, but can be realised through a number of other government policies and initiatives, many of which the Federal Government does have direct responsibility for, as I turn to discuss next.

3 Realising the right to housing happens not just through providing housing units, or housing policy, but through a range of policies, laws and regulation:

We might first think of realising the right to housing as imposing obligations to build houses. This can be an effective strategy, particularly where there is not enough housing supply. However, as noted above, realising the right to housing happens through a number of policies and initiatives, some of which the national government has direct responsibility for. These include:

- Taxation policy – which can include subsidies or advantageous policies for renters, home owners, organisations or businesses/non-profits providing housing *as appropriate to protect or further* the right to housing;
- Regulation – for example of the construction industry, banking and credit industries, and real estate industries; and
- Resource allocation to the states.

The Federal government already intervenes in either realising the right to housing, or failing to do so, through its constitutional responsibility for policy in these areas, and it is in many of these areas where federal human rights legislation would give Australians the opportunity to hold the government to account for the right to housing.

It is worth reprising here a couple of key elements of the right to housing. I have been referring to the right to housing as a shorthand in this response, but in reality the right is a right to have *access* to *adequate* housing. This does not mean that the right is a right to buy housing or to home ownership. Instead:

The right to housing is a right to access an adequate home in peace, dignity and security

(as elaborated by the UN Committee on Economic, Social and Cultural Rights in General Comment No 4 on the Right to Housing, 1992).

When we understand the right to housing more accurately in this way, we can better see the important ways that the Federal Government can facilitate access to adequate housing through policies and resources outside the specific sphere of the States' responsibility for housing.

4 The most effective protection of the right will require cooperation and harmonization

That said, it is clear that the most effective way to protect the right to housing in Australia will be through effective coordination and cooperation among all levels of government. For this reason, harmonization and coordination between States and Territories, and the Federal Government will be important in making any federal human rights legislation successful. Federal human rights legislation might also provide a model for those States and Territories that do not already have human rights legislation, pointing again to the importance of having a strong Federal model.

Question on Notice, Mr Broadbent (Page 3) Mr BROADBENT: *You mentioned the states then. In developing a federal human rights act, what lessons should be taken from the human rights acts in the ACT, Victoria and Queensland?*

Dr Cristy Clark: If I could add to our response to this question, a further benefit of these Acts is that they have significantly strengthened the early human rights scrutiny process for bills and legislative instruments in each jurisdiction. In the ACT, for example, each bill is accompanied by explanatory statement that must include the following:

- an outline of the purpose and effect of the bill;
- description of the consultation that has occurred and how consultation feedback has informed the proposed approach;
- rights engaged;
- justification of reasonable limits on human rights through an analysis for each provision limiting rights (the criteria for this analysis is set out in s 28 of the Act); and
- a statement of compatibility, to be signed by the Attorney-General, based on the proportionality analysis and reasons provided in the above sections.

You will note that this process is quite similar to the process at the Commonwealth level, where a statement of compatibility is also required. However, there is an important difference. The ACT Directorate of Justice and Community Safety (JACS) contains a 'human rights scrutiny unit ('HRSU') who liaise with all other areas of the ACT public service and the Premier's office to discuss bills while they are still in development in order to support the conceptualisation and drafting of legislation that is compatible with human rights by design. During the drafting of the Bill, Directorates can discuss any potential human rights issues with the HRSU and seek advice on potential issues or changes that might assist its human rights compatibility. These conversations take place frequently in relation to 'significant bills'.

The ACT Human Rights Commission is also regularly consulted and included in these early conversations in order to support robust analysis and to ensure that the least rights-restrictive approach is adopted, that adequate safeguards are considered and incorporated, and that the legislation makes provision for oversight and review where warranted.

Once they are happy with the final legislation, the HRSU at JACS provides a bill with a Memorandum of Compatibility to inform the Attorney-General in granting a Statement of Compatibility. This process means that much of the work of the *Human Rights Act 2004* (ACT) remains invisible to the public, which does raise some issues of transparency, but it also a very effective method of reducing human rights incompatibility and of educating the public service (and politicians) about their human rights obligations and of the (often) very simple changes that can be made to legislation to ensure that it upholds these obligations.