

*Conceptualising Domestic Servitude as a Violation of the Human Right to Housing and Reframing
Australian Policy Responses*

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Abstract

This article makes a twofold contribution to a human rights-centred response to domestic servitude as a modern form of slavery. First, it offers a conceptualisation of domestic servitude as a comprehensive and specific violation of the human right to housing, based on a reading of the right to housing as sitting at a crucial juncture of the public and private. Victims of domestic servitude experience a violation of the right to housing, the nature of which strikingly demonstrates both how housing sits at the nexus of the public and the private; and that the enjoyment of rights in both those spheres is crucial to a person's experience of dignity, peace and security. This conceptualisation deepens our understanding the right to housing, and the condition of domestic servitude as a violation of human rights. This article's second aim is to demonstrate how the commitment to fulfilling the human right to housing underpins a better policy response to modern slavery in Australia. It opens a conversation on how a social rights based response is one that would better serves victim/survivors, offering a more meaningful and targeted response to the harms they suffer.

Keywords

Domestic servitude, right to housing, human rights, public/private distinction, modern slavery.

Introduction

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This article makes a contribution to a human rights-centred response to domestic servitude as a modern form of slavery.¹ The contribution is twofold. First, to offer a conceptualisation of domestic servitude as a comprehensive and specific violation of the human right to housing. The crucial characteristics of domestic servitude are that it takes place in the private sphere of the house or home, where the victim is under the control of the perpetrator. For the perpetrator, the house functions as a valuable private space: in fact, a space sufficiently closed to public scrutiny to allow the criminal act of keeping a domestic slave to take place there. But for victims, the house is a place of work and a place where they are subject to the control of another person to the extent of servitude. Those who experience domestic servitude are denied the rights, freedoms and protections that we associate with safe and secure housing, such as privacy, respite, and refuge, all of which underpin the right to housing as a human right. At the same time, they are denied access to the world outside the house, access to which makes housing as refuge meaningful. Victims of domestic servitude experience a violation of the right to housing, the nature of which strikingly demonstrates both how housing sits at the nexus of the public and the private; and that the enjoyment of rights in both those spheres is crucial to a person's experience of dignity, peace and security. This conceptualisation deepens our understanding the right to housing, and the condition of domestic servitude as a violation of human rights.

While this article focuses on domestic servitude, it is notable that housing will also be a first requirement for survivors of other forms of modern slavery. In many cases of forced or bonded labour, or trafficking, for example, access to housing is controlled by others, and victims do not have access to a safe, secure or private space of their own.² Noting this fact reinforces the importance of the right to housing as a lens to examine and assess the harms experienced in modern forms of slavery, and as a guiding principle in all policy responses, even while a discussion of further forms of modern slavery is beyond the scope of the article.

¹ Modern slavery is a contested term. See Vijayarasa and Bello y Villarino (2002), p 38; Allain (2017); see Stead and Davies (2020) for a critical perspective on the characterisation of 'modern slavery' in Australia. I use the term as an umbrella under which to gather contemporary practices of slavery, servitude, forced labour and human trafficking recognised in Australian and international law.

² See eg Davy (2016).

The article's second contribution is to argue that responses to domestic servitude need to take into account the housing rights of victim/survivors, as central to their recovery and ability to move out of the subjection and violation of domestic servitude. This is a call to move beyond current Australian policy responses, which are poorly informed by social rights, and to make a shift to frame responses around protecting the right to housing.

As a form of slavery, domestic servitude involves the violation of human rights, which rest on the insistence of the 'inherent dignity and of the equal and inalienable rights of all'.³ In essence, forms of slavery deny equal personhood, treating people as objects or as open to ownership and control. The denial of human rights entailed in the condition of slavery should prompt a human rights response, yet a rights-centred reaction is missing in Australia, where the legal and policy landscape on slavery is heavily criminal justice focussed. Specifically, access to social support (which make access to adequate housing possible for those coming out of experiences of domestic servitude) is largely contingent on cooperation with the Australian Federal Police. While subjecting people to slavery and servitude is a crime and should remain so, a criminal justice response can discourage victims from coming forward; can offer little support when they do; and does little to address the underlying causes of modern forms of slavery. This article's second aim is thus to demonstrate how the commitment to fulfilling the human right to housing underpins a better policy response to modern slavery in Australia. It opens a conversation on how a social rights based response is one that better serves victim/survivors, and offers a more meaningful and targeted response to the harms they suffer.

The article begins, in the following section, by describing the condition of domestic servitude, and its prevalence and expression in Australia. It then turns to conceptualise the inherent link between the condition of domestic servitude and the denial of the human right to housing. In this part, I sketch out the content and scope of the right to housing as a human right; and then turn to an analysis of the denial of the right to housing involved in the condition of domestic servitude, with particular attention to the public/private distinction and its relevance to the enjoyment of the right;

³ *Universal Declaration of Human Rights* 1948 (UDHR), Preamble; *International Covenant on Civil and Political Rights* 1966 (ICCPR), Preamble; *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, Preamble.

before illustrating the importance of safe, adequate and secure housing to those exiting domestic servitude. The final section considers how conceptualising domestic servitude as a violation of the right to housing can underpin better policy responses, moving beyond the criminal justice approach to fully take account of the human rights of victim/survivors.

The Condition of Domestic Servitude

Defining Domestic Servitude

Domestic Work

Domestic work is defined by the place in which it is performed – the household – rather than by the employer or by the type of duties performed.⁴ The UN Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences (‘the Special Rapporteur on Slavery’) describes domestic work as ‘work performed in or for a household and includes cooking, cleaning, washing, gardening, being a chauffeur, taking care of children, the elderly and domestic pets. It remains a highly gendered activity.’⁵ Domestic workers may ‘live-in’, being housed in their employer’s home, or ‘live-out’. While the International Labour Organisation (ILO) has noted that the proportion of ‘live-in’ domestic workers has fallen in recent years, it remains an important sector of domestic work.⁶ According to the ILO, globally there are more than 70 million domestic workers.⁷ Yet because domestic work takes place in private homes, it is often hidden. The ILO’s statistics show that over 75% of domestic workers are female.⁸ 11.5 million are migrants.⁹ Domestic work thus, ‘constitutes one of the largest, yet least visible service industries in the world.’¹⁰ Indeed, as Virginia Mantouvalou notes, ‘domestic work is vital for the sustainability and functioning of the economy outside the

⁴ *International Labour Organisation Convention – Decent Work for Domestic Workers* 2011, Article 1. See also Bhoola 2018, para 20.

⁵ Shahinian 2010, para 13.

⁶ ILO (2013a), pp 2-3.

⁷ ILO (2018), p 166.

⁸ ILO (2015a), p 3; ILO 2021, p 12.

⁹ ILO (2015b).

¹⁰ Shahinian (2010), para 12.

household.’¹¹ It powers the care economy¹² and for many workers, it may be fulfilling and empowering.¹³

Because of the private and home-based nature of the work that domestic servants do, they are often excluded from employment protections. These tend to govern only those who fall within the definition of ‘employee’ or who have a formal contractual relationship with the employer.¹⁴ The ILO estimates that 75% of domestic workers are in informal jobs, and that only 10% are covered by general labour legislation to the same extent as other workers, while nearly 30% are completely excluded from the scope of national labour legislation. As the UN Special Rapporteur on Slavery notes, domestic work ‘is deliberately made invisible to public scrutiny. A “private sphere” is constructed, where labour relationships are supposedly beyond State or social control’.¹⁵ This places all domestic servants in a precarious and vulnerable condition, and heightens the potential for abusive and exploitative work conditions.¹⁶ Domestic workers are, therefore, among the most vulnerable of workers.

Domestic Servitude: Crossing the Line from Exploitative work to the condition of Slavery

Domestic Servitude in International Law

Domestic servitude has been defined as an exploitative labour practice, occurring when the victim is held in a private or domestic setting, receives low or no wages, and is subject to abuse and the restriction of movement. Thus domestic servitude crosses the line from harsh or even exploitative labour conditions that a domestic worker may experience, into a condition where the victim is under the *possession* and *control* of another.¹⁷ The US State Department describes involuntary domestic

¹¹ Mantouvalou (2013), p 2.

¹² ILO (2021), p 6.

¹³ Mantouvalou (2013), p 3.

¹⁴ See ILO (2013b), p 51.

¹⁵ Shahinian (2010), para 18.

¹⁶ Mantouvalou describes this as the ‘legislative precariousness’ of domestic workers. See Mantouvalou (2013), part 2; Shahinian (2010), pp 12-22; Human Rights Watch (2005).

¹⁷ See *R v Kovacs* [2009] 2 Qd R 51 (*Kovacs*).

servitude as a ‘unique form of forced labour’ in which the victim’s ‘workplace is informal, connected to their off-duty living quarters, and not often shared with other workers.’¹⁸

Domestic servitude contravenes international law. It is prohibited as a ‘condition analogous to slavery’ in Article 5 and in the Preamble to the Slavery Convention,¹⁹ and as one of the four specific conditions proscribed under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices of Slavery²⁰ as ‘institutions and practices similar to slavery.’ It has also been held to contravene Article 8 of the ICCPR.²¹

Domestic Servitude in Australian Law

In Australia, servitude is defined under s 270.4 of the Commonwealth Criminal Code, which prohibits ‘slavery-like offences’ as:

- (1) ... the condition of a person (the victim) who provides labour or services, if, because of the use of coercion, threat or deception:
 - a. a reasonable person in the position of the victim would not consider himself or herself to be free:
 - i. to cease providing the labour or services; or
 - ii. to leave the place or area where the victim provides the labour or services;
and
 - iii. the victim is significantly deprived of personal freedom in respect of aspects of his or her life other than the provision of the labour or services.

¹⁸ US Department of State (2009), p 18.

¹⁹ *Slavery Convention* 1926, Article 5.

²⁰ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices of Slavery* 1956.

²¹ ICCPR, Article 8:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour

...

The approach of the courts, following the High Court in *Tang*,²² is to assess whether the indicia of slavery (or slave like practices) exists. These centre on the ‘nature and extent of the powers exercised over a complainant.’²³ These indicia include ‘[i]n particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase’ as well as ‘the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services.’²⁴ In each case, whether the condition meets the threshold indicia for slavery is a question of degree.²⁵

Although *domestic* servitude it is not explicitly defined in Australian law, the courts have held that it falls under the slavery offences in the Criminal Code.²⁶ As such, it can be prosecuted in Australian criminal law, subject to establishing the elements of the offence.

The Criminal Code’s definition of servitude also recognises, in 270.4(3)(a) that a person may be in a condition of servitude even where escape from the condition is practically possible. The section reflects Australian courts’ approach to servitude. Specifically, the courts have held that domestic servitude need not mean that a person is under lock and key. Rather, while a person may have some apparent freedoms – such as the ability to leave the house, access to outside communications, and a room that could be ‘locked from the inside but not the outside’²⁷ apparent freedoms may be ‘largely illusory or non-existent.’²⁸ This may be the case where the victim’s poverty, fear of reprisals or criminal sanctions due to immigration status, limited facility with English, lack of friends or associates, threat of debt to the perpetrator, remoteness of location, and confiscation of documents (notably passports) are evident.²⁹ This approach reflects the *Tang* case, the first Australian conviction for a modern form of slavery. At first instance, Justice McInerney found that

²² *R v Tang* (2008) 237 CLR 1 (High Court of Australia) (*Tang*)

²³ *Tang* at [44] (per Gleeson CJ).

²⁴ *Tang* at [44] (per Gleeson CJ).

²⁵ *Tang* at [44] (per Gleeson CJ).

²⁶ See *Kovacs* [2009].

²⁷ *Kovacs* [2009] at 44.

²⁸ *Kovacs* [2009] at 46. See also *The Queen v Wei Tang* [2006] VCC 637 (*The Queen v Wei Tang*).

²⁹ See *R v Pulini and Pulini* [2019] QCA 258 (*Pulini*); *Kovacs* [2009] at 47-48. The court did not directly link the sexual abuse and violence in the *Kovacs* case to the ‘illusory’ nature of the victim’s freedom, but it would be highly relevant in my view.

while the victims were not locked in, they were, in fact, restrained ‘by the insidious nature of their contract’.³⁰ The approach was confirmed by the High Court, giving rise to the ‘indicia’ of slavery as discussed above. The approach also means that domestic servitude may exist even in cases where a person does not ‘live in’ with the perpetrator.

Domestic Servitude: Push Factors and Vulnerabilities

Domestic servitude, like domestic work more generally, is a gendered phenomenon, predominantly experienced by women.³¹ The condition of domestic servitude can be linked also to forced marriage,³² and forced labour.³³ In addition, in many cases, particularly in global north states, domestic servitude relies on migrant labour, and workers may be trafficked into a country for that purpose.³⁴ According to the UN Special Rapporteur on Slavery, situations of dependency ‘can derive from a multiplicity of physical, economic, social, cultural, psychological and legal factors’ that may interact and reinforce each other ‘creating a net of dependency factors from which the victim cannot extract herself’.³⁵ These may include deferred payment, restrictions on freedom of movement, threats of withholding food, water or essential medical care, as well as physical and psychological abuse – including sexual abuse.³⁶

There are four predominant, intertwined, push factors into domestic servitude. First, poverty and the ills it encompasses such as lack of safe and adequate housing, hunger, lack of access to education and basic services. Second, discrimination and marginalisation: the UN Special Rapporteur on Slavery notes that the feminisation of poverty and gender discrimination; discrimination based on ethnicity, race, skin tone or caste; and lack of state protection are root causes of domestic servitude. Third, the presence of civil strife or armed conflict; weak rule of law and impunity for perpetrators. The fourth push factor is occurrence of natural disasters.³⁷

³⁰ *The Queen v Wei Tang* [2006] at 8. The High Court affirmed this broader approach in *Tang*.

³¹ ILO (2015a), p 3.

³² See Shahinian (2010), paras 43-46; ILO (2017), p 43.

³³ See eg *Pulini* (2019).

³⁴ Moore (2019), pp 16-17; Davy (2016) p 195; ILO (2017), pp 29-31, Berg (2016) Ch 8.

³⁵ Shahinian (2010), para 47.

³⁶ Shahinian (2010), paras 47-52.

³⁷ Shahinian (2010), paras 62-82.

These factors are, as the UN Special Rapporteur on Slavery notes, tied in to an exploitative global order in which migration into domestic servitude occurs. This is a global political economy where markets and macroeconomic factors have exacerbated social hierarchies and inequalities both within and among states.³⁸ Playing out in highly unequal ways, the global political economy has seen first, the integration of women into the global labour market, an integration which leaves a gap with regard to domestic and care work.³⁹ Second, demographic shifts, such as an ageing population and a reduction in the traditional role of the extended family which further change patterns of care and caring.⁴⁰ Finally, increasing reliance on domestic workers reflects and is related to the insufficiency of public sector care provision.⁴¹

The Prevalence and expression of Domestic Servitude in Australia

The main push factors into domestic servitude identified by the UN Special Rapporteur on Slavery are relevant in Australia, as reflected in those instances where domestic servitude has come to light. For example, in the *Kovacs* case the court found that Ms G, the victim, had been ‘working with her aunt in a sewing factory and earning a little over \$10 a week. She was then 25 years of age and living in Manila with nine other family members in a one room, galvanised iron shack with no electricity, running water or telephone.’ In addition, she had an ill son and mother to support, and her family encouraged her to go to Australia so that the family could be helped financially.⁴² Similarly, in the Kannan case, Ms N, who was held in domestic servitude for eight years in a Melbourne home, came from a background of deprivation and poverty. In sentencing, the Judge summarised the circumstances that made her vulnerable to exploitation in domestic servitude: she

did not complete her first year primary level education and left school at around age 6. ...

[S]he worked in fields looking after farm animals, later helped workers with menial tasks

³⁸ Stewart (2012). See also Bhoola (2018), paras 24-27.

³⁹ Bhoola (2018), para 25. See also UNANIMA (2012), p 22.

⁴⁰ Bhoola (2018), para 25. See also UNANIMA (2012), p 22.

⁴¹ Bhoola (2018), para 25. See also UNANIMA (2012), p 22.

⁴² *Kovacs* [2009] at 7.

on building sites and cooked. Her life has been characterised by an exceedingly low level of education, illiteracy in language and numeracy and carrying out low level employment. She married and had four children, but her husband died early and she was forced to raise and care for her children on her own. She lost whatever assets she had when she had to mortgage some property to pay for her daughter's wedding and was unable to repay the loan. Her life in India has been dominated by financial struggle and deprived circumstances.⁴³

Samantha Lyneham, Christopher Dowling and Samantha Bricknell have demonstrated the difficulty in measuring the prevalence of slavery victimisation in Australia, due to the clandestine nature of slavery in the contemporary context.⁴⁴ However, the perception that modern forms of slavery, and specifically domestic servitude, happen only elsewhere is inaccurate.⁴⁵ Cases of domestic servitude in Australia are reflective of the international literature on migrant domestic servitude: they 'align with the fact patterns known through publically reported cases of exploitation in domestic work and/or labour trafficking for domestic servitude'.⁴⁶ Heather Moore found a data gap on domestic servitude,⁴⁷ that there are insufficient pathways out of domestic servitude, and inadequate remedies, leading to 'a culture of impunity.'⁴⁸ Lyneham, Dowling and Bricknell estimated only 1 in 4 victims of modern slavery in Australia are detected⁴⁹ and that figure may be even lower for those held in domestic servitude, given that it takes place in the private, hidden sphere of the home. The overall context is also relevant. Australia is a country with a high prevalence of migrant workers, within which is a high proportion of domestic workers.⁵⁰ It is clear that domestic servitude takes place in

⁴³ *Cth Director of Public Prosecutions v Kumuthini Kannan and Cth DPP and Kandasamy Kannan* [2021] VSC 439 at 6 (*Kannan*). See also para 220 for further discussion of Ms N's vulnerability.

⁴⁴ Lyneham et al (2019), p 192. See also Larsen and Renshaw (2012).

⁴⁵ Moore (2019), p 11.

⁴⁶ Moore (2019), p 54.

⁴⁷ Moore (2019), p 8.

⁴⁸ Moore (2019), p 8.

⁴⁹ Lyneham et al (2019), p 195.

⁵⁰ ILO (2015b), p 78.

Australia, and that the cases that come to public attention, let alone prosecution, represent the very tip of the iceberg.⁵¹

There have however, been successful prosecutions in cases revealing domestic servitude before Australian courts.⁵² In 2021, a couple were convicted of holding a woman in domestic servitude over a period of eight years. The Kannans obtained a visa for Ms N under false pretences, and she arrived in Australia to perform domestic work for the family. In sentencing, the judge found that the Kannans has proceeded to ‘develop[] almost absolute control over all aspects of [Ms N’s] day-to-day life.’⁵³ Her passport was confiscated; she was paid only a minimal amount; her work, communications with family and others, and access to health care were controlled by the Kannans.⁵⁴ The Judge noted a ‘massive power imbalance’ between the Kannans and Ms N.⁵⁵ The lack of care with which the Kannans treated Ms N led to the deterioration of her health to the point of severe and life-threatening collapse, even at which point the Kannan’s failed to seek treatment and then misled medical staff in efforts to absolve themselves of blame. In sentencing, the Judge stressed that domestic servitude need not be characterised by the presence of shackles and locks, but that the personal vulnerabilities of the victim and the power and control of the perpetrator could operate to the same effect, producing the condition of slavery.⁵⁶

In the case of *R v Kovacs*,⁵⁷ the Kovacs brought a young woman, (Ms G) to Australia under cover of a sham marriage. They required Ms G to work 7 days a week, for up to 17 hours a day. The evidence showed that her ‘working hours in the shop were from 6 am to 6 pm Monday to Friday and from 6 am to noon on Saturdays. Normally, after finishing work at the shop the complainant did

⁵¹ Moore (2019), Part 1 and p 18; Schloenhardt and Jolly (2010), p 692.

⁵² The relevant cases are: *Kovacs* [2009]; *Kannan* [2021]; *Pulini* [2019]; *Masri v Nenny Santoso and anor* [2004] NSWIRComm 108 (*Marsi v Santoso*), and the case of *McAleer* (<https://www.afp.gov.au/news-media/media-releases/sydney-couple-sentenced-forced-labour>). It should be noted that while the facts in these cases evidence domestic servitude, they have been prosecuted under various of the Criminal Code’s slavery offences.

⁵³ *Kannan* [2021] at para 102.

⁵⁴ *Kannan* [2021] at para 102.

⁵⁵ *Kannan* [2021] at para 223.

⁵⁶ *Kannan* [2021] at para 230.

⁵⁷ *Kovacs* [2009].

domestic work until between 10 pm and 11 pm each night. She had no work-free days allocated to her.⁵⁸ Over three years, she received wages of only \$460, most of which she returned to the Kovacs so that they could send the money to her family.⁵⁹ She was repeatedly raped by Mr. Kovacs.⁶⁰ On her first attempted escape, Ms G was caught and her passport was confiscated by the Kovacs.⁶¹

The case of *Masri v Santoso*, heard before the NSW Industrial Relations Commission, where Ms Masri brought a claim for a breach of employment law,⁶² concerned a woman who was brought to Australia to perform household duties for a family. She arrived on false documents, arranged by the employer/perpetrator, and worked in their house for several years, never being paid a regular wage. Her passport, documents and travellers cheques were confiscated by the Santosos on arrival in Australia.⁶³ She was threatened with immigration detention if she were to leave employment, and told to hide from visitors to the house.⁶⁴ She slept in a corner of the rumpus room and later in the respondents' office;⁶⁵ her letters were read by others;⁶⁶ and she was not allowed to go to the shops on her own.⁶⁷ She performed cooking, cleaning, childcare, garden maintenance, and waiting on the family, as well as helping in their office.⁶⁸ The Tribunal found that the applicant 'usually worked from 5.30 am to 11pm and sometimes until 3.00am in the morning seven days a week.'⁶⁹ The award details a story of vulnerability, poverty, and lack of information, but also Ms Masri's resilience, self-belief and resourcefulness.

There have also been a number of alleged cases of domestic servitude involving the staff of Foreign Embassies in Australia.⁷⁰ The law of diplomatic immunity makes these cases especially

⁵⁸ *Kovacs* [2009] at para 10.

⁵⁹ *Kovacs* [2009] at 8-9.

⁶⁰ *Kovacs* [2009] at 11.

⁶¹ *Kovacs* [2009] at 11-13.

⁶² *Marsi v Santoso* [2004].

⁶³ *Marsi v Santoso* [2004] at para 29.

⁶⁴ *Marsi v Santoso* [2004] at para 29.

⁶⁵ *Marsi v Santoso* [2004] at para 34 and 42.

⁶⁶ *Marsi v Santoso* [2004] at para 41.

⁶⁷ *Marsi v Santoso* [2004] at para 43.

⁶⁸ *Marsi v Santoso* [2004] at para 38.

⁶⁹ *Marsi v Santoso* [2004] at para 38(g).

⁷⁰ Lewis (2007).

difficult: the victim/survivors are highly vulnerable, they are deeply hidden from oversight, and holding the perpetrators to account raises additional practical and legal challenges.

Domestic Servitude and the Denial of the Right to Housing

Recently, attention has turned to the links between the lack of adequate, safe and secure housing and vulnerability to domestic servitude and modern slavery more broadly. Those working with survivors of slavery and with those experiencing homelessness have documented how escape from abusive and unsafe housing situations may push people into slavery, and those in homelessness are vulnerable to exploitation through slavery and slave like practices.⁷¹ These are important connections. However, in this section, I seek to go beyond these general links, and provide a specific conceptualisation of domestic servitude – servitude which is characterised by the location in which it takes place – as a violation of the human right to housing. The connection between the denial of the right to housing and the experience of domestic servitude is inherent. In domestic servitude, the victim/survivor does not experience the crucial protections of the space of the house as a place of refuge, privacy and respite. Instead, the house is a place of labour, in which the victim/survivor is under the control of another. Those in domestic servitude are *housed*, as domestic service is defined by the space in which it takes place, but they have no rights to or in that home or house.

I begin with a brief synopsis of the right to housing, and Australia's obligations for it, before developing my argument on domestic servitude as a violation of it.

What is the Right to Housing and what are Australia's Obligations for it?:

The right to housing has been enshrined in international human rights law since the adoption of the Universal Declaration on Human Rights (UDHR) in 1948.⁷² It was subsequently included in the

⁷¹ UNANIMA (2012), p 28.

⁷² *Universal Declaration of Human Rights* 1948 (UDHR). The Right is also included in over 50 domestic constitutions, a number of which predate its inclusion in the UDHR: Oren et al (2014). For further analysis of

International Covenant on Economic Social and Cultural Rights (ICESCR), giving it binding legal expression. The right is included as an aspect of the right to an adequate standard of living, in Article 11(1) ICESCR:

The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right...

The provision echoes Article 25 UDHR in recognising that housing is nested in a ‘network of mutually dependent and reinforcing human needs’.⁷³ It is notable that the right in Article 11(1) is to *adequate* housing, rather than a minimal right to shelter. Nevertheless, and unlike UDHR Article 25, ICESCR Art 11(1) is tempered by internal limitations and by other Articles of ICESCR, notably, Article 2(1), which specifies state obligations for realisation of the rights.

While Article 2(1) has often been misinterpreted as imposing only a standard of progressive – or future – realisation, in fact it imposes a number of immediate obligations on the State. These include to immediately remove any discrimination in the realisation of the right (through legislative and other measures),⁷⁴ to ensure the minimum core of the right,⁷⁵ and to take all other measures for realising the right that do not require substantial government resources. Beyond that, where the state cannot immediately comply with full realisation of the right, it must take steps, toward full realisation, using the maximum of its available resources.⁷⁶

The Australian government ratified ICESCR in 1975. Thus, as a matter of international law, Australia has accepted the obligation to respect, protect and fulfil the right to housing. These obligations remain binding on Australia as a basic principle of international law, regardless of whether

the legal content and interpretation of the right to housing in international law and in key domestic jurisdictions, see Hohmann (2013), Part I.

⁷³ Wilson (2020), p 184.

⁷⁴ UN Committee on Economic, Social and Cultural Rights (CESCR) (1990), para 1. See further Sepúlveda Carmona (2003).

⁷⁵ CESCR (1990), para 10.

⁷⁶ CESCR (1990), para 10.

Australia has taken steps to translate the ICESCR rights into domestic legal norms. In addition, although Australia has not incorporated ICESCR, its formal position is that it ‘ensure[s] that Australia’s domestic legislation, policy and practice are consistent with Australia’s international human rights obligations’.⁷⁷ Thus, while the right to housing cannot currently be claimed before an Australian court, it remains an important standard against which government legislation and policy can be measured, and can be powerfully used to underpin advocacy and activism. It can—and should—be used to guide responses to social problems.

The lack of adequate housing is a serious deprivation. Housing shields us from the elements, provides refuge from external physical threats, and gives us a base from which to build a livelihood and take part in community and civic life.⁷⁸ It is a ‘zone of personal intimacy and family security.’⁷⁹ But housing also provides a space in which our psychological needs can be met and fostered.⁸⁰ Housing is thus important in the formation and protection of identity, community and place in the world.⁸¹ To understand and protect this complexity requires a multifaceted right, which recognises housing’s role in the relationship between the individual and the state, the public and the private, inclusion and exclusion. Its realisation is deeply affected by and tied up with a range of other political, economic and ideological problems and phenomena.

As I have argued elsewhere, recognition of the right to housing as a human right is based on an appreciation of the importance of housing to privacy, autonomy and freedom; its function in facilitating participation and inclusion in society; and its role in providing the material goods that make all of these things meaningful and possible.⁸² In other words, the principles that inform and undergird the right to housing include some of the most fundamental human needs that human rights seek to protect. Moreover, while aspects of a person’s relationship with her housing and home may be protected by rights to privacy and property, by rights to vote and to freedom of expression, a right to

⁷⁷ CESCR (2016), paras 24-27.

⁷⁸ Hohmann (2013), p 231.

⁷⁹ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 (CC) at 17 (Sachs J).

⁸⁰ Hohmann (2013), p 231.

⁸¹ Hohmann (2013), p 231.

⁸² Hohmann (2013), p 231.

housing shifts the focus, insisting that housing is not merely instrumental to the realisation of other human needs and goods.⁸³

The Public Private Divide and the Right to Housing

Housing sits at a crucial juncture between the public and the private spheres.⁸⁴ Housing is meaningful precisely because it sits at this crux, offering a respite from the world but also a base from which to take part in community and society beyond. Its protection as such has a deep history in the common law. For example, the 1604 *Semayne's Case*, held that 'the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.'⁸⁵ At the same time, housing offers a base from which we can take part in the life of the community, and contribute to it more broadly. For example, the Indian courts have linked safe, secure and adequate housing to the ability to contribute to public life as a citizen.⁸⁶ The right to housing protects this important complementarity between the private and public.⁸⁷ The house and home are the paradigmatic private space, a fact also reflected in human rights law more broadly.⁸⁸

⁸³ Hohmann (2013), p 1.

⁸⁴ Hohmann (2013), ch 6.

⁸⁵ *Semayne's Case* [1604] 5 Co. Rep 91 a 194 (KB) at 195 (*Semayne's Case*).

⁸⁶ See *Chameli Singh and others v State of Uttar Pradesh and others* (1996) 2 SCC 549 (Indian Supreme Court) p 555-556. See also the arguments raised (unsuccessfully) before the Canadian courts in *Victoria (City) v Adams* (2009) BCCA 563 (British Columbia Court of Appeal) at para 55 that the effect of homelessness 'was to exclude the homeless from both the benefits and the responsibilities of citizenship - in effect to render the homeless non-citizens.'

⁸⁷ Hohmann (2013), p 165. I am mindful that to say that housing is the 'key' mediation between the public and the private, and in arguing for rights to and in both spheres, I risk re-inscribing this distinction in ways that do not move beyond the classed, gendered and racialized view of liberal legal rights. For this reason, we should be attuned to the possibilities of meaningful lives, and meaningful rights, beyond a world structured on the public private distinction.

⁸⁸ See, eg, Article 17 ICCPR which states that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

and Article 8 ECHR, which protects:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The private realm lies, in the western political and philosophical conceptions that underlie the Anglo-Australian legal system, outside the parameters of state regulation.⁸⁹ The ‘heart’ of the private life has been recognised in law as ‘the notion of a private space into which no-one is entitled to enter’.⁹⁰ This is not merely a conceptual commitment to a sphere of life that is not subject to state control or interference. Instead, it is the house (particularly the house as a home) that is considered the paradigm of the private.

Ideas of privacy and the private sphere have consistently placed what happens within the home as outside the law, as belonging to and in a private realm untouched by legal regulation. As Sandra Berns summarises: ‘The public is associated with freedom, with the (male) transcendental subject ... and with that subject’s absolute right to a private sphere, a space into which the state’s authority does not run and within which *he* is free to do as *he* will with his property (including *his* wife and children)’.⁹¹ These ideas continue to operate powerfully, despite the fact that the home is in fact heavily regulated in law, a point feminist legal scholars continue to stress.⁹²

This brings us to the important fact that the private space of the house is a gendered one: women’s place and women’s experience have long been tied to the domestic realm.⁹³ Women’s legal status and independent subjectivity were obscured by the opacity of the family unit to the state.⁹⁴ Seen as occurring outside the market, women’s role in providing care and the goods of social reproduction were not considered as part of the public realm, and not rewarded, or protected, by the state.⁹⁵

Both Article 8 and 17 may provide important protection for those subjected to domestic servitude. However, it is relevant that both refer only to existing rights or interests in a home, and may offer only limited protection for those who do not already have a home. See Hohmann (2013) p 69. Moreover, Article 17 and 8 are normally considered negative rights, whereas the right to housing entails positive obligations, particularly in cases (such as domestic servitude) where people are homeless. See further Hohmann (2013) p 35.

⁸⁹ Gavison (1992), p 19.

⁹⁰ See Harris et al (2014), p 367; See also *Semayne’s Case* [1604].

⁹¹ Berns (2003), p 119. Original emphasis. The inverse of this male freedom in the home, is, as Davies notes, that for women the home has ‘often been difficult, dangerous, or, at the very least, normatively and practically problematic. The home has been a primary site of oppression for many women and a place where inequality is reproduced.’ Davies (2014), p 156.

⁹² See Lacey (1993), p 94-96.

⁹³ For example, Charlesworth et al (1991), p 626.

⁹⁴ See Romany (1993), p 101.

⁹⁵ Hochschild (2018), p 32.

Although this description can appear historical, it remains relevant for two important reasons. First, the assumptions about the public/private distinction run through contemporary human rights in theory and in law.⁹⁶ The state's blindness to the private sphere fosters an understanding of human rights in which rights that regulate or constrain actions in the house and home are seen as trampling on sacred private ground. Meanwhile, the state as an entity remains built on a model of social organisation in which the activities occurring in the house, provided through a woman's 'normal' role, are 'instrumental in providing' what might otherwise be seen as social rights that might be claimed against the state.⁹⁷ With specific reference to domestic servitude, the house often remains opaque to legal regulation of the work that takes place there. For example, the US State Department describes involuntary domestic servitude as a 'unique form of forced labour' in which the victim's 'workplace is informal, connected to their off-duty living quarters, and not often shared with other workers. Such an environment is conducive to exploitation since authorities cannot inspect private property as easily as they can inspect formal workplaces.'⁹⁸ Likewise, the UN Special Rapporteur on Slavery has noted that while domestic servitude is unequivocally outlawed in international human rights law, in fact, international labour protections are often weak in safeguards for domestic workers, at least in part because of the commitment to the private sphere as a space beyond legal regulation.⁹⁹ Moore, meanwhile, notes that 'one of the greatest causes of vulnerability of domestic workers is the isolation in which they work. A key reason for this isolation is the lack of regulatory frameworks.'¹⁰⁰

Second women's lives continue to be more closely knotted to the house than those of men. Worldwide, women 'are the primary users of housing and therefore most affected by housing.'¹⁰¹ Women shoulder heavier child rearing and other caring responsibilities.¹⁰² Where women enter the paid workforce, their social reproductive responsibilities often result in buying in domestic work by

⁹⁶ Romany (1993), p 87.

⁹⁷ Wright (2003), p 75.

⁹⁸ US Department of State (2009), p 18.

⁹⁹ Shahinian (2010), para 83.

¹⁰⁰ Moore (2019), p 29.

¹⁰¹ Farha (1999), p 486.

¹⁰² In the context of the Covid 19 Pandemic, see Wood et al (2021).

other women, resulting in complex global ‘care chains’¹⁰³ along the links of which domestic servitude may occur.

As such, the descriptive force of the public/private dichotomy, and the differential rights experienced by women on both sides of it, remain highly relevant. The assumptions of the public/private divide continue to inform and structure our understandings of housing and the home. In the house, women were, and to an extent remain, hidden from the law both metaphorically and physically.¹⁰⁴

The recognition of the house as a private space rests upon the importance of such a private space to a fulfilled and meaningful human life. Douglas Porteous and Sandra Smith have identified home as a crucial private space across two axes. The first is outward looking: ‘home as centre – a place of refuge, freedom, shelter and security.’ The second is inward looking: ‘home as identity – with themes of family, friends and community, attachment, rootedness, memory, and nostalgia’.¹⁰⁵ However, to have value a private sphere must be complemented with a public sphere. The private sphere as a space of retreat, a sanctuary or space of empowerment, ceases to have value if the privacy is an enforced one. In such cases, housing can become a denial of autonomy, freedom and privacy.

Catherine MacKinnon’s feminist analysis of how the denial of the public sphere and public life devalues, and can even render the private sphere meaningless is apposite:

For women, the measure of the intimacy has been the measure of the oppression. To see the personal as political means to see the private as public. On this level, women have no privacy to lose or to guarantee... Privacy is everything women as women have never been allowed to be or to have; at the same time the private is everything women have been equated with.¹⁰⁶

¹⁰³ On care chains and domestic work see Yeats (2009) and Fudge (2012), p 63-69.

¹⁰⁴ See Hohmann (2013), p 158.

¹⁰⁵ Porteous and Smith (2003), p 61.

¹⁰⁶ MacKinnon (1989), p 70.

MacKinnon thus foregrounds the loss or denial of the value of the private, through the denial of rights in that sphere. But, to reiterate, it is not the private itself that is without value. Rather, the private is devalued when rights in and to it are absent. Those rights give a person control in and over the space, and the choices made in it, including to leave it.

The right to housing is premised on the need for the freedom, security and safety of a private space, in which to exist and to ground our social subjectivity and legal personhood. It also demonstrates the need for rights to and in that space in order to enjoy that freedom and security, rather than to suffer privation and deprivation in it. One must be able not only to retreat to a private space as a refuge, but to come out of it and to have a life beyond it.¹⁰⁷

For those in domestic servitude, the home often operates to provide neither of these crucial protections that the right to housing seeks to protect and ensure. Domestic servitude is a condition that devalues the private sphere, at the same time it denies access to the public, and as such it cuts out any meaningful enjoyment of the right to housing, which rests on the need for both.

In a situation of domestic servitude, the victim is often fully in the private sphere, unable to access the freedoms, social and civic participation of the public sphere. At the same time, the victim is denied the private sphere as a retreat from the public. While the home that she lives in is someone else's private sphere, for the victim it remains the public. This is a form of homelessness in which there is no retreat from the pressures of work and public into the safety and relaxation of home, nor is there the unconstrained ability to move beyond this sphere to enjoy the rights and privileges of social, economic and political citizenship.

The crucial characteristics of domestic servitude are that it takes place in the private sphere of the home, where the victim is under the control of the perpetrator. For the employer/perpetrator, the home continues to function as a valuable private space: in fact, a space sufficiently closed from public scrutiny to allow the criminal act of keeping a person in servitude there. But for the victim, the house is a place of work, and moreover, a place where she is subject to the control of another person to the

¹⁰⁷ Hohmann (2013), p 159.

extent of servitude. For these reasons, domestic servitude is a *particular* denial of the right to housing. Either way she turns, the victim is confronted by both the public and the private set out against the meaningful protection of her rights or freedoms. For an individual in a condition of domestic servitude, there are no complementary public and private spheres. This, coupled with the loss of the fundamental protections that are supposed to attach to each, means that in the case of domestic servitude, both the ‘inward looking’ and ‘outward looking’ aspects of home are not present. Inserting attention to the complementarity of the public and private in the right to housing has the potential to ensure that such situations of homelessness are recognised, rather than marginalised or denied because they happen behind the closed doors of a house.

The Importance of Safe, Secure and Adequate Housing for victim/survivors of Domestic Servitude

As the lack of secure, safe and adequate housing is central to the condition of domestic servitude, it is unsurprising that access to housing is vital to those escaping and recovering from conditions of domestic servitude.

In a 2019 study, Heather Moore found that those seeking to escape domestic servitude in Australia sought ‘to leave the situation safely, followed by shelter, information and general assistance to avoid having to return to the employer.’¹⁰⁸ However, she found that access to safe shelter or housing was difficult to obtain: ‘of those who fled, several spent the night out of doors in parks and public spaces before connecting with a support service.’¹⁰⁹ People thus risk re-victimisation or the violation of other human rights while awaiting social support.

With respect to forced marriage, including forced marriage accompanied by ‘slave like conditions’,¹¹⁰ key findings from the Lighthouse Project point to the fundamental nature of a safe housing environment in recovery: ‘the house itself provided a physical holding function for the young

¹⁰⁸ Moore (2019) p 52.

¹⁰⁹ Moore (2019) p 53.

¹¹⁰ Powell (2020) pp 46-7.

women which contributed to internal feelings of safety and comfort.’¹¹¹ Survivors who had accessed the safe house, ‘convey[ed] a sense that the home itself constitutes a significant part of how the young women were able to re-gain an internal sense of safety and security.... The idea that the home provides a secure base for the re-establishment of a sense of safety setting up the conditions for growth’.¹¹² As staff at the Salvos Safe House report, access to safe and secure housing is an essential first step in trauma recovery for victim/survivors. When survivors are able to access stable housing, the sense of safety and belonging is powerful. Many victim/survivors of domestic servitude may never have had privacy or a private space for themselves, they may never have been able to be at leisure in the home.¹¹³

But the Australian legislative framework for responding to domestic servitude under the criminal law places significant hurdles in access to housing for those exiting domestic servitude, and does little to address their housing needs or rights. I turn now to consider the current framework, and to argue that a right to housing could help reframe policy responses to domestic servitude in important ways.

Current Legislative Response to Slavery in Australia and its Limitations

The domestic response to modern slavery in Australia is heavily criminal justice focussed. Criminal offences for slavery, sexual servitude, people trafficking and debt bondage were inserted into the Criminal Code at the Federal level in 1999, and have been deepened and broadened since.¹¹⁴ These laws address slavery-like practices (such as servitude, forced labour, or forced marriage), and

¹¹¹ Powell (2020) p 5, see also 26-28. See also UNANIMA (2012), p 2.

¹¹² Powell (2020) p 28.

¹¹³ Salvos Safe House Staff (Personal communication), 26 July 2021.

¹¹⁴ *Criminal Code (Slavery and Slavery-like Offences) Act 1995* (Cth); *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth); *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth); *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth); *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013* (Cth); *Proceeds of Crime Act 2002* (Cth); *Fair Work Act 2009* (Cth); *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

trafficking, among other offences. They have been described as ‘relatively robust,’¹¹⁵ and, as discussed above, take within their sweep the crime of subjecting a person to domestic servitude.

The recent Commonwealth Modern Slavery Act¹¹⁶ forms an important further response to contemporary forms of slavery and slave like practices. But as commentators note it is unlikely to have much relevance for domestic servitude, given that it is largely concerned with due diligence for slavery like practices in global supply chains, which raise issues of a different character to domestic servitude,¹¹⁷ since domestic servitude takes place in the home and generally outside of the formal labour market.

In addition to the legislation, the Commonwealth Government’s most recent National Action Plan to Combat Modern Slavery sets out its strategic framework in the area. The plan rests on a vision where slavery is eliminated, and ‘the human rights of all people are valued equally’; where victim/survivors are supported, protected and empowered.¹¹⁸ Its underpinning principles include prevention and deterrence, protection and support, and access to effective remedies.¹¹⁹ However, the plan lacks a human rights framing, and importantly, remains silent on the issue of housing.

This is not to argue that criminal offences are unimportant. Criminalisation brings with it sanctions, moral weight, and can act as a deterrent. However, criminalisation of perpetrators may do little to protect those who are subjected to conditions of servitude. First, criminal sanctions normally apply only after the harm has occurred, and focus on the perpetrator, rather than the victim. Second, criminalisation on its own offers little to support victim/survivors who are often vulnerable and marginalised, and who may have been traumatised by the experience of servitude, as it is not coupled with redress or compensation for victim/survivors.¹²⁰

¹¹⁵ Vijeyarasa (2019), p 861.

¹¹⁶ *Modern Slavery Act* 2018 (Cth). See also *Modern Slavery Act* 2018 (NSW).

¹¹⁷ See Christ and Burritt (2017), p 105.

¹¹⁸ National Action Plan to Combat Modern Slavery (2020) ‘vision’ p 18, ‘mission’ p 18.

¹¹⁹ See National Action Plan (2020) p 20-21.

¹²⁰ Simmons and Burn (2013), p 993; Burns and Simmons (2006), p 553; Richards and Lyneham (2014), p 4; Moore (2019) p 8; The Guardian, ‘Australia urgently needs a compensation scheme for victims of slavery- without it there can be no justice’, <https://www.theguardian.com/commentisfree/2021/aug/06/australia-urgently-needs-a-compensation-scheme-for-victims-of-slavery-without-it-there-can-be-no-justice>. In the UK context see Mantouvalou (2018).

The specific way in which responses to modern slavery foreground criminal justice and simultaneously background the housing rights of victim/survivors in Australia is that forms of support for victims/survivors are only unlocked by meaningful participation of the victim/survivor in the criminal justice process.¹²¹ Access to housing is among the supports that are contingent on participation in the criminal justice process, used to incentivise victim/survivors to participate in bringing perpetrators to justice. Support for victim/survivors of domestic servitude should be decoupled from participation in the criminal justice process. And criminal sanctions for perpetrators must be coupled with human rights responses which protect and support the victim/survivor.¹²²

Advocates have long recognised that linking support to participation in the criminal justice process can be draconian in its effects, forcing victims into a choice between destitution or contact with law enforcement they are ill equipped to handle in the direct aftermath of trauma.¹²³ This has been accepted with respect to forced marriage, which is now exempt from the requirement that the victim/survivor cooperate with Federal Police to ensure ongoing access to support services.¹²⁴

The Support for Trafficked People Program is managed by the Department of Social Services. According to the National Action Plan to Combat Modern Slavery, the Program ‘meets victim and survivors’ basic needs, including food, safe accommodation, and support for mental and physical health and well-being.’¹²⁵ It is not framed around victim/survivor rights. The Program allows access to emergency housing for 45 days, irrespective of whether the person is able or willing to help the police. Longer-term support, for example the Extended Intensive Support Stream and the Justice Support Stream, require participation from the victim in the police’s ongoing investigation.¹²⁶ In addition, referrals to the Program can only be made by Australian Federal Police, so the

¹²¹ National Roundtable on Human Trafficking and Slavery (2015), p 13.

¹²² On economic, social and cultural rights as a response to contemporary forms of slavery and servitude more broadly, see Rassam (2005).

¹²³ Davy (2015), pp 194-195; Joint Standing Committee on Foreign Affairs, Defence and Trade (2017), part 7.18-7.30; Chazal and Raby (2021) p 44-45 In the EU and UK context, see Fudge and Strauss (2014).

¹²⁴ Australian Red Cross (2019).

¹²⁵ National Action Plan to Combat Modern Slavery (2020), p 13.

¹²⁶ Australian Red Cross (2019); See also Social Security Guide, ‘Human Trafficking Visa Framework’, <https://guides.dss.gov.au/guide-social-security-law/9/1/2/130> for access to the Program for people who do not have a valid visa, and National Roundtable on Human Trafficking and Slavery (2015), p 16.

victim/survivor must have overcome a number of obstacles to be in touch with the police and be referred, and the victim/survivor must already have shared enough information about their case to be considered eligible for the Program.¹²⁷ There are an additional number of hurdles for access to housing support beyond the initial contact. First, the police may not take the case seriously as a case of slavery, choosing not to refer the individual for support. Kelly Richards and Samantha Lyneham's research found that '[o]n the small number of occasions in which victim/survivors chose to involve the police based on the belief that the police would intervene and facilitate appropriate referral pathways, they did not receive the expected outcome from their attempt at seeking help. Commonly, their situation was not recognised as exploitative or as related to human trafficking.'¹²⁸ Or police may proceed with the investigation, but decide that the case doesn't have a realistic prospect of success, also terminating access to support. Even so, there is little evidence to suggest that cooperation with the police leads to a positive outcome. Research by Heather Moore found at least half of those who contacted police did not receive a favourable outcome.¹²⁹ This demonstrates the pressing need for a response that moves beyond the criminal justice focus currently dominating Australian law and policy.

For victim/survivors who are present in Australia without a valid visa, or who are in Australia on a visa category which does not give them access to social payments or welfare supports, those payments which are tied to the criminal justice process are often the only form of income available.¹³⁰ There are more avenues of support open for Australian permanent residents or citizens. However, there remain particular obstacles to gaining adequate housing, as noted by those agencies which support victim/survivors in Australia.¹³¹ These individuals are eligible to register for social housing, but wait lists remain extremely long across Australia.¹³² Priority access to housing for victims of

¹²⁷ See, eg Moore (2019); Chazal and Raby (2021), p 45-46.

¹²⁸ Richards and Lyneham (2014), p 4.

¹²⁹ Moore (2019), pp 52-53; see also National Roundtable on Human Trafficking and Slavery (2015), p 13.

¹³⁰ According to the National Action Plan to Combat Modern Slavery, the majority of victim/survivors helped by the Support Program between 2014-19 were Australian citizens. National Action Plan (2020) p 15. This may not accurately reflect the nationalities of victims of slavery offences, and may align instead with the limitations of the programme and factors that constrain non-citizens from contacting authorities.

¹³¹ See Chazal and Raby (2021), p 46-7.

¹³² A recent report found that even if the states (who have responsibility for social housing) were to meet their targets in creating new social housing, 'they will have failed to meet the immediate housing needs of 100,000

crime is often limited to those who have experienced an act of physical or sexual violence,¹³³ and long periods of coercion and control experienced by those in domestic servitude may not meet the criteria,¹³⁴ even if some victim/survivors may be eligible for priority access on other grounds. Overall, priority access to social housing in Australian states serves a very small category, which has been narrowed over time.¹³⁵

Because victim/survivors of servitude often lack formal qualifications and ability to prove work history, many have limited employment options, on top of the issues for stable employment caused by trauma and victimisation.¹³⁶ As with access to priority housing, victim support payments are normally only available to those who have been victims of physical or sexual violence,¹³⁷ which does not always characterise the experience of domestic servitude, although welcome changes in NSW extend eligibility for victim/survivors of modern slavery.¹³⁸

Even when victim/survivors are able to access social supports through participation in the criminal justice process, the programs lack access to adequate, safe and secure housing.¹³⁹ Victim/survivors can end up housed in hotels or serviced apartments for a number of months.¹⁴⁰ This

families' across Australia. Compass Housing Services (2021), p 3. In NSW, for example, the current expected waiting time for social housing in some areas tops 10 years for all property types, with a total of 46,087 applicants registered on the waiting list. See NSW Communities and Justice, 'Expected Waiting Times', <https://www.facs.nsw.gov.au/housing/help/applying-assistance/expected-waiting-times>. The figures are similar in Queensland, where the numbers on the waitlist have increased by 70% in three years. See Brisbane Times, 'Social Housing Waiting List Could Fill a Town Larger than Gladstone', <https://www.brisbanetimes.com.au/politics/queensland/social-housing-waiting-list-could-fill-a-town-larger-than-gladstone-20210429-p57nd3.html>.

¹³³ Communities & Justice, 'Social Housing Eligibility and Allocations Policy Supplement', <https://www.facs.nsw.gov.au/housing/policies/social-housing-eligibility-allocations-policy-supplement/chapters/urgent-housing-needs>; Housing VIC, 'Social Housing Eligibility', <https://www.housing.vic.gov.au/social-housing-eligibility#priority-categories>.

¹³⁴ See ANROWS (2021).

¹³⁵ Compass Housing Services (2021), p 2.

¹³⁶ See Rose et al (2021); see also Red Cross (2021), p 15.

¹³⁷ For example, see: Victims of Crime, 'Violent of Physical Crime', <https://www.victimsofcrime.vic.gov.au/the-crime/types-of-crime/violent-or-physical-crime>; but see Victims of Crime, 'Family Violence', <https://www.victimsofcrime.vic.gov.au/the-crime/types-of-crime/family-violence>.

¹³⁸ See NSW Government, Victims Services, NSW Victim Support Scheme 'Eligibility Criteria' <https://victimsservices.justice.nsw.gov.au/victims-services/how-can-we-help-you/victims-support-scheme/eligibility-criteria.html#Victims1>.

¹³⁹ Red Cross (2021).

¹⁴⁰ See Detective Sergeant Bevan Moroney, Head of AFP Human Trafficking Programme Melbourne, quoted in Lighthouse Foundation, 'Young Women's Freedom Program', <https://lighthousefoundation.org.au/young-women-s-freedom-program>. See also Red Cross (2021), pp 7, 23.

form of housing constitutes emergency or temporary housing, and it may be fundamentally important, but it does not constitute safe, adequate and secure housing in terms of the right to housing,¹⁴¹ and is often poorly supported for those with complex needs.¹⁴²

All these factors need to be seen against a background of Australia's very high housing prices; and overall inadequate levels of public housing and welfare support.¹⁴³ They must also be seen in light of a 'relentless' policy to discourage irregular migration,¹⁴⁴ which contributes to the vulnerability of those in domestic service: restrictive immigration controls contribute to exploitation of migrant domestic labourers.¹⁴⁵

In the best case scenario, victim/survivors escaping domestic servitude will be able to cooperate in the criminal justice process to the satisfaction of police. However, there is no guarantee that this will in fact ensure ongoing support: Moore's research found that most victims sought help through informal channels, because of the perception, supported by evidence, that going to the police and other officials did not result in a positive outcome.¹⁴⁶ Failing the ability to cooperate with the police, victim/survivors may be able to access one of the crucially important – but limited capacity – charity-supported programmes that are not tied to the criminal justice programme, such as the Salvos Safe House Project.¹⁴⁷ However, the current legislative framework leaves serious gaps in social protection, and particularly in access to housing, for those victims/survivors of domestic servitude. This means that victims/survivors move out of servitude into potential homelessness or re-victimization (and, in the case of those with irregular migration status, deportation).

¹⁴¹ CESCR (1991), para 7.

¹⁴² Source embargoed until late Nov 21, p 20.

¹⁴³ On housing affordability and the right to housing in Australia see Hohmann (2020); On welfare support more broadly, see Murphy et al (2011).

¹⁴⁴ Vogl et al (2020) generally, and at p 2.

¹⁴⁵ Bustamante (2010), paras 15, 16 and 60-61; Shahinian (2010), para 96; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (2011), para 21. See also Fudge and Strauss (2014), p 174.

¹⁴⁶ See Moore (2019) p 53. See also Richards and Lyneham (2014).

¹⁴⁷ The Salvos Safe house supports up to 10 women in the safe house, and up to 20 additional victim/survivors who are assisted but not housed in a safe house or residence. See Others, 'Filling the Gaps for Victims of Human Trafficking', <https://others.org.au/features/filling-the-gaps-for-victims-of-human-trafficking/>.

This situation it underlies the need for a new response: we need to take seriously the denial of the right to housing that arises in cases of domestic servitude, and craft responses that focus on social rights for victim/survivors. We need to complement criminal sanctions for perpetrators with a right to access to adequate housing as a human right for survivors. It is this point that I turn to now, in concluding my argument.

Conclusion

The link between the denial of the right to housing and the experience of domestic servitude is inherent. In domestic servitude, the victim/survivor does not experience the crucial protections of housing as a place of refuge, privacy and respite. Instead, the house is a place of labour, in which the victim/survivor is under the control and subjection of another. Those in domestic servitude are *housed*, as domestic work is defined by the home as the space in which it takes place, but they have no rights to or in that home or house. This violation of the right to housing in the condition of domestic servitude prompts us to consider new, human rights-focussed responses to domestic servitude, that move beyond the current criminal justice emphasis.

Housing remains a first requirement for those who escape the condition of domestic servitude. A safe, adequate and secure place to live is of crucial practical importance, ensuring physical safety and helping protect against destitution or re-victimisation. It is also fundamental to recovery from the trauma of domestic servitude, and a path forward to a life where the person can enjoy human rights, freedom, and ability to participate in social life. But there are inadequate pathways out of domestic servitude in Australia, including adequate access to housing options, and many of these are tied to participation in the criminal justice process, with which victim/survivors are often ill-equipped to engage.

What, then, if we informed the response to domestic servitude through the right to housing of victim/survivors? Such a response would be tailored specifically to the harms that those in domestic servitude experience, and respond to their practical, material and psychological needs. Australia

already bears obligations to respect, protect and fulfil the right to housing under the ICESCR. Making the right to housing meaningful here would be a better way to respond to victim/survivors of domestic servitude. This step could be immensely important in framing a social rights response to modern forms of slavery.

It must be acknowledged that the Australian Government's approach to economic, social and cultural rights to date has been characterised by reluctance and lack of meaningful engagement,¹⁴⁸ even while these rights remain binding on it as a matter of international law. However, at the State level, there is a promising trend toward enshrining these rights in law, where they can be enforced when they are violated. For example, the Human Rights Act 2019 (Qld) enshrines a right to health services in section 37 and in 2021 a report by the Victorian Legislative Assembly recommended that the Victorian Charter of Human Rights and Responsibilities be amended to include a right to housing.¹⁴⁹ However, human rights also have a role at the stage of policy formation: they can guide a policy that respects the right to housing at the outset. Arguably, they are more powerful and useful at the point of policy formation, instead of after the fact of a violation,¹⁵⁰ even if the ability to seek a meaningful remedy is inherent to the enjoyment of human rights. The principles and normative content of the right to housing remain available even absent the ability to enforce them.

I also acknowledge that it would be difficult to persuade any Australian government to take policy steps that might look 'friendly' to those with irregular migration status (such as to comply with obligations for social rights). However, this status does not pertain to all of those who experience modern forms of slavery.¹⁵¹ Moreover, any meaningful response to domestic servitude must be attuned to global phenomena. Ultimately, preventing and redressing domestic servitude will require attention to structural factors in the global political economy, which make people vulnerable to

¹⁴⁸ Solomon (2017), p 376.

¹⁴⁹ See Parliament of Victoria (2021), p xxii, xxxvi, Recommendation 34. For a discussion of the potential content and scope of such a right, see Hohmann forthcoming.

¹⁵⁰ See a discussion of this point in Hohmann (2022, forthcoming) part V.

¹⁵¹ The National Action Plan to Combat Modern Slavery records that the majority of victim/survivors helped by the Support Program between 2014-19 were Australian citizens. National Action Plan (2020), p 15.

domestic servitude. These structural factors include the lack of access to safe, adequate and secure housing across the globe.

At an immediate domestic policy level a meaningful right to housing for victim/survivors of domestic servitude is unlikely to respond to push factors into domestic servitude beyond Australia's borders. However, international human rights aim toward a truly global response, recognising that all people everywhere have rights. Thus the right to housing as response is a critique of the failures of Australian policy, as well as, at a deeper level, of the global political economy.

In the short term, conceptualising domestic servitude as a violation of the right to housing offers the potential to shift the debate toward a human rights framed response. Focussing on the right to housing as a human right better serves victim/survivors, and offers a more meaningful and targeted response to the harms they suffer. It helps us to understand the violations inherent in domestic servitude, and offers a new conceptual underpinning for a human rights response to it. This paper provides this conceptual grounding, in anticipation of increased attention to and understanding of economic and social rights in Australia in the coming years.

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