

# VACANT PROPERTY TAXES AND THE HUMAN RIGHT TO ADEQUATE HOUSING

JONATHAN BARRETT\*

## ABSTRACT

As parties to fundamental human rights instruments, Australia and New Zealand have undertaken to provide their citizens with adequate housing, that is, somewhere to live in security, peace and dignity. Nevertheless, homelessness, which is the starkest manifestation of inadequate housing, is a significant social problem in both countries. Homelessness is one feature of an inequitable and inefficient distribution of scarce housing resources; residential properties left vacant is another. Vacant property taxes ('VPTs'), which are gaining popularity around the world, are an obvious response to this mismatch between lack and surplus. In this article, I consider what homelessness means in Australia and New Zealand, and discuss whether VPTs respond proportionately to the lack of adequate housing.

## I. INTRODUCTION

Access to adequate housing 'is essential to a person's physical, psychological, social and economic wellbeing',<sup>1</sup> and is recognised by Australia and New Zealand as a universal human right.<sup>2</sup> Nevertheless, homelessness is a significant social problem in both countries. According to the Organization of Economic Cooperation and Development ('OECD'),<sup>3</sup> New Zealand has the highest level of homelessness among its members – 0.94% of the population. Australia's corresponding figure is about 0.5%.<sup>4</sup> Although the definitions of homelessness used by Australia and New Zealand are substantially similar, the OECD comparison is generally

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\* Dr Jonathan Barrett is a Senior Lecturer in Taxation and Commercial Law in the School of Accounting and Commercial Law, Victoria University of Wellington, PO Box 600, Wellington, 6014, New Zealand. Email: jonathan.barrett@vuw.ac.nz

<sup>1</sup> United Nations Sustainable Development, *United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21*, preamble <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>>.

<sup>2</sup> See part III.B below.

<sup>3</sup> OECD, *HC3.1 Homeless Population* (2017) <<http://www.oecd.org/els/family/HC3-1-Homeless-population.pdf>>.

Among developed countries, Finland is commonly cited as having most successfully engaged with homelessness. See, for example, Juha Kaakinen, 'Lessons from Finland: helping homeless people starts with giving them homes', *The Guardian* (online), 14 September 2016 <<https://www.theguardian.com/housing-network/2016/sep/14/lessons-from-finland-helping-homeless-housing-model-homes>>.

<sup>4</sup> OECD, above n 3 reports a figure of 0.47% but, according to the Australian Housing and Urban Research Institute ('AHURI'), the rate of homelessness rose 'from 47.6 people experiencing homelessness for every 10,000 Australians in 2011 to 49.8 people in 2016.' AHURI, *How has homelessness changed between 2011-2016?* (27 March 2018) <<https://www.ahuri.edu.au/policy/ahuri-briefs/how-homelessness-changed-between-2011-2016>>.

devalued by the different definitions used by other member countries and their statistics agencies.<sup>5</sup> The 2013 New Zealand census data showed that 4197 (0.1%) of New Zealanders were living on the streets or in cars. However, if temporary arrangements, such as staying in a severely crowded friend's house or a boarding house, are taken into account, the figure rises to 41 705 (0.94% of the population).<sup>6</sup> That number reflects the official government definition of 'homelessness'.<sup>7</sup> Likewise, the Australian government recognises that people do not need to be roofless to be homeless. Overcrowding, for example, is a commonly encountered manifestation of homelessness.<sup>8</sup> Using the Australian Bureau of Statistics ('ABS') definition, Homelessness Australia says '[o]n any given night in Australia 1 in 200 people are homeless'.<sup>9</sup> Precise quantification of the number of homeless people may be elusive,<sup>10</sup> but it is self-evident that, on the streets of, say, Auckland or Sydney, sleeping rough – the most conspicuous sign of homelessness – is a grave social problem.

Obvious allocative inefficiencies arise from residential accommodation being empty when people are homeless. More than one in ten of Australia's residential properties (1 089 165 dwellings) were vacant on the night of the 2016 census.<sup>11</sup> Housing may be unoccupied for a variety of reasons, including 'inheritance, the cost of financing repairs, inability to achieve a desired sale or rental price, and stalled redevelopment'.<sup>12</sup> The financialisation of housing has made ownership without owner-occupation more likely. According to the United Nations

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<sup>5</sup> Japan has the lowest recorded level of homelessness. See OECD, above n 3. But, if New Zealand used the same definition (rough sleepers), it would have the same proportion as Japan. See K Amore, *Severe housing deprivation in Aotearoa/New Zealand: 2001-2013* (He Kainga Oranga/Housing & Health Research Programme, University of Otago, 2016).

<sup>6</sup> See Henry Cooke, 'New Zealand has worst level of homelessness in the world, Labour says', *Stuff* (online), 21 July 2017 <<https://www.stuff.co.nz/national/politics/94983470/new-zealand-has-worst-level-homeless-housing-model-homes>>.

<sup>7</sup> New Zealand Parliament, *Homelessness in New Zealand* (2014) <<https://www.parliament.nz/en/pb/research-papers/document/00PLEcoRP14021/homelessness-in-new-zealand>>.

<sup>8</sup> ABS, *A Spotlight on 'Severe' Crowding* (2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2049.0Feature%20Article12011>>.

<sup>9</sup> Homelessness Australia, *Homelessness in Australia* (2016) <<https://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Homelessness%20in%20Australia2.pdf>>.

<sup>10</sup> It is, for example, easier to estimate the number of people living on city streets than the number of people living in overcrowded accommodation. See Human Rights Commission ('NZHRC'), *Human Rights in New Zealand Ngā Tika Tangata O Aotearoa* (2010) 210 <[https://www.hrc.co.nz/files/7014/2388/0544/Human\\_Rights\\_Review\\_2010\\_Full.pdf](https://www.hrc.co.nz/files/7014/2388/0544/Human_Rights_Review_2010_Full.pdf)>.

<sup>11</sup> See Eryk Bagshaw, 'Census snapshot: One million homes left empty across Australia', *The Sydney Morning Herald* (online), 18 July 2017 <<http://www.smh.com.au/federal-politics/political-news/census-snapshot-one-million-homes-left-empty-across-australia-20170717-gxcpiw.html>>.

<sup>12</sup> Department for Communities and Local Government, *Laying the Foundations: A Housing Strategy for England* (The Stationery Office, 2011) 39

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7532/2033676.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7532/2033676.pdf)>.

Special Rapporteur on adequate housing, financialisation encompasses ‘structural changes in housing and financial markets and global investment whereby housing is treated as a commodity, a means of accumulating wealth and often as security, for financial instruments that are traded and sold on global markets’.<sup>13</sup> Foreign investment in residential property and local speculation may contribute to a stock of empty houses and apartments.<sup>14</sup> When housing is bought solely as an investment, investors often buy at the over-supplied luxury end of the market.<sup>15</sup> Australia, which New Zealand intends to follow,<sup>16</sup> formally prohibits non-residents from buying existing residential property,<sup>17</sup> but a foreign investor is not required to rent out their unoccupied investment property.

In response to the mismatch between homelessness and broader housing unaffordability, on the one hand, and vacant housing, on the other hand, several jurisdictions, including Victoria, have introduced vacant property taxes (‘VPTs’) with a view to directing or nudging owners of empty housing into leasing their properties to tenants. Analogous to VPTs, in the state housing sector, the United Kingdom and New South Wales have introduced under-occupancy charges – colloquially known as bedroom taxes – which penalise tenants whose access to public housing exceeds their presumed needs. These penalties illustrate how a simplistic utilitarian notion of allocative efficiency can lead to inequitable results and provide lessons for crafting VPTs and other property taxes. Particularly if we consider social mischiefs through a human rights lens, the remedy must be proportionate.

This article, which is the second part of a planned triptych on taxation and housing affordability,<sup>18</sup> homelessness and tenant protections,<sup>19</sup> is structured as follows: after this introduction, in part II, I identify the meanings of ‘home’ and ‘homelessness’, and consider homelessness and its causes. In part III, I outline the universal human right to adequate housing. In part IV, I describe current VPTs and under-occupancy penalties, sketch proportionality testing in a human rights context, and apply the benchmark of proportionality to under-occupancy penalties and a generic VPT. I then draw conclusions.

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<sup>13</sup> *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context* (2017) <<http://globalinitiative-escr.org/wp-content/uploads/2017/08/Special-Rapporteur-on-the-right-to-adequate-housing-2017-report-on-financialization-English.pdf>>.

<sup>14</sup> Jack Y Favilukis and Stijn van Nieuwerburgh, *Out-of-Town Home Buyers and City Welfare* (1 August 2017) <<http://dx.doi.org/10.2139/ssrn.2922230>>. The authors specifically consider North American cities but their conclusions appear broadly generalisable.

<sup>15</sup> See Richard Florida and Benjamin Schneider, ‘The Global Housing Crisis’ on *CityLab* (12 April 2018) <<https://www.citylab.com/equity/2018/04/the-global-housing-crisis/557639/>>.

<sup>16</sup> See Overseas Investment Amendment Bill 2017 (5-1).

<sup>17</sup> See Australian Government, *Residential real estate – foreign non-residents [Guidance Note 3]* (1 July 2017) <<http://firb.gov.au/resources/guidance/gm03/>>.

<sup>18</sup> Jonathan Barrett, ‘Property Taxes as a Policy Response to Foreign Investment as a Perceived Cause of Housing Unaffordability’ (2018) *Journal of the Australasian Tax Teachers Association* (forthcoming).

<sup>19</sup> Jonathan Barrett, ‘The Role of Taxes in Promoting Synthetic Owner-Occupation in Property-Owning Democracies’ (Paper presented at the 9<sup>th</sup> Queensland Tax Researchers Symposium, Griffith University, 9 July 2018).

II. HOMELESSNESS AND ITS CAUSES

III.

In this part of the article I consider what is meant by ‘home’ and ‘homelessness’ and identify the common causes of homelessness.

A. *What Is a ‘Home’?*

‘Home’ is often conflated with ‘house’.<sup>20</sup> But, as well as a physical structure, a home implies intangible experiences including ‘continuity, privacy, self-expression, social relationships, warmth’;<sup>21</sup> it is the place, Margaret Radin says, where ‘one embodies or constitutes oneself’.<sup>22</sup> For Shelley Mallett, whose work was influential in the construction of the ABS conceptions of home and homelessness, ‘the term home functions as a repository for complex, inter-related and at times contradictory socio-cultural ideas about people’s relationships with one another, especially family, and with places, spaces, and things’.<sup>23</sup> Psychological aspects of home may include ‘a sense of security, stability, privacy, safety, and the ability to control living space’.<sup>24</sup>

Radin argues that homes deserve greater legal consideration than other types of property because personal accommodation is non-fungible.<sup>25</sup> (Fungible property is readily replaceable; its loss is adequately compensated with money.) I recognise the distinction Radin draws between fungible and personal (personhood) property,<sup>26</sup> but think that, except in exceptional circumstances,<sup>27</sup> real property is ultimately fungible. For housing, fungibility appears to be a medium to long-term phenomenon. We do shift our affective allegiances from space-to-space, if not immediately. Fungibility in the context of a home is not, of course, objective, as it is in

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<sup>20</sup> Shelley Mallett, ‘Understanding Home: A Critical Review of the Literature’ (2004) 52(1) *Sociological Review* 62, 66. This conflation is particularly evident ‘in the popular media typically as a means of selling real estate and promoting homeownership as a means of self-reliance’. *Ibid.*

<sup>21</sup> Sandy G Smith, ‘The Essential Qualities of a Home’ (1994) 14 *Journal of Environmental Psychology* 31, 44.

<sup>22</sup> Margaret Jane Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957, 959.

<sup>23</sup> Mallett, above n 20, 84.

<sup>24</sup> ABS, above n 8.

<sup>25</sup> Margaret Jane Radin, ‘Residential Rent Control’ (1986) 15(4) *Philosophy & Public Affairs* 350, 359. For critiques of Radin’s arguments on homes as personal property, see Stephen J Schnably, ‘Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood’ (1993) 45(3) *Stanford Law Review* 347; D Benjamin Barros, ‘Home as a Legal Concept’ (2006) 46(2) *Santa Clara Law Review* 255; and Stephanie M Stern, ‘Residential Protectionism and the Legal Mythology of Home’ (2009) 107(7) *Michigan Law Review* 1093. I considered Radin’s claims on homes more thoroughly in Jonathan Barrett, ‘“The Castle Doctrine” and Preferential Tax Treatment of Owner-Occupied Property’ (2016) 22 *New Zealand Journal of Taxation Law and Policy* 255.

<sup>26</sup> Radin, above n 22, 959.

<sup>27</sup> Radin’s principal example of non-fungible property is a wedding ring. See Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 37. Like Radin, I approach the question from a Western perspective but note that Indigenous peoples typically express a spiritual connection to particular spaces. See, for example, Ronald Paul Hill, ‘Blackfellas and Whitefellas: Aboriginal Land Rights, the Mabo Decision, and the Meaning of Land’ (1995) 17(2) *Human Rights Quarterly* 303.

its usual legal meaning.<sup>28</sup> Rather numerous factors may determine fungibility for different people in different contexts. Whether one moves *within* or *beyond* a particular community may be a critical determinant of fungibility. Individual psychology and other factors, such as a person's age,<sup>29</sup> are also likely to be contributory factor. In short, while I deny that residential property is categorically non-fungible, I submit that the likelihood of deferred fungibility – however that might be objectively taken into account – should not be ignored by policymakers and legislators when dealing with unoccupied or under-occupied housing.

### B. What Does 'Homelessness' Mean?

According to the ABS, a person should be considered homeless if they do 'not have suitable accommodation alternatives ... if their current living arrangement is in a dwelling that is inadequate; or has no tenure, or if their initial tenure is short and not extendable; or does not allow them to have control of, and access to space for social relations'.<sup>30</sup> Expressing the idea otherwise, the bureau says homelessness is a lack of one or more of the elements that represent 'home' (as identified in II.A above).<sup>31</sup> But home is such an elusive and contested concept that a simple homed/homeless binomial is not plausible. More credibly, a continuum may be drawn between an ideal concept of owner-occupation, perhaps the Englishman's castle,<sup>32</sup> and the situation of the exposed and endangered person sleeping rough. As circumstances determine, we may move between these poles.

Statistics New Zealand ('Stats NZ') published the official New Zealand government definition of 'homelessness' in 2009. In terms of that definition, homelessness is, in essence, 'having no other options to acquire safe and secure housing'.<sup>33</sup> Stats NZ identifies four categories of homelessness, namely: being without permanent shelter, for example, 'living on the street and inhabiting improvised dwellings, such as shacks or cars'; having temporary accommodation, for example, 'overnight shelter or 24-hour accommodation in a non-private dwelling not intended for long-term living', including hostels, transitional supported accommodation, women's refuges, and long-term in motor camps and boarding houses'; sharing accommodation, such as someone else's private dwelling; and living in uninhabitable

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<sup>28</sup> The *Oxford English Dictionary* (online ed) defines a 'fungible' good as one 'that has been contracted for: that can be replaced by another identical item without breaking the terms of the contract. More generally: interchangeable, replaceable.' Radin does not, as I understand her, intend to use 'fungible' in a strict legal sense, but in the more general meaning of replaceable.

<sup>29</sup> See Vanessa Burholt, 'The dimensionality of "place attachment" for older people in rural areas of South West England and Wales' (2012) 44(12) *Environment and Planning A* 2901.

<sup>30</sup> ABS, 4922.0 – *Information Paper – A Statistical Definition of Homelessness, 2012* (2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4922.0Main%20Features22012?opendocument&tabn>>.

<sup>31</sup> Ibid.

<sup>32</sup> See *Semayne's Case* (1604) 5 Coke Rep. 91.

<sup>33</sup> New Zealand Parliament, above n 7.

housing.<sup>34</sup> Vulnerable insecurity is the golden thread that weaves through and links the ABS and Stats NZ definitions.

### C. *What Causes Homelessness?*

The causes of homelessness are multifactorial; some are structural, and others relate to individual circumstances. The Salvation Army identifies poverty and lack of affordable housing as two key determinants of homelessness, along with personal factors, such as addiction and relationship breakdown.<sup>35</sup> But saying poverty causes homelessness is somewhat circular because homelessness itself is best conceived as a feature of multidimensional poverty.<sup>36</sup>

Michael Horn argues that homelessness is caused by a market failure to provide accommodation for low income earners, rather than personal circumstances.<sup>37</sup> Homelessness, in this view, is a manifestation of housing unaffordability. No doubt, unaffordability and homelessness do have some, perhaps the strongest, causal relationship but the role of individual luck in determining homelessness or other life outcomes should not be discounted.<sup>38</sup> With regards to market failure, property developers would, of course, prefer the high profit margins offered by upmarket developments, rather than the low margins presented by housing that lower incomes groups can afford.<sup>39</sup> According to Richard Florida and Benjamin Schneider, ‘all of the money being poured into housing markets has not contributed to a significant increase in supply but rather to an increase in ultra-high-end units that are extremely expensive to produce’.<sup>40</sup> In the face of market failure, governments have been culpably neglectful in remedying the failings of the market. From their research, Gavin Wood and his co-authors conclude ‘public housing is the important factor in preventing homelessness among vulnerable people’ and yet, in Australia, ‘the stock of public housing continued to decline between the

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<sup>34</sup> Ibid.

<sup>35</sup> Salvation Army, *Why are people homeless?* <<http://www.salvationarmy.org.au/en/Who-We-Are/our-work/Homelessness/Why-are-people-homeless/>>. See also Sophia Beaton, Trudie Cain, Helen Robinson and Victoria Hearn, *An insight into the experience of rough sleeping in central Auckland* (2015) <<http://temp.aucklandcouncil.govt.nz/EN/newsevents/culture/OurAuckland/mediareleases/Documents/insightsleepingroughcentralakl.pdf>>.

<sup>36</sup> See United Nations Development Programme, *Multidimensional Poverty Index (MPI)* (2016) <<http://hdr.undp.org/en/content/multidimensional-poverty-index-mpi>>.

<sup>37</sup> See Michael Horn, ‘Increasing homelessness: evidence of housing market failure in Australia’ (2002) 25 *Just Policy: A Journal of Australian Social Policy* 26.

<sup>38</sup> See Bernard Williams, ‘Moral Luck’ (1979) 50 *Proceedings of the Aristotelian Society* 115; Thomas Nagel, *Moral Luck in His Mortal Questions* (Cambridge University Press, 1979).

<sup>39</sup> See generally R Ong and other authors, *Housing supply responsiveness in Australia: distribution, drivers and institutional settings, AHURI Final Report No 281* (2017) <<https://www.ahuri.edu.au/research/final-reports/281>>.

<sup>40</sup> Florida and Schneider, above n 15.

2011 and 2016 censuses'.<sup>41</sup> The state has undertaken to ensure its citizens have adequate housing; private corporations have not done so.

#### IV. THE HUMAN RIGHT TO ADEQUATE HOUSING

##### V.

In this part of the article, I sketch the human right to adequate housing. The aim here is to demonstrate that even the expansive definitions of homelessness adopted by Australia and New Zealand, which, if reversed, capture what it is to be decently homed, do not fully correspond with the human right to adequate housing. Before that, in anticipation of legal positivist objections, I explain what I mean by a *right* to adequate housing.

##### A. What Are 'Human Rights'?

Human rights can be derived from the needs and capabilities of the human person.<sup>42</sup> Because human needs and capabilities are generalisable, we can formulate basic requirements for meeting those needs, and fostering those capabilities. In the broadest consensus, these basic requirements have been declared universal human rights.<sup>43</sup> In the natural law tradition, human rights precede and supersede positive law.<sup>44</sup> Thus, for Jacques Maritain, whose work was highly influential in the crafting of the *Universal Declaration of Human Rights* ('UDHR'),<sup>45</sup> human rights are not dependant on positive laws. Maritain says '[t]he human person possesses rights because of the very fact that it is a person'.<sup>46</sup>

Commentators often distinguish between negative civil and political rights, and positive social, economic and cultural rights, describing the former as first-generation rights and the latter as

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<sup>41</sup> Gavin Wood, Guy Johnson, Juliet Watson and Rosanna Scutella, 'Homeless numbers will keep rising until government changes course on housing', *The Conversation* (online), 16 March 2018 <<http://theconversation.com/homeless-numbers-will-keep-rising-until-governments-change-course-on-housing-93417>>.

<sup>42</sup> This explanation of human rights starts with Aristotle, and has been developed by Thomas Aquinas (see Dino Bigongiari, *The Political Ideas of St. Thomas Aquinas* (Hafner Press, 1975); Immanuel Kant (see, generally, Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (first published 1785, HJ Paton tr, Taylor & Francis, 2012); and contemporary philosophers, such as Martha Nussbaum (see, generally, Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006)).

<sup>43</sup> See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) ('UDHR') *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49, UN Doc A/6316 (1966), 993 UNTS 3 ('ICESCR') and *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16), at 52, UN Doc A/6316 (1966), 999 UNTS 171.

<sup>44</sup> See, for example, John M Finnis, 'Grounding Human Rights in Natural Law' (2015) 60 *American Journal of Jurisprudence* 199.

<sup>45</sup> See Michael Novack, 'Human Dignity, Human Rights' (1999) 97 *First Things* 39-42.

<sup>46</sup> Jacques Maritain, *The Rights of Man and Natural Law* (DC Anson trans, G Bles, 1945) 65 [trans of : *Les Droits d'Homme et la Loi Naturelle* (first published 1942)].

second-generation rights.<sup>47</sup> Municipal laws prescribe which rights are directly justiciable in a particular jurisdiction. Bills of rights, such as those of Australian Capital Territory, Canada, New Zealand and Victoria, typically affirm civil and political rights, partly because those rights have long been expected in Western liberal democracies but also because negative rights ostensibly require governments to do no more than refrain from engaging in prejudicial action. In contrast, giving effect to positive rights, which are associated with progressive ideology, may require governments to engage in expensive programmes of social, economic and cultural development. Typifying traditional liberal objections to the categorisation of social, economic and cultural claims as human rights – unlike claims to life, liberty and property – Maurice Cranston argues that such rights claims do not meet the criteria of practicability, paramount importance and universality.<sup>48</sup> However, Jack Donnelly plausibly disproves Cranston on his own terms.<sup>49</sup> I therefore agree with Donnelly’s conclusion that ‘Cranston is simply wrong that internationally recognized economic, social, and cultural rights fail to meet these tests’.<sup>50</sup> A right to housing, adequate in the context of the country of which one is a citizen, is surely as much ‘inseparable from liberty’ as a right to property?<sup>51</sup> Indeed, a crucial feature of homelessness is the vitiation of opportunities to make autonomous choices.<sup>52</sup> Besides, not only have countries, including Australia and New Zealand, promised to meet their citizens’ social, economic and cultural needs, they have also agreed that human rights are indivisible, interdependent and interrelated.<sup>53</sup>

A hallmark of legal positivism is the non-existence of a legal right in the absence of a corresponding duty that courts will enforce.<sup>54</sup> Whether such a right-duty relationship exists with regard to a specific type of claim, in a particular jurisdiction, is a matter of empirical evidence.<sup>55</sup> South Africa has incorporated extensive socio-economic rights into its constitution,

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<sup>47</sup> See Karel Vasak, ‘Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights’ (1977) 30(11) *UNESCO Courier* 29.

<sup>48</sup> See Maurice Cranston, *What Are Human Rights?* (The Bodley Head, 1973) 66-71.

<sup>49</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989) 28-30.

<sup>50</sup> Ibid, 28. See also Hugh Breakey, ‘Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities’ (2015) 63 *Political Studies* 1198.

<sup>51</sup> Cranston, above n 48, 50 uses this phrase to justify property rights.

<sup>52</sup> See, for example, the interviews with homeless people in Hannah Martin, ‘The complex paths to homelessness’, *Stuff* (online), 9 July 2016) <<https://www.stuff.co.nz/national/81771216/The-complex-paths-to-homelessness>>.

<sup>53</sup> See the UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

<sup>54</sup> See generally Leslie Green, ‘Legal Positivism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2018 ed) <<https://plato.stanford.edu/archives/spr2018/entries/legal-positivism/>>.

<sup>55</sup> Australia and New Zealand follow a dualist doctrine whereby international undertakings must be incorporated into domestic law in order to be justiciable (see Law Commission, *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) [43]). Compare with Germany’s monist system, under which international undertakings have the force of domestic legislation (see David Sloss ‘Domestic Application of Treaties’ (2011) <<https://digitalcommons.law.scu.edu/facpubs/635/>>). Some rights, such as freedom from slavery, constitute jus cogens and are automatically incorporated into domestic law (see



including adequate housing,<sup>56</sup> whereas Australia and New Zealand have enacted numerous specific Acts to meet their citizens' socio-economic needs but have not made laws guaranteeing an adequate standard of living.<sup>57</sup> A homeless person in Australia or New Zealand does not, therefore, have a justiciable right to adequate housing. This does not, however, mean that government does not owe legal (natural law), moral and political obligations to ensure its citizens have decent accommodation. In particular, the public international law principle of *pacta sunt servanda* (agreements must be kept)<sup>58</sup> places a considerable burden on countries to do what they have promised to do under the *UDHR* and its cognate covenants.<sup>59</sup> As the New Zealand Human Rights Commission ('NZHRC') says, '[t]he human right to adequate housing is [a] binding legal obligation of the State of New Zealand ... It is an "international obligation" that must be performed in New Zealand'.<sup>60</sup> Human rights are not principally legal in nature.<sup>61</sup> before their legal expression, they are moral undertakings,<sup>62</sup> and, before that, they are existential imperatives.<sup>63</sup> A right to adequate housing therefore exists in Australia and New Zealand even if it has not yet been perfected by municipal law.

### B. *The right to adequate housing*

Article 25(1) of the *UDHR* provides '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including ... housing'. Furthermore, in terms of article 11(1) of the *ICESCR*, treaty parties, including Australia and New Zealand, recognise 'the right of everyone to an adequate standard of living for himself and his family, including adequate ... housing' and 'to the continuous improvement of living conditions', and promise to 'take appropriate steps to ensure the realization of this right'.<sup>64</sup>

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*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53).

<sup>56</sup> See *Constitution of the Republic of South Africa Act 1996* (South Africa), s 26.

<sup>57</sup> See NZHRC, above n 10, 219.

<sup>58</sup> See also *Vienna Convention*, above n 53, art 26.

<sup>59</sup> Neither Australia nor New Zealand have signed the optional protocol to *ICESCR*, which provides for an individual complaints procedure.

<sup>60</sup> NZHRC, *The human right to adequate housing in New Zealand* (2017) <[https://www.hrc.co.nz/files/4215/1363/5639/2017\\_07\\_25\\_-\\_Right\\_to\\_housing\\_flyer\\_-\\_updated.pdf](https://www.hrc.co.nz/files/4215/1363/5639/2017_07_25_-_Right_to_housing_flyer_-_updated.pdf)>.

<sup>61</sup> See Stephen C Toope, 'Cultural Diversity and Human Rights' (1997) 42 *McGill Law Journal* 169, 176.

<sup>62</sup> Occasionally, countries enforce human rights outside their borders through the use of military force. See Jane Olson, Lois Fielding, Holly Burkhalter, Douglas Cassel Jr, 'Bosnia, War Crimes, and Humanitarian Intervention' (1994) 15 *Whittier Law Review* 445.

<sup>63</sup> See Margaret MacDonald, 'Natural Rights' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 21, 21 on how, after every great crisis for humanity, claims for rights derived from natural law are reasserted.

<sup>64</sup> Other relevant human rights instruments include: the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979 A/RES/34/180; the *United Nations Convention on the Rights of the Child*, 20 November 1989, UNTS 1577, 3; the *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106; and the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, UNTS 660, 195. See Human Rights & Equal

While everyone has the right not to be excluded from a country's scheme of property ownership, and not to be *arbitrarily* deprived of their property,<sup>65</sup> they do not have a right to some property.<sup>66</sup> A person may not claim, therefore, that they have a right to *own* adequate housing.<sup>67</sup> The pertinent right, and indeed human need, is to have access to adequate housing. This right may be satisfied in different ways – by the state, the market or some third sector arrangement.<sup>68</sup> Indeed, while the need for some state housebuilding seems inevitable,<sup>69</sup> government's principal role may be as the 'facilitator of the actions of all participants in the production and improvement of shelter'.<sup>70</sup> Generally, the right to adequate housing is 'the right to live somewhere in security, peace and dignity'.<sup>71</sup> Specifically, according to the Office of the United Nations High Commissioner for Human Rights ('OHCHR'), 'housing is not adequate if':<sup>72</sup>

- 'its occupants do not have a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats';
- 'its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal';
- 'its cost threatens or compromises the occupants' enjoyment of other human rights';
- 'it does not guarantee physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards';
- 'the specific needs of disadvantaged and marginalized groups are not taken into account';
- 'it is cut off from employment opportunities, health-care services, schools, childcare centres and other social facilities, or if located in polluted or dangerous areas'; or

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Opportunity Commission, *Homelessness is a Human Rights Issue* (2008) 8-12 <<https://www.humanrights.gov.au/publications/homelessness-human-rights-issue>>.

<sup>65</sup> UDHR, above n 43, art 17.

<sup>66</sup> The Hegelian theory of property holds that a person needs some property in order to fulfil their humanity. See Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) 57-69.

<sup>67</sup> If a person occupies adequate housing, they will almost certainly have some enforceable claim against someone, for example, via a public housing tenancy agreement against the state. That claim may be recognised as a form of property. See Charles A Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733.

<sup>68</sup> In New Zealand, *iwi* (tribes), which do not fit comfortably into a second/third sector distinction, are becoming increasingly important players in the housing market, in particular, in the provision of affordable housing, primarily, but not exclusively for Māori. See, for example, Francis Cook, 'Auckland *iwi* launches housing project', *The New Zealand Herald* (online), 16 March 2017 <[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11818801](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11818801)>.

<sup>69</sup> In New Zealand, the proportion of rental housing that is publicly owned fell from 37.8% to 18.2% between 1986 and 2006. See NZHRC, above n 10, 209.

<sup>70</sup> Office of the United Nations High Commissioner for Human Rights ('OHCHR'), *The Right to Adequate Housing Fact Sheet No 2/Rev 1* (2014) 6 <[http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)>.

<sup>71</sup> *Ibid*, 3.

<sup>72</sup> *Ibid*, 4.

- ‘it does not respect and take into account the expression of cultural identity’.<sup>73</sup>

### C. *Concluding Comments*

The Australian and New Zealand governments have undertaken to endeavour to ensure all of every citizen’s human rights are satisfied. Consonant with liberal values, realisation of negative rights ostensibly requires the state to leave citizens alone but the realisation of everyone’s right to adequate housing, perhaps by optimally distributing the nation’s housing stock,<sup>74</sup> may lead the state to interfere with individuals’ property holdings and autonomous choice in ways dissonant with traditional liberal expectations.<sup>75</sup> As behaviour modifying mechanisms, VPTs represent an attempt by government to interfere with individuals’ choices regarding their property holdings, albeit for the presumed public good. Thus, according to the Irish government, its VPT ‘is in line with the increasing use internationally of economic market-based instruments for the purpose of influencing the achievement of desired behavioural change and objectives, be they social, economic or environmental’.<sup>76</sup> Because VPTs interfere with individuals’ autonomy and their choices, I submit they must be proportionate. (See IV.C below for a discussion of proportionality.)

## IV. VPTS AND UNDER-OCCUPANCY PENALTIES

In this part of the article, I outline various VPTs and under-occupancy penalty schemes. I then subject these measures to proportionality testing.

### A. *VPTs*

British Columbia, France, Ireland, Scotland, and Victoria currently levy VPTs. The United Kingdom has announced plans to empower local authorities in England and Wales to impose punitive rates on vacant properties but, at the time of writing, enabling legislation had not been

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<sup>73</sup> The cultural practices of Indigenous peoples typically include accommodating multiple generations under one roof. This practice often clashes with the design of Western-style housing and attendant tenancy agreements which usually presume occupancy by a single generation, nuclear family. See, for example, M J Andersen and other authors, ‘Housing conditions of urban households with Aboriginal children in NSW Australia: tenure type matters’ (2018) 18 *BMC Public Health* 70.

<sup>74</sup> On Australia’s inefficient distribution of the existing housing stock, see Hal Pawson, ‘Taxing empty homes: a step towards affordable housing, but much more can be done’, *The Conversation* (online), 17 July 2017 <<http://www.theconversation.com/au>>.

<sup>75</sup> See Cranston, above n 46, 49-50 on a continuum between voluntary and confiscatory taxes.

<sup>76</sup> Department of Housing, Planning and Local Government, *Circular PL 7/2016 - Implementation of the Vacant Site Levy as provided for in the Urban Regeneration and Housing Act 2015* (2016) <<http://www.housing.gov.ie/planning/vacant-site-levy/circular-pl-72016-implementation-vacant-site-levy-provided-urban>>.

enacted.<sup>77</sup> Hong Kong is also reportedly considering a VPT.<sup>78</sup> However, the New Zealand government has, for the moment, ruled out a VPT.<sup>79</sup>

### 1 France

France introduced its *taxe sur les logements vacants* (tax on empty accommodation) ('TLV') in 1988. The TVL applies only to vacant accommodation in an affected council district.<sup>80</sup> Affected districts are urban areas with a population in excess of 50 000 in which there is a disequilibrium between supply and demand for accommodation.<sup>81</sup> To be taxable, a property must be vacant for a year and must be habitable, that is, have an electricity supply, running water and sanitary equipment. Relief applies for involuntary vacancies. The tax is calculated by reference to the rateable value of the property, which is based on the notional annual rental value,<sup>82</sup> and is payable at a rate of 12.5% for the first year of vacancy, rising to 25% for subsequent years.<sup>83</sup>

Councils which are not required to levy the TLV, such as those in rural areas, may choose to impose *la taxe d'habitation sur les logements vacants* (residence tax on empty accommodation) ('THLV') on residential properties that have been unoccupied for two consecutive years. Relief also applies for involuntary vacancies. The THLV effectively deems an unoccupied property to be occupied by the owner, thereby rendering residence tax (*la taxe d'habitation*) payable.<sup>84</sup>

### 2 Scotland

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<sup>77</sup> Anushka Asthana and Peter Walker, 'Councils still without extra powers to crack down on empty homes', *The Guardian* (online), 5 March 2018 <<https://www.theguardian.com/society/2018/mar/05/councils-no-extra-powers-crack-down-empty-homes-housing-crisis>>.

<sup>78</sup> Tony Cheung, Naomi Ng and Sum Lok-kei, 'Owners of empty flats could be taxed under new plan to tackle Hong Kong's housing shortage', *South China Morning Post* (online), 16 March 2018 <<http://www.scmp.com/news/hong-kong/economy/article/2137404/hong-kong-mulls-tax-vacant-properties-unsold-flats-pile-red>>.

<sup>79</sup> 'Minister rules out "empty homes tax" to battle homelessness', *Auckland Now* (online), 5 May 2018 <<https://www.stuff.co.nz/auckland/103660218/minister-rules-out-empty-homes-tax-to-battle-homelessness>>.

<sup>80</sup> Service-Public, *Taxe sur les logements vacants applicable à certaines communes (TLV)* (14 February 2017) <<https://www.service-public.fr/particuliers/vosdroits/F2847>>.

<sup>81</sup> Ibid.

<sup>82</sup> French local taxes on residential property, akin to local authority rates in Australia and New Zealand, are *la taxe d'habitation* (residence tax) payable by the occupier of a property, and *la taxe foncière* (ownership tax) payable by the owner of a residential property.

<sup>83</sup> Economie.gouv.fr, *Tout savoir sur les taxes sur les logements vacants (TLV et THLV)* (2017) <<https://www.economie.gouv.fr/particuliers/taxes-logements-vacants-tlv-thlv>>.

<sup>84</sup> Ibid.

Traditionally, British local authorities have granted unoccupied properties a rates discount.<sup>85</sup> This concession has the potential to encourage landlords to keep properties off the rental market, while accruing capital gains.<sup>86</sup> In response to its housing crisis,<sup>87</sup> the Scottish Parliament passed the Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013/45) which took effect from 1 April 2013. In terms of the regulations, a local authority has the discretionary power ‘to remove the empty property discount or set a council tax increase of 100% on certain properties which have been empty for one year or more’.<sup>88</sup> The surcharge does not apply to second homes, and various other concessions apply. Because the issue of rates discounts or surcharges is decided at a local level, according to the Local Government Association, councils ‘are able to exercise their council tax discretion in different ways, in order to tailor bills and discounts toward local circumstances and priorities’ and so have been able to bring ‘empty properties back into use by understanding the underlying reasons why properties have lain empty, and have provided assistance to enable the property to be put back into use.’<sup>89</sup>

### 3 *British Columbia*

From 2018, residential properties in metropolitan Vancouver, which are empty for more than six months in a year, are subject to an Empty Homes Tax (also known as the Vacancy Tax).<sup>90</sup> The tax payable is 1% of the assessable value of the vacant property. Most properties are exempt, notably: principal residences, occupied for at least six months a year; and properties rented for at least six months of the year, in periods of 30 or more consecutive days. Short-term, Airbnb-style leases are therefore taxable.<sup>91</sup> Net revenues from the tax will be reinvested into affordable housing initiatives.<sup>92</sup>

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<sup>85</sup> Around 100,000 empty properties receive rates discounts in Britain, although cash strapped councils appear to be curtailing concessions. See Michael Savage, ‘Tax cuts on empty homes costing cash-strapped councils millions’, *The Observer* (online), 1 April 2018 <<https://www.theguardian.com/society/2018/mar/31/council-tax-cuts-empty-homes-costing-millions>>.

<sup>86</sup> See Rolland O’Regan, *Rating in New Zealand* (Baranduin Publishers, 2<sup>nd</sup> ed, 1985) 3.

<sup>87</sup> See Shelter Scotland, *Impact Report 2016/17* (2017) <[https://scotland.shelter.org.uk/\\_\\_data/assets/pdf\\_file/0006/1402962/Shelter\\_Scotland\\_Impact\\_Report-July\\_17.pdf/\\_nocache](https://scotland.shelter.org.uk/__data/assets/pdf_file/0006/1402962/Shelter_Scotland_Impact_Report-July_17.pdf/_nocache)>.

<sup>88</sup> Scottish Government, *Council Tax on Second Homes and Long Term Unoccupied Dwellings* (2018) <<http://www.gov.scot/Topics/Government/local-government/17999/counciltax/Secondhomes>>.

<sup>89</sup> Quoted by Savage, above 85.

<sup>90</sup> See *Vancouver Charter* [SBC 1953] Chapter 55, Part XXX – Vacancy Tax; Vacancy Tax By-law No 11674.

<sup>91</sup> *Ibid.*

<sup>92</sup> City of Vancouver, *Will your home be taxed?* (2018) <<http://vancouver.ca/home-property-development/will-your-home-be-taxed.aspx>>.

In its 2018 budget, the British Columbian government announced a speculation tax that will apply to designated urban areas across the province.<sup>93</sup> ‘The tax is designed to capture foreign and domestic speculators, satellite families who live in B.C. but do not pay their share of income taxes, as well as homeowners who hold vacant property in designated urban centres.’<sup>94</sup> For 2018, a rate of 0.5% of the property value applies to all taxable properties. From 2019 onwards, the rates will depend on the status of the owner. Foreign investors and satellite families will pay at a rate of 2%; Canadian citizens and permanent residents, who do not live in British Columbia, 1%; and Canadian citizens or permanent residents who reside in British Columbia, 0.5%.<sup>95</sup> It appears that, say, a foreign owner of an unoccupied apartment in metropolitan Vancouver would pay an aggregate vacancy tax of 3% from 2019.

#### 4 *Ireland*

In Ireland, ‘[u]nderlying housing demand has outpaced actual supply ... This has elevated housing affordability concerns and contributed to the number of homeless people in Ireland doubling between the start of 2015 and mid-2017.’<sup>96</sup> The *Urban Regeneration and Housing Act 2015* (Ireland) introduced a Vacant Site Levy (‘VSL’) which comes into effect on 1 January 2019. The VSL applies to vacant sites exceeding 0.05 hectares in area (excluding a person’s home) in a designated area. The land must have been vacant for at least 12 months before being included on the vacant site register.<sup>97</sup>

The OECD has endorsed these measures and further urged the Irish government to ‘consider introducing a higher recurrent property tax rate on properties that are left vacant in city areas’.<sup>98</sup> In fact, in the budget for 2018, the rate of the 3% rate of VSL was increased to 7% for the second and subsequent years of vacancy.<sup>99</sup>

#### 5 *Victoria*

In terms of the *State Taxation Acts Amendments Act 2017* (Vic), from 1 January 2018, residential properties in the inner and middle ring of Melbourne left unoccupied for six months

<sup>93</sup> British Columbia, *Budget 2018: Working for You* (2018) <[http://bcbudget.gov.bc.ca/2018/highlights/2018\\_Highlights.pdf](http://bcbudget.gov.bc.ca/2018/highlights/2018_Highlights.pdf)>.

<sup>94</sup> Ministry of Finance, *Tax Information Sheet: B.C. Speculation Tax* (March 2018) <<https://www2.gov.bc.ca/assets/gov/taxes/property-taxes/publications/is-2018-001-speculation-tax.pdf>>. Satellite families are ‘households with high worldwide income that pay little income tax in B.C.’. *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> OECD, *OECD Economic Surveys: Ireland 2018* (OECD, 2018) 40.

<sup>97</sup> Department of Housing, Planning and Local Government (‘DHPLG’), *Circular PL 7/2016 - Implementation of the Vacant Site Levy as provided for in the Urban Regeneration and Housing Act 2015* <<http://www.housing.gov.ie/planning/vacant-site-levy/circular-pl-72016-implementation-vacant-site-levy-provided-urban>>.

<sup>98</sup> OECD, *OECD Economic Surveys Ireland March 2018 Overview* (2018) 33 <<https://www.oecd.org/eco/surveys/Ireland-2018-OECD-economic-survey-overview.pdf>>.

<sup>99</sup> RTÉ, *Vacant site levy to more than double to 7%* (2017) <<https://www.rte.ie/news/budget-2018/2017/1010/911250-vacant-site-levy-to-more-than-double-to-7/>>.

will be subject to a vacant residential land tax of 1% of the property's capital improved value.<sup>100</sup> An absentee owner surcharge also applies to unimproved land (1.5% from 1 January 2017).<sup>101</sup>

## 6 *Australian Commonwealth*

Foreign investment in Australian residential property is overseen by the Foreign Investment Review Board ('FIRB'). The principal control mechanism is the requirement for non-resident investors, other than students while studying, to invest in new properties only. While the system is not infallible,<sup>102</sup> it has advantages over taxes, to which wealthy investors may be immune.<sup>103</sup> Nevertheless, an investor may allow their property to remain unoccupied. On 9 May 2017, the Commonwealth Government announced the introduction of a fee on foreign owners of residential property if their property is not occupied or genuinely available on the rental market for at least six months of each year.<sup>104</sup> 'The fee is intended to encourage foreign owners of residential real estate to make their properties available for rent where they are not occupied as a residence, and so increase the number of properties available for Australians to live in.'<sup>105</sup> However, the fee, which falls under the purview of the FIRB, rather than the Australian Taxation Office, only applies to properties bought after 9 May 2017.<sup>106</sup> The fee is equivalent to the fee an investor must pay when applying to invest; for example, the fee for an investment in a property with a value of up to \$1 million is \$5500 (0.55% at the ceiling) and for an investment with a value of \$9-10 million \$100 400 (1.12% at the ceiling).<sup>107</sup>

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<sup>100</sup> State Revenue Office Victoria, *Vacant residential land tax* (2017) <<http://www.sro.vic.gov.au/vacant-residential-land-tax>>.

<sup>101</sup> State Revenue Office Victoria, *Absentee owner surcharge* (2017) <<http://www.sro.vic.gov.au/node/1870>>.

<sup>102</sup> On the 'significant rorting' of the system before 2016, see Stephen Anthony and Gary Lu, *Discussion Paper: Assisting Housing Affordability* (November 2017) 20 <<http://www.industrysuperaustralia.com/assets/Reports/Assisting-Housing-Affordability-ISA-Discussion-Paper-FINAL-2017.pdf>>.

<sup>103</sup> When British Columbia hiked its stamp duty for foreign investors to 20%, Juwei, a website aimed at Chinese property investors predicted that the increase would have no effect on wealthy investors. See Juwei, *How will B.C.'s new 20% tax sway Chinese buyers in Canada?* (1 March 2018) <<http://list.juwei.com/news/2018/will-be-new-20%25-tax-sway-chinese-buyers-in-canada>>.

<sup>104</sup> Australian Government, *Residential Real Estate – Annual Vacancy Fee (Guidance Note 48)* (20 December 2017) <<https://cdn.tspace.gov.au/uploads/sites/79/2017/12/171221-GN48-RRE-Annual-Charge.pdf>>.

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

<sup>106</sup> *Ibid.*

<sup>107</sup> Australian Government, *Fees – Residential Land (Guidance Note 29)* (12 July 2017) <[https://cdn.tspace.gov.au/uploads/sites/79/2017/06/29\\_GN\\_FIRB.pdf](https://cdn.tspace.gov.au/uploads/sites/79/2017/06/29_GN_FIRB.pdf)>.

<b>Jurisdiction</b>	<b>Affected area</b>	<b>Vacancy period</b>	<b>Rates of tax</b>
Australia	National (only applies to non-resident investments made after 9 May 2017)	6 months	Fee equivalent to, e.g. 0.55% for property <\$1 million value; 1.12% for \$9-10 million value
British Columbia	Designated urban areas	<ul style="list-style-type: none"> <li>• 9 months (2018)</li> <li>• 6 months (2019)</li> </ul>	<ul style="list-style-type: none"> <li>• 0.5% (2018)</li> <li>• 2% foreign investors; 1% non-BC Canadians; 0.5% BC Canadians (2019)</li> </ul>
France (TLV)	Designated urban areas	1 year	<ul style="list-style-type: none"> <li>• 12.5% (year 1)</li> <li>• 25% (subsequent years)</li> </ul>
Ireland	Designated urban areas	1 year	<ul style="list-style-type: none"> <li>• 3% (year 1)</li> <li>• 7% (subsequent years)</li> </ul>
Scotland	Local authority choice	1 year	<100% on local rate
Victoria	Inner/middle-ring Melbourne	6 months	<ul style="list-style-type: none"> <li>• 1%</li> <li>• 1.5% surcharge for unimproved land</li> </ul>

### B. *Under-Occupancy Penalties*

In the United Kingdom, the bedroom tax, officially the housing benefit under-occupancy penalty or removal of spare room subsidy,<sup>108</sup> is designed to make more efficient use of social housing, so that the size of accommodation meets the presumed needs of the occupants. Housing benefits are reduced if a tenant is deemed to have excess space. For example, a person with a spare bedroom is expected to take in a lodger to compensate for the reduced benefit or move to smaller accommodation. The bedroom tax has generally attracted negative publicity and academic critique,<sup>109</sup> yet, in principle, it is consonant with allocative efficiency.

New South Wales has also introduced a Vacant Bedroom Charge ('VBC') which is 'a reduction in a tenant's rental subsidy which means that the rent payable per week will increase'.<sup>110</sup> The VBC applies per household: '\$20 a week per household if there is one person aged 16 years and over, or \$30 a week per household with two people or more aged 16 years and over.'<sup>111</sup>

<sup>108</sup> See *Welfare Reform Act 2012* (UK) and Regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/2013).

<sup>109</sup> See Peter Robinson, 'The Bedroom Tax' (2015) 19(1) *Edinburgh Law Review* 134; Kenneth Gibb, 'The Multiple Policy Failures of the UK Bedroom Tax' (2015) *International Journal of Housing Policy* 1.

<sup>110</sup> NSW Government, *Vacant Bedroom Charge* (2014) <<http://www.housing.nsw.gov.au/forms,-policies-and-fact-sheets/fact-sheets/vacant-bedroom-charge>>.

<sup>111</sup> *Ibid.*



The VBC ‘is not applicable to tenants of community housing or Aboriginal Housing Office properties, only to public housing tenants’.<sup>112</sup>

### C. *Proportionality Testing*

Proportionality is a generally accepted benchmark for assessing the justifiability of government actions,<sup>113</sup> particularly in a human rights context.<sup>114</sup> Proportionality testing is relevant to policymaking as well as judicial reasoning. According to the Productivity Commission, ‘[a]n element of sounds analysis that is not an explicit [regulatory impact] element but conditions all of them is the proportionality principle’.<sup>115</sup>

Modern conceptions of proportionality are derived from Aristotelian justice,<sup>116</sup> otherwise known as ‘proportionate fairness’,<sup>117</sup> which underpins the concepts of horizontal and vertical equity which traditionally informs tax policy.<sup>118</sup> Proportionality may also take into account expectations about economic efficiency, such as the avoidance of excess burden.<sup>119</sup> But proportionality testing is more comprehensive and more integrated in terms of taking account of socio-economic and rights considerations than traditional tax benchmarks, which typically start with Adam Smith’s four canons.<sup>120</sup>

Despite its traditional association with civil law jurisprudence, proportionality is increasingly employed in common law jurisdictions,<sup>121</sup> particularly with regard to infringements of

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<sup>112</sup> Ibid.

<sup>113</sup> I previously applied proportionality testing to taxation in Jonathan Barrett, ‘Fat Taxes: A Proportionality Approach’ (2012) 18(3) *New Zealand Journal of Taxation Law and Policy* 242.

<sup>114</sup> See generally Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

<sup>115</sup> Australian Government, *Regulatory Impact Analysis: Benchmarking*, Productivity Commission Research Paper (November 2012) <<https://www.pc.gov.au/inquiries/completed/regulatory-impact-analysis-benchmarking/report>>.

<sup>116</sup> See Aristotle, *The Nicomachean Ethics* (Oxford University Press, 2009) 85.

<sup>117</sup> Anton-Herman Chroust and Daniel L Olsen, ‘Aristotle’s Conception of Justice’ (1942) 17(2) *Notre Dame Law Review* 129, 131.

<sup>118</sup> See, for example, AICPA, *Guiding Principles for Tax Equity and Fairness* (2007) <<https://www.aicpa.org>>.

<sup>119</sup> See, for example, Carl S Shoup, *Public Finance* (Weidenfeld & Nicolson, 1969) 28.

<sup>120</sup> See Adam Smith, *An Inquiry Into Nature and Causes of the Wealth of Nations* (Encyclopaedia Britannica, 1952, first published 1776) 261-62.

<sup>121</sup> See Michael Taggart, ‘Proportionality, Deference, Wednesbury’ (2008) *New Zealand Law Review* 423, 424-25. On the substantive similarity between proportionality and reasonableness, see David Williams, ‘Globalization and Governance: The Prospects for Democracy’ (2003) 10(1) *Indiana Journal of Global Legal Studies* 157, 162.

fundamental rights by the executive.<sup>122</sup> In *Bank Mellat v Her Majesty's Treasury (No. 2)*, Lord Sumption outlined the judicial proportionality test in the following terms:

the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.<sup>123</sup>

Courts consider the proportionality of laws or regulations that have already been promulgated, whereas policymakers assess proportionality on an ex ante basis. However, since a court may not conduct its analysis on an ex post facto or wisdom of hindsight basis, the two approaches are, in substance, similar.

Before a measure is introduced, the OECD Council on Regulatory Policy and Governance recommends adopting ex ante regulatory impact assessment ('RIA') practices 'that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs'.<sup>124</sup> A regulation should respond to a particular policy imperative, market failure or threat to citizens' rights.<sup>125</sup> Alternative measures should be considered so that the optimal policy choice is made.<sup>126</sup> Ex ante RIA 'should in most cases identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards'.<sup>127</sup> Regulatory impacts should not only taken into account measurables, such as business compliance costs, but also 'provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects'.<sup>128</sup> Transparency and stakeholder engagement are also important considerations.<sup>129</sup>

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<sup>122</sup> In countries with a supreme law, which incorporates a bill or charter of rights, such as Canada, proportionality is also used as a benchmark to consider parliamentary legislation. See, for example, *R v Oakes* [1986] 1 SCR 103 (SCC) [70] on the application of proportionality by the Supreme Court of Canada. While parliamentary legislation is not, unlike subordinate legislation, subject to judicial review in Australia and New Zealand, I elide that difference here for the purposes of considering tax policy and human rights in broad terms.

<sup>123</sup> *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] 4 All ER 533, [2013] UKSC 39, [20].

<sup>124</sup> OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012) <<http://www.oecd.org/governance/regulatory-policy/49990817.pdf>>.

<sup>125</sup> *Ibid.* Compare with the legal concept of social mischief.

<sup>126</sup> *Ibid.* Compare with the judicial consideration of alternatives.

<sup>127</sup> *Ibid.* Compare with judicial balancing of interests.

<sup>128</sup> *Ibid.* Compare with judicial concern with impact on rights.

<sup>129</sup> *Ibid.* Compare with the legal principal of open justice.

Because RIA is conducted on an ex ante basis, it is predictive in nature. Even the most comprehensive RIA cannot take into account unforeseen, unintended consequences. Proportionality testing should therefore be reperformed once a measure has been in force for a reasonable period of time.

### 1 *Are Under-Occupancy Penalties Proportionate?*

A basic proportionality test involves an investigation into the sufficient importance of the proposed objective; establishment of a rational nexus between method, mischief and outcome; consideration of less intrusive alternatives; and a balancing of rights and community interests. Given that scarcity in public housing denies people access to adequate housing, seeking to rectify that lack is an important social objective. No doubt, pressurising people with housing in excess of their presumed needs into less capacious accommodation will have some positive effect on the efficient allocation of housing, and economic penalties are widely expected to promote desired behaviours.<sup>130</sup> But, say, a person whose partner has died and their children moved out is not the cause of the lack of public housing, unlike neoliberal governments' failure to build and retain sufficient and adequate public housing. But, while such neglect may be the root problem, the proportionality of under-occupancy penalties needs to be considered in the context they operate, which is an acute shortage of public housing.

The critical consideration when subjecting an under-occupancy penalty to proportionality testing lies with the impact such a penalty may have on the rights and reasonable expectations of those affected. Again, the essence of the human right to adequate housing is 'to live somewhere in security, peace and dignity'.<sup>131</sup> Ultimately, all human rights spring from respect for equal human dignity,<sup>132</sup> which the jurist and human rights commentator Aharon Barak identifies as 'the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is freedom of choice.'<sup>133</sup> Under-occupancy penalties only apply to certain people, generally some of the most deprived and vulnerable members of society. The right to adequate housing is breached when 'the specific needs of disadvantaged and marginalized groups are not taken into account'.<sup>134</sup> It unsurprising that, in the United Kingdom, the bedroom tax has been successfully challenged on the grounds of discrimination against people with disabilities, many of whom reside in social housing.<sup>135</sup>

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<sup>130</sup> See DHPLG, above n 97.

<sup>131</sup> OHCHR, above n 70, 3.

<sup>132</sup> See *UDHR*, above n 43, preamble.

<sup>133</sup> Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 86.

<sup>134</sup> OHCHR, above n 70, 6.

<sup>135</sup> See *Burnip v Birmingham City Council*; *Mathieson v Secretary of State for Work and Pensions*; *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550. For a discussion of the last suit of the combined decision, see Timothy Sayer, 'The Bedroom Tax Case: *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, 1 WLR 4550' (2017) 22(2) *Judicial Review* 208.

Consistent with Radin’s views on personhood property, the Redfern Legal Centre observes that the New South Wales VBC ‘will result in many tenants having to choose between the social costs of moving away from their communities and the financial cost of paying the charge and staying in their homes’.<sup>136</sup> If a person thinks of their government-provided accommodation as a *home* because they have made a psychological investment in that particular space and consider themselves to be part of the surrounding community, then the decision to move and thereby not incur the VBC or to stay and suffer the financial consequences will not be a simple matter of economic calculus. Radin indicates that, if we want to treat people equitably and compassionately in the field of housing, we need to take into account the psychological aspects and the (deferred) fungibility of the home, whether that space is owned by the occupier, a private landlord or the state.

An under-occupancy penalty is proportionate in principle because it rationally seeks to alleviate the problem of insufficient public housing by allocating on the basis of an objective conception of need. However, the operation of the penalty and the extent to which the often-vulnerable human subjects of the penalty are affected will determine whether it is proportionate in practice.

## 2 *Are VPTs Proportionate?*

Each VPT has particular features but they share in common the imposition of an economic penalty or stimulus designed to coerce or nudge owners of vacant properties to lease them to tenants. All VPTs include safeguards to ensure that taxpayers’ behaviour is, in general, modifiable; in other words, a person subject to the tax has chosen to leave the property unoccupied. It would, for example, be most likely disproportionate to subject a person who is hospitalised for an extended period to a VPT because they cannot modify their behaviour.

### a Sufficiently important objective

A lack of adequate housing denies people satisfaction of their fundamental human rights and is self-evidently a grave social mischief.

### b Rational nexus

Two models – or, perhaps, caricatures – of taxpayers whose behaviour must be modified by a VPT are the speculator, who hoards land in expectation of capital gains or zoning changes,<sup>137</sup> and the foreign investor for whom residential property is absolutely fungible. An effective VPT for a speculator, who engages in the calculus of profit maximisation, would need to neutralise any economic benefits arising from keeping a property vacant or zone squatting. Obviously the rate to be effective would vary from taxpayer – some might need a nudge and others the threat of confiscatory rates. The huge difference in VPT rates between the Australian FIRB fee and

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<sup>136</sup> Redfern Legal Centre, *Spare Bedroom Tax* (2013) <<http://rlc.org.au/article/spare-bedroom-tax>> (emphasis added).

<sup>137</sup> For an explanation why it may be financially advantageous for a property owner to keep their property unoccupied or undeveloped, see Cameron Murray, *Empty homes: The economic reasons behind investors keeping properties vacant* (4 April 2017) <<https://www.domain.com.au/news/empty-homes-the-economic-reasons-behind-investors-keeping-properties-vacant-20170404-gvdc7l/>>.

the French TLV indicates that policymakers probably have little understanding of what an optimal average VPT rate should be.

For most foreign investors, buying a residential property in an attractive city in a country governed by the rule of law, such as Auckland, Melbourne or Vancouver, is likely to be a profit maximisation scheme and so, if they neither occupy themselves nor rent out, they can be assumed to be speculators. Indeed, it is not obvious why, if a property is a fungible investment – other than speculation – why an investor would keep the property empty. Perhaps psychological issues are at play for foreign investors who do not conform with the model of the speculator. An apartment in, say, Sydney may represent an idealised home for a non-resident, which they wish to keep unoccupied for future contingencies. If so, that is a psychological luxury the city cannot afford to entertain. Relatively petty economic penalties, such as the FIRB fee, may be ineffective. For those investors, renting out might need to be made a condition of investment.<sup>138</sup>

#### c Less intrusive alternatives

No property investor can be unaware of the housing crisis in major cities. Consequently, the usual first level social marketing initiatives that might encourage owners of unoccupied properties to make them available for rental, such as education or advertising, seem pointless. Assuming that owners of vacant properties choose to leave their properties unoccupied in the time of a housing crisis, potential government responses include taking a lenient approach to squatting,<sup>139</sup> and compulsorily purchasing vacant properties after, say, five years of non-occupation.<sup>140</sup> In the light of these alternatives, a VPT presents a relatively non-intrusive policy option.

#### d Balance of rights and community interests

In a human rights context, everyone has the right to adequate housing but, offensive as this proposition may be to libertarian sensibilities,<sup>141</sup> no one has a right to undisturbed holdings in absolutely fungible property, when their use of that property prevents the satisfaction of others' human rights.<sup>142</sup> VPTs, however 'confiscatory' – and they cannot be plausibly described as

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<sup>138</sup> Under free trade agreements, countries are typically permitted to retain restrictions that discriminate between domestic investors and investors from another treaty party country. However, usually, such non-conforming measures may not be made more severe. See, for example, article 141 of the *Free Trade Agreement between the Government of New Zealand and The Government of the People's Republic of China*.

<sup>139</sup> See A J van der Walt, 'Property and Marginality' in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2009) 81.

<sup>140</sup> An Irish charity concerned with homelessness proposes compulsory purchase after five years of non-occupation. See Pat Doyle, 'In Dublin, there are 13 empty homes for every adult in homelessness' on *thejournal.ie* (22 February 2017) <<http://www.thejournal.ie/readme/in-dublin-there-are-13-empty-homes-for-every-adult-in-homelessness-3250795-Feb2017/>>.

<sup>141</sup> See Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, 1974) 167-72.

<sup>142</sup> A person may, of course, gain utility from owning an unoccupied apartment but human rights and Aristotelian justice are primarily concerned with objective needs.

such except, perhaps, in France – still leave the property owner with the choice whether or not rent.

e Ex post facto analysis

Most VPTs are new or are in the process of implementation, and so cannot be subjected to meaningful ex post facto analysis. Despite having been in force for 20 years, empirical evidence on the effectiveness of the French TLV is lacking. Sébastien Ménard has constructed a model which plausibly indicates that a TLV-style tax is likely to reduce the amount of vacant accommodation in an economy.<sup>143</sup> However, he also predicts two negative side effects. The first effect is investors leaving the rental market because of a decrease in profitability; this exit, he says, will reduce the stock of rentable accommodation in the long-term.<sup>144</sup> Furthermore, as owners stop offering lower rents to maintain their profitability, part of the increase of the tax will be shifted to tenants through the increase in average rent.<sup>145</sup> Eventually, in the long-term, a tax on vacant dwellings is inefficient in improving the number of dwellings and decreasing the average rent.<sup>146</sup> However, Ménard's model considers the TLV *in abstracto*. If they are to be effective, like other behaviour modifying taxes, VPTs should be one element of a suite of remedial measures. So, if the housing stock is increased otherwise, for example, through new public housing schemes, Ménard's predictions for a shrinking housing supply would become less plausible and a VPT's efficacy more likely.

#### D. Concluding Comments

Hal Pawson observes that misallocation of housing in Australia goes far beyond empty apartments, and consequently any VPT will have little effect on overall allocation. Indeed, it is widely believed that a comprehensive land tax, along with the neutralising of tax policies that privilege homeownership will make the most significant contribution – from a perspective of behaviour modification through taxes – to meeting the right to adequate housing.<sup>147</sup>

At the time of writing, the New Zealand government had pledged an extra NZ\$100 million to combat homelessness.<sup>148</sup> Yet, welcome as this expenditure may be, the money is essentially aimed at the roofless. Eradicating homelessness, as expansively defined by the Australian and New Zealand governments, and fully complying with *ICESCR* obligations to ensure adequate

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<sup>143</sup> Sébastien Ménard, 'Should we tax vacant dwellings? A search equilibrium model applied to the rental housing market' (2012) 117(1) *Economics Letters* 88.

<sup>144</sup> Ibid, 90.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> See John Daley, Brendan Coates and Trent Wiltshire, *Housing Affordability: Re-imagining the Australian Dream* (Grattan Institute Report No 2018-04, March 2018) <<https://grattan.edu.au/wp-content/uploads/2018/03/901-Housing-affordability.pdf>>.

<sup>148</sup> Phil Twyford, '\$100 million to tackle homelessness' (media release, 4 May 2018) <<https://www.beehive.govt.nz/release/100-million-tackle-homelessness>>.

housing for all, will need a far greater shift in resources. Nevertheless, VPTs may make some positive contribution to increasing the supply of rentable housing.

## V. CONCLUSION

Access for everyone to adequate housing is not an ideological desideratum; it is a universal human right. Once this fundamental imperative is recognised, we must ask how we may satisfy that right, including the role taxation might play. It would be absurd to consider homelessness through the prism of the human right to adequate housing, and to then propose disproportionate methods as means for remedying the social mischief. In a human rights paradigm, the fundamental inquiry relates to the impact of a measure on human dignity. Drawing on ideas of home and fungible property, I have indicated psychological features of housing which policymakers should take into account when constructing proportionate responses to the cognate phenomena of homelessness and unoccupied residential property. From this, I conclude that under-occupancy penalties may be disproportionate but VPTs are proportionate, even if they can only contribute to tackling the problem of inadequate housing but not solve it.