

EXPLORING THE LEGAL BASIS IN AUSTRALIA FOR EVACUATIONS FROM DISASTERS: AVOIDING ARBITRARY DISPLACEMENT

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The summer of 2019–20 saw Australia’s largest ever peacetime evacuation, as bushfires threatened homes, communities and lives. In 2022, thousands of people were evacuated from catastrophic floods in northern New South Wales and Queensland. As climate change amplifies the frequency and severity of extreme weather events, evacuations are likely to become increasingly common. Yet, while evacuations can protect people from imminent danger, they can also displace people from their homes and place human rights at risk. This article provides a detailed analysis of state and federal evacuation powers in Australia, in light of international law and policy standards, and highlights where protection gaps exist. It argues that such gaps arise, in part, because evacuations are not ‘seen’ as a form of displacement in Australia, thereby rendering people’s needs – and rights – invisible. The challenges identified here are not only pertinent to law and policy reform in Australia, but also in other countries.

‘As the events of the 2019–2020 bushfire season show, what was unprecedented is now our future.’¹

I INTRODUCTION

The Australian summer of 2019–20 saw the country’s largest peacetime evacuation,² as bushfires threatened homes, communities and lives. The fires were

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1 *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 6 (‘*Royal Commission*’).

2 The air and sea evacuation of people from Mallacoota was part of the largest maritime evacuation of Australian citizens ever in a disaster: *ibid* 191, 273.

unprecedented in their severity and intensity, burning over 24 million hectares of land, killing 33 people and nearly three billion animals,³ and displacing thousands of people. Indeed, the Internal Displacement Monitoring Centre ('IDMC') estimated that around 65,000 people were forced to flee.⁴ It is likely that the real figure was significantly higher, perhaps even in the hundreds of thousands,⁵ since the IDMC data did not include tourists (who comprised 16% of those evacuated).⁶ In early 2022, thousands of people were evacuated from catastrophic floods in northern New South Wales ('NSW') and Queensland,⁷ with many left homeless and wondering if they could ever return to rebuild.⁸ As climate change intensifies the frequency and severity of extreme weather events,⁹ evacuations are likely to become increasingly necessary.

While evacuations provide a vital emergency tool to rescue people from crises and save lives, they can also displace people from their homes – sometimes for long periods of time. Yet, despite being formally recognised as a form of displacement,¹⁰

3 Ibid 5.

4 Internal Displacement Monitoring Centre, *The 2019–2020 Australian Bushfires: From Temporary Evacuation to Longer-Term Displacement* (Report, September 2020) 4 ('2019–2020 Bushfires'); Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2021: Internal Displacement in a Changing Climate* (Report, 2021) 46 ('GRID 2021'). Most were pre-emptive evacuations: GRID 2021 (n 4) 47.

5 The New South Wales ('NSW') Rural Fire Service declared a 250-kilometre stretch from the NSW south coast into Victoria a 'tourist leave zone', for instance: Kieran Gair et al, 'Bushfire Disaster: Death Toll Rises to Eight in Victorian, NSW Tragedies', *The Australian* (online, 1 January 2020) <<https://www.theaustralian.com.au/nation/bushfire-disaster-emergency-warnings-in-victoria-multiple-homes-lost-in-nsw/news-story/f0b761dd092ed94cbc4203dc2f0fe4e4>>. CNBC News reported that a quarter of a million people were urged to evacuate at one point: Reuters, 'Australia Urges a Quarter of a Million to Flee as Winds Fan Massive Bushfires', *CNBC* (online, 10 January 2020) <<https://www.cnb.com/2020/01/10/australia-urges-a-quarter-of-a-million-to-flee-as-winds-fan-massive-bushfires.html>>. It is difficult to quantify precise numbers of evacuees, since people may evacuate of their own accord and they commonly seek shelter with family and friends rather than in designated evacuation centres. See proxy indicators in Internal Displacement Monitoring Centre, *Global Report on Internal Displacement: Methodological Annex* (Report, 2020).

6 2019–2020 Bushfires (n 4) 10.

7 See, eg, Tom Rabe, "'Unimaginable': Thousands Displaced as True Extent of NSW Floods Revealed', *The Sydney Morning Herald* (online, 7 March 2022) <<https://www.smh.com.au/national/nsw/unimaginable-thousands-displaced-as-true-extent-of-nsw-floods-revealed-20220306-p5a281.html>>; Tiffanie Turnbull, 'Queensland Floods: Residents Evacuate as Australia Faces New Emergency', *BBC News* (online, 13 May 2022) <<https://www.bbc.com/news/world-australia-61432458>>.

8 The floods prompted Lismore City Council to propose a government-funded land swap arrangement to enable residents to move to higher ground: 'Starting the Discussion: Building Back Better', *Lismore City Council* (Web Page, 23 June 2022) <<https://yoursay.lismore.nsw.gov.au/growth-management-strategy#:~:text=A%20planned%20retreat%20of%20the,existing%20social%20networks%20and%20jobs>>.

9 *Royal Commission* (n 1) 5, 22 [23]–[25].

10 Francis M Deng, *Report of the Representative of the Secretary-General, Submitted Pursuant to Commission Resolution 1997/39, Human Rights, Mass Exoduses and Displaced Persons, Addendum: UN Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) principle 6(2)(d) ('Guiding Principles'); Inter-Agency Standing Committee, 'IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters' (Guidelines, Brookings–Berm Project on Internal Displacement, January 2011) 12 [I.6] ('IASC Operational Guidelines').

there is little critical analysis of evacuations in the forced migration scholarship.¹¹ Arguably, this is partly because evacuations have acquired a different normative quality from other types of displacement, conceived within a ‘rescue’ paradigm. As such, they are commonly viewed as a *proactive* measure to move people to safety in the face of an imminent threat, rather than as a sign of extreme risk and vulnerability. While acknowledging that evacuations ‘are a form of displacement’, the IDMC observes that ‘they successfully reduce the number of injuries and lives lost when a disaster strikes’¹² and show that ‘not all displacement is negative’.¹³ Evacuations are now a major component of national and local disaster risk reduction strategies,¹⁴ and have arguably resulted in fewer lives being lost in disasters.¹⁵

Even so, it is essential to appreciate that evacuations can impinge on people’s human rights, including in contexts like Australia where evacuees are rarely thought of as ‘internally displaced persons’ (‘IDPs’) with rights and entitlements under international law.¹⁶ Further, the fact that States may carry out evacuations with the best of intentions does not exonerate them from their obligations to safeguard human rights more generally, particularly when displacement becomes prolonged. While it is commonly assumed that evacuations are short-lived and evacuees return home quickly, there is mounting evidence that ‘significant numbers’ of people end up displaced for long periods of time.¹⁷ This can lead to blind spots in national responses that either fail to appreciate the scale of displacement, or to identify it at all.¹⁸ In concrete terms, this may mean insufficient support for those who are displaced and a lack of accountability among government authorities.¹⁹

Adopting a human rights lens, this article provides the first in-depth scholarly analysis of evacuation powers in Australian law and policy,²⁰ with a focus on disasters.²¹ By conceptualising evacuations as a form of displacement, it argues

11 For analysis of this gap, see Jane McAdam, ‘Displacing Evacuations: A Blind Spot in Disaster Displacement Research’ (2020) 39(4) *Refugee Survey Quarterly* 583.

12 *GRID 2021* (n 4) 47.

13 Internal Displacement Monitoring Centre, *Global Report on Internal Displacement* (Report, April 2020) 14. See also regarding Fiji and Bangladesh: at 43, 49.

14 *Sendai Framework for Disaster Risk Reduction 2015–2030*, GA Res 69/283, UN Doc A/RES/69/283 (23 June 2015) (‘*Sendai Framework*’). See especially para 33(m).

15 Mami Mizutori, ‘Commemoration of the Adoption of the Sendai Framework, Paris Agreement and the Nansen Initiative in 2015’ (Speech, United Nations Office for Disaster Risk Reduction, 4 February 2021) <<https://www.undrr.org/news/disaster-displacement-great-humanitarian-challenge-21st-century>>.

16 See *Guiding Principles* (n 10). Interestingly, evacuation guidelines in South Australia (‘SA’) and Western Australia (‘WA’) do refer to ‘displaced persons’ in parts: State Emergency Management Committee, ‘State Emergency Management Plan Part 3: Guidelines and Frameworks Annex A’ (Guidelines Version 1.0, Government of South Australia, last revised 30 May 2018) 12 (‘SA Guidelines’); State Emergency Management Committee, ‘State Emergency Management: A Strategic Framework for Emergency Management in Western Australia’ (Guidelines Version 0.300, Government of Western Australia, 18 December 2020) 20–1 (‘WA Guidelines’).

17 *GRID 2021* (n 4) 21 (see, eg, considering housing destruction), 78.

18 *Ibid* 78.

19 *Ibid*.

20 The laws span general emergency powers, as well as specific authorisation in the contexts of fires, public health, ambulance services and counter-terrorism.

21 Although this article does not focus on smaller-scale evacuations, such as where residents are evacuated from a building, such evacuations may raise similar concerns and deserve separate analysis. For instance,

that current domestic frameworks pay insufficient attention to protection needs that may arise – particularly for groups that may find themselves in vulnerable situations, such as children and people with a disability, and for people whose displacement becomes prolonged. While Australian law safeguards the right to life in the emergency phase, it is otherwise silent on the protection needs of evacuees. This is notwithstanding the fact that in 2020, the explanatory memorandum to Australia’s first federal emergency law explicitly acknowledged the risk of ‘individuals being displaced from disaster-affected areas’.²² International legal standards reflected in the Guiding Principles on Internal Displacement,²³ and human rights law more generally,²⁴ are directly relevant to protecting such people, and international law also offers a framework for holding governments to account. If law and policymakers were to consider the needs of evacuees through this lens, they could confront protection gaps head-on and thereby enhance the promotion of people’s rights, wellbeing and recovery.

II WHAT ARE EVACUATIONS?

Evacuations are a risk management strategy designed ‘to reduce the loss of life or lessen the effects of an emergency on a community, prior to the onset of, or during, an emergency’.²⁵ They can be spontaneous or assisted, voluntary or directed,²⁶ and can apply ‘to individuals, a house, a street, a large facility (i.e. school

the evacuation in 2019 of residents of defectively constructed apartment blocks in Sydney has seen people unable to return to their homes for more than two years: Yumi Oba, ‘Owners in Last-Ditch Attempt to Recoup Losses Two Years after Mascot Towers Evacuation’, *SBS Japanese* (online, 3 June 2021) <<https://www.sbs.com.au/language/english/owners-in-last-ditch-attempt-to-recoup-losses-two-years-after-mascot-towers-evacuation>>. I thank one of the anonymous reviewers for raising this point.

22 Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 6 [17] (‘Explanatory Memorandum’).

23 *Guiding Principles* (n 10).

24 In addition to international treaty law, see ‘The MEND Guide: Comprehensive Guide for Planning Mass Evacuations in Natural Disasters’ (Guide, Camp Coordination and Camp Management Cluster, 2014) (‘MEND Guide’); ‘IASC Operational Guidelines’ (n 10); Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (Practical Action Publishing, 4th ed, 2018); *Sendai Framework* (n 14) annex II, paras 33(h), (m). See also *Report of the International Law Commission*, UN Doc A/71/10 (2 May–10 June and 4 July–12 August 2016) ch iv (Protection of Persons in the Event of Disasters: Draft Articles and Commentary). While evacuations are not mentioned expressly, the draft articles do detail states’ responsibilities to undertake preventive and remedial action in the context of disasters: *Report of the International Law Commission* (n 24) arts 9, 11. The MEND Guide provides the comprehensive international guidance on evacuations. Although specifically developed for ‘mass evacuations’ – namely, ‘the evacuation of whole communities, neighborhoods or geographical areas’ – it is relevant to all types of evacuations: ‘Mend Guide’ (n 24) 11, 17.

25 Emergency Management Victoria, *Victorian Emergency Operations Handbook* (3rd ed, 2020) 73 (‘Vic Operations Handbook’).

26 See Australian Institute for Disaster Resilience, *Australian Disaster Resilience Handbook Collection, Handbook 4* (4th ed, 2017) 1–2 (‘Handbook 4’).

or hospital), a suburb, a town or a large area of the State'.²⁷ They are intended to be rapid, temporary ('from hours to weeks'²⁸) and thus envisage 'eventual safe and timely return'.²⁹

While each Australian state and territory has its own guidelines on evacuations, many draw on the Australian Institute for Disaster Resilience's ('AIDR') *Evacuation Planning Handbook* ('*Handbook*'), which provides guidance on national principles and practices for evacuation. Developed with input from relevant state and territory agencies, governments, organisations and individuals involved in disaster resilience,³⁰ the *Handbook* covers all stages of evacuations – namely, the decision to evacuate, warning, withdrawal (ie, the evacuation itself), shelter and return.³¹ While the *Handbook* reflects, and in some cases expands upon, international standards, it does not directly reference them.³²

The *Handbook* classifies evacuations into three types: (a) compulsory/directed; (b) recommended; and (c) self-evacuation, noting that each may be total, partial or phased.³³ This typology is reflected in a variety of ways in state and territory evacuation policies, such as immediate evacuations (resulting from a sudden hazard impact), pre-warned/managed evacuations (following reliable information that enables a managed movement of people ahead of the hazard impact), and self-

27 *Vic Operations Handbook* (n 25) 73. This is also reflected in a number of local government emergency plans: see, eg, Towong Shire, 'Municipal Emergency Management Plan 2018–2021' (Plan, 11 October 2021).

28 See 'MEND Guide' (n 24) 16. The Tasmanian guidelines draw almost verbatim from *Handbook 4* (n 26) 1, stating:

Some evacuations may be carried out very quickly and over very short distances. For example, people may be warned to move to higher ground pending a potential tsunami or flash flood, or to move two streets away from a rural–urban interface to avoid a bushfire. On the other hand, people evacuated from an area may be relocated many kilometres from their homes and unable to return for a considerable period.

See Department of Police, Fire and Emergency Management, 'Emergency Evacuation Framework' (Guidelines Version 2, Tasmanian Government, August 2018) 6 ('Tasmanian Framework').

29 *Vic Operations Handbook* (n 25) 73. According to the NSW Evacuation Management Guidelines, they are distinct from rescues, which entail 'the safe removal of persons or domestic animals from actual or threatened danger of physical harm': State Emergency Management Committee Evacuation Working Group, 'State Emergency Management Plan: Evacuation Management Guidelines' (Guidelines, NSW Government, March 2014) 7 ('NSW Guidelines'), referring to State Rescue Policy: 'NSW Guidelines' (n 29) 7.

30 *Handbook 4* (n 26) iii.

31 *Ibid* vi–vii. Queensland adds '[c]ommunity [p]reparedness' as the first stage to ensure that communities appreciate the risk and understand evacuation zones: Queensland Fire and Emergency Services, 'Evacuation: Responsibilities, Arrangements and Management' (Manual No 1.190, Queensland Government, 18 September 2018) 4 ('Queensland Evacuation Manual').

32 Indeed, until the development of the MEND Guide (n 24), most guidance on evacuations had been developed at the national or sub-national level, often by disaster management organisations and with a strong law enforcement orientation: Sanjula Weerasinghe et al, *Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future* (Report, 12–14 March 2014) 9. Most international guidance on evacuations does not cite international law in any detail either, even if said to be 'based on' it: see, eg, 'IASC Operational Guidelines' (n 10) 9 n 8: 'The Guidelines are based on the full spectrum of the universal human rights instruments, as far as appropriate, as well as on relevant regional human rights conventions and other standards'.

33 *Handbook 4* (n 26) 1–2.

managed evacuations/relocations (where people independently choose to move away from an area).³⁴

Whether and how an evacuation occurs depends not only on the risk posed by particular threats, but on where and how people choose to live and the extent to which they are 'prepared, supported and cared for during and after disasters.'³⁵ Evacuations can be enormously disruptive to people's lives and livelihoods,³⁶ and if they are poorly planned, they can themselves put lives and property at risk. Thus, a timely and well-conceived evacuation 'could be the difference between life and death'.³⁷

In determining whether or not to evacuate, consideration should be given to factors such as the imminence of the threat (and whether an evacuation is feasible in the available timeframe); the potential psychological and physical harm if people remain/evacuate; the potential harm to emergency services personnel; the potential economic and social costs of evacuating; and who in the affected area lacks the capacity to respond to an evacuation order, including because of increased vulnerability.³⁸ In some contexts, the risks of evacuating may be greater than remaining, for instance, if there is insufficient time.³⁹

34 See, eg, 'NSW Guidelines' (n 29) 12–13; 'SA Guidelines' (n 16) 4; 'WA Guidelines' (n 16) 4, 29.

35 *Royal Commission* (n 1) 22.

36 *GRID 2021* (n 4) 48.

37 *Royal Commission* (n 1) 265. For instance, 'WA Guidelines' (n 16) 6 state (verbatim) that the following factors are integral to any evacuation plan:

- known trigger points for identified hazards;
- details of suitable access/egress routes for the expected type/volume of traffic, including alternatives by water or air when suitable roads are inaccessible, insufficient or inappropriate;
- possible locations for vehicle control points to assist with traffic management (i.e. where traffic can be easily re-routed and where communications should be reliable);
- effective warning methods appropriate to the community (including consideration of at risk persons and the demographics of the community, as far as practicable);
- places that could be used as evacuation/welfare centres;
- facilities where people with animals may go;
- transport options for those without access to private vehicles; and
- appropriate and up-to-date contact details for relevant groups and facilities to be accessed by the Controlling Agency and/or HMA during an emergency.

See also *Handbook 4* (n 26) 25; 'Queensland Evacuation Manual' (n 31) 35.

38 *Handbook 4* (n 26) 10; *Royal Commission* (n 1) 280. Queensland's Evacuation Manual recommends that planners create a timeline mapping the steps in an evacuation process, as this reveals 'the critical links between the predicted impact time, the decision to evacuate and the many factors that will determine the time taken to complete the withdrawal': 'Queensland Evacuation Manual' (n 31) 24.

39 *Handbook 4* (n 26) 13. Evacuation plans should identify people at higher risk and potentially provide more detailed arrangements: at 20. For discussion of imminence of threat: see below nn 80–7 and accompanying text.

III WHAT EMPOWERS AUSTRALIAN AUTHORITIES TO MOVE PEOPLE?

The primary responsibility for emergency management in Australia rests with the states and territories,⁴⁰ and planning for evacuations is a core part of this.⁴¹ The Commonwealth does not have an express constitutional power for emergencies, although other heads of power enable it to act in certain cases.⁴² The Commonwealth does, however, retain responsibility under international law to ensure that the actions of all domestic authorities comply with Australia's international legal obligations.⁴³ While safeguarding life is a fundamental duty under human rights law,⁴⁴ and the core rationale behind evacuations in Australia,⁴⁵ it does not give the authorities *carte blanche*. As Part IV below explores, even though international law permits certain rights to be restricted (or even derogated from) in an emergency, such restrictions are subject to strict temporal and proportional requirements, and difficult to sustain beyond the initial emergency phase.

Each state and territory has legislative provisions empowering a range of actors to undertake evacuations in certain circumstances, sometimes by force.⁴⁶

40 As the Australian Government Crisis Management Framework underscores, the states and territories 'control most functions essential for effective crisis prevention, preparedness, response and recovery': Department of the Prime Minister and Cabinet, 'Australian Government Crisis Management Framework' (Framework Version 2.3, October 2020) 8 ('*Government Crisis Framework*'). On Commonwealth responsibilities for domestic disasters requiring a national response, see 51–2.

41 *Handbook 4* (n 26) 4. A list of Australian emergency management legislation is available at Michael Eburn, 'Emergency Management Legislation', *Australian Emergency Law* (Blog Post, 1 February 2021) <<https://emergencylaw.wordpress.com/emergency-management-legislation/>>.

42 Royal Commission into National Natural Disaster Arrangements, *Issues Paper: Constitutional Framework for the Declaration of a State of National Emergency* (Issues Paper, 8 May 2020) 8 [28] ('*Royal Commission Issues Paper*').

43 *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN Doc A/56/10 (23 April–1 June and 2 July–10 August 2001) (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries) 35:

In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law.

See also *Guiding Principles* (n 10) 2 [3].

44 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6 ('*ICCPR*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 6 ('*CRC*'); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 10 ('*CRPD*'). See Part III(B).

45 *Handbook 4* (n 26) 13.

46 See, eg, *State Emergency and Rescue Management Act 1989* (NSW) ss 37(2), 60L ('*NSW Emergency and Rescue Act*'); *State Emergency Service Act 1989* (NSW) s 22(2) ('*NSW Emergency Service Act*'); *Terrorism (Community Protection) Act 2003* (Vic) s 21 ('*Vic Terrorism Act*'); *Disaster Management Act 2003* (Qld) s 77(4) ('*Qld Disaster Management Act*'); *Fire and Emergency Services Act 1990* (Qld) s 53(2)(l) ('*Qld Fire and Emergency Act*'); *Emergency Management Act 2005* (WA) s 76 ('*WA Emergency Management Act*'); *Fire and Emergency Services Act 1998* (WA) s 18B(4) ('*WA Fire Services Act*'); *Fire Brigades Act 1942* (WA) s 34A ('*WA Brigades Act*'); *Emergencies Act 2004* (ACT) s 168(2) ('*ACT Emergencies Act*'); *Emergency Management Act 2013* (NT) s 23(2) ('*NT Emergency Management Act*');

Some laws contain a general emergency evacuation power,⁴⁷ while others relate to particular types of disasters, most notably fires. In order to provide a complete country-wide picture, frameworks in each jurisdiction – and for each evacuation ‘type’ – are examined in turn below. Sections A–D examine the legislative frameworks in place at the federal, state and territory levels. Section E considers particular safeguards for vulnerable groups, while section F considers mandatory versus voluntary evacuations.

A Evacuation Powers at the Federal Level

Until December 2020, Australia had no core federal emergency management legislation.⁴⁸ The federal government’s capacity to intervene in a particular case, or to override state authorities, depended upon the particular circumstances and interpretation of relevant constitutional and state laws.⁴⁹ This was despite the fact that many disasters have historically affected multiple jurisdictions (and/or overwhelmed the capacity of state authorities),⁵⁰ and the federal government has played a significant role in emergency planning, coordination, operational responses, financial support, education/training, public awareness and research.⁵¹

Country Fire Authority Act 1958 (Vic) s 30(1)(g) (*‘Vic Country Fire Authority Act’*); *Fire Service Act 1979* (Tas) ss 47(4), 47 (*‘Tas Fire Service Act’*); *Public Safety Preservation Act 1986* (Qld) ss 8(1)(d), 8AZ(2), 8PB(4) (*‘Old Public Safety Act’*); *Public Health Act 1997* (Tas) s 17(3)(d) (*‘Tas Public Health Act’*); *Public Health Act 2016* (WA) s 199 (*‘WA Public Health Act’*). See discussion further below.

- 47 In NSW, an ‘emergency’ is defined in section 4 of the *NSW Emergency Rescue Act* (n 46) as
 an actual or imminent occurrence (such as fire, flood, storm, earthquake, explosion, terrorist act, accident, epidemic or warlike action) which—
 (a) endangers, or threatens to endanger, the safety or health of persons or animals in the State, or
 (b) destroys or damages, or threatens to destroy or damage, property in the State, or
 (c) causes a failure of, or a significant disruption to, an essential service or infrastructure
 ... which requires a significant and co-ordinated response.
- 48 However, section 20 of the *Emergency Response Fund Act 2019* (Cth) establishes a fund to assist financially with recovery from ‘natural’ disasters, and/or post-disaster resilience for areas affected (directly or indirectly) by such disasters.
- 49 For an overview of Commonwealth powers, see *Royal Commission Issues Paper* (n 42); Michael Eburn, ‘Responding to Catastrophic Natural Disasters and the Need for Commonwealth Legislation’ (2011) 10(3) *Canberra Law Review* 81, 85–93 (*‘Natural Disasters’*); John Kehoe, ‘Defence Needs New Powers for Disaster Help’, *Australian Financial Review* (online, 12 January 2020) <<https://www.afr.com/politics/federal/defence-needs-new-powers-for-disaster-help-20200112-p53qt0>>; Michael Eburn, ‘Calling Out the Troops’, *Australian Emergency Law* (Blog Post, 5 January 2020) <<https://emergencylaw.wordpress.com/2020/01/05/calling-out-the-troops/>>. The Commonwealth has responsibility for managing the disaster response in Australia’s non-self-governing territories.
- 50 See generally Australian Institute for Disaster Resilience, *Australian Disaster Resilience Handbook Collection: Australian Emergency Management Arrangements Handbook* (3rd ed, 2019) (*‘Australian Emergency Arrangements Handbook’*), which describes the various emergency management roles/responsibilities of government, non-governmental organisations, businesses, communities and individuals.
- 51 Australian National Audit Office, *Commonwealth Emergency Management Arrangements* (Report No 41, 2000) 11. For hazards such as bushfires and tsunamis, there is a nationally agreed warning framework: ‘Tasmanian Framework’ (n 28) 26. For the various emergency management roles/responsibilities of government, non-governmental organisations, businesses, communities and individuals, see generally *Australian Emergency Arrangements Handbook* (n 50).

The Royal Commission into the 2019–20 bushfires accordingly recommended the establishment of a legislative mechanism for the federal government to declare a state of national emergency to signal the gravity of a disaster and to clearly articulate the ‘objectives, thresholds and considerations’ of federal support.⁵² The *National Emergency Declaration Act 2020* (Cth) was a direct response to that recommendation,⁵³ its objective being to ‘recognise and enhance the role of the Commonwealth in preparing for, responding to and recovering from emergencies that cause, or are likely to cause, nationally significant harm’⁵⁴ by enabling the Commonwealth to make ‘national emergency declarations’.⁵⁵ The Governor-General may make such a declaration if the Prime Minister is satisfied that:

- (a) an emergency has recently occurred, is occurring or is likely to occur (whether in or outside Australia); and
- (b) the emergency has caused, is causing or is likely to cause nationally significant harm in Australia or in an Australian offshore area; and
- (c) any of the following subparagraphs apply:
 - (i) the governments of each State and Territory in which the emergency has caused, is causing or is likely to cause nationally significant harm have requested, in writing, the making of the declaration
 - (ii) because of the emergency, it is not practicable for a request to be made under subparagraph (i);
 - (iii) the emergency has affected, is affecting or is likely to affect Commonwealth interests;

52 *Royal Commission* (n 1) 140. Recommendation 5.1 of the Royal Commission’s report states at 149:

The Australian Government should make provision, in legislation, for a declaration of a state of national emergency. The declaration should include the following components:

- 1. the ability for the Australian Government to make a public declaration to communicate the seriousness of a natural disaster
- 2. processes to mobilise and activate Australian Government agencies quickly to support states and territories to respond to and recover from a natural disaster, and
- 3. the power to take action without a state or territory request for assistance in clearly defined and limited circumstances.

See also Eburn ‘Natural Disasters’ (n 49). The federal government may already declare an emergency in relation to biosecurity matters, for instance, as it did in relation to the COVID-19 pandemic: *Biosecurity Act 2015* (Cth) s 443; *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

53 Explanatory Memorandum (n 22) 2 [1].

54 *National Emergency Declaration Act 2020* (Cth) s 3(1) (‘*Cth Emergency Declaration Act*’). Section 10 defines ‘nationally significant harm’ as that which:

- (a) has a significant national impact because of its scale or consequences; and
- (b) is any of the following:
 - (i) harm to the life or health (including mental health) of an individual or group of individuals;
 - (ii) harm to the life or health of animals or plants;
 - (iii) damage to property, including infrastructure;
 - (iv) harm to the environment;
 - (v) disruption to an essential service.

55 *Ibid* s 3(2).

- (iv) the making of the declaration is appropriate, having regard to the nature of the emergency and the nature and severity of the nationally significant harm; and
- (d) for reasons relating to emergency management, it is desirable for the declaration to be made for the purposes of one or more national emergency laws.⁵⁶

The Prime Minister must first consult with the relevant state/territory government(s), unless such government(s) requested the declaration or ‘the Prime Minister is satisfied that it is not practicable’ to engage in consultation.⁵⁷ Importantly, section 9 clarifies that the Act ‘does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently’.⁵⁸ The declaration empowers Ministers to modify certain administrative requirements during an emergency to aid the public, such as requirements that information be given in writing, that signatures be witnessed, or that matters be reported to a Commonwealth agency.⁵⁹ It also enables the Prime Minister to require a Commonwealth authority to provide specified information ‘for the purposes of preparing for, responding to or recovering from an emergency to which the national emergency declaration relates’.⁶⁰ The initial declaration must not extend beyond three months.⁶¹

Despite the newness of this legislation, several federal agencies and networks have long provided support and guidance to the states and territories in emergencies. The National Security Committee of Cabinet directs and provides coherence to a national strategy; the Australian Government Crisis Committee coordinates inter-departmental responses to domestic crises; the National Crisis Committee coordinates with state and territory officials where a crisis affects one or more jurisdictions; and the Australian Government Disaster Recovery Committee coordinates Australia’s whole-of-government recovery efforts for all hazards

⁵⁶ Ibid s 11(1).

⁵⁷ Ibid s 11(2)–(3).

⁵⁸ Ibid s 9. Indeed, the rationale behind the Royal Commission’s recommendation for a federal mechanism was to

signal to communities the severity of a disaster early, act as a marshalling call for the early provision of Australian Government assistance when requested, facilitate coordination with state and territory emergency management frameworks, and, in very limited circumstances, allow the Australian Government to act without a request from a state or territory: *Royal Commission* (n 1) 136.

The Senate Legal and Constitutional Affairs Legislation Committee reported on the operation of the Act in June 2021: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *National Emergency Declaration Act 2020* (Report, June 2021).

⁵⁹ *Cth Emergency Declaration Act* (n 54) ss 15(1), (4). The Explanatory Memorandum (n 22) 2 [3] explains that this is to avoid ‘red tape’.

⁶⁰ *Cth Emergency Declaration Act* (n 54) s 16(2). Examples might be information on stockpiles of supplies or other assets or resources: at s 16(3).

⁶¹ Ibid s 11(5)(b). It can be extended under section 12 and revoked under section 14. The Senate Legal and Constitutional Affairs Legislation Committee (n 58) 25 paragraph 2.58 recommended that ‘the Commonwealth government considers amending the National Emergency Declaration Act 2020, through the removal of subsection 12(5), so that any extension of a declaration beyond the three month period is subject to disallowance’.

(convened if the complexity of recovery demands a coordinated response, or if there are multiple incidents and/or jurisdictions).⁶²

The Australian Government Crisis Management Framework sets out the Commonwealth government's 'all hazards' crisis management approach, focusing on immediate response and early recovery.⁶³ It 'provides ministers and senior officials with guidance on their respective roles and responsibilities'.⁶⁴ From an administrative perspective, Emergency Management Australia, within the Department of Home Affairs,⁶⁵ provides national leadership in assisting states and territories to develop emergency management measures. It develops and maintains government emergency management plans for national and international disasters, including the federal Australian Government Disaster Response Plan ('COMDISPLAN') which 'outlines the coordination arrangements for the provision of Australian Government non-financial assistance in the event of a disaster or emergency within Australia or its offshore territories',⁶⁶ according to the criteria and principles outlined in COMDISPLAN.⁶⁷ The National Catastrophic Natural Disaster Plan sets out coordination arrangements to support states and territories in responding to, and recovering from

an extreme hazard event that affects one or more communities, resulting in widespread, devastating, economic, health, social and environmental consequences, and that exceeds the capability of existing State or Commonwealth Government emergency and disaster management arrangements.⁶⁸

Such events may have either a sudden or a sustained impact.⁶⁹

When state or territory authorities are insufficiently resourced or overwhelmed, the Department of Defence can play a key role in providing assistance.⁷⁰ However, the Australian Defence Force ('Defence') does not have the authority to take action in, or control of, a domestic civil emergency response without a state or territory

62 Department of Defence, 'ADF Response to a Natural Disaster or an Emergency' (Joint Doctrine Note 5-20, December 2020) [2-6]–[2-8].

63 *Government Crisis Framework* (n 40) 7.

64 *Ibid.*

65 Emergency Management Australia was moved from the Attorney-General's Department to the Department of Home Affairs in 2018: Australian Government Attorney-General's Department, *Annual Report 2017–18* (Report, 2018) 143.

66 Australian Government, 'COMDISPLAN 2020: Australian Government Disaster Response Plan' (Plan, December 2020) 4 [1.1.1].

67 The request must be made by a nominated official (see *ibid* 6 [2.1.2]) and meet at least one of four criteria: at 5 [1.4.6]. Essentially, when 'the total resources (government, community and commercial) of an affected jurisdiction cannot reasonably cope with the needs of the situation': at 4 [1.3.1]. In a different context, the Emergency Management Australia, 'Australian Government Plan for the Reception of Australian Citizens and Other Approved Persons Evacuated from Overseas' (COMRECEPLAN, 2002) outlines the arrangements for the reception into Australia of Australian citizens, permanent residents, and their immediate dependents and approved foreign nationals evacuated from overseas.

68 Emergency Management Australia, *NATCATDISPLAN: National Catastrophic Natural Disaster Plan* (Plan Version 2-1, December 2017) 1 [2].

69 *Ibid.*

70 Department of Defence, 'Defence Assistance to the Civil Community' (Manual, 19 December 2012) iii [1] ('DACC').

request.⁷¹ Nor is Defence permitted to use force in such circumstances.⁷² The scale of the 2019–20 fires necessitated substantial assistance from Defence,⁷³ including to evacuate people by air and sea, as well as the contribution of military disaster relief assistance by eight other countries – the largest commitment ever provided to Australia.⁷⁴ With the passage of the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Act 2020* (Cth) in December 2020, which amended the *Defence Act 1903* (Cth), Defence and foreign military personnel are now immune from criminal or civil liability when performing duties in good faith ‘to prepare for a natural disaster or other emergency that is imminent, or to respond to one that is occurring or recover from one that occurred recently’.⁷⁵ While such immunity is similar to that granted to state and territory emergency services,⁷⁶ there remains a risk that without specific legislative or regulatory safeguards, human rights (other than the right to life) could be overlooked.

B State/Territory Evacuation Powers in General Emergency Legislation

This section provides an overview of state and territory evacuation powers in general emergencies, as that term is defined in the various statutes.⁷⁷ All jurisdictions permit evacuations to safeguard people’s lives, safety and health; the Northern Territory and Tasmania also permit evacuations to protect people from ‘distress’;⁷⁸ and Queensland allows evacuations where necessary to ensure ‘public order’.⁷⁹ In all cases, protecting lives is of paramount concern.

There is no uniform definition of an ‘emergency’. Western Australia’s definition is the simplest – ‘the occurrence or imminent occurrence of a hazard which is of such a nature or magnitude that it requires a significant and coordinated response’⁸⁰ – while NSW’s definition in the *State Emergency and Rescue Management Act 1989* (NSW) exemplifies the more common, detailed approach:

71 This is not authorised by the Australian Constitution or the *Defence Act 1903* (Cth) (*‘Defence Act’*).

72 *DACC* (n 70) 1–2. See also at 1A–4: ‘Use of force includes the restriction of freedom of movement of the civil community whether there is physical contact or not.’

73 Defence’s assistance was unparalleled in peacetime disaster relief, with around 9,000 personnel (including more than 2,500 Reserves) involved: Department of Defence (n 62) 1–14. See also Anthony Gray, ‘The Australian Government’s Use of the Military in an Emergency and the Constitution’ (2021) 44(1) *University New South Wales Law Journal* 357 <<https://doi.org/10.53637/JJZV8883>>.

74 Department of Defence (n 62) 7–3: Canada, Fiji, Indonesia, Japan, New Zealand, Papua New Guinea, Singapore and the United States.

75 *Defence Act* (n 71) s 123AA.

76 See Nicholas Kanarev, ‘Assessing the Legal Liabilities of Emergencies’ (2001) 16(1) *Australian Journal of Emergency Management* 18.

77 All jurisdictions except the Australian Capital Territory (‘ACT’) have separate legislation detailing evacuation powers in fires. In the ACT, such powers are encompassed within the *ACT Emergencies Act* (n 46). See also below n 126. Comprehensive legislative searches for each jurisdiction were conducted across the areas of emergency and disaster management, fires, public health, ambulance services and counter-terrorism.

78 *Fire and Emergency Act 1996* (NT) s 3 (*‘NT Fire and Emergency Act’*); *Emergency Management Act 2006* (Tas) s 40 (*‘Tas Emergency Management Act’*).

79 *Qld Disaster Management Act* (n 46) s 76(2)(b)(i).

80 *WA Emergency Management Act* (n 46) s 3.

[A]n actual or imminent occurrence (such as fire, flood, storm, earthquake, explosion, terrorist act, accident, epidemic or warlike action) which—

- (a) endangers, or threatens to endanger, the safety or health of persons or animals in the State, or
- (b) destroys or damages, or threatens to destroy or damage, property in the State, or
- (c) causes a failure of, or a significant disruption to, an essential service or infrastructure,⁸¹

which requires ‘a significant and co-ordinated response’.⁸² Sub-section 2 clarifies that the definition encompasses threats or danger to the environment.⁸³

Imminence of harm is a core element of an ‘emergency’ in NSW, Victoria and Western Australia,⁸⁴ as well as a threshold for Defence’s engagement.⁸⁵ In the Northern Territory, fire control officers have the power ‘to do anything necessary for or incidental to’ protecting human life from ‘existing or imminent danger’,⁸⁶ including by ordering evacuations. In all cases, a threat must be sufficiently foreseeable and near in time for an evacuation order to be appropriate,⁸⁷ if the threat is almost upon a community, however, it may be too late for an evacuation to be carried out safely.

Each state and territory has legislated thresholds and conditions for evacuations in emergencies, as outlined below, which are further explained and elaborated in guidelines. The level of detail in the guidelines varies considerably,⁸⁸ but all set

81 *NSW Emergency and Rescue Act* (n 46) s 4(1).

82 *Ibid.*

83 *Ibid* s 4(2). See also *Emergency Management Act 1986* (Vic) s 4 (‘Vic Emergency Act’); *Qld Disaster Management Act* (n 46) s 76(2)(b); *NT Fire and Emergency Act* (n 78) s 3; *ACT Emergencies Act* (n 46) s 34(1); *Fire and Emergency Services Act 2005* (SA) s 3 (definition of ‘emergency’, ‘harm to the environment, or to flora or fauna’) (‘SA Fire and Emergency Act’); *Tas Emergency Management Act* (n 78) s 3; *WA Emergency Management Act* (n 46) ss 50(2)(b)(iii), 56(2)(c)(iii).

84 *NSW Emergency and Rescue Management Act* (n 46) s 4; *Rural Fires Act 1997* (NSW) s 22 (‘NSW Rural Fires Act’); *WA Emergency Management Act* (n 46) s 3. See also references in *Qld Disaster Management Act* (n 46) ss 111–12; *Bushfires Management Act 2016* (NT) s 47(1) (‘NT Bushfires Act’). NSW’s State Emergency Management Plan requires an assessment of ‘the imminent danger to the community’ prior to any evacuation decision: NSW Government, ‘New South Wales State Emergency Management Plan’ (Plan, December 2018) [824].

85 *Defence Act* (n 71) s 123AA(1).

86 *NT Bushfires Act* (n 84) s 47(1).

87 On the notion of imminence, see Adrienne Anderson et al, ‘Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection’ (2019) 68(1) *International and Comparative Law Quarterly* 111 <<https://doi.org/10.1017/S0020589318000398>>.

88 For instance, whereas the ‘Queensland Evacuation Manual’ (n 31) is exceptionally detailed, Victoria’s has a much more operational/procedural focus: Emergency Management Victoria, ‘Joint Standard Operating Procedure: Evacuation for Major Emergencies’ (Procedure No J03.12, 2 October 2020) (‘Victorian Guidelines’). The ‘Queensland Evacuation Manual’ (n 31), for example, suggests that evacuation zones could be communicated to the public through ‘colour coded fridge magnets’, ‘colour coded stickers on household meter boxes’, ‘roadside wheelie bin zone colouring’ and ‘emergency preparedness brochures and maps available and easily accessible in locations where tourists and transient populations access for example foyers of hotels, motels, caravan parks’: at 18. The ‘Tasmanian Framework’ (n 28) is also very comprehensive and practical. The ‘WA Guidelines’ (n 16) include appendices of evacuation planning templates.

out procedures for planning, responding to and managing evacuations.⁸⁹ In NSW and Queensland, comprehensive all-hazards evacuation management guidelines⁹⁰ are supplemented with detailed sub-plans for specific emergencies (including tsunamis, storms and other major incidents).⁹¹

In NSW, if a state of emergency has been declared, the Minister may direct (or authorise an emergency services officer⁹² to direct) people to leave premises or to move out of an emergency area if satisfied that it is ‘necessary or convenient to do so for the purpose of responding to an emergency’.⁹³ An emergency services officer may do ‘all such things as are reasonably necessary to ensure compliance’ with the direction, including using ‘such force as is reasonably necessary in the circumstances’.⁹⁴ Section 60L empowers police to ‘evacuate or to take other steps concerning persons’ where ‘there are reasonable grounds for doing so’ in order to protect people ‘from injury or death threatened by an actual or imminent emergency’. Police may use ‘such force as is reasonably necessary in the circumstances’.⁹⁵

Similarly, Queensland’s *Public Safety Preservation Act 1986* (Qld) permits the emergency commander to direct the evacuation and exclusion from premises, and to remove with such force as is necessary anyone who does not comply.⁹⁶ The test is whether the commander is ‘satisfied on reasonable grounds that it is necessary to effectively deal with that emergency situation’.⁹⁷ The legislation includes specific evacuation powers for a ‘terrorist emergency’.⁹⁸

89 Victoria’s now superseded guidelines did reference one international standard-setting document: see Emergency Management Victoria, ‘Emergency Management Manual Victoria’ (Manual, 1997–2020) 8-36 (‘*Vic Emergency Manual*’), citing The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (3rd ed, 2004). None of the current guidelines cite international standards or frameworks, but they are reflected in many aspects and the guidelines could be useful templates for other contexts.

90 ‘NSW Guidelines’ (n 29); ‘Queensland Evacuation Manual’ (n 31).

91 See NSW Government, ‘Sub Plans’, *Resilience NSW* (Web Page) <<https://www.emergency.nsw.gov.au/Pages/publications/plans/sub-plans/Sub-plans.aspx>>; Queensland Government, ‘Assessment and Plans’, *Disaster Management* (Web Page, 12 August 2022) <<https://www.disaster.qld.gov.au/qermf/Pages/Assessment-and-plans.aspx>>. See also below n 129. Queensland’s Evacuation Manual (n 31) 11 recommends that sub-plans be reviewed annually.

92 *NSW Emergency and Rescue Act* (n 46), defined in section 32A as:

- (a) a police officer,
- (b) an officer of Fire and Rescue NSW of or above the position of station commander,
- (c) an officer of the State Emergency Service of or above the position of unit commander,
- (d) a member of a rural fire brigade of or above the position of deputy captain,
- (e) a Regional Emergency Management Officer,
- (f) a member of the Ambulance Service of NSW of or above the rank of station officer.

93 *Ibid* s 37.

94 *Ibid* s 37(2). Identical language is contained in section 22 of the *NSW Emergency Service Act* (n 46) (with respect to the powers of the Commissioner).

95 *NSW Emergency Service Act* (n 46) ss 60L(1)–(2).

96 *Qld Public Safety Act* (n 46) ss 8(1)(d), 8AZ(1). See also the *Public Safety Preservation Act 1958* (Vic) which confers powers to make regulations to secure public safety or order, including ‘to prevent the doing of any act or thing ... which may have the effect of prejudicing the public safety or order’ (at s 4(b)(iii)), and to make regulations ‘securing the essentials of life to the community’: at s 5.

97 *Qld Public Safety Act* (n 46) s 8(1).

98 *Ibid* ss 8GA(1), 8M, 8PB, 8PC.

If a disaster situation has been declared in Queensland,⁹⁹ then a district disaster coordinator or declared disaster officer is authorised to control the movement of people into, out of or around the area, including through evacuations,¹⁰⁰ to:

- (i) ensure public safety or public order;
- (ii) prevent or minimise loss of human life, or illness or injury to humans or animals;
- (iii) prevent or minimise property loss or damage, or damage to the environment;
- (iv) otherwise prepare for, respond to, or recover from, the disaster situation.¹⁰¹

Reasonable force may be used,¹⁰² and it is an offence to disobey a direction without a reasonable excuse.¹⁰³

As noted above, local disaster management groups in Queensland may coordinate voluntary evacuations and may recommend to a District Disaster Coordinator ('DDC') that a directed evacuation is required (given their in-depth 'situational awareness'), but they have no formal legislative authority to order one.¹⁰⁴ Despite this, 'complete evacuation planning requires local governments to develop an evacuation sub-plan that recognises and includes any scenario where a directed evacuation may be ordered by the DDC'.¹⁰⁵

In a declared state of disaster in Victoria, the Minister may 'compel the evacuation of any or all persons from the disaster area or any part of it', with the exception of someone who has 'a pecuniary interest in the land or building or in any goods or valuables on the land or in the building'.¹⁰⁶ While a decision to evacuate should ordinarily only be taken by the Incident Controller, in 'some urgent life-threatening circumstances, and in an effort to preserve life', any agency representative may make a decision to evacuate.¹⁰⁷ The police may declare an 'emergency area' and exclude people from it if that is necessary to ensure public safety, the security of evacuated premises, or 'the safety of, or prevention of obstruction, hindrance or interference to' those working on the emergency.¹⁰⁸

South Australia emphasises its 'all-hazards approach' – namely, that a large range of hazards can have similar impacts so require similar arrangements to manage them (such as warning, evacuation, medical services and community recovery). Thus, for example, when 'an identified major incident, a major

99 *Qld Disaster Management Act* (n 46) s 64(2):

Before declaring the disaster situation, the district disaster coordinator must take reasonable steps to consult with –

- (a) the district group for the disaster district; and
- (b) each local government whose area is in, or partly in, the declared area for the disaster situation.

100 *Ibid* ss 77(1)(a)–(c).

101 *Ibid* s 76(2)(b).

102 *Ibid* s 77(4).

103 *Ibid* s 116.

104 'Queensland Evacuation Manual' (n 31) 13. See *Qld Disaster Management Act* (n 46) s 29.

105 'Queensland Evacuation Manual' (n 31) 13.

106 *Vic Emergency Act* (n 83) ss 24(2)(e), 24(7). See also 'Victorian Guidelines' (n 88).

107 'Victorian Guidelines' (n 88) 4 [1.10].

108 *Vic Emergency Act* (n 83) s 36A, with exception in section 36B for those with a pecuniary interest in property within the area.

emergency or a disaster' has been declared, the *Emergency Management Act 2004* (SA) expressly authorises the State Co-ordinator 'must take any necessary action to ... cause such response and recovery operations to be carried out as he or she thinks appropriate'.¹⁰⁹ This includes the power (of the State Co-ordinator or an authorised officer) to remove, cause to be removed or direct the evacuation or removal of any person or animal if, it is considered 'necessary to do so'.¹¹⁰ Local councils are expressly required to 'take measures to protect [their] area from natural and other hazards and to mitigate the effects of such hazards'.¹¹¹

In Western Australia, if an emergency situation declaration or state of emergency declaration is in force,¹¹² an authorised officer may 'direct the evacuation and removal of persons or animals from the emergency area or any part of the emergency area',¹¹³ defined as 'the occurrence or imminent occurrence of a hazard which is of such a nature or magnitude that it requires a significant and coordinated response'.¹¹⁴ An officer may do 'all such things as are reasonably necessary to ensure compliance', including using reasonable force.¹¹⁵ There is a penalty of \$50,000 for non-compliance.¹¹⁶

A core function of the Western Australia Fire and Emergency Commissioner is 'to promote the safety of life and property from natural disasters, accidents and other events that may require search and rescue operations to be carried out'.¹¹⁷ This includes restricting or prohibiting the movement of people and vehicles by closing roads or waterways, using such force as is reasonably necessary.¹¹⁸

In Tasmania, evacuations are authorised to protect people from 'distress, injury or death', or to protect property or the environment from 'damage or destruction'.¹¹⁹ Tasmania's guidelines also emphasise that officials should consider 'the potential harm (physical, psychological) to people remaining, including any that may be particularly vulnerable to the hazard, and potential harm to people evacuating'.¹²⁰

In the Australian Capital Territory ('ACT'), the *Emergencies Act 2004* (ACT), empowers the chief officer of an emergency service to regulate or prohibit

109 *Emergency Management Act 2004* (SA) s 25(1) ('SA Emergency Management Act').

110 Ibid s 25(2). Similar powers apply to relevant officers under the *SA Fire and Emergency Act* (n 83), although are only permitted when they appear 'necessary or desirable for the purpose of protecting the life, health or safety of any person or animal, or protecting property, relevant services or the environment, or for any other purpose associated with dealing with a fire or other emergency or the threat of a fire or other emergency': at ss 42, 97, 118. In all cases, see especially ss 42(2)(e), 97(2)(e), 118(2)(e).

111 *Local Government Act 1999* (SA) s 7(d).

112 *WA Emergency Management Act* (n 46) s 65.

113 Ibid s 67(b).

114 Ibid s 3.

115 Ibid s 76.

116 Ibid s 86. These powers are replicated in the *WA Public Health Act* (n 46) with a \$20,000 fine for non-compliance: at ss 180, 199, 202.

117 *WA Fire Services Act* (n 46) s 18A(c). See also *WA Brigades Act* (n 46) s 25.

118 *WA Fire Services Act* (n 46) ss 18B(3)(j), 18B(4).

119 *Tas Emergency Management Act* (n 78) s 40. See Schedule 1, which includes evacuation within the 'emergency powers'. Section 52 provides that such force as is reasonably necessary may be used.

120 'Tasmanian Framework' (n 28) 22.

movement, including by evacuating people, to protect or preserve life, property or the environment.¹²¹

The Northern Territory's *Emergency Management Act 2013* (NT) permits an authorised officer to direct people to evacuate a specified site and use reasonable force to remove those who do not comply with such an order.¹²²

Finally, Christmas Island, the Cocos (Keeling) Islands and Jervis Bay Territory all have emergency management ordinances in effect which contain evacuation powers.¹²³

Operationally, states and territories have multi-level coordination and control facilities, including at the inter-agency level (eg, to coordinate police, fire and rescue services and state emergency services).¹²⁴ There are also state and territory crisis committees to support ministerial decision-making, whose members may form part of the National Crisis Committee. Non-governmental organisations play essential practical roles. For instance, the Australian Red Cross helps to run evacuation centres and register evacuees. Its 'Register.Find.Reunite.' system matches registrations from affected people with enquiries from relatives searching for news.¹²⁵

C State/Territory Evacuation Powers in Fire Legislation

It is noteworthy that fires are the only disaster for which explicit legislative evacuation powers exist in Australia,¹²⁶ including evacuation by force.¹²⁷ Other natural hazards, such as floods and tsunamis, are encompassed by the general emergency legislation discussed above.¹²⁸ This is despite the fact that in NSW, for instance, evacuations are the State Emergency Service's primary response strategy for managing people at risk of a flood or a tsunami.¹²⁹

121 *ACT Emergencies Act* (n 46) ss 34(1)(k)–(l). See also section 68 regarding fire, section 150C(2) regarding emergency management and 156(2) regarding declared state of emergency.

122 *NT Emergency Management Act* (n 46) s 23.

123 *Christmas Island Emergency Management Ordinance 2012* (Cth) regs 21, 22; *Cocos (Keeling) Islands Emergency Management Ordinance 2012* (Cth) regs 21, 22; *Jervis Bay Territory Emergency Management Ordinance 2015* (Cth) reg 19.

124 See, eg, NSW Government, 'State Emergency Operations Centre (SEOC)', *Resilience NSW* (Web Page, 15 November 2017) <<https://web.archive.org/web/20200123191846/https://www.emergency.nsw.gov.au/Pages/about-us/semc/State-Emergency-Operations-Centre.aspx>>.

125 During the 2019–20 fires in East Gippsland in Victoria, 29,863 people registered with Victoria Police: 'Victorian Bushfires Remembered: Victoria Police's Response to a Bushfire Emergency', *Victoria Police* (Web Page, 26 August 2021) <<https://www.police.vic.gov.au/victoria-bushfires-remembered>>.

126 This is the case for every state plus the Northern Territory. In the ACT, since 2004, fires have been regulated in detail within the *ACT Emergencies Act* (n 46). The statute empowers the chief officer of an emergency service to regulate or prohibit movement, including by evacuating people, to protect or preserve life, property or the environment: at ss 34(1)(k)–(l). See also section 68 regarding fire, section 150C(2) regarding emergency management and section 156(2) regarding declared state of emergency.

127 See discussion of mandatory versus voluntary evacuations in Part III(F).

128 Some states have specific evacuation plans for these types of hazards: see above n 91. Tasmania's policy provides a list of past evacuation events in that state, predominantly in relation to floods, which have helped to shape current guidance: 'Tasmanian Framework' (n 28) 8.

129 NSW Government, 'New South Wales State Flood Plan: A Sub Plan of the State Emergency Management Plan' (Plan, 1 March 2018) 17 [5.7.1]; NSW Government, 'New South Wales State Tsunami Plan: A Sub Plan of the State Emergency Management Plan' (Plan, 13 September 2018) 19 [5.7.1]. In storms, the

When it comes to fires, the *Fire and Rescue Act 1989* (NSW) contains general powers to remove people at or near a fire who may, in the officer's opinion, interfere with the work of fire fighters.¹³⁰ Section 13 empowers the officer in charge to 'take such measures as the officer thinks proper for the protection and saving of life and property', which could potentially include by force.¹³¹ Any person who 'obstructs or hinders' fire fighters or other personnel in exercising a function under the Act may be fined and/or imprisoned for up to two years.¹³²

In Victoria, officials may order people 'to withdraw from any premises then burning or which are threatened by fire' and to remove them forcibly if they do not comply.¹³³ Under the *Country Fire Authority Act 1958* (Vic), the Chief Officer has a duty to warn the community and provide information if necessary to protect life and property.¹³⁴ There are criminal penalties for obstructing officers exercising a power or performing a duty under the Act, without reasonable excuse.¹³⁵

In South Australia, officers may direct the evacuation or removal of any person if it appears

necessary or desirable for the purpose of protecting the life, health or safety of any person or animal, or protecting property, relevant services or the environment, or for any other purpose associated with dealing with a fire or other emergency or the threat of a fire or other emergency.¹³⁶

The broad power afforded to officials to take 'any action that appears necessary or desirable' could potentially include the use of force. It is a fineable offence not to comply with a direction without reasonable excuse.¹³⁷

In Queensland, the *Fire and Emergency Services Act 1990* (Qld) empowers an authorised fire officer (or person acting at their direction) to take 'any reasonable measure' to protect persons, property or the environment, including by directing them not to remain in an area, or by removing them (with 'such force as is reasonably necessary') if they fail to comply with such an order.¹³⁸ A person who

strategy is to 'evacuate people from dangerous or potentially dangerous places created by storm damage or coastal erosion to safe locations away from the hazard' when there is a risk to public safety, such as buildings that are uninhabitable or could collapse: NSW Government, 'New South Wales State Storm Plan: A Sub Plan of the State Emergency Management Plan' (Plan, 7 June 2018) 16 [5.7.1]–[5.7.2]. See generally *NSW Emergency Service Act* (n 46) s 22.

130 *Fire and Rescue Act 1989* (NSW) s 19 ('*NSW Fire and Rescue Act*'). See also at s 13; *NSW Rural Fires Act 1997* (n 84) s 22A.

131 Note also that force is expressly authorised under the *NSW Emergency and Rescue Act* (n 46) section 37(2), which encompasses fires.

132 *NSW Fire and Rescue Act* (n 130) s 35.

133 *Fire Rescue Victoria Act 1958* (Vic) ss 58 (other than those with a pecuniary interest in, or goods or valuables on, the premises), 32B; *Vic Country Fire Authority Act* (n 46) s 30(1)(g); *Fire Rescue Victoria Act 1958* (Vic) s 58.

134 *Vic Country Fire Authority Act* (n 46) s 50B(1)(b).

135 *Ibid* s 107.

136 *SA Fire and Emergency Act* (n 83) ss 42, 97, 118. In all cases see especially subsection (2)(e). The same powers inhere in the state co-ordinator under the *SA Emergency Management Act* (n 109): at s 25.

137 *SA Fire and Emergency Act* (n 83) s 42(4).

138 *Qld Fire and Emergency Act* (n 46) ss 53, 59. See also 'Queensland Evacuation Manual' (n 31). Queensland Government, 'Queensland Strategy for Disaster Resilience 2017: Making Queensland the Most Disaster Resilient State in Australia' (Strategy, 2018) incorporates climate change risk, in line with 'international best practice': at 12.

obstructs an authorised person in the performance of a function under the Act, without reasonable excuse, may be fined or imprisoned for up to six months.¹³⁹

To enforce all necessary steps to protect and save life and property from fire,¹⁴⁰ the Western Australia Fire and Emergency Services Commissioner ‘may take and direct any measures which appear to him to be necessary or expedient for the protection of life and property’.¹⁴¹ The *Bush Fires Act 1954* (WA) expressly allows authorised officers or police to direct an evacuation from an affected area,¹⁴² and anyone who does not comply can be fined \$25,000.¹⁴³

In the Northern Territory, the *Bushfires Management Act 2016* (NT) grants fire control officers the power ‘to do anything necessary for or incidental to’ protecting human life from ‘existing or imminent danger’,¹⁴⁴ and it is an offence to intentionally obstruct a ‘fire control officer, fire warden or authorised bushfire volunteer’ if they are acting in an official capacity.¹⁴⁵ The *Fire and Emergency Act 1996* (NT) empowers the incident commander to order people to vacate land where an occurrence threatens to cause loss of life or property; injury or distress; a risk to public safety; or damage to the environment.¹⁴⁶ It is an offence to interfere with or obstruct an officer performing duties under the Act.¹⁴⁷

In the ACT, the *Emergencies Act 2004* (ACT) empowers the chief officer of an emergency service to evacuate people or animals ‘for the protection or preservation of life, property or the environment’.¹⁴⁸ The chief officer of the fire and rescue service may also direct a person to leave any premises ‘on fire, near the fire, or affected by the consequences of the fire’ and do ‘anything else the chief officer considers appropriate’ for the purpose of ‘extinguishing or preventing the spread’ of a fire or responding to its consequences.¹⁴⁹ The Act further enables a member of the fire and rescue service, or a police officer, to do ‘anything the chief officer (fire and rescue service) may do under an applicable provision or another territory law’ in order to protect ‘life or property or to control or extinguish the fire’.¹⁵⁰ The emergency controller has the power to use necessary and reasonable force to remove a person they reasonably believe is obstructing, or threatening to obstruct, emergency response or recovery.¹⁵¹ Moreover, failure to comply with a direction to leave a fire area is a strict liability offence, punishable by an \$8,000 fine and up to

139 *Qld Fire and Emergency Act* (n 46) s 150C.

140 *WA Brigades Act* (n 46) s 25.

141 *Ibid* s 34(c).

142 *Bush Fires Act 1954* (WA) s 14B(2)(b).

143 *Ibid* s 14C(1).

144 *NT Bushfires Act* (n 84) s 47(1).

145 *Ibid* s 50.

146 *NT Fire and Emergency Act* (n 78) ss 3, 20(2).

147 *Ibid* ss 35(1)(c), 52. See also sections 20, 21 which would appear to authorise the use of force.

148 *ACT Emergencies Act* (n 46) s 34(1)(l). The Act was adopted in response to Ron McLeod, *Inquiry into the Operational Response to the January 2003 Bushfires in the ACT* (Report, 1 August 2003). The Act established the framework for the creation of the ACT Emergency Services Agency.

149 *ACT Emergencies Act* (n 46) s 67(2). The chief officer of the rural fire service also has the power to direct someone to leave land or premises: at s 68(2).

150 *Ibid* s 67(5).

151 *Ibid* s 168.

six months' imprisonment.¹⁵² Finally, the *Fire Service Act 1979* (Tas) permits police to remove people from land or premises using reasonable force if necessary.¹⁵³ A person who wilfully obstructs, hinders or interferes with a member of the Fire Service 'exercising any power' under the Act may be fined or imprisoned for up to six months.¹⁵⁴

D State/Territory Evacuation Powers in Other Types of Legislation

For completeness, this section briefly notes other types of legislation that permit evacuations, namely in the areas of public health, ambulance services and terrorism.¹⁵⁵

While it is common for public health legislation to authorise restrictions on movement (such as for quarantine purposes),¹⁵⁶ Tasmania's *Public Health Act 1997* (Tas) expressly provides that when an emergency declaration is in force, the Director may give directions to 'evacuate any persons from any area',¹⁵⁷ using reasonable force if necessary, to save life or prevent injury (inter alia).¹⁵⁸ Failure to comply can result in a fine or imprisonment for up to six months.¹⁵⁹

Queensland's *Ambulance Service Act 1991* (Qld) authorises ambulance officers to 'take any reasonable measures' to 'protect persons from any danger or potential danger associated with an emergency situation',¹⁶⁰ including by requiring individuals 'not to enter into or remain within a specified area'.¹⁶¹

Victoria's *Terrorism (Community Protection) Act 2003* (Vic) allows a police officer to direct a person or group 'to enter, not to enter or to leave any particular premises or area' and, if necessary, detain them, to protect them from chemical, biological or radiological contamination.¹⁶² Police may use 'reasonable and necessary force to ensure compliance' with a direction.¹⁶³ As noted above,

152 Ibid s 189. However, the ACT Emergency Evacuation Policy states that apart from this limited power to leave a fire area, '[t]here are no offence provisions empowering forced evacuations in the ACT': Justice and Community Safety (ACT) 'ACT Emergency Evacuation Policy' (Policy, 15 June 2012) 1 ('ACT Policy').

153 *Tas Fire Service Act* (n 46) s 47.

154 Ibid s 128(1): 'Fine not exceeding 26 penalty units or imprisonment for 6 months.'

155 This section is illustrative only and does not purport to provide a comprehensive analysis of these areas.

156 See, eg, *Public Health and Wellbeing Act 2008* (Vic) s 200: the Chief Health Officer may authorise officers to restrict or prevent the movement of persons within the emergency area (namely, the area where the state of emergency is declared to exist), including by detaining them in that area 'for the period reasonably necessary to eliminate or reduce a serious risk to public health', restricting their movement within the area, or preventing them from entering the area. There is a similar provision in the *Public Health Act 2010* (NSW) ('*NSW Public Health Act*') which enables the Minister to declare any part of the state to be a 'public health risk area' and to isolate inhabitants of, and/or prevent access to, that area: at s 7(3).

157 *Tas Public Health Act* (n 46) s 16(1)(c).

158 Ibid s 17(3).

159 Ibid s 16(3). See also *NSW Public Health Act* (n 156) s 10; *Qld Public Safety Act* (n 46) ss 8(3), 31(3); *Bush Fires Act 1964* (WA) ss 14C, 57.

160 *Ambulance Service Act 1991* (Qld) s 38(1).

161 Ibid s 38(3).

162 *Vic Terrorism Act* (n 46) s 18. See also section 16, which empowers a senior police officer to 'give an authorisation to a police officer ... in relation to an area' for the purpose of 'protecting people from chemical, biological or radiological contamination'.

163 Ibid s 21. See also *Terrorism (Extraordinary Powers) Act 2005* (WA) ss 7(2), 11. In order 'to minimise the risk to the safety or health of the public': at s 7(2).

Queensland's public safety legislation contains express evacuation powers for a 'terrorist emergency'.¹⁶⁴

E Aiding Vulnerable Groups

The legislative frameworks analysed above are buttressed by policy documents that flesh out operational aspects of the evacuation process, as well as setting out the overarching context and rationale for moving people out of harm's way. All such guidance emphasises the importance of safeguarding vulnerable individuals and groups. These are people considered to be at higher risk than the general population¹⁶⁵ if, 'upon receiving an evacuation message, they will not or cannot comply with evacuation directions'.¹⁶⁶ Under international law, Australia has specific obligations to people who may find themselves in a situation of vulnerability, including children and people with disabilities (explored in Part IV below). However, it is important to recognise that in Australian guidance, 'vulnerability' may extend beyond those who are disadvantaged by age, health or socio-economic status. For instance, NSW's guidelines acknowledge that a lack of familiarity with the local environment may create vulnerabilities for tourists.¹⁶⁷ Indeed, a community with a high proportion of tourists may itself require greater support from the emergency services in order to evacuate them safely, as well as additional resources to ensure that supplies are not rapidly depleted.¹⁶⁸ Unlike locals, tourists may not have friends or relatives close by with whom they can shelter, or even access to a car so that they can leave.¹⁶⁹ However, they do have homes to which they can return once conditions permit this.

Queensland's evacuation manual requires a population analysis to determine 'any special considerations or actions which may be required to accommodate the demographics of the community'.¹⁷⁰ It assumes that the following groups (inter alia) may require special consideration: non-English speaking people; people with a disability or special needs; homeless or house-bound people; temporary/transient populations and tourists; and communities that are still recovering from a disaster.¹⁷¹ The Queensland Floods Commission of Inquiry also noted logistical issues that may complicate evacuations, such as the fact that children in child care centres may be 'too young to evacuate on foot, or even to be evacuated in a motor vehicle unless fitted with appropriate car seats, increasing the required evacuation time'.¹⁷² It recommended that local councils identify groups whose mobility could

164 *Qld Public Safety Act* (n 46), ss 8GA(1), 8M, 8PB, 8PC.

165 *Handbook 4* (n 26) 20. For international guidance, see 'MEND Guide' (n 24) 39–40.

166 'Queensland Evacuation Manual' (n 31) 7.

167 *Royal Commission* (n 1) 266 [12.14].

168 See especially *Royal Commission* (n 1) 266. For instance, the East Gippsland Shire Council stated that 'the decision by many visitors to stay resulted in an escalation of the provision of immediate relief to the Mallacoota community and ultimately to a significant evacuation approach that was only possible with the assistance of the Australian Defence Forces': at 273.

169 'Queensland Evacuation Manual' (n 31) 10.

170 *Ibid* 7.

171 *Ibid*.

172 Queensland Floods Commission of Inquiry, *Final Report* (Report, March 2012) 150.

pose a challenge during evacuations and identify organisations that might be able to assist.¹⁷³

South Australia's guidelines explicitly note the importance of catering for 'culturally and linguistically diverse communities, other persons with a cognitive or sensory impairment and other vulnerable or isolated community members' so that warnings can be heeded.¹⁷⁴ The AIDR *Handbook* recognises that while some cultures do not permit certain family members to travel alone, or be accommodated together, such 'cultural practices may be set aside in certain situations, such as emergencies'.¹⁷⁵ This language is reflected verbatim in Tasmania's guidelines.¹⁷⁶ Tasmania's guidance also suggests that evacuation warnings should be tailored to reach particular groups, including 'people who are homeless or socially isolated', 'remote communities', and 'members of culturally and linguistically diverse (CALD) communities'.¹⁷⁷

Victoria's previous Emergency Management Manual (and Evacuation Guidelines) expressly acknowledged that vulnerable groups in the community must be given special consideration in an emergency,¹⁷⁸ including hospitals, aged care facilities, educational facilities and prisons. It was noted that early evacuations might at times be required on account of the complexity of the process and the providers' duty of care.¹⁷⁹ However, replacement documents issued in 2020 do not contain this level of detail.

F What if People Do Not Want to Move?

In any situation, it is likely that some people will refuse to evacuate. Each individual and community has a different tipping point, influenced by their material and psychological capacity and resources, and the cumulative impact of pre-existing stressors (eg economic stress, health status, experience of prior disasters, etc).¹⁸⁰ Minorities and disadvantaged groups may have no real choice about movement at

173 Queensland Floods Commission of Inquiry, *Interim Report* (Report, August 2011) 197 [5.65]–[5.66] ('*QFCI Interim*').

174 'SA Guidelines' (n 16) 7. See also *Handbook 4* (n 26) 15; 'Tasmanian Framework' (n 28) 27; Western Australia, 'State Emergency Management' (Framework Version 3.03, August 2022) 24; 'Queensland Evacuation Manual' (n 31) 19; *Vic Operations Handbook* (n 25) 78; 'NSW Guidelines' (n 29) 15–17.

175 *Handbook 4* (n 26) 20.

176 'Tasmanian Framework' (n 28) 34.

177 Ibid 27–8 citing Australian Institute for Disaster Resilience 'Guidelines for Emergency Management in CALD Communities: Manual 44' (Guidelines, 2007).

178 *Vic Emergency Manual* (n 89) 8–34.

179 Ibid 8–35.

180 See Jane McAdam, 'Conceptualizing "Crisis Migration": A Theoretical Perspective' in Susan F Martin, Sanjula Weerasinghe and Abbie Taylor (eds), *Humanitarian Crises and Migration: Causes, Consequences and Responses* (Routledge, 2014) 28; Susan Harris Rimmer, 'Leaving Coonabarabran: Who Will Be Australia's Climate Refugees?' (2020) 71 *Griffith Review*. On gendered dimensions, see, eg, Julie M Bateman and Bob Edwards, 'Gender and Evacuation: A Closer Look at Why Women Are More Likely to Evacuate for Hurricanes' (2002) 3(3) *Natural Hazards Review* 107 <[https://doi.org/10.1061/\(ASCE\)1527-6988\(2002\)3:3\(107\)](https://doi.org/10.1061/(ASCE)1527-6988(2002)3:3(107))>. For instance, in Bangladesh, many women do not want to go to evacuation shelters because of the lack of separate toilets and spaces for men and women: Tahmina Hadi et al, 'Seeking Shelter: The Factors that Influence Refuge since Cyclone Gorky in the Coastal Area of Bangladesh' (2021) 11 *Progress in Disaster Science* 100179, 6 <<https://doi.org/10.1016/j.pdisas.2021.100179>>.

all,¹⁸¹ especially if they do not have the means (including transport) to leave. The *AIDR Handbook* also notes that '[p]eople under stress may struggle to receive and process information',¹⁸² a point that is also reflected in Tasmanian guidance.¹⁸³ Understanding these socio-economic and psychological factors helps to explain why people's decisions may be disconnected from official advice.¹⁸⁴

Research into compliance/non-compliance with Australian bushfire evacuation orders has identified seven archetypes, ranging from people who deny that a threat exists, to those who are determined to evacuate safely, through to those who are self-reliant, well-prepared and experienced with fires but prepared to evacuate in certain unfavourable conditions.¹⁸⁵ Decisions may be influenced not just by the imminent risk of harm, but also by 'the need to protect property and/or care for dependents and animals, family circumstances that may create additional requirements during evacuation, and the influence of social media commentary'.¹⁸⁶ In addition, 'the magnitude and proximity of the disaster, past encounters with disasters, vulnerability of dependents, and consistency and clarity of warnings'¹⁸⁷ will factor into decision-making processes.

As noted in the legislative review above, most state and territory jurisdictions may impose penalties on those who refuse to comply with an evacuation order,¹⁸⁸ and either explicitly or implicitly, permit officials to use force to compel movement.¹⁸⁹ The high number of non-evacuations or late evacuations during the Victorian Black Saturday fires,¹⁹⁰ led the Law Council of Australia to call for 'consideration of

181 Brandon Curtis, 'Criminalizing Non-evacuation Behavior: Unintended Consequences and Undesirable Results' [2015] (2) *Brigham Young University Law Review* 503, 526; David P Eisenman et al, 'Disaster Planning and Risk Communication with Vulnerable Communities: Lessons from Hurricane Katrina' (2007) 97(1) *American Journal of Public Health* 109 <<https://doi.org/10.2105/AJPH.2005.084335>>.

182 *Handbook 4* (n 26) 27.

183 'Tasmanian Framework' (n 28) 44.

184 Luke Bonkiewicz and R Barry Ruback, 'The Role of the Police in Evacuations: Responding to the Social Impact of a Disaster' (2012) 15(2) *Policy Quarterly* 137, 139 <<https://doi.org/10.1177/1098611112442808>>.

185 Ken Strahan, Joshua Whittaker and John Handmer, 'Self-Evacuation Archetypes in Australian Bushfire' (2018) 27 *International Journal of Disaster Risk Reduction* 307 <<https://doi.org/10.1016/j.ijdr.2017.10.016>>.

186 *Handbook 4* (n 26) 3. On the role of social networks, see Bonkiewicz and Ruback (n 184) 140–1.

187 Curtis (n 181) 526, citing Keith Elder et al, 'African Americans' Decisions Not to Evacuate New Orleans before Hurricane Katrina: A Qualitative Study' (2007) 97(1) *American Journal of Public Health* 124 <<https://doi.org/10.2105/AJPH.2006.100867>>. See also Bonkiewicz and Ruback (n 184).

188 See, eg, *ACT Emergencies Act* (n 46) ss 164, 189; *Vic Emergency Act* (n 83) s 36C; *SA Fire and Emergency Act* (n 83) ss 42(4), 97(4), 118(4); *SA Emergency Management Act* (n 109) s 28; *Qld Disaster Management Act* (n 46) ss 77(5), 112(4); *NT Fire and Emergency Act* (n 78) s 35; *WA Emergency Management Act* (n 46) ss 76, 85–7; *WA Public Health Act* (n 46) s 202; *Tas Fire Service Act* (n 46) s 62(5); *State Emergency and Rescue Management Act 1989* (NSW) s 40. For the position in international law, see Part IV below.

189 See above n 46. According to Eburn, 'the extent of the compulsion is that the officer may use reasonable force to ensure compliance': Michael Eburn, 'Legality of Forced Evacuations During NSW Bushfires', *Australian Emergency Law* (Blog Post, 10 January 2014) <<https://emergencylaw.wordpress.com/2014/01/10/legality-of-forced-evacuations-during-nsw-bushfires/>> ('Legality of Forced Evacuations').

190 Joshua Whittaker, 'Ten Years after the Black Saturday Fires, What Have We Learnt from Post-Fire Research?' (2019) 34(2) *Australian Journal of Emergency Management* 32.

mandatory evacuation measures, which are consistent with human rights principles of reasonableness, necessity and proportionality'.¹⁹¹

However, bushfire reviews in Australia have repeatedly underscored the importance of voluntariness in evacuations, and the *AIDR Handbook* states that trying to persuade people to move against their will 'can be time-consuming and fruitless and, if protracted, may endanger personnel managing the withdrawal'.¹⁹² Efforts should therefore only be made where it is 'clearly unsafe for people to remain'.¹⁹³ Eburn suggests that 'for all practical purposes', evacuation orders may 'be unenforceable',¹⁹⁴ although they may 'give moral strength' to officials who refuse to re-enter an area from which people had been told to evacuate,¹⁹⁵ or protect individual officers seeking to evacuate premises such as nursing homes.¹⁹⁶

This non-compellable approach is reflected in state and territory guidance as well.¹⁹⁷ Tasmania's guidelines acknowledge that 'compulsory evacuation is a last resort and unlikely to be operationally possible or practical'.¹⁹⁸ South Australia's evacuation guidelines instruct officers to undertake a risk assessment based on the 'greater good', and to 'only exercise their authority to forcible [sic] evacuate if there is no detriment to other community members and they have the capacity and ability to do so without further endangering themselves or others'.¹⁹⁹ NSW's guidelines state that the use of force during evacuations 'is not desirable and should be seen as an absolute last resort',²⁰⁰ noting that it can place responders at risk from both the hazard and those resisting evacuation. The ACT policy notes that 'in general, response agencies will not physically force people to evacuate and will

191 Law Council of Australia, Submission to Royal Commission into National Natural Disaster Arrangements (30 April 2020) 8 [16]. See also 'MEND Guide' (n 24) 30–1.

192 *Handbook 4* (n 26) 20.

193 *Ibid.* Evacuation plans should detail how such people should be managed. If evacuations are not voluntary, they must 'only be undertaken if they are provided for by law and are necessary to protect the life and health of affected persons, and if less intrusive measures would be insufficient to avert the harmful consequences of the threat': International Law Association, Committee on International Law and Sea Level Rise, 'Resolution 6/2018, Annex (Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise)' (August 2018) 5 principle 5(2) ('Sydney Declaration').

194 Eburn, 'Legality of Forced Evacuations' (n 189): 'The risk to officers and the diversion of resources that can be used to warn others means that the chances of police or emergency services deploying resources to forcibly evacuate one person, during an extreme bushfire, must be virtually nil.'

195 For instance, during Cyclone Yasi, the Queensland Premier announced that people could not expect assistance if they had been ordered, but chose not, to evacuate: see *ibid.*

196 *Ibid.*

197 Interestingly, no guidelines frame this in terms of rights, in contrast to the approach in the 'MEND Guide' (n 24) 30:

[E]nforcing an evacuation order ... must be considered alongside its effect on the right to freedom of movement and residence and the right to privacy and home, as well as practical issues around the availability of resources and authorities' abilities to enforce evacuation orders, noting that responders should not be put in situations of extreme risk.

198 'Tasmanian Framework' (n 28) 10. See also Elsie Loh, 'Evacuation Powers of Emergency Workers and Emergency-Service Organisations in Australia' (2007) 22(4) *Australian Journal of Emergency Management* 3. Loh notes that 'the decision to evacuate is in fact a discretionary choice of the ESO [emergency service organisations] officer and the victim': at 3.

199 'SA Guidelines' (n 16) 12.

200 'NSW Guidelines' (n 29) 12.

adopt a common sense approach'.²⁰¹ Western Australia's guidelines state that while officials 'may do all such things as are reasonably necessary to ensure compliance' with a directive to evacuate, they 'may choose not to force a person to comply with a direction to evacuation' based on such factors as 'the resources that would need to be diverted from responding to the emergency' and 'the safety of personnel'.²⁰² To the extent that they can, officials should ensure that anyone who refuses to leave understands the risks entailed and can make an informed choice. If possible, there should be mechanisms to track the welfare of those who stay, provided that this does not endanger response personnel.²⁰³

Formally, at least, Australia's voluntary approach to evacuations can be contrasted with that of the United States ('US'), where mandatory evacuation orders (accompanied by threats of coercion) are favoured. However, the evidence shows that even there they are rarely enforced in practice.²⁰⁴ Some commentators argue that mandatory orders serve an important symbolic function by signalling the seriousness of a hazard,²⁰⁵ and that non-enforcement reflects respect for individual choice. Others, however, suggest that non-enforcement results from governmental inability to provide assistance, and/or relieves states of responsibility and liability for those who remain.²⁰⁶ Overall, 'there exists a broad consensus that the use of force is unwarranted'²⁰⁷ and prosecutions are extremely rare.²⁰⁸ Arrests have been generally limited to cases where people have been found on beaches after an evacuation has been completed, or on streets during curfew.²⁰⁹ Verbal persuasion is considered to be the most effective tool.²¹⁰

Australia's AIDR *Handbook* emphasises the importance of fostering a sense of shared responsibility for evacuations between governments, 'individuals, households, businesses and communities',²¹¹ especially since community involvement is viewed as a way of engaging people and promoting

201 'ACT Policy' (n 152) 2.

202 'WA Guidelines' (n 16) 18.

203 Ibid 19. Unaccompanied children should never be left and should be placed in the care of the Department of Communities. On international best practice in relation to children, see 'IASC Operational Guidelines' (n 10) 19 [A.2.1]–[A.2.2].

204 See Amy L Fairchild et al, *Ethical and Legal Challenges Posed by Mandatory Hurricane Evacuation: Duties and Limits* (Report, October 2006) 8, 17 <<https://doi.org/10.7916/D8183FW8>>; Tanya L Settles, 'Federalism, Law, and the Ethics of Disaster Evacuations' in Mathieu Deflem (ed), *Disasters, Hazards and Law* (Emerald Group Publishing, 2012) vol 17 65, 72–6 <[https://doi.org/10.1108/S1521-6136\(2012\)0000017007](https://doi.org/10.1108/S1521-6136(2012)0000017007)>. See generally Curtis (n 181).

205 Curtis (n 181) 506; Eburn, 'Legality of Forced Evacuations' (n 189).

206 Fairchild et al (n 204) 17.

207 Ibid.

208 Curtis (n 181) was unable to find any such prosecutions, noting that the higher the *mens rea* requirement of the offence, the more difficult prosecution will be: at 524.

209 Fairchild et al (n 204) 17.

210 Ibid, citing Evidence to House Select Bipartisan Committee to Investigate the Preparation and Response to Hurricane Katrina, United States Congress, Washington DC, 14 December 2005 (Terry Ebert, Director, Louisiana Office of Homeland Security). See also Fairchild et al (n 204) 20, citing Evidence to House Select Bipartisan Committee to Investigate the Preparation and Response to Hurricane Katrina, United States Congress, Washington DC, 14 December 2005 (Ray Nagin, Mayor, New Orleans).

211 *Handbook 4* (n 26) ix.

responsiveness.²¹² This point is also stressed in international guidance.²¹³ It has been argued that mandatory evacuation orders can in fact disempower communities because residents may ‘choose not to engage in community level preparations, fail to consider what action they would take during an emergency or fail to take adequate steps to protect their properties’.²¹⁴ Queensland’s Evacuation Manual therefore notes that ‘[t]he primary message to be conveyed to the community is that individuals are encouraged to take responsibility for their own, their family and their pets safety.’²¹⁵

IV WHAT DOES INTERNATIONAL LAW REQUIRE?

This part examines what international law both permits and requires when it comes to using evacuation as a protective measure. In light of this analysis, Part V then identifies a number of protection gaps in Australia’s evacuation frameworks and suggests possibilities for reform.

Under international law, states have a fundamental, non-derogable duty to protect the right to life.²¹⁶ This may require the authorities to evacuate people from foreseeable hazards,²¹⁷ including with proportionate force in limited circumstances,²¹⁸ and with ‘full respect for the life, dignity, liberty, and security of evacuees’.²¹⁹ Such restrictions on people’s right to free movement are only lawful if ‘necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others’.²²⁰ Evacuations will constitute

212 Ibid. See below n 214; Benjamin A Payne et al, “‘They’re Going to Arrive, Ready or Not’: Hill-Based Residents Capacity to Support the Evacuated after Earthquake and Tsunami” (2020) 35(4) *Australian Journal of Emergency Management* 35.

213 ‘MEND Guide’ (n 24) 44.

214 ‘SA Guidelines’ (n 16) 5–6, citing Government of Western Australia, *A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review* (Report, 16 June 2011); ‘SA Guidelines’ (n 16) 6, citing *2013 Tasmanian Bushfires Inquiry: Volume One* (Report, October 2013).

215 ‘Queensland Evacuation Manual’ (n 31) 26.

216 ICCPR (n 44) art 6; CRC (n 44) art 6; CRPD (n 44) art 10.

217 Walter Kälin, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: Protection of Internally Displaced Persons in Situations of Natural Disasters*, UN Doc A/HRC/10/13/Add.1 (5 March 2009) 17 para 42:

The duty to protect the life and security of persons entails, in particular, an obligation to evacuate persons from zones where they face imminent dangers for life and limb caused by a disaster. A failure to assist persons who cannot leave such zones on their own may amount to a human rights violation if competent authorities knew or should have known the danger and would have had the capacity to act.

218 ‘MEND Guide’ (n 24) 30–1. See also Bruce Burson et al, ‘The Duty to Move People out of Harm’s Way in the Context of Climate Change and Disasters’ (2018) 37(4) *Refugee Survey Quarterly* 379 <<https://doi.org/10.1093/rsq/hdy015>>; *Guiding Principles* (n 10) principle 6(2)(d). See above n 46 and the discussion above regarding the use of force within Australia.

219 Sydney Declaration (n 193) principle 5(3).

220 ICCPR (n 44) art 12(3); *Universal Declaration of Human Rights*, GA Res 217A(III) (10 December 1948) art 13. See especially Human Rights Committee, *General Comment No 27 (67): Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) para 7: ‘Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement.’ See also Burson et al (n 218) 395 ff. For an overview of relevant international standards and legal considerations, see ‘MEND Guide’ (n 24) 27–33.

arbitrary displacement unless they are required to ensure ‘the safety and health of those affected’.²²¹

The right to life is ‘a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights’.²²² As such, safeguarding the right to life entails much more than the preservation of life alone. The United Nations (‘UN’) Human Rights Committee has stated that measures required to ensure adequate conditions for protecting the right to life include

access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes.²²³

The Committee has also observed that poverty, deprivation and homelessness may compromise the right to life.²²⁴ The Inter-American Court of Human Rights has stated that the right to life includes a duty ‘of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it’.²²⁵

The *Convention on the Rights of the Child* links the right to life even more plainly with its socio-economic dimensions, stating in article 6 that:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.²²⁶

The UN Committee on the Rights of the Child has explained the importance of understanding this right holistically ‘through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play’.²²⁷ These socio-economic components of the right to life are particularly pertinent in the evacuation context when people leave behind their property and possessions, and may have limited access to their usual livelihoods, support

221 *Guiding Principles* (n 10) principle 6(2)(d). See also principles 6(3), 8; ‘IASC Operational Guidelines’ (n 10) A.1.5.

222 Human Rights Committee, *General Comment No 36: Article 6: Right to Life*, UN Doc CCPR/C/GC/36 (3 September 2019) 1 para 2 (citation omitted) (‘*General Comment No 36*’).

223 Ibid 6 para 26 (citations omitted). The *Guiding Principles on Internal Displacement*, for instance, state that the authorities must ‘ensure, to the greatest practicable extent, that proper accommodation is provided to displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated’: *Guiding Principles* (n 10) principle 7(2).

224 See Human Rights Committee, *CCPR General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)*, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) para 10: ‘The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.’

225 *Case of the Yakye Axa Indigenous Community v Paraguay (Judgment)* (Inter-American Court of Human Rights, Series C No 125, 17 June 2005) [162], citing *Case of the ‘Juvenile Reeducation Institute’ (Judgment)* (Inter-American Court of Human Rights, Series C No 112, 2 September 2004) [159].

226 CRC (n 44) art 6.

227 Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) 4 para 10.

networks, education and resources.²²⁸ In all actions concerning children, ‘the best interests of the child shall be a primary consideration’ and states must ‘ensure the child such protection and care as is necessary for his or her well-being’.²²⁹

The *Convention on the Rights of Persons with Disabilities* is even more explicit in providing that states must take ‘all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters’.²³⁰ People with disabilities may be especially vulnerable to displacement, including on account of ‘[l]imited knowledge of evacuation processes, a lack of accessible evacuation shelters and delays in fleeing because of functional impairments’.²³¹ This is why the Sendai Framework for Disaster Risk Reduction encourages states to adopt ‘an inclusive and all-of-society disaster risk management’,²³² recognising the important role that women, children, people with disabilities, older people, indigenous peoples, and migrants can play when it comes to managing disaster risk, and designing and implementing disaster risk reduction policies. Indeed, one of the guiding principles of the Sendai Framework stresses the need for ‘inclusive, accessible and non-discriminatory participation’ in disaster risk reduction,²³³ noting the importance of integrating a ‘gender, age, disability and cultural perspective ... in all policies and practices’ and promoting ‘women and youth leadership’.²³⁴ Other international guidance emphasises that communities should be involved in the consultation and planning stages to ensure that relevant local input and knowledge is incorporated, and to heighten the chances that people will be aware of, and ‘on board’ with an evacuation plan if it needs to be executed.²³⁵ In all cases, clear communication is essential.²³⁶

228 Indeed, the Human Rights Committee notes that governments should develop ‘contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters that may adversely affect enjoyment of the right to life’: *General Comment No 36* (n 222) para 26. See also *Guiding Principles* (n 10) principle 18.

229 *CRC* (n 44) art 3. The Human Rights Committee states that *ICCPR* (n 44) article 24(1) ‘requires adoption of special measures designed to protect the life of every child’: *General Comment No 36* (n 222) 13 para 60. See also *Guiding Principles* (n 10) principle 4(2).

230 *CRPD* (n 44) art 11. The *General Comment No 36* (n 222) 5 para 24 notes:

Persons with disabilities, including psychosocial and intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on equal basis with others. Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services, and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities

referring inter alia to *CRPD* (n 44) arts 5(3), 9–10. See also *Guiding Principles* (n 10) principle 4(2).

231 *GRID 2021* (n 4) 81 (citation omitted).

232 *Sendai Framework* (n 14) 19 para 36(a).

233 *Ibid* 7 para 19(d).

234 *Ibid*.

235 See ‘IASC Operational Guidelines’ (n 10) 16 A.1.4; *Handbook 4* (n 26) 3–6.

236 *Royal Commission* (n 1) 269. This is a feature of state evacuation manuals. For instance, the Queensland Evacuation Manual contains instructive lists of ‘key messages’ for decision-makers to consider in evacuation planning, ranging from political to economic to legislative: ‘Queensland Evacuation Manual’ (n 31) 11–12.

The explanatory memorandum to Australia's first federal emergency law, the *National Emergency Declaration Act 2020* (Cth), lists promotion of the rights to life, health and an adequate standard of living as key objectives.²³⁷ Although the law is not focused specifically on evacuations, the explanatory memorandum notes that a 'framework that streamlines and expedites the immediate response to and recovery from an emergency' can promote the rights to life, health and an adequate standard of living by 'assisting to prevent or mitigate a greater proportion of the harm caused by the emergency',²³⁸ 'enabling relief to be provided to individuals and communities affected by the emergency more promptly',²³⁹ and 'supporting efforts to more rapidly and effectively recover from the harm caused by the emergency'.²⁴⁰

Such rights have been interpreted in the European context as meaning that, inter alia, where the risk and impacts of a disaster are foreseeable,²⁴¹ the relevant authorities must monitor known hazards,²⁴² inform people at risk,²⁴³ have an evacuation plan in place,²⁴⁴ order evacuations when people's life or safety is at imminent risk,²⁴⁵ and enforce evacuation orders until the threat has passed.²⁴⁶ Evacuations must be for the shortest possible time²⁴⁷ and carried out in a non-discriminatory manner that respects other human rights.²⁴⁸ If evacuations go beyond these limits, then they may amount to unlawful, arbitrary displacement.²⁴⁹

Furthermore, international guidance provides that people should not be evacuated against their will unless this:

237 Explanatory Memorandum (n 22) 5 [11]–[12], referring to *ICCPR* (n 44) art 6; Explanatory Memorandum (n 22) [20], referring to *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 11–12. A 'statement of compatibility with human rights' is required for each bill before Parliament: Australian Government, 'Statements of Compatibility Templates', *Attorney's General Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility-templates>>.

238 Explanatory Memorandum (n 22) 5 [12], 6 [16], 7 [22].

239 Ibid.

240 Ibid 6 [16], 7 [22].

241 *Budayeva v Russia* [2008] II Eur Court HR 267, [135], [156].

242 Ibid [154]. See also Mirko Sossai, 'States' Failure to Take Preventive Action and to Reduce Exposure to Disasters as a Human Rights Issue' in Flavia Zorzi Giustiniani et al (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge, 2018) 119 <<https://doi.org/10.4324/9781315115238-8>>.

243 *Budeyeva v Russia* (n 241) [152]; *Öneryildiz v Turkey* (2005) 41 EHRR 20, 359 [90].

244 *Budayeva v Russia* (n 241) [152].

245 *Guiding Principles* (n 10) principle 6(2)(d).

246 *Budayeva v Russia* (n 241) [153].

247 *Guiding Principles* (n 10) principles 6(2)(d), 6(3); 'MEND Guide' (n 24) 27–8.

248 'IASC Operational Guidelines' (n 10) 17 [A.1.5]; *Guiding Principles* (n 10) principle 8. See also Emanuele Sommario, 'Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings' in Flavia Zorzi Giustiniani et al (eds) *Routledge Handbook of Human Rights and Disasters* (Routledge, 2018) 98 <<https://doi.org/10.4324/9781315115238-7>>.

249 *Guiding Principles* (n 10) principles 6(1), 6(2)(d), 6(3), 8; 'IASC Operational Guidelines' (n 10) 17 [A.1.5]. For further analysis, see Burson et al (n 218) 397. As noted above, the *Guiding Principles* (n 10) acknowledge that an evacuation from a disaster can constitute 'arbitrary displacement' unless 'the safety and health of those affected requires' it: at principle 6(2)(d).

- (a) Is provided for by law;
- (b) Is absolutely necessary under the circumstances to respond to a serious and imminent threat to their life or health, and less intrusive measures would be insufficient to avert that threat; and
- (c) Is, to the extent possible, carried out after the persons concerned have been informed and consulted.²⁵⁰

However, the greater the risk to life, ‘the more the margin of appreciation shrinks as to the choice of means to save lives, and the less room remains for States to decide whether or not to take action.’²⁵¹ This is why, as an emergency measure, evacuations require particularly careful oversight: the authorities are given extraordinary powers that go far beyond what the law ordinarily permits. Under international law, any restrictions on human rights are permissible only to the extent that they are necessary, reasonable, proportionate to the risk and based on clear legal criteria.²⁵² Without careful monitoring, there is a danger that evacuations may transform into protracted displacement or de facto relocations. Indeed, the Guiding Principles on Internal Displacement, which reflect binding international law and provide detailed guidance for the protection and assistance of those ‘forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of ... natural or human-made disasters’,²⁵³ provide that evacuations from disasters will be arbitrary unless necessary to protect people’s health and safety.²⁵⁴ Thus, an evacuation that is permissible in the face of imminent harm may become unlawful if people are displaced for longer than is necessary and face ongoing rights restrictions. It is therefore imperative that protective legal principles are incorporated into the conception, planning and implementation of evacuations.

250 ‘IASC Operational Guidelines’ (n 10) 16 [A.1.4].

251 Burson et al (n 218) 387.

252 See, eg, American Association for the International Commission of Jurists, ‘Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (Principles, April 1985).

253 *Guiding Principles* (n 10) 2 [2]. See also [3].

254 Ibid principle 6(2)(d). The Guiding Principles set out the rights and guarantees of people who are displaced within their own countries, drawing on international human rights law, refugee law and humanitarian law to ‘restate the relevant principles applicable to the internally displaced, ... clarify any grey areas that might exist, and address the gaps’: ‘Introductory Note to the Guiding Principles’ in *Guiding Principles* (n 10) 2 [9]. See also Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [12] (citation omitted): ‘The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.’

V CHALLENGES AND OPPORTUNITIES

Although Australia's domestic evacuation frameworks are extensive and at times implicitly reflect international guidance,²⁵⁵ protection gaps still exist. In particular, if evacuation is not 'seen' as a potential form of arbitrary displacement, people's protection needs cannot be adequately addressed. This Part identifies some existing gaps and opportunities for reform.

A Absence of Human Rights Law Safeguards: General

Given that the 'primary intent of issuing a warning to evacuate is to protect life',²⁵⁶ it is striking that none of Australia's national, state or territory legislation or guidelines engages directly with international law or standards at all – not even with domestic human rights charters (in Victoria, Queensland and the ACT). The Royal Commission's detailed analysis of Australia's responsibilities in disasters also failed to consider these legal duties, either as a means of identifying rights at risk or holding the State to account. The fact that state, territory and local government actors are absent from global policymaking discussions on disasters may partly account for the gap – but it is highly problematic, not only because there is a risk that Australia does not implement its international law obligations in full, but also because lived experiences of evacuations and effective practices consistent with international law should filter both up and down the chain. It also seems like a missed opportunity when locally led responses have been hailed as 'one of the strengths of the disaster management system' and a 'foundational principle' in Australia.²⁵⁷

Furthermore, the Guiding Principles on Internal Displacement provide a ready-made 'framework and guide for action' that could enhance Australia's protection responses before, during and after an evacuation has been carried out. A report published in the aftermath of Hurricane Katrina in the US examined in detail how the Guiding Principles could 'greatly strengthen the U.S. government's ability to quickly, adequately and equitably address the ongoing crises that continue to plague tens of thousands of people displaced'.²⁵⁸ It emphasised that utilising this framework would better enable the US to recognise IDPs; bring domestic law into line with

255 See above n 32.

256 *Handbook 4* (n 26) 13.

257 Australian disaster management is premised on the idea that 'risk should be managed by the lowest level of government that is capable of managing it': *Royal Commission* (n 1) 21. Queensland's Evacuation Manual states that local governments 'are best placed to conduct evacuation planning prior to the onset of an event through their local knowledge, experience, community understanding and existing community relationships': 'Queensland Evacuation Manual' (n 31) 4. *Qld Disaster Management Act* (n 46) section 29 requires local governments to establish Local Disaster Management Groups which may recommend that an evacuation take place 'based on their situational awareness in preparation for an imminent disaster': 'Queensland Evacuation Manual' (n 31) 13. In South Australia, each local council must 'take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards': *Local Government Act 1999* (SA) s 7(d).

258 Chris Kromm and Sue Sturgis, *Hurricane Katrina and the Guiding Principles on Internal Displacement: A Global Human Rights Perspective on a National Disaster* (Report, 2008) 5.

the Guiding Principles (and, in turn, with international law); enhance protection from displacement; enhance protection during displacement; direct humanitarian assistance; safeguard the right to return, resettlement and reintegration; and improve collection of and access to information.²⁵⁹ These recommendations are pertinent to the Australian context as well, where the invisibility of ‘evacuation as displacement’ means a host of protection issues may be ignored.

B Absence of Human Rights Law Safeguards: People in Vulnerable Situations

A particular weakness in Australian frameworks is the lack of attention given to the unique needs (and rights) of specific groups, such as children and people with disabilities.²⁶⁰ While some of Australia’s evacuation policies recognise children as a vulnerable group and/or suggest that a child-sensitive lens should be adopted, there is scant detail as to what this means.²⁶¹ The Royal Commission into the 2019–20 bushfires made 24 sets of recommendations on disaster preparedness, response and recovery, yet none focused on the specific needs of children.²⁶² On the flipside, policy frameworks concerning children do not expressly deal with disasters or large-scale emergencies.²⁶³

The needs of people with disabilities are similarly overlooked,²⁶⁴ again despite Australia’s well-defined obligations under international law.²⁶⁵ As with children, disability is mentioned only as a risk factor; there is no reflection of ‘the active participation and agency of people with disability’.²⁶⁶

The UN Committee on the Rights of Persons with Disabilities has relevantly observed that Australia lacks:

259 Ibid 28–9.

260 See generally Part IV. A report by United Nations Children’s Fund Australia and Royal Far West in the aftermath of the bushfires found this to be widespread across Australian disaster law and policy generally: United Nations Children’s Fund Australia and Royal Far West, *After the Disaster: Recovery for Australia’s Children* (Report, 2021) 6–7. This is despite the fact that Australian guidance does acknowledge the importance of assisting people with vulnerabilities: Part III(E).

261 The most comprehensive guidance is contained in the *Handbook 4* (n 26) 25, which states only that: Children and people with special needs may be particularly vulnerable in an evacuation centre as their normal safeguards, routines and support structures have been interrupted or altered. The evacuation plan should consider how their needs could be met, including:

- access to health and wellbeing support, including for people who need psychosocial support
- additional measures to ensure the safety and protection of children, including the establishment of ‘child-safe spaces’
- provision of age-appropriate activities and recovery support programs.

262 United Nations Children’s Fund Australia and Royal Far West (n 260) 36: ‘This lack of attention to support the mental health of our children and young people after a significant national trauma is a lost opportunity and demonstrates a gap in our national attention.’

263 Ibid.

264 See generally Anne Kavanagh et al, ‘Emergency Planning and Response for People with Disability in Australia’ (Joint Response, Centre for Disability Research and Policy and Centre of Research Excellence Disability and Health, 17 July 2020).

265 CRPD (n 44) art 11; *Sendai Framework* (n 14) paras 19(d), 33(m), 36(a)(iii); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) para 21.

266 Kavanagh et al (n 264) 2.

- (a) Nationally consistent emergency management standards that ensure access to disability-specific and disability-responsive support during emergencies;
- (b) A mechanism for engagement with organizations of persons with disabilities in the implementation of the Sendai Framework for Disaster Risk Reduction 2015–2030 at the national level and in its reporting process.²⁶⁷

The implications of this are stark: a 2013 global survey of 5,717 people with disabilities found that only 20.6% thought they could evacuate immediately without difficulty in a sudden-onset disaster. With sufficient time to leave, that percentage nearly doubled, but 58% of people still felt that they would have some, or a lot of, difficulty in evacuating.²⁶⁸ Given that the *raison d'être* for evacuations in Australian legislation is to protect lives, this is of significant concern, especially since people with disabilities in Australia 'are in significantly poorer health and have less access to information and to adequate, affordable and accessible health services and equipment' than the general population.²⁶⁹

Some excellent groundwork has already been laid by the Queensland Department of Communities, Disability Services and Seniors, in partnership with the University of Sydney's Centre for Disability Research and Policy, the Queenslanders with Disability Network and the Community Services Industry Alliance. Through a series of community consultations, they engaged with people from the disability, community and emergency services sectors to co-design tools, resources and support for disability-inclusive disaster risk reduction, including the Disability-Inclusive Disaster Risk Reduction Framework and Toolkit.²⁷⁰ While its focus is broader than evacuations, it is an exemplar for similar tools in other jurisdictions.²⁷¹ Internationally, there are other good examples of community-led policymaking that could also inform approaches in Australia.²⁷²

267 Committee on the Rights of Persons with Disabilities (n 265) para 21.

268 United Nations Office for Disaster Risk Reduction, *Living with Disability and Disasters: UNISDR 2013 Survey on Living with Disabilities and Disasters: Key Findings* (Report, 2014) 2. See also Rhiannon Shine, 'Bushfire Survivors Call for More Fire Preparedness Support for People with Disabilities', *ABC News* (online, 27 January 2020) <<https://www.abc.net.au/news/2020-01-27/bushfire-survivors-call-for-disability-support-fire-emergency/11895218>>.

269 Committee on the Rights of Persons with Disabilities (n 265) para 47.

270 See Michelle Villeneuve et al, 'Disability Inclusive Disaster Risk Reduction Framework and Toolkit' (Framework, 2019) 5. See also the Queensland Government's Inclusive Community Engagement Stakeholder Consultation on Disability Inclusive Disaster Risk Reduction: 'Queensland Report: Inclusive Community Engagement Stakeholder Consultation', *Collaborating 4 Inclusion* (Web Page, 2022) <<https://collaborating4inclusion.org/disability-inclusive-disaster-risk-reduction/framework-and-toolkit/queensland-reports/>>.

271 See also Centre for Disability Research and Policy and Natural Hazards Research Group, 'Local Emergency Management Guidelines for Disability Inclusive Disaster Risk Reduction in NSW' (Guidelines, 2017).

272 See examples from Fiji (community input in development of national planned relocation guidelines) and Indonesia (sister village program for disaster preparedness) in GP20, *Working Together Better to Prevent, Address and Find Durable Solutions to Internal Displacement: GP20 Compilation of National Practices* (Report, 23 November 2020); Vita Elysia and Ake Wihadanto, 'The Sister Village Program: Promoting Community Resilience after Merapi Eruption' (2018) 3(1) *Indonesian Journal of Planning and Development* 32 <<https://doi.org/10.14710/ijpd.3.1.32-43>>.

C Multi-jurisdictional Fragmentation

The multi-jurisdictional nature of disaster response in Australia means that gaps, overlap and confusion may arise between local, state, territory and federal actors.²⁷³ During the 2019–20 bushfires, the challenges created by differing policies and approaches to evacuations were all too clear, including confusion caused by different terminology and people not being allowed to cross a state border to their nearest evacuation centre.²⁷⁴ Some of the practical difficulties were partly attributable to multiple jurisdictions, actors and policies; even inconsistencies in data collection and sharing made coordinating approaches problematic.²⁷⁵ International guidelines have not addressed these issues in any depth, noting only the need for cooperation where multiple domestic actors are involved.²⁷⁶ Given that the federal government retains ultimate responsibility under international law to ensure that people are not arbitrarily displaced and that their right to life (among others) is protected,²⁷⁷ this is clearly an area that warrants further attention.

A particular priority identified by the bushfires Royal Commission was the need to improve cooperation and coordination in planning internal cross-border evacuations, especially in border communities where the safest evacuation route may be across a state line.²⁷⁸ Existing domestic guidance, such as the Cross-Border Assistance Guidelines 2014 on emergency relief, may provide some assistance in this regard,²⁷⁹ but it is unclear to what extent state and territory governments ‘are aware of, and have used these arrangements’.²⁸⁰ Interestingly, the Royal

273 It has been observed that in crises, federal systems of government face particular ‘challenges related to horizontal and vertical collaboration and coordination’: Davia Cox Downey and William M Myers, ‘Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the United States’ (2020) 50(6–7) *American Review of Public Administration* 526, 526 (citations omitted) <<https://doi.org/10.1177/0275074020941696>>.

274 Public submissions to the Royal Commission detailed the frustration of border communities when it came to their evacuation experiences: see, eg, *Royal Commission* (n 1) 281. There was considerable confusion (even at times among emergency services personnel) caused by different terminology used to describe sheltering facilities in NSW and Victoria, including the level of protection that particular facilities could provide: at 274, 276.

275 *Royal Commission into National Natural Disaster Arrangements: Interim Observations* (Interim Report, 31 August 2020) 5 [10].

276 See, eg, ‘MEND Guide’ (n 24) 23, 27, 32, 41ff.

277 See above n 43.

278 *Royal Commission* (n 1) 281. Some states and territories already do regular cross-border evacuation exercises to determine what will (and will not) work in practice, and for different scenarios. The Queensland Floods Commission of Inquiry also noted challenges that can arise with other boundaries, including local government boundaries, disaster district boundaries police district boundaries, other emergency services boundaries and government agency boundaries: *QFCI Interim* (n 173) 18 [5.74].

279 Australia New Zealand Emergency Management Committee Recovery Sub-Committee Social Recovery Reference Group, ‘Cross-Border Assistance Guidelines’ (Guidelines, August 2014). The guidelines are based on the following principles at 1:

I. The basic immediate needs of citizens will be met in an emergency, regardless of the state or territory in which they live.

II. Jurisdictions will work together and cooperate in the provision of immediate relief to all those impacted by an emergency event.

III. Coordinated emergency relief efforts are critical to successful longer-term recovery.

280 *Royal Commission* (n 1) 451.

Commission observed that knowledge and experience gained from COVID-19 related border closures could mean that cross-border commissioners, who help to resolve issues that arise from being located near a state border,²⁸¹ ‘have a useful role to play in future evacuation planning in border areas’.²⁸²

D Data

Consistent with global trends, poor data collection practices in Australia mean that we have an incomplete picture of what happens to evacuees after the initial emergency phase.²⁸³ The IDMC has noted that what little data is gathered tends to lack detail about people’s background, socio-economic status and so on,²⁸⁴ which hampers the development of well-targeted policies and interventions. Accurate data is vital ‘to learn lessons and improve planning, preparedness and responses to future displacement crises’²⁸⁵ and ‘to foster the meaningful participation of various groups in the planning and design of support programmes’.²⁸⁶ Australian authorities should also be transparent about their decisions and calculations in responding to disasters, particularly when they involve restrictions on people’s human rights so that their necessity, proportionality and reasonableness can be assessed.

E Concurrent Disasters

The Royal Commission noted the need to plan for compound or concurrent disasters, such as the intersection of bushfires with COVID-19.²⁸⁷ These may be catastrophic given the additional pressures they place on existing emergency management arrangements (including coordination between multiple actors),²⁸⁸ and the confusion for those affected. For instance, when people were ordered to evacuate from bushfires in Perth that coincided with a strict COVID-19 lockdown in February 2021, the Commissioner for Fire and Emergency Services stressed that preservation of life was the priority: ‘if you’re quarantining and you’re required

281 See, eg, NSW Government, ‘Office of the Cross-Border Commissioner’, *Regional NSW* (Web Page) <<https://www.regional.nsw.gov.au/our-work/ocbc>>; ‘Victoria’s Cross Border Commissioner’, *Regional Development Victoria* (Web Page, 17 February 2021) <<https://www.rdv.vic.gov.au/about-rdv/cross-border-commissioner>>.

282 *Royal Commission* (n 1) 282 (citations omitted).

283 *GRID 2021* (n 4) 78; *2019–2020 Bushfires* (n 4) 20.

284 *2019–2020 Bushfires* (n 4) 20.

285 *Ibid.*

286 *GRID 2021* (n 4) 79.

287 This was the situation in early February 2021, when bushfires in Perth took hold while the city was in a COVID-19 lockdown. See ‘Perth Bushfire: Evacuations as Dozens of Homes Destroyed’, *BBC News* (online, 3 February 2021) <<https://www.bbc.com/news/world-australia-55913543>>.

288 *Royal Commission* (n 1) 5, 271–2. At 22:

Compounding disasters may be caused by multiple disasters happening simultaneously, or one after another. Some may involve multiple hazards – fires, floods and storms. Some have cascading effects – threatening not only lives and homes, but also the nation’s economy, critical infrastructure and essential services, such as our electricity, telecommunications and water supply, and our roads, railways and airports.

See also ‘Tasmanian Framework’ (n 28) 29, noting the need to cross-reference between authorities in warnings.

to evacuate, you should just evacuate'.²⁸⁹ In other parts of the world, fears about COVID-19 meant that when disasters hit, many people remained in their exposed homes rather than moving to crowded evacuation centres.²⁹⁰ This is why in Japan, authorities co-opted private facilities, such as hotels and shopping centres, as additional evacuation shelters to enable physical distancing.²⁹¹ Evacuations from Cyclone Harold in the Pacific in April 2020, and Cyclone Amphan in Bangladesh and neighbouring states in May 2020, were complicated by the need to follow strict COVID-19 protocols.²⁹²

VI CONCLUSION

This article has revealed an extensive body of Australian law and practice on evacuations at the state, territory and local levels, bolstered by federal emergency management policies, organisational structures and now also legislation. On the one hand, it has revealed a panoply of relatively considered, sophisticated evacuation policies that often reflect approaches advocated in international guidelines on evacuations.²⁹³ On the other hand, it has shown that Australian legal and policy frameworks do not reference international human rights law or principles concerning the protection of displaced people. By failing to 'see' evacuation as a form of displacement, prevention and preparedness strategies may be ill-targeted and costly,²⁹⁴ and people's protection needs may be overlooked. Unclear lines of authority, multi-jurisdictional overlaps and insufficient attention to detail during the planning process may hamper evacuation efforts, put lives and property at risk, and result in arbitrary displacement. Disasters do not respect borders, and this can lead to varied and uneven responses when multiple states/territories are involved.²⁹⁵ Furthermore, while emergency officers are empowered to order evacuations, they are not necessarily compelled to assist. Leaving people to their own devices in dangerous situations creates a significant risk of harm, including loss of life.

289 Darren Klemm quoted in Bridget Fitzgerald, 'Hundreds of Fire Fighters Continue to Battle a Large, Out of Control Fire North East of Perth', *The World Today* (ABC News, 3 February 2021) <<https://www.abc.net.au/radio-australia/programs/worldtoday/perth-ravaged-by-bushfire/13116768>>.

290 *GRID 2021* (n 4) 21.

291 *Ibid* 74.

292 Viviane Clement et al, *Groundswell: Acting on Internal Climate Migration: Part II* (Report, World Bank, 2021) 4 <<https://doi.org/10.1596/36248>>.

293 See above n 24.

294 For instance, they may not take into account the economic costs of evacuations, especially if livelihoods are disrupted over a prolonged period. Following the 2019–20 bushfires, it was estimated that the cost of providing a year's temporary housing for those who lost their homes was \$60–72 million, and for each day that a person could not work, the loss was \$705 per person: *2019–2020 Bushfires* (n 4) 4.

295 This was exemplified by state and territory border policies during the COVID-19 pandemic: Catherine Bennett, 'Australia's Mishmash of COVID Border Closures Is Confusing, Inconsistent and Counterproductive', *The Conversation* (online, 6 January 2021) <<https://theconversation.com/australias-mishmash-of-covid-border-closures-is-confusing-inconsistent-and-counterproductive-152620>>; Editorial, 'Border Closures Are Understandable but They Need to Be Handled Better', *The Age* (online, 6 January 2021) <<https://www.theage.com.au/politics/federal/border-closures-are-understandable-but-they-need-to-be-handled-better-20210106-p56s61.html>>.

Although international legal standards are implicit in much domestic guidance on evacuations, more overt references and detailed analysis would give greater prominence to (and awareness of) the human rights obligations that Australian authorities are required to respect – and provide greater measures of accountability. At the very least, state, territory and federal guidelines on evacuations should acknowledge and reflect Australia's obligations under international law, and underscore the importance of understanding and responding to evacuations within a human rights framework.

Even a brief evacuation can have long-lasting impacts, affecting different rights over time. Physically moving people out of harm's way is only part of the evacuation process. Ensuring that people can return – in safety and with dignity – is crucial to recovery,²⁹⁶ and to realising the right to life in its fullest sense.²⁹⁷ While a detailed analysis of return is beyond the scope of this article, it is essential that evacuation planning processes consider what happens beyond *physical* return alone.²⁹⁸ As the MEND Guide states, while an evacuation plan itself will not go into the detail of return, 'it is important to identify appropriate strategies for transitioning into the solutions stage, and to identify appropriate actors to whom the longer term recovery process can be handed over'.²⁹⁹ As a matter of law, evacuees have a right to seek safety elsewhere in the country, and to be protected against forcible return if their life, safety, liberty and/or health would be at risk.³⁰⁰

Finally, since evacuations are a measure of last resort, it is vital that authorities undertake a holistic assessment of the hazards facing people living in disaster-prone areas – especially as climate change amplifies the frequency and severity of extreme weather events and the risk of displacement increases. Evacuations are envisaged for emergencies when people face an *imminent* risk of harm. As a matter of good public policy, there needs to be greater consideration of situations where risk materialises over a longer period (eg erosion), or where slow-onset impacts (such as sea-level rise) exacerbate the impact of sudden-onset events (such as storm surges, which then trigger movement).³⁰¹ Continued exposure to hazards

296 'The evacuation process is not complete when the hazard has passed. It is critical that people return to their homes and community in a safe manner with as much support and assistance as required': 'Queensland Evacuation Manual' (n 31) 39. See also 'Tasmanian Framework' (n 28) 46 ff; *Handbook 4* (n 26) 29 ff; 'SA Guidelines' (n 16) 5; 'WA Guidelines' (n 16) 21. If people cannot return, then planned relocation should be considered. See also *Guiding Principles* (n 10) principles 28–30.

297 See Part IV above.

298 For instance, Queensland recognises that planning should ensure that 'appropriate support and counselling is considered and where possible, offered through local, State agencies and/or non-government organisations': 'Queensland Evacuation Manual' (n 31) 39.

299 'MEND Guide' (n 24) 97. For guidance in this context, see 97–9. See also *Guiding Principles* (n 10).

300 *Guiding Principles* (n 10) principle 15.

301 Climate Council, 'Damage from Cyclone Pam was Exacerbated by Climate Change' (Briefing Statement, 2015) 2 <<https://www.climatecouncil.org.au/resources/damage-from-cyclone-pam-was-exacerbated-by-climate-change/>>. For instance, sea-level rise means that there is a higher volume of water riding on storm surges, which, in turn, leads to more extensive flooding. See also Anderson et al (n 87); Adrienne Anderson et al, 'A Well-Founded Fear of Being Persecuted ... But When?' (2020) 42(2) *Sydney Law Review* 155.

can increase vulnerability over time,³⁰² which is why forethought and coordinated planning across a range of sectors is essential.³⁰³

These challenges are pertinent not only to law and policy reform within Australia, but for other jurisdictions as well, especially those without the same capacity to provide government support to those forced to move. Over the past decade, 80% of the world's disaster displacement occurred in the Asia Pacific region – much of it resulting from government led evacuations.³⁰⁴ In 2020, a single cyclone triggered close to five million evacuations across Bangladesh, India, Myanmar and Bhutan;³⁰⁵ by the end of that year, some seven million people globally remained displaced on account of disasters.³⁰⁶ Given the enormous social, economic and personal costs of evacuations,³⁰⁷ the ramifications of not considering protection needs in this context are all too stark.

302 Sylvain Ponsérre and Justin Ginnetti, *Disaster Displacement: A Global Review, 2008–2018* (Report, Internal Displacement Monitoring Centre, 2019) 45. See this interesting personal reflection in the Australian context: Harris Rimmer (n 180).

303 *Government Crisis Framework* (n 40) 7 expressly excludes '[l]ong term disaster risk reduction and resilience building activities' from its purview.

304 Ponsérre and Ginnetti (n 302) 7.

305 *GRID 2021* (n 4) 53. Cyclone Amphan was the largest disaster displacement event of 2020: at 53.

306 *Ibid* 78.

307 For instance, in the aftermath of Australia's 2019–20 bushfires, temporary housing for 65,000 evacuees amounted to \$60–72 million for one year, and each day of lost work cost \$705 per person: *2019–2020 Bushfires* (n 4) 4.