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**Exploring the Legal Basis in
Australia for Evacuations from
Disasters: Avoiding
Arbitrary Displacement**

Jane McAdam

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

JANE MCADAM*

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 unprecedented in their severity and intensity, burning over 24 million hectares of land, killing 33 people and more than three billion animals,³ and displacing thousands of people. Indeed, the Internal Displacement Monitoring Centre (IDMC) estimated that more than 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 per cent of those evacuated).⁶ As climate change intensifies the frequency and severity of extreme weather events,⁷ 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,⁸ there is little critical analysis of evacuations in the

* Scientia Professor and Director, Andrew & Renata Kaldor Centre for International Refugee Law, Faculty of Law & Justice, UNSW Sydney, Australia; ORCID iD: 0000-0002-3999-7843. This article was produced under the auspices of an Australian Research Council Discovery Grant on ‘The Concept of “Imminence” in the International Protection of Refugees’, DP160100079. Thank you to Regina Jefferies for her painstaking research assistance and comments on earlier drafts, and to Michelle Foster, Zsafia Korosy, Lucas Lixinski, Noam Peleg and Tamara Wood for their helpful suggestions. Any errors or omissions are, of course, the author’s own.

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

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.

³ *Ibid* 5.

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

⁵ The NSW Rural Fire Service declared a 200-kilometre stretch from the NSW south coast into Victoria a ‘tourist leave zone’, for instance. 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 at 10 January 2020) <<https://www.cnbc.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 IDMC, *Global Report on Internal Displacement (GRID) 2020: Methodological Annex* (IDMC, 2020).

⁶ IDMC 2020 (n 4) 10.

⁷ *Royal Commission* (n 1) 5, 22.

⁸ *UN Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998), principle 6(2)(d); Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Brookings–Bern Project on Internal Displacement, January 2011) [I.6].

forced migration scholarship.⁹ 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’¹⁰ and show that ‘not all displacement is negative’.¹¹ Evacuations are now a major component of national and local disaster risk reduction strategies,¹² and have arguably resulted in fewer lives being lost in disasters.¹³

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.¹⁴ 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.¹⁵ This can lead to blind-spots in national responses that either fail to appreciate the scale of displacement, or to identify it at all.¹⁶ In concrete terms, this may mean insufficient support for those who are displaced and a lack of accountability among government authorities.¹⁷

Adopting a human rights lens, the article provides the first in-depth scholarly analysis of evacuation powers in Australian law and policy,¹⁸ with a focus on disasters.¹⁹ By conceptualising evacuations as a form of displacement, it argues 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

⁹ For analysis of this gap, see Jane McAdam, ‘Displacing Evacuations: A Blind Spot in Disaster Displacement Research’ (2020) 39(4) *Refugee Survey Quarterly* 583.

¹⁰ IDMC 2021 (n 4) 47.

¹¹ IDMC, *Global Report on Internal Displacement (GRID) 2020* (IDMC, 2020) 14. See also *ibid* at 43 (re Fiji) and 49 (re Bangladesh).

¹² *Sendai Framework for Disaster Risk Reduction 2015–2030*, GA Res 69/283, UN Doc A/RES/69/283 (23 June 2015), esp art 33(m).

¹³ Mami Mizutori, UN Special Representative of the Secretary-General for Disaster Risk Reduction, ‘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>>.

¹⁴ See *Guiding Principles* (n 8). Interestingly, evacuation guidelines in South Australia (SA) and Western Australia (WA) do refer to ‘displaced persons’ in parts: Government of South Australia, *State Emergency Management Plan* (Part 3: Guidelines and Frameworks, Annex A: Evacuation) (v 1.0, last revised 30 May 2018) 12; WA Community Evacuation in Emergencies Guideline, v0.300 (in effect 18 December 2020) 20, 21.

¹⁵ IDMC 2021 (n 4) 21 (eg considering housing destruction), 78.

¹⁶ *Ibid* 78.

¹⁷ *Ibid*.

¹⁸ The laws span general emergency powers, as well as specific authorisation in the contexts of fires, public health, ambulance services and counter-terrorism.

¹⁹ Although the 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, 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* (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.

acknowledged the risk of ‘individuals being displaced from disaster-affected areas’.²⁰ International legal standards reflected in the Guiding Principles on Internal Displacement,²¹ and human rights law more generally,²² 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, well-being 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.’²³ They can be spontaneous or assisted, voluntary or directed,²⁴ and can apply ‘to individuals, a house, a street, a large facility (i.e. school or hospital), a suburb, a town or a large area of the State’.²⁵ They are intended to be rapid, temporary (‘from hours to weeks’²⁶) and thus envisage ‘eventual safe and timely return.’²⁷

While each Australian state and territory has its own guidelines on evacuations, many draw on the Australian Institute for Disaster Resilience (AIDR)’s *Evacuation Planning 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,²⁸ the *Handbook* covers all stages of evacuations – namely, the decision to evacuate,

²⁰ Explanatory Memorandum to the *National Emergency Declaration Act 2020* (Cth) para 17.

²¹ *Guiding Principles* (n 8).

²² In addition to international treaty law, see *The MEND Guide: Comprehensive Guide for Planning Mass Evacuations in Natural Disasters* (IASC Camp Coordination and Camp Management Cluster, 2014); IASC Operational Guidelines (n 8); Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (4th edn 2018); *Sendai Framework* (n 12) annex II, [33(h)], [33(m)]. Note also International Law Commission (ILC), *Protection of Persons in the Event of Disasters: Draft Articles and Commentary*, UN Doc A/71/10 (2016). While evacuations are not mentioned expressly, the draft articles do detail States’ responsibilities to undertake preventive and remedial action in the context of disasters. 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’ (17) – it is relevant to all types of evacuations.

²³ Emergency Management Victoria, *Victorian Emergency Operations Handbook* (3rd edn, Dec 2020) 73.

²⁴ See Australian Institute for Disaster Resilience (AIDR), *Evacuation Planning* (Australian Disaster Resilience Handbook Collection, Handbook 4, 2017) 1–2.

²⁵ Emergency Management Victoria (n 23) 73. This is also reflected in a number of local government emergency plans: eg Towong Shire, *Municipal Emergency Management Plan 2018–2021* (Plan, 20 August 2019) <<https://www.towong.vic.gov.au/facilities-services/community-health/emergency-management/images/MEMP-Final-abridged.pdf>>.

²⁶ See *MEND Guide* (n 22) 16. The Tasmanian guidelines draw almost verbatim from the AIDR Handbook (n 24) 1, stating that: ‘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 Tasmanian Government, *Emergency Evacuation Framework* (version 2, August 2018) 6 <<https://d2kpbjo3hey01t.cloudfront.net/uploads/2018/10/Emergency-Evacuation-Framework-Package.pdf>>.

²⁷ Emergency Management Victoria (n 23) 73. According to the New South Wales (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’: *NSW State Emergency Management Plan: Evacuation Management Guidelines* (March 2014) 7 <https://www.emergency.nsw.gov.au/Documents/publications/guidelines/Guideline_Evacuation-Management.pdf>, referring to State Rescue Policy.

²⁸ AIDR Handbook (n 24) iii.

warning, withdrawal (ie the evacuation itself), shelter and return.²⁹ While the *Handbook* reflects, and in some cases expands upon, international standards, it does not directly reference them.³⁰

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.³¹ 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-managed evacuations/relocations (where people independently choose to move away from an area).³²

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.’³³ Evacuations can be enormously disruptive to people’s lives and livelihoods,³⁴ 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’.³⁵

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

²⁹ Ibid iii, v. Queensland adds ‘community preparedness’ as the first stage to ensure that communities appreciate the risk and understand evacuation zones: Queensland Government, *Evacuation: Responsibilities, Arrangements and Management Manual.1.190* (Manual, 18 September 2018) 4

<<https://www.disaster.qld.gov.au/dmg/st/Documents/M1190-Evacuation-Manual.pdf>>.

³⁰ Indeed, until the development of the *MEND Guide*, 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: Elizabeth Ferris, *Planned Relocations, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future* (Background Document, San Remo Consultation, 12–14 March 2014, UNHCR, Brookings, Georgetown University) 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 8) 9 fn 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’.

³¹ AIDR Handbook (n 24) 1–2.

³² See eg NSW guidelines (n 27) 12–13; SA guidelines (n 14) 4; WA guidelines (n 14) 4, 29.

³³ *Royal Commission* (n 1) 22.

³⁴ IDMC 2021 (n 4) 48.

³⁵ Ibid 265. For instance, WA guidelines (n 14) 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 AIDR Handbook (n 24) 25; Queensland Evacuation Manual (n 29) 35.

vulnerability.³⁶ In some contexts, the risks of evacuating may be greater than remaining – for instance, if there is insufficient time.³⁷

III WHAT EMPOWERS AUSTRALIAN AUTHORITIES TO MOVE PEOPLE?

The primary responsibility for emergency management in Australia rests with the states and territories,³⁸ and planning for evacuations is a core part of this.³⁹ The Commonwealth does not have an express constitutional power for emergencies, although other heads of power enable it to act in certain cases.⁴⁰ 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.⁴¹ While safeguarding life is a fundamental duty under human rights law,⁴² and the core rationale behind evacuations in Australia,⁴³ it does not give the authorities *carte blanche*. As section 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.⁴⁴ Some laws contain a general emergency evacuation power,⁴⁵ while others relate to particular types of disasters, most notably fires. In order to

³⁶ AIDR Handbook (n 24) 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's Evacuation Manual (n 29) 24.

³⁷ AIDR Handbook (n 24) 13. Evacuation plans should identify people at higher risk and potentially provide more detailed arrangements: AIDR Handbook (n 24) 20. See discussion of imminence of threat below: text to nn 78–85 below.

³⁸ As the Australian Government Crisis Management Framework underscores, the states and territories 'control most functions essential for effective crisis prevention, preparedness, response and recovery': Australian Government Crisis Management Framework (version 2.3, October 2020) 8 (fn omitted). On Commonwealth responsibilities for domestic disasters requiring a national response, see 51–52.

³⁹ AIDR Handbook (n 24) 4. A list of Australian emergency management legislation is available at Michael Eburn, *Australian Emergency Law*, Blog <<https://emergencylaw.wordpress.com/emergency-management-legislation/>>.

⁴⁰ Royal Commission into National Natural Disaster Arrangements, *Issues Paper: Constitutional Framework for the Declaration of a State of National Emergency* (8 May 2020) para 28.

⁴¹ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/10 (2001), 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 8) principle 3.

⁴² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), art 6; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC), art 6; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD), art 10; see section III.B below.

⁴³ AIDR Handbook (n 24) 13

⁴⁴ See eg *State Emergency and Rescue Management Act 1989 Act* (NSW) ss 37(2), 60L; *State Emergency Service Act 1989* (NSW) s 22(2); *Terrorism (Community Protection) Act 2003* (Vic) s 21; *Disaster Management Act 2003* (Qld) s 77(4); *Fire and Emergency Services Act 1990* (Qld) ss 53(2)(l); *Emergency Management Act 2005* (WA) s 76; *Fire and Emergency Services Act 1998* (WA) s 18B(4); *Fire Brigades Act 1942* (WA) s 34A; *Emergencies Act 2004* (ACT) s 168(2); *Emergency Management Act 2013* (NT) s 23(2); *Country Fire Authority Act 1958* (Vic) s 30(1)(g); *Fire Service Act 1979* (Tas) ss 47(4), 52; *Public Safety Preservation Act 1986* (Qld) ss 8(1)(d), 8AZ(2), 8PB(4); *Public Health Act 1997* (Tas) s 17(3)(d); *Public Health Act 2016* (WA) s 199. See discussion further below.

⁴⁵ In NSW, an 'emergency' is defined in section 4 of the *State Emergency and Rescue Management Act 1989* (NSW) as: 'an actual or imminent occurrence (such as fire, flood, storm, earthquake, explosion, terrorist act, accident, epidemic or warlike action) which—

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.⁴⁶ 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.⁴⁷ This was despite the fact that many disasters have historically affected multiple jurisdictions (and/or overwhelmed the capacity of state authorities),⁴⁸ and the federal government has played a significant role in emergency planning, coordination, operational responses, financial support, education/training, public awareness and research.⁴⁹ 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.⁵⁰ The *National Emergency Declaration Act 2020* (Cth) was a direct response to that recommendation,⁵¹ its objective being to ‘recognise and enhance the role of the Commonwealth in preparing for, responding to and

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- (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’.

⁴⁶ 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.

⁴⁷ For an overview of Commonwealth powers, see Royal Commission Issues Paper (n 40); Eburn (n 50) esp 85–93; John Kehoe, ‘Defence Needs New Powers for Disaster Help’, *AFR* (online at 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.

⁴⁸ See generally the *Australian Emergency Management Arrangements Handbook* (AIDR, 2019), which describes the various emergency management roles/responsibilities of government, non-governmental organisations, businesses, communities and individuals.

⁴⁹ Australian National Audit Office, *Commonwealth Emergency Management Arrangements* (Auditor-General Audit Report No. 41 1999–2000, 2000) 11. For hazards such as bushfires and tsunamis, there is a nationally agreed warning framework: Tasmanian guidelines (n 26) 26. For the various emergency management roles/responsibilities of government, non-governmental organisations, businesses, communities and individuals, see generally the *Australian Emergency Management Arrangements Handbook* (n 48).

⁵⁰ *Royal Commission* (n 1) 140; see also Michael Eburn, ‘Natural Disasters and the Need for Commonwealth Legislation’ (2011) 10(3) *Canberra Law Review* 81. Rec 5.1 of the Royal Commission’s report states: ‘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.

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.

⁵¹ Explanatory Memorandum (n 20) para 1.

recovering from emergencies that cause, or are likely to cause, nationally significant harm⁵² by enabling the Commonwealth to make ‘national emergency declarations’.⁵³ 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;
 - (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.⁵⁴

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.⁵⁵ 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’.⁵⁶ 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.⁵⁷ 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’.⁵⁸ The initial declaration must not extend beyond three months.⁵⁹

⁵² *National Emergency Declaration Act 2020* (Cth), s 3(1). 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.

⁵³ *Ibid* s 3(2).

⁵⁴ *Ibid* s 11(1).

⁵⁵ *Ibid* s 11(2)–(3).

⁵⁶ 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 is due to report on the operation of the Act in June 2021.

⁵⁷ *National Emergency Declaration Act 2020* (Cth), s 15 (1), (4). The Explanatory Memorandum (n 20) para 3 explains that this is to avoid ‘red tape’.

⁵⁸ *National Emergency Declaration Act 2020* (Cth), s 16(2). Examples might be information on stockpiles of supplies or other assets or resources: s 16(3).

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 (convened if the complexity of recovery demands a coordinated response, or if there are multiple incidents and/or jurisdictions).⁶⁰

The Australian Government Crisis Management Framework sets out the Commonwealth government's 'all hazards' crisis management approach, focusing on immediate response and early recovery.⁶¹ It 'provides ministers and senior officials with guidance on their respective roles and responsibilities.'⁶² From an administrative perspective, Emergency Management Australia (EMA), within the Department of Home Affairs,⁶³ 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',⁶⁴ according to the criteria and principles outlined in COMDISPLAN.⁶⁵ The National Catastrophic Natural Disaster Plan (NATCATDISPLAN) 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.'⁶⁶ Such events may have either a sudden or a sustained impact.⁶⁷

When state or territory authorities are insufficiently resourced or overwhelmed, the Department of Defence can play a key role in providing assistance.⁶⁸ 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 request.⁶⁹ Nor is Defence permitted to use force in such circumstances.⁷⁰ The scale of the 2019–20 fires necessitated substantial assistance from Defence,⁷¹ including to evacuate people by air and sea, as well as the contribution of military disaster relief

⁵⁹ Ibid s 11(5); it can be extended under s 12 and revoked under s 14.

⁶⁰ Department of Defence Joint Doctrine Note 5–20, *ADF Response to a Natural Disaster or an Emergency* (December 2020), 2-6–2-8.

⁶¹ Australian Government Crisis Management Framework (n 38) 7.

⁶² Ibid.

⁶³ EMA was moved from the Attorney-General's Department to the Department of Home Affairs in 2018.

⁶⁴ *COMDISPLAN 2020: Australian Government Disaster Response Plan* (2020), para 1.1.1.

⁶⁵ The request must be made by a nominated official (see *ibid* para 2.1.2) and meet at least one of four criteria (para 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': para 1.3.1. In a different context, the *Australian Government Plan for the Reception of Australian Citizens and Other Approved Persons Evacuated from Overseas* (COMRECEPLAN) outlines the arrangements for the reception into Australia of Australian citizens, permanent residents, and their immediate dependents and approved foreign nationals evacuated from overseas.

⁶⁶ *NATCATDISPLAN: National Catastrophic Natural Disaster Plan* (version 2-1, December 2017), para 2.

⁶⁷ Ibid.

⁶⁸ Department of Defence, *Defence Assistance to the Civil Community Manual* (DACC) (19 December 2012) 3.

⁶⁹ This is not authorised by the Australian Constitution or the *Defence Force Act 1903* (Cth).

⁷⁰ Department of Defence (n 68) 1-2; see also 1A-4: 'Use of force includes the restriction of freedom of movement of the civil community whether there is physical contact or not.'

⁷¹ 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 60) 1-14. See also Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the Constitution' (2021) 44(1) *UNSWLJ* 357.

assistance by eight other countries – the largest commitment ever provided to Australia.⁷² 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’.⁷³ While such immunity is similar to that granted to state and territory emergency services,⁷⁴ 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.⁷⁵ 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’;⁷⁶ and Queensland allows evacuations where necessary to ensure ‘public order’.⁷⁷ 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’⁷⁸ – while NSW’s definition in the *State Emergency and Rescue Management Act 1989* (NSW) exemplifies the more common, detailed approach:

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,⁷⁹

which requires ‘a significant and co-ordinated response’.⁸⁰ Sub-section 2 clarifies that the definition encompasses threats or danger to the environment.⁸¹

Imminence of harm is a core element of an ‘emergency’ in NSW, Victoria and Western Australia,⁸² as well as a threshold for Defence’s engagement.⁸³ In the Northern Territory, fire control

⁷² Department of Defence (n 60) 7-3: Canada, Fiji, Indonesia, Japan, New Zealand, Papua New Guinea, Singapore and the United States.

⁷³ *Defence Act 1903* (Cth) s 123AA.

⁷⁴ See Nicholas Kanarev, ‘Assessing the Legal Liabilities of Emergencies’ (2001) 16(1) *Australian Journal of Emergency Management* 18.

⁷⁵ 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 *Emergencies Act 2004* (ACT). See also n 124 below. Comprehensive legislative searches for each jurisdiction were conducted across the areas of emergency and disaster management, fires, public health, ambulance services and counter-terrorism.

⁷⁶ *Fire and Emergency Act 1996* (NT) s 3; *Emergency Management Act 2006* (Tas) s 40.

⁷⁷ *Disaster Management Act 2003* (Qld) s 76(2)(b)(i).

⁷⁸ *Emergency Management Act 2005* (WA) s 3.

⁷⁹ *State Emergency and Rescue Management Act 1989* (NSW) s 4(1).

⁸⁰ *Ibid.*

⁸¹ *Ibid* s 4(2). See also *Emergency Management Act 1986* (Vic) s 4; *Disaster Management Act 2003* (Qld) s 76(2)(b); *Fire and Emergency Act 1996* (NT) s 3; *Emergencies Act 2004* (ACT) s 34(1); *Fire and Emergency Services Act 2005* (SA) s 3 (‘harm to the environment, or to flora or fauna’); *Emergency Management Act 2006* (Tas) s 3; *Emergency Management Act 2005* (WA) ss 50(2)(b)(iii), 56(2)(c)(iii).

officers have the power ‘to do anything necessary for or incidental to’ protecting human life from ‘existing or imminent danger’,⁸⁴ including by ordering evacuations. In all cases, a threat must be sufficiently foreseeable and near in time for an evacuation order to be appropriate;⁸⁵ 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,⁸⁶ but all set out procedures for planning, responding to and managing evacuations.⁸⁷ In NSW and Queensland, comprehensive all-hazards evacuation management guidelines⁸⁸ are supplemented with detailed sub-plans for specific emergencies (including tsunamis, storms and other major incidents).⁸⁹

In NSW, if a state of emergency has been declared, the Minister may direct (or authorise an emergency services officer⁹⁰ 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’.⁹¹ 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’.⁹² 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

⁸² *State Emergency and Rescue Management Act 1989* (NSW) s 4; *Rural Fires Act 1997* (NSW) s 22; *Emergency Management Act 2005* (WA) s 3. See also references in *Disaster Management Act 2003* (Qld) ss 111–12; *Bushfires Management Act 2016* (NT) s 47(1). NSW’s State Emergency Management Plan requires an assessment of ‘the imminent danger to the community’ prior to any evacuation decision: NSW State Emergency Management Plan (EMPLAN) (December 2018) [824] <<https://www.emergency.nsw.gov.au/Documents/publications/20181207-NSW-state-emergency-management-plan.pdf>>.

⁸³ *Defence Act 1903* (Cth) s 123AA(1).

⁸⁴ *Bushfires Management Act 2016* (NT) s 47(1).

⁸⁵ 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 & Comparative Law Quarterly* 111.

⁸⁶ For instance, whereas Queensland’s Evacuation Manual (n 29) is exceptionally detailed, Victoria’s has a much more operational/procedural focus: Emergency Management Victoria, *Joint Standard Operating Procedure: Evacuation for Major Emergencies* (2 October 2020) <<https://files-em.em.vic.gov.au/public/JSOP/SOP-J03.12.pdf>>. Queensland’s Evacuation Manual, 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’: 18. Tasmania’s guidelines (n 26) are also very comprehensive and practical; WA’s guidelines (n 14) include appendices of evacuation planning templates.

⁸⁷ Victoria’s now superseded guidelines did reference one international standard-setting document. See Victoria State Government, *Emergency Management Manual Victoria* (Appendix 9: Evacuation Guidelines) (1997–2020) [8-36], referring to The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (3rd edn 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.

⁸⁸ NSW guidelines (n 27); Queensland Evacuation Manual (n 29).

⁸⁹ See NSW Government, *Resilience NSW*, ‘Sub Plans’ (Web Page, 25 February 2021)

<<https://www.emergency.nsw.gov.au/Pages/publications/plans/sub-plans/Sub-plans.aspx>> (NSW); Queensland Government, *Disaster Management*, ‘Assessment and Plans’ (Web Page, 2 October 2019)

<<https://www.disaster.qld.gov.au/qermf/Pages/Assessment-and-plans.aspx>> (Queensland); see also n 127 below. Queensland’s Evacuation Manual (n 29) 11 recommends that sub-plans be reviewed annually.

⁹⁰ *State Emergency and Rescue Management Act 1989 Act* (NSW), defined in s 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.’

⁹¹ *State Emergency and Rescue Management Act 1989* (NSW) s 37.

⁹² *Ibid* s 37(2). Identical language is contained in section 22 of the *State Emergency Service Act 1989* (NSW) (with respect to the powers of the Commissioner).

death threatened by an actual or imminent emergency'. Police may use 'such force as is reasonably necessary in the circumstances.'⁹³

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.⁹⁴ The test is whether the commander is 'satisfied on reasonable grounds that it is necessary to effectively deal with the emergency situation'.⁹⁵ The legislation includes specific evacuation powers for a 'terrorist emergency'.⁹⁶

If a disaster situation has been declared in Queensland,⁹⁷ 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,⁹⁸ 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.⁹⁹

Reasonable force may be used,¹⁰⁰ and it is an offence to disobey a direction without a reasonable excuse.¹⁰¹

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.¹⁰² 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'.¹⁰³

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'.¹⁰⁴ 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.¹⁰⁵ The police may declare an 'emergency area' and exclude people from it if

⁹⁴ *Public Safety Preservation Act 1986* (Qld) s 8(1)(d); also s 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' (s 4(b)(iii)), and to make regulations 'securing the essentials of life to the community' (s 5).

⁹⁵ *Public Safety Preservation Act 1986* (Qld) s 8(1).

⁹⁶ *Ibid* ss 8GA(1), 8M, 8PB, 8PC.

⁹⁷ *Disaster Management Act 2003* (Qld) 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.'

⁹⁸ *Ibid* s 77(1)(a)–(c).

⁹⁹ *Ibid* s 76(2)(b).

¹⁰⁰ *Ibid* s 77(4).

¹⁰¹ *Ibid* s 116.

¹⁰² Queensland Evacuation Manual (n 29) 13. See *Disaster Management Act 2003* (Qld) s 29.

¹⁰³ Queensland Evacuation Manual (n 29) 13.

¹⁰⁴ *Emergency Management Act 1986* (Vic) ss 24(2)(e), 24(7). See also Victorian guidelines (n 86).

¹⁰⁵ Victorian guidelines (n 86) para 1.10.

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.¹⁰⁶

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 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’.¹⁰⁷ 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’.¹⁰⁸ 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’.¹⁰⁹

In Western Australia, if an emergency situation declaration or state of emergency declaration is in force,¹¹⁰ an authorised officer may ‘direct the evacuation and removal of persons or animals from the emergency area or any part of the emergency area’,¹¹¹ 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’.¹¹² An officer may do ‘all such things as are reasonably necessary to ensure compliance’, including using reasonable force.¹¹³ There is a penalty of \$50,000 for non-compliance.¹¹⁴

A core function of the WA 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’.¹¹⁵ This includes restricting or prohibiting the movement of people and vehicles by closing roads or waterways, using such force as is reasonably necessary.¹¹⁶

In Tasmania, evacuations are authorised to protect people from ‘distress, injury or death’, or to protect property or the environment from ‘damage or destruction’.¹¹⁷ 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.’¹¹⁸

¹⁰⁶ *Emergency Management Act 1986* (Vic) s 36A, with exception in s 36B for those with a pecuniary interest in property within the area.

¹⁰⁷ *Emergency Management Act 2004* (SA) s 25(1).

¹⁰⁸ *Ibid* s 25(2). Similar powers apply to relevant officers under the *Fire and Emergency Services Act 2005* (SA), 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’: ss 42, 97, 118; in all cases, see para (2)(e), in particular.

¹⁰⁹ *Local Government Act 1999* (SA) s 7(d).

¹¹⁰ *Emergency Management Act 2005* (WA) s 65.

¹¹¹ *Ibid* s 67(b).

¹¹² *Ibid* s 3.

¹¹³ *Ibid* s 76.

¹¹⁴ *Ibid* s 86. These powers are replicated in the *Public Health Act 2016* (WA) with a \$20,000 fine for non-compliance: ss 180, 199, 202.

¹¹⁵ *Fire and Emergency Services Act 1998* (WA) s 18A(c). See also *Fire Brigades Act 1942* (WA) s 25.

¹¹⁶ *Fire and Emergency Services Act 1998* (WA) ss 18B(3)(j), 18B(4).

¹¹⁷ *Emergency Management Act 2006* (Tas) s 40. See Schedule 1, which includes evacuation within the ‘emergency powers’. Section 52 of the Act provides that such force as is reasonably necessary may be used.

¹¹⁸ Tasmanian guidelines (n 26) 22.

In the Australian Capital Territory (ACT), the *Emergencies Act 2004* (ACT), 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.¹¹⁹

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.¹²⁰

Finally, Christmas Island, the Cocos (Keeling) Islands and Jervis Bay Territory all have emergency management ordinances in effect which contain evacuation powers.¹²¹

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 services¹²²). 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.¹²³

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,¹²⁴ including evacuation by force.¹²⁵ Other natural hazards, such as floods and tsunamis, are encompassed by the general emergency legislation discussed above.¹²⁶ 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.¹²⁷

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.¹²⁸

¹¹⁹ *Emergencies Act 2004* (ACT) s 34(1)(k), (l); see also ss 68 re fire, 150C(2) re emergency management, 160A(2) re declared state of emergency.

¹²⁰ *Emergency Management Act 2013* (NT) s 23.

¹²¹ *Christmas Island Emergency Management Ordinance 2012* (Cth) ss 21, 22; *Cocos (Keeling) Islands Emergency Management Ordinance 2012* (Cth) ss 21, 22; *Jervis Bay Territory Emergency Management Ordinance 2015* (Cth) s 19.

¹²² See eg NSW Government, *Resilience NSW*, 'State Emergency Operations Centre (SEOC)' (Web Page, 15 November 2017) <<https://www.emergency.nsw.gov.au/Pages/about-us/semc/State-Emergency-Operations-Centre.aspx>>.

¹²³ During the 2019–20 fires in East Gippsland in Victoria, 9,863 people registered with Victoria Police, 'Victorian bushfires remembered' (Web Page, 13 January 2021) <<https://www.police.vic.gov.au/victoria-bushfires-remembered>>.

¹²⁴ This is the case for every state plus the Northern Territory. In the ACT, since 2004, fires have been regulated in detail within the *Emergencies Act 2004* (ACT). 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: s 34(1)(k), (l); see also ss 68 re fire, 150C(2) re emergency management, 160A(2) re declared state of emergency.

¹²⁵ See discussion of mandatory versus voluntary evacuations in section III.F below.

¹²⁶ Some states have specific evacuation plans for these types of hazards (see n 89). 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 guidelines (n 26) 8.

¹²⁷ NSW Government, *New South Wales State Flood Plan* (1 March 2018) 5.7.1

<<https://www.emergency.nsw.gov.au/Documents/plans/sub-plans/SubPlan-Flood.pdf>>; NSW Government, *New South Wales State Tsunami Plan* (13 September 2018) 5.7.1

<<https://www.emergency.nsw.gov.au/Documents/plans/NSW-Tsunami-plan.pdf>>. In storms, the 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* (7 June 2018) 5.7.1–5.7.2

<<https://www.emergency.nsw.gov.au/Documents/plans/NSW-State-Storm-Plan.pdf>>. See generally *State Emergency Service Act 1989* (NSW), s 22.

¹²⁸ *Fire and Rescue Act 1989* (NSW) s 19, see also s 13; *Fire and Rescue Act 1989* (NSW) s 19; *Rural Fires Act 1997* (NSW) s 22A.

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.¹²⁹ 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.¹³⁰

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.¹³¹ 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.¹³² There are criminal penalties for obstructing officers exercising a power or performing a duty under the Act, without reasonable excuse.¹³³

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’.¹³⁴ 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.¹³⁵

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.¹³⁶ A person who 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.¹³⁷

To enforce all necessary steps to protect and save life and property from fire,¹³⁸ the WA 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’.¹³⁹ The *Bush Fires Act 1954* (WA) expressly allows authorised officers or police to direct an evacuation from an affected area,¹⁴⁰ and anyone who does not comply can be fined \$25,000.¹⁴¹

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’,¹⁴² 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.¹⁴³ The *Fire and Emergency Act 1996* (NT) empowers the incident commander to order people to vacate land where

¹²⁹ Note also that force is expressly authorised under the *State Emergency and Rescue Management Act 1989 Act* (NSW) s 37(2), which encompasses fires.

¹³⁰ *Fire and Rescue Act 1989* (NSW) s 35.

¹³¹ *Metropolitan Fire Brigades Act 1958* (Vic) ss 58 (other than those with a pecuniary interest in, or goods or valuables on, the premises), 32B; *Country Fire Authority Act 1958* (Vic) s 30(1)(g); *Fire Rescue Victoria Act 1958* (Vic) s 58.

¹³² *Country Fire Authority Act 1958* (Vic) s 50B(1)(b).

¹³³ *Ibid* s 107.

¹³⁴ *Fire and Emergency Services Act 2005* (SA) ss 42, 97, 118; in all cases see para (2)(e), in particular. The same powers inhere in the State Co-ordinator under the *Emergency Management Act 2004* (SA) s 25.

¹³⁵ *Fire and Emergency Services Act 2005* (SA) s 42(4).

¹³⁶ *Fire and Emergency Services Act 1990* (Qld) ss 53, 59. See further Queensland Evacuation Manual (n 29); Queensland Government, *Queensland Strategy for Disaster Resilience 2017* (2018) incorporates climate change risk, in line with ‘international best practice’ (12).

¹³⁷ *Fire and Emergency Services Act 1990* (Qld) s 150C.

¹³⁸ *Fire Brigades Act 1942* (WA) s 25.

¹³⁹ *Ibid* s 34(c).

¹⁴⁰ *Bush Fires Act 1954* (WA) s 14B(2)(b).

¹⁴¹ *Ibid* s 14C(1).

¹⁴² *Bushfires Management Act 2016* (NT) s 47(1).

¹⁴³ *Ibid* s 50.

an occurrence threatens to cause loss of life or property; injury or distress; a risk to public safety; or damage to the environment.¹⁴⁴ It is an offence to interfere with or obstruct an officer performing duties under the Act.¹⁴⁵

In the ACT, the *Emergencies Act 2004* (ACT) empowers the chief officer of an emergency service to evacuate people or animals ‘for the preservation of life, property or the environment’.¹⁴⁶ 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.¹⁴⁷ 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.’¹⁴⁸ 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.¹⁴⁹ 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 six months’ imprisonment.¹⁵⁰ Finally, the *Fire Service Act 1979* (Tas) permits police to remove people from land or premises using reasonable force if necessary.¹⁵¹ 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.¹⁵²

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.¹⁵³

While it is common for public health legislation to authorise restrictions on movement (such as for quarantine purposes),¹⁵⁴ 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

¹⁴⁴ *Fire and Emergency Act 1996* (NT) ss 20(2), 3.

¹⁴⁵ *Ibid* ss 35, 52. See also ss 20, 21 which would appear to authorise the use of force.

¹⁴⁶ *Emergencies Act 2004* (ACT) s 34(1)(1). The Act was adopted in response to Ron McLeod, *Inquiry into the Operational Response to the January 2003 Bushfires in the ACT* (2003). The Act established the framework for the creation of the ACT Emergency Services Agency.

¹⁴⁷ *Emergencies Act 2004* (ACT) s 67(2). The chief officer of the rural fire service also has the power to direct someone to leave land or premises: see s 68.

¹⁴⁸ *Ibid* s 67(5).

¹⁴⁹ *Ibid* s 168.

¹⁵⁰ *Ibid* s 189. However, the ACT Emergency Evacuation Policy (15 June 2012) 1 states that apart from this limited power to leave a fire area, ‘[t]here are no offence provisions empowering forced evacuations in the ACT’.

¹⁵¹ *Fire Service Act 1979* (Tas) s 47.

¹⁵² *Ibid* s 128(1): ‘Fine not exceeding 26 penalty units or imprisonment for 6 months.’

¹⁵³ This section is illustrative only and does not purport to provide a comprehensive analysis of these areas.

¹⁵⁴ 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) which enables the Minister to declare any part of the state to be a ‘public health risk area’ (s 7(3)) and to isolate inhabitants of, and/or prevent access to, that area.

any area’,¹⁵⁵ using reasonable force if necessary, to save life or prevent injury (inter alia).¹⁵⁶ Failure to comply can result in a fine or imprisonment for up to six months.¹⁵⁷

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’,¹⁵⁸ including by requiring individuals ‘not to enter into or remain within a specified area’.¹⁵⁹

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.¹⁶⁰ Police may use ‘reasonable and necessary force to ensure compliance’ with a direction.¹⁶¹ As noted above, Queensland’s public safety legislation contains express evacuation powers for a ‘terrorist emergency’.¹⁶²

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 population¹⁶³ if, ‘upon receiving an evacuation message, they will not or cannot comply with evacuation directions.’¹⁶⁴ 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 section 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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ However, they do have homes to which they can return once conditions permit this.

¹⁵⁵ *Public Health Act 1997* (Tas) s 16(1)(c).

¹⁵⁶ *Ibid* s 17(3).

¹⁵⁷ *Ibid* s 16(3). See also *Public Health Act 2010* (NSW) s 10; *Public Safety Preservation Act 1986* (Qld) ss 8(3), 31(3); *Bush Fires Act 1964* (WA) ss 14C, 57. See discussion in Queensland Floods Commission of Inquiry, *Interim Report* (August 2011) 96.

¹⁵⁸ *Ambulance Service Act 1991* (Qld) s 38(1).

¹⁵⁹ *Ibid* s 38(3).

¹⁶⁰ *Terrorism (Community Protection) Act 2003* (Vic) s 18; see also s 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’.

¹⁶¹ *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’.

¹⁶² *Public Safety Preservation Act 1986* (Qld), ss 8GA(1), 8M, 8PB, 8PC.

¹⁶³ AIDR Handbook (n 24) 20. For international guidance, see *MEND Guide* (n 22) 39–40.

¹⁶⁴ Queensland Evacuation Manual (n 29) 7.

¹⁶⁵ NSW guidelines (n 27) 17.

¹⁶⁶ See further *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’: *ibid* (n 1) 273.

¹⁶⁷ Queensland Evacuation Manual (n 29) 10.

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.'¹⁶⁸ 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.¹⁶⁹ 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.'¹⁷⁰ It recommended that local councils identify groups whose mobility could pose a challenge during evacuations and identify organisations that might be able to assist.¹⁷¹

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.¹⁷² 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.'¹⁷³ This language is reflected verbatim in Tasmania's guidelines.¹⁷⁴ 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'.¹⁷⁵

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,¹⁷⁶ 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.¹⁷⁷ 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).¹⁷⁸ Minorities and disadvantaged groups may have no real choice about

¹⁶⁸ Ibid 7.

¹⁶⁹ Ibid.

¹⁷⁰ Queensland Floods Commission of Inquiry, *Final Report* (2012) 149.

¹⁷¹ Queensland Floods Commission of Inquiry (n 157) 197, recs 5.65 and 5.66.

¹⁷² SA guidelines (n 14) 7. See also AIDR Handbook (n 24) 14; Tasmanian guidelines (n 26) 22; Western Australia, *State Emergency Management* (version 2, 21 December 2018) 9; Queensland Evacuation Manual (n 29) 19; *Victorian Emergency Operations Handbook* (n 23) 78; NSW guidelines (n 27) 15–17.

¹⁷³ AIDR Handbook (n 24) 20.

¹⁷⁴ Tasmanian guidelines (n 26) 34.

¹⁷⁵ Ibid 27, referring also to Australian Disaster Resilience (ADR) Manual 44 Guidelines for Emergency Management in CALD Communities (AIDR, 2007) <<https://knowledge.aidr.org.au/resources/manual-series/>>.

¹⁷⁶ *Emergency Management Manual Victoria* (n 87) 8-34.

¹⁷⁷ Ibid 8-35.

¹⁷⁸ See Jane McAdam, 'Conceptualizing "Crisis Migration"' in Susan Martin, Sanjula Weerasinghe and Abbie Taylor (eds), *Humanitarian Crises and Migration: Causes, Consequences and Responses* (Routledge, 2014); Susan Harris Rimmer, 'Leaving Coonabarabran: Who Will Be Australia's Climate Refugees?' (2020) 71 *Griffith Review* (online only) <<https://www.griffithreview.com/articles/leaving-coonabarabran/>>. On gendered dimensions, see eg Julie M Bateman, 'Gender and Evacuation: A Closer Look at Why Women Are More Likely to Evacuate for Hurricanes' (2002) 3(3)

movement at all,¹⁷⁹ 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',¹⁸⁰ a point that is also reflected in Tasmanian guidance.¹⁸¹ Understanding these socio-economic and psychological factors helps to explain why people's decisions may be disconnected from official advice.¹⁸²

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.¹⁸³ 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.'¹⁸⁴ In addition, 'the magnitude and proximity of the disaster, past encounters with disasters, vulnerability of dependents, and consistency and clarity of warnings'¹⁸⁵ 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 order¹⁸⁶ and – either explicitly or implicitly – permit officials to use force to compel movement.¹⁸⁷ The high number of non- or late evacuations during the Victorian Black Saturday fires¹⁸⁸ led the Law Council of Australia to call for

Natural Hazards Review 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 Gorkyin the Coastal Area of Bangladesh' (2021) 11 *Progress in Disaster Science* 1001792, 6.

¹⁷⁹ 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(S1) *American Journal of Public Health* S109.

¹⁸⁰ AIDR Handbook (n 24) 27.

¹⁸¹ Tasmanian guidelines (n 26) 44.

¹⁸² 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.

¹⁸³ Ken Strahan, Joshua Whittaker and John Handmer, 'Self-Evacuation Archetypes in Australian Bushfire' (2018) 27 *International Journal of Disaster Risk Reduction* 307.

¹⁸⁴ AIDR Handbook (n 24) 3. On the role of social networks, see Bonkiewicz and Ruback (n 182) 140–41.

¹⁸⁵ Curtis (n 179) 526, referring to Keith Elder et al, 'African Americans' Decisions Not to Evacuate New Orleans before Hurricane Katrina: A Qualitative Study' (2007) 97 (Supp 1) *American Journal of Public Health* S124. See also Bonkiewicz and Ruback (n 182).

¹⁸⁶ See eg *Emergencies Act 2004* (ACT) ss 164, 189; *Emergency Management Act 1986* (Vic) s 36C; *Fire and Emergency Services Act 2005* (SA) ss 42(4), 97(4), 118(4); *Emergency Management Act 2004* (SA) s 28; *Disaster Management Act 2003* (Qld) ss 77(5), 112(4); *Fire and Emergency Act 1996* (NT) s 35; *Emergency Management Act 2005* (WA) ss 76, 85, 86, 87; *Public Health Act 2016* (WA) s 202; *Fire Service Act 1979* (Tas) ss 62(5), 125; *State Emergency and Rescue Management Act 1989* (NSW) s 40. For the position in international law, see section IV below.

¹⁸⁷ See n 44. 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/>>.

¹⁸⁸ 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.

‘consideration of mandatory evacuation measures, which are consistent with human rights principles of reasonableness, necessity and proportionality’.¹⁸⁹

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’.¹⁹⁰ Efforts should therefore only be made where it is ‘clearly unsafe for people to remain’.¹⁹¹ Eburn suggests that ‘for all practical purposes’, evacuation orders may ‘be unenforceable’,¹⁹² although they may ‘give moral strength’ to officials who refuse to re-enter an area from which people had been told to evacuate,¹⁹³ or protect individual officers seeking to evacuate premises such as nursing homes.¹⁹⁴

This non-compellable approach is reflected in state and territory guidance as well.¹⁹⁵ Tasmania’s guidelines acknowledge that ‘compulsory evacuation is a last resort and unlikely to be operationally possible or practical’.¹⁹⁶ 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’.¹⁹⁷ NSW’s guidelines state that the use of force during evacuations ‘is not desirable and should be seen as an absolute last resort’,¹⁹⁸ 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 adopt a common sense approach’.¹⁹⁹ 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’.²⁰⁰ 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

¹⁸⁹ Law Council of Australia, Submission to the *Royal Commission into National Natural Disaster Arrangements* (30 April 2020), [16] <<https://naturaldisaster.royalcommission.gov.au/system/files/submission/NND.600.00202.pdf>>. See further *MEND Guide* (n 22) 30–31.

¹⁹⁰ *AIDR Handbook* (n 24) 20.

¹⁹¹ *Ibid.* Evacuation plans should detail how such people should be managed. As stated in the *Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise*, International Law Association Resolution 6/2018 (August 2018) principle 5(2), 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.’

¹⁹² Eburn (n 187). ‘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.’

¹⁹³ 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 Eburn (n 187).

¹⁹⁴ Eburn (n 187).

¹⁹⁵ Interestingly, no guidelines frame this in terms of rights, in contrast to the approach in the *MEND Guide* (n 22) 30: ‘enforcing 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.’

¹⁹⁶ Tasmanian guidelines (n 26) 10. See further Elsie Loh, ‘Evacuation Powers of Emergency Workers and Emergency-Service Organisations in Australia’ (2007) 22(4) *Australian Journal of Emergency Management* 3, 3, who notes that ‘the decision to evacuate is in fact a discretionary choice of the ESO [emergency service organisations] officer and the victim’.

¹⁹⁷ SA guidelines (n 14) 12.

¹⁹⁸ NSW guidelines (n 27) 12.

¹⁹⁹ ACT policy (n 150) 2.

²⁰⁰ WA guidelines (n 14) 18.

mechanisms to track the welfare of those who stay, provided that this does not endanger response personnel.²⁰¹

Formally, at least, Australia's voluntary approach to evacuations can be contrasted with that of the United States, where mandatory evacuation orders (accompanied by threats of coercion) are favoured. However, the evidence shows that even there they are rarely enforced in practice.²⁰² Some commentators argue that mandatory orders serve an important symbolic function by signalling the seriousness of a hazard,²⁰³ 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.²⁰⁴ Overall, 'there exists a broad consensus that the use of force is unwarranted'²⁰⁵ and prosecutions are extremely rare.²⁰⁶ 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.²⁰⁷ Verbal persuasion is considered to be the most effective tool.²⁰⁸

Australia's AIDR *Handbook* emphasises the importance of fostering a sense of shared responsibility for evacuations between governments, 'individuals, households, businesses and communities',²⁰⁹ especially since community involvement is viewed as a way of engaging people and promoting responsiveness.²¹⁰ This point is also stressed in international guidance.²¹¹ 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.'²¹² 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.'²¹³

²⁰¹ 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 8) A.2.1–A.2.2.

²⁰² See Amy Fairchild et al, *Ethical and Legal Challenges posed by Mandatory Hurricane Evacuation: Duties and Limits* (National Center for Disaster Preparedness, October 2006) 8 (fn omitted), 17; Tanya L Settles, 'Federalism, Law, and the Ethics of Disaster Evacuations' in Mathieu Deflem (ed), *Disasters, Hazards and Law* (Emerald Group Publishing, 2012) 72–76; see generally Curtis (n 179).

²⁰³ Curtis (n 179) 506; Eburn (n 187).

²⁰⁴ Fairchild et al (n 202) 17 (citations omitted).

²⁰⁵ Ibid, citing Neil Johnson and John Railey, 'Evacuation Procedures: Flurry Before Storm' *Tampa Tribune* (5 August 2002).

²⁰⁶ Curtis (n 179) 524 was unable to find any such prosecutions, noting that the higher the *mens rea* requirement of the offence, the more difficult prosecution will be.

²⁰⁷ Fairchild et al (n 202) 17.

²⁰⁸ Ibid, citing Terry Ebert (Director, Louisiana Office of Homeland Security, New Orleans), Bipartisan Select Committee Hearings (14 December 2005); see also ibid 20, citing Nagin, House Hearings (14 December 2005).

²⁰⁹ AIDR *Handbook* (n 24) ix.

²¹⁰ Ibid. See also n 212 below; 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.

²¹¹ *MEND Guide* (n 22) 44.

²¹² SA guidelines (n 14) 5–6, referring to Public Sector Commissioner, Government of Western Australia, *Perth Hills Bushfire February 2011 Review* (Final Report, 16 June 2011) and Department of Premiere and Cabinet, *2013 Tasmanian Bushfires Inquiry* (Final Report, October 2013).

²¹³ Queensland Evacuation Manual (n 29) 26.

IV WHAT DOES INTERNATIONAL LAW REQUIRE?

This section examines what international law both permits and requires when it comes to using evacuation as a protective measure. In light of this analysis, section 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.²¹⁴ This may require the authorities to evacuate people from foreseeable hazards,²¹⁵ including with proportionate force in limited circumstances,²¹⁶ and with 'full respect for the life, dignity, liberty, and security of evacuees.'²¹⁷ 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'.²¹⁸ Evacuations will constitute arbitrary displacement unless they are required to ensure 'the safety and health of those affected'.²¹⁹

The right to life is 'a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights'.²²⁰ As such, safeguarding the right to life entails much more than the preservation of life alone. The 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 fire-fighters, ambulances and police forces) and social housing programs'.²²¹ The Committee has also observed that poverty, deprivation and homelessness may compromise the right to life.²²² The Inter-American Court of Human Rights has stated that the right to life includes a duty 'of generating minimum living

²¹⁴ ICCPR, art 6; CRC, art 6; CRPD, art 10.

²¹⁵ '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': 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) para 42.

²¹⁶ *MEND Guide* (n 22) 30–31. See also Bruce Burson, Walter Kälin, Jane McAdam and Sanjula Weerasinghe, '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; *Guiding Principles* (n 8) principle 6(2)(d). See n 44 and discussion above re use of force within Australia.

²¹⁷ *Sydney Declaration* (n 191) principle 5(3).

²¹⁸ ICCPR, art 12(3); *Universal Declaration of Human Rights*, GA Res 217A(III), 10 December 1948, art 13. Note UN Human Rights Committee (HRC), 'General Comment No. 27: Article 12 (Freedom of Movement)', UN Doc CCPR/C/21/Rev.1/Add.9 (2 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 further Burson et al (n 216) 395ff. For an overview of relevant international standards and legal considerations, see *MEND Guide* (n 22) 27–33.

²¹⁹ *Guiding Principles* (n 8) principle 6(2)(d); see also principles 6(3), 8; IASC Operational Guidelines (n 8) A.1.5.

²²⁰ HRC, 'General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', UN Doc CCPR/C/GC/36 (October 2018), para 2 (fn omitted).

²²¹ *Ibid* para 26 (fns 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 8) principle 7(2).

²²² See HRC, 'General Comment No. 28: The Equality of Rights between Men and Women (Article 3)', UN Doc CCPR/C/21/Rev.1/Add.10 (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'.

conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it'.²²³

The Convention on the Rights of the Child (CRC) 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.²²⁴

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'.²²⁵ 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 networks, education and resources.²²⁶ 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'.²²⁷

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'.²²⁸ 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'.²²⁹ This is why the Sendai Framework for Disaster Risk Reduction encourages States to adopt 'an inclusive and all-of-society disaster risk management',²³⁰ 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,²³¹ noting the importance of integrating a

²²³ *Case of the Yakye Axa Indigenous Community v Paraguay* (Inter-American Court of Human Rights, 17 June 2005), Series C No. 125, para 162, referring to *Case of the 'Juvenile Reeducation Institute'* (Inter-American Court of Human Rights 2 September 2004), Series C No. 112, para 159.

Case of the Yakye Axa Indigenous Community v. Paraguay Judgment of June 17, 2005 (Merits, Reparations and Costs)

²²⁴ CRC, art 6.

²²⁵ 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 (September 2005), para 10.

²²⁶ 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, which may adversely affect enjoyment of the right to life': HRC (n 220) para 26. See also *Guiding Principles* (n 8) principle 18.

²²⁷ CRC, art 3. The Human Rights Committee states that ICCPR art 24(1) 'requires adoption of special measures designed to protect the life of every child'. See also *Guiding Principles* (n 8) principle 4(2).

²²⁸ CRPD, art 11. The Human Rights Committee (n 220) 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 shall 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, arts 5(3), 9, 10. See also *Guiding Principles* (n 8) principle 4(2).

²²⁹ IDMC 2021 (n 4) 81 (fn omitted).

²³⁰ *Sendai Framework* (n 12) art 36(a).

²³¹ *Ibid* art 19(d).

‘gender, age, disability and cultural perspective ... in all policies and practices’ and promoting ‘women and youth leadership’.²³² 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.²³³ In all cases, clear communication is essential.²³⁴

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.²³⁵ 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’,²³⁶ ‘enabling relief to be provided to individuals and communities affected by the emergency more promptly’,²³⁷ and ‘supporting efforts to more rapidly and effectively recover from the harm caused by the emergency’.²³⁸

Such rights have been interpreted in the European context as meaning that, *inter alia*, where the risk and impacts of a disaster are foreseeable,²³⁹ the relevant authorities must monitor known hazards,²⁴⁰ inform people at risk,²⁴¹ have an evacuation plan in place,²⁴² order evacuations when people’s life or safety is at imminent risk,²⁴³ and enforce evacuation orders until the threat has passed.²⁴⁴ Evacuations must be for the shortest possible time²⁴⁵ and carried out in a non-discriminatory manner that respects other human rights.²⁴⁶ If evacuations go beyond these limits, then they may amount to unlawful, arbitrary displacement.²⁴⁷

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

²³² Ibid.

²³³ See IASC Operational Guidelines (n 8) A.1.4; AIDR Handbook (n 24) 3–6.

²³⁴ *Royal Commission* (n 1) 269. This is a feature of state evacuation manuals. For instance, Queensland’s Evacuation Manual (n 29) 11–12 contains instructive lists of ‘key messages’ for decision-makers to consider in evacuation planning, ranging from political to economic to legislative.

²³⁵ Explanatory Memorandum (n 20) paras 11, 12, 20, referring to article 6 of the ICCPR and articles 11–12 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). A ‘statement of compatibility with human rights’ is required for each bill before Parliament.

²³⁶ Explanatory Memorandum (n 20) para 12, 16, 22.

²³⁷ Ibid.

²³⁸ Ibid paras 16, 22.

²³⁹ *Budayeva v Russia*, App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (European Court of Human Rights, 20 March 2008), paras 135, 156.

²⁴⁰ Ibid para 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, Emanuele Sommario, Federico Casolari and Giulio Bartolini (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge, 2018).

²⁴¹ Ibid para 152; *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 90.

²⁴² *Budayeva v Russia* (n 239) para 152.

²⁴³ *Guiding Principles* (n 8) principle 6(2)(d).

²⁴⁴ *Budayeva v Russia* (n 239) para 153.

²⁴⁵ *Guiding Principles* (n 8) principles 6(2)(d), 6(3); *MEND Guide* (n 22) 27–28.

²⁴⁶ IASC Operational Guidelines (n 8) A.1.5; *Guiding Principles* (n 8) principle 8. See further Emanuele Sommario, ‘Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings’ in Zorzi Giustiniani et al (n 240).

²⁴⁷ *Guiding Principles* (n 8) principles 6(1), 6(2)(d), 6(3), 8; IASC Operational Guidelines (n 8) A.1.5. For further analysis, see Burson et al (n 216) 397. As noted above, the *Guiding Principles* acknowledge that an evacuation from a disaster can constitute ‘arbitrary displacement’ unless ‘the safety and health of those affected requires’ it: 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.²⁴⁸

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.’²⁴⁹ 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.²⁵⁰ 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’,²⁵¹ provide that evacuations from disasters will be arbitrary unless necessary to protect people’s health and safety.²⁵² 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 on-going rights restrictions. It is therefore imperative that protective legal principles are incorporated into the conception, planning and implementation of evacuations.

V CHALLENGES AND OPPORTUNITIES

Although Australia’s domestic evacuation frameworks are extensive and at times implicitly reflect international guidance,²⁵³ 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 section 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’,²⁵⁴ 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,

²⁴⁸ IASC Operational Guidelines (n 8) A.1.4 (direct quote).

²⁴⁹ Burson et al (n 216) 387.

²⁵⁰ See eg American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (April 1985).

²⁵¹ *Guiding Principles* (n 8) para 3; see also para 2.

²⁵² 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 existing norms and seek to clarify grey areas and fill in the gaps’: ‘Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons, Mr Frances M Deng’ (June 2001) in *Guiding Principles* (n 8). See also HRC, ‘General Comment No. 35: Article 9 (Liberty and Security of Person)’, UN Doc CCPR/C/GC/35 (October 2014) para 12 (fn 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, 24 as well as elements of reasonableness, necessity and proportionality.’

²⁵³ See n 30 above.

²⁵⁴ AIDR Handbook (n 24) 13.

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.²⁵⁵

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'.²⁵⁶ It emphasised that utilising this framework would better enable the US to recognise IDPs; bring domestic law into line with 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.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ The Royal

²⁵⁵ 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 29) 4. Queensland's *Disaster Management Act 2003* (Qld) s 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 29) 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).

²⁵⁶ Chris Kromm and Sue Sturgis, *Hurricane Katrina and the Guiding Principles on Internal Displacement: A Global Human Rights Perspective on a National Disaster* (Institute for Southern Studies, 2008) 5.

²⁵⁷ *Ibid* 28–29.

²⁵⁸ See generally section IV. A report by UNICEF Australia and Royal Far West in the aftermath of the bushfires found this to be widespread across Australian disaster law and policy generally: UNICEF Australia and Royal Far West, *After the Disaster: Recovery for Australia's Children* (2021) 6–7. This is despite the fact that Australian guidance does acknowledge the importance of assisting people with vulnerabilities: section III.E above.

²⁵⁹ The most comprehensive guidance is contained in the AIDR Handbook (n 24) 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.'

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.²⁶⁰ On the flipside, policy frameworks concerning children do not expressly deal with disasters or large-scale emergencies.²⁶¹

The needs of people with disabilities are similarly overlooked,²⁶² again despite Australia's well-defined obligations under international law.²⁶³ 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'.²⁶⁴

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

- (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.²⁶⁵

The implications of this are stark: a 2013 global survey of 5,717 people with disabilities found that only 20.6 per cent thought they could evacuate immediately without difficulty in a sudden-onset disaster. With sufficient time to leave, that percentage nearly doubled, but 58 per cent of people still felt that they would have some, or a lot of, difficulty in evacuating.²⁶⁶ 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.²⁶⁷

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 (DIDRR) Framework and Toolkit*.²⁶⁸ While its focus is broader than evacuations, it is

²⁶⁰ UNICEF Australia and Royal Far West (n 258) 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.'

²⁶¹ UNICEF Australia and Royal Far West (n 258) 36.

²⁶² See generally Gwynnyth Llewellyn and others, *Emergency Planning and Response for People with Disability in Australia: A Joint Response from the Centre for Disability Research and Policy and Centre of Research Excellence Disability and Health to the Issues Paper: Emergency Planning and Response, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (July 2020).

²⁶³ CRPD, art 11; *Sendai Framework* (n 12) arts 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 (20 September 2019) para 21.

²⁶⁴ Llewellyn et al (n 262) 2.

²⁶⁵ Committee on the Rights of Persons with Disabilities (n 263) para 21.

²⁶⁶ UN Office for Disaster Risk Reduction, *Living with Disability and Disasters: UNISDR 2013 Survey on Living with Disabilities and Disasters: Key Findings* (2014) 2. See also Rhiannon Shine, 'Bushfire Survivors Call for More Fire Preparedness Support for People with Disabilities', ABC News (27 January 2020) <<https://www.abc.net.au/news/2020-01-27/bushfire-survivors-call-for-disability-support-fire-emergency/11895218>>.

²⁶⁷ Committee on the Rights of Persons with Disabilities (n 265) para 47.

²⁶⁸ See Michelle Villeneuve et al, *Disability Inclusive Disaster Risk Reduction (DIDRR) Framework and Toolkit* (Centre for Disability Research and Policy, University of Sydney, 2019) 5. See also the Queensland Government's Inclusive Community Engagement Stakeholder Consultation on Disability Inclusive Disaster Risk Reduction:

an exemplar for similar tools in other jurisdictions.²⁶⁹ Internationally, there are other good examples of community-led policymaking that could also inform approaches in Australia.²⁷⁰

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.²⁷¹ 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.²⁷² 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.²⁷³ International guidelines have not addressed these issues in any depth, noting only the need for cooperation where multiple domestic actors are involved.²⁷⁴ 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,²⁷⁵ 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.²⁷⁶ Existing domestic guidance, such as the Cross-Border Assistance Guidelines 2014 on emergency relief, may provide some assistance in this regard,²⁷⁷ but it is unclear to what extent state and territory governments ‘are

<<https://collaborating4inclusion.org/disability-inclusive-disaster-risk-reduction/framework-and-toolkit/queensland-reports/>>.

²⁶⁹ See also *Local Emergency Management Guidelines for Disability Inclusive Disaster Risk Reduction in NSW* (2017).

²⁷⁰ 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* (2020)

<https://www.iom.int/sites/default/files/our_work/DOE/gp20_web.pdf>; Vita Elysia and Ake Wihadanto, ‘The Sister Village Program: Promoting Community Resilience after Merapi Eruption’ (2018) 3(1) *The Indonesian Journal of Planning and Development* 32.

²⁷¹ 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 (fns omitted).

²⁷² Public submissions to the Royal Commission detailed the frustration of border communities when it came to their evacuation experiences, for instance: *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: *Royal Commission* (n 1) 274, 276.

²⁷³ Royal Commission into National Natural Disaster Arrangements, *Interim Observations* (31 August 2020) para 10.

²⁷⁴ See eg *MEND Guide* (n 22) 23, 27, 32, 41 ff.

²⁷⁵ See n 41.

²⁷⁶ *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: Queensland Floods Commission of Inquiry (n 157) 98.

²⁷⁷ Cross-Border Assistance Guidelines (2014)

<<https://naturaldisaster.royalcommission.gov.au/system/files/exhibit/SSA.468.005.0036.pdf>>. 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.’

aware of, and have used these arrangements'.²⁷⁸ Interestingly, the Royal 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 border²⁷⁹ – 'have a useful role to play in future evacuation planning in border areas.'²⁸⁰

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.²⁸¹ The IDMC has noted that what little data is gathered tends to lack detail about people's background, socio-economic status and so on,²⁸² 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'²⁸³ and 'to foster the meaningful participation of various groups in the planning and design of support programmes'.²⁸⁴ 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-19.²⁸⁵ These may be catastrophic given the additional pressures they place on existing emergency management arrangements (including coordination between multiple actors),²⁸⁶ 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 to evacuate, you should just evacuate'.²⁸⁷ 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.²⁸⁸ This is why in Japan, authorities co-opted private facilities, such as hotels and shopping centres, as additional evacuation shelters to enable physical distancing.²⁸⁹ Evacuations from Cyclone Harold in

²⁷⁸ *Royal Commission* (n 1) 451.

²⁷⁹ See eg NSW Government, *Regional NSW*, 'Office of the Cross-Border Commissioner' (Web Page, last accessed 26 February 2021) <<https://www.regional.nsw.gov.au/our-work/ocbc>>; Regional Development Victoria, 'Victoria's Cross Border Commissioner' (Web Page, 17 February 2021) <<https://www.rdv.vic.gov.au/about-rdv/cross-border-commissioner>>.

²⁸⁰ *Royal Commission* (n 1) 282 (fn omitted).

²⁸¹ IDMC 2021 (n 4) 78; IDMC 2020 (n 4) 20.

²⁸² IDMC 2020 (n 4) 20.

²⁸³ IDMC 2020 (n 4) 20.

²⁸⁴ IDMC 2021 (n 4) 79.

²⁸⁵ 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>>.

²⁸⁶ *Royal Commission* (n 1) 5, 271–72. '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' (22). See also Tasmanian guidelines (n 26) 29, noting the need to cross-reference between authorities in warnings.

²⁸⁷ Quoted in Bridget Fitzgerald, 'Hundreds of Fire Fighters Continue to Battle a Large, Out of Control Fire North East of Perth' (ABC, *The World Today*, 3 February 2021) <<https://www.abc.net.au/radio/adelaide/programs/worldtoday/perth-ravaged-by-bushfire/13116768>>.

²⁸⁸ IDMC 2021 (n 4) 21.

²⁸⁹ IDMC 2021 (n 4) 74.

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.²⁹⁰

V 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.²⁹¹ 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,²⁹² 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.²⁹³ 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.

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,²⁹⁴ and to realising the right to life in its fullest sense.²⁹⁵ 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.²⁹⁶

²⁹⁰ Viviane Clement et al, *Groundswell: Acting on Internal Climate Migration: Part II* (The World Bank, 2021) 4.

²⁹¹ See n 22.

²⁹² 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 A\$60–72 million, and for each day that a person could not work, the loss was A\$705 per person: IDMC 2020 (n 4) 4.

²⁹³ 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 at 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 at 6 January 2021) <<https://www.theage.com.au/politics/federal/border-closures-are-understandable-but-they-need-to-be-handled-better-20210106-p56s61.html>>.

²⁹⁴ ‘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 29) 39; see also Tasmanian guidelines (n 26) 46ff; AIDR Handbook (n 24) 29ff; SA guidelines (n 14) 5; WA guidelines (n 14) 21. If people cannot return, then planned relocation should be considered. See also *Guiding Principles* (n 8) principles 28–30.

²⁹⁵ See section IV above.

²⁹⁶ 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 29) 39.

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.’²⁹⁷ 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.²⁹⁸

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).²⁹⁹ Continued exposure to hazards can increase vulnerability over time,³⁰⁰ which is why forethought and coordinated planning across a range of sectors is essential.³⁰¹ 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 per cent of the world’s disaster displacement occurred in the Asia-Pacific region – much of it resulting from government-led evacuations.³⁰² In 2020, a single cyclone triggered close to five million evacuations across Bangladesh, India, Myanmar and Bhutan;³⁰³ by the end of that year, some seven million people globally remained displaced on account of disasters.³⁰⁴ Given the enormous social, economic and personal costs of evacuations,³⁰⁵ the ramifications of not considering protection needs in this context are all too stark.

²⁹⁷ *MEND Guide* (n 22) 97. For guidance in this context, see 97–99. See also *Guiding Principles* (n 8).

²⁹⁸ *Guiding Principles* (n 8) principle 15.

²⁹⁹ Climate Council (Australia), ‘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 85); Adrienne Anderson et al, ‘A Well-Founded Fear of Being Persecuted ... But When?’ (2020) 42(2) *Sydney Law Review* 155.

³⁰⁰ Sylvain Ponserre and Justin Ginnetti, *Disaster Displacement: A Global Review, 2008–2018* (IDMC, 2019) 45, 52. See this interesting personal reflection in the Australian context: Harris Rimmer (n 178).

³⁰¹ The Australian Government Crisis Management Framework (n 38) 7 expressly excludes ‘[l]ong term disaster risk reduction and resilience building activities’ from its purview.

³⁰² Ponserre and Justin Ginnetti (n 300) 7.

³⁰³ IDMC 2021 (n 4) 53. Cyclone Amphan was the largest disaster displacement event of 2020.

³⁰⁴ *Ibid* 78.

³⁰⁵ For instance, in the aftermath of Australia’s 2019–20 bushfires, temporary housing for 65,000 evacuees amounted to A\$60–72 million for one year, and each day of lost work cost A\$705 per person: IDMC 2020 (n 4) 4.