

# **Inquiry into Homelessness**

## **Legislation**

**14 August 2009**

### **Submission by the NSW Young Lawyers Human Rights Committee**

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To Whom It May Concern,

### **Inquiry into Homelessness Legislation**

The Human Rights Committee (**HRC**) of the NSW Young Lawyers is grateful for the opportunity to make a submission to the Inquiry into Homelessness Legislation.

NSW Young Lawyers is made up of law students and legal practitioners who are in their first 5 years of practice or under the age of 35. The HRC is concerned with a range of human rights issues both in Australia and abroad and aims to raise awareness and provide education to the legal profession and the wider community on these issues.

If you have any questions in relation to the matters raised in this submission, please contact Claire Hammerton, Chair of the NSW Young Lawyers Human Rights Committee ([hrc.chair@younglawyers.com.au](mailto:hrc.chair@younglawyers.com.au)).

Yours faithfully,



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## INTRODUCTION

1. The NSW Young Lawyers Human Rights Committee (NSWYLHRC) commends the federal government for its consideration of the introduction of new legislation relating to the issue of homelessness. We thank you for this opportunity to make a submission on this very important issue.
2. Many NSW young lawyers provide legal services to homeless persons in a voluntary capacity. Some NSW Young Lawyers also work with general homeless persons' service providers in a voluntary capacity. NSWYLHRC argues strongly that a human rights based approach should be central to the delivery of such services.

***The principles that should underpin the provision of services to Australians who are homeless or at risk of homelessness***

3. The HRC submits that human rights principles should be the key principles to guide the development of homelessness legislation.
4. Australia has ratified the *International Covenant of Economic, Social and Cultural Rights*<sup>1</sup> (ICESCR), *The International Covenant on Civil and Political Rights*<sup>2</sup> (ICCPR), the *Convention on the Rights of the Child*<sup>3</sup> (CRC), the *Convention on the Elimination of Discrimination Against Women*<sup>4</sup> (CEDAW) the *International Convention on the Elimination of Racial Discrimination*<sup>5</sup> (CERD), *Convention on the Rights of Persons with Disabilities and Optional Protocol*.<sup>6</sup> Accordingly, Australia has an obligation to uphold the rights referred to in these instruments and the State and federal

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<sup>1</sup> Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), ratified by Australia 10 December 1975, entered into force for Australia 10 March 1976.

<sup>2</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia 13 August 1980, entered into force for Australia 13 November 1980.

<sup>3</sup> Opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), ratified by Australia 17 December 1990, entered into force for Australia 16 January 1991.

<sup>4</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*. opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), ratified by Australia 28 July 1983.

<sup>5</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), ratified by Australia 30 October 1975.

governments have a responsibility to enact domestic legislation to protect such rights. Australia also supports the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>7</sup>

5. The principles in these treaties and declarations are founded upon the inherent right to be treated with dignity and respect and specifically include the right to an adequate standard of living, including the right to housing.<sup>8</sup>
6. Human rights are indivisible, inalienable and mutually reinforcing. As such, the right to housing is intimately connected to other rights. For example:
  - The right to health;<sup>9</sup>
  - The right to equality;<sup>10</sup>
  - The right to life;<sup>11</sup>
  - The right to social security;<sup>12</sup>
  - The right to safety;<sup>13</sup>
  - The right to education<sup>14</sup>
  - The right to vote<sup>15</sup>
  - A child's right to protection;<sup>16</sup>
7. Indigenous people, women, children, people with mental illness and refugees are disproportionately affected by homelessness.<sup>17</sup> The right to substantive equality must underpin the provision of services to Australians who are homeless and seek to address this disadvantage.

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<sup>6</sup> Opened for signature on 30 March 2007 (entered into force 3 May 2008), ratified by Australia 17 July 2008.

<sup>7</sup> Adopted by General Assembly Resolution 61/295 on 13 September 2007, Australia formally supports 3 April 2009.

<sup>8</sup> *ICESCR*, Article 11, *CRC*, Article 27; See also *United Nations Declaration of Human Rights*, Article 25, adopted 10 December 1948; *United Nations Declaration on the Rights of Indigenous Peoples*, (*UNDRIP*) Article 8(2)(b) and (c), Article 10, Article 21, Article 23; *CEDAW*, Article 14(2)(h); *CERD*, Article 5(e)(iii);

<sup>9</sup> *ICESCR*, Article 12; *CRC*, Article 24.

<sup>10</sup> *ICESCR*, Article 2; *ICCPR*, Articles 3, 26; *UNDRIP*, Article 21

<sup>11</sup> *ICCPR*, Article 6; *CRC*, Article 6, *UNDRIP*, Article 7

<sup>12</sup> *ICESCR*, Article 9; *CEDAW*, Article 11(1)(e); *CRC*, Article 26; *UNDRIP*, Article 21

<sup>13</sup> *ICCPR*, Article 9(1).

<sup>14</sup> *ICESCR*, Article 13; *UNDRIP* Article 14

<sup>15</sup> *ICCPR* Article 25

<sup>16</sup> *ICCPR*, Article 24; *ICESCR*, Article 10; *CRC*, Articles 3, 9, 19, 20, 39.

<sup>17</sup> See Australian Human Rights Commission, *Homelessness is a Human Rights Issue*, 2008 accessed on 8 August 2009 at: [http://www.hreoc.gov.au/human\\_rights/housing/homelessness\\_2008.html](http://www.hreoc.gov.au/human_rights/housing/homelessness_2008.html)

8. It is essential that human rights principles inform the development of legislation and policy in this area. The introduction of a Federal Charter of Rights containing all of Australia's international human rights obligations into domestic law would go a long way to supporting this.
9. Active participation in one's own development must also be a key principle underpinning the provision of services to Australians who are homeless or at risk of homelessness. This is essential and should not be treated as an optional extra. One of the great strengths of some of the submissions responding to last year's Green Paper into Homelessness was hearing directly from homeless persons.<sup>18</sup> Homeless people must be at the centre of any decision-making regarding the provision of services.
10. A holistic, coordinated and integrated response to the issue of homelessness is also required, drawing upon and strengthening existing homelessness networks.

***The effectiveness of existing legislation and regulations governing homelessness services in Australia and overseas***

11. NSWYLHRC strongly endorses the Federal Government's statement in the White Paper that they will work with specialist homelessness services and state and territory governments to amend the SAA legislation. Specialist homelessness services hold the necessary experience and expertise and are best position to provide a voice for homeless persons.
12. It is a difficult task to gauge the effectiveness and success of the current legislation governing the provision of homelessness services, the *Supported Accommodation Assistance Act 1994* (Cth). On the one hand, the program that was established under that Act, the Supported Accommodation Assistance Program, has flourished: in 1985, there were 500 service providers but today there are more than 1300 service providers. The increase in service providers which are supported under the Act can only mean that more homeless persons are receiving services as needed.

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<sup>18</sup> See particularly submission from the Homeless Persons Legal Service.

13. However, statistics show that the current legislation is not making enough headway in *reducing* the rate of homelessness. Statistics show that homelessness rates have remained steady for the past 12 years, with 105 000 people homeless every night. Of these, 16 375 are sleeping rough. Whilst it is a positive step that homelessness rates are not increasing, maintaining a consistent rate of homelessness is not desirable. This is a fact that the Federal Government has realised in its recent White Paper, *A Road Home – A National Approach to Reducing Homelessness*.
14. Part of the reason why the current legislation is not as effective as it could be is the fact that the current legislation takes too narrow a definition of homelessness service providers. The legislation currently states that a person is homeless “if, and only if, he or she has inadequate access to safe and secure housing” (s 4(1)). Thus, the legislation confines itself to service providers for the *already* homeless. Yet, homelessness service providers include, or ought to include, not just those services which provide accommodation to those who are already homeless, but also those services which may prevent persons who are at danger of becoming homeless from doing so.
15. This narrowness reflects the reactive approach of the SAAP. The legislation concerns only services which provide accommodation to homeless persons *after the fact* of their homelessness. It has been well recognised that, in order to effectively combat homelessness, a proactive approach is also required.
16. This proactive approach may require the amendment of several acts, not just the *Supported Accommodation Assistance Act 1994*. Legislation such as the *Social Security Act 1991* (Cth) and the *Housing Assistance Act 1996* (Cth) ought to be amended to include separate sections dealing with the special factors and issues which pertain to homeless persons. So, for instance, a separate Part or Division in the *Social Security Act 1991* entitled “Special Benefits for Persons At Risk of Homelessness” should be included, rather than addressing housing problems as sub-divisions of PART 3.12A----PROVISIONS FOR SENIORS HEALTH CARD TAXABLE INCOME TEST for instance.
17. It would seem that one of the greatest flaws of the current legislation is that it lacks any great detail. The legislation sets up a very general scheme and outlines the

- responsibilities of service providers, as well as establishing a Commonwealth Advisory Body on Homelessness. However, it does not provide a detailed strategy for dealing with and tackling the issue of homelessness. For instance, there is a lack of any coordination of efforts to target different stages of the homelessness cycle.
18. The White Paper quite reasonably recognises the fact that the current body of service providers cannot provide for all the answers to the homelessness problem. Such service providers can only provide for ad hoc needs as they arise. However, this means that the scope for service provision needs to be widened to include not only those service providers catering to those who are currently homeless, but also those services which can help “turn off the tap”. Already existing agencies and services and agencies may be able to undertake this role or new government funded services could be encouraged. Regardless, it must be a coordinated response.
19. Further, the legislation does not recognise that there are several reasons for homelessness. The Federal Government has also realised this fact in its White Paper, highlighting housing stress, domestic violence and mental illnesses as some of the main causes for homelessness. The fact that the current legislation is silent on these issues, and merely leaves the formulation of strategy to the Commonwealth Advisory Body does not provide the impetus that is required. By having these factors recognised in legislation, it will provide not only a clear statement about just what the causes are, but also provide motivation for addressing those issues.
20. In contrast, the United Kingdom legislation concerning homeless is far more detailed and provides for a lot more innovation when it comes to combating homelessness. The *Homelessness Act 2002* (UK) provides for more reviews and strategising. In particular, section 3 of that Act provides for the creation of a homelessness strategy by local housing authorities. The Act also recognises the need for prioritising homeless persons’ needs in section 5. The success of that legislation may be gleaned from the fact that homelessness has been reduced by two-thirds, much earlier than its planned deadline in 2005.
21. In summary, the current legislation is not as effective as it could be as it provides no real coherent strategy on how to address the homelessness problem at all stages.

Rather, it would be helpful to have one unifying strategy incorporated in a Homelessness Act, as in the United Kingdom, which addresses the issue at all stages. This legislation would affect not only the current homelessness service providers, but other services (such as Centrelink) which are crucial at earlier stages that may help prevent person from becoming homeless.

22. It is also important to note that while legislation plays a role in improving the quality of services for people who are homeless or at risk of homelessness, legislation alone is not enough. More needs to be done through community education to raise awareness about the causes of homelessness and address these underlying causes.

***The applicability of existing legislative and regulatory models used in other community service systems, such as disability services, aged care and child care, to the homelessness sector.***

23. The Australian Government's white paper on homelessness, *The Road Home*, identifies the implementation of new legislation to ensure people who are homelessness or at risk of homelessness receive quality services and adequate support to meet their needs<sup>19</sup>. In particular, the white paper identifies the need to amend the *Supported Accommodation Assistance Act 1994* and develop quality standards which could be based on existing legislation such as the *Disability Services Act 1986*.
24. NSWYLHRC seeks to ensure that the Australian Government takes a human rights approach to developing legislation that will underpin the planned reforms to policies and programs for people who are homeless in Australia. The existing legislative and regulatory framework for other community services have had variable success in adopting human rights principles and consequently in protecting and promoting the rights of vulnerable and disadvantaged people in the community.

<sup>19</sup> Australian Government, *The Road Home: A national Approach to Reducing Homelessness* (2008), 80.



25. Many people experiencing, or at risk of homelessness have complex needs and therefore may also require support from the disability, aged care, community care, children's services, mental health and health sectors.
26. It is important that, in developing legislation and regulations, the interface of different community service sectors is addressed to facilitate access based on needs for a range of services. In the past, the Supported Accommodation Assistance Program (SAAP) has been found to exclude people with complex needs including people who are alcohol and drug dependent; have mental illness; have challenging behaviours; and people with disabilities<sup>20</sup>. A key aspect of new legislation should therefore be to avoid exclusions of groups with particular need for services. The particular needs of some children in contact with homelessness services for children's and child protection services should also be considered.<sup>21</sup>

## Legislation

27. Legislation regarding the delivery of services in the disability, aged care, community care and child care sectors include but are not limited to:
- The *Disability Services Act 1986* (Cth)
  - The *Aged Care Act 1997* (Cth)
  - The *Home and Community Care Act 1985* (Cth)
  - State and Territory legislation for children's services and protection

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<sup>20</sup> NSW Ombudsman, *Assisting Homeless People: The need to improve their access to accommodation and support services, Final Report arising from an Inquiry into the Access to and Exit from Supported Accommodation Assistance Program*, May 2004.

<sup>21</sup> Productivity Commission, *Report on Government Services 2009*, 2009, [15.68].

28. Regulations and standards that are relevant include but are not limited to:

- *Home and Community Care National Service Standards* 1995 (Cth)
- *Disability Service Standards* 2007 (Cth) and state and territory disability service standards and performance monitoring frameworks
- State and territory children's service regulations and standards
- Principles (regulations) made under the *Aged Care Act* 1997<sup>22</sup>
- *National Service Standards for Mental Health Services* 1997 (currently under review)<sup>23</sup>

#### **Principles that can be adopted from existing legislative and regulatory models**

29. There are some important principles included in legislation and corresponding regulations and guidelines for services provided to people in the community and in facilities. Some of the principles that should be incorporated into legislation on homelessness are:

- The right to receive quality services and care
- The right to make complaints and provide feedback about services
- The right to access personal information that is held by the service providers
- The right to privacy and confidentiality
- Consumer participation in service design and service delivery
- Access to advocacy services
- Respect and human dignity
- Quality of life ensured through provision of services

<sup>22</sup> <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-legislat-aca1997-prindex.htm-copy2>

<sup>23</sup> <http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-servstds-toc>

- Cultural awareness of service providers
- Identification of special needs groups such as people from Indigenous communities, people born in non-English speaking countries, people who live in rural or remote areas, people who are financially or socially disadvantaged
- Increased focus on early intervention
- Integration with other service sectors

### **A human rights approach to legislative and regulative development and implementation**

30. Homelessness is a human rights issue. It has been recognised that there is a human rights approach to homelessness in Australia. However, there is a need to ensure that this discourse is translated into legislation and policies that protect and uphold the rights of individuals.<sup>24</sup>
31. The criticism that rights enshrined in legislation do not always translate into realisation of rights through service delivery has been made of other community service sectors and presents a significant challenge in the design of legislation, regulation and monitoring of services.
32. For example, it has recently been reported in NSW that the shortcomings of some services in meeting the needs of their clients results in limitations on individuals to exercise choice over their own lives and other basic human rights which are supposed to underpin disability services legislation and standards<sup>25</sup>. Similarly, the delivery of mental health services in Australia does not always reflect the approach to human rights that is stated in mental health legislation and national standards<sup>26</sup>.

<sup>24</sup> Dianne Otto and Philip Lynch, 'Housing, homelessness and human rights', (2004) 2 *Australian Journal of Human Rights*, 1-10

<sup>25</sup> NSW Ombudsman, *Review of Individual Planning in DADHC Large Residential Centres*, Report under s 11(c) of the *Community Services (Complaints, Review and Monitoring) Act 1993*, July 2009

<sup>26</sup> Bernadette McSherry, 'Human Rights and Mental Health: The Gap between Legislating and Implementing Human Rights', Conference Paper delivered at the Castan Centre *Human Rights 2005: Year in Review* conference, 2 December 2005 [www.law.monash.edu.au/castancentre/events/2005/mcsherry-paper.html](http://www.law.monash.edu.au/castancentre/events/2005/mcsherry-paper.html)

33. Civil society and advocacy groups have argued that a human rights approach to funding and service delivery is necessary and that without ensuring access to services and quality of services some people in Australia are denied basic human rights<sup>27</sup>.

34. In addition to service quality, service availability is an issue, particularly in rural and remote areas of the country. Unmet need across a range of community service sectors is a considerable problem particularly in light of increasing demand as the population ages<sup>28</sup>.

### **Monitoring and review**

35. Legislation, regulation and service standards developed in other community service settings should be reviewed by the Committee to ensure quality, transparency and accountability in the accreditation, monitoring and review of homelessness services. Some of the methodologies employed in other parts of the service system which should be considered are:

- Development of national service standards and performance indicators which measure quality of services and by which services can be measured
- Development of adequate system for complaints and promotion of a culture that encourages consumers to make complaints if they feel they have not had their needs met or have had their rights infringed by a service
- Community Visitors schemes to proactively monitor services against service standards and legislative requirements
- Investigation and reporting to Parliament by a monitoring body such as Ombudsman

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<sup>27</sup> People with Disability Australia Incorporated, *Submission: National Human Rights Consultation*, June 2009 accessed at [http://www.pwd.org.au/publications/SB120609\\_National\\_Human\\_Rights\\_Consultation.pdf](http://www.pwd.org.au/publications/SB120609_National_Human_Rights_Consultation.pdf) 30 July 2009

36. In conclusion, the NSWYLHRC makes the following recommendations:

- That there be a human rights based approach to the development of any legislation regarding homelessness
- That central to a human rights approach to the issue of homelessness is the active participation of homeless people and those at risk of becoming homeless in the development of provision of services
- That any legislation relating to homelessness be both reactive and proactive in its response
- That on its own, the introduction of new legislation relating to homelessness is not enough. A community awareness campaign about the underlying causes of homelessness and possible solutions should also occur
- Any new legislation needs to take account of the complex needs of people who are homeless and the possible compounding causes of homelessness.

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<sup>28</sup> Australian Institute of Health and Welfare, *Australia's Welfare*, 2007, 192; 139.