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Australian
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**Submission to the House of Representatives Standing Committee on
Family, Community, Housing and Youth**

Inquiry into Homelessness Legislation

ACOSS, August 2009

Introduction

The Australian Council of Social Service (ACOSS) is the peak council of the community services and welfare sector and the national voice for the needs of people affected by poverty, disadvantage and inequality.

ACOSS thanks the Standing Committee on Family, Community, Housing and Youth ('the Committee') for this opportunity to have input into the Inquiry into Homelessness Legislation.

The White Paper on Homelessness, *The Road Home*, included a Commonwealth Government commitment to 'implement new legislation to ensure people who are homeless or at risk of homelessness receive quality services and adequate support to meet their needs'.¹ ACOSS welcomes the announcement of this Inquiry to progress this White Paper commitment.

Existing homelessness legislation, the *Supported Accommodation and Assistance Act (SAA Act)*, is limited in scope to homelessness services funded under the Supported Accommodation and Assistance Program (SAAP). With a new direction in national homelessness policy set out in *The Road Home* and a new homelessness funding agreement, new legislation is necessary to underpin the new strategy and reflect the broader scope and increased funding flexibility of the new funding environment.

At the same time, it is important that the gains that have been made around homelessness law and regulation are not lost. Any legislative reform must achieve both stronger protections of the rights of those who are homeless or at risk of homeless and support quality, innovative and flexible service delivery.

The new funding environment poses some very complex regulatory challenges. The framework of a National Affordable Housing Agreement (NAHA) with supplementary national partnership agreements (NPs) raises questions about the appropriate scope of legislation. Should separate legislation be enacted with respect to each NP, or would a broad legislative framework which covers the scope of the NAHA and associated NPs be a more effective way to achieve policy and legal integration? On the other hand, how might the potential risks of integration be minimised, for example, the potential marginalisation of specialist homelessness services?

The federal nature of funding agreements raises further questions about which regulatory and quality-improvement processes are best conducted nationally, and which at state and territory level. The risk of complex, inconsistent and overlapping regulatory frameworks must be addressed. Most importantly, careful consideration must be given to which aspects of service delivery (and types of service) should best be dealt with in legislation and which through other means, for example, performance based funding agreements. Decisions also need to be made about the level of detail which should be contained in legislation as opposed to standards set out in legislative instrument and conditions in funding agreements.

¹ Australian Government, *The Road Home: A National Approach to Reducing Homelessness*, December 2008 at 62.

The above issues are canvassed in this submission and a number of recommendations are made for law and regulatory reform. However, the complexity and detail of these issues suggests that further consultations with the sector are required before a final legislative and regulatory framework is developed.

The purpose of homelessness legislation

The Government has indicated that any new homelessness legislation should build on the strengths of existing legislation to deliver consistent national standards, ensuring people who are homeless or at risk of homelessness receive quality services and adequate support to meet their needs.

The purpose of homelessness legislation should be to provide a legal framework which underpins the funding and delivery of services to people experiencing or at risk of homelessness, including prevention and early intervention and the role of mainstream services.

The framework should reflect the key components of the White Paper: 'turning off the tap', 'improving and expanding services' and 'breaking the cycle'. In pursuance of these objectives it should:

- Impose obligations on governments to prevent homelessness by addressing the structural drivers of homelessness;
- Impose obligations on mainstream service providers to prevent homelessness by identifying those at risk and intervening early;
- Protect the human rights of people experiencing or at risk of homelessness;
- Impose obligations on governments and service providers to provide quality services;
- Entrench government policy objectives in legislation to enhance accountability; and
- Establish accountability and monitoring mechanisms and processes by which government progress against its goals can be measured.

Objectives of homelessness legislation

The objectives of new homelessness legislation should be directed to the prevention of homelessness, the protection of the human rights of service users and to supporting the development of quality, flexible and innovative service delivery models.

The objects clauses in both the *Disability Services Act 1986* (Cth) and the *Aged Care Act 1997* (Cth) offer useful examples, including a range of principles which go to the quality of services, the rights of service users, the outcomes of service delivery, encouraging diverse and flexible service delivery and better integrating services with other parts of the service system. Obviously, these clauses will need to be adapted in recognition of the specific issues affecting homeless service users and the sector's federal funding arrangements.

New homelessness legislation should reflect the specific objectives and outcomes which are set out in the National Partnership Agreement (NP) on Homelessness. The NP frames

its objective as being that 'people who are homeless or at risk of homelessness achieve sustainable housing and social inclusion'. The NP also contains the following outcomes:

- (a) Fewer people will become homeless and fewer of these will sleep rough;
- (b) Fewer people will become homeless more than once;
- (c) People at risk of or experiencing homelessness will maintain or improve connections with their families and communities, and maintain or improve their education, training or employment participation; and
- (d) People at risk of or experiencing homelessness will be supported by quality services, with improved access to sustainable housing.

Notably, the achievement of outcomes (a) and (b) require governments and service providers to engage in prevention and early intervention activities. This should be reflected in legislation.

Section 5(4) of the current *SAA Act* recognises the importance of service innovation as a key feature of specialist homelessness service delivery. The *Disability Services Act 1986* includes a similar provision in section 3 ('Objects'). ACOSS recommends that a provision be included in new legislation modeled on these sections.

The principles underpinning homelessness legislation

Terms of Reference:

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

The *SAA Act* includes a preamble which reflects a strong social justice ethic and recognises the social and structural context in which homelessness occurs. It not only refers to the international human rights of those who are homeless but also more generally to 'their right to an equitable share of the community's resources'.

In doing so, the Act includes recognition by Parliament of 'the need to redress social inequalities and to achieve a reduction in poverty and the amelioration of the consequences of poverty for individuals.' ACOSS recommends that the ethos of the preamble in the *SAA Act* should be carried over to the new act.

In particular, the following principles stated in the preamble to the *SAA Act* should be retained in any new legislation:

- A recognition of the powerlessness and marginalisation experienced by people who are homeless or at risk of homelessness;
- The principle of empowerment in shaping responses to homelessness;
- Respect for dignity and the enhancement of self-esteem;
- Sensitivity to social and economic circumstances;
- Respect for cultural and religious diversity;
- Human rights, as contained in relevant international instruments; and
- Responsiveness to the individual needs of clients.

The new act should acknowledge the complex causes of homelessness, emphasise the importance of prevention and early intervention, commit to ensuring consumer participation and feedback and express a commitment to evidence-based policy and service delivery approaches and evaluation.

Notably, a reference to increasing social inclusion should be added to firmly link homelessness policy with the social inclusion agenda. Homelessness policy and legislation should be situated within this policy framework. This is consistent with the language of the NP on Homelessness in which the parties state their commitment to 'addressing the issue of social inclusion, including responding to Indigenous disadvantage':

'together with other elements of the broader COAG Reform Agenda, this Agreement will improve the social inclusion of homeless Australians'.²

Human rights

Human rights principles should be clearly articulated in the preamble to the legislation and should underpin the act. Further, specific human rights relating to people who are homeless or at risk of homelessness should be included in legislation so as to be enforceable. The relationship between homelessness legislation and a national human rights act is discussed below.

The scope of homelessness legislation

Terms of Reference:

2. The scope of legislation with respect to related government initiatives in the areas of social inclusion and rights.

The scope of the *SAA Act* is defined by reference to the SAAP funding program, it being 'an Act relating to the financial assistance to the States [and Territories] in connection with the jointly-funded program known as [SAAP], and for related purposes.'

The new federal homelessness funding agreement complements the National Affordable Housing Agreement (NAHA). The NP 'aims to facilitate significant reforms to reduce homelessness'. The new reform direction highlights need for a new legislative framework to underpin the NP.

The NP is broader in its scope than the previous SAAP Agreement. Its scope extends beyond the provision of crisis and transitional accommodation services and even beyond the range of homelessness specific services. The preliminaries to the Agreement recognise that 'reducing homelessness will require all governments to pursue improvements to a wide range of policies, programs and services.' It also notes the broader context of COAG reform within which the agreement is situated. More specifically, the NP sets out the three key strategies outlined in the White Paper (prevention and early intervention, breaking the cycle and creating a better connected service system).

² National Partnership Agreement on Homelessness, page 3.

As the NP does not specify inputs, it is not limited to the funding and management of homelessness specific services. Rather, it requires Governments to achieve a number of core outputs and pursue additional outputs. The roles and responsibilities of states are set out only in very general terms. However, there are a series of performance benchmarks and reporting requirements which state and territory governments must meet.

Significantly, the way that states and territories achieve these benchmarks is not stipulated, allowing them discretion in the allocation of funding to a range of programs in pursuance of the defined outputs and outcomes of the NP.

New homelessness legislation must reflect the new funding environment and be sufficiently broad in scope as to allow Governments to make strategic funding decisions, while ensuring accountability and progress towards achievement of outcomes under the NP and supporting a sustainable specialist homelessness sector.

These changes will require the drafting of a number of new legislative provisions with respect to the objects of the legislation (currently in section 5), the aim of the NP (currently in section 5(2)), the strategies to be pursued (currently in section 5(3)), the form of the agreement (section 6), the responsibilities of service providers (currently in section 7), the key matters to be dealt with in form of agreement (currently in section 8) and services dealt with by form of agreement (currently section 9 and 10).

Objects and aims

A new objects clause should be drafted to underpin the NP and reflect the broader ambit of the agreement, specifically including prevention and early intervention initiatives, the provision of medium and longer-term support, tenancy support and supported housing.

Section 5(4) of the *SAA Act* could be usefully retained as it contains some important principles on the relationship between parties and the purposes of the funding agreement. Importantly, it includes as a feature of the homelessness service system (formerly SAAP) that it:

- d) ... is to promote an image of people who are homeless that emphasises their human dignity and that fact that, irrespective of their current circumstances, they are entitled to opportunities that will enable them to participate fully in community life;
- e) ... is to encourage innovation in the provision of services to people who are homeless.

Human rights

The human rights of those who are homeless or at risk of homelessness should be protected in legislation.

The National Human Rights Consultation Committee (NHRCC) is due to report at the end of September. We understand that the timing of the Standing Committee's report is scheduled such as to enable it to consider the recommendations of the NHRCC.

In its submission to the NHRCC, ACOSS strongly recommended the enactment of the national human rights act which includes social, economic and cultural rights. The submission

focused on the right to housing as a case study in the potential impact of a national human rights act. An extract from ACOSS's submission on the right to housing is included in Appendix 1.

ACOSS is hopeful that the NHRCC will recommend to Government that it enact a national human rights act which includes economic, social and cultural rights. In the event that the Federal Government accepts this recommendation and includes the right to housing in a national act, new homelessness legislation should make reference to the rights included in the act and the act should be drafted so as to be consistent with a national human rights act.

Failing this – either in the event that a national human rights act is not enacted or is enacted but excludes social and economic rights - consideration should be given to the inclusion of a charter of rights for those who are homeless or at risk of homelessness in new homelessness legislation. Such a charter should include the right to housing and set out government responsibilities to progressive realisation of the right, as proposed in the ACOSS submission to the NHRCC attached. It should also include related rights, including access to services and Indigenous rights to active involvement in the development and delivery of health and housing programs that affect their communities.

A national human rights act should also contain protections against the criminalisation of behaviour associated with homelessness. In doing so, the Federal Government should respond to the recommendation of the Special Rapporteur on Housing that:

‘Australian governments should address homelessness and its causes as a priority. Moreover, laws that criminalise poverty and homelessness and those currently disproportionately impacting upon homeless people such as begging laws, public drinking laws and public space laws, should be revised and amended to ensure that fundamental human rights are protected.’³

Existing state and territory charters of rights could inform the development of a national charter. However, ACOSS recommends that a national charter be legally binding and enforceable, unlike existing state and territory charters.

Definition of homelessness

The definition of homelessness in the legislation should be broad enough to encompass those who are marginally or unsafely housed and be consistent with Government policy statements. The White Paper clearly sets out a broad definition of homelessness which includes primary, secondary and tertiary homelessness:

- Primary homelessness, such as sleeping rough or living in an improvised dwelling
- Secondary homelessness including staying with friends or relatives and with no other usual address, people in specialist homelessness services

³ Milaan Kothari, *Report of the Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living – Mission to Australia*, A/HRC/4/18/Add.2, 11 May 2007 at 33.

- Tertiary homelessness including people living in boarding houses, or caravan parks with no secure lease, and no private facilities, both short and long term.⁴

The definition of homelessness should be supported by a preamble which recognises the complex and dynamic causes of homelessness, including structural, social and individual causes.

The *SAA Act* defines homelessness to include 'inadequate access to safe and secure housing' and specifically recognises the inadequacy of housing which damages or is likely to damage a person's health or threatens a person's safety. There is support in the sector for the inclusion of these key aspects of the *SAA Act* definition into the new legislation.

Consideration should also be given to ensuring that the definition adequately reflects the causes, realities and dynamics of Indigenous homelessness. Keys Young have developed a definition of Indigenous homelessness which includes spiritual homelessness, overcrowding, relocation, transient homelessness.⁵

Government and service provider responsibilities under homelessness legislation

New homelessness legislation should set out the responsibilities of governments and service providers. It should clearly state the responsibilities of the Federal, State and Territory Governments and, where relevant, local Governments.

All governments

The preamble should state the responsibility of all levels of government to address the structural causes of homelessness, including through efforts to increase the stock of affordable housing.

The new act should impose an obligation on Federal, State and Territory governments to work together to meet the targets set out in *The Road Home*. It should also stipulate that funding should be directed to pursuing the three key strategies outlined in the White Paper, emphasising the importance of prevention and early intervention programs and the obligations of mainstream services.

The legislation should also include a protection, similar to that contained in section 10 of the *SAA Act* against funding being used by any government for programs previously funded by other funding agreements.

The Federal Government

Legislation should set out the responsibility of the Federal Government to develop the national homelessness policy direction, to promote linkages between homelessness services and other federally funded social support services, to coordinate national reporting

⁴ Australian Government, *The Road Home*, December 2008, citing C Chamberlain & D MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning', *Australian Journal of Social Issues*, 27 (4), 1992, pp. 274-97.

⁵ Keys Young, *Aboriginal and Torres Strait Islander Context and its possible implications for the Supported Accommodation Assistance Program*, Commonwealth of Australia, 1998.

and management and to monitor performance and financial management at the Commonwealth level. The Government should also ensure that programs or initiatives it funds under the legislation are subject to comprehensive evaluation at appropriate intervals.

More specifically, the Federal Government's commitments to homelessness policy targets in *The Road Home* should be embedded in the new legislation. This includes the commitment to offer all rough sleepers accommodation and to halve overall homelessness by 2020.

State and Territory Governments

Legislation should set out the responsibility of the State and Territory Governments to provide their component of funding, to develop and make public state and territory implementation plans (homelessness and housing strategies), to manage state/territory funding programs, to report on performance and financial management at the state level and to promote linkages between homeless and other state funded/administered social support services (for example, by entering into memoranda of understanding with other parts of the service system at state, regional and local levels).

The legislation should also require state and territory governments to develop 'no exits' strategies, including by ensuring that pre-release or discharge planning is conducted with respect to all those who are at risk of homelessness upon release or discharge.

Local Governments

Local governments could play an important role in developing local area homelessness strategies (particularly in rural areas, an output under the NP) and reforming planning rules to support the development of affordable housing. As suggested below, planning issues should be addressed in housing legislation (or in a housing and homelessness act were these legislative frameworks to be integrated. See discussion below.)

Service providers

The new act should set provide a framework for the responsibilities of both specialist homelessness services and mainstream services, including government and non-government services. More detailed service standards should be set out in legislative instrument and subject to consultation with the sector and service users.

There are a number of broad obligations which might be appropriate for inclusion in legislation and supplemented by further detail in service standards. For example, all services – government and non-government, specialist and mainstream – should have a responsibility to broker long-term or permanent accommodation for clients which is affordable, appropriate, accessible, well-located and safe.

Mainstream services should be required to make reasonable efforts to seek to identify and assist service users who are homeless or at risk of homelessness and intervene to prevent homelessness or link the person with housing and relevant support services. A 'reasonableness' criteria would recognise resource constraints.

The responsibilities of homelessness service providers are currently set out in section 7 of the *SAA Act*.

Responsibilities of service providers

A form of agreement specified in an instrument under section 6 must include provisions that are directed towards assisting service providers, over time, to fulfil the following responsibilities:

- a) to help people who are homeless to resolve crisis, and to achieve greater independence, through the following:
 - (i.) case management;
 - (ii.) assessment and referral;
 - (iii.) if appropriate—early intervention and re-establishment of family links;

- b) to further the integration into the community of people who are homeless by increasing access to the following:
 - (i.) employment;
 - (ii.) education and training;
 - (iii.) health services (including mental health services);
 - (iv.) disability and rehabilitation services;
 - (v.) children's support services;
 - (vi.) income support;
 - (vii.) other appropriate opportunities and resources;

- (c) to help people who are homeless to obtain long-term, secure and affordable housing and accommodation by providing access to a range of options suitable to their needs;

- (d) to complement other services available to people who are homeless.

A new responsibilities clause should include a broader range of possible responsibilities and/or activities. Specifically, additional responsibilities which should apply to mainstream services should include activities related to the prevention of homelessness and early intervention for those at risk of homelessness.

Both the *Disabilities Services Act* and the *Aged Care Act* set out the responsibilities of service providers by reference to service standards. The *Aged Care Act* also sets out a number of general responsibilities in the text of the legislation which include providing services of an appropriate quality (in compliance with the relevant standards and with respect to user rights), and maintaining an adequate number of staff and to meet a range of responsibilities to respect user rights (in Part 4.3 of the Act). The Act enables the development of accreditation standards within quality of care principles addressing a range of matters, including:

- (a) health and personal care of care recipients;
- (b) the lifestyle of care recipients;
- (c) safe practices and the physical environment in which residential care is provided;
- (d) management systems, staffing and organisational development relating to the provision of residential care.⁶

⁶ Section 54.2.

The *Aged Care Act* also requires service providers to establish complaints resolution mechanisms (section 56.4). Under the *Disability Service Act* these requirements are contained in the standards (Standard 7) rather than the legislation.

To recognise the resource constraints faced by non-government service providers and their dependence on government funding, a clause similar to that contained in section 3 of the *Disability Services Act 1986* should be included in homelessness legislation. This section states that ‘in construing the objects and in administering this Act, due regard must be had to the limited resources available to provide services and programs under this Act.’

The *Aged Care Act* provides for the imposition of sanctions in the event that service providers do not comply with their responsibilities under certain parts of the Act which relate to quality of care, user rights and accountability. These sanctions can include revoking or suspending the license of a provider, restricting approval to provide services, restricting payment of the subsidy and requiring repayment of grants paid, among other available sanctions. Consultations should be conducted with the sector in the development of any sanctions provisions in the legislation with recognition of the different funding environment affecting the homelessness sector (highly dependent on government funding) compared to the aged care sector (which also receives significant contributions from service users) and the fact that homeless services are jointly funded by the Commonwealth and State and Territory governments which complicates enforcement.

The relationship between homelessness and housing legal frameworks

Legislation can play an important role in improving service quality and protecting the rights of those who are homeless by imposing obligations on governments and service providers and enshrining service user rights in law. However, broader outcomes for the homeless can only be achieved if measures are taken to increase the supply of affordable housing.

Under current legislative arrangements, laws pertaining to homelessness and housing are contained in separate legislation, the *SAA Act* and the *Housing Assistance Act 1996 (HA Act)*. Each act relates to a specific funding agreement – the *SAA Act* to the SAAP Agreement and the *HA Act* to the Commonwealth State Housing Agreement (CSHA).

The preamble to the current *HA Act* states the desirability of all governments working in cooperation with non-government organisations that provide housing and related assistance, including ‘organisations that have responsibility for the provision of services for people who are homeless or at risk of homelessness’.⁷ It also describes the provision of housing assistance as ‘essential to reduce poverty and its effects on individuals and the community as a whole’. Section 4(2) sets out the aim of the act and includes the goal of targeting housing assistance to those most in need, ‘including the homeless and those discriminated against in the private rental market.’ As these examples demonstrate, the *HA Act* recognises the links between homelessness and housing systems but only in very general terms.

Relevantly, the preamble to the *HA Act* describes housing and shelter as ‘basic human needs’ and refers to relevant international human rights instruments recognised by

⁷ Preamble clause (k).

Australia. The legislation refers to 'rights and responsibilities' at various points but does not specify or define them.

The new NAHA 'provide[s] a framework for governments to work together to improve housing affordability, reduce homelessness and reduce Indigenous housing disadvantage'. It is complemented by a number of NPs on homelessness, social housing and Indigenous housing.

As a result of these funding and policy changes, there is an opportunity to integrate the legislative frameworks and clearly define the relationship between, and respective responsibilities of, the housing and homelessness systems. Consideration should be given to whether this policy alignment is best achieved in separate or combined legislation. Some of the challenges to integration have been raised above. The question of how to effectively regulate very different kinds of services (for example, specialist homelessness services compared to mainstream services and housing services) would be critical in this process, as would the need to recognise the complex causes of homelessness, including housing issues but extending to a range of other individual, social and structural factors.

At the very least, it would appear that the *HA Act* should be amended to better align with the NAHA and any new homelessness legislation. This would support the emphasis on integrated service responses, including for example, the 'no exits' strategy in the White Paper which relies on the availability of affordable housing.

A broad housing and homelessness legislative framework (whether in one or two acts) might also include:

- rules relating to the allocation of 'social housing' and the National Rental Affordability Scheme to meet the twin objectives of housing those in greatest need and achieving a sustainable social mix;
- more specifically, rules relating to the priority allocation of housing to the homeless population;
- regulation of evictions from affordable housing where the tenant is at risk of homelessness;
- housing affordability benchmarks and targets for different types of housing (deeply subsidised affordable rental housing, National Rental Affordability Scheme and affordable home ownership programs);
- affordable housing quotas and planning requirements;
- national tenancy legislation; and
- national boarding house tenants' rights and service standards.

The relationship between homelessness legislation and the broader regulatory environment

Terms of Reference

The Committee is to make inquiries into the principles and service standards that could be incorporated into [homelessness legislation], building on the strengths of existing legislation, particularly the [SAA Act].⁷

The Committee shall give particular consideration to:

3. The role of legislation in improving the quality of services for people who are homeless or at risk of homelessness.
4. The effectiveness of existing legislation and regulations governing homelessness services in Australia and overseas.
5. 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. [Emphasis added]

While most states have developed SAAP service standards, there is currently no unified national regulatory framework for the delivery of homeless services and no mandated system of accreditation or quality assurance.⁸ There is also no national system through which the rights of service users can be protected and enforced.

ACOSS supports the development of appropriate national homelessness service standards. We recommend that fundamental human rights issues and core features of quality service be contained in legislation, with other more detailed service quality issues addressed in service standards (through legislative instrument, as under the *Disability Services Act 1986*). Legislation should also set out the consequences of non-compliance with the standards, for example, a declaration of failure to meet the standards being issued by the Minister which sets out the action to be taken.⁹

There are a number of issues which would need to be carefully considered in the development of service standards:

- Standards should give service users better confidence in the services they use with mechanisms for ensuring that services meet minimum standards and for objectively assessing service quality (clearly defined).
- Service standards and accreditation processes should not create undue additional complexity and cost for service providers, particularly small providers, keeping in mind that many services regard existing regulation (across the service system, not just in homeless service delivery) as inconsistent, inappropriate, unduly complex, resource intensive. Many organisations report high compliance costs.
- National standards and accreditation processes should be consistent with existing state and territory systems, to minimise duplication and complexity for services.

⁸ Steve Jeanneret, 'Exclusion in SAAP Services', 17(1) *Parity* 26 February 2004 at 27.

⁹ See, for example, the *Disability Services Act 1986*, section 14G. Again, given the federal funding agreement, consideration should be given to whether this function should be performed by a Federal or State Minister.

- Strong and transparent grievance and complaint procedures should be included in standards to protect the rights of service users. A general obligation on governments to establish such systems at national and state levels should be set out in legislation, with more detailed responsibilities of service providers contained in service standards. Consideration should be given to the establishment of an independent national body or office holder to determine complaints, similar to the role of the Aged Care Commissioner under the *Aged Care Act*.¹⁰
- Issues faced by organisations required to comply with a range of quality assurance and other compliance requirements should be addressed, for example, organisations in receipt of multiple funding sources.
- Standards should require organisations to inform service users of their rights by providing plain language information to service users and displaying rights charters publicly.
- Service standards should require that 'service exclusion' (whether through eviction, or blacklisting) should be a last resort with attempts made to locate alternative accommodation, except where the threat to staff or other service users makes this inappropriate.
- Service standards should require services to support the participation of service users in decision-making including by ensuring service-user representation in governance processes.

Importantly, service providers and people who are homeless or have been homeless should be closely involved in the development of service standards. We note that the Government has engaged consultants to consult with the sector about these issues.

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

The strengths and weaknesses of existing homelessness legislation have been discussed throughout the submission. Key features of the *SAA Act* which should be retained have been suggested and a number of reforms proposed. The importance of retaining provisions in the *SAA Act* relating to the collection of national data should also be stressed.

In this section, we consider the British and Scottish legislative frameworks and suggest a number of features which might be adapted to the Australian context.

Since 1977, British legislation has imposed an obligation on local authorities to assist people at imminent risk of homelessness who are classed as being in 'priority need' by taking reasonable steps to prevent them from losing existing accommodation.¹¹ The definition of 'priority need' has evolved with changes in government and policy. This category has generally always been, and continues to be, narrower than the category of eligible service users under the *SAA Act*. It is important that the imposition of service obligations on Australian government and non-government service providers does not restrict eligibility for services and is supported by appropriate funding to meet responsibilities.

¹⁰ Section 95A.1.

¹¹ Hal Pawson, 'Local Authority Homelessness Prevention in England: Empowering Consumers of Denying Rights?', 22 (6) *Housing Studies* 867-883, November 2007 at 867.

Legislation introduced in Britain in 2002 requires local authorities to take a more assertive approach and devise 'prevention-focused' homelessness strategies.¹² It also introduced a duty for local authorities to carry out homelessness reviews, formulate strategies to combat homelessness and work with other agencies to prevent and deal with homelessness.

The Scottish Parliament introduced legislation in 2001 which committed it to ending homelessness within 10 years. The legislation includes the right to be immediately housed and the right to long-term supportive housing as long as is needed for priority groups.¹³ Like the British act, the Scottish law makes a distinction between intentional and unintentional homelessness, with permanent accommodation offered to those deemed 'unintentionally' homeless and probationary tenancies offered to people judged to have made themselves homeless 'intentionally'.

Under Scottish law, individuals can bring legal action if their rights are not being respected and they have a right to be housed during the dispute resolution process. Local authorities are to notify the applicant of eligibility determinations and provide reasons. Applicants can then seek review of decisions as to their eligibility for assistance.

The Scottish legislation also requires local authorities to develop strategies to respond to homelessness including forming partnerships with other organisations and social sectors. It includes high level service standards.

ACOSS suggests that a number of features of the British and Scottish legislation should be adapted to the Australian context and included in new homelessness legislation, including:

- Government commitments to high-level homelessness targets.
- The obligation on service providers to assist those who are homeless, or at risk of homelessness, and eligible for assistance. The obligation should be framed in recognition of the resource constraints of non-government service providers and their dependence on government funding. This means that the obligation should be framed not as an absolute obligation to provide assistance (for example, accommodation) but to provide the assistance sought or, if unable to do so, to link individuals up with assistance provided by another service or agency.
- The obligation of relevant levels of government (Federal, State and Local) to develop homelessness strategies with an emphasis on prevention and early intervention.
- The obligation on all levels of government and non-government agencies to seek to work with other parts of the service system.
- High level service standards, supplemented by more detailed standards contained in legislative instrument.

However, other aspects of British and Scottish legislation fall far below existing Australian legislative standards and would represent retrogressive policy developments here. ACOSS would oppose any moves toward limiting assistance through distinctions between 'intentional' and 'unintentional' homelessness or through a narrow definition of 'priority need'.

¹² Pawson at 868.

¹³ Eric S. Tars and Caitlin Egleson, 'Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States', Volume XVI, Number 1, Winter 2009, *Georgetown Journal on Poverty Law and Policy* at 187.

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.

Reference has been made to existing legislative and regulatory models in other community service systems throughout this submission. Although there are some useful aspects of these models which might be replicated in homelessness legislation and regulation, some important differences between these areas of service delivery should also be kept in mind. In the first instance, the homeless population is highly disadvantaged and its needs are both complex and specific. Arguable, homeless services require a greater degree of flexibility in the way that services are delivered in light of the diversity of the homeless population and the specialised nature of services. Further complexities arise from the fact that residential aged care and disability employment services are directly funded by the Commonwealth, such that sanctions or other mechanisms can be directly enforced.

Appendix 1

Extract from ACOSS Submission to the National Human Rights Consultation, June 2009, pages 45-49.

What difference would a national human rights act make? A case study on the right to housing.

The right to housing provides a useful case study in the content, interpretation, implications and effects of social and economic rights as it is one of the most developed social and economic rights, with a significant body of judicial interpretation and academic commentary, including two general comments adopted by CESCR.

The level of housing need in Australia

More than 100,000 people are homeless on any given night in Australia. Among these are approximately 50,000 who are under 25 and 10,000 who are children.¹⁴ More than 50% of those who approach crisis accommodation services on any particular day are refused accommodation as services are at capacity.¹⁵

The number of people experiencing homelessness is rapidly increasing and is likely to continue to do so, as a result of the economic downturn.

Many homeless people experience violations of their human rights to non-discrimination, social security, health, security of person, privacy and adequate housing.¹⁶

Nearly one million low income Australians are experiencing housing stress, spending more than 30% of their income on rent or other housing costs. There is a serious shortage of affordable housing, with approximately 180,000 people on public housing waiting lists across the country¹⁷ and an annual shortage in the construction of new housing of more than 30,000 dwellings.¹⁸

As these statistics reveal, Australia faces some significant housing affordability challenges, with high levels of housing stress, a significant homeless population and long public housing waiting lists. While these statistics do not amount to human rights violations in themselves, they do place a strong onus on governments to show that appropriate steps are being taken to remedy the situation.¹⁹

¹⁵ SAAP IV Evaluation Report at 93.

¹⁶ Dianne Otto and Philip Lynch, 'Housing, homelessness and human rights', [2004] *Australian Journal of Human Rights* 1.

¹⁷ AIHW, *Public Rental Housing 2006-07: Commonwealth State Housing Agreement national data report*, at x and AIHW, *Australia's Welfare 2007* at 237.

¹⁸ AIHW, *Housing Assistance in Australia*, 2008.

¹⁹ Dan Nicholson, *The Human Rights to Housing*, Produced for the Housing is a Human Right Project, 2004 at 7.

The content of the right and the nature of government obligations

The right to adequate housing is a component of the right to an adequate standard of living, contained in Article 11 of ICESCR.

In its General Comments, CESCR has identified a number of factors essential to the realisation of the right to adequate housing, including legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability, accessibility; location and cultural adequacy.²⁰

Further, CESCR has specifically noted that security of tenure should guarantee protection against forced eviction and that evictions should not result in a person becoming homeless.²¹

Government obligations under the right to housing have been interpreted to require a *significant level of public spending* on affordable housing to meet the requirement that the maximum of available resources must be directed to protection of the right. Although there are no clear benchmarks as to what constitutes adequate funding, Canada was criticised by the UN Committee on Social, Economic and Cultural Rights in 1993 for spending only 1.3% of its government expenditure on social housing.²²

In interpreting the requirement to pursue the progressive realisation of the right 'by all appropriate means' the Committee on Social, Economic and Cultural Rights has emphasised the importance of a *national housing strategy*.

The right has also been interpreted to require governments to provide *effective remedies* for those who are homeless or at risk of homelessness and to take steps to the maximum of its resources to progressively eliminate homelessness.²³

As a component of the right to an adequate standard of living, the links between housing and other rights must be understood. The conceptualisation of homelessness as a human rights issue highlights some of these links as it can be considered to bring into play the right to security of the person, the right to freedom from discrimination, the right to privacy, the right to freedom of expression, the right to freedom of association, the right to vote, the right to social security and the right to health, in addition to the right to housing.²⁴

A joint-government responsibility?

Responsibility for the implementation of the right to adequate housing is shared between the Commonwealth and the State and Territory Governments. This division of responsibilities is set out in the National Affordable Housing Agreement (NAHA) which has replaced the Commonwealth State Housing Agreement (CSHA) and the Supported Accommodation Assistance Program (SAAP) Agreement.

²⁰ Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and responding to homelessness as a human rights violation', Volume 4 *Melbourne Journal of International Law* [2003].

²¹ Lynch and Cole citing CESCR *General Comment 7* at [1] and [16].

²² Dan Nicholson at 18.

²³ Dianne Otto and Philip Lynch, 'Housing, homelessness and human rights', [2004] *Australian Journal of Human Rights* 1.

²⁴ Lynch and Cole.

Current protection of the right to housing

The right to housing is not explicitly protected in Australian legislation.

Further, individuals have no access to the UN individual complaints mechanism with respect to the right to housing, although the Optional Protocol to ICESCR will be open for signing in September.

Commonwealth-state housing agreements are supported by legislative frameworks set out in the *Housing Assistance Act 1996* (Cth) and the *Supported Accommodation and Assistance Act 1994* (Cth).

The preambles to each of these acts explicitly recognises that the goals of these programs are to be understood in light of international human rights standards, including the ICESCR, the ICCPR, CERD, CEDAW, CROC, the UDHR and the *Declaration on the Elimination of Violence against Women (1993)*.

However, although the legislative frameworks provide user rights, they do not provide rights of access to housing.²⁵

Gaps in the protection of the right to housing

There remains no clear legal protection of the right to housing in Australian law and a number of housing rights issues remain unaddressed.

A recent report by the UN Special Rapporteur on the Right to Housing found that Australia has 'failed to implement its legal obligation to progressively realise the human right to adequate housing ... particularly in view of its responsibilities as a rich and prosperous country'.²⁶ In particular, the Special Rapporteur highlighted the retrogressive nature of some of the former's Government's housing policy measures, for example, its cuts in expenditure to public housing and homelessness services. The Special Rapporteur highlighted the fact that such cuts are permitted only in exceptional circumstances of economic crisis. Their implementation during a period of strong economic growth and large budget surpluses could not, therefore, be justified.

Australia has also been criticised for the inadequacy of its protections against evictions and unfair rent increases. In 2000, the Committee on Economic, Social and Cultural Rights raised concerns about this issue, particularly in urban centres which were "experiencing very low rental property vacancy rates with intense competition".

The inadequacy of Commonwealth Rent Assistance, as one component of the housing assistance policy framework, has also been identified as an area in which Australia's obligation to direct 'maximum possible resources' to advance the right to housing may not be being met. Many low income households in receipt of CRA continue to experience housing stress due to the inadequacy of the payment, its failure to keep pace with market rents and the failure to take relative housing costs in different housing markets into account.

²⁵ Dan Nicholson at 7.

²⁶ Milaan Kothari, *Report of the Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living – Mission to Australia*, A/HRC/4/18/Add.2, 11 May 2007 at 2.

The current Government has substantially increased affordable housing expenditure and introduced some innovative affordable housing programs. The national homelessness white paper, *The Road Home*, signals a new direction in national housing policy with a much greater emphasis on early intervention and prevention, and is supported by additional funding to homelessness services of \$800 million over 4 years. Investment in social housing has also been substantially increased, with \$6.2 billion invested in social housing infrastructure as part of the Government's stimulus package. Investment of \$600 million in the National Rental Affordability Scheme (NRAS) to deliver an additional 50,000 affordable housing dwellings will also improve access to housing. Further, *Time for Action*, the report of the National Council to Reduce Violence against Women and their Children is an important step in improving the Government response to violence against women and children, and will inform the development of a National Plan to Reduce Violence Against Women.

These measures are all very welcome and go some way to meeting the Government's obligations under the right to housing. A national human rights act, including a right to housing as a component of the right to an adequate standard of living, would be an important further step in the protection of the right to housing.

What difference would a national human rights act make?

A national human rights act which included the right to housing could make a real difference to the lives of disadvantaged and marginalised Australians.

It would enable individuals to bring a direct action in the courts where the right to housing has been infringed by a public authority, for example, because of denial of access to housing on discriminatory grounds, because the condition of public housing is unsafe or in the case of an unfair eviction.

In such cases, a national human rights act would enable the court to find that a public authority had acted inconsistently with human rights and provide remedies, for example, ordering the relevant housing authority to take a particular action.

The court could also declare that a relevant law, for example requiring public authorities to act in a particular way, was incompatible with the national human rights act.

Parliament would then be required to respond to the declaration of incompatibility and substantively engage with the human rights questions arising.

Perhaps more importantly, a national human rights act would require Government to turn its mind to the impacts of any new legislation or policy on the right to housing and publicly articulate these impacts and its position. A 2008 report by the Victorian Equal Opportunity and Human Rights Commission on the operation of the Victorian Charter highlights some positive changes to public sector management and culture resulting from the Victorian charter of rights.

Reports from agencies and other sources suggest that the understanding of human rights in the Victorian public sector has been amplified and brought into sharper focus by the Charter. The Charter has encouraged employees to see human rights as relevant to their work, acted as a trigger for reform in some areas,

enhanced existing ethical frameworks and provided a new framework for independent statutory authorities to strengthen and reinforce the obligations of service providers.²⁷

Obviously, to maximise the indirect or cultural effects of a national human rights act, strong institutional support and resourcing will be required, including direct education regarding the impact of human rights on a broad range of social and community services, as discussed below.

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²⁷ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: the 2008 report on the operation of the Charter of Human Rights and Responsibilities*, 2009 accessed at <http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf> at page 5