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PILCH Homeless Persons' Legal Clinic submission to the House Standing Committee on Family, Community, Housing and Youth

Inquiry into Homelessness Legislation

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1. Executive Summary

1.1 Overview

This submission is made by the PILCH Homeless Persons' Legal Clinic (***HPLC***) to the Federal Parliament's House Standing Committee on Family, Community, Housing and Youth (***the Committee***) in response to its inquiry into homelessness legislation (***the Inquiry***). The Committee's broad terms of reference are to inquire into and report on the content of homelessness legislation. The Committee has invited public comment and submissions in response to its terms of reference.

The impetus for the Inquiry process has come from the Australian Government's White Paper on Homelessness – *The Road Home: A National Approach to Reducing Homelessness* – which proposed that legislation would 'underpin the national response to homelessness, setting standards to deliver the best quality services possible.' This legislation will essentially replace the *Supported Accommodation Assistance Act 1994* (Cth) (***SAA Act***), which has governed the provision of funding to homelessness specific services for the past 15 years.

Where appropriate, the HPLC's submission addresses the key questions of the Inquiry process, but is not limited to them in addressing the important overarching question of how to improve and strengthen the current legislative response to homelessness in Australia. This submission principally considers the need to situate the problem of homelessness within a human rights framework. Using the human rights framework as a starting point, this submission recommends that legislative mechanisms based on human rights principles and norms must be adopted to ensure the most effective response to tackle the homelessness crisis in Australia.

In our view, the implementation of such a framework is necessary not only to discharge Australia's human rights obligations at international law, but as the foundation for any integrated approach to ending the homelessness crisis. As this submission clearly illustrates, approaching the issue of homelessness within a human rights framework creates positive outcomes by enhancing social policy, improving social services and providing an effective tool for advocacy.

This submission proposes a paradigm shift in Australia's legislative and policy approach to homelessness. It recommends that in order to respond to the current homelessness crisis, the Government must introduce a Federal *Homelessness Act* that goes far beyond the mere funding framework provided by the SAA Act. This new Act must enshrine the right to adequate housing as recognised in international human rights law and incorporate other rights based mechanisms such as core minimum standards for homelessness services, participation models and funding that is linked to individual outcomes.

We consider that new legislation that recognises the right to adequate housing will:

- emphasise Parliament's commitment to the progressive realisation of the right to adequate housing;
- establish within Government and the wider community the paramount importance of addressing homelessness as part of the Government's wider social inclusion agenda; and
- give practical effect to Australia's existing human rights commitments recognised through the ratification of relevant international treaties.

1.2 Recommendations

The HPLC makes the following recommendations for reform:

Recommendation 1: That the Federal government recognise that homelessness is a human rights issue and that any effective response to homelessness must start from a human rights approach.

Recommendation 2: That the Federal government enshrine the right to adequate housing in a new federal Homelessness Act.

Recommendation 3: that the Homelessness Act be underpinned by the values of fairness and non-discrimination, participation and empowerment of the poor and disadvantaged, holistic, and transparency and accountability.

Recommendation 4: that the Homelessness Act be underpinned by standards of availability, accessibility, acceptability and quality.

Recommendation 5: That the new federal Homelessness Act be modelled on the Scottish legislative model.

Recommendation 6: That the Federal government develops a tailored legislative approach to the issue of homelessness rather than transposing an existing community services legislative framework such as the aged care or disability services model.

Recommendation 7: that the new Federal Homelessness Act recognise Australia's obligation to enable the progressive realisation of the right to adequate housing.

Recommendation 8: that the new Federal Homelessness Act includes a right of access to emergency housing and related services for those defined as homeless.

Recommendation 9: that the new Federal Homelessness Act retain the current definition of homelessness contained in the SAA Act

Recommendation 10: that the new Federal Homelessness Act prohibit the eviction of any person from government funded accommodation into homelessness

Recommendation 11: that the statutory office of Commissioner for Adequate Housing be created.

Recommendation 12: that the statutory office of Housing Ombudsman be created.

Recommendation 13: that the new Federal Homelessness Act entrenches the participation of people with an experience of homelessness in homelessness service provision.

2. Introduction

'The right to housing goes further than the right not to be subjected to arbitrary or forced eviction. It also involves a duty on the State to take effective action to enable its people to meet their need for a safe and secure home where they can live with dignity. That is not achieved easily or overnight, but… it is now internationally recognised that States must take appropriate action to ensure the realisation of this right.'

Nelson Mandela, Former President of South Africa[1]

The increase in homelessness in Australia over the past decade has coincided with a period of unprecedented prosperity. This 'poverty gap' was identified by former Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari (***the Special Rapporteur***), when he visited Australia in 2006. The Special Rapporteur's 2007 report to the United Nations on his Mission to Australia, condemned Australia, 'a rich and prosperous country' for its regressive policies that resulted in increasing homelessness, '*reductions in public housing stock, soaring private rental rates, [and] an acknowledged housing affordability crisis*'.[2] The Special Rapporteur concluded that Australia had failed to implement the human right to adequate housing and was in the midst of 'a serious national housing crisis'.[3] The comments of the Special Rapporteur demonstrate that past Australian Governments have not fulfilled their duty to ensure realisation of the right to adequate housing. As a result, there are currently over 105,000 Australians without access to and enjoyment of a safe and secure home where they can live with dignity.

The current Australian Government recently recognised the urgent need to address the extent of homelessness in Australia in its White Paper on Homelessness – *'The Road Home: A National Approach to Reducing Homelessness'* (***the White Paper***).[4] While the White Paper acknowledges that homelessness is not just an issue of housing, it fails to take the next step and recognise that addressing homelessness is a matter of ensuring that the human rights of all individuals are adequately protected and promoted. The government's failure to address the issue of homelessness within a human rights framework creates significant gaps in its overall response.

In the HPLC's view, the Government must go much further than the White Paper and adopt a human rights approach to tackling homelessness in Australia. One of the most important steps in this process is the enactment of a Federal Homelessness Act, which enshrines an enforceable right to adequate housing for people experiencing or at risk of homelessness. This legislation should take a broad and holistic approach to solving

[1] Nelson Mandela, *Foreword*, in Scott Leckie (ed), *National perspectives on housing rights* (2003), xvii.

[2] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, *Mission to Australia* (11 May 2007) A/HRC/4/18/Add.2, 32.

[3] Ibid, 2.

[4] Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness* (2008).

homelessness through a human rights framework, enabling the Government to develop and deliver more responsive, efficient, effective and empowering homelessness policy and services. It would also provide a tool for advocacy, action and accountability, to ensure that homeless people are able to live with human dignity and fully participate in and contribute to society.

In Australia, people experiencing homelessness are subject to multiple and intersectional human rights violations which go far beyond the issue of housing. These include violations of the right to dignity and respect, the right to participation, the right to liberty and security, the right to freedom from cruel, inhuman or degrading treatment, the right to freedom from discrimination, the right to privacy, the right to social security and the right to the highest attainable standard of health. For example, on a day-to-day basis people experiencing homelessness are not able to adequately exercise their right to vote, are regularly discriminated against on the basis of their homelessness and are often forced to live their private lives in public. Accordingly, this submission recommends that the Government must go further than the current Inquiry process and work with State and Territory governments to review and amend *all* laws, policies and practices that impact disproportionately and discriminatorily on people experiencing homelessness, and in particular residential tenancy laws, anti-discrimination laws, public space laws and electoral laws.

It is important to note that all comments and recommendations contained in this submission are consistent with the Federal Government's commitment to human rights,[5] and its social inclusion agenda.[6] As this submission reveals there is a strong positive correlation between the Government's respect for human rights and its success in addressing homelessness and poverty, with the realisation of people's human rights ensuring the underlying enabling conditions of their social inclusion.[7] In the HPLC's view, the Federal Government will only achieve its 'social inclusion' agenda and solve the issue of homelessness if it also works to protect, fulfill and realise the human rights of all Australians, particularly the most marginalized and disadvantaged members of our society. The relationship between the human rights framework and the Federal Government's social inclusion agenda (particularly as they relate to homelessness) is therefore mutually reinforcing and complementary; one cannot be achieved without the other.

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[5] See eg Commonwealth of Australia, *Australia's Common Core Document, incorporating Australia's Fifth Report under the ICCPR and Fourth Report under the ICESCR* (2007). For a discussion of the Government's policy position, see Australian Labor Party, *National Platform and Constitution*, Chapter 13 – Respecting Human Rights and a Fair Go for All, principle 4.

[6] Attorney General, Rob McClelland MP, Speech at 2008 Non-Government Organisation Forum on Domestic Human Rights (10 June 2008).

[7] See *ICCPR*, article 2. See also CESCR, *General Comment 15: The Right to Water*, [17]–[29], UN Doc E/C.12/2002/11 (2002); CESCR, *General Comment 12: The Right to Adequate Food*, 69, [15], UN Doc HRI/GEN/1/Rev.5 (2001); and CESCR, *General Comment 13: The Right to Education*, 84, [47], UN Doc HRI/GEN/1/Rev.5 (2001). See generally, Amartya Sen, *Development as Freedom* (1999) 49, 87, 90 and 144. See also Dianne Otto, 'Linking Health and Human Rights: What are the Possibilities?' (Paper presented at the International Symposium on Human Rights in Public Health: Research, Policy and Practice, The University of Melbourne, 3-5 November 2004) 11.

It is time for the Australian Government to put its words into action. To ensure improved human rights protections, and to create socially inclusive services and policies, for people experiencing or at risk of homelessness the Government must '*enable its people to meet their need for a safe and secure home where they can live with dignity*'.[8] We believe that this is best be achieved by strengthening the legislative framework in relation to homelessness by introducing a Federal Homelessness Act, which enshrines an enforceable right to adequate housing; establishes human rights monitoring and accountability mechanisms; and sets human rights principles and benchmarks aimed at achieving high quality service delivery.

[8] Mandela, above n 1.

3. Background and context

3.1 Overview of the HPLC

The HPLC is a project of the Public Interest Law Clearing House (***PILCH***) and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.[9] The HPLC has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 14 outreach locations that are accessed already by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.[10] Since its establishment in 2001, the HPLC has assisted over 4500 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights.

The HPLC operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic

[9] See http://www.pilch.org.au.

[10] Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, St Kilda Crisis Centre, St Luke's (Bendigo), Loddon Mallee Housing Service (Bendigo) and Homeground Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth, Freehills, Stella Stuthridge and Associates, Arnold Dallas McPherson and the legal departments of Goldman Sachs JBWere and the National Australia Bank.

process. The HPLC recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (***CAG***). The CAG was established by the HPLC in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the HPLC with a view to enhancing and improving the quality of the HPLC's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the HPLC but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

3.2 Definition of homelessness

There is general consensus that the 'cultural definition' of homelessness, developed by Chamberlain and MacKenzie,[11] should be adopted when considering the nature and extent of homelessness in Australia. This definition proposes that the concept of homelessness be defined by reference 'to shared community standards about the minimum accommodation that people have the right to expect in order to live according to the conventions of contemporary life.'[12] In Australia, the accepted minimum community standard is understood to be 'a small rented flat', with the minimum required amenities, such as a bedroom, living room, bathroom and kitchen.[13] This minimum standard provides a benchmark for measuring and monitoring homelessness and inadequate housing in the Australian context.

In broad terms, the 'cultural definition' of homelessness has led to the identification of three categories within the homeless population:[14]

a) **primary homelessness** – refers to people without conventional accommodation living on the streets, in deserted buildings, railway carriages, under bridges, in parks etc (i.e. 'rough sleepers');

b) **secondary homelessness** – refers to people moving between various forms of temporary shelter including friends, emergency accommodation, refuges and hostels; and

c) **tertiary homelessness** – refers to people living permanently in single rooms in private boarding houses without their own bathroom or kitchen and without security of tenure. They are homeless because their accommodation does

[11] Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues*; and Chris Chamberlain and Guy Johnson, 'The Debate about Homelessness' (2001) 36(1) *Australian Journal of Social Issues* 35, 39.

[12] Chris Chamberlain, *Counting the Homeless: Implications for Policy Development*, Australian Bureau of Statistics (2 December 1999), 49.

[13] Ibid.

[14] Chamberlain and Johnson, above n 11.

not satisfy the requisite conditions of the minimum community standard.[15] Medium to long-term residents of caravan parks would, in most circumstances, be considered to be experiencing tertiary homelessness.

The Australian Bureau of Statistic (***ABS***) has adopted the definition of homelessness proposed by Chamberlain and MacKenzie.[16]

Chamberlain and Mackenzie's 'cultural definition' of homelessness accords with the definition of homelessness provided in section 4 of the SAA Act, which provides that:

1) a person is considered to be homeless if she or he has inadequate access to safe and secure housing; and
2) a person is considered to have inadequate access to safe and secure housing if the only housing to which the person has access:
    a) damages, or is likely to damage, the person's health; or
    b) threatens the person's safety; or
    c) marginalises the person through failing to provide access to:
        i) adequate personal amenities; or
        ii) he economic and social supports that a home normally affords; or
    d) Places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

Nevertheless, the definition of homelessness under the SAA Act appears to be slightly broader than the Chamberlain and Mackenzie definition, as it does not purport to segment the concept of homelessness into different and specific 'types'. Instead, the definition of homelessness under the SAA Act sets out a number of factors to be considered when determining whether the housing is safe and secure, including: adequacy, health and hygiene, safety, security, affordability, and location in relation to social supports and structures. These factors are strikingly similar to the seven indicia used to determine 'adequacy' of housing under the right to adequate housing in international human rights law.

The definition of homelessness under the SAA Act is, in fact, consistent with the definition enunciated by the United Nations Committee on Economic, Social and Cultural Rights (***CESCR***), which provides in effect that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity. Given its consistency with the CESCR definition of the right to adequate housing, the definition of homelessness under the SAA Act is adopted for the purposes of this submission.

[15] Chris Chamberlain, Guy Johnson and Jacqui Theobald, *Homelessness in Melbourne: Confronting the Challenge* (February 2007), Centre for Applied Social Research, RMIT University, 13 – 14.

[16] Chamberlain and MacKenzie, above n 11; Chamberlain, above n 12.

3.3 Causes of homelessness

The causes of homelessness are complex and varied.[17] Generally, they include:

- **structural factors**, for example: poverty, severe financial hardship and lack of access to adequate income support, unemployment, lack of affordable housing etc;
- **economic and social policy causes**, for example: economic and housing strategies that focus on homeownership models and housing as a commodity, lack of access to education opportunities and resource allocation to the welfare sector; and
- **individual causes**, for example: domestic and family violence, mental illness, lack of access to appropriate health care and support, drug and alcohol dependency, gambling and legal problems.

In many cases, these causes are intersectional and interrelated.[18] Given the multiple causes of homelessness, it is understandable that the experience of homelessness affects a diversity of people from different backgrounds, social groups and across ages. However, there are some social groups that are particularly vulnerable to homelessness. People from socially marginalised groups including indigenous Australians, women, children and youth, people with a mental illness, and refugees are all disproportionately affected by homelessness.[19] The intersectional and interrelated causes of homelessness, coupled with its discriminatory impact on certain social groups, illustrates that responding to homelessness is not just a matter of improving houses and services for the homeless. Homelessness is a complex issue that gives rise to multiple and interdependent human rights concerns and raises difficult social problems. These factors must all be addressed in any effective response to homelessness.

3.4 Extent of homelessness in Australia

The ABS enumerated that on Census night in 2006 there were almost 105,000 people experiencing homelessness across Australia, with over 20,500 of those in Victoria.[20] This national figure includes over 16,300 people sleeping rough or in squats, almost 20,000 in crisis accommodation and refuges (up from approximately 14,000 in 2001), almost 21,600 in boarding houses, and nearly 47,000 people staying temporarily with friends or relatives.[21] A further 17,500 people across Australia live temporarily in caravan parks.[22]

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[17] Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 142. See also Kothari, above n 2.

[18] Ibid, 14.

[19] Human Rights and Equal Opportunity Commission, *Homelessness and Human Rights* (2008), 2 - 6.

[20] Australian Bureau of Statistics (ABS), *Counting the Homeless 2006* (2008), 3-4.

[21] Ibid, 21.

[22] Ibid, chapter 7. It is important to note that Census data only captures those people who respond to the Census survey and identify as homeless. Research shows that, for example, while many young people and indigenous people

Between 2004 and 2008, the number of people accessing homelessness specific services, under the Supported Accommodation Assistance Program (***SAAP***), increased by almost 30 per cent.[23] Approximately 202,500 people are now accessing these services each year.[24] The growing rate of homelessness has placed significant strain on social services, resulting in 57 per cent of people requiring accommodation being turned away.[25] In other words, more than one in two people experiencing homelessness who seek accommodation from relevant services are turned away *every day*, due to lack of beds.[26]

3.5 Responses to homelessness in Australia

The Australian government recently recognised the urgent need to address the extent of homelessness in Australia and has developed two key initiatives in response: the National Affordable Housing Agreement (***NAHA***)[27] and the White Paper.[28]

The NAHA was established by the Council of Australian Governments (***COAG***). It provides a package of investment for housing, including specific and additional funding towards homelessness, social housing and Indigenous housing.[29] The central aim of the NAHA is to develop a whole-of-government approach to providing accessible, affordable, safe and sustainable housing for all Australians.[30] The funding strategy set out in the NAHA underpins the policy commitments contained in the White Paper.

The White Paper is an ambitious policy document, containing targets and goals that are worthy of much praise.[31] The two headline goals of the White Paper are:

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may fall within the above definition of homeless in that they have no fixed address and seek transitory accommodation from friends and extended family, they may not identify as homeless. It is therefore reasonable to assume that the actual number of people experiencing homelessness exceeds the official figure.

[23] The 2004 – 2005 SAAP National Data Collection Annual Report indicated that 157,200 people had accessed SAAP services in that financial year. By 2007 – 2008 the number of people accessing SAAP services had risen to 202,500. These figures reveal an increase of 28.8% in the number of people accessing SAAP services since 2004 – 2005. Refer to Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2004 – 2005* (2006), xvii; Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2006 – 2007* (July 2008), ix; Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2007 – 2008* (April 2009), vii.

[24] Australian Institute of Health and Welfare, *Women, children and teens, heavy users of SAAP*, Media Release (24 April 2009), available at http://www.aihw.gov.au/mediacentre/2009/mr20090403.cfm. See also Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2007 – 2008*, April 2009.

[25] Australian Institute of Health and Welfare, *Demand for SAAP Accommodation by homeless people 2006 – 2007: Summary*, Bulletin 64, October 2008, 2.

[26] Ibid. See also Australian Institute of Health and Welfare, *Demand for Somewhere to stay continues to exceed available places for Australia's homeless*, Media Release (10 October 2008), available at http://www.aihw.gov.au/mediacentre/2008/mr20081010.cfm.

[27] See http://www.fahcsia.gov.au/sa/housing/progserv/affordability/affordablehousing/Pages/default.aspx. See also other funding initiatives that fall under the NAHA, i.e. Social Housing Initiative; Housing Affordability Fund; National Partnership on Social Housing; National Rental Affordability Scheme; National Housing Supply Council.

[28] Commonwealth of Australia, above n 4.

[29] Council of Australian Governments Meeting, *Communiqué* (29 November 2008).

[30] See further http://www.fahcsia.gov.au/Pages/default.aspx.

[31] Ibid. See also Josh Gordon, *Rudd's $6 Billion Homeless Plan*, the Sunday Age, 21 December 2008, 1.

- Halving overall homelessness by 2020; and
- Offering accommodation to all rough sleepers who need it by 2020.

These goals are underpinned by targeted programs that focus on early intervention, prevention and a more connected and responsive service system that efficiently moves people from crisis accommodation into stable, secure and supported housing. The idea behind these programs is clear; we must create better, smoother and more supportive pathways out of homelessness. These impressive goals are to be commended. Nevertheless, the White Paper fails to address the issue of homelessness within a human rights framework, which the HPLC contends is vital.

4. Situating homelessness within a human rights framework

4.1 The Australian Government's commitment to human rights

The Federal government has obligations under international law to respect, protect and fulfil the human rights found in a number of international human rights treaties to which Australia is a party, including:

- International Covenant on Civil and Political Rights (***ICCPR***);
- International Covenant on Economic, Social and Cultural Rights (***ICESCR***);
- Convention on the Elimination of All Forms of Discrimination Against Women (***CEDAW***);
- International Convention on the Elimination of All Forms of Racial Discrimination (***CERD***);
- Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (***CAT***);
- Convention on the Rights of the Child (***CRC***); and
- Convention on the Rights of Persons with Disabilities (***CRPD***).

Australia's ratification of these instruments commits the Government, at the Federal, State and local levels, to the full implementation of the human rights contained in each treaty. For example, article 2(1) of *ICESCR* provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[32]

Australia has obligations under international law in relation to each of these human rights treaties to which it is a party. By ratifying these treaties the government has agreed to take steps to achieve full implementation of the rights therein.[33] While all levels of government in Australia are responsible for ensuring that all people enjoy human rights, ultimate responsibility lies with the Federal government even when the means for protecting such rights falls under the jurisdiction of State and Territory governments.[34] For example, art 28 of the ICESCR states that it extends 'to all parts of federal states without limitations or exceptions.'

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[32] *ICESCR* article 2. Refer to United Nations Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations (Art. 2, par.1) (General Comment 3)* 1990.

[33] See *Vienna Convention on the Law of Treaties* (1969): Article 26 'Pacta sunt servanda' - Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[34] Dianne Otto and David Wiseman, 'In search of 'effective remedies': Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) *Australian Journal of Human Rights* 2. See also Rowan McRae and Dan

International human rights law is often described as imposing three types of duties on States in relation to all human rights: obligations to *respect*, *protect* and *fulfil*.[35] The Australian government's failure to perform any one of these three duties in relation to a particular human right will mean that it is in violation of that right. For example, in the context of the government ensuring realisation of the right to adequate housing, these three duties can be explained as follows:

- The obligation to *respect* human rights requires that government's refrain from interfering directly or indirectly with the enjoyment of human rights. In respect of the right to adequate housing, governments must not prevent or impair the right of access to housing and would be in violation of the right if it engaged in arbitrary forced evictions.[36]
- The obligation to *protect* human rights requires that governments prevent third parties (private actors) from interfering with the enjoyment of rights. This duty requires that the government take positive steps by, for example, creating regulation to restrain the abuse of human rights by individuals and organisations. In relation to the right to adequate housing, this obligation requires that governments ensure that tenancy laws prohibit arbitrary and unreasonable evictions.
- The obligation to *fulfil* human rights requires that government's take positive steps to promote[37] and support the realisation of human rights for everyone,[38] particularly marginalised and disadvantaged groups. Accordingly, the Australian government must take all appropriate legislative, administrative, budgetary, judicial and other measures to facilitate full realisation of the right to adequate housing.[39]

4.2 The right to adequate housing

The most established and comprehensive statement of the right to adequate housing is that which is contained in art 11(1) of the ICESCR.[40] Article 11(1) requires that governments:

Nicholson, 'No place like home: homelessness in Australia and the right to adequate housing' (2004) *Australian Journal of Human Rights* 3.

[35] Ibid.

[36] Geoff Budlender, 'Justiciability and the Right to Housing – the South African experience' in Scott Leckie (ed), *National Perspectives on Housing Rights* (2003) 207 – 219.

[37] Sometimes the notion of 'promote' is considered a separate duty – consider the typology applied by Otto and Wiseman, above n 34.

[38] Ibid.

[39] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691, ¶ 6.

[40] Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing* (1991).

> Recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions…

The right to adequate housing is a component of the right to an adequate standard of living and is considered to be 'of central importance for the enjoyment of all economic, social and cultural rights.'[41] The right to adequate housing should be interpreted broadly to apply to all people and should be understood to mean 'the right to live somewhere in security, peace and dignity.'[42]

According to the CESCR, at a minimum, housing must be affordable, accessible to disadvantaged groups, habitable, culturally appropriate, provide occupants with security of tenure and afford access to appropriate services, materials, facilities and infrastructure, including employment, health care, schools and other social facilities. [43]

Article 2(1) of the *ICESCR* obliges Australia to take concrete steps, using the maximum available resources, to progressively fulfil economic, social and cultural rights. The steps taken must be targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures, including budgetary prioritisation.[44] Retrogressive measures, such as cuts in funding to homelessness assistance services, public housing or health care, are generally prohibited by international law and may only be justified by exceptional circumstances which do not exist in Australia following over a decade of substantial economic growth and prosperity.[45] Further, even while Australia is developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, it is under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including in relation to the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.[46]

For further detail about the content of the right to adequate housing, the HPLC endorses the submission made to the present Inquiry by the Human Rights Law Resource Centre.

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[41] Ibid.

[42] Ibid.

[43] CESCR, *General Comment 4: The Right to Adequate Housing,* UN Doc HRI/GEN/1/Rev.5 (2001) 22.

[44] CESCR, *General Comment No 3: The Nature of States Parties' Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

[45] Ibid; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 4–5, [15]–[18].

[46] CESCR, *General Comment No 3: The Nature of States Parties' Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

4.3 Homelessness and human rights violations

As discussed in **section 3.3** above, the causes of homelessness in Australia are complex and varied. However, they are generally acknowledged to include poverty, unemployment, inadequate access to affordable housing, family violence, physical and mental health issues, legal issues, evictions.[47] In many cases of homelessness, these causes are intersectional and inter-related. It is well established that through these underlying causes and consequences of homelessness people who experience it are subject to multiple and intersectional human rights violations.[48]

Between March and May 2009, the HPLC consulted with over 140 individuals experiencing or at risk of homelessness about human rights in Australia as part of its response to the National Human Rights Consultation. The resounding response of participants at those consultations was that the human rights that matter most to them are economic, social and cultural rights including: the right to adequate housing; the right to access appropriate health care, the right to education; and the right to social security. Many participants considered that these rights (which entitle them to access basic necessities such as food, clothing and shelter) are most important and enable them to live with dignity and security. However, participants also stated that they experience violations of their economic, social and cultural rights most frequently. Many participants expressed that violations of their human rights occur on a daily basis and that therefore, in reality, these rights do not exist for them. As one participant said,

> *'Our human rights don't exist. We are homeless and it (is) looked upon as our fault. Sometimes it is other times not, but if someone keeps falling should we pick them up or walk straight over them, which is what's being* [sic] *going on too much.'*

Participants recognised that the rights to work, an adequate standard of living, housing, food, health and education have a direct and immediate bearing on their experiences of homelessness and poverty.[49] Participants highlighted the right to adequate housing as one of the most important human rights, enabling them access to and enjoyment of all other associated rights. On a practical level, people felt that if they had adequate housing they could access other rights such as the right to work, the right to education and the right to the highest attainable standard of health. For example, a home gives a person a place to sleep, be warm, eat and

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[47] See generally, Australian Bureau of Statistics, *Counting the Homeless 2001* (2003); Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2003–04* (2005); Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004).

[48] Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008). These human rights violations include, violations of the right to dignity and respect, the right to participation, the right to liberty and security, the right to freedom from cruel, inhuman or degrading treatment, the right to freedom from discrimination, the right to privacy, the right to social security, the right to the highest attainable standard of health and, of course, the right to adequate housing.

[49] CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (10 May 2001) E/C.12/2001/10 ¶ 1.

wash, which then allows them the very basic necessities to engage in social activities. In other words, the right to adequate housing, which is derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights and civil and political rights. As one participant said, 'I should have the right to eat, sleep, work, be educated and be treated with respect and dignity, like the majority of the population.'

Australia's failures in this area have not gone unnoticed by the international community. The Special Rapporteur's 2007 report concluded that Australia had failed to implement the human right to adequate housing, and lacked a complaint mechanism for alleged violations of housing rights.[50] He went on to urge that:

> Australian legislation should explicitly incorporate human rights and the right to adequate housing, and the recommendation on housing and land made to the Australian authorities by various United Nations human rights bodies should be fully implemented.[51]

However, for many participants, indeed for people experiencing homelessness throughout Australia, the reality is that they do not enjoy a right to adequate housing. For people experiencing homelessness it is one of the most commonly violated human rights. In fact, the Special Rapporteur has described homelessness as 'the most visible and severe symptom of the lack of respect for the right to adequate housing.'[52]

There are over 105,000 people in Australia experiencing homelessness. For these people, who are amongst the most marginalised and disadvantaged members of society, human rights do not exist. The Australian Government must take immediate action to rectify this situation and improve human rights protections for those who need it most. The Government must begin by reversing the most severe symptom of homelessness; it must address the continuing denial of the right to adequate housing.

Recommendation 1:

That the Federal government recognise that homelessness is a human rights issue and that any effective response to homelessness must start from a human rights approach.

[50] Ibid, 7.

[51] Ibid, 2.

[52] Kothari, above n 2.

4.4 Adequate housing on the ground?

In the HPLC's recent consultations with people experiencing homelessness,[53] participants were unsurprisingly vocal about what is well established fact – that housing in both the public and private markets in Australia is unaffordable, inadequate and there is not enough to meet the needs of the most disadvantaged and marginalised. Over 85 per cent of participants at the consultations indicated that accommodation and housing services in Australia were either inadequate or very inadequate. As one participant said, *'public housing is extremely ineffective with an unacceptably long waiting list, even for those in dire need of housing.'*

Participants discussed the current difficulties many experienced accessing adequate crisis and transitional accommodation. One participant recounted his difficulty accessing housing and support services when he became homeless a few years ago, *'I tried to get help on countless occasions. I tried and failed to get help. I was unemployed, had my slip. Breakdown, it was breakdown. I needed support and I got none.'* Another participant stated that he was *'unable to secure housing for myself for reasons like mental illness probably and lack of money. I spent weeks in my car and sleeping on people's couches. I went to a housing service but they couldn't find immediate accommodation.'*

Forty-four per cent of the participants at the consultations indicated that they were currently on a waiting list for public housing. Of the people on the waiting list, 46 per cent of participants had been on the waiting list for more than 2 years. Disturbingly, 7 per cent said they had been on the waiting list for more than ten years. The appalling waiting period for public housing in Australia was highlighted by one participant who said, *'the waiting list means it's 15 – 20 years before you get public housing, I'll be dead and buried by then…', and another who said 'Applied for public housing after 9 years [on the street] – then told I will have to wait another 9 years'.*

At the same time, for people who are 'lucky' enough to be granted public housing, the quality and standard of accommodation often leaves much to be desired. Over 80 per cent of the participants stated that public housing in Australia is either inadequate or very inadequate.

Many people on the waiting list for public housing are forced into boarding houses and rooming houses. This was very common amongst workshop participants, given that more than 25 per cent of the participants at the consultations had been homeless for more than 10 years. Unfortunately, many participants indicated that they feel unsafe and are at risk of violence or theft in boarding houses and rooming houses. As one participant said, *'rooming houses are blight on humanity. The hell*

[53] These consultations were conducted between March and May 2009, in response to the National Human Rights Consultation process. Comments by participants at those consultations are contained within the HPLC's two submissions to the National Human Rights Consultation Committee, entitled: *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia* and *Righting the Wrongs of Homelessness*. These submissions can be accessed by the Committee online at www.pilch.org.au/hplc.

that these places represent and the suffering and misery they engender and profit from is a disgrace.' Another participant said, '*The major issue is effective, fair [and] readily available housing. I know of many people who have opted out of the system and who prefer homelessness rather than living in boarding/ rooming houses.'*

4.5 Benefits and positive outcomes of a human rights framework

Even leaving aside the governments clear legal imperative in relation to human rights, there are clear benefits to adopting a human rights approach. In particular, it would provide Government with a clear strategy and policy position for responding to homelessness. This strategy is underpinned by the fundamental features of the human rights normative framework including; the notion of accountability, the principle of universality, non-discrimination and equality, the principles of participation and empowerment, and recognition of the interdependence and indivisibility of rights.[54] These essential characteristics of a human rights approach operate to 'set standards'[55] and function as a 'model'[56] for government decision-making, law reform, policy development, programmatic design and service delivery.[57]

Another fundamental component of a human rights approach - meaningful and genuine participation of homeless people in the development of laws, policies and programs that affect them,[58] - is essential in promoting empowerment and a sense of value and independence among marginalised and vulnerable members of the community.[59] As one participant said, '*Everyone should have the right to have their say*'. Participation not only enhances an individual's personal autonomy and self-confidence, it also results in more effective and targeted policies and programs.[60] One participant summed it up as follows: *'Government needs to start listening to the silent voices of the marginalised.'*

The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand that enshrine human rights protections in law, is that a human rights approach to the development by Governments of laws, policies and

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[54] Ibid.

[55] Maria Foscarinis, 'Homelessness and Human Rights: Towards an Integrated Strategy' (2000) 19 *St Louis University Public Law Review* 327, 347.

[56] Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *A Human Rights Based Approach to Development* (undated).

[57] See also Philip Lynch 'Homelessness, Human Rights and Social Inclusion' (2005) 30:3 *Alternative Law Journal* 116, 117.

[58] Deena R Hurwitz 'Lawyering for Justice and the Inevitability of International Human Rights Clinics' (2003) 28 *Yale Journal of International Law* 505, 516.

[59] Lynch, above n 57. See also Office of the High Commissioner of Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

[60] Ibid. Refer also to Office of the High Commissioner of Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002). See also Scott Leckie 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 81, 106; and Anne Gosley, *Stop and Listen… Don't' Assume – Why the Homeless People's Association was formed* (2003) Paper presented at the 3rd National Homelessness Conference 'Beyond the Divide.

programs can have significant positive impacts. Some of the benefits of using a human rights approach, which are relevant to Australia, include:[61]

- 'A significant, but beneficial effect upon the development of policy';[62]
- Increased scrutiny of government, which improves transparency and accountability mechanisms;[63]
- 'The language and ideas of human rights have a dynamic life beyond the courtroom.' For example, individuals can and do use the language and concepts of human rights to challenge unfair treatment and to negotiate improved service delivery;[64]
- Human rights are an important practical tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality beyond simply anti-discrimination;[65]
- Human rights principles can help decision-makers see seemingly intractable problems in a new light;[66]
- Awareness raising and education about human rights empowers people to take action, and leads to better public service delivery and outcomes;[67]
- Improved public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empower policy development processes and more individualised, flexible and responsive public services.

The recent introduction of the *Charter of Human Rights and Responsibilities Act 2006* (***the Charter***) in Victoria has similarly resulted in 'new ways of thinking' within government, including by giving people greater say in decisions that affect them.[68]

The HPLC has had positive experiences engaging with and utilising the Charter to advocate for its clients. For example, the frequently cited case study below was the HPLC's first Charter matter.

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[61] See generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

[62] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), United Kingdom, 19.

[63] Ibid.

[64] British Institute of Human Rights, above n 61.

[65] Human Rights Law Resource Centre, *A Human Rights Act for All Australians* (May 2009), 68. See also British Institute of Human Rights, above n 61.

[66] British Institute of Human Rights, above n 61.

[67] Ibid.

[68] Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (2009), 3.

A pregnant single mother with two children was living in community housing. She was given a 'no cause' eviction notice, which didn't provide any reasons as to why she was required to vacate the property and did not allow her to address the landlord's concerns. The HPLC used the Victorian Charter to negotiate with her landlord to prevent an eviction into homelessness, and an alternative arrangement was reached.

The examples described above clearly demonstrate that legislative human rights instruments have far greater impact at the 'front end' by influencing policy development and service implementation, rather than as an avenue for litigious remedy. In other words, legislative human rights instruments provide mechanisms for a less litigious and less reactive framework that is more focused on individuals. This serves to address some of the underlying, systemic causes of human rights violations such as homelessness. This was recognised by one participant, who said, '*if people knew about human rights they'd be better protected and you'd be better treated by government.*'

4.6 Conclusion

The HPLC contends that approaching homelessness from a human rights perspective should be the starting point for any effective national response aimed at tackling the issue and promoting social inclusion.[69] Such action is necessary not only because it would discharge Australia's obligations at international law, but because it would result in the following positive outcomes:

- more effective homelessness policy;
- enhanced homelessness services;
- a tool for advocacy and improved government accountability; and
- community empowerment, education and a reduction of the social stigma attached to homelessness.

This submission has identified empirical and anecdotal evidence which shows that there is currently no protection of the right to adequate housing. The Australian Government must take positive steps to introduce such protections, including the introduction of a new Federal Homelessness Act.

[69] Human Rights and Equal Opportunity Commission, above n 48.

5. Legislating to protect the right to adequate housing

5.1 The role of legislation

The HPLC contends that approaching homelessness from a human rights perspective should be the starting point for any effective national response aimed at tackling the issue and promoting social inclusion. However, adopting a human rights framework is not enough; Australia must enshrine these human rights in law.

Legislation has in important role to play in society generally. For example, it is an important tool to provide the general public with direction and guidance about appropriate conduct and behaviour. It is also necessary to draw boundaries around activities that infringe on the rights of others, require people to act in certain ways, ensure proper processes and promote accountability, fairness and good governance.

Legislation also has an extremely important role in improving the quality of services for people experiencing or at risk of homelessness. Legislation can operate to protect and safeguard the interests and rights of some of the most marginalised and disadvantaged members of the community. This can, in turn, influence political discourse, government decision-making and the development of laws, policies and programs. Improved protection of the rights and interests of people experiencing homelessness would also result in fairer processes, quality services and the promotion of substantive equality for some of the most disadvantaged members of society.

Only when the right to adequate housing and other inter-related rights are recognised and enshrined in law, will national goals and targets for the reduction of homelessness sit within a robust policy framework.

5.2 A new Federal Homelessness Act

It is the HPLC's strong submission that the Australian government must introduce a Federal Homelessness Act that enshrines an enforceable right to adequate housing and gives effect to the policy objectives set out in the White Paper. Indeed, the HPLC advocated the introduction of such a statute in its submission to the White Paper, *Righting the Wrongs of homelessness.*[70] Therefore, as well as clearly setting out government's obligation to progressively realise the right to adequate housing, and providing effective remedies for individuals whose rights have been violated, this legislation should provide a national model of best practice (based on human rights concept) for homelessness services to deliver accessible, affordable, acceptable and quality services for individuals.

[70] Available at http://pilch.org.au/Assets/Files/FINAL%20HPLC%20submission%20-%20HR%20Consulation%20-%2015%20June%202009[1].pdf.

Recommendation 2:

That the Federal government enshrine the right to adequate housing in a new federal Homelessness Act.

People experiencing homelessness will continue to be the subject of human rights violations unless the Government enacts a Federal Homelessness Act, which builds on the existing legislative framework in the SAA Act.

Enshrining the right to adequate housing in a Federal Homelessness Act would require government to take reasonable and effective steps to progressively realise the right to adequate housing in Australia, including through its seven aspects, as identified by the CESCR: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. To ensure that the right is practically realised, the legislation must also provide effective remedies for individuals whose rights are violated. The HPLC also submits that the new Federal Homelessness Act could specify action that would be a violation of the right to adequate housing. For example, it could provide that that no person be *arbitrarily* evicted by the government (ie from government funded accommodation) into homelessness.[71]

It should be remembered that it is government, and not individual service providers, which must be ultimately responsible and accountable for tackling homelessness. The legislation must therefore ensure that service providers are not punished for failures to comply with standards where that failure is caused solely by insufficient funding or support from the government.

5.3 Effectiveness of the current homelessness legislative framework

The HPLC submits that existing legislation is ineffective in addressing the causes of homelessness and fails to provide adequate support to people who are experiencing homelessness.

While the SAA Act recognises human rights principles in its preamble, it falls short of incorporating these rights into law and providing effective remedies to those whose rights are violated. The SAA Act does not provide any clear mechanism by which human rights standards must be achieved and there is no clear correlation between the funding mechanisms in the legislation and the need to ensure that services have the effect of realising human rights, including the right to adequate housing.

Although SAAP service standards exist, and might be expected to require accommodation of a standard adequate under human rights law, they do not ensure that SAAP accommodation meets the standard of adequacy under human

[71] The reasonableness of an eviction should be established based on whether the person evicted has been consulted and reasonable attempts made to secure or provide alternative accommodation.

rights law. First, although the content of the standards differs across states, none of them provide guarantees of accommodation that are adequate. Second, the nature of rights provided under service standards is insufficient to protect the human rights that should be associated with housing assistance. Under the SAA Act, particular groups of people may be excluded from SAAP services, including people:

- who use, are dependent on, or are effected by drugs and/or alcohol;
- who exhibit behaviour or who have previously exhibited violence or other challenging behaviour;
- affected by mental illness; and
- with a disability, including people with physical disability, intellectual disability or acquired brain injury.

In addition, user rights are often conditional on fulfilment of responsibilities. Where these are not fulfilled, rights are regularly withdrawn. The effect of this is that those rights that appear to be guaranteed under the service standards are often not protected. For example, people can be evicted from SAAP services and then refused referral to another service in such a way as to force them on to the streets. Thirdly, accountability mechanisms to ensure existing service standards are enforced are inadequate. In many cases, service standards are enforced only by internal grievance procedure, or to an external community based services, with no right to appeal to an independent administrative or judicial body, and no external monitoring of the effectiveness of these internal procedures or compliance with service standards. As one participant said, '*The Government needs to start looking deeper into the services, accommodation and help that is available. Investigate how they treat us on a whole. It would serve as a good wake up call, I think, as well as hopefully they would work to make the changes that [are] so obviously necessary.*'

While many of the principles behind the SAA Act remain relevant today, the HPLC submits that it must be transformed into a Federal Homelessness At that takes a broad and holistic approach to solving homelessness through a human rights framework and creates an enforceable mechanism and effective remedies to ensure the promotion and protection of human rights for people experiencing homelessness.

5.4 Principles to underpin the legislative framework and homelessness service delivery

In the HPLC's view, human rights principles and norms should underpin the delivery of services to Australians who are homeless or at risk of homelessness. These norms should form the directive principles for the homelessness sector within a Federal Homelessness Act.

Cassandra Austin has acknowledged the benefit of adopting a human rights framework when responding to homelessness:

> Utilising the human rights discourse when referring to homelessness allows the articulation of rights for the individual and the collective, recognition of the commensurate responsibility incurred with each right, and most importantly highlights the link between the aspiration and the reality through standards, benchmarks and indicators.[72]

In addition to the responsibilities imposed on government, the legislation should provide clear direction and guiding principles to ensure that government, its agencies and service providers work within a human rights framework and seek to promote the dignity of individual clients and ensure their participation in decision and policy making that affects them. In the HPLC's view, such guiding principles should be grounded in the human rights framework and should remain flexible enough to apply to the broad range of services which those experiencing homelessness require.

The main features of a human rights approach to combating poverty and homelessness issues include:

- **fairness and non-discrimination** – this requires that policies, programs and services be targeted at the alleviation of disadvantage and the elimination of discrimination.[73]
- **participation and empowerment of the poor and disadvantaged** – this requires the active and informed participation of key stakeholders in the formulation, implementation and monitoring of policies, programs and services that directly affect them. It also requires the promotion of capacity-building activities to empower people.[74]
- **holistic** – this requires that policies, programs and service have regard to the civil, economic, social and cultural determinants of wellbeing of affected persons. The interrelatedness and indivisibility of human rights must be recognised. This approach requires the adoption and promotion of broad, multisectoral and interdisciplinary strategies to advance more systematic and integrated approaches to policy, program and service development, thereby enabling more holistic solutions to issues of homelessness and poverty.[75]
- **transparency and accountability** – this requires that policies, programs and services identify the persons or entities responsible for

[72] Cassandra Austin 'Rights for the Homeless' (1996) Australian Housing and Urban Research Institute, Working Paper No. 5, 1.

[73] Austin, above n 72, 2. Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) 17-18.

[74] Austin, above n 72. Office of the High Commissioner for Human Rights, above n 73.

[75] Austin, above n 72. Office of the High Commissioner for Human Rights, above n 73, 13 - 25.

implementation, sets targets or indicators to measure progress, and establishes accessible, transparent and effective mechanisms to ensure accountability.[76]

Recommendation 3: that the Homelessness Act be underpinned by the values of fairness and non-discrimination, participation and empowerment of the poor and disadvantaged, holistic, and transparency and accountability.

5.5 Standards to underpin the legislative framework and homelessness service delivery

The human rights framework also provides criteria against which policies, programs and services can be measured. For example, housing should be *available*, *accessible*, *acceptable* and of sufficient *quality* to ensure the realisation of a core minimum or essential level of rights.[77] The HPLC considers that the Federal Homelessness Act should incorporate these requirements as service standards, which the homelessness sector must work to achieve. These service standards may include:

- **Availability:** functioning and habitable crisis, short and long term housing and accommodation options must be available in sufficient quantity to meet the minimum essential standards of the right to adequate housing under international law.
- **Accessibility:** crisis, short and long term housing and accommodation options must be accessible to everyone without discrimination. Accessibility has a number of overlapping dimensions including: non-discrimination; physical accessibility (i.e. accommodation must be within safe physical reach for all sections of the population and requires adequate access to accommodation for persons with disabilities and special needs); economic accessibility (i.e. accommodation must be affordable); and eligibility (i.e. qualifying conditions for housing must be reasonable, proportionate and transparent).
- **Acceptability:** crisis, short and long term housing and accommodation options must be culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to promote improved health and wellbeing of residents.

[76] Austin, above n 72. Office of the High Commissioner for Human Rights, above n 73, 15 - 16.

[77] CESCR, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (11 August 2000) E/C.12/2000/4 ¶ 12.

- **Quality:** crisis, short and long term housing and accommodation options must be of good quality and residents must have access to support services of appropriate quality.

Recommendation 4: that the Homelessness Act be underpinned by standards of availability, accessibility, acceptability and quality.

In our view, best practice service standards such as those described above should apply to homelessness service providers. Homelessness service providers should also be evaluated on the basis of these service standards, with government funding being made available on the condition that such service standards are met. Nevertheless it is also crucial that, in addition to these conditions, government provide homelessness services with sufficient funding to meet demand and discharge both their service standard and human rights obligations to people experiencing homelessness.

5.6 Overseas examples of homelessness legislation

Based on the review set out below of existing legislation and regulations governing homelessness in other Western nations, we note that no other comparable jurisdiction has yet created a legal framework that can truly be said to implement the right to adequate housing and other associated rights. In our view, this creates an opportunity for Australia to take a lead and demonstrate to the international community that governments are able to incorporate the provisions of *ICESCR* into legislation and give practical effect to its *ICESCR* obligations without placing undue constraints on the policy and budgetary discretion which is properly reserved to elected governments.

5.6.1 The Republic of South Africa

The nation which has created the clearest nexus between its *ICESCR* commitments and domestic law is the Republic of South Africa. Section 26 of the South African Constitution states:

(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

This provision in the South African Constitution is neither a panacea for resolving homelessness, nor is it an undue restraint on the discretion of the elected Government to set policies and budgets in accordance with what it regards as the national interest. In other words, the practical implications for

Governments of incorporating article 11 of *ICESCR* into domestic law are quite modest. This is particularly so given the three distinct elements of the Government's obligations outlined in section 26(2) of the South African Constitution. The right to have access to adequate housing outlined in section 26(1) is not an absolute right. The Government's obligations are highly qualified to reflect the fact that no law, regulation, treaty or constitutional right can solve the complex, long-term challenges of homelessness. In accordance with the South African Constitution the Government's obligations are to:

> *(a) take **reasonable** legislative and other measures*
>
> *(b) within its **available resources***
>
> *(c) to achieve the **progressive realisation** of the right to have access to adequate housing. [emphasis added]*

In our view, the South African model creates an appropriate balance between giving practical effect to *ICESCR* commitments and reserving for Government the discretion to set appropriate policies and budgets to implement those commitments.

The Australian government has recently demonstrated its willingness to incorporate its international obligations into domestic law through its decision to give practical effect to the Kyoto Protocol by proposing legislation for an Australian carbon pollution reduction scheme. The same approach is available in relation to the government's stated priority of addressing Australia's homelessness challenge. It is a question of priority, not of precedent or practicality.

5.6.2 Scotland

The Scottish *Homelessness Act 2001* sets an ambitious goal of effectively guaranteeing the right of access to emergency accommodation in Scotland within 10 years (by 2012). Under the Act, local authorities have both corporate duties to the Scottish Executive to develop their own homelessness strategy and ongoing monitoring and evaluation strategies as well as duties to homeless individuals.

The extent of this duty is contingent upon how a person is assessed under the Act. In essence, under the legislation there is a duty on local authorities to consider an applicant's case and if that person is homeless then find him or her accommodation. Under the Housing (Scotland) Act 2001, social housing providers (known in the act as 'Registered Social Landlords') must, where requested to do so by a local government authority, provide housing for a homeless person. If the local government and the registered social landlord can not achieve this outcome by consensus within a set period (generally six weeks) the matter is required to be arbitrated. The arbitration

process is designed to be speedy and simple with a view to achieving housing for the individual in question. This model demonstrates that, even in the absence of direct application of *ICESCR* commitments into domestic law, it is still possible to create clear legislative rights for people experiencing homelessness to have their matter considered not just by funded service providers but by an independent arbiter with enforceable powers.

Reflecting the 'progressive realisation' principle outlined in the South African Constitution, Scotland's ten year target is to be achieved by gradually expanding the categories of people defined as being in 'priority housing need' and giving households classified as 'intentionally homeless', accommodation with greater social support. For example, the categories of priority need will be gradually broadened until in ten years time there is no distinction drawn between any homeless person who is categorised as unintentionally homeless.

Recommendation 5:

That the new federal Homelessness Act be modelled on the Scottish legislative model.

5.6.3 United Kingdom

The UK *Homelessness Act 2002* is less prescriptive than the Scottish Act and consequently less effective at the macro level (in raising the policy bar for future Government action) and at the micro level (in creating enforceable rights for people experiencing homelessness). The main duties are owed to people who are homeless, eligible for assistance, have a priority need, and did not become homeless intentionally.

The relevant local housing authority is required to give a person (who meets the above eligibility criteria) interim housing until a final decision about the assistance owed to that person is made. As long as the local housing authority is finally satisfied that they are such a person, and that they did not became homeless intentionally, the local housing authority has a duty to secure accommodation for that person. The duty generally comes to an end when the person is settled in accommodation.

If a person is threatened with homelessness, is eligible for assistance, has a priority need and did not become threatened with homelessness intentionally, the local housing authority must take reasonable steps to secure that accommodation does not cease to be available for that person. Persons who became homeless intentionally (as defined in the Act) but who have a priority need are entitled to more limited assistance; they must be provided with secured accommodation for a period allowing them to find suitable accommodation. Persons who do not have a priority need are also entitled to assistance, but this is limited to advice and assistance to secure

accommodation. A person has a right to request review of certain decisions by the local authority, including the suitability of accommodation secured for them, and to appeal to the county court on points of law only.

Local housing authorities are required to allocate housing according to an allocation scheme, which must give reasonable preference to persons who are homeless as well as to various other groups. A local housing authority has a duty to carry out a homelessness review for its district and formulate a homelessness strategy every five years. It must take the homelessness strategy into account in carrying out its functions.

The major weakness of the UK legislation is the limits on the right to assistance. For example, people who are intentionally homeless or who do not have a priority need have more limited duties owed to them. The definition of who is homeless is also unduly restrictive. However the legislation does provide assistance for those defined to be in the greatest need, and provides a framework which could be used to expand the targeted groups over time.

There are also limited standards imposed on local authorities to measure their performance or the overall performance of authorities in reducing homelessness. The UK model is not recommended as a template for Australia's proposed reforms.

5.6.4 United States

Following the election of President Obama, the USA's approach to homelessness has undergone significant change, the detail and results of which are still to emerge. On 20 May 2009, President Obama signed into law the *Homeless Emergency Assistance and Rapid Transition to Housing Act* (***HEARTH Act***), which will reauthorise various homeless assistance programs established under Reagan era (1980s) legislation. The new Act will:

- 'streamline housing assistance and services';
- allocate millions of dollars of extra funding to homelessness prevention, rapid re-housing and permanent housing, with:
    - a new 'Emergency Shelter/Solutions Grant' (***ESG***) to fund homelessness prevention and re-housing as well as emergency shelters;
    - 20% increase of funding for ESGs;
    - a Continuum of Care Program; and
- re-establish the US Interagency Council on the Homeless, including heads of the Social Security Administration, Department of Justice, and the Office of Management and Budget.

The US Department of Housing and Urban Development (***HUD***) is now drafting new rules and regulations in support of the legislation which are expected to be implemented in late 2010. It is noteworthy that in a nation with a constitutional Bill of Rights, the USA does not have an enforceable right to housing or shelter. In the words of the US Supreme Court, '*the Constitution does not provide a right to shelter … and does not provide judicial remedies for every social and economic ill*'.[78]

The HEARTH Act is more accurately characterised as a new funding commitment rather than a paradigm shift in the United States' approach to homelessness.

The United States and Australia share in common a Federal constitutional structure where delivery of services to people experiencing homelessness has traditionally been a State (and, to some extent in the US a local) responsibility. To this extent, both Australia and the US require cooperation between different levels of government to achieve outcomes for people experiencing homelessness.

The Reagan era legislation, known as the *McKinney-Vento Homelessness Assistance Act*, established an important policy principle which is now commonplace in Australia: Federal funding for State housing programs was made conditional on the States accepting the policies and principles outlined in the McKinney-Vento Act. The Act (in its original form) stated that '*the causes of homelessness are many and complex, and homeless individuals have diverse needs* and that *there is no single, simple solution to the problem of homelessness'*,[79] and:

- established an Interagency Council on the Homeless;
- aimed to use public resources and programs in a co-ordinated matter; and
- provided funds for programs to assist the homeless, with a special emphasis on elderly, disabled, families, Native Americans and veterans.

At the State level in the US there is some recognition of social rights without specific reference to housing rights. For example the Constitution of New York State contains the following provision:

> *the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means as the legislature may… determine:* Article XVII.

[78] Lindsey v Normett (1972) 405 US 56, 74.

[79] HEARTH Act, section 11301.

The clearest indication of future policy direction in the US is that HUD intends to implement the following funding criteria under the HEARTH Act:

- the previous performance of the community (including reductions in length of time people are homeless, reductions in homelessness);
- the quality and comprehensiveness of a community's plan to reduce homelessness and ensure homeless children receive education services (and the extent to which the plan identifies quantifiable performance measures); and
- the methodology for prioritising funding.

While these criteria suggest greater accountability and more targeted funding, there is little cause for hope that the United States' proud record of enshrining rights into law will be extended to people experiencing homelessness.

5.6.5 Canada

Canada has no specific legislation or regulatory framework which addresses homelessness and there is no explicit recognition by the Canadian legislature of a right to adequate housing.

A statutory 'right' to security of tenure exists under provincial legislation generally referred to as the Residential Tenancies Act (or similar), with the legislation permitting termination of tenancy only for particular reasons.[80] As in Australia, this 'right' often does not afford vulnerable individuals protection (for example, if they are staying in emergency or transitional housing).

Notwithstanding the lack of effective legislative protection, there are indications that the right to shelter may be indirectly recognised through the judicial implementation of international human rights obligations and expansion of the protection from discrimination on the ground of 'social condition'.

The *Canadian Charter of Rights and Freedoms* (***Canadian Charter***) forms Part 1 of *The Constitution Act, 1982*, in which it entrenches the rights and freedoms necessary in a free and democratic society does not explicitly recognise economic, social and cultural rights. Efforts to have such rights included in the Canadian Charter have been based on the 'Equality Rights' under section 15 of that charter, but have been of limited success.

The Supreme Court has recognised that the Canadian Charter must be interpreted consistently with Canada's international human rights obligations. While ratified human rights treaties are not directly enforceable as law, they are recognised as values and rights that inform the Canadian Charter and

[80] Bruce Porter, Homelessness, human rights, litigation and law reform: A view from Canada (2004) *Australian Journal of Human Rights* 133, 137.

the reasonable exercise of judicial decision-making must conform with these values.[81] Case law has furthermore established that discretionary decision-making must be properly informed by reference to the values of international human rights law.[82]

This 'discretionary decision-making' approach means that decisions affecting the lives of people living in poverty can be challenged as unreasonable if they are inconsistent with rights recognised in international law.[83]

The Canadian Human Rights Act applies to those people employed by or receiving goods or services from the Canadian Federal Government, who have been discriminated against – one of the grounds included is housing, although this should not be confused with 'on the basis of homelessness'. In addition the federal Human Rights Act, each Province also has its own human rights law (Code, Act or Charter) that covers organisations not included under federal legislation.

Case law suggests that 'social condition' should be interpreted in a broad, liberal and flexible manner, and should take into account a variety of factors.[84] In most Provinces, the ground of 'social condition' (or equivalent) has been interpreted as prohibiting discrimination with respect to the 'occupancy of residential accommodation'.[85]

Nevertheless, in light of the shortcomings outlined above and the reality that homelessness is viewed as an increasing 'national disaster', with dozens dying on streets every winter and high rates of tuberculosis, Hepatitis B and HIV,[86] the Canadian approach cannot be recommended as one to be adopted in Australia.

5.7 Possible models in the Australian system – other community service examples

Outside the homelessness context, there are numerous pieces of legislation which purport to regulate the access to and quality of community and human services in Australia. It has been suggested, primarily in the White Paper, that it may be appropriate to transpose one of these legislative frameworks for use in the homelessness context. The HPLC submits that, given the multifaceted and complex

[81] Ibid.

[82] *Baker v Canada (Minister of Citizenship & Immigration)* (1997)

[83] Clayton Utz paper, 'Research regarding economic, social and cultural rights for the Homeless Persons' Legal Clinic' (3 April 2009) 35. In *Vriend v Alberta (1998) S.C.J. No. 29 1998,* the Supreme Court held that no category of government decision-making is exempt from constitutional review, and that the Court has a constitutional duty to uphold rights, including those infringed by the failure of government to act.

[84] *Québec Commission Des Droits der la Personne du Québec v Gauthier (1993) 19 C.H.R.R. D/312 (T.D.P.Q.)*

[85] CERA, *Human Rights in Housing in Canada: An Advocate's Guide* (2008) 16.

[86] Porter, above n 80, 134.

contributors to homelessness, it is not appropriate to simply adopt one of the existing community service frameworks and apply it to homelessness.

These frameworks are all designed to meet a particular type of need or regulate providers of a particular type of service. This means, generally speaking, each of the existing frameworks is too specific to the need they are addressing to be a direct fit for the homelessness sector. This is not to say that there are not aspects of each framework that could be adopted. Indeed, some of the existing frameworks contain interesting ideas on how to impose service standards and improve accountability, as described below in the general overview of:

- the *Aged Care Act 1997* (Cth) (***AC Act***);
- the *Disability Services Act 1986* (Cth) (***DS Act***);
- the *Disability Act 2006* (Vic); and
- the *Children's Services Act 1996* (Vic) (**CS Act**).

5.7.1 The Aged Care Act

The AC Act governs all aspects of the provision of residential care, flexible care and community aged care to the aged on a national basis. The AC Act sets out matters relating to the planning of services, the approval of service providers and care recipients, payment of subsidies, and responsibilities of service providers. In addition to the AC Act, there are also currently 22 sets of Principles in force which set out specific details on the application of legislative requirements. These operate in conjunction with the requirements of the AC Act to define minimum service standards and set the rights and responsibilities of both providers and consumers. The funding mechanisms contained in the AC Act are premised around subsidising individual residential places which providers compete for.

5.7.2 The Commonwealth Disability Services Act 1986

The DS Act provides a legislative framework to assist people with a disability by providing employment and rehabilitation services. The DS Act exhaustively lists the types of services which may apply for funding under that Act. These services are: accommodation support services, advocacy services, independent living training services, information services, print disability services; recreation service; and respite care. It should be noted, that although the list is exhaustive, there is scope for the Minister to approve additional types of services under the section 9 of the DS Act. The DS Act also provides for minimum standards which must be met. These standards are similar to those in the *Disability Act 2006* (Vic) (see below) in the sense they are standards which specify an outcome with associated performance measures.

5.7.3 The Victorian Disability Act 2006

The *Disability Act 2006* (Vic) establishes a regime for the registration and regulation of disability service providers with the aim of strengthening and affirming the rights of those with a disability. Service providers under the Act must be registered in order to receive funding under the Act. It provides for a set of minimum standards, imposes obligations on providers (for example to produce individualised support plans) and establishes a complaints system. Rights, duties and obligations are imposed on providers and clients. Minimum standards are determined by the Minister, along with performance measures used to assess compliance with those standards. The standards include outcome standards for clients and the industry standards for service providers – critically these standards are outcome based and not merely prescriptive in nature. For example, one standard mandates that providers ensure that a client's privacy, dignity and confidentiality are respected and maintained. Assessment of compliance with standards is completed by providers themselves, although independent auditing has recently been introduced.

5.7.4 The Victorian Children's Services Act 1996

The CS Act regulates the licensing and operation of children's services within Victoria. It also regulates family day care services. The CS Act focuses on protecting children in child care by establishing strict duties and obligations on operators and potential operators of children's services. It also establishes detailed operating standards to protect the safety and welfare of children, while providing care which also meets a child's individual developmental needs. Compliance with the CS Act is achieved through the use of licensing of operators and premises and a monitoring and enforcement regime.

5.7.5 Why none of these models are a direct fit

The HPLC submits that none of the regulatory models described above would be a good fit for the homelessness sector. This is because they address specific problems and particular forms of services and are not broad or flexible enough to be transposed to the homelessness sector. The manner in which those models address issues of services providers, delivery standards and funding are either inapplicable or unacceptably narrow for any proposed homelessness legislation.

The funding mechanisms and service regulations contained in the AC Act are a clear example of why simple transposition of an existing framework would fail in the homelessness context. In the AC Act, the government funds a particular number of places, of a particular type, at particular locations – eligible providers then compete against each other for the right to provide these places to clients. While the targeting of government funds to particular

geographical regions could be of benefit in the homelessness sector, the concept of funding individual 'places' is inflexible and, with the possible exception of accommodation providers, would not accurately reflect the providers' operating models in the homelessness sector.

The prescriptive nature of the standards and operational requirements imposed on aged care services providers by the AC Act is also problematic. Detailed operational requirements and standards are only possible when they are targeted at a specific service – if applied to the homelessness sector, such an approach would limit the scope of services regulated, result in an inordinate number of standards being created and or unduly inhibit the ability of service providers to adequately respond to client's complex circumstances.

The Commonwealth's DS Act suffers from similar issues as it exhaustively sets out the types of services it will cover. Although the Act provides that additional services can be added, requiring Ministerial approval every time a new type of service is added reduces the responsiveness of the framework.

The regulatory models examined above are not appropriate in the area of homelessness because they do not enshrine human rights protections. Although some of the above frameworks will seek to protect particular rights within minimum standards, those protections apply only in the context of a person's dealing with a service provider. This approach means that there is no obligation on government to protect the rights of vulnerable individuals. As a starting point, any legislation seeking to address homelessness in Australia must provide for this human rights protection.

Recommendation 6: That the Federal government develops a tailored legislative approach to the issue of homelessness rather than transposing an existing community services legislative framework such as the aged care or disability services model.

This tailored approach would provide flexibility to deal with the diversity of issues and needs amongst people experiencing homelessness.

5.7.6 Applicable concepts

While the HPLC considers that no single regulatory model is transferable in its entirety to the homelessness sector, there are some aspects of existing regimes which could be incorporated into a Federal Homelessness Act. They are:

- a Charter of user rights and responsibilities, to help protect rights and ensure quality services (refer to the AC Act);
- an appropriate dispute resolution process (refer to the AC Act);

- use of regular independent audits to assess compliance of services or something similar to the 'community visitors' program found in the *Disability Act 2006* (Vic);
- a general principle that services operate in manner which ensures the safety, health and wellbeing of the client and that the wider needs of the client in addressing homelessness are met (refer to CS Act);
- the critical requirement to produce individualised support plans (DS Act) – a support plan may tie in directly with guiding principles or minimum standards; and
- guiding principles and minimum standards.

5.8 Recommendations regarding the features of a new Federal Homelessness Act

The HPLC submits that the proposed new Federal Homelessness Act must include the following elements.

5.8.1 Purpose and definition

A new Homelessness Act should include an overarching recognition of and commitment to Australia's obligations under the *ICESCR*, in particular the government's responsibility to ensure the progressive realisation of the right to adequate housing. The Act must also include legislative objects that set out the responsibility of government to progressively realise the right to adequate housing, which must incorporate both short (ie crisis) and long term accommodation and housing options.

Within this human rights context, the HPLC contends that the primary object of the Act should be expressed as follows:

> *'The primary object of this Act is the progressive realisation in Australia of the right to adequate housing in order to fulfil Australia's obligations including under the International Covenant on Economic, Social and Cultural Rights'*

Recommendation 7: that the new Federal Homelessness Act recognise Australia's obligation to enable the progressive realisation of the right to adequate housing.

The Act should include a right of access to emergency housing and related services for those defined as homeless, which if necessary, could be implemented by gradually broadening eligible categories (similar to the Scottish legislative framework).

Recommendation 8: that the new Federal Homelessness Act includes a right of access to emergency housing and related services for those defined as homeless.

The legislation should include the broad definition of homelessness currently provided under the *SAA Act*. Homelessness will be defined by reference to the right to adequate housing, which (as a matter of international law) requires:

- security of tenure;
- availability of services;
- affordability;
- habitability;
- accessibility;
- proximity; and
- cultural appropriateness.

Recommendation 9: that the new Federal Homelessness Act retain the current definition of homelessness contained in the SAA Act

Provision for government funding of social support services under the *Homelessness Act* should be conditional upon their continuing compliance with individuals' human rights, particularly the right to adequate housing and associated rights that are relevant for people experiencing homelessness or at risk of homelessness

Provision that eviction from government funded (currently principally SAAP) accommodation shall be an act of absolute last resort, and that no person may be evicted from accommodation until adequate alternative accommodation can be found.

Recommendation 10: that the new Federal Homelessness Act prohibit the eviction of any person from government funded accommodation into homelessness

5.8.2 Standards of service

The HPLC is also of the view that the new Homelessness Act should create overarching minimum service standards, which must be adhered to by service providers that are based on human rights principles. In addition to these principles and standards, the new legislation could provide a Charter of Rights and Responsibilities for Consumers that clearly sets out their rights, responsibilities and mechanisms for redress when their rights have been violated. This approach would provide a national framework of rights and minimum standards while at the same time not being so prescriptive as to be only applicable to a small set of services. This framework would also allow the States and Territories to legislate to address their own specific needs while ensuring any legislation enacted by a State meets or exceeds the minimum standards specified in the national framework. In this sense, the

Federal Homelessness Act has the capacity to operate as a national model of best practice within the homelessness service sector, while also recognising that the ultimate responsibility for ensuring adequate housing lies with the government (including the important provision of funding and the building of infrastructure).

The new Act should provide a requirement to set benchmarks and targets which have legislative effect in relation to the government's progressive realisation of the right to adequate housing. These benchmarks and targets should address the structural, process and outcome issues related to homelessness and could be set by the Commission for Adequate Housing.

5.8.3 Establishment of Commissioner

The Special Rapporteur has identified that a significant problem in Australia is the lack of adequate complaint mechanisms for people to complain about breaches of housing and associated rights. This illustrates the need for the new legislation to provide for an effective complaints system for people experiencing homeless who have their rights breached while accessing, or attempting to access services.

Similarly, the legislation should provide for an independent monitoring system whereby breaches of standards do not need to be reported before they are investigated and enforcement action taken. This is particularly important in the homelessness sector, where the ability of clients to advocate for their rights may be inhibited by their circumstances and lack of resources.

The HPLC recommends the establishment of an independent Office of the Commissioner for Adequate Housing for the purpose of monitoring the government's progressive realisation of the right to adequate housing in Australia and to safeguard individuals' rights. The Commissioner should do this by:

- setting structural, process and outcome benchmarks and targets;
- conducting investigations and reviews of government departments, public authorities and services governed by the Homelessness Act, including service providers, on its own initiative; and
- reporting to Parliament on benchmarks and targets and investigations undertaken.

Practically, the Commissioner should also have the power to:

- develop grievance and appeals procedures in respect of public housing matters and general social support services;
- hear individual complaints;

- refer grievances to the Housing Ombudsman (discussed below) for further investigation;
- develop a charter of rights and responsibilities that service providers must adhere to in order to access Government funding;
- develop, review and monitor national standards for the provision of adequate housing;
- report on an annual basis to the Federal Government on the progressive realisation of the right to adequate housing; and
- any other powers as are necessary and convenient for the Commissioner to perform his or her function of promoting and protecting people's right to adequate housing.

Recommendation 11: that the statutory office of Commissioner for Adequate Housing be created.

The *Office of the Commissioner for Adequate Housing* could be established as a Commissioner position within the Australian Human Rights Commission, which would facilitate the sharing of knowledge and an improved understanding of the relationship between homelessness and human rights issues. Such a Commissioner may also be established with specific links to Consumer Advisory Groups[87] around Australia, to enable homeless people to have a direct say in matters that affect them.

Further, the Act should establish a *Housing Ombudsman*, or provide the *Commissioner for Adequate Housing*, with the following additional powers:

- hear and investigate complaints in respect of federally funded service provision, including whether or not service providers are acting compatibly with the rights of individuals; and
- conduct investigations and reviews of Federal government departments and federally funded public authorities, including service providers, on its own initiative; and
- report directly to parliament

Recommendation 12: that the statutory office of Housing Ombudsman be created.

[87] Consumer Advisory Groups would comprise people experiencing, or who have experienced, homelessness. Such groups would act as consultants to the Council/Commissioner, advising on matters that directly affect them.

5.8.4 Consultation and participation

The HPLC also recommends that the Federal government should ensure that participation by people with an experience of homelessness is entrenched as best practice in the area homelessness service provision, including through:

- ensuring that the National Homelessness Council (recommended in the White Paper and recently established) includes people with an experience of homelessness;
- requiring services funded under the Homelessness Act (through service standards) to include participatory processes in their governance and evaluation processes, in order to entrench participation at the service level;
- requiring that the Commissioner for Adequate Housing convene state and territory level advisory groups, which are comprised of people with an experience of homelessness to ensure participation in the independent monitoring of the government's progressive realisation of the right to adequate housing.

Recommendation 13: that the new Federal Homelessness Act entrenches the participation of people with an experience of homelessness in homelessness service provision.

5.8.5 Ensuring other laws are compatible with a Homelessness Act

As part of the transitional arrangements, the Federal government should work with state and territory governments to review and amend all legislation, policies and procedures that impact disproportionately and discriminatorily on people experiencing homelessness, including:

- residential tenancy laws, particularly as they relate to no-cause evictions;
- anti-discrimination laws to address the current lack of protection against social status discrimination[88]
- public space laws; and
- electoral laws.

5.9 Conclusion

The HPLC submits, in the strongest terms, that new legislation is required to protect Australians' rights to realise their right to adequate housing. Current

[88] The HPLC considers that social status discrimination includes, at a minimum, discrimination on the basis of someone's homelessness, unemployment or receipt of social security benefits.

legislation is inadequate, in that it fails to recognise individuals rights, and fails to provide a framework to support the attainment of these rights.

Legislative and regulatory responses to homelessness adopted by other Western nations provide some guidance for what is possible and, in some instances, what should be avoided in Australia. Comparative international legislation provides some positive and negative guidance, and the HPLC contends that the South African model provides the most appropriate model for any new Federal Homelessness Act. Australian legislation in other community and human service contexts is inappropriate to address the many, varied and interrelated causes and effects of homelessness. However, there are features of Australian legislation that provide (limited) guidance on appropriate mechanisms to address homelessness service provision. It is therefore HPLC's submission that although no one single framework is appropriate, a new model designed to address homelessness may incorporate some of the features in various existing frameworks.

Australia must take leadership and develop a holistic Federal Homelessness Act. It falls to Australia to take a leadership position and demonstrate to other Western nations that a rights-based approach to homelessness is both practical and responsible.

6 Conclusion

This submission has provided detailed reasoning around the benefits of framing homeless services within a human rights based approach. Such an approach provides real, demonstrative benefits for government, consumers and services alike. However, such an approach requires a legislative framework to guide practices and policies.

Regardless of any other associated initiatives government make be undertaking, the creation of the Homelessness Act must not be stalled.

The HPLC commends the Government on many of its initiatives to eradicate homelessness and social exclusion. However, the implementation of a Federal Homelessness Act is consistent and complementary to those initiatives.

There is not currently any legislation that specifically protects the right to adequate housing (and only limited protection of human rights in other Federal and State legislation). While the current National Human Rights Consultation is considering the best ways to protect and promote human rights in Australia, this uncertainty should not affect the Committee moving forward to provide improved human rights protections where it is most needed in society, particularly through the introduction of a right to adequate housing in homelessness specific legislation.

Our call for Australia to adopt a leadership stance is fully consistent with the Prime Minister's public comments made on 26 January 2008 when he announced the Green Paper on Homelessness:

> 'It [homelessness] is something which you can either push to one side and sweep under the carpet or you can say, 'Actually this is just dead wrong, we need to do something about it'. We don't believe it is something which a country as wealthy as ours in the 21st century can just ignore.'

There can be no clearer statement of intent in response to homelessness than to incorporate into domestic law Australia's commitment to implement and fulfil the right to adequate housing for all Australians.

People experiencing homelessness will continue to be the subject of human rights violations unless the Government enacts a Federal Homelessness Act, which builds on the existing legislative framework in the SAA Act and extends the right to adequate housing to all Australians.