

# ***Righting the Wrongs of Homelessness***

PILCH Homeless Persons' Legal Clinic submission to the  
National Human Rights Consultation

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## **Endorsements**

This submission is endorsed by the following organisations:

**North East Housing Service**

**Pathways Rehabilitation and Support Services Inc**

**Borderlands Cooperative Inc**

**Housing Legal Clinic (South Australia)**

**QPILCH Homeless Persons' Legal Clinic**

**HomeGround Services**

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**Consumer Advisory Group, PILCH Homeless Persons' Legal Clinic**

**The PILCH Homeless Persons' Legal Clinic wishes to extend its sincere thanks to the many people who participated in the eighteen workshops it conducted between March and May 2009. Thank you for your time and expertise and for openly and courageously sharing your stories with us.**

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## 1. Introduction and Executive Summary

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### 1.1 Introduction and Executive Summary

This submission is made by the PILCH Homeless Persons' Legal Clinic (**HPLC**) in response to the National Human Rights Consultation (**the Consultation**). This submission is the second of two submissions by the HPLC.<sup>1</sup> The HPLC welcomes this opportunity to comment on the state of human rights in Australia, and commends the Australian government for placing human rights on the national agenda.

This submission aims to answer the following three questions in the context of people experiencing homelessness in Australia:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

The focus of this submission is on those issues on which the HPLC is in a unique position to comment namely, the legislative mechanisms that the Australian government must adopt to ensure the most effective response to tackle the homelessness crisis in Australia. This submission is also greatly informed by the HPLC's consultations with people who are currently homeless or who have experienced homelessness in the past.

Part 2 of this submission provides contextual background about the work of the HPLC and considers the importance of people experiencing homelessness participating in the debate about human rights in Australia. Part 3 discusses the homelessness context in Australia, highlighting that the problem of homelessness is severe and requires an urgent and effective response. The HPLC submits that for any response to homelessness to be effective it must operate within the human rights framework. Part 4 argues that a human rights approach to homelessness is necessary to discharge Australia's obligations under international human rights law and to ensure improved outcomes and better services for people experiencing homelessness. In light of the preceding discussion, the remainder of the submission turns to the key questions posed by the Consultation Committee. Part 5 considers the human rights that should be protected and promoted. Part 6 discusses the inadequate protection of human

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<sup>1</sup> The first submission is entitled *'Promoting and Protecting the Human Rights of People Experiencing Homelessness'*.

rights for people experiencing homelessness, considering a number of specific examples provided by participants at the HPLC's consultations. Part 7 provides recommendations to government that will strengthen the promotion and protection of human rights in Australia, particularly in relation to redressing the human rights violations endured by people experiencing homelessness.

The increase in homelessness in Australia over the past decade has coincided with a period of unprecedented prosperity. This poverty gap was identified by the then 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 'as a rich and prosperous country' for its regressive policies that resulted in increasing numbers of homelessness, 'reductions in public housing stock, soaring private rental rates, [and] an acknowledged housing affordability crisis'.<sup>2</sup> 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'.<sup>3</sup>

The 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*).<sup>4</sup> 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. The first and most important step in this approach is the enactment of federal legislation that adequately promotes and protects the human rights of all Australians.

Human rights legislation also provides a valuable legislative framework within which the government can develop and deliver more responsive, efficient, effective and empowering homelessness policy and services. It also provides a tool for advocacy, action and

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<sup>2</sup> 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.

<sup>3</sup> *Ibid.*, 2.

<sup>4</sup> Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness* (2008). Available at [www.fahcsia.gov.au/publications](http://www.fahcsia.gov.au/publications).

accountability, which ensures that homeless people are able to live with human dignity and fully participate in and contribute to society.

## 1.2 Recommendations

The HPLC makes the following recommendations for reform:

**Recommendation 1:** *That the Australian government take immediate legislative action to effectively respect, protect and fulfil the human rights contained in the two primary international human rights instruments, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and other international human rights treaties to which Australia is a party.*

**Recommendation 2:** *That the Australian government implement a Human Rights Act which protects the human rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.*

**Recommendation 3:** *That the Human Rights Act imposes obligations on all arms of government (the Executive, Parliament and the Courts) to respect, protect and fulfil human rights, including the full range of bodies charged with government/public service delivery.*

**Recommendation 4:** *That the Human Rights Act require that courts and tribunals interpret and apply laws consistently with human rights, having regard to international and foreign law.*

**Recommendation 5:** *That any 'breach of human rights' action is justiciable in federal courts and tribunals.*

**Recommendation 6:** *That all legal and equitable remedies are available for any successful breach of human rights action.*

**Recommendation 7:** *That the rules of standing in relation to matters litigated under a Human Rights Act should be broad and permissive.*

**Recommendation 8:** *That the Human Rights Act includes mechanisms that enable effective, comprehensive and regular reviews to identify and respond to gaps and weaknesses within the legislative framework.*

**Recommendation 9:** *That the rules as to costs should not be used as an obstacle to court action where individuals or organisations are seeking to uphold a right set out in the Human Rights Act.*

**Recommendation 10:** *That there needs to be improved human rights education and awareness raising throughout the community, to promote a culture of human rights in Australia.*

**Recommendation 11:** *That all staff from all public authorities (defined broadly under the Human Rights Act) and Commonwealth departments, agencies and statutory bodies receive adequate training to ensure practical compliance with the Human Rights Act.*

**Recommendation 12:** *That Executive policies and programs are directed towards respecting, protecting and fulfilling human rights and that the Executive must take all steps necessary, within available resources, to achieve this end.*

**Recommendation 13:** *That all public authorities (broadly defined under the Human Rights Act) and Commonwealth departments, agencies and statutory bodies conduct regular reviews of all policies, procedures and programs to ensure that they protect and promote human rights.*

**Recommendation 14:** *That the human rights education and awareness campaigns are accessible for disadvantaged and marginalised Australians through a variety of means, which take into account issues of exclusion.*

**Recommendation 15:** *That the Human Rights and Equal Opportunity Commission Act 1986 (Cth) be amended to include all relevant international human rights instruments to which Australia is a party, such as the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of Persons with Disabilities.*

**Recommendation 16:** *That the Australian Human Rights Commission be given greater powers of investigation, monitoring and enforcement of human rights in Australia.*

**Recommendation 17:** *That the Australian Human Rights Commission be adequately resourced to undertake any additional powers and functions.*

**Recommendation 18:** *That the Australian government immediately sign and ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights as soon as it comes into force.*

**Recommendation 19:** *That the Australian government enact a Homelessness Act, modelled on the Homelessness etc (Scotland) Act 2003, which incorporates the policy objectives of the*

*White Paper, enshrines the right to adequate housing and provides effective remedies for violations of the right to adequate housing.*

**Recommendation 20:** *Federal and State anti-discrimination laws should be amended to include social status (including homelessness, unemployment or the receipt of social security payments) as a protected attribute.*

**Recommendation 21:** *Australian governments must review and amend all legislation, policies and procedures that impact disproportionately and discriminatorily on people experiencing homelessness, including: residential tenancy laws, electoral laws, public space laws.*

## 2. Background and context

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### 2.1 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.<sup>5</sup> The HPLC is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the HPLC recently received confirmation of a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

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.<sup>6</sup> Since its establishment in 2001, the HPLC has assisted over 4000 people at risk of, or experiencing, homelessness in Victoria.

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<sup>5</sup> See <http://www.pilch.org.au>.

<sup>6</sup> 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.

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 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.

## **2.2 Recognising the right to participate: direct consultations with homeless people**

The stated aim of the Consultation process was to provide all Australians with a once in a lifetime opportunity to have their say about human rights in our country. Giving people an opportunity to participate in public affairs and community debates is an essential element of our democracy and is an important human right.

Active, informed and inclusive participation in community debates can only be achieved if people are familiar with the issues being discussed and are given equal opportunity to contribute to the discussion. To achieve this in relation to the debate about human rights in Australia, there must be education and community awareness-raising about human rights and positive steps must be taken to include members of the community who experience discrimination and marginalisation throughout the process.

Indeed, the active and informed participation of such community members, and particularly those who are homeless, formerly homeless or at risk of homelessness in the design, delivery and evaluation of laws, policies and programs that affect them is important for three key reasons:

- the right of affected persons to participate in public affairs and decision-making processes is a fundamental human right;
- informed and active participation of affected persons is more likely to result in the development and implementation of policies and programs that are targeted, efficient, effective and meet people's needs; and
- the process of participation can be empowering and enhance personal development, self-esteem, capacity and independence.

The HPLC recognises that the Consultation Committee held numerous public forums to enable people within the community to have their say about human rights. The Committee also created online forums and social media pages to promote discussion about its three questions. However, for people experiencing marginalisation and social exclusion, such as homeless people, it is often extremely difficult to access and participate in these types and forms of discussion. In our experience, people experiencing homelessness may also have difficulty, or may not feel comfortable, voicing their opinions and views on human rights as they may not be aware that their experiences translate into human rights violations.

In light of the many barriers that prevent people experiencing homelessness having their say in this Consultation process, the HPLC felt it was essential to directly engage with people experiencing homelessness to inform them about human rights and the Consultation process and give them an opportunity to participate in the debate.

### **2.3 Homelessness and human rights workshops**

Between March and May 2009, the HPLC directly engaged with people experiencing homelessness, or who had formerly experienced homelessness, by holding 18 workshops at homelessness specific service providers in Victoria.<sup>7</sup> The purpose of conducting these workshops was to promote the right to participate by informing homeless people in our community about human rights and engaging them in the Consultation process.

Each workshop ran for approximately one and a half hours. The first half of the workshop provided participants with general information about homelessness, human rights and the Consultation process. This aspect of the workshop gave participants an opportunity to participate in an interactive discussion and openly express their views and opinions about

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<sup>7</sup> Workshops were held at the following locations: Melbourne CityMission Footscray, The Big Issue, Ozanam House, VACRO, Homeground, Credo Café, Loddon Mallee Housing Service Bendigo, St Luke's Anglicare Bendigo, Salvation Army Life Centre, Flagstaff Crisis Accommodation, PILCH office, St. Peter's Eastern Hill Breakfast Program, Koonung Community Mental Health Service, Frontyard and Hanover.

human rights in Australia. The second half of the workshop facilitated participants' active engagement in the Consultation process. During this part of the workshop, participants were assisted to complete a survey and tell their story. They were also encouraged and assisted to write their own submission in response to the National Consultation.<sup>8</sup>

In total, the HPLC consulted with 145 people who were experiencing homelessness, or who had formerly experienced homelessness, about human rights in Australia. The collated survey results and the views and comments put forward by participants at these workshops forms the entirety of the first submission provided by the HPLC to the Consultation Committee.<sup>9</sup>

The HPLC considered that it was important to provide the views and comments of workshop participants in a separate submission to the Consultation Committee in order to appropriately capture the extent of participants' concerns about human rights issues in Australia. That first submission encapsulates the voices of the voiceless in our community. It should provide the Consultation Committee with a clear understanding of the concerns of homeless people about what human rights mean for them in Australia, i.e. that human rights don't exist from their perspective. The HPLC strongly encourages the Consultation Committee to listen to and respond to the concerns raised in that submission and keep those concerns in mind when reading this second submission.

## 2.4 Key findings of the workshops

The key findings and results of the workshop questionnaires are:

- 35% of participants are experiencing chronic homelessness (i.e. they have experienced homelessness for more than 5 years).
- Over 85% of participants said that accommodation and housing services in Australia are either inadequate or very inadequate.
- 73% of participants indicated that they had a current health need and of those participants over 70% said that their health issues worsened as a result of experiencing homelessness.

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<sup>8</sup> Twenty-five participants wrote their own submission to the government. The HPLC forwarded these submissions to the Consultation Committee uncensored.

<sup>9</sup> Refer to PILCH Homeless Persons' Legal Clinic, *Promoting and protecting the Human Rights of People Experiencing Homelessness in Australia*, 2009.

- The primary source of income for almost 50% of participants is the Disability Support Pension.
- Over 80% of participants stated that the amount of social security that they receive is inadequate to meet their most basic needs.
- 80% of participants reported having been treated in a cruel and degrading way while experiencing homelessness.
- 99% of participants said the law must change to better protect their human rights.
- 99% of participants said that Australia should have a Human Rights Act that adequately protects their human rights.
- 99% of participants said that in addition to an Australian Human Rights Act, there needs to be education and awareness raising within the community so that people know about human rights.

For a more detailed discussion of the workshop results, please refer to the HPLC's first submission entitled: *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia*.

### 3. Homelessness in Australia

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#### 3.1 Definition and causes of homelessness

There is general consensus that the 'cultural definition' of homelessness, developed by Chamberlain and MacKenzie,<sup>10</sup> 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.'<sup>11</sup> 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.<sup>12</sup> 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:<sup>13</sup>

- 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 not satisfy the requisite conditions of the minimum community standard.<sup>14</sup> Medium to long-term residents of caravan parks would, in most circumstances, be considered to be experiencing tertiary homelessness.

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<sup>10</sup> 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.

<sup>11</sup> Chris Chamberlain, *Counting the Homeless: Implications for Policy Development*, Australian Bureau of Statistics (2 December 1999), 49.

<sup>12</sup> *Ibid.*

<sup>13</sup> Chris Chamberlain and Guy Johnson, 'The Debate about Homelessness' (2001) 36(1) *Australian Journal of Social Issues* 35, 39.

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

The Australian Bureau of Statistic (**ABS**) has adopted the definition of homelessness proposed by Chamberlain and MacKenzie.<sup>15</sup>

Chamberlain and Mackenzie's 'cultural definition' of homelessness accords with the definition of homelessness provided in section 4 of the *Supported Accommodation Assistance Act 1994* (Cth) (**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. The 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.

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.

The causes of homelessness are complex and varied.<sup>16</sup> Generally, they include:

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<sup>15</sup> Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274; Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11.

<sup>16</sup> 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 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, *Economic, Social and Cultural Rights* (3 March 2005) E/CN.4/2005/48, ¶ 22.

- **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.<sup>17</sup> 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.<sup>18</sup> 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.

### 3.2 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.<sup>19</sup> 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.<sup>20</sup> A further 17,500 people across Australia live temporarily in caravan parks.<sup>21</sup>

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<sup>17</sup> Ibid, 14.

<sup>18</sup> Human Rights and Equal Opportunity Commission, *Homelessness and Human Rights* (2008), 2 - 6. Paper available at [www.hreoc.gov.au](http://www.hreoc.gov.au).

<sup>19</sup> Australian Bureau of Statistics (ABS), *Counting the Homeless 2006* (2008), 3-4.

<sup>20</sup> Ibid, 21.

<sup>21</sup> 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 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.

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.<sup>22</sup> Approximately 202,500 people are now accessing these services each year.<sup>23</sup> The growing rate of homelessness has placed significant strain on social services, resulting in 57 per cent of people requiring new accommodation being turned away.<sup>24</sup> 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.<sup>25</sup>

The increase in homelessness in Australia over the past decade has coincided with a period of unprecedented prosperity. This poverty gap was identified by the then 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 'as a rich and prosperous country' for its regressive policies that resulted in increasing numbers of homelessness, 'reductions in public housing stock, soaring private rental rates, [and] an acknowledged housing affordability crisis'.<sup>26</sup> 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'.<sup>27</sup>

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**)<sup>28</sup> and the White Paper.<sup>29</sup>

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.<sup>30</sup> The central aim of the NAHA is to develop a whole-of-government approach to providing accessible, affordable, safe and

<sup>22</sup> 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; available at <http://www.aihw.gov.au/publications>.

<sup>23</sup> 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.

<sup>24</sup> Australian Institute of Health and Welfare, *Demand for SAAP Accommodation by homeless people 2006 – 2007: Summary*, Bulletin 64, October 2008, 2.

<sup>25</sup> *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>.

<sup>26</sup> 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.

<sup>27</sup> *Ibid.*, 2.

<sup>28</sup> Go to - <http://www.fahcsia.gov.au/sa/housing/progse/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.

<sup>29</sup> Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness* (2008). Available at [www.fahcsia.gov.au/publications](http://www.fahcsia.gov.au/publications).

sustainable housing for all Australians.<sup>31</sup> The funding strategy set out in the NAHA underpins the policy commitments contained in the White Paper.

The White Paper is an ambitious and enthusiastic policy document, containing targets and goals that are worthy of much praise.<sup>32</sup> The two headline goals of the White Paper are:

- 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 should be commended.

However, 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. The first and most important step in this approach is the enactment of federal legislation that adequately promotes and protects the human rights of all Australians.

### 3.3 Homelessness and human rights in Australia

Although people experiencing homelessness are subject to multiple and intersectional human rights violations,<sup>33</sup> there is no comprehensive federal law that protects fundamental human rights in Australia. The HPLC considers that any effective response to homelessness in Australia requires the adoption of a human rights approach to the development and implementation of laws, policies and programs at all levels of government.

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<sup>30</sup> Council of Australian Governments Meeting, *Communiqué* (29 November 2008).

<sup>31</sup> For further information go to - <http://www.fahcsia.gov.au/Pages/default.aspx>.

<sup>32</sup> Ibid and Josh Gordon, *Rudd's \$6 Billion Homeless Plan*, the Sunday Age, 21 December 2008, 1.

<sup>33</sup> 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.

## 4. Situating homelessness within a human rights framework

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### 4.1 Australia's obligation to apply a human rights framework

Notwithstanding the lack of domestic protection of human rights, the Australian government has definite obligations under international human rights law to protect human rights and remedy the multiple and intersectional human rights violations experienced by homeless people.

The Australian government's obligations are found in a number of the major 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 that 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.<sup>34</sup>

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<sup>34</sup> *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.

## 4.2 Benefits of applying 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.<sup>35</sup> These essential characteristics of a human rights approach operate to 'set standards'<sup>36</sup> and function as a 'model'<sup>37</sup> for government decision-making, law reform, policy development, programmatic design and service delivery.<sup>38</sup>

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,<sup>39</sup> - is essential in promoting empowerment and a sense of value and independence among marginalised and vulnerable members of the community.<sup>40</sup> Participation not only enhances an individual's personal autonomy and self-confidence, it also results in more effective and targeted policies and programs.<sup>41</sup>

Improved processes and outcomes have been achieved in comparative jurisdictions, where governments have applied a human rights approach to the development of laws, policies and programs. The experience of the United Kingdom highlights some of the benefits of a human rights approach:

- 'A significant, but beneficial effect upon the development of policy',<sup>42</sup>
- Increased scrutiny of government, which improves transparency and accountability mechanisms;<sup>43</sup>

<sup>35</sup> Ibid.

<sup>36</sup> Maria Foscarinis, 'Homelessness and Human Rights: Towards an Integrated Strategy' (2000) 19 *St Louis University Public Law Review* 327, 347.

<sup>37</sup> Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *A Human Rights Based Approach to Development* (undated), available at [www.rwi.lu.se/news/pastact/hrba.pdf](http://www.rwi.lu.se/news/pastact/hrba.pdf).

<sup>38</sup> See also Philip Lynch 'Homelessness, Human Rights and Social Inclusion' (2005) 30:3 *Alternative Law Journal* 116, 117.

<sup>39</sup> Deena R Hurwitz 'Lawyering for Justice and the Inevitability of International Human Rights Clinics' (2003) 28 *Yale Journal of International Law* 505, 516.

<sup>40</sup> Philip Lynch 'Homelessness, Human Rights and Social Inclusion' (2005) 30(3) *Alternative Law Journal* 116, 117. Refer also to Office of the High Commissioner of Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

<sup>41</sup> 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 3<sup>rd</sup> National Homelessness Conference 'Beyond the Divide'.

<sup>42</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), United Kingdom, 19.

<sup>43</sup> Ibid.

- '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;<sup>44</sup>
- 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;<sup>45</sup>
- Human rights principles can help decision-makers see seemingly intractable problems in a new light;<sup>46</sup>
- Awareness raising and education about human rights empowers people to take action, and leads to better public service delivery and outcomes;<sup>47</sup>
- 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* in Victoria has similarly resulted in 'new ways of thinking' within government, including by giving people greater say in decisions that affect them.<sup>48</sup>

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

*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.*

In these circumstances, where the eviction of the tenant and her children would have resulted in their homelessness, it was argued that the use of 'no cause' eviction notices by a community housing association (public authority) was contrary to international human rights law and principles and was therefore unlawful under the Charter. Following this matter, the

<sup>44</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007, 1<sup>st</sup> edition) 5.

<sup>45</sup> Human Rights Law Resource Centre, *A Human Rights Act for All Australians* (May 2009), 68. See also British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007, 1<sup>st</sup> edition) 5.

<sup>46</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007, 1<sup>st</sup> edition) 5.

<sup>47</sup> Ibid.

HPLC undertook training and education within the sector about the use of these 'no cause' eviction notices. As a result, there has been a reduction in the use of 'no cause' eviction notices by community housing associations in Victoria.

These examples clearly demonstrate that legislative human rights instruments can have far greater impact at the 'front end' by influencing policy development and service implementation, 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.

It is clear from the abovementioned benefits of a human rights approach that the application of such a framework to the homelessness crisis in Australia would result in the following positive outcomes, in particular:

- 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.

The HPLC therefore contends that the Federal government must address the issue of homelessness within the human rights paradigm. Such action is necessary not only because it would discharge Australia's obligations at international law, but because the benefits of a human rights approach are widely acknowledged as promoting and facilitating positive outcomes, particularly improving policy development, service delivery and ensuring more accountable governance.

#### **4.3 Applying human rights will facilitate social inclusion**

A human rights approach to homelessness is also relevant to the Australian government's commitment to achieving social inclusion in this country.<sup>49</sup> Indeed, there is a strong and positive correlation between the government's respect for human rights and its 'success in addressing homelessness and poverty, with the realisation of human rights ensuring the

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<sup>48</sup> 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.

enabling conditions of social inclusion, participation and empowerment.<sup>50</sup> The two frameworks are mutually supportive and reinforcing, with the normative human rights framework essentially underpinning the social inclusion theory.<sup>51</sup> For the government to achieve its social inclusion agenda it must ensure that all people in Australia enjoy human rights, particularly the most marginalised and disadvantaged amongst us.

#### 4.4 Conclusion

Adopting a human rights approach to homelessness should therefore be the starting point for any effective national response aimed at tackling homelessness and promoting social inclusion.<sup>52</sup> 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.

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<sup>49</sup> Australian Labor Party, National Platform and Constitution 2007, Chapter 13, Respecting Human Rights and a Fair Go for All (2007) 206 – 207, available at [www.alp.org.au/platform/](http://www.alp.org.au/platform/).

<sup>50</sup> Philip Lynch 'Homelessness, Human Rights and Social Inclusion' (2005) 30:3 *Alternative Law Journal* 116, 116. See generally, Amartya Sen, *Development as Freedom* (1999) 3 – 13; and Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2003), 48.

<sup>51</sup> Dianne Otto and Philip Lynch, 'Housing, Homelessness and Human Rights' (2004) *Australian Journal of Human Rights* 1. Available at - <http://www.austlii.edu.au/au/journals/AJHR/2004/>.

<sup>52</sup> Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008).

## 5. Which human rights should be protected and promoted?

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### 5.1 What are human rights?

Human rights derive from the inherent dignity of all people. The *Universal Declaration of Human Rights (UDHR)* authoritatively states this:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Human rights are contained in international human rights treaties and customary international law. For further discussion and analysis of the scope and application of international human rights treaties and customary international law, please refer to the Human Rights Law Resource Centre (*HRLRC*) submissions.<sup>53</sup>

Australia has ratified the primary international human rights treaties namely, the ICCPR; ICESCR; CERD; CEDAW; CRPD, CAT; and CRC (discussed above in part 4).

All human rights are interdependent, interrelated and mutually reinforcing. The principle of the indivisibility of human rights recognises that rights cannot be fully enjoyed in isolation, but depend on the enjoyment of all other rights. It is the stated intention of the UN that they be considered together when determining a state's human rights responsibilities.<sup>54</sup>

Accordingly, when considering the protection and promotion of human rights in Australia one must consider all human rights listed under the international human rights instruments to which Australia is a party, as well as human rights under customary international law.

### 5.2 Australia's human rights obligations

Australia has obligations under international law in relation to each of the 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.<sup>55</sup>

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

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<sup>53</sup> Human Rights Law Resource Centre 'A Human Rights Act for All Australians' and 'Engage, Educate, Empower' (2009).

<sup>54</sup> OHCHR, *Fact Sheet No 30: The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, 20–1.

<sup>55</sup> Refer to - *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.

for protecting such rights falls under the jurisdiction of State and Territory governments.<sup>56</sup> For example, art 28 of the ICESCR states that it extends 'to all parts of federal states without limitations or exceptions.'

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*.<sup>57</sup> 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.<sup>58</sup>
- 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<sup>59</sup> and support the realisation of human rights for everyone,<sup>60</sup> 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.<sup>61</sup>

<sup>56</sup> 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 Nicholson, 'No place like home: homelessness in Australia and the right to adequate housing' (2004) *Australian Journal of Human Rights* 3. Available at <http://www.austlii.edu.au/au/journals/AJHR/2004/>.

<sup>57</sup> Ibid.

<sup>58</sup> Geoff Budlender, 'Justiciability and the Right to Housing – the South African experience' in Scott Leckie (ed), *National Perspectives on Housing Rights* (2003) 207 – 219.

<sup>59</sup> Sometimes the notion of 'promote' is considered a separate duty – consider the typology applied by Otto and Wiseman, refer to 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.

<sup>60</sup> 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.

<sup>61</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691, ¶ 6.

### 5.3 Which human rights should be protected and promoted?

The HPLC supports the HRLRC's contention that 'as a signatory to main international human rights treaties, Australia has an obligation to implement the full range of internationally recognised rights.'<sup>62</sup>

The homelessness context in Australia demonstrates the urgent need for improved human rights protections in Federal, State and Territory law and policy.

There is a clear causal link between violations of a person's human rights and their experience of homelessness.<sup>63</sup> Homeless people often experience daily violations of their human rights. Specifically, the Special Rapporteur has described homelessness as 'the most visible and severe symptom of the lack of respect for the right to adequate housing.'<sup>64</sup> Importantly, there are numerous international human rights instruments, to which Australia is a party, that enshrine a right to housing or home<sup>65</sup> that the Australian government is obligated to implement. However, the intersectional and interrelated nature of the causes of homelessness illustrates that homelessness is not just an issue of housing, rather it is much more complex and gives rise to multiple and interdependent human rights issues. As one person who has formerly experienced homelessness aptly said: 'homelessness is not just houselessness.'<sup>66</sup>

Homeless people in Australia currently experience barriers to their enjoyment of many human rights, which in turn constitutes a barrier to those persons effectively dealing with the causes of their homelessness and to their ability to transition out of homelessness. In considering the human rights of people experiencing homelessness, it is critical that these complex and interrelated issues are recognised. A human rights approach to tackling homelessness must uphold the indivisibility and interconnectedness of all human rights.

A human rights approach to resolving homelessness is important as there is a strong and positive correlation between the government's respect for human rights and its 'success in addressing homelessness and poverty, with the realisation of human rights ensuring the enabling conditions of social inclusion, participation and empowerment.'<sup>67</sup> As one person experiencing homelessness stated: *"We need to make sure that we are protected. To know*

<sup>62</sup> Human Rights Law Resource Centre 'A Human Rights Act for All Australians' (2009). Available at [www.hrlrc.org.au](http://www.hrlrc.org.au).

<sup>63</sup> Philip Lynch, 'Homelessness, Human Rights and Social Inclusion' (2005) 30(3) *Alternative Law Journal* 116.

<sup>64</sup> 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.

<sup>65</sup> Article 17 ICCPR; Article 5(e) CERD; Article 14 CEDAW; and Article 27 CRC.

<sup>66</sup> PILCH Homeless Persons' Legal Clinic, *Green Paper submission*, June 2008. Available at [www.pilch.org.au/hplc](http://www.pilch.org.au/hplc).

<sup>67</sup> Philip Lynch 'Homelessness, Human Rights and Social Inclusion' (2005) 30:3 *Alternative Law Journal* 116, 116. See generally, Amartya Sen, *Development as Freedom* (1999) 3 – 13; and Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2003), 48.

*we are the only developed country in the world without this [human rights] protection; it's not good enough."*

Through its ratification of international treaties, the Australian Government has undertaken international obligations to ensure that all civil, political and economic, social and cultural rights are enjoyed by all people. The Australian government must domestically give effect to its international human rights obligations by enshrining all civil, political and economic, social and cultural rights in law.

**Recommendation 1:** *That the Australian government take immediate legislative action to effectively respect, protect and fulfil the human rights contained in the two primary international human rights instruments, the ICCPR and the ICESCR, and other relevant international human rights treaties to which Australia is a party.*

## 6. Are these human rights sufficiently protected and promoted?

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### 6.1 Current protection of human rights in Australia

As discussed above, Australian law and policy does not provide comprehensive and consistent protection of human rights and many basic rights remain unprotected.<sup>68</sup>

Recently the CESCR and the United Nations Human Rights Committee (**HRC**) called upon the Australian government to enact comprehensive legislation giving effect to all civil and political and economic, social and cultural rights uniformly across all jurisdictions.<sup>69</sup> Following the Special Rapporteur's Mission to Australia in 2006, he recommended that the Australian government explicitly incorporate the wide range of international human rights instruments, to which Australia is a party, into the domestic legal system.

The very fact that people experiencing homelessness endure multiple and intersectional violations of their human rights on a daily basis is evidence that Australian law and policy does not currently sufficiently protect and promote human rights. The extent of homelessness in Australia, which has been described by our Prime Minister as a 'national obscenity',<sup>70</sup> indicates the serious impact of deficient human rights protections in our country.

By accepting that homelessness constitutes a human rights violation we can see that resolving homelessness is directly related to ensuring enjoyment of 'the rights, dignity and freedoms of over 105,000 people.'<sup>71</sup>

### 6.2 Gaps in the current protection and promotion of human rights for homeless people

As discussed above, homeless people experience human rights violations on a daily basis. Given this common experience, it is unsurprising that 99 per cent of participants at the HPLC's workshops said that the law needs to change to better protect their human rights.

At all of the workshops, participants unanimously called for the law to change to better protect their human rights.

Workshop participants provided many examples of human rights that are regularly denied to them, including:

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<sup>68</sup> Human Rights Law Resource Centre, *A Human Rights Act for All Australians* (May 2009), 8.

<sup>69</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (22 May 2009) E/C.12/AUS/CO/4; and Human Rights Committee, *Concluding Observations: Australia* (2 April 2009) CCPR/C/AUS/CO/5.

<sup>70</sup> Stephen Lunn, 'Salvation Army demand action on homelessness, not reviews', *The Australian*, 28 May 2008.

<sup>71</sup> 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, 165 – 166.

- Equality, equal recognition before the law, equal enjoyment of rights and the right not to be discriminated against;
- Freedom of speech and the right to speak up;
- Right to adequate housing;
- Right to education;
- Right to social security;
- Right to an adequate standard of living;
- Right to access appropriate health services;
- Right to be treated with dignity and respect;
- Rights of women to feel safe and be free from violence;
- Right to participate;
- Right to a fair hearing;
- Right to be protected from cruel and degrading treatment; and
- Right to be presumed innocent until proven guilty.<sup>72</sup>

The significant gaps in human rights protections, or the regular human rights violations experienced by homeless people, are discussed further below.

**(a) 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.<sup>73</sup> Article 11(1) requires that governments:

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,

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<sup>72</sup> Refer generally to PILCH Homeless Persons' Legal Clinic, *Promoting and protecting the Human Rights of People Experiencing Homelessness in Australia*, 2009.

social and cultural rights.<sup>74</sup> 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.’<sup>75</sup>

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.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

Workshop 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 in the workshops indicated that accommodation and housing services in Australia is 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.*”

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<sup>73</sup> Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing* (1991).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

<sup>77</sup> CESCR, *General Comment No 3: The Nature of States Parties’ Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

<sup>78</sup> *Ibid.*; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 4–5, [15]–[18].

<sup>79</sup> CESCR, *General Comment No 3: The Nature of States Parties’ Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

Workshop 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 workshops 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...”*

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 workshops have 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 a blight on humanity. The hell that these places represent and the suffering and misery they engender and profit from is a disgrace.”*

Australia’s failure to provide adequate housing has 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.<sup>80</sup> He went on to urge that:

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<sup>80</sup> Ibid, 7.

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.<sup>81</sup>

As noted above, the international community recognises the importance of the right to adequate housing. Unsurprisingly, people experiencing homelessness have the same view.

The HPLC submits that for the government to fulfil its stated commitment to social inclusion and human rights, and if the country's homelessness crisis is to be addressed in any meaningful way, the right to adequate housing must be entrenched within federal legislation. Any legislative implementation of the right to adequate housing needs to take into account the scope of that right in international human rights law, and must provide effective remedies in the event that the right is violated.

While the SAA Act recognises international human rights protection standards in its preamble, it does not provide for any clear mechanisms by which those human rights standards must be achieved (i.e. there is no clear correlation between the funding mechanisms in the SAA Act and the need to ensure that services have the effect of realising human rights). We note that this legislation, which was developed in the 1980s, has provided an important first step in legislative protection for people experiencing homelessness; however, it is now time for the reach of this legislative protection to be greatly extended. Accordingly, while the SAA Act remains important today, the HPLC submits that it must be transformed into a Federal *Homelessness Act* that takes a broad and holistic approach to solving homelessness through a human rights framework and creates an enforceable mechanism to ensure the promotion and protection of human rights for people experiencing homelessness. A Federal *Homelessness Act* cannot, however, exist on its own and must be enacted *in addition* to a Federal Human Rights Act that protects economic, social and cultural rights (including the right to adequate housing) and civil and political rights.

**(b) The right to freedom from discrimination**

The norm of non-discrimination is enshrined in art 2 of the ICESCR, which provides that all States must use all their available resources, including through the enactment of laws, to progressively realise the rights recognised in the ICESCR which covers a range of economic, social and cultural rights, including the right to be free from poverty, the right to work and the right to adequate housing. These rights must be exercised

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<sup>81</sup> Ibid, 2.

without any discrimination of any kind, including discrimination on the basis of 'other status'.<sup>82</sup> International jurisprudence clearly establishes that the term 'other status' refers to people who are 'homeless', or 'unemployed', or a 'recipient of social security payments'.<sup>83</sup>

Remarkably, despite Australia's obligation under international law to ensure that all people are free from discrimination,<sup>84</sup> and to implement anti-discrimination law at both State and Federal levels, it remains lawful to discriminate against people on the basis of their housing status in this country.

An extremely high number of people experiencing homelessness are subject to discriminatory treatment on the basis of their social status, be that because they are unemployed, receive social security payments, have a criminal record, or simply because they are homeless.

Data collected at the workshops supports this position. Eighty per cent of participants felt that they had been treated in a cruel or degrading way during their experience of homelessness. Almost 20 per cent of participants indicated that discrimination was one of the causes of them first becoming homeless. A number of participants provided testimonials of being discriminated on the basis of homelessness, mental illness or other attributes. As one participant said, *"mental health has a big stigma attached to it. It stops you getting employment and private housing."* Another participant described being discriminated against by public transport officers: *"I had a valid ticket (and a concession card) yet the ticket inspectors asked to see other identification as I had four concession cards. They thought that I had stolen the concession cards but I had just moved four times in two months and didn't throw them away."*

Participants also indicated that they were often treated as criminals simply because they were homeless. Other participants indicated that police had ignored their requests for help; they had been hassled on the street for being a 'pest' and were subject to assault, all stemming from their homelessness.

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<sup>82</sup> Article 2 of ICESCR provides that: (1) 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>83</sup> The European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record: see *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97. Also, see generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2<sup>nd</sup> ed, 2004), 689.

<sup>84</sup> Refer to CESCR, *General Comment No. 20: Non-discrimination*, (25 May 2009) E/C.12/GC/20.

The HPLC has provided clear qualitative evidence in previous submissions to the Victorian Government<sup>85</sup> which demonstrate that law reform is necessary in order to counteract the devastating impact of social status discrimination on some of the most marginalised and disadvantaged members of our society. This evidence highlights that the majority of people experiencing homelessness or at risk of homelessness routinely experience discrimination at the hands of accommodation and goods and service providers. For example, as the law currently stands in Victoria a service provider, such as a real estate agency or caravan park owner, can refuse accommodation to someone (who may be homeless or precariously housed) because they want to pay either with a cheque from a welfare agency, or from their social security benefits.

The experience of one participant at the workshops reinforced that this discrimination continues unabated, *“a couple of places have not accepted us because we were paying the bond with [Housing Establishment Fund] cheques. One caravan park organised a van, then rang back and said it wasn’t available after they found out how we were paying.”*

This form of discrimination not only stymies individuals’ genuine attempts to integrate into the community and contribute to Australia’s economy, but also serves to entrench people in homelessness, unemployment and poverty.

The impacts of discrimination are not confined to the denial of opportunity and social inclusion or access to necessary goods and services. Research shows that significant social, health and economic costs also flow from discrimination. According to the World Health Organisation, ‘discrimination violates one of the fundamental principles of human rights and often lies at the root of poor health status’.<sup>86</sup> This is consistent with an emerging consensus that discrimination and stigmatisation are major causal factors and consequences of social exclusion and ill-health among people experiencing homelessness and unemployment, including higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping. Equally, the economic implications of discrimination can be immense. Just as discrimination can entrench homelessness and unemployment, it can also put strain on public spending.

There are also many laws throughout Australian States and Territories that disproportionately and discriminatorily impact upon people experiencing homelessness.

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<sup>85</sup> For further information see for example the Clinic’s submissions to Victoria’s *Review of the Equal Opportunity Act 1996* (Cth) 2008, available at [www.pilch.org.au](http://www.pilch.org.au).

<sup>86</sup> World Health Organisation, *Health and Freedom from Discrimination: WHO’s Contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) [6].

A clear example is legislation that prohibits begging. In Victoria, begging is a criminal offence that carries a penalty of up to 12 months imprisonment but generally involves the imposition of graduated fines (i.e. \$50 for the first offence, \$100 for a second offence etc).<sup>87</sup> While on its face this law applies equally to all people, in reality it impacts 'society's most marginalised, disadvantaged and vulnerable'.<sup>88</sup> Begging must be understood as a social and economic issue, rather than criminal activity.<sup>89</sup> People engage in begging as a last resort, in order to *survive*: to have some food for the day and maybe a bed for the night.<sup>90</sup>

The HRC recently expressed concern that the rights to equality and non-discrimination are not comprehensively protected in Australia and recommended that the government 'adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination'.<sup>91</sup> The Special Rapporteur also recognised the particular need to address discrimination against people experiencing homelessness, which is prevalent throughout Australia.<sup>92</sup>

The Australian government must take leadership on the issue of discrimination experienced by homeless people. The HPLC submits that this requires:

- Adoption of comprehensive federal legislation that covers all grounds of discrimination including 'other status' as defined under international human rights law;
- Review and amendment of all Federal, State and Territory laws that impact disproportionately and discriminatorily on people experiencing homelessness.

**(c) The right to the highest attainable standard of physical and mental health**

Many workshop participants reported that they had experienced violations of the right to the highest attainable standard of physical and mental health. In fact over 70 per cent of participants at the workshops indicated that they had a current health need and of those participants 70 per cent indicated that health issues worsened as a result of experiencing homelessness. One participant stated that she had not received dental care in 15 years. As a result, she has no teeth and has trouble eating which has

<sup>87</sup> For example, refer to section 49A of the *Summary Offences Act 1966* (Vic).

<sup>88</sup> Philip Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 *Melbourne University Law Review* 609.

<sup>89</sup> *Ibid.*

<sup>90</sup> PILCH Homeless Persons Legal Clinic, *We Want Change* (2005). Available at – [www.pilch.org.au/hplc](http://www.pilch.org.au/hplc).

<sup>91</sup> Human Rights Committee, *Concluding Observations: Australia* (2 April 2009) CCPR/C/AUS/CO/5 ¶ 12.

caused her to lose weight. The participant stated that “*it is painful to eat and I have developed jaw problems / pain. I have also lost confidence and am unable to get a job or interview.*”

Sixty-three per cent of participants at the workshops indicated that their lack of money to pay for services was a barrier to them obtaining adequate health care, while 47 per cent of participants indicated that basic living needs such as food and housing must take precedence over health care. Other barriers to obtaining adequate health care identified by participants include lack of transportation to medical facilities (43 per cent), lack of documentation including a Medicare card (23 per cent), complexity of the health service system (34 per cent) and lack of information (41 per cent). Independent research has identified other barriers to adequate health care for people experiencing homelessness.<sup>93</sup> One of the participants stated that her inability to access health services when she was pregnant and had pneumonia resulted in her having a miscarriage. The participant sought assistance from numerous health services. All services she approached refused to assist her and as a result her pneumonia worsened, she was hospitalised and she suffered a miscarriage. This was obviously a very traumatic and distressing experience for the woman.

Research and experience demonstrate that improving health outcomes for homeless people requires specifically targeted health care services, delivered together with programs to address underlying causes of homelessness, including in the areas of housing, income support, primary health care, training and employment, protection from discrimination, rehabilitation and reintegration.<sup>94</sup> The consequences of failing to provide adequate treatment, support services and supportive housing for people who are homeless and have mental health issues include ‘poor physical health, social dysfunction, inappropriate incarceration, higher crime rates, prolonged homelessness and early death’.<sup>95</sup> Finally, the fact that the primary source of income for almost 50 per cent of participants that attended the workshops is the disability support pension highlights the systematic breach of homeless persons’ rights to the highest attainable standard of physical and mental health.

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<sup>92</sup> 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, ¶ 130.

<sup>93</sup> L Gelberg, L S Linn, R P Usatine and M H Smith, *Health, Homelessness and Poverty: A Study of Clinic Users* (1996) 2325–30; National Mental Health Working Group, *Homelessness and Mental Illness: Bridging the Gap — Discussion Paper* (2003) 5; Margaret Eberle et al, *Homelessness: Causes and Effects — A Review of the Literature* (2001) 16–17. See also Royal District Nursing Service Homeless Persons Program, *It Can Be Done: Health Care for People who are Homeless* (1992), cited in Department of Human Services (Victoria), *Primary and Acute Health Responses to People Who Are Homeless or at Risk of Homelessness: Information Paper* (2000) 3.

<sup>94</sup> Paula Braveman and Sofia Gruskin, ‘Poverty, Equity, Human Rights and Health’ (2003) 81(7) *Bulletin of the World Health Organization* 539, 540.

**(d) The right to social security**

Article 9 of the ICESCR provides that everyone has a right to social security. Indeed, an adequate income is necessary for people to enjoy an adequate standard of living. According to Amartya Sen, Nobel Prize Winner for Economics, '*inadequate income is a strong predisposing condition for an impoverished life*'.<sup>96</sup> An adequate income is necessary to ensure an adequate standard of living, and facilitate participation in the civil, political, economic, social and cultural aspects of community life. However, current social security arrangements in Australia fail to protect people's human rights.

The absence of a guaranteed minimum income, together with the fact that social security payments are generally pegged and paid below the Henderson Poverty Line,<sup>97</sup> is a significant contributor to people either living in or being at risk of poverty and homelessness in Australia.<sup>98</sup> Over 83 per cent of participants at the workshops stated that the amount of social security that they receive is inadequate to meet their most basic needs. This is not an uncommon result.<sup>99</sup> However, it is particularly alarming given that the primary source of income of over 90 per cent of participants is some form of social security. One participant stated an experience that was common to many attendees at the workshops, "*social security isn't enough, I run out of food for lunches and it's hard to afford medication and treatment...*" Many other participants described the difficulties they had meeting the basic costs of life on Centrelink payments. In the HPLC's experience Centrelink payments are pegged so low that people must at times resort to begging to supplement their income in order to pay for food, accommodation and other basic necessities.<sup>100</sup>

Homeless people also regularly experience a number of barriers to accessing social security payments at all, often because they are unable to satisfy reporting requirements or because of lack of identification documents. Many participants also reported not being able to apply for a Centrelink payment because they could not provide 100 points of identification – something which is difficult for the homeless because original documents can't be kept in a safe place, and many do not have a driver's licence or passport. For young people, sufficient identification can be an even bigger problem, as they may not be eligible for things like a driver's licence, or their

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<sup>95</sup> National Health Care for the Homeless Council (US), *Addiction, Mental Health and Homelessness: Policy Statement* (2004) 1.

<sup>96</sup> Amartya Sen, *Development as Freedom* (1999) 87.

<sup>97</sup> Melbourne Institute of Applied Economics and Social Research, *Poverty Lines Australia* (December Quarter 2008).

<sup>98</sup> 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.

<sup>99</sup> More than 83 per cent of people accessing homelessness assistance services in 2002 received a social security payment, indicating that such payments are inadequate to access or maintain housing: AIHW, above n 14.

<sup>100</sup> PILCH Homeless Persons Legal Clinic, *We Want Change*, Report on Begging in Melbourne (2005). Available at [pilch.org.au/hplc](http://pilch.org.au/hplc).

documents may be held by a parent. These effects of Australian social security law and policy have been described by some commentators as having a disproportionate and discriminatory impact on people experiencing homelessness, as it is often so difficult for homeless people to access the payments.<sup>101</sup>

Sixty-three per cent of participants at the workshops indicated that their Centrelink payment had been withheld at some point. This statistics appears to demonstrate the harsh impact 'Welfare to Work' legislation has had on people experiencing homelessness. This legislation introduced social security compliance regimes, which provided that where a job seeker fails to meet a participation requirement (such as failing to attend a training course) the job-seeker may have their payment suspended until they comply. Where a person has failed to meet a participation requirement three times, their payments may be cut off for a period of eight weeks and the person will receive no income whatsoever during this time. The job-seeker is not required to contact Centrelink or their Job Network Provider until the conclusion of the suspension period thereby interrupting potential job training and employment opportunities. The effect of a compliance regime that withholds welfare payments to this extent perpetuates a cycle of poverty and homelessness for severely disadvantaged members of our community who are forced to focus on surviving rather than securing employment and getting their lives back on track.

The HPLC considers the negative impact of the penalty regime under this type of legislation to be contrary to Australia's human right obligations. In particular, punitive penalty regimes may constitute breaches of a person's human rights to social security, adequate standard of living and right of access to the highest standard of physical and mental health as found in the *International Covenant on Economic, Social and Cultural Rights* ratified by Australia in 1975.<sup>102</sup>

The Australian government must address current income disparities and the structural barriers that make it difficult for people experiencing homelessness to access social security benefits in order to stop the cycle of poverty, homelessness and disadvantage.

**(e) The rights to freedom of association and movement**

The increased regulation and policing of public spaces in which many homeless people congregate, particularly young people and indigenous people, can violate an individual's rights to public space and freedom of association. This constitutes a barrier

<sup>101</sup> Human Rights and Equal Opportunity Commission, *Homelessness and Human Rights* (2008), 11.

<sup>102</sup> Articles 9, 11 and 12 of the *International Covenant on Economic, Social and Cultural Rights*.

to changing the public perception of homelessness and people experiencing homelessness.

Respect for the right to freedom of association is guaranteed by international law.<sup>103</sup> This right enables people experiencing homelessness to participate in, and integrate with, the community.

Laws that criminalise the lived experience of homelessness include those that prohibit sleeping, bathing or urinating in a public space.<sup>104</sup> Such laws effectively operate to punish people for being poor, rather than because of any criminal activity.<sup>105</sup> United States courts have held that these laws violate the right to freedom from cruel and unusual punishment.<sup>106</sup> Punishing people for begging, or simply for sleeping in public space (because they have no alternative), perpetuates the cycle of poverty and disadvantage. This further marginalises some of the most disadvantaged and vulnerable members of our community. In his Concluding Remarks following his mission to Australia, the Special Rapporteur concluded that '*laws such as begging laws, public drinking laws and public space laws, should be revised and amended to ensure that fundamental human rights are protected.*'<sup>107</sup>

An effective response to homelessness must understand and address these realities in a way that promotes people's rights and human dignity.

**(f) The right to freedom from torture or cruel, inhuman and degrading treatment**

It has been stated that '*recognition of inherent dignity ... is the foundation of freedom, justice and peace*' and that human rights derive from the '*inherent dignity*' of the human person.<sup>108</sup> It is therefore particularly alarming that over 80 per cent of participants at the workshops reported having been treated in a cruel and degrading way while experiencing homelessness.

Many participants reported being the subject of cruel and degrading treatment by Victoria Police, Centrelink, public transport authorised officers, workers within the Office of Housing and even homelessness assistance services. Participants recounted

<sup>103</sup> See eg article 22 of the ICCPR; article 4(d)(ix) of CERD; article 7(c) of CEDAW; article 15 of the CRC.

<sup>104</sup> Human Rights and Equal Opportunity Commission *Homelessness is a Human Rights Issue* (2008), 12.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Jones v City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006). See also Human Rights and Equal Opportunity Commission *Homelessness is a Human Rights Issue* (2008), 12.

<sup>107</sup> HRC, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, UN Doc A/HRC/4/18/Add.2 (2007).

<sup>108</sup> Preamble to the ICCPR.

instances when requests for help had been ignored, when they had been hassled on the street for being a 'pest' or had been the subject of assault.

**(g) The rights to participation and freedom of expression**

Many people experiencing homelessness feel deeply alienated from the community due to an inability to have their say in public policy formulation and decision-making processes. The involvement of people experiencing homelessness in policy development and decision-making processes, at both government and service provision levels, would result in more sensitive and effective responses to homelessness and would empower homeless people to participate more fully in social, cultural, economic and political life.<sup>109</sup>

The HPLC has a policy of ensuring, as far as possible, direct client involvement in the development of the services we deliver. In our experience, efforts to maximise client participation in service planning and delivery has a material impact on outcomes.

At the workshops there was a great deal of discussion about people's right to participate, or lack thereof. Seventy per cent of attendees said that they did not feel that they had been given an adequate opportunity to have their say about government policies in relation to homelessness and human rights.

It is important that the Government improve processes and procedures so that meaningful participation of and consultation with consumers is encouraged and facilitated. Clearly, people experiencing homelessness are uniquely placed to provide government with feedback and comment on improving pathways out of homelessness.

### **6.3 Conclusion**

On a day-to-day basis, homeless people experience systematic and repeated breaches of their human rights. The stories, perspective and lived experience of homeless people show that there is an urgent need for improved and legislated human rights protections in Australia. The HPLC urges the government to take heed of these stories and experiences and move towards the introduction of such protections as soon as possible.

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<sup>109</sup> *International Covenant on Civil and Political Rights*, articles 19 and 25. See also *Convention on the Rights of the Child*, article 12 and 13.

## 7. How could Australia better protect and promote human rights?

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### 7.1 Introduction

People experiencing homelessness and the Australian community generally require legislative protection of their human rights and an improved human rights culture, both within government and in the wider community. In the words of one participant at the workshops, “*our rights [need] to be legitimate and legalised.*”

The HPLC submits that the Australian government must develop a legislative human rights framework, which specifically considers and responds to the human rights violations experienced by homeless people. This must be accompanied by other measures, described below, to increase and improve the broader social response to homelessness and other human rights violations.

The HPLC is of the view that as part of the government’s legislative response to ensure improved human rights protections in Australia, it should introduce legislation that protects the integral human rights of people experiencing homelessness (i.e. the right to adequate housing, the right to social security, the right to participate etc). In this regard, the HPLC refers the Consultation Committee to homelessness specific legislation introduced in Scotland *Homelessness etc (Scotland) Act 2003* (**Scotland Act**).

The HPLC submits that the Australian government must address the issue of homelessness within the human rights paradigm. This is necessary not only to discharge Australia’s obligations at international law, but because the benefits of a human rights approach are widely acknowledged as promoting and facilitating positive outcomes, particularly improving policy development, service delivery and ensuring more accountable governance.

### 7.2 The need for a Human Rights Act

The HPLC recognises that there are many forms that a Human Rights Act could take. In this regard, the HPLC endorses section 12 of the HRLRC’s submission titled ‘A Human Rights Act for all Australians’.

In order to protect and promote human rights and prevent human rights violations, people experiencing homelessness need well drafted, unambiguous legislative human rights protections that operate in a preventative manner. Ninety-nine per cent of participants at the workshops said that Australia should have a Human Rights Act that adequately protects their human rights; every participant said that this legislation should protect civil and political rights,

while 98 per cent said that social, economic and cultural rights should be protected. As one participant said, *“we definitely need to introduce a bill of rights for Australia.”*

Furthermore, the HPLC believes that the language used in the Human Rights Act must be clear and accessible. A Human Rights Act should be a document that unequivocally sets out the rights that will be protected and the remedies that are available in the event that those rights are violated.

**Recommendation 2:** *That the Australian government implement a Human Rights Act which protects the human rights contained in the ICCPR and the ICESCR.*

Australia urgently needs a Human Rights Act to ensure improved domestic implementation of our obligations in international human rights law. A Human Rights Act for all Australians is also required to redress the many human rights violations that are prevalent within our society, particularly those experienced by the homeless, the poor and the marginalised.

Suggested mechanisms and important aspects of an Australian Human Rights Act are discussed below.

**(a) Role of the executive, government departments and public authorities in protecting human rights**

A Federal Human Rights Act should apply to the full range of bodies charged with government service delivery, whether the body itself is public or private. The purpose of the Act must be to enshrine government responsibilities to implement human rights and create mechanisms to ensure government accountability. As one participant at the workshops said, a Human Rights Act must *“make organisations and governments accountable to those whom the services are being provided for.”*

A Human Rights Act has significance not only as a document that gives legal effect to human rights, but also as a symbol of the government’s commitment to acknowledging and protecting the rights of its citizens. In addition, it may act as a legislative deterrent to conduct that is inconsistent with human rights. Government accountability is crucial to the development of a human rights culture.

The Executive, which comprises government departments and other public officers and authorities, is responsible for the development and delivery of policies, programs and

services. Many of these departments have the potential to contribute significantly to, or derogate significantly from, the realisation of human rights for all Australians.

It is imperative that the Executive establish appropriate mechanisms to ensure that human rights under a Human Rights Act are protected, respected and fulfilled, and that its policies and activities promote the realisation of human rights. Drawing on comparative international experience, concrete mechanisms and strategies could include:

- entrenchment of the principle that Executive policies and programs must be directed towards respecting, protecting and fulfilling human rights and that the Executive must take all steps necessary, within available resources, to this end;<sup>110</sup>
- entrenchment of the principle that the Executive must act consistently with human rights and take human rights into consideration in decision-making processes;<sup>111</sup>
- a requirement that the Attorney General, upon presentation of a Bill to Parliament, prepare and present to Parliament a 'Statement of Compatibility' confirming that the Bill is consistent with the Human Rights Act;<sup>112</sup>
- a requirement that the Executive develop and implement a Human Rights Action Plan and report periodically on implementation of that Plan;<sup>113</sup>
- a Cabinet Committee on Human Rights to develop, implement and scrutinise governmental policy and programs consistently with a Human Rights Act;
- the appointment of a Human Rights Officer within each governmental department and public authority to promote and coordinate the implementation of human rights within their portfolio or area of responsibility and activity;
- the establishment of a Human Rights Unit within the Department of Premier and Cabinet to coordinate the joined-up implementation of human rights across government; and

<sup>110</sup> See, eg, South African Bill of Rights 1996 ss 7(2), 26(2), 27(2).

<sup>111</sup> See, eg, *Minister for Immigration v Teoh* (1992) 175 CLR 1, 42.

<sup>112</sup> See, eg, Bill of Rights Act 1990 (NZ) s 7; Human Rights Act 1998 (UK) s 19; and Human Rights Act 2004 (ACT) s 37.

<sup>113</sup> See, eg, Human Rights Commission (NZ), New Zealand Action Plan for Human Rights (2005)

<http://www.hrc.co.nz/report/actionplan/0foreword.html> at 1 August 2005.

- the establishment of an Inter-Departmental Human Rights Taskforce, comprising senior public servants, to ensure an integrated and coordinated approach to human rights implementation.<sup>114</sup>

In addition to providing a useful framework for identifying and imposing obligations in relation to the specified rights, the Human Rights Act should apply to and bind the activities, conduct and functions of the Executive such that its policies and programs are:

- fair and non-discriminatory – this requires that the policy or service be targeted at the alleviation of disadvantage and the elimination of discrimination;
- participatory and empowering – this requires that the policy or service be informed by the active participation of key stakeholders and expands their range of choice and freedoms;
- holistic – this requires that the policy or service have regard to the civil, economic, social and cultural determinants of wellbeing of affected persons; and
- transparent and accountable – this requires that the policy or service identify the persons or entities responsible for implementation, sets targets or indicators to measure progress, and establishes mechanisms to ensure accountability.

**Recommendation 3:** *That the Human Rights Act imposes obligations on all arms of government (the Executive, Parliament and the Courts) to respect, protect and fulfil human rights, including the full range of bodies charged with government/public service delivery.*

### (b) Role of the courts

The role of the courts in protecting, respecting and fulfilling human rights centres on hearing and determining disputes concerning human rights.

<sup>114</sup> For a discussion of the importance of a range of coordinating mechanisms across government to ensure a coherent and effective approach to human rights promotion and poverty reduction, see Australian Council of Social Service, *International Comparisons of Anti-Poverty Plans: Lessons for Australia* (2004); Comparative Research Programme on Poverty, *Abolishing Poverty Through the International Human Rights Framework: Towards an Integrated Strategy for the Social and Human Sciences* (2003) 9.

Some human rights frameworks, in addition to conferring remedial functions and powers on courts, also establish frameworks to ensure that the judiciary acts consistently with human rights and has appropriate regard to human rights in proceedings. Both the Charter and the *Human Rights Act 2004 (ACT)* require that, so far as possible, domestic legislation be interpreted in conformity with international human rights principles<sup>115</sup> and remove the requirement that there be an ambiguity or lacuna in the legislation for the principle to be invoked.<sup>116</sup>

In terms of examples from comparative jurisdictions, the South African *Bill of Rights 1996* goes further than this, providing that not only should legislation be interpreted and applied consistently with the Bill, but that:

When interpreting the Bill of Rights, a court, tribunal or forum:

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.<sup>117</sup>

It is the HPLC's view that not only should legislation be interpreted and applied consistently with human rights, but that courts have an important role to play in promoting the values of human rights and should consider international human rights law when applying domestic law and policies.

**Recommendation 4:** *That the Human Rights Act require that courts and tribunals interpret and apply laws consistently with human rights, having regard to international and foreign law.*

### (c) Effective remedies

Much of the criticism that has been levelled at current human rights legislation in Victoria and the ACT goes to the absence of effective remedies.<sup>118</sup> International law requires that human rights norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to

<sup>115</sup> See, eg, *Polites v Commonwealth* (1949) 70 CLR 60, 67; *Newcrest Mining Ltd v Commonwealth* (1997) 190 CLR 513, 661.

<sup>116</sup> John Stanhope, 'The Human Rights Act 2004 (ACT): Making a Stand in the ACT' (2005) 30(2) *Alternative Law Journal* 54, 55.

<sup>117</sup> South African Bill of Rights, s 39(1)

<sup>118</sup> See generally Richard Refshauge SC, *Assessing the First Year of the ACT Human Rights Act*, July 2005. Mike Salvaris, "Economic and Social Rights: The Victorian Charter's Unfinished Business", 2007 (43) *Just Policy* 30.

any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.<sup>119</sup>

The availability of an 'effective remedy' requires that '*individuals be able to seek enforcement of their rights before national courts and tribunals*'.<sup>120</sup> Such an approach was strongly endorsed by participants in the workshops; around 75 per cent considered that a Human Rights Act should provide effective remedies for breaches of human rights. Participants also stated that affected persons should be able to pursue a human rights complaint and obtain an effective remedy in a court (67 per cent), before a human rights commission (69 per cent), human rights ombudsman or commissioner (64 per cent), specialist human rights unit within the government (65 per cent) and/or to the relevant governmental department (61 per cent).

Remedies available under comparative domestic human rights frameworks (i.e. in South Africa, Canada, New Zealand, the United States and the United Kingdom) include:

- a declaration or order that a law, policy or program is inconsistent with human rights and be invalidated, repealed or 'struck down' to the extent of the inconsistency;<sup>121</sup>
- a declaration or 'statement' that a law, policy or program is incompatible with human rights and requiring government to respond to this incompatibility;<sup>122</sup>;
- a declaration or order that a law, policy or program be implemented in accordance with human rights;<sup>123</sup>
- an injunction, declaration or order that the conduct or activity amounting to a breach of human rights be stopped;<sup>124</sup>
- compensation and reparations;<sup>125</sup> and

<sup>119</sup> CESCR, General Comment 9: The Domestic Application of the Covenant, [2], UN Doc E/C.12.1998/24 (1998). See also article 2(3) of the ICCPR and article 2(1) of the ICESCR.

<sup>120</sup> Ibid.

<sup>121</sup> See, eg, Canadian Charter of Rights and Freedoms 1982; South African Bill of Rights 1996; US Constitution, First Amendment.

<sup>122</sup> See, eg, Human Rights Act 2004 (ACT) s 32; Human Rights Act 1998 (UK) s 4.

<sup>123</sup> See, eg, Human Rights Act 1998 (UK) s 7.

<sup>124</sup> HRC, *General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant*, [17], [19], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>125</sup> See, eg, *Simpson v Attorney General (NZ)* [1994] 3 NZLR 667; Human Rights Act 1998 (UK) s 8. The HRC has stated that 'States Parties [are required to] make reparation to individuals whose ... rights have been violated. Without reparation to individuals whose ... rights have been violated, the obligation to provide an effective remedy, which is central to efficacy of article 2, paragraph 3 is not

- such remedies as are 'just and appropriate' or 'just and equitable'.<sup>126</sup>

The federal government has afforded itself the opportunity to create a meaningful and expansive living document that will not only comply with obligations under international human rights law<sup>127</sup> but that will evince a strong commitment to the protection and promotion of rights of all its people. For such a document to be worthwhile it must contain effective remedies, appropriate means of redress and ensuring mechanisms for improved government accountability.

Remedies of practical utility must be available under a Human Rights Act for those whose human rights have been breached. These remedies should extend to the availability of compensation, the provision of an apology and punitive damages.

It is the HPLC's view that a declaration of incompatibility that does not affect the rights or obligations of anyone (as is the case in Victoria, under the Charter) is not sufficient to ensure government accountability and does not constitute an effective remedy.

**Recommendation 5:** *That any 'breach of human rights' action is justiciable in federal courts and tribunals.*

**Recommendation 6:** *That all legal and equitable remedies are available for any successful breach of human rights action.*

#### (d) Rules of Standing

We note that standing rules of considerable sophistication have been developed in jurisdictions with a charter of rights (and indeed in various Australian jurisdictions), to ensure that organisations with an interest in the court's determination of the scope or nature of a right, and its application to the facts at issue, have a chance to present their position, while still recognising that it is the individual or organisation directly affected whose rights are of central concern.

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discharged': HRC, General Comment No 31: The Nature of the Legal Obligation Imposed on States Parties to the Covenant, [16], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>126</sup> See Canadian Charter of Rights and Freedoms 1982; South African Bill of Rights 1996; Human Rights Act 1998 (UK) s 7.

As the Tampa Case aptly demonstrated, in matters of fundamental human rights it is important that where a person or group is unable to bring a complaint on their own behalf, an individual or group acting on their behalf and in their interests should be able to initiate a proceeding.<sup>128</sup>

**Recommendation 7:** *That the rules of standing in relation to matters litigated under a Human Rights Act should be broad and permissive.*

**(e) Review and monitoring**

It is essential that the introduction of a Human Rights Act is only seen as one step towards the development of a human rights culture in Australia. A Human Rights Act should therefore expressly include mechanisms for periodic review to assess the efficacy of protections conferred by the Human Rights Act and to identify and respond to gaps and weaknesses in the legislative framework. As a participant at the workshops stated “A [Human Rights Act] should be able to be reviewed, because standards change over time.”

Comprehensive reviews should take place regularly (for example, 1 year, 5 years and 10 years) and should be conducted with the active and resourced participation of all stakeholders. Importantly, any further consultation process should ensure that community organisations and stakeholders are given sufficient time and resources to engage in meaningful consultations with their consumers. It is only through broad and generous consultations that government will be equipped with a true picture of the human rights landscape, the existing gaps and the need for further reform.

**Recommendation 8:** *That the Human Rights Act includes mechanisms that enable effective, comprehensive and regular reviews to identify and respond to gaps and weaknesses within the legislative framework.*

<sup>128</sup> *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 (Unreported, North J, 11 September 2001), [123]–[137] (‘Tampa Case’).

**(f) Costs**

The HPLC also submits that the normal rules of costs should not apply in Human Rights Act cases and that the court should be empowered to award costs only in exceptional circumstances. Security for costs should not be used as an obstacle to court action where individuals or organisations are seeking to uphold a right set out in the Human Rights Act. Further, there should be the proper provision of legal aid for categories of Human Rights Act cases.

**Recommendation 9:** *That the rules as to costs should not be used as an obstacle to court action where individuals or organisations are seeking to uphold a right set out in the Human Rights Act.*

**7.3 Other measures, in addition to a Human Rights Act**

In addition to a Federal Human Rights Act, other measures are required to ensure improved promotion and protection of human rights. In particular, the introduction of a Human Rights Act must coincide with improved human rights education and a long-term awareness campaign. Entities with obligations under the Human Rights Act (i.e. all arms of government and public bodies) must also receive adequate training about human rights and how to apply them. All people must know about human rights and how to assert and uphold them in order for the general community to enjoy these rights.

There are a number of straightforward steps that the government can take to improve human rights protections. Following the introduction of the White Paper, there are also a number of important steps that the government can take to specifically protect the human rights of people experiencing homelessness.

**(a) Strategies for promoting a human rights respecting culture**

The efficacy of a Human Rights Act would be significantly dependent on not only rights-holders, but also duty-holders, being aware of and properly understanding their obligations under legislation. As one participant said, *“if people knew about human rights they’d be better protected and you’d be better treated by government.”* A Human Rights Act must therefore be accompanied by greater human rights education and awareness raising, to promote a culture of human rights in Australian society.

Participants at the workshops proposed a range of strategies to promote a culture of human rights. Many participants considered that human rights should comprise a compulsory component of the primary and secondary school curricula. A number of participants also suggested that all Australian residents should be provided with a booklet about their human rights. As one participant said, we need “*education from an early age. Schools should have a [human] rights class. Human rights at home, human rights at school, human rights in the workplace, human rights in the community.*”

In total, 99 percent of participants at the workshops said that in addition to a Human Rights Act, there needs to be education and awareness raising within the community so that people know about human rights. Many participants suggested that the government should resource a comprehensive media campaign, covering television, newspapers and radio. The TAC campaign was offered as an effective example. Some participants spoke of the need for ongoing forums and dialogue, including forums that enable people who are homeless to give testimony about their human rights experiences. They spoke of the need for cultural change to be progressed through effective leadership and action. They said that it is very important that the government be seen to be supporting human rights, with a lot of people saying that the best way for government to contribute to such a culture is to ‘practice what they preach’.

The HPLC contends that community education and awareness raising about human rights is essential to ensure the effective implementation of human rights. For further details about the form of such education and awareness campaigns, the HPLC refers the Committee to the HRLRC’s second submission entitled ‘*Engage, Educate, Empower*’.

**Recommendation 10:** *That there needs to be improved human rights education and awareness raising throughout the community, to promote a culture of human rights in Australia.*

In order to ensure the effectiveness of the Human Rights Act, staff of government and public bodies must be properly trained in human rights and must be appropriately informed about their obligations under a Human Rights Act.

**Recommendation 11:** *That all staff from all public authorities (broadly defined under the Human Rights Act) and Commonwealth*

*departments, agencies and statutory bodies receive adequate training to ensure practical compliance with the Human Rights Act.*

In addition to training of staff, government policies and programs should be directed towards the aims and objectives of the Human Rights Act namely, respecting, protecting and fulfilling human rights for all Australians.

**Recommendation 12:** *That Executive policies and programs are directed towards respecting, protecting and fulfilling human rights and that the Executive must take all steps necessary, within available resources, to achieve this end.*

**Recommendation 13:** *That all public authorities (broadly defined under the Human Rights Act) and Commonwealth departments, agencies and statutory bodies conduct regular reviews of all policies, procedures and programs to ensure that they protect and promote human rights.*

It is well understood that people experiencing homelessness often confront multiple barriers to accessing information and education and that targeted strategies need to be developed to overcome these barriers.<sup>129</sup> Strategies identified by homeless participants at the workshops included:

- the provision of information and education about human rights at homelessness assistance services and welfare agencies (supported by 74 per cent). According to the Australian Institute of Health and Welfare, in 2007–08, homelessness assistance services funded through the Commonwealth-State SAAP provided services to an estimated 202,500 people experiencing homelessness;<sup>130</sup>

<sup>129</sup> See, eg, Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004) 151.

<sup>130</sup> Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2007–08* (2009) vii.

- the provision of information and education about human rights at Centrelink offices (supported by 73 per cent). According to the Australian Institute of Health and Welfare, in 2003–04, approximately 86 per cent of people experiencing homelessness accessed social security payments through Centrelink;<sup>131</sup>
- many homeless people (particularly people with special, multiple or complex needs) are unable to access homelessness assistance services or welfare agencies due to lack of supply<sup>132</sup> and issues of exclusion.<sup>133</sup> For these people, many of whom comprise the group of people experiencing 'primary homelessness' (i.e., rough sleepers), engagement with street outreach workers or consumer advocates is the principle means of accessing services. This strategy was supported by 72 per cent of participants;
- the provision of information and education by legal aid and community legal centres (supported by 69 per cent);
- information should be available on the internet (70 per cent) and at public libraries (61 per cent);
- community service announcements on television (71 per cent), radio (58 per cent) and in newspapers (65 per cent).

**Recommendation 14:** *That the human rights education and awareness campaigns are accessible for disadvantaged and marginalised Australians through a variety of means, which take into account issues of exclusion.*

<sup>131</sup> Australian Institute of Health and Welfare, Homeless People in SAAP: National Data Collection Annual Report 2003–04 (2005) 63, 66. This accords with the workshops where the primary source of income for over 90% of participants was social security.

<sup>132</sup> The Australian Institute of Health and Welfare estimates that at least 700 homeless people are unable to access SAAP services on any given day due to lack of capacity and resources: Australian Institute of Health and Welfare, Homeless People in SAAP: National Data Collection Annual Report 2002–03 (2004).

<sup>133</sup> See, eg, NSW Ombudsman, above n 77.

**(b) Human rights monitoring**

International law requires signatory states to submit formal reports to the United Nations treaty bodies, including reports on the measures which they have adopted and the progress made in achieving the observance of human rights.<sup>134</sup>

As a part of an ongoing commitment to monitoring human rights, the government should develop reporting mechanisms which focus on the implementation and continuing status of human rights protection. Effective data should be collected to show what rights are most frequently violated and why, and rigorous research should be funded to inform the development of effective solutions and measure progress. This data will help identify areas of weakness and gaps in human rights protection which will inform strategies for improvement under an action plan.<sup>135</sup>

To enable the effective collation of data and better monitoring of human rights compliance domestically, the government should enhance the powers and functions of the Australian Human Rights Commission (**AHRC**). Currently, the AHRC has limited powers to protect human rights in Australia. For example, the AHRC is not mandated to consider the implementation of economic, social and cultural rights in Australia. The AHRC is mostly concerned with ensuring implementation of anti-discrimination laws and has responsibility for the following human rights instruments:

- ICCPR;
- Convention Concerning Discrimination in Respect of Employment (ILO 111);
- CRC;
- Declaration of the Rights of the Child;
- Declaration on the Rights of Disabled Persons;
- Declaration on the Rights of Mentally Retarded Persons; and
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

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<sup>134</sup> Article 40 of the ICCPR.

<sup>135</sup> For example, Importantly, the NZ Action Plan (<http://www.hrc.co.nz/report/actionplan/2children.html>) identified human rights abuses against children and young people as one 'one of the greatest challenges facing New Zealand.' The report recognised that despite the introduction of a bill of rights, children and young people continue to face serious rights abuses in relation to violence and poverty. The

The HPLC submits that the AHRC requires greater powers of investigation, monitoring and enforcement of human rights in Australia. In addition, the HPLC is of the view that the human rights instruments for which the AHRC is responsible require updating to incorporate the primary human rights instruments to which Australia is a party, namely: ICESCR, CERD, CRPD, CEDAW and CAT (in addition to the ICCPR and CRC, which are currently included within the AHRC's mandate).

The HPLC also contends that improved monitoring and enforcement of human rights in Australia requires that the Federal government immediately ratify the Optional Protocol to the ICESCR, as this will enable individual's to seek adjudication of human rights matters when domestic remedies have been exhausted. Ratification of the Optional Protocol is also necessary in the context of acknowledgement that human rights are indivisible and interdependent.

**Recommendation 15:** *That the Human Rights and Equal Opportunity Commission Act 1986 (Cth) be amended to include all relevant international human rights instruments to which Australia is a party, such as the ICESCR, CERD, CEDAW, CRPD and CAT.*

**Recommendation 16:** *That the Australian Human Rights Commission be given greater powers of investigation, monitoring and enforcement of human rights in Australia.*

**Recommendation 17:** *That the Australian Human Rights Commission be adequately resourced to undertake any additional powers and functions.*

**Recommendation 18:** *That the Australian government immediately sign and ratify the Optional Protocol to the ICESCR as soon as it*

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Action Plan then proceeds to list priorities for action and specific strategies for improving rights protection afforded to children and young people.

*comes into force.*

**(c) Protecting the rights of people experiencing homelessness**

As discussed above in Part 6, people experiencing homelessness regularly suffer human rights violations. There are a number of human rights that are particularly important to people experiencing homelessness, but there are significant gaps in the implementation of those rights.

The right to adequate housing is highlighted above as a right that is particularly important to homeless people, but it is also one which is denied to them on a daily basis. Indeed, the Special Rapporteur has described homelessness 'the most visible and severe symptom of the lack of respect for the right to adequate housing'.<sup>136</sup>

It is important that the government introduce specific legislation that protects, and ensure realisation of, the human rights that are particularly important to people experiencing homelessness. In this regard, the HPLC refers the Consultation Committee to homelessness specific legislation introduced in the Scotland Act.

The White Paper proposes that new legislation will underpin its aims and goals. The HPLC submits that this new legislation, which will give effect to the policy objectives set out in the White Paper, should also enshrine the right to adequate housing. This legislation may be drafted as a Federal *Homelessness Act*, which follows and improves upon the progressive model exemplified in the Scotland Act. The HPLC contends that such legislation should include the following elements:

- 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.
- Legislative objects that set out the responsibility of government to progressively realise the right to adequate housing, which must incorporate both short and long term accommodation and housing options.
- The following primary object:

<sup>136</sup> 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.

*“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”*

- The broad definition of homelessness currently provided under the *SAAP Act*.
- The definition of the right to adequate housing as it appears in international law, incorporating:
  - Security of tenure;
  - Availability of services;
  - Affordability;
  - Habitability;
  - Accessibility;
  - Proximity; and
  - Cultural appropriateness.
- Provision for government funding of social support services under the *Homelessness Act* to 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.
- Establishment of the *Office of the Commissioner for Adequate Housing* for the purpose of safeguarding individuals’ rights. The Commissioner should have the power to:
  - Develop grievance and appeals procedures in respect of public housing matters and general social support services;
  - 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.
- The *Office of the Commissioner for Adequate Housing* could be established as a Commissioner position within the AHRC, 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<sup>137</sup> around Australia, to enable homeless people to have a direct say in matters that affect them.
  - 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.

**Recommendation 19:**

*That the Australian government enact a Homelessness Act, modelled on the Scotland Act, which incorporates the policy objectives of the White Paper, enshrines the right to adequate housing and provides effective remedies for violations of the right to adequate housing.*

<sup>137</sup> 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.

The right to equality and freedom from discrimination is consistently denied to people experiencing homelessness, as it is currently lawful throughout Australia to discriminate against people on the basis of their homelessness or social status. The HPLC contends that equality laws in Australia must be improved in order to provide people experiencing homelessness with protection of their right to equality and freedom from discrimination. The HPLC notes that the HRC recently recommended that the Australian government comprehensively review and revise Australian anti-discrimination laws.

**Recommendation 20:** *Federal and State anti-discrimination laws should be amended to include social status (including homelessness, unemployment or the receipt of social security payments) as a protected attribute.*

Any human rights response to the problem of homelessness in Australia must recognise that the problem is complex and involves many interrelated issues. There are many laws and policies in Australia that have a disproportionate and discriminatory impact on people experiencing homelessness, only serving to further entrench them in the cycle of poverty and disadvantage. One of the first steps of a human rights approach to homelessness should be an audit of all Commonwealth, State and Territory legislation, policies and procedures to ensure they do not violate the rights of people experiencing homelessness.

**Recommendation 21:** *Australian governments must review and amend all legislation, policies and procedures that impact disproportionately and discriminatorily on people experiencing homelessness, including: residential tenancy laws, electoral laws, public space laws.*

The HPLC contends that the Australian government must address the issue of homelessness within the human rights paradigm. Such action is necessary not only because it would discharge Australia's obligations at international law, but because the benefits of a human rights approach are widely acknowledged as promoting and

facilitating positive outcomes, particularly improving policy development, service delivery and ensuring more accountable governance.

## 8. Way Forward

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The focus of this submission has been the issues on which the HPLC is in a unique position to comment; namely, the legislative mechanisms that the Australian government must adopt to ensure the most effective response to tackle the homelessness crisis in Australia.

It is clear that homelessness is not just an issue of housing; it is a matter of ensuring that the human rights of *all* individuals are adequately protected and promoted. People experiencing homelessness are subject to multiple and intersectional human rights violations including, 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.

It is imperative that the Federal government adopt a human rights approach to the issue of homelessness in Australia. This approach necessitates the introduction of a holistic legislative mechanism (in the form of a Federal Human Rights Act), which acknowledges the interconnectedness of human rights and promotes and protects the human rights of all individuals in Australia, particularly those of the most disadvantaged and marginalised members of our society.

A Federal Human Rights Act would not only send a strong message about the Federal government's commitment to addressing homelessness and poverty, but more importantly it would also provide important protection for individuals experiencing homelessness whose rights are violated on a daily basis. It would also create the impetus for review and amendment of laws, policies and practices that cause marginalisation and disadvantage within society.

This submission has been greatly informed by our consultations with people who are currently homeless or who have experienced homelessness in the past. We are extremely grateful for their time, expertise and courage in sharing their stories with us. In turn, the HPLC urges the government to listen to the voices of people experiencing homelessness when it comes to human rights. Here are some of their thoughts:

*"If my rights are not protected there is no ground for my life to improve. If agencies and organisation don't observe our human rights, we can't survive. Our rights to have a life like anyone else's [shouldn't] be taken away."*

*"We need to make sure that we are protected. To know we are the only developed country in the world without this [human rights] protection; it's not good enough."*

*“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 be pick them up or walk straight over them, which is what’s being going on too much.”*