

15 December 2008

Committee on Economic, Social and Cultural Rights
Office of the United Nations High Commissioner for Human Rights
By email: CESCRdiscussionday@ohchr.org

Dear Sir/Madam,

Draft General Comment No 20: Non-Discrimination

During its 35th session the Committee on Economic, Social and Cultural Rights (**the Committee**) initiated a review of a Draft General Comment on non-discrimination under the *International Covenant on Economic, Social and Cultural Rights* (**General Comment**). The Committee has sought comments and suggestions on the General Comment from interested parties, including non-government organisations. This submission is made by the PILCH Homeless Persons' Legal Clinic (**HPLC**) and addresses the prohibited ground of 'other status' discrimination, discussed in section 5(b) of the General Comment.

Background

The HPLC was established in Melbourne, Australia in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness. The HPLC provides free legal services to people experiencing or at risk of homelessness at 13 outreach locations that are already accessed by homeless people for basic needs and social and family services (such as soup kitchens, crisis accommodation facilities and health services). Since its establishment in 2001, the Clinic has assisted over 3500 people at risk of, or experiencing, homelessness in Victoria, Australia.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing, the right to non-discrimination and other fundamental human rights. The HPLC has for a number of years been lobbying Australian State and Federal governments to incorporate 'social status' (which includes people experiencing homelessness, the unemployed and recipients of social security) as a protected attribute under anti-discrimination laws.

The HPLC has significant expertise representing and advocating on behalf of people experiencing or at risk of homelessness. This experience has highlighted that the majority of people who are homeless, or at risk of homelessness, routinely encounter discrimination. Such discrimination not only stymies an individual's genuine attempts to integrate into the community and contribute to society, but, it also serves to entrench people in homelessness, unemployment and poverty. The HPLC therefore considers that it is well placed to remark on the provisions of the General Comment, particularly those parts relating to discrimination on the basis of 'other status'.

Preliminary observations on the General Comment

The HPLC commends the Committee for initiating a review of the General Comment. The HPLC supports the adoption of a general comment that clarifies the scope and application of the right to equality and non-

discrimination and which clearly states the obligations incumbent on State Parties to ensure the practical and effective realisation of these rights.

While the HPLC provides its in-principle support for the General Comment there are a number of aspects which require further clarification and strengthening. In this regard, the HPLC refers to and endorses the joint submission of the Human Rights Law Resource Centre and Public Interest Law Clearing House (*HRLRC/PILCH*).

Specific observations on the General Comment – Discrimination on the ground of ‘other status’

Paragraphs 13 – 31 of the General Comment address the prohibited grounds of discrimination including express grounds and ‘other status’. The HPLC supports this section of the General Comment as it provides a useful overview of the prohibited grounds of discrimination while clearly stating that the inclusion of ‘other status’ indicates that the list of prohibited grounds is non-exhaustive.

The HPLC is of the view that a flexible and contextual approach, which accords with the underlying principles of the Covenant, should be adopted when characterising grounds of ‘other status’ discrimination. In this regard, the HPLC commends the Committee’s articulation in the General Comment that ‘a flexible approach to the ground of “other status” is essential since the nature of differential treatment in the exercise of Covenant rights varies according to context and evolves over time.’

Although the General Comment alludes to the importance of adopting this flexible approach when characterising ‘other status’ discrimination, it does not provide further guidance to assist in determining the breadth of relevant attributes (in addition to those already mentioned) that may fall under the umbrella of ‘other status’. The HPLC respectfully submits that this aspect of the General Comment requires further clarification and explanation. We refer the Committee to the recommendation made by the HRLRC/PILCH that:

the Committee include in the General Comment a statement regarding the general principles upon which it relies when determining what grounds of discrimination may fall under ‘other status’. This can be done alongside an acknowledgement that the Committee will make determinations on a case by case basis. Wording may be drawn from the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* which prohibits discrimination on the basis of ‘any other ground causes or perpetuates systemic disadvantage; undermines human freedom; or adversely affects the equal enjoyment of a person’s rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.’¹

The General Comment lists a number of examples of discrimination on the basis of ‘other status’ including the ground of civil, cultural, economic, political or social status. However, the HPLC respectfully submits that the Committee’s discussion of discrimination on the ground of civil, cultural, economic, political and social status provides an inadequate explanation of discrimination on the basis of a person’s social status, such as living in poverty or being homeless. The General Comment should clearly establish social status (which includes people experiencing homelessness, the unemployed and recipients of social security) as a separate and independent ground of discrimination that is prohibited under international law.

¹ Refer to the HRLRC/PILCH Joint Submission to the Committee on Economic, Social and Cultural Rights, Draft General Comment No 20: Non-Discrimination (15 December 2008) and footnote 58, which cites the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*, s.1(1)(xxii)(b).

There is ample evidence that supports the need to articulate social status as a prohibited ground of discrimination under international law. For example, in 2006 the HPLC conducted a series of detailed consultations with homeless people in Victoria, Australia, about their experiences of discrimination. The purpose of these consultations was to gather qualitative and quantitative data regarding the nature and extent of social status discrimination in Victoria. The results of the consultations are both illuminating and disturbing. Seventy per cent of people surveyed reported that they had experienced discrimination on the basis of homelessness or social status. The HPLC has also collected numerous case studies over the years, from its own work and that of community and welfare organisations, which detail persistent discrimination against homeless persons, unemployed persons and social security recipients, including women, children and families.² The HPLC's consultations and case studies illustrate that discrimination is not simply another obstacle or challenge for people made vulnerable by homelessness or unemployment. In many instances, this form of discrimination can actually lead to or entrench homelessness, unemployment and poverty.

The devastating impact of social status discrimination is not confined to the Australian experience; it is a worldwide problem that affects the most marginalised and disadvantaged members of society. It is well understood that the experience of homelessness, unemployment and poverty produce a pervasive set of discriminations including stigmatisation, socio-economic marginalisation, negative stereotyping, lack of mobility, the denial of autonomy and authority and of course violations of human rights.³ Indeed, International law⁴ and State practice⁵ supports this conclusion and in many instances clearly recognises that social status (including homelessness and unemployment) is a prohibited ground of discrimination. As the Canadian Bar Association has argued:

People who live in poverty are subject to widespread discrimination. These people are routinely denied housing and access to services and they are reviled in popular culture as being morally inferior. People who live in poverty are not even on the political agenda. They are marginalised to the point of invisibility. This is precisely the kind of social disadvantage human rights legislation is meant to alleviate.⁶

There is widespread recognition of the extent and deleterious impact of social status discrimination and the need to ensure such discrimination is adequately protected against under international law. Accordingly, the HPLC respectfully submits that the General Comment should clearly explain the nature and scope of social status (which includes people experiencing homelessness, the unemployed and recipients of social security) as a prohibited ground of discrimination. Any such discussion should also be linked to the obligation on

² Refer to HPLC submission on social status discrimination, including: PILCH Homeless Persons' Legal Clinic Submission to the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995 (January 2008); PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, Discrimination on the Grounds of Homelessness or Social Status (2007); PILCH Homeless Persons' Legal Clinic Submission, Promoting Equality: Homeless Persons' and Discrimination (2002); PILCH Homeless Persons' Legal Clinic Submission, Homelessness and Human Rights in Victoria (2005); and Discrimination in Employment on the Basis of Criminal Record (2005). All submissions are available at www.pilch.org.au

³ 'Finding a Place for the Jobless in Discrimination Theory' (1997) 110 *Harvard Law Review* 1616.

⁴ Refer generally to: Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' [2002] *Deakin Law Review* 15.

⁵ In New Zealand, the *Human Rights Act 1993* includes 'employment status' as a prohibited ground of discrimination. The United Kingdom House of Lords recently held that 'homelessness' constitutes other status and is therefore a protected ground of discrimination, see *RJM v Secretary of State for Work and Pensions* [2008] UKHL 63.

⁶ Canadian Bar Association (British Columbia Branch), *Human Rights for the Next Millennium* (1998).

State Parties to ensure equality under and before the law for people living in poverty or experiencing homelessness.

The HPLC is grateful for the opportunity to make a submission in response to the General Comment and we thank the Committee for its time considering our submission. If the Committee wishes to clarify any aspect of this submission it can contact Caroline Adler, Manager/Principal Lawyer of the HPLC, on + 61 3 8636 4408.

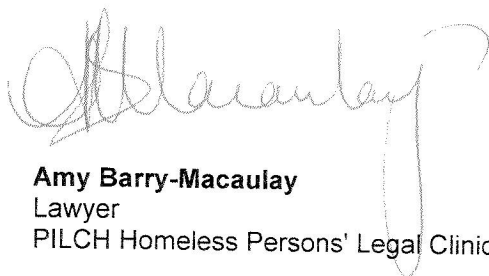
We look forward to working with the Committee in the future.

Yours sincerely,



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