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Homeless Persons' Legal Clinic

Promoting Equality:
Homeless Persons and
Discrimination

Submission Regarding Discrimination on
the Ground of Social Status

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September 2002

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1. Executive Summary and Recommendations

1.1 Summary

This submission is made by the Homeless Persons' Legal Clinic. It is endorsed by the organisations and individuals listed in Part 7. Letters of support for the submission form Annexure A.

The submission examines discrimination faced by people who are homeless, unemployed or recipients of social security payments in Victoria. Evidence from community and welfare organisations suggests that discrimination against the homeless, the unemployed and people who receive social security payments is widespread, particularly in the areas of accommodation and the provision of goods and services.

The current provisions of the *Equal Opportunity Act 1995* (Vic) (**Act**) do not make it unlawful to discriminate against a person on the basis of his or her status as a homeless person, an unemployed person or a recipient of social security payments. Discrimination on these grounds is currently lawful in Victoria.

The submission argues that law reform is necessary to protect people with these attributes from discrimination. It further argues that legislative change is required for Australia to discharge relevant obligations under international human rights laws and for Victoria to keep pace with anti-discrimination developments in many common law jurisdictions.

The reforms proposed in this submission are consonant with the stated law reform objectives of the Victorian Government.

The submission recommends that the Act be amended to prohibit discrimination on the basis of "social status". It is the Clinic's view that such reform is imperative to enable the homeless, the unemployed and social security recipients to enjoy the same freedom from unwarranted discrimination as people with homes, jobs and means, and so to be afforded equality before and under the law. Adding the ground of social status to the Act would also have an educational and deterrent effect.

A summary of key findings and recommendations is set out below.

1.2 Findings

Discrimination against people on the ground of their status as homeless, unemployed or a recipient of social security payments is widespread in Victoria in many aspects of public and private life.

Discrimination against people on the ground of their status as homeless, unemployed or a recipient of social security payments has a deleterious impact on the individuals concerned and the community as a whole.

The Act does not provide any protection from, or redress in relation to, discriminatory treatment on the ground of social status. Reform of the Act by adding "social status" as a prohibited ground of discrimination is imperative to ensure that some of the most vulnerable

members of our community are protected from unfair and unjust treatment. Reform is also necessary to ensure compliance with international human rights law, overseas developments and progressive public policy.

1.3 Recommendations

Recommendation 1

Amend section 6 of the Act to include "social status" as an attribute on the basis of which discrimination is prohibited.

Recommendation 2

Amend section 4 of the Act to include the following definition of "social status":

"Social status" includes a person's status of being:

- (a) homeless;
- (b) unemployed; or
- (c) a recipient of social security payments.

Recommendation 3

Amend section 4 of the Act to include the following definition of "homeless":

A person is taken to be "homeless" if he or she has inadequate access to safe and secure housing.

A person is taken to have inadequate access to safe and secure housing if the only housing to which a 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 or 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.

Recommendation 4

Amend section 4 of the Act to include the following definition of "unemployed":

"Unemployed" in relation to a person means not having a job or being unable to earn a sufficient livelihood.

Recommendation 5

Amend section 4 of the Act to include the following definition of “recipient of social security payments”:

“Recipient of social security payments” in relation to a person means being a recipient of a payment, benefit, pension or allowance under the *Social Security Act 1991* (Cth).

2. Introduction

2.1 What is the Homeless Persons' Legal Clinic?

The Homeless Persons' Legal Clinic (**Clinic**) is a joint pilot project of the Public Interest Law Clearing House (Vic) Inc (**PILCH**) and the Council to Homeless Persons (**CHP**). It was established in October 2001 to provide free legal assistance to, and advocacy on behalf of, one of society's most disenfranchised groups – people who are homeless or at risk of homelessness. The fundamental objectives of the Clinic are to reduce the degree to which homeless people are marginalised and to provide a viable and sustainable pathway out of homelessness.

The Clinic provides civil legal services at crisis accommodation centres and welfare agencies so as to encourage direct access by clients.¹ This is important because, given the range of pressures and issues confronting many homeless people (including financial, familial, social, psychological, medical and health issues), legal problems often remain unaddressed unless services are provided at locations already frequented by homeless people.

The Clinic is staffed by pro bono lawyers from participating law firms and legal departments, including Blake Dawson Waldron, Clayton Utz, Hunt & Hunt, Mallesons Stephen Jaques, Minter Ellison and the National Australia Bank Legal Department.

2.2 What is Homelessness?

Definitions of “homelessness” are diverse and culturally contingent.

Poet Robert Frost wrote, “Home is the place where, when you have to go there, they have to take you in.”² Seen this way, being without a “home” or “homeless” means being without a conventional home with basic amenities *and* the attendant economic and social supports that such a home normally affords.³ Such a definition assists in understanding the lived experience of being homeless or at risk of homelessness.⁴ It is an experience that Ian Charles, himself formerly homeless and now a cook at an open lunch program for Melbourne's marginalised and disadvantaged, understands well:

Just because you have a roof over your head doesn't mean you have a home. I thought my life had ended when I found myself homeless and out on the streets. Where should I go from here? After a couple of months moving from beach to park around Melbourne, I thought it was

¹ Services are currently provided at Melbourne Citymission Western, Flagstaff Crisis Accommodation (a crisis accommodation facility operated by The Salvation Army), Ozanam House (a crisis accommodation facility operated by the St Vincent de Paul Society), Credo Café (an open lunch program operated by Urban Seed), St Peter's Eastern Hill (an open breakfast program operated by Anglicare) and the offices of The Big Issue (an independent current affairs magazine sold on the streets by people who are homeless or long-term unemployed).

² Robert Frost, 'The Death of the Hired Man' (1914).

³ See, for example, *Supported Accommodation and Assistance Act 1994* (Cth) s 4.

⁴ Sue Casey, 'Single Women and Homelessness: Which Way is Home?' (2002) Catholic Commission for Justice Development and Peace Occasional Paper No 11, 7.

time to get some stability in my life. I thought a rooming house might provide shelter and a base to repair my fragile emotional state. How wrong I was!⁵

In Australia, there is an emerging consensus around the definition of homelessness developed by Chamberlain and MacKenzie⁶ and endorsed by the Australian Bureau of Statistics.⁷ Chamberlain and MacKenzie argue that homelessness is best defined in relation to common community standards regarding the minimum accommodation necessary to live according to the conventions of community life.⁸ In Australia, the accepted minimum community standard is a small, rented flat with basic amenities such as a bedroom, bathroom and kitchen.⁹ Having regard to this standard, Chamberlain and MacKenzie identify three categories of homeless persons:

Primary homelessness

People without conventional accommodation, such as people living on the streets, sleeping in parks, squatting in derelict buildings, or using cars or railway carriages for temporary shelter.

Secondary homelessness

People who move frequently from one form of temporary shelter to another. It covers: people using emergency accommodation (such as hostels for the homeless or night shelters); teenagers staying in youth refuges; women and children escaping domestic violence (staying in women's refuges); people residing temporarily with other families (because they have no accommodation of their own); and those using boarding houses on an occasional or intermittent basis.

Tertiary homelessness

People who live in boarding houses on a medium to long-term basis. Residents of private boarding houses do not have a separate bedroom and living room; they do not have kitchen and bathroom facilities of their own; their accommodation is not self-contained; they do not have security of tenure provided by a lease.¹⁰

The categories of person defined as homeless in Chamberlain and MacKenzie's widely used definition are captured in the legislative definition of homelessness contained in section 4 of the *Supported Accommodation Assistance Act 1994* (Cth) which relevantly provides that:

⁵ Ian Charles, 'A Roof Over Your Head Doesn't Guarantee the Safety of a Home' (2002) 2 *Urban Seed* 2.

⁶ Chris Chamberlain and David McKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274.

⁷ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (Australian Bureau of Statistics: Canberra, 1999).

⁸ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (Australian Bureau of Statistics: Canberra, 1999) 9-11, 49.

⁹ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (Australian Bureau of Statistics: Canberra, 1999) 9-11, 49.

A person is taken to be "homeless" if he or she has inadequate access to safe and secure housing.

A person is taken to have inadequate access to safe and secure housing if the only housing to which a 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
 - (iii) the economic or 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.

This is consistent with the international law definition of "homelessness" developed by the United Nations Committee on Economic, Social and Cultural Rights 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.¹¹

This submission adopts the *Supported Accommodation Assistance Act 1994* (Cth) definition of homelessness.

In 1996, there were over 105,000 homeless persons across Australia and over 17,800 homeless persons in Victoria.¹² The 1996 Census data indicates that homelessness occurs throughout Victoria. The highest rate of homelessness was recorded in inner-city Melbourne (173 people per 10,000 of the population), with the next highest rates being in East Gippsland (96 people per 10,000 of the population) and the Western Mallee (92 people per 10,000 of the population). Rates of homelessness in suburban Melbourne averaged 28 people per 10,000 of the population.

¹⁰ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (Australian Bureau of Statistics: Canberra, 1999) 1, 9-11, 13, 49.

¹¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 4 in Relation to the Right to Adequate Housing*, UN Doc E/CN4/1991/4 (12 December 1991).

¹² Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (Australian Bureau of Statistics: Canberra, 1999).

3. Problem Statement

3.1 Grounds of Unlawful Discrimination

The *Equal Opportunity Act 1995* (Vic) makes it unlawful to treat anyone less favourably on the basis of particular attributes or personal characteristics (such as sex, race, disability or age) in certain areas of public life (such as accommodation, education, employment or the provision of goods or services).

Not all acts of unfair, unjust or less favourable treatment are unlawful. Discrimination is not unlawful unless it occurs on the basis of one (or more) of the attributes set out in section 6 of the Act, and in respect of an area of activity set out in Part 3 of the Act.

Section 6 provides that the following are the attributes on which discrimination is prohibited:

- (a) age;
- (ab) breastfeeding;
- (ac) gender identity;
- (b) impairment;
- (c) industrial activity;
- (d) lawful sexual activity;
- (e) marital status;
- (ea) parental status or status as a carer;
- (f) physical features;
- (g) political belief or activity;
- (h) pregnancy;
- (i) race;
- (j) religious belief or activity;
- (k) sex;
- (l) sexual orientation;
- (m) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

3.2 Discrimination against the Homeless, the Unemployed and Social Security Recipients

Many persons are subject to discriminatory treatment on the basis of their social status, in particular their status as:

- a homeless person; or
- an unemployed person; or
- a recipient of social security payments.

St Vincent de Paul Society reports that:

Our extensive experience in the [homelessness] sector leads us to believe that there is a significant issue in relation to discrimination against this particular group in the community who have very complex needs and are very vulnerable.¹³

The effects of such discrimination are deleterious to the individuals who are subject to the unfair, unjust or less favourable treatment, and to the community as a whole. As St Mary's House of Welcome states:

Our service users include homeless people, people in financial crisis, people who are suffering hardship, people with alcohol, drug and gambling addictions, mentally ill people and others of low social status. They experience discrimination because of their social status, their appearance, and the results of their lack of access to amenities and services. The effect of this discrimination can be detrimental to health and well-being, result in further financial hardship, and impact negatively on ability to cope.¹⁴

The prohibited grounds of discrimination set out in section 6 of the Act are exhaustive. The Act is the only piece of legislation in Victoria which prohibits the Crown and private individuals from engaging in discriminatory conduct against others.

Discrimination against a person on the basis of his or her status as a homeless person, an unemployed person or a recipient of social security payments is not prohibited and therefore is currently lawful in Victoria. Without a statutory prohibition on discrimination on the grounds of social status, these people are left without any legal remedy and often find themselves powerless, and further marginalised in the face of unfair, unjust or less favourable treatment.

As the Jesuit Social Services have recognised:

Discrimination, especially in the areas of private housing, room and caravan rental, and also in health, is both widespread and can result in significant psychological deterioration as well as material deprivation of the recipient. Indeed, consistent discrimination of this nature results in deepening of identification with the marginalised condition so as to make negotiation through their issues more difficult.¹⁵

Although discrimination against, and unfair and unjust treatment of, the homeless, the unemployed and social security recipients is rife in many areas of public and private life, the comments and case studies below focus on these grounds in the areas where discrimination most commonly occurs, namely the provision of:

- (a) accommodation; and
- (a) goods and services.

¹³ Letter of support from St Vincent de Paul Society dated 12 August 2002, attached at A.

¹⁴ Letter of support from St Mary's House of Welcome dated 20 August 2002, attached at A.

¹⁵ Letter of support from Jesuit Social Services dated 22 August 2002, attached at A.

3.3 Discrimination against the Homeless, the Unemployed and Social Security Recipients in the Provision of Accommodation

The most common examples of discriminatory treatment on the ground of social status occur in the provision of accommodation. Netty Horton from the Council to Homeless Persons reports that:

Consultations were held by the Council to Homeless Persons with 157 staff from homeless persons services in each region of Victoria over a six week period in May-July 2002. Workers from all consultations referred to discrimination towards their clients from real estate agents and landlords.

The chronic shortage of affordable, appropriate housing, together with the obvious fact that homeless persons need housing, creates a situation that is often exploited by landlords and proprietors. And, while most acute in the case of the homeless, such discrimination affects the non-homeless unemployed or social security recipients as well. As Bernie Durkin of Eastern Access Community Health identifies:

I have witnessed first-hand hundreds of episodes of subtle and overt discrimination towards people who are homeless, or in housing crisis. When people ask why, the answer is simple; "because they can!"¹⁶

Through its consultations with community and welfare organisations, the Clinic was provided with numerous case studies regarding discrimination against homeless persons, unemployed persons and social security recipients – including women, children and families – in the provision of accommodation.

In some cases, the discrimination was direct, meaning that the person was treated less favourably in the circumstances than a person who was not homeless, unemployed or a social security recipient would have been treated.

In other cases, the discrimination was indirect, meaning that unreasonable requirements or conditions were placed upon the attainment of certain benefits or services which the homeless, the unemployed or social security recipients are less likely to be able to satisfy.

Discrimination by a caravan park against a homeless couple

A Salvation Army support worker in Warrnambool organised for a homeless couple to stay at XYZ Caravan Park until alternative crisis accommodation could be organised. The initial booking was for a period of two nights, to be paid by the Salvation Army.

First thing in the morning after the second night, the couple were rudely reminded by the caravan park owner that they were to leave that day as the Salvation Army had only approved funds for two nights. The couple asked if they could stay as they had no where else to go, but were told that the park was all booked out for school holidays.

The couple then came to my office and explained that they were homeless. As my crisis house was full, I undertook to arrange alternative accommodation for a three day period after which there was a vacancy in my crisis house. I proceeded to ring around the caravan parks to find emergency accommodation. I was unaware that the couple had been staying at XYZ Caravan Park and was able to secure a vacancy at that location. I provided

¹⁶ Letter of support from Eastern Access Community Health dated 12 August 2002, attached at A.

the caravan park owner with the couple's name and contact details. When I got off the phone I explained to the couple that XYZ Caravan Park had a vacancy. The couple told me that they had previously been staying at XYZ Caravan Park, but as I had provided the caravan park owner with the couple's names I presumed that there must have been a cancellation. When the couple arrived at the caravan park they were abused. Just minutes later I received a phone call from a very angry owner who also abused me and called me a 'sneak' and a 'smart arse'. He accused me of deception in that I had identified myself as Colleen rather than as a Salvation Army worker. I tried to explain that I had not realised that the couple had been staying at XYZ Caravan Park, but the owner would not listen to anything I had to say. He continued to abuse me and told me never to call again as he wanted nothing to do with our clients. As the caravan park owner had admitted to having a vacancy he allowed the couple to stay. Through that night we had a very heavy down fall of rain. The couple's caravan leaked badly and the following morning they approached the owner to ask whether they could swap caravans. The owner abused them once again and told them to leave. The couple knew that he had other caravans in much better condition than the one he had put them in, but he refused to give them any further accommodation.

XYZ Caravan Park clearly discriminated against these people as homeless persons referred by a welfare agency. XYZ Caravan Park had a number of caravans available for other members of the public. All it took was a phone call from an unidentified member of the public to secure a vacancy. I would like to add that the couple is now in transitional housing awaiting priority housing. They are a very nice couple who just needed somewhere to stay. They did not need to be discriminated against or abused as they were.

Colleen Smalley, Crisis Support Worker, The Salvation Army, Warrnambool

Jan Kenny of Hamilton Accommodation Program reports:

We come across so many examples of discrimination.

Two local accommodation providers will not take any clients that are associated with our program. Other accommodation providers ask if our clients are black or white – they are very reluctant to take Kooris.

Real estate agents demand higher bonds from social security recipients.

No real estate agents accept a full Office of Housing bond – tenants must put in at least one week's cash themselves.

Although the underlying causes of homelessness are complex and varied, it is a person's social status as homeless that is often the basis of discriminatory treatment. The following examples demonstrate that whether the underlying cause of homelessness is release from prison, domestic violence, drug addiction or mental illness, the discriminatory treatment, and the effect thereof, is often the same.

Discrimination by a real estate agent against a homeless ex-prisoner

Kelvin was released from prison and lived for a short period with his girlfriend. He was referred to our service by police after his relationship broke down and he became homeless.

Kelvin stayed in our service for six weeks, during which time he investigated private rental with my support. He was apprehensive as he believed he had no hope of finding private rental. At one real estate agent I accompanied him to the front door and he went in to make an enquiry. Shortly after he came out saying, 'I told you they won't even listen to my enquiry' as he was only able to give them a brief window of the past and his prison story. Next day I wrote a letter to the management but no answer was received, despite follow up calls.

During his time with us, Kelvin was an excellent tenant, rigid in keeping his unit clean and in paying rent. The real issue was discrimination by the real estate agent towards homeless people and ex-prisoners. In fact, if one reflects upon a prison existence, many prisoners have pretty good living and house skills which can be carried into civilian life.

John Clonan, Support Worker, Salvation Army

Discrimination against single homeless women fleeing domestic violence

It is this organisation's general experience that single women with children – whether they be victim's of domestic violence or young homeless women who are pregnant or parenting – have great difficulty in obtaining private rental regardless of whether it is housing or caravan park accommodation. One particular central caravan park in Bendigo advised a client that they had accommodation available. As soon as the client mentioned that Emergency Accommodation Support Enterprise were working with her, they realised that she was homeless and a victim of domestic violence and advised her that they had made an error and had no vacancies.

Case Worker, Emergency Accommodation Support Enterprise, Loddon Campaspe Region

Discrimination by real estate agents against homeless youth

An 18 year old female was referred to me for youth housing in December 2001. She was a former drug user who was well known to welfare agencies. When she first presented she was absolutely desperate for suitable accommodation. She had submitted an application to the Office of Housing and was also looking for a private rental property through the local real estate agencies.

The client visited many agencies looking for private rental properties. Each agency required that she fill out a form with her particulars, including her history. Her story to me was that, in most instances, when she first approached an agency they were polite and friendly. However, the minute her history became evident, the accommodation was no longer available. To her credit, this young lady had stayed clean for six months and was actively participating in an employment program.

Due to her youth, employment status, housing history and association with welfare agencies, this client was shunned by the private rental agencies.

Although at times she was very despondent, I admired her pluck and courage as a young homeless person persisting with her attempts to secure affordable housing.

Ruth Skinner, Support Worker, Child and Family Services, Ballarat

Many welfare agencies and community organisations report that the mere association of a person with certain support services can be a ground of discriminatory treatment.

Discrimination by a hostel against a homeless man

A middle aged man approached a local backpacker accommodation facility in Warrnambool and enquired whether they had any vacancies. He was told yes, so he went to The Salvation Army Social Housing Service for financial assistance. He went back to the backpackers and handed over a Salvation Army cheque for his accommodation. When the proprietor saw the cheque he said to the man, 'Sorry. We've just had a busload arrive and no longer have any vacancies.'

Lindsay Stow, The Salvation Army Social Housing Service, Warrnambool

Discrimination by boarding houses against referrals from homelessness agencies

Evan is a seasonal fruitpicker. He receives a Disability Support Pension in connection with his mental illness. After returning to Melbourne from his seasonal employment, Evan obtained accommodation at a rooming house in Fitzroy. The Society of St Vincent de Paul undertook to pay rental amounts to the rooming house proprietor, upon invoice, until Evan obtained stable accommodation. About a week later, the rooming house proprietor bodily evicted Evan from the premises for 'failure to pay rent'. St Vincent de Paul had never been invoiced. The proprietor refused to grant Evan access to his belongings, including compact discs and a leather jacket, which remained locked in his room. When Evan's caseworker contacted the rooming house to formally complain, the proprietor apologised for the 'mistake' but stated that, unfortunately, Evan could not return as there were no longer any vacancies. He denied the existence of Evan's belongings. Happily, the Clinic was able to negotiate an apology and monetary compensation in connection with Evan's eviction. Unfortunately, the practice of evicting 'undesirable boarders' (that is, homeless persons referred by a welfare agency) when a rooming house is full remains widespread.

Philip Lynch, Coordinator, Homeless Persons' Legal Clinic, Melbourne

Discrimination by hostels against referrals from homelessness agencies

Not long after a new backpackers opened up in Warrnambool a few years ago, the proprietor personally visited all the welfare providers in town and advised them not to refer anyone to him because he didn't want 'those kind of people' in his place.

Lindsay Stow, The Salvation Army Social Housing Service, Warrnambool

Sometimes the discriminatory treatment suffered is not direct, but involves the imposition of conditions or requirement on access to accommodation which have a disproportionate impact on homeless persons.

Discrimination by landlords and real estate agents against single homeless parents

The majority of my clients, living in transitional housing, are single parents with children. In the past six months, not one (out of 26) of these has been able to access a private rental.

Residential tenancy application forms, which require that a person provide a minimum 100 points made up of items such as past rent receipts, current car registration papers, references from previous landlords and the like explain why homeless persons do not obtain private rentals here.

Discrimination is rife here, but difficult to prove. Agents say it is the landlords who choose the tenants, but of course we know who produces the shortlist for the landlord to 'choose' from.

Harrison McIlroy, Family Support Worker, Family Support Services, Warrnambool

Discrimination by the Office of Housing against social security recipients

Jodie, a 16 year old woman who is pregnant with twins, cannot live with her mother any longer as the situation at home is extremely difficult with many complex issues which need to be addressed. Our organisation found a very small bedsit for Jodie while she was waiting for her priority housing application to be assessed. She applied for an Office of Housing Bond Loan for the bedsit but was advised that she was ineligible for the Bond Loan as she was on Youth Allowance and her rent (\$110 per week) must not be more than 55 per cent of her income. This ineligibility for bond assistance applies generally to any woman on Youth Allowance or Newstart.

Case Worker, Emergency Accommodation Support Enterprise, Loddon Campaspe Region

Discrimination by real estate agents against social security recipients

Fiona, a 44 year old woman, became homeless after fleeing domestic violence. She applied for a one bedroom unit, but was refused on the basis that the real estate agent did not believe she could pay the rent of \$100 per week on a Newstart Allowance.

Case Worker, Emergency Accommodation Support Enterprise, Loddon Campaspe Region

3.4 Discrimination against the Homeless, the Unemployed and Social Security Recipients in the Provision of Goods and Services

The homeless, the unemployed and social security recipients are also subject to discriminatory treatment in the provision of goods and services. As the following case studies disclose, discriminatory treatment is widespread in relation to: access to and use of public spaces and amenities; the behaviour of law enforcement officers; and treatment by traders.

Discrimination by law enforcement officers against a homeless man

In November 2001, David, an elderly homeless man, was issued with an infringement notice for drinking intoxicating liquor at St Paul's Cathedral in Melbourne. He had

previously been denied entry to Young & Jackson's on the basis of his disheveled appearance. 'We already have enough trouble with the black cunts in the city and don't need any more trouble from people like you,' he was told by the police officer. David was with some Aboriginal friends at the time. He was directed by the officer to get into a Police Divisional Van. Although he was not placed under arrest, David feared the use of force and so complied with the officer's instructions. The officer did not, at any stage, explain the basis on which David was being detained or the purpose of his detention. David was not told where he was to be taken. The doors of the Divisional Van were locked behind him. He was detained for approximately 40 minutes. The Divisional Van was moving for most of this time. When the Divisional Van stopped and the doors were unlocked, David disembarked and realised that he was in Fitzroy. 'You'd better not come back into the city,' the police officer threatened. David felt intimidated and scared by this statement. As a Big Issue vendor, he relies on a part-time job in the city to supplement income received from a Disability Support Pension. As a result of the actions of the police, David suffered deprivation of liberty, injury to feelings, emotional distress and, perhaps most importantly, a loss of dignity. He decided not to pursue legal action against the police for fear of victimisation.

This discriminatory treatment occurred because David was a homeless man with no private place to drink. Homeless people, like all of us, have human rights. Unlike many of us, however, they may not be appraised of those rights or have the resources to seek redress for their violation. These problems are exacerbated by the inadequacy of anti-discrimination legislation – in both an educative and protective sense – with respect to homeless persons.

Philip Lynch, Coordinator, Homeless Persons' Legal Clinic, Melbourne

Discrimination by service providers against itinerants and rough sleepers

Homeless people are discriminated against because of their status and appearance. Anthony is homeless and has a mental illness. He is often asked to leave services due to his appearance, which is perceived to be threatening and upsetting to other service users. Services that discriminate against people because of their appearance include Centrelink, hospitals, police, schools, banks and boarding houses.

Anne Emery, Community Development Worker, St Mary's House of Welcome, Melbourne

Discrimination by the Office of Housing against itinerants

People awaiting public housing are informed by letter of a housing offer. Letters are sent to their last known address. Due to transient lifestyles, homeless people often do not receive letters within the response time and no further attempt is made to contact them. The result is they miss out and often have to wait years for another offer even if they are on a priority list. Steve has been sleeping rough for over 11 years. He is on the normal housing waiting list. He was sent an offer but did not hear of it until several months after the offer was made. By then the housing was no longer available so he has had to go back to the bottom of the list.

Anne Emery, Community Development Worker, St Mary's House of Welcome, Melbourne

Discrimination by a restaurant against an elderly homeless man

I recently arranged to meet some colleagues and an elderly homeless client at an inner-city café in Melbourne. When I arrived with the client, I was told that we were unable to be seated as we didn't have a reservation. There were numerous vacant tables in the café. My colleagues encountered no such problems when I waited around the corner with the client while they tried to get a table about five minutes later.

Philip Lynch, Coordinator, Homeless Persons' Legal Clinic, Melbourne

4. Proposal

As disclosed by the case studies, discrimination experienced by homeless people further marginalises and disenfranchises an already extremely vulnerable and disadvantaged group.

Notwithstanding the prevalence of discrimination against homeless persons and the impacts thereof, such behaviours are lawful in Victoria.

The Clinic proposes the following legislative and educative amendments and reforms:

Recommendation 1

Amend section 6 of the Act to include "social status" as an attribute on the basis of which discrimination is prohibited.

Recommendation 2

Amend section 4 of the Act to include the following definition of "social status":

"Social status" includes a person's status of being:

- (a) homeless;
- (d) unemployed; or
- (e) a recipient of social security payments.

Recommendation 3

Amend section 4 of the Act to include the following definition of "homeless":

A person is taken to be "homeless" if he or she has inadequate access to safe and secure housing.

A person is taken to have inadequate access to safe and secure housing if the only housing to which a person has access:

- (a) damages, or is likely to damage, the person's health; or
- (d) threatens the person's safety; or
- (e) marginalises the person through failing to provide access to:
 - (i) adequate personal amenities; or
 - (iv) the economic or 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.

Recommendation 4

Amend section 4 of the Act to include the following definition of “unemployed”:

“Unemployed” in relation to a person means not having a job or being unable to earn a sufficient livelihood.

Recommendation 5

Amend section 4 of the Act to include the following definition of “recipient of social security payments”:

“Recipient of social security payments” in relation to a person means being a recipient of a payment, benefit, pension or allowance under the *Social Security Act 1991* (Cth).

The proposed amendments and reforms are consistent with:

- (a) public policy;
- (b) international human rights law; and
- (c) domestic laws in progressive jurisdictions.

Such amendments and reforms would also serve important educative and deterrent functions. They reflect respect for human dignity and fundamental human rights. The marginalised, the less “successful” and the less “able” members of our community are those most in need of the protection of anti-discrimination laws in order to secure their right to enjoyment of basic human rights. As Justice Brennan recognised in *Waters v Public Transport Corporation*:

A measure of the civilisation of a society is the extent to which it provides for the needs of the disabled (and of other minorities) and protects them from adverse and unjust discrimination which offends their human dignity.¹⁷

¹⁷ (1992) 173 CLR 349.

5. Norm of Non-Discrimination on the Ground of Social Status

5.1 Do the Proposed Grounds Constitute Social Statuses?

Public policy, international human rights norms and domestic legislation in progressive common law jurisdictions prohibit discrimination on the basis of “social status”.

(a) Homelessness

The commonality of experience and of discriminations of homeless persons makes homeless persons a “social group” and “homelessness” constitutes a “social status”.¹⁸

The experience of homelessness produces a specific and pervasive set of discriminations, including stigmatisation, socio-economic marginalisation, violations of rights, negative stereotyping, lack of mobility and the denial of autonomy or authority.¹⁹ 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 that human rights legislation is meant to alleviate.²⁰

Discriminatory treatment of homeless persons is rarely recognised or acknowledged by the media, lobby groups, politicians or policy-makers. Homeless people generally lack the level of socio-economic enfranchisement necessary to command attention in the political arena, or even to shape definitions or understandings of themselves or their experiences.²¹

Homelessness has many causes. A number of those causes are themselves attributes within the meaning of section 6 of the Act. So, a homeless person suffering mental illness may be unlawfully discriminated against on the basis of that mental illness. However, the discrimination experienced by homeless persons is referable not only to the characteristics of component groups of the homeless population (such as the mental health of persons suffering from mental illness, the disability of persons suffering from drug or alcohol addictions, the gender and age of women and children fleeing domestic violence, or the unemployed status and reliance on social security payments of many homeless people), but to the very status of those persons as “homeless”.

(b) Unemployment

Like homelessness, “unemployment” is a condition affecting a discrete and identifiable group of people.

¹⁸ The classification of homeless persons as a “social group” and of “homelessness” as a social status has been recognised in the United States: see, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

¹⁹ ‘Finding a Place for the Jobless in Discrimination Theory’ (1997) 110 *Harvard Law Review* 1609, 1616.

²⁰ Canadian Bar Association (British Columbia Branch), *Human Rights for the Next Millennium* (1998).

²¹ ‘Finding a Place for the Jobless in Discrimination Theory’ (1997) 110 *Harvard Law Review* 1609, 1618.

According to the Australian Bureau of Statistics, in November 2001 there were 161,800 unemployed people in Victoria.²² However, this estimate only takes into account those persons aged 15 years and over who were not employed and were actively looking for and available for work.

As the New Zealand Human Rights Commission has pointed out, the unemployed constitute a broader range of people than those who are unable to find, but are seeking, paid work. It includes people who are unable to earn a sufficient livelihood. In addition, the category of "unemployed person" includes persons not employed in paid work for various reasons, including illness, disability, family responsibilities, retirement or study.

There is enormous value and importance placed on work in Australian society. Employment imparts a sense of identity, self-worth and social connections. Conversely, the personal and social costs of unemployment include severe financial hardship and poverty, debt, homelessness and housing stress, family tensions and breakdown, boredom, alienation, shame and stigma, increased social isolation, crime, erosion of confidence and self-esteem, and the atrophy of work skills and ill-health.²³

The social stigma and prejudice associated with unemployment is linked to the emphasis in our society on the importance of paid work and leads to negative stereotyping and discrimination against unemployed people. Such discrimination is evidenced in the case studies in this submission. The recognition of unemployment as an attribute under section 6 of the Act would help to work against such discrimination.

(c) Receipt of social security payments

Receipt of social security payments is an attribute that is connected to, but distinct from, homelessness and unemployment.

While many people are discriminated against, directly or indirectly, for not having a "real job", including housewives and students, there is also a significant amount of negative stereotyping specifically related to "*dole bludgers*" who live off "*government handouts*." This is so despite the fact that the right to receive welfare assistance is recognised under the International Covenant on Economic, Social and Cultural Rights, and that Australia has a long history of providing a strong welfare safety-net for citizens.

Discrimination against people who rely on social security payments manifests itself in the public arena most commonly in the area of provision of accommodation, and in the provision of goods and services, particularly banking services. Negative stereotypes about the ability of social security recipients to meet rent or loan repayments are often relied upon to deny people the opportunity to secure a home or finance. Such denials of service are rarely based on relevant financial information, but on preconceived or imputed notions about the ability to pay, and general trustworthiness, of people in receipt of social security payments. The recognition of receipt of social security payments under section 6 of the Act would help to work against such discrimination.

²² Australian Bureau of Statistics, *Labour Force, Victoria* (2001) paragraph 6202.2.

²³ Alison McClelland and Fiona Macdonald, 'The Social Consequences of Unemployment' (Business Council of Australia, July 1998) <<http://www.bsl.org.au/pdfs/social.pdf>>.

5.2 Intersection of the Proposed Grounds

There is a frequent intersection between homelessness, unemployment, receipt of social security payments and other attributes protected from discriminatory conduct under the Act. For example, many homeless people also experience discrimination on the basis of race, disability, gender, sexual orientation and family status. The recognition of social status as a ground of discrimination would not lessen or invalidate claims based on other forms of discrimination. Instead, it would advance and enrich the principle of non-discrimination by recognising the complex nature of the experiences of homeless and unemployed people.²⁴

Without protection on the basis of social status, the Act is unable to truly address the complex experiences of this profoundly disadvantaged group. The evidence of welfare organisations suggests that the existing grounds in the Act do not provide sufficient or consistent protection for homeless or unemployed people. In Canada, it has been recognised that the inclusion of social status as a prohibited ground of discrimination advances a more sophisticated intersectional approach to discrimination.²⁵

It is for this reason that the Clinic recommends that three additional grounds, namely homelessness, unemployment, and being a recipient of social security payments be included in the Act under an umbrella attribute of “social status”.

As discussed in this submission, receipt of social security payments and unemployment are common elements of homelessness, but do not of themselves adequately encapsulate the experiences of the treatment afforded to many homeless persons. Similarly, the proposed income-source related grounds need to include references both to employment status and to status as a recipient of social security payments. The inclusion of only, for example, ‘being a recipient of social security payments’ as a prohibited ground under the Act could make protection capricious – available one week, but not the next, depending on the income source of the individual at the time of suffering the discrimination. Many people would only be protected temporarily while receiving welfare assistance, and would lose that protection if their source of income changed, notwithstanding that the disadvantages and discriminatory treatment they suffer might remain the same.

In the Clinic’s view, the introduction of the ground of “social status”, incorporating homelessness, unemployment and receipt of social security payments would provide the broad protection required.

5.3 International Law and the Norm of Non-Discrimination on the Ground of Social Status

The norm of non-discrimination on the ground of social origin or status is entrenched in international treaty law. It may well constitute a non-derogable principle of customary international law.²⁶

²⁴ ‘Finding a Place for the Jobless in Discrimination Theory’ (1997) 110 *Harvard Law Review* 1609, 1623.

²⁵ A Wayne Mackay, Tina Piper and Natasha Kim, ‘Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act’ <<http://canada.justice.gc.ca/chra/en/socond2.html>>.

²⁶ See generally, Peter Bailey and Annemarie Devereux, ‘The Operation of Anti-Discrimination Laws in Australia’ in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (The Federation Press: Sydney, 1998) 292-318.

The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination, including on the ground of social origin or status, is set out in article 26 of the *International Covenant on Civil and Political Rights (ICCPR)*:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁷

This article is a free-standing non-discrimination provision that is not confined to the enjoyment of rights in the ICCPR, but extends to all human rights and fundamental freedoms, including economic and social rights such as the right to an adequate standard of living and social security.²⁸

Although “discrimination” is not defined in the ICCPR, the United Nations Human Rights Committee has defined it as:

... any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁹

Following ratification, the ICCPR entered into force for Australia on 13 August 1980. Australia’s obligation to protect and promote the norm of non-discrimination is set out in article 2(1) of the ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Where domestic law does not already provide for the prohibition of, and effective remedies against, discriminatory behaviour, articles 2(2) and 2(3) of the ICCPR require States Party to take all necessary steps to adopt such legislative measures as may be required to give effect to the rights enunciated under the ICCPR and to ensure that affected individuals have their rights determined by a competent judicial, administrative or legislative authority empowered to enforce effective remedies.³⁰ That is, the obligations under both article 2(2)

²⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, (1980) ATS 23 (entered into force generally 23 March 1976 and for Australia 13 August 1980). See also article 7 of the *Universal Declaration of Human Rights* (entered into force generally and for Australia 10 December 1948).

²⁸ See, for example, *Broeks v The Netherlands* (172/84) and *Zwaan de Vries v The Netherlands* (182/84), in which the United Nations Human Rights Committee found article 26 to be applicable to complaints concerning discrimination in the field of social security.

²⁹ Human Rights Committee, *General Comment No 18: Non-Discrimination*, HRI/GEN/1/25 (1989). This definition is based on the definitions contained in article 1 of the *Convention on the Elimination of All Forms of Racial Discrimination* (1965) and article 1 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (1975).

³⁰ See also article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, (1976) ATS 5 (entered into force generally 3 January 1976 and for Australia 10 March 1976).

and article 26 are immediately applicable and every State party is expected to have fully implemented them.

Australia is also a party to the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).³¹ The ICESCR promotes recognition of people's cultural, economic and social rights. Article 9 of the ICESCR recognises the right of everyone to receive social security. Article 11 recognises the right to an adequate standard of living, which includes adequate housing. Article 2 of the ICESCR provides:

- (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.

The United Nations Committee on Economic, Social and Cultural Rights has recommended to several States Parties to the ICESCR that these rights be protected by including social and economic rights in domestic human rights legislation to prevent discrimination against homeless and impoverished people.³² Although the implementation obligations under article 2(1) of the ICESCR are progressive, rather than immediate as in the ICCPR, the United Nations Committee on Economic, Social and Cultural Rights has emphasised that many aspects of the rights enumerated in the ICESCR are to be immediately realised, foremost among them being the right to enjoy ICESCR rights without discrimination.³³ The Committee has also stressed that the ICESCR will not be fully implemented in the absence of “effective remedies”, and has noted that in relation to guaranteeing the non-discriminatory enjoyment of ICESCR right, “the provision of some form of judicial remedy would seem indispensable”.³⁴

The United Nations Committee on Economic, Social and Cultural Rights has been critical of Australia's failure to fully implement the ICESCR and has said:

³¹ *International Covenant on Economic Social and Cultural Political Rights*, 19 December 1966, (1976) ATS 5 (entered into force generally 3 January 1976 and entered into force for Australia 10 March 1976).

³² See for example, Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* (10 December 1998) paragraph 51. See also Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland* (14 May 1999) paragraph 22, in which the Committee recommended that: “the State Party incorporate justiciable economic, social and cultural rights in the proposed amendment to the Constitution.”

³³ Committee on Economic, Social and Cultural Rights, *General Comment No 3*, paragraph 5.

³⁴ Committee on Economic, Social and Cultural Rights, *General Comment No 9*, paragraph 9. See further Dianne Otto and David Wiseman, ‘In Search of “Effective Remedies”: Applying the International Covenant on Economic, Social and Cultural Rights in Australia’ (2001) 7 *Australian Journal of Human Rights* 5.

The Committee strongly recommends that the State party incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts.³⁵

The norm of non-discrimination on the ground of social origin or status may also constitute a peremptory principle of customary international law.³⁶ In the *Namibia Case*, Judge Ammoun of the International Court of Justice stated:

One right which must be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality.³⁷

Under the terms of international treaty law and customary international law, Australia has an obligation to prohibit, and provide effective remedies for, any discriminatory or less favourable treatment on the ground of social origin or other status. Moreover, although Australia has not implemented the ICCPR or the ICESCR as a part of its domestic law or incorporated customary international law as justiciable in domestic courts, international human rights law is a legitimate and important influence on the development, interpretation and application of domestic law.³⁸

Victoria has a role to play in discharging Australia's obligations under international human rights law to prohibit discrimination on the ground of social status. It can do so by adding "social status" as a prohibited ground of discrimination under the Act.

5.4 Lessons from Overseas

The reforms proposed in this submission are reflective of similar protections currently available in a number of overseas jurisdictions. These overseas experiences highlight the positive effect that the prohibition of discrimination against the homeless, unemployed and recipients of social security benefits can have in ensuring equal access to legal protection and promoting social awareness.

(a) New Zealand

In New Zealand, the *Human Rights Act 1993* includes "employment status" as a prohibited ground of discrimination.

"Employment status" is defined in the Act as "being unemployed, receiving an income support benefit or receiving accident compensation payments." The term "being unemployed" is not defined further. However, in a report by the Human Rights Commission

³⁵ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* (1 September 2000) paragraph 24.

³⁶ See, for example, K Parker and L B Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411, 441-2.

³⁷ *Namibia Case* (1971) ICJ Rep 16. See also *Barcelona Traction, Light and Power Company Limited Case (Belgium v Spain) Second Phase* (1970) ICJ Rep 3, 34.

to the New Zealand Minister of Justice, the Commission stated that it preferred a broad interpretation of "unemployment" as having no occupation, disengaged, at leisure or temporarily out of work. The Report states that:

There seems little doubt that "being unemployed" should be broadly interpreted to refer to not just those who are temporarily unable to find paid work, but to those who are not gainfully employed for a raft of reasons including illness, disability, family responsibilities, retirement and more.³⁹

Discrimination on the basis of employment status is unlawful in any of the prohibited areas of public life, including the provision of accommodation, goods or services and employment.

The ground of "employment status" has been successfully relied on by many applicants to the New Zealand Human Rights Commission.⁴⁰ For example, in *S v B Ltd & E Ltd* (C279/66), the complainant, who received social security payments, bought a mobile phone. In order to be connected to the cellular telephone network run by E Ltd, customers with income under \$18,000 were required to provide a guarantor. B Ltd was a retailer of the mobile phone network. The complainant had an income of slightly more than the threshold, but was still asked to provide a guarantee by an employee of B Ltd, because she was on a benefit. Her complaint of discrimination was upheld against B Ltd, as they were found to have treated her differently because she was in receipt of social security payments.

In addition to ensuring equal access to goods and services, the provisions in New Zealand have been used to ensure effective and equal access to essential health care. Thus, in *K v J* (11/12/97), the complainant, a social security beneficiary, made a complaint that her dentist refused to treat her when he was told that payment would be met by the Department of Social Welfare. The evidence was that the dentist refused treatment because he believed that the Department of Social Welfare should not have to pay for what he considered to be non-urgent dental work. K subsequently went to another dentist, who noted that she had evidence of acute toothache. The Human Rights Commission found that the dentist had discriminated against K because of her beneficiary status, and had treated her rudely and dismissively.

(b) Canada

Article 15(1) of the *Canadian Charter of Rights and Freedoms* provides that:

³⁸ See generally, *Mabo v Commonwealth* (1992) 175 CLR 1, 42 (Mason CJ, Brennan and McHugh JJ). See also *Kartinyeri v Commonwealth* [1998] HCA 22 (1 April 1998) [166-7] (Kirby J).

³⁹ Human Rights Commission, *Consistency 2000 Report* (2000) Part C, 2.

⁴⁰ See generally, Karen Davis, *Discrimination on the Grounds of Employment Status - A Report Prepared for the Human Rights Commission* (July 2000).

Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination.⁴¹

Article 15(1) of the Charter lists a number of prohibited grounds of discrimination, but such grounds are not exhaustive. Thus, at a federal level, there is a guarantee of freedom from discrimination in Canada.

The provinces in Canada provide varying degrees of protection for people who are in receipt of social security assistance, unemployed, homeless or poor.

Discrimination on the basis of "source of income" is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term "receipt of public assistance".⁴² These grounds do not always apply to all areas covered by the legislation. For example, in British Columbia and Ontario, the prohibitions only applies to housing and accommodation.

The province of Québec has human rights legislation prohibiting discrimination on the ground of "social condition". Article 10 of the *Québec Charter of Human Rights and Freedoms* provides that:

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.⁴³

There is no statutory definition of "social condition" in the Québec Charter. The Québec Human Rights Tribunal defined the term in the *Gauthier Case* as follows:

The definition of "social condition" contains an objective component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with the perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.⁴⁴

In the *Gauthier Case*, a landlord was found to have denied accommodation to a welfare recipient irrespective of his ability to pay the monthly rent. The Tribunal ruled that the landlord, in presuming that the complainant would not be a dependable tenant capable of paying the rent monthly, discriminated against him on the basis of social condition.

In another case, a credit union was found to have discriminated against the complainant on the basis of social condition when it failed to consider her loan application. The

⁴¹ *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canadian Act 1982* (UK) 1982, c 11.

⁴² Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>>.

⁴³ *Québec Charter of Human Rights and Freedoms* Article 10.

⁴⁴ *Commission Des Droits De La Personne Du Quebec v Gauthier*, (1993-11-15) QCTDP 500-53-000024-925.

complainant, a single mother of two children, was a recipient of social security payments. Evidence showed that the complainant had sufficient means to obtain a mortgage, but was refused when the institution found out she was a welfare recipient. The Tribunal held that a person's social condition could be *temporary*. The Tribunal further held that the fact that the complainant was only temporarily receiving public assistance was sufficient to constitute "social condition".⁴⁵

There has been considerable public discussion in Canada about the introduction of the ground of "social condition" into other provincial legislation, and in particular into the *Canadian Human Rights Act*.⁴⁶

In June 1998, the Canadian Senate passed a bill to add "social condition" as a prohibited ground of discrimination in sections 2 and 3(1) of the *Canadian Human Rights Act*. The bill received its first reading in the House of Commons on 19 October 1998, but was subsequently defeated. In April 1999, the Canadian Justice Minister announced the appointment of an independent panel, the Canadian Human Rights Act Review Panel, to consider, among other things, whether "social condition" should be added to the *Human Rights Act* as a prohibited ground of discrimination.

The Canadian Human Rights Act Review Panel recommended that "social condition" be added to the federal legislation. The Panel recommended that the ground be defined in the Act in a manner similar to the Québec definition. The Panel's Report stated that "we believe it is essential to protect the most destitute in Canadian society against discrimination."⁴⁷

In December 1998, the United Nations Committee on Economic, Social and Cultural Rights made a number of recommendations to the Canadian Government as to how it could better comply with its obligations under the ICESCR. Recommendation 51 states:

The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status.⁴⁸

The recommended reforms to the *Canadian Human Rights Act* have yet to be introduced.

⁴⁵ *D'Aoust v Vallieres* (1993) 19 CHRR D/322.

⁴⁶ See, for example, Bruce Porter, 'ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada' (Plenary Presentation, Ottawa Bar Association, April 2001); A Wayne Mackay, Tina Piper and Natasha Kim, 'Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act' <<http://canada.justice.gc.ca/chra/en/research.html>>; Richard Shillington, 'Adding Social Condition to the Canadian Human Rights Act: Some Issues' <<http://canada.justice.gc.ca/chra/en/research.html>>; Lucie Lamarche, 'Social Condition as a Prohibited Ground of Discrimination in Human Rights Legislation: Review of the Quebec Charter of Human Rights and Freedoms' (November 1999) <<http://canada.justice.gc.ca/chra/en/research.html>>; Ontario Human Rights Commission, 'Social Condition - An Option for Human Rights Commissions' <<http://www.ohrc.on.ca/english/publications/index.shtml>>.

⁴⁷ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>> 113.

⁴⁸ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* (10 December 1998) paragraph 51.

(c) Europe

Article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁴⁹ (ECHR) contains a prohibition on discrimination, including discrimination on the grounds of property or other status. It provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

All Member States of the European Union are signatories to the ECHR.

The 12th Protocol to the ECHR, contains a more general prohibition of discrimination in article 1 in the following terms:

The enjoyment of any rights set forth by law shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁵⁰

This Protocol was opened for signature in April 2000 and has been signed by 27 Member States and ratified by two Member States. Ten ratifications are required before it enters into force. The Protocol was drafted to respond to the fact that Article 14 of the ECHR does not contain an independent prohibition on discrimination in the application of legal rights (that is, it prohibits discrimination only with regard to the "enjoyment to the rights and freedoms" set forth in the Convention).

The lists of grounds of non-discrimination in Article 14 of the ECHR and Article 1 of the 12th Protocol are non-exhaustive.

(d) United Kingdom

In the United Kingdom, parliament enacted the *Human Rights Act 1998* (UK) to give legislative effect to Articles 2 to 12 and, most relevantly, Article 14 of the ECHR.

Section 2 of the *Human Rights Act* incorporates Article 14 of the ECHR which, as discussed above, guarantees a right to freedom from discrimination on any ground, including social status, in the enjoyment of certain rights and freedoms.

(e) United States

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits every State from denying any person within its jurisdiction the equal protection of the laws.⁵¹ In other words, the laws of the State must treat an individual in the

⁴⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe - ETS Number 005.

⁵⁰ *European Convention on the Protection of Human Rights* (Protocol Number 12) 4.XI.2000.

⁵¹ While this serves to protect individuals from discriminatory laws, it does not protect them from discrimination by individuals or companies who provide their services in a discriminatory way.

same manner as others in similar circumstances and conditions. This has been interpreted to prohibit discrimination on the basis of status, including socio-economic status and homelessness.⁵²

Thus, in *Griffin v Illinois*, the United States Supreme Court struck down a state statute requiring payment for trial records as a prerequisite to appellate review of criminal proceedings. As Justice Black opined, “There can be no equal justice where the kind of trial a man [sic] gets depends on the amount of money he [sic] has.”⁵³

Similarly, in *Harper v Virginia Board of Education*, the United States Supreme Court, in striking down legislation requiring a poll tax as a precondition to eligibility to vote, held that the fee requirement constituted “invidious discrimination” on the basis of wealth or property.⁵⁴

5.5 Public Policy Grounds for Reform

The reforms proposed in this submission accord with the objectives of the Act and the stated policy objectives of the Victorian Government. They also comply with Australia's international treaty obligations and bring Victoria into line with internationally recognised and protected economic, social and civil rights. The reforms would help to promote and foster equal access to, and equal protection by, the law for all Victorians. They would help to build upon the positive steps already taken by the Bracks Labor Government to protect the rights of other marginalised and disadvantaged groups in our community.

In his Ministerial Statement to the House of Representatives regarding law reform initiatives which would be taken during the Bracks Government's term of office, the Attorney-General, Rob Hulls, stated that:

Justice is about openness, transparency and accountability. It is about protecting the rights of all citizens and ensuring that people are treated fairly. It is about ensuring equality of access before the law, regardless of financial resources, gender, ethnicity, age or sexual orientation....

The Bracks Labor Government has a vision for Victoria's justice system. This vision is of a robust justice system that is fair, accessible and responsive to community needs. ... Although this Government has achieved many important reforms to Victoria's system of justice during its first term of Government, there is still much important work to be done.⁵⁵

The Act is the principal legislative instrument in Victoria used to redress discrimination and to promote equality amongst all Victorians. The objectives of the Act include:

⁵² See, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

⁵³ *Griffin v Illinois* 351 US 12, 19 (1956).

⁵⁴ *Harper v Virginia Board of Education* 383 US 663, 668 (1966).

⁵⁵ Victoria, *Ministerial Statement: A Fair, Accessible and Understandable Justice System*, Legislative Assembly, 18 April 2002 (Rob Hulls, Attorney-General).

- the promotion of recognition and acceptance of everyone's right to equality of opportunity; and
- the elimination, as far as possible, of discrimination against people by prohibiting discrimination on the basis of various attributes.⁵⁶

In April 2000, the Attorney-General introduced the *Equal Opportunity (Gender Identity and Sexual Orientation) Bill*, which made amendments to the Act to render it unlawful to discriminate on the basis of sexual orientation. In the Second Reading Speech for the bill, the Attorney-General stated that:

This bill implements two of the government's pre-election commitments designed to provide equal opportunity for all Victorians. The bill is the first step in a process of reform that will assist all Victorians to live free from unjustified discrimination.

Throughout this year the government will review *the Equal Opportunity Act* to ensure that it allows Victorians to effectively combat unwarranted discrimination ...⁵⁷

The introduction of a new ground in the Act to protect homeless and unemployed people and recipients of social security payments from discrimination would move further towards the Bracks Labor Government's stated goal of creating a "socially just and cohesive community", in which all Victorians can live free from unwarranted discrimination.

5.6 Educative and Deterrent Functions of Reform

In addition to providing protection from discriminatory and unfair treatment, the Clinic envisages that reform of the Act in the manner proposed would have the further effect of empowering a disadvantaged group in our society and also increasing recognition and understanding of the plight of homeless and unemployed people. This broader educative objective of reform accords with the overriding objective of the Act "to promote recognition and acceptance of everyone's right to equality of opportunity."⁵⁸ In addition, the educative function of the proposed amendments would assist in realising other measures undertaken by both governmental and private institutions and organisations. As the Canadian Human Rights Act Review Panel stated in relation to the introduction of the ground of "social condition":

At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function. It sends out a signal about assumptions

⁵⁶ *Equal Opportunity Act 1995* (Vic) s 3.

⁵⁷ Victoria, *Second Reading Speech: Equal Opportunity (Gender Identity and Sexual Orientation) Bill*, Legislative Assembly, 13 April 2002, (Rob Hulls, Attorney-General) 1014.

⁵⁸ *Equal Opportunity Act 1995* (Vic) s 3(a).

and stereotypes to be taken into account by policy makers. ... Perhaps the addition of this ground will spark more ... activity. We hope so.⁵⁹

The Chief Commissioner of the Canadian Human Rights Commission, Falardeau-Ramsay, took this idea further, noting that:

...it would give recognition to the idea that differences in economic status are as much a source of inequality in our society as race, gender or disability...[P]oor Canadians live daily with social stigma and negative stereotypes and face prejudice similar to those who are discriminated against on other grounds enumerated in the Canadian Human Rights Act...adding "social condition" to the CHRA would send the message to Canadians that prejudice against people who are poor is as unacceptable in our society as prejudice against people who are black or aboriginal or disabled or female.⁶⁰

The anticipated educative effects of the proposed amendments are of central importance to many of the individuals and organisations who support this submission. As the Support and Accommodation Rights Service states in its letter of support:

Prohibiting discrimination and harassment on the basis of social status would send a clear message to the community about unacceptable attitudes and behaviour in this regard. By legislating social status as a protected attribute under the Act it is also hoped that homelessness will be more recognised as a community issue requiring a community response.⁶¹

Recognition of homelessness as a ground of discrimination would have a powerful educative effect and would function as a deterrent to discriminatory treatment. It would enable unjust treatment of homeless persons – much of which is not recognised as discriminatory – to be recognised, named and addressed. It would, moreover, create a more complex understanding of the common experiential framework of homelessness and the need for measures to address the underlying causes of such experiences. In this respect, the Clinic notes that the introduction of new prohibited grounds into the Act in the manner proposed is only one element in a broader strategy necessary to eliminate discrimination against, and improve the living standards of and prospects for, Victoria's homeless and unemployed populations. Litigation on the ground of "social status" should not displace other important measures to combat poverty through activity aimed at improving conditions of the socially and economically disadvantaged. The organisations which endorse this submission are involved in many and various programs and projects in this regard.

⁵⁹ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.htm>> 113.

⁶⁰ Michelle Falardeau-Ramsay, Chief Commissioner, Canadian Human Rights Commission, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 1st Session, Parliament (27 May 1998).

⁶¹ Letter of support from Support and Accommodation Rights Services dated 19 August 2002, attached at A.

5.7 Effects of Reform on Business Decisions

The inclusion of “social status” as a prohibited ground of discrimination is not intended to, and would not have the effect of, vesting persons of a designated social status with additional rights. The reforms are intended to rectify existing injustices and to protect the exercise of rights from discriminatory behaviours rather than to create additional rights. They are intended to ensure that all persons are subject to the equal protection of the law and that homeless persons, unemployed persons and recipients of social security payments can compete on a rational basis in the market for goods, services and accommodation.

In this respect, it is important to differentiate between a valid justification for the refusal of a loan or the rejection of a tenancy application and a denial based on stereotypes about the homeless or unemployed.

The Clinic recognises that people or businesses providing accommodation or other goods or services are concerned to retain the right to differentiate between customers in order to ensure the continued viability of their business. For example, it is acknowledged that a bank has a legitimate right to perform a credit check on a potential customer before issuing a credit card, or that a landlord can require a prospective tenant to pay a bond before entering into a lease.

However, too often stereotypes about a person's social status are relied upon to unjustly discriminate. Preconceived notions based on a person's social status are not legitimate grounds for making judgments about financial capacity. The proposed amendments would not inhibit the right of Victorian businesses to make legitimate decisions on the basis of objective, unbiased information about a person's financial situation. However, where such decisions were taken, for example, on the basis of prejudices against, or imputations in respect of, people in receipt of social security payments, or against homeless or unemployed people, the Act would provide a basis for redress.

The New Zealand case of *V v M & C* (C384/97), involving discrimination on the basis of employment status, highlights the difference between decision-making on valid, objective grounds and decision-making on the basis of preconceived notions and stereotypes. In that case, a woman made a complaint to the New Zealand Human Rights Commission that she had been discriminated against by a bank because of her employment status. The woman was receiving accident compensation payments as her main source of income. She was refused a home loan from her bank unless she could provide a letter from the Accident Rehabilitation and Compensation Insurance Corporation detailing medical information about the woman's condition and stating that her disability was “permanent” and “non-reviewable”. The bank told the woman that without proof that the complainant had a permanent disability, it could not be satisfied that her income was permanent and guaranteed.

The Human Rights Commission found that the complainant was being directly discriminated against by the bank. It noted that the bank had already established that the woman met the required income threshold, and it was not until the bank manager discovered that the complainant was in receipt of Accident Compensation Corporation weekly compensation that he asked her for evidence of the permanence of her disability, and therefore her income. There was no evidence to indicate that other home loan applicants were required to show proof of permanency of income, and the Commission

acknowledged that, in a time where there is no guarantee of lifetime employment, many people would be unable to satisfy such a requirement.

This case is an example of a decision made on the basis of prejudice, not on the basis of an unbiased assessment about the customer's financial capacity and the bank's potential exposure.

The case studies provided by community and welfare organisations which endorse this proposal indicate that discriminatory treatment such as that referred to above is rife in Victoria. It is these cases which would be caught by the proposed reforms to the Act. The purpose of the Clinic's recommendations is to ensure that all persons are equal before and under the law and have the same chance to benefit when subject to the same policies.

6. Conclusions

Discrimination against people on the ground of their social status as a homeless person, an unemployed person or a recipient of social security payments is widespread in Victoria in many areas of public and private life, particularly in relation to accommodation and the provision of goods and services.

Discrimination against people on the ground of their social status as a homeless person, an unemployed person or a recipient of social security payments has a deleterious impact on the individuals concerned and the community as a whole. In many cases, discriminatory treatment exacerbates underlying causes of marginalisation and disadvantage.

The *Equal Opportunity Act 1995* (Vic) does not provide any protection from, or redress in relation to, discriminatory treatment on the ground of social status. Reform of the Act by adding “social status” as a prohibited ground of discrimination is imperative to ensure that some of the most vulnerable members of our community are protected from unfair and unjust treatment. Reform is also necessary to ensure compliance with international human rights law, overseas developments and progressive public policy.

The organisations and individuals who have endorsed this submission have done so because they recognise the urgent need for greater protection from discrimination for the homeless and disadvantaged in our community. As Bernie Durkin of Eastern Access Community Health writes:

We cannot legislate to make people “good”, but we can afford the vulnerable the maximum legal protection that our community allows. This reform is well overdue, and it is my belief that the whole community, if aware, would demand its redress. I cannot think of a defensible reason for avoiding it.⁶²

The Homeless Persons' Legal Clinic and the many individuals and organisations endorsing this submission urge the Bracks Labor Government to add to its commendable record in relation to law reform by further amending the Act to ensure recognition of the right of all Victorians, including the homeless, the jobless and recipients of social security payments, to live free from discrimination.

⁶² Letter of support from Eastern Access Community Health dated 12 August 2002, attached at A.

7. Endorsements

This submission is endorsed and adopted by the following organisations:

Anglicare – Anglicare provides an extensive range of support services throughout metropolitan Melbourne and Gippsland for children, young people, families and the broader community.

Argyle Street Housing – Argyle Street Housing is a non-profit community based organisation that provides transitional housing and housing information referral services to people in housing crisis.

Australian Federation of Homelessness Organisations – AFHO is the national peak body for homelessness organisations. AFHO researches, develops and promotes national policy and action to reduce homelessness and its impact on the diverse range of people it affects.

Catholic Social Services – Catholic Social Services is a network of 80 Catholic welfare organisations working in Victoria across a broad range of service delivery to disadvantaged communities and individuals.

Council to Homeless Persons – CHP is a non-government peak body for approximately 250 agencies which facilitates services to homeless people, educational institutions, and individuals concerned about homelessness. CHP also provides advocacy, policy and program development for and on behalf of homeless people.

Eastern Access Community Health – Eastern Access Community Health, in partnership with the community, delivers an integrated range of community-based health, disability and mental health support services to enhance the physical, mental and social wellbeing of individuals, families and communities across the eastern metropolitan region of Melbourne.

Eastern Children's Resource Program – The Eastern Children's Resource Program is a unique service that identifies and addresses the specific needs of children experiencing homelessness or family violence.

Eastern Tenancy & Housing Ltd – Eastern Tenancy & Housing Ltd is a public housing advocacy program funded by the Office of Housing. The core function of ETHL is to provide advice, advocacy and support to public housing tenants and applicants in the eastern metropolitan region of Melbourne.

Federation of Community Legal Centres – The Federation of Community Legal Centres is the peak body of Victoria's community legal centres. The Federation is committed to the principles of human rights, social justice and equity.

Jesuit Social Services – Jesuit Social Services is a social service organisation committed to promoting the common good. It expresses its Christian mission through the service of faith and the promotion of justice.

Law Institute of Victoria – The Law Institute of Victoria is the professional association for Victorian solicitors. The Institute represents its members' interests and works to improve the law so that it better serves a changing society. It aims to increase public understanding and respect for the law and legal process, while encouraging full participation in the profession by all members.

Melbourne Citymission – Melbourne Citymission works alongside people who are marginalised, at risk, disadvantaged, frail or denied access to other services in order to empower and enhance their well-being and maximise their human potential. The Western Region office offers a range of programs for adults and families who are homeless, women exiting prison, early intervention & employment, education and training programs for young people and a range of disability programs.

Melbourne Homelessness Network – Melbourne Homelessness Network is a forum for homelessness agencies to share information and ideas regarding policies and programs.

North Melbourne Legal Service – North Melbourne Legal Service is an independent, not for profit, community legal centre. NMLS provides essential legal services and assistance, including advice and representation, to the community of North Melbourne, Parkville, West Melbourne and the CBD. These legal services are provided free of charge and are specifically targeted at persons from needy, marginalised or disadvantaged backgrounds.

Public Interest Law Clearing House – PILCH is a non-profit community legal centre that coordinates the provision of free legal assistance in public interest matters. These services are targeted at non-profit organisations and people from marginalised or disadvantaged backgrounds.

Salvation Army Adult Services – Salvation Army Adult Services offer a range of support services to marginalised and disadvantaged people. This includes Flagstaff Crisis Accommodation, a crisis accommodation facility and support service for adult males who are homeless or in crisis situations.

Society of St Vincent de Paul Community and Support Services – The Society of St Vincent de Paul Community and Support Services offer a range of services to people from disadvantaged backgrounds. This includes Ozanam House, a crisis accommodation facility and support service for adult males who are homeless or severely disadvantaged.

St Mary's House of Welcome – St Mary's House of Welcome provides support and services to homeless people, people in financial crisis, people suffering hardship, people with drug, alcohol and gambling addictions, and mentally ill people.

Support and Accommodation Rights Service – SARS is a statewide advocacy service for persons wishing to make a complaint about the standard and level of service they have or have not received from a homelessness agency. In addition to the core client advocacy of the program, SARS also participates in a range of activities and initiatives designed to improve the rights of people experiencing homelessness.

The Big Issue – The Big Issue is an independent, current affairs magazine sold on the streets of Melbourne, Sydney, Brisbane, Geelong and Bendigo by vendors who are homeless or long-term unemployed. The Big Issue exists to help its vendors earn their own income.

Urban Seed – Urban Seed is a non-profit organisation which engages in and raises public awareness about issues including homelessness. It provides support and services to homeless people who live in the city. These services include Credo Café, which provides free meals to Melbourne's homeless, particularly those with mental health or substance abuse issues.

Victorian Council for Civil Liberties (Liberty Victoria) – Liberty Victoria strives to advance and take the necessary steps to defend and extend civil liberties in Victoria and the rights and freedoms recognised by national and international law.

Victorian Council for Social Services – VCOSS is a non-government peak body that works towards the reduction and eventual elimination of social and economic disadvantage in Victoria. It promotes cooperation between organisations and individuals involved in the field of social and community service in Victoria.

Wesley Mission Homelessness Services – Wesley Mission is Australia's largest Christian complex.

West Heidelberg Legal Service – West Heidelberg Legal Service is a non-profit community legal centre that provides free legal assistance to, and advocacy on behalf of, people from marginalised or disadvantaged backgrounds in the West Heidelberg catchment.

The submission is endorsed and adopted by the following individuals:

Alexandra Richards QC

Andrea Lott, Manager, Melbourne Citymission Western

Dr Annemarie Devereux, Senior Solicitor, Public Interest Advocacy Centre

Bernie Geary, Director, Jesuit Social Services

Bill Manallack, Managing Director, The Big Issue

Berne Durkin, Coordinator, Gambler's Help Eastern

Cassandra Goldie, Principal Solicitor, Darwin Community Legal Service

Chris Maxwell QC, President, Liberty Victoria

David Wright-Howie, Policy Officer, Council to Homeless Persons

Dianne Otto, Associate Professor, Faculty of Law, University of Melbourne

Diane Dickson

Emma Hunt, Co-Executive Director, Public Interest Law Clearing House

Father Joe Caddy, Director of Policy, Catholic Social Services

Felicity Hampel SC, Commissioner, Victorian Law Reform Commission

Gary Sullivan, Principal Solicitor, West Heidelberg Legal Service

Greg Connellan, Barrister and Committee Member, Liberty Victoria

Ian Horrocks, Chief Executive Officer, Federation of Community Legal Centres

John Manetta, Barrister and Committee Member, Liberty Victoria

Julian Burnside QC

Livia Carusi, Coordinator and Advocate, Support and Accommodation Rights Service

Liz Curran, Lecturer in Law and Legal Studies, La Trobe University

Marina Lewis, Coordinator, Barwon South West SAAP Network

Netty Horton, Chief Executive Director, Council to Homeless Persons

Noelene Greene, Coordinator, Eastern SAAP Network

Paul Ronalds, Executive Director, Urban Seed

Samantha Burchell, Co-Executive Director, Public Interest Law Clearing House

Sue Coleman, Advocate, Support and Accommodation Rights Service

The Reverend Bevil Lunson, Lazarus Centre, Anglicare

The Reverend Ray Cleary, Director, Anglicare

The Reverend Tim Costello, Collins Street Baptist Church

Tony McCosker, Community Director, Society of St Vincent de Paul