

Righting the Wrongs of Homelessness

PILCH Homeless Persons' Legal Clinic submission to the Federal Government's Green Paper: '*Which Way Home?*'

27 June 2008

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Endorsements

This submission is endorsed by the following organisations:

Council to Homeless Persons

Homelessness Australia

Homeless Persons Legal Service NSW, Public Interest Advocacy Centre

Human Rights Law Resource Centre

Loddon Mallee Accommodation Network

National Youth Coalition for Housing

Queensland Youth Housing Coalition

QPILCH Homeless Persons' Legal Clinic

WRCSA Housing Legal Clinic, South Australia

Acknowledgments

The PILCH Homeless Persons' Legal Clinic gratefully acknowledges the significant contributions to this submission of:

Anton Hermann, Nicole Reid, Claire Henderson, Naty Guerrero-Diaz, Sophia Kagan, and Georgie Coleman of Minter Ellison Lawyers.

Kristen Walker of Counsel.

Monika Pekevaska and **Phoebe Knowles**, secondees solicitors to the Clinic.

The PILCH Homeless Persons' Legal Clinic **Consumer Advisory Group**.

All participants at the Clinic's Consumer Forum on 24 June 2008.

Victoria Law Foundation and the **City of Melbourne** for their generous financial contribution to the PILCH Homeless Persons' Legal Clinic's Consumer Forum.

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1. Introduction and Executive Summary

1.1 Overview

This submission is made by the Public Interest Law Clearing House (**PILCH**) Homeless Persons' Legal Clinic (**the Clinic**) in response to the Federal Government's Green Paper entitled *Which Way Home? A new approach to homelessness* dated May 2008 (**Green Paper**). The Green Paper invites responses to a series of consultation questions and seeks ideas on how to implement a new approach to reducing homelessness in Australia.

Where appropriate, this submission addresses those consultation questions, but is not limited to them in dealing with the issue of homelessness. The focus of this submission is upon those issues which the Clinic is in a unique position to comment on, namely the legislative mechanisms that the Federal Government must adopt to ensure the most effective response to tackle the homelessness crisis in Australia. This submission is greatly informed by the Clinic's consultations with people who are currently homeless or who have experienced homelessness in the past. In particular, this submission is informed by the Homelessness Consumer Forum hosted by the Clinic on 24 June 2008, further details of which are provided in section 2.

The devastating consequences of homelessness for those who experience it, and the broader social implications for Australian society, are well known. The Clinic notes with approval that these are recognised by the Green Paper, and therefore does not deem it necessary to explore these further in its submission.

This submission principally considers the need to situate the problem of homelessness within a human rights framework. In our view, the implementation of such a framework is necessary not only in discharging Australia's human rights obligations at international law, but as the starting point for any integrated approach to ending the homelessness crisis. As this submission clearly illustrates, approaching the issue of homelessness within a human rights framework creates positive outcomes by:

- Enhancing social policy;
- Improving social services; and
- Providing an effective tool for advocacy.

This submission proposes a paradigm shift in Australia's policy approach to homelessness and recommends that, in order to improve social policy design and support services for the purpose of responding to the homelessness crisis, the Government must introduce a Federal *Homelessness Act* that enshrines the right to adequate housing as recognised in international law. Such a recommendation *does not* place undue budgetary pressure or policy burdens on Government. Rather, it is proposed that new legislation to recognise the right to adequate housing will:

- emphasise Parliament's commitment to the progressive realisation of the right to adequate housing;
- establish within Government and the wider community the paramount importance of addressing homelessness as part of the Government's wider social inclusion agenda; and

- give practical effect to Australia's existing human rights commitments recognised through the ratification of relevant international treaties.

Homelessness is not just an issue of housing; it is a matter of ensuring that the human rights of *all* individuals are adequately protected and promoted. In Australia, people experiencing homelessness are subject to multiple and intersectional human rights violations including, violations of the right to dignity and respect, the right to participation, the right to liberty and security, the right to freedom from cruel, inhuman or degrading treatment, the right to freedom from discrimination, the right to privacy, the right to social security, the right to the highest attainable standard of health and, of course, the right to adequate housing. In particular these violations include that homeless people are not able to adequately exercise their right to vote; that they are regularly discriminated against on the basis of their homelessness; that they are regularly forced to accept inadequate and inappropriate accommodation in preference to living on the streets. Accordingly, this submission recommends that the Government must undertake to review and amend *all* laws, policies and practices that impact disproportionately and discriminatorily on people experiencing homelessness.

Fundamentally, a human rights approach to the issue of homelessness in Australia requires the Government to adopt an integrated and holistic legislative framework which acknowledges the interconnectedness of human rights. In this regard, the Clinic recommends that in addition to a Federal *Homelessness Act*, the Government must go further and enact a Federal Charter of Rights to ensure the promotion and protection of the human rights of *all* individuals within Australia.¹

Human rights legislation also provides a valuable legislative framework that can enable the development and delivery of more responsive, efficient, effective and empowering homelessness policy and services. It also provides a tool for advocacy, action and accountability, which ensures that homeless people are able to live with human dignity and fully participate in and contribute to society.

All comments and recommendations contained within this submission are consistent with the Federal Government's commitment to human rights,² and its social inclusion agenda.³ As this submission reveals there is a strong positive correlation between the Government's respect for human rights and its success in addressing homelessness and poverty, with the realisation of people's human rights ensuring the underlying enabling conditions of their social inclusion.⁴ In the Clinic's view, the Federal Government will only achieve its 'social inclusion' agenda and solve the issue of homelessness if it also works to protect, fulfill and realise the human rights of all Australians. The relationship between the human rights framework and the Federal Government's social inclusion agenda is therefore mutually reinforcing and complementary; one cannot be achieved without the other.

¹ This recommendation is discussed further at page 25, however, from the outset the Clinic submits that the proposed Federal Charter of Rights must enshrine all rights in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*.

² Australian Labour Party National Platform and Constitution, Chapter 13 – Respecting Human Rights and a Fair Go for All, principle 4. Available at – http://www.alp.org.au/platform/chapter_13.php.

³ Attorney General, Rob McClelland MP, Speech at 2008 Non-Government Organisation Forum on Domestic Human Rights (10 June 2008).

⁴ See *ICCPR*, article 2. See also CESCR, *General Comment 15: The Right to Water*, [17]–[29], UN Doc E/C.12/2002/11 (2002); CESCR, *General Comment 12: The Right to Adequate Food*, 69, [15], UN Doc HRI/GEN/1/Rev.5 (2001); and CESCR, *General Comment 13: The Right to Education*, 84, [47], UN Doc HRI/GEN/1/Rev.5 (2001). See generally, Amartya Sen, *Development as Freedom* (1999) 49, 87, 90 and 144. See also Dianne Otto, 'Linking Health and Human Rights: What are the Possibilities?' (Paper presented at the International Symposium on Human Rights in Public Health: Research, Policy and Practice, The University of Melbourne, 3-5 November 2004) 11.

1.2 Recommendations

The Clinic makes the following recommendations for reform:

Recommendation 1

The Federal Government must recognise that homelessness is a human rights issue and that any effective response to homelessness must incorporate a human rights approach.

Recommendation 2

The Federal Government must review and amend all legislation, policies and procedures that impact disproportionately and discriminatorily on people experiencing homelessness, including: residential tenancy laws, anti-discrimination laws, electoral laws, public space laws, etc.

Recommendation 3

The Government should enact a Federal Homelessness Act which provides for the promotion and protection of human rights, particularly the right to adequate housing. The Clinic refers to section 4.2 of this submission, which sets out the key elements of such an Act.

Recommendation 4

The Government must undertake to review and amend State and Federal tenancy laws to ensure realisation of the right to adequate housing (refer to recommendation 2 above). For example, to ensure security of tenure, public and community housing authorities should be required to obtain Court Orders from residential tenancy tribunals prior to serving a notice to vacate upon tenants.

Recommendation 5

The Federal Government should consider the legislative approaches adopted by comparative jurisdictions in tackling the issue of homelessness in Australia.

Recommendation 6

The Government establish a Consumer Advisory Council comprised of people currently experiencing homelessness or who have experienced homelessness in the past, which reports directly to the Federal Minister of Housing. Such a Council would involve a minimum of two representatives from a similarly formed Council at the State or Territory level.

Recommendation 7

The Government should provide funding for consumer based initiatives such as vocational training; further education and peer support and mentor programs.

Recommendation 8

The Federal Government should amend the Human Rights and Equal Opportunity Commission Act 1986 (Cth) to include social status (including homelessness, unemployment or the receipt of social security payments) as a protected attribute. Equivalent State and Territory laws must also be amended to enshrine social status as a protected attribute.

Recommendation 9

The federal law prohibiting criminal record discrimination should be amended to more clearly establish criminal record as a protected attribute. In particular, the prohibition should be set out solely in the Human Rights and Equal Opportunity Commission Act 1986 (Cth). The 'inherent requirements defence' should also be repealed and replaced with specific enumerated exceptions to the prohibition, and a provision via which an employer may apply for an exemption in its particular workplace.

Recommendation 10

The Federal Government should provide federal funding to the Clinic on a recurrent basis.

Recommendation 11

The Federal Government in its legal procurement policies should incorporate social justice obligations similar to those currently in place in Victoria.

Recommendation 12

A Housing Ombudsman should be established in each State and Territory with the powers and functions set out above.

Recommendation 13

That the Federal Government introduce express protection of the human right to social security to ensure that access to social security for the most vulnerable is realised.

Recommendation 14

That the Federal Government review income support levels and ensure they sit above the poverty line

Recommendation 15

That the Federal Government repeal the eight-week penalty regime for non-compliance with Centrelink participation requirements.

Recommendation 16

The Federal Government should provide the Clinic and its counterparts with recurrent funding to enhance the service provision of these organisations.

Recommendation 17

The Government must encourage and facilitate the transposition of the Clinic model into other service sectors in a way that promotes an integrated mode of service delivery such as through 'community hubs' where legal, health and financial services are provided at the one location.

Recommendation 18

The Federal Government should enact a legally enforceable human rights document in the form of a Charter of Rights.

Recommendation 19

The Federal Charter of Rights should protect all rights included in the ICCPR and ICESCR:

Recommendation 20

The Charter of Rights should apply to all institutions comprising the Federal Government – including the Parliament, the Executive, the Judiciary and public authorities, including private entities entrusted with government functions – and require that those institutions respect, protect and fulfil human rights.

2. Background

2.1 Overview of the Clinic

The Clinic is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.⁵ The Clinic is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the Clinic recently received confirmation of a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

The Clinic has the following aims and objectives:

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

Free legal services are offered by the Clinic on a weekly basis at 11 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.⁶ Since its establishment in 2001, the Clinic has assisted over 3000 people at risk of, or experiencing, homelessness in Victoria.

The Clinic also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In

⁵ See <http://www.pilch.org.au> (at 12 June 2008).

⁶ Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre and Homeground Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth and the legal departments of Goldman Sachs JBWere and the National Australia Bank.

2005, the Clinic received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights.

The Clinic operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic process. The Clinic recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (**CAG**). The CAG was established by the Clinic in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the Clinic with a view to enhancing and improving the quality of the Clinic's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the Clinic but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

In the context of this Green Paper process, the CAG has met with members of the Federal Government's Homelessness Taskforce on more than one occasion to discuss its ideas and suggestions about resolving the issue homelessness.

2.2 Consumer Forum on Homelessness

From the outset, the Clinic has been committed to ensuring that the voices of people who have experienced homelessness are heard through this Green Paper process. We note that the Federal Government hosted several public meetings to consult with the general community on the issue of homelessness. We further understand that the Federal Government engaged external consultants to conduct a series of consultations with people who are experiencing homelessness.

Despite these two initiatives, the Clinic considers that further work should have been done by the Federal Government to gather the views of and listen to the real experts – homeless people. In an attempt to right the balance, on Tuesday 24 June 2008, the Clinic and its CAG organised a Consumer Forum at the Melbourne Town Hall, entitled '*Have Your Say*' (**Consumer Forum**). The Consumer Forum was generously funded by the Victoria Law Foundation and the Melbourne City Council.

The Consumer Forum was designed so that people who have experienced homelessness or who are currently homeless could come and have their say about what the Federal Government should do to *solve* homelessness. The Consumer Forum was a great success with over 50 people attending. Marian Pettit from the Homelessness Taskforce team within FAHCSIA also attended and took questions from participants.

The Forum participants drew on their experiences to discuss how to solve homelessness and improve service delivery in relation to homelessness. The Clinic sought input from attendees in relation the Clinic's submission by asking them to complete a survey.⁷ Further ideas were

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A copy of the pro forma survey is attached as an appendix to this submission.

expressed by participants through an 'open mic' session. Finally, participants at the Consumer Forum had the opportunity to write their own individual submissions to the Green Paper.⁸

This submission has been greatly enhanced by the ideas and perspectives of the people with whom we consulted at the Consumer Forum. It also contains qualitative and quantitative data collected at the Consumer Forum.

3. A Human Rights Framework

3.1 Australia's Obligation to Apply a Human Rights Framework

It is well established that people experiencing homelessness are subject to multiple and intersectional human rights violations.⁹ The Federal Government is obligated under international law to redress these violations. Its obligations are found in a number of the major international human rights treaties to which Australia is a party, including:

- The International Covenant on Civil and Political Rights (**ICCPR**);
- The International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
- The Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**);
- The International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); and
- The Convention on the Rights of the Child (**CRC**).

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

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁰

Approaching homelessness from a human rights perspective should therefore be the starting point for any effective national response aimed at tackling homelessness and promoting social inclusion.¹¹ Only when the right to adequate housing and other inter-related rights are recognised and enshrined in law will national goals and targets for the reduction of homelessness sit within a robust policy framework.

⁸ The Clinic forwarded 20 individual submissions to the Federal Government on Wednesday 26 June 2008. As agreed at the Forum, the Clinic has not read or changed any of these submissions. As a result the Clinic cannot comment on and does not endorse the content of these 20 individual submissions.

⁹ Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008). These human rights violations include, violations of the right to dignity and respect, the right to participation, the right to liberty and security, the right to freedom from cruel, inhuman or degrading treatment, the right to freedom from discrimination, the right to privacy, the right to social security, the right to the highest attainable standard of health and, of course, the right to adequate housing.

¹⁰ *ICESCR* article 2. Refer to United Nations Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations* (Art. 2, par. 1) (*General Comment 3*) 1990.

¹¹ Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008).

3.2 Important Elements of a Human Rights Framework

There are three key overarching elements to a human rights framework, they are:

- Universality;
- Interdependence and indivisibility; and
- Accountability.

The principle of *universality* recognises that human rights are universally applicable to *all* people on equal terms.¹² This principle underlies the vast body of international human rights law and establishes a normative framework within which governments can formulate laws, policies and practices that provide for and protect peoples' human rights as well as measure those laws, policies and procedures against the core minimum standards and benchmarks. A human rights approach promotes universal human dignity, a notion that applies to all irrespective of their living situation. This principle is acknowledged in key principle number 4 of the Green Paper. The recognition of human rights not only protects society's vulnerable members, but has the empowering function of restoring their dignity.

The notion of the *interdependence* and *indivisibility* of human rights acknowledges the equal importance that is attached to *all* rights,¹³ and acknowledges that *all* rights are 'mutually supportive, concomitant and evolving.'¹⁴ Therefore, rights based approaches to law reform, policy development and service delivery must involve a multisectoral, 'consultative and participatory process in which the interests of all relevant actors' are fully considered.¹⁵

The obligation to implement human rights, and to achieve the principle of *accountability*, requires that the Federal Government discharge three general duties including: *respect* for human rights, the *protection* of people from human rights violations, and taking positive action to *fulfil* human rights. The obligation to *respect* requires that the Federal Government refrain from interfering, directly or indirectly, with people's enjoyment of their human rights. This prohibits the Federal Government from enacting or implementing laws that, directly or indirectly, disadvantage or discriminate against certain social groups such as homeless people. The obligation to *protect* requires that the Federal Government prevent third parties, including organisations and individuals, from interfering in any way with the enjoyment of human rights. The obligation to *fulfil* requires that the Federal Government take positive steps to promote and support the realisation of human rights and, where necessary, to provide for the realisation of human rights for marginalised or disadvantaged groups.

To successfully implement human rights and to be accountable for ensuring their realisation for *all* people within its jurisdiction, the Federal Government must guarantee that all domestic

¹² Universal Declaration of Human Rights 1948, article 1.

¹³ Committee on the Rights of the Child, *General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention*, UN Doc CRC/C/5 (30 October 1991) [8].

¹⁴ UNICEF Innocenti Research Centre, *Summary Report of the Study on the Impact of the Implementation of the Convention on the Rights of the Child* (2004), 1-2.

¹⁵ John Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275-306. See also United Nations Committee on the Rights of the Child, *Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4, [42].

legislation is fully compatible with human rights and that policies and practices of public bodies are applied in accordance with human rights.¹⁶

3.3 Benefits and Positive Outcomes of a Human Rights Framework

The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws, policies and programs can have significant positive impacts. Some of the benefits of using a human rights approach, which are relevant to Australia, include:¹⁷

- a 'significant, but beneficial, impact on the development of policy';
- enhanced scrutiny, transparency and accountability in government;
- better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
- 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
- the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
- awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.

These benefits demonstrate that legislative human rights instruments have far greater impact at the 'front end' by influencing policy development and service implementation, rather than as an avenue for litigious remedy. In other words, legislative human rights instruments provide mechanisms for a less litigious and less reactive framework that is more focused on individuals. This serves to address some of the underlying, systemic causes of human rights violations such as homelessness.

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

- More effective homelessness policy;
- Enhanced homelessness services;
- A tool for advocacy and improved government accountability;

¹⁶ Committee on the Rights of the Child, *General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention*, UN Doc CONVENTION/C/5 (30 October 1991) ¶ 1. It is therefore fundamentally important that government, Parliament and the judiciary employ a human rights approach to all decision-making processes in order to ensure consistent compliance with human rights across all levels of government. Refer to the obligations on the three arms of government (Parliament, the Executive and the judiciary) in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁷ See generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

- Community empowerment, education and a reduction of the social stigma attached to homelessness.

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

3.4 The Complementary Relationship between Social Inclusion and Human Rights

In general terms, the Clinic endorses the ten principles identified in the Green Paper. However, the Clinic notes that the allusion to rights (principle number 6 – *Rights and responsibilities of individuals and families are paramount*) is not discussed in the Green Paper beyond that one general reference. While the ten principles provide broad overarching guidelines for addressing homelessness, without a focus on the positive recognition of relevant human rights they lack the force required to effect real change and achieve the paradigm shift required to reduce Australia's ever increasing levels of homelessness.

The Green Paper's insistence on a social inclusion framework is to be applauded. Nevertheless, the Clinic submits that this framework cannot be separated from a human rights framework. Indeed, the principles of social inclusion (principle number 3) and dignity (principle number 4) can only be achieved by recognising and fulfilling the human rights of marginalised and disadvantaged members of society. At the core of each of these discourses is the principle that people must be treated with dignity and respect. The importance of this principle is demonstrated by the staggering figure that 75 per cent of Consumer Forum participants felt they had been treated in a cruel or degrading way while experiencing homelessness.

The human rights framework builds upon the principle of dignity and respect by setting out a process that contains universal benchmarks and remedies to ensure its realisation. Consequently, to achieve social inclusion for people experiencing homelessness the Government must respond to the homelessness crisis within a human rights framework.

Recommendation 1

The Federal Government must recognise that homelessness is a human rights issue and that any effective response to homelessness must incorporate a human rights approach.

4. Situating Homelessness within a Human Rights Framework

4.1 Homelessness and Human Rights

The causes of homelessness in Australia are complex and varied. However, they are generally acknowledged to include:

- poverty, severe financial hardship and lack of access to adequate income support;
- unemployment;
- lack of affordable housing;

- domestic and family violence;
- mental illness and lack of access to health care;
- drug and alcohol disorders and lack of access to drug treatment services;
- problem gambling;
- legal issues;
- discrimination;
- disability; and
- evictions.¹⁸

In many cases of homelessness, these causes are intersectional and inter-related. The Green Paper documents these matters in detail.

The intersectional and interrelated nature of the causes of homelessness also illustrate that homelessness is not just an issue of housing, rather it is much more complex and gives rise to multiple and interdependent human rights issues. As one Consumer Forum participant aptly said: “homelessness is not just houselessness” (Kirra). Any human rights response to homelessness in Australia must recognise these complex and interrelated issues and the first step must be an audit of all legislation, policies and procedures to ensure they do not violate the rights of people experiencing homelessness.

Recommendation 2

The Federal Government must review and amend all legislation, policies and procedures that impact disproportionately and discriminatorily on people experiencing homelessness, including: residential tenancy laws, anti-discrimination laws, electoral laws, public space laws, etc.

4.2 The Right to Adequate Housing

Pursuant to art 11 of *ICESCR*,¹⁹ all people have the right to adequate housing, which includes a right to live somewhere in security, peace and dignity.²⁰ The *ICESCR* entered into force for Australia in 1976.

According to the United Nations Committee on Economic, Social and Cultural Rights (*CESCR*), at a minimum, housing must be affordable, accessible to disadvantaged groups, habitable, culturally appropriate, provide occupants with security of tenure and afford access to appropriate services, materials, facilities and infrastructure, including employment, health care, schools and other social facilities.²¹

Article 2(1) of the *ICESCR* obliges Australia to take concrete steps, using the maximum available resources, to progressively fulfil economic, social and cultural rights. The steps taken must be

¹⁸ See generally, Australian Bureau of Statistics, *Counting the Homeless 2001* (2003); Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2003–04* (2005); Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004).

¹⁹ Opened for signature 19 December 1966, 993 UNTS 2 (entered into force 3 January 1976).

²⁰ *CESCR, General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

²¹ *CESCR, General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures, including budgetary prioritisation.²²

Retrogressive measures, such as cuts in funding to homelessness assistance services, public housing or health care, are generally prohibited by international law and may only be justified by exceptional circumstances which do not exist in Australia following over a decade of substantial economic growth and prosperity.²³

Further, even while Australia is developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, it is under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including in relation to the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.²⁴

Consumer Forum participants were unsurprisingly vocal about what is well established fact – that housing both in the public and private markets in Australia is unaffordable, inadequate and there is not enough to meet the needs of the most disadvantaged and marginalised. We note that the submission of the New South Wales Homeless Persons' Legal Service (*NSW HPLS*) also discusses the current state of public and private housing in Australia.

Participants at the Consumer Forum discussed the insufficient number of adequate crisis and transitional accommodation options. Over 70 per cent of participants indicated that they had been refused crisis or transitional accommodation for one reason or another. In addition, 55 per cent of participants indicated that they were on the waiting list for public housing. Of those participants, 20 per cent had been on the waiting list for 1 to 2 years. Disturbingly, over 30 per cent indicated that they had been on the list for between 5 and 10 years.

Australia's failure to provide adequate housing has not gone unnoticed by the international community. In August 2006, the United Nations Human Rights Council Special Rapporteur on Adequate Housing (the *Special Rapporteur*) led a mission to Australia to examine the status of realisation of adequate housing as a component of the right to an adequate standard of living.²⁵ His report concluded that Australia had failed to implement the human right to adequate housing, and lacked a complaint mechanism for alleged violations of housing rights.²⁶ He went on to urge that:

Australian legislation should explicitly incorporate human rights and the right to adequate housing, and the recommendation on housing and land made to the Australian authorities by various United Nations human rights bodies should be fully implemented.²⁷

As noted above, the international community recognises the importance of the right to adequate housing. Unsurprisingly, people experiencing homelessness have the same view. As Scott, a Consumer Forum participant, said:

²² CESCR, *General Comment No 3: The Nature of States Parties' Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

²³ Ibid; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 4–5, [15]–[18].

²⁴ CESCR, *General Comment No 3: The Nature of States Parties' Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

²⁵ Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, UN Doc A/HRC/4/18/Add.2 (2007) 2.

²⁶ Ibid, 7.

²⁷ Ibid, 2.

Just because I've been homeless doesn't mean I'm prepared to live in dirty, tiny not appropriate housing.

The Clinic submits that for the Federal Government to fulfil its stated commitment to social inclusion and human rights, and if the country's homelessness crisis is to be addressed in any meaningful way, the right to adequate housing must be recognised formally by the Federal Government. Any legislative implementation of the right to adequate housing needs to take into account the scope of that right in international law.

While the *Supported Accommodation Assistance Act 1994* (Cth) (**SAA Act**) recognises international human rights protection standards in its preamble, it does not provide for any clear mechanisms by which those human rights standards must be achieved (i.e. there is no clear correlation between the funding mechanisms in the SAA Act and the need to ensure that services have the effect of realising human rights). We note that this legislation, which was developed in the 1980s, has provided an important first step in legislative protection for people experiencing homelessness; however, it is now time for the reach of this legislative protection to be greatly extended. Accordingly, while the SAA Act remains important today, the Clinic submits that it must be transformed into a Federal *Homelessness Act* that takes a broad and holistic approach to solving homelessness through a human rights framework and creates an enforceable mechanism to ensure the promotion and protection of human rights for people experiencing homelessness.

The Clinic understands that there are plans to repeal or scale back the SAA Act from its already limited application. As a result there will be no legislative framework in relation to homelessness. In our view, these suggestions are misguided. Without a legislative framework in place, homelessness service provision would be reliant on political leadership and goodwill and the Government and service providers could not be held accountable for their actions. People experiencing homelessness will continue to be the subject of human rights violations unless the Government enacts a Federal *Homelessness Act*, which builds on the existing legislative framework in the SAA Act.

The Clinic considers that it is imperative that a Federal *Homelessness Act* be enacted and that such an Act should include:

- Overarching recognition of and commitment to Australia's obligations under the *ICESCR*, in particular the Government's responsibility to ensure the progressive realisation of the right to adequate housing.
- Legislative objects that set out the responsibility of Government to progressively realise the right to adequate housing, which must incorporate both short and long term accommodation and housing options.
- The following primary object:

"The primary object of this Act is the progressive realisation in Australia of the right to adequate housing in order to fulfil Australia's obligations including under the International Covenant on Economic, Social and Cultural Rights"
- The broad definition of homelessness currently provided under the SAA Act.
- The definition of the right to adequate housing as it appears in international law, incorporating:

- Security of tenure;
- Availability of services;
- Affordability;
- Habitability;
- Accessibility;
- Proximity; and
- Cultural appropriateness.
- Provision for Government funding of social support services under the *Homelessness Act* to be conditional upon their continuing compliance with individuals' human rights, particularly the right to adequate housing and associated rights that are relevant for people experiencing homelessness or at risk of homelessness.
- Establishment of the *Office of the Commissioner for Adequate Housing* for the purpose of safeguarding individuals' rights. The Commissioner should have the power to:
 - Develop grievance and appeals procedures in respect of public housing matters and general social support services;
 - Refer grievances to the Housing Ombudsman for further investigation;
 - Develop a Charter of rights and responsibilities that service providers must adhere to in order to access Government funding;
 - Develop, review and monitor national standards for the provision of adequate housing;
 - Report on an annual basis to the Federal Government on the progressive realisation of the right to adequate housing; and
 - Any other powers as are necessary and convenient for the Commissioner to perform his or her function of promoting and protecting people's right to adequate housing.
- Establish a *Housing Ombudsman* that has the power to:
 - hear and investigate complaints in respect of Federally funded service provision, including whether or not service providers are acting compatibly with the rights of individuals; and
 - Conduct investigations and reviews of Federal Government departments and Federally funded public authorities, including service providers, on its own initiative.

Recommendation 3

The Government should enact a Federal Homelessness Act which provides for the promotion and protection of human rights, particularly the right to adequate housing. The Clinic refers to section 4.2 of this submission, which sets out the key elements of such an Act.

Recommendation 4

The Government must undertake to review and amend State and Federal tenancy laws to ensure realisation of the right to adequate housing (refer to recommendation 2 above). For example, to ensure security of tenure, public and community housing authorities should be required to obtain Court Orders from residential tenancy tribunals prior to serving a notice to vacate upon tenants.

4.3 Comparative Jurisdictions

The Clinic notes that constitutional and legislative protection of housing rights has already been achieved in other jurisdictions, such as the United Kingdom and Scotland. Although they are necessarily culturally contingent, the Clinic contends that these and other legislative instruments form an excellent basis from which Australia can build on within its own governmental and political framework. Discussed below are two examples of homelessness legislation from countries with a similar constitutional and legal history. These examples should provide the Federal Government with comfort that legislation enshrining the right to adequate housing has been adopted elsewhere with success.

(a) Homelessness Act 2002 (UK)

In 2002, the United Kingdom introduced the *Homelessness Act*, which has application in England and Wales. The Act requires that local authorities (similar to our local councils) implement five yearly action plans to tackle homelessness, to conduct annual censuses of rough sleeping and to give temporary accommodation to 'unintentionally homeless' people in priority need until they can be provided with more permanent housing. The Act also insists on new safeguards to prevent homeless families with children and vulnerable homeless people being housed in inappropriate accommodation.²⁸

Under the Act, the government also added new vulnerable groups to those already recognised as being in 'priority need.' The positive aspect of this legislation is that it creates an obligation on local authorities to find temporary accommodation to the small group of the most vulnerable. However, it suffers from several drawbacks, including a limitation of the target group to those who are 'unintentionally homeless'.²⁹ Nevertheless and importantly, people seeking accommodation have the right to appeal the decision of a local authority internally and then to the County Court on a question of law.

(b) Homelessness Act 2003 (Scotland)

The Scottish *Homelessness Act*, while not explicitly enumerating the right to housing, effectively guarantees the right of access to emergency accommodation for every individual and household in Scotland within 10 years (by 2012).

Under the Act, local authorities have both corporate duties to the Scottish Executive to develop their own homelessness strategy and ongoing monitoring and evaluation strategies as well as duties to homeless individuals. The extent of this duty is contingent upon how a person is assessed under the Act. In essence, under the legislation there is a duty on local authorities to consider an applicant's case and if that person is homeless then find him or her accommodation.

²⁸ Iain Byrne and Andrew Blick, 'Home Truths' in Stuart Weir (ed) *Unequal Britain: Human Rights as a Route to Social Justice*, 200.

²⁹ Intentional homelessness is defined as someone falling into rental arrears or committing an act of anti-social behaviour. The Act also makes it possible to exclude or suspend people from tenancies for quite arbitrary reasons. See: Iain Byrne and Andrew Blick, 'Home Truths' in Stuart Weir (ed) *Unequal Britain: Human Rights as a Route to Social Justice*, 200.

The Act's ten year target is to be achieved by gradually expanding the categories of people defined as being in 'priority housing need' and giving households classified as 'intentionally homeless', accommodation with greater social support. For example, the categories of priority need will be gradually broadened until in ten years time there is no distinction drawn between any homeless person who is categorised as unintentionally homeless. The Act also gives Ministers the powers to make regulations banning the use of unsuitable accommodation, such as bed and breakfasts, and requires local councils to accommodate homeless people who apply for rehousing in their area rather than shuffling them off, as many local authorities do, to other areas where they have a local connection.

Recommendation 5

The Federal Government should consider the legislative approaches adopted by comparative jurisdictions in tackling the issue of homelessness in Australia.

4.4 Protection of interrelated human rights

In addition to the right to adequate housing, a human rights-based approach should also uphold other interconnected human rights in order to effectively tackle the problem of homelessness. Through its ratification of international treaties, the Australian Government has undertaken international obligations to ensure that all civil, political, economic, social and cultural human rights are enjoyed in Australia. However, homeless persons in Australia currently experience barriers to their enjoyment of these rights, which in turn constitutes a barrier to those persons effectively dealing with the causes of their homelessness and to their ability to transition out of homelessness. The nature of these barriers is described further below.

(a) The rights to participation and freedom of expression

Many people experiencing homelessness feel deeply alienated from the community due to an inability to have their say in public policy formulation and decision-making processes. The involvement of people experiencing homelessness in policy development and decision-making processes, at both government and service provision levels, would result in more sensitive and effective responses to homelessness and would empower homeless people to participate more fully in social, cultural, economic and political life.³⁰

The Clinic operates on the basis of direct client involvement in shaping the services we deliver. In our experience, efforts to maximise client participation in service planning and delivery has a material impact on outcomes.

At the Consumer Forum there was a great deal of discussion about people's right to participate, or lack thereof. An alarming 87 per cent of attendees at the Consumer Forum said that they did not feel that they had been given the opportunity to have their say about government policies in relation to housing and homelessness.

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

³⁰

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

with feedback and comment on improving pathways out of homelessness. As one attendee commented at the Consumer Forum:

It's always been a struggle but from my point of view, things do need to change to make this place a better place. We do need to be heard because we are people with lots of knowledge and we have experienced things so we do know how to make things better. (Sheree)³¹

Another participant at the Consumer Forum said:

There can't just be one solution. If people are not being listened to about what their needs are then it will continue the cycle of homelessness. Can't just say hey your homeless here is a roof over your head – it has to be adequate. (Kirra)³²

Based on the comments provided by participants at the Consumer Forum in relation to improving consultation with consumers, the Clinic makes the following recommendations.

Recommendation 6

*The Government establish a Consumer Advisory Council comprised of people currently experiencing homelessness or who have experienced homelessness in the past, which reports directly to the Federal Minister of Housing. Such a Council would involve a minimum of two representatives from a similarly formed Council at the State or Territory level.*³³

Recommendation 7

*The Government should provide funding for consumer based initiatives such as vocational training; further education; and peer support and mentor programs.*³⁴

In this submission we have called for the establishment of a Commissioner for Adequate Housing (refer to section 4.2 above). In our view, if the proposal for a Commissioner is supported by the Government, it should be mandatory for the Commissioner to involve homeless people in performing his or her role.

(b) The right to freedom from discrimination

Remarkably, despite Australia's obligation under international law to ensure that all people are free from discrimination³⁵ and anti-discrimination law at both State and Federal level, it remains lawful to discriminate against people on the basis of their housing status in this country.

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

³¹ PILCH Homeless Person's Legal Clinic Consumer Forum, 'Have Your Say' (24 June 2008), Melbourne Town Hall (**Consumer Forum**). Refer to annexed Consumer Forum survey.

³² Comments made at the Consumer Forum 'open mic' session.

³³ Suggestion provided by Greg at the Consumer Forum 'open mic' session.

³⁴ Suggestion provided by Greg at the Consumer Forum 'open mic' session.

³⁵ Refer to *ICESCR* and *ICCPR*.

The Clinic has provided clear qualitative evidence in previous submissions to the Victorian Government³⁶ which reinforces that law reform is necessary in order to counteract the devastating impact of social status and criminal record discrimination on some of the most marginalised and disadvantaged members of our society. Data collected at the Consumer Forum supports this position. Seventy five per cent of participants at the Consumer Forum felt that they had been treated in a cruel or degrading way during their experience of homelessness. Furthermore, over 50 per cent felt they had been discriminated against in relation to their housing. This evidence highlights that the majority of people experiencing homelessness or at risk of homelessness routinely experience discrimination at the hands of accommodation and goods and service providers. For example, as the law currently stands in Victoria:

- a service provider, such as a real estate agency or caravan park owner, can refuse accommodation to someone (who may be homeless or precariously housed) because they want to pay either with a cheque from a welfare agency, or from their social security benefits; and
- an individual may be refused a job that they can adequately perform due to an old or irrelevant criminal record.

Such discrimination not only stymies individuals' genuine attempts to integrate into the community and contribute to Victoria's economy, but also serves to entrench people in homelessness, unemployment and poverty.

The impacts of discrimination are not confined to the denial of opportunity and social inclusion or the access of necessary goods and services. Research shows that significant social, health and economic costs also flow from discrimination. According to the World Health Organisation, 'discrimination violates one of the fundamental principles of human rights and often lies at the root of poor health status'.³⁷ This is consistent with an emerging consensus that discrimination and stigmatisation are major causal factors and consequences of social exclusion and ill-health among people experiencing homelessness and unemployment, including higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping. Equally, the economic implications of discrimination can be immense. Just as discrimination can entrench homelessness, unemployment and recidivism, it can also put strain on public spending.

The Federal Government must take leadership on the issue of discrimination. A number of participants at the Consumer Forum agreed that the Government must '*make it illegal to discriminate against homeless people*'.³⁸ Accordingly, we submit that the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) should be amended to include social status (including homelessness, unemployment or the receipt of social security payments) as protected grounds, to ensure improved outcomes for homeless people. In addition, the Federal Government must amend current federal law that prohibits criminal record discrimination in order to more clearly establish criminal record as a protected attribute. It is also crucial that these amendments in relation to social status and criminal

³⁶ For further information see for example the Clinic's submissions to Victoria's *Review of the Equal Opportunity Act 1996* (Cth) 2008, available at www.pilch.org.au.

³⁷ World Health Organisation, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) [6].

³⁸ Suggestion provided by Kirra and agreed by others at the Consumer Forum.

record discrimination flow down to equivalent State and Territory laws to ensure consistency across the regimes.

In our view, such amendments would reinforce the Government's commitment to addressing the issue of homelessness within a social inclusion framework.

Recommendation 8

The Federal Government should amend the Human Rights and Equal Opportunity Commission Act 1986 (Cth) to include social status (including homelessness, unemployment or the receipt of social security payments) as a protected attribute. Equivalent State and Territory laws must also be amended to enshrine social status as a protected attribute.

Recommendation 9

The federal law prohibiting criminal record discrimination should be amended to more clearly establish criminal record as a protected attribute. In particular, the prohibition should be set out solely in the Human Rights and Equal Opportunity Commission Act 1986 (Cth). The 'inherent requirements defence' should also be repealed and replaced with specific enumerated exceptions to the prohibition, and a provision via which an employer may apply for an exemption in its particular workplace.

(c) The right to vote

The United Nations Office of the High Commissioner for Human Rights (**OHCHR**) has drawn a direct link between homelessness, poverty and the right to vote, stating:

Lack of political rights is both a cause and a consequence of poverty. Socially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalization...Active participation in political decision-making processes plays a role in expanding political freedoms and empowering people, which in turn contributes towards combating social exclusion and political marginalization.³⁹

It is therefore vital that people experiencing homelessness are able to share in the experience of participative democracy by exercising their right to vote.⁴⁰

Article 25 of the *ICCPR* recognises and protects the right of every citizen to vote. This right also requires that the government take all such legislative and other steps to ensure that everyone is *able* to exercise their right to vote, whatever the form of constitution or government adopted by a state.⁴¹ No distinctions are permitted between citizens in the enjoyment of the right to vote on the grounds of, *inter alia*, social origin, property or other status. In Australia, homeless people continue to face great difficulties in exercising their

³⁹ UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 48.

⁴⁰ Conservative estimates show that at least 64,000 people experiencing homelessness were eligible to vote at the 2007 Federal Election. Further, we note that previous research conducted by the Clinic suggested that at the time of the 2004 Federal Election, up to 76 per cent of the 64,000 homeless people who were eligible to vote did not do so. PILCH Homeless Persons' Legal Clinic, 'Homelessness and Voting: Submission to the Joint Standing Committee on Electoral Matters Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto' (2005) 38 <<http://www.aph.gov.au/house/committee/em/elect04/subs/sub131.pdf>

⁴¹ Human Rights Committee, *General Comment 25: Article 25*, UN Doc HRI/GEN/1/Rev.5 (2001) 157.

right to vote. The enfranchisement of homeless people is a key challenge for individuals, organisations and governments concerned with social inclusion and the alleviation and eradication of homelessness in Australia.

In accordance with its human rights obligations, the Australian governments and agencies must adopt specific measures, including voter education and awareness campaigns, so as to ensure that obstacles to voting and participation, such as poverty, illiteracy and homelessness, are overcome.⁴²

In the Clinic's view, the ability of homeless people to exercise their right to vote would be enhanced by the Australian Electoral Commission (and state-based electoral commissions) engaging homelessness services and other organisations to act:

- in an advisory capacity, by providing accurate information to the AEC regarding the particular difficulties faced by homeless people around getting information about how to participate in elections, going through the process of enrolment, attending polling booths, providing original identification documents etc;
- as a facilitator of the AEC's consultations on this issue with people experiencing homelessness, or people who have previously experienced homelessness;
- as a conduit or gateway for the provision of information to people experiencing homelessness around enrolment and voting issues (voter education);
- as a possible location for actual enrolment and voting; the Clinic has long suggested that enrolment stations or polling booths could be co-located at certain homelessness agencies (voter registration and participation); and
- in an advocacy role, publicly supporting the introduction of measures to improve access to the vote and the exercise of voting rights for people experiencing homelessness.

The ability of homeless people to exercise their right to vote would also be enhanced by legislative reform (at Commonwealth and State levels) that:

- repeals the Howard government's 2006 amendments to the Commonwealth Electoral Act, which served to reduce the already limited participation of financially and socially disadvantaged people, particularly homeless people, in Australian electoral processes. The 2006 amendments increased proof of identity and proof of residence requirements and reduced the time available for electors to enrol or transfer enrolment through early closure of the Electoral Roll.⁴³
- Amends itinerant or no fixed address elector provisions (both Commonwealth and State) to expressly incorporate a definition of homelessness and reference to

⁴² Ibid.

⁴³ For further information about the impact of these amendments on people experiencing homelessness, see the Clinic's recent submission Joint Standing Committee on Electoral Matters Inquiry into the 2007 Federal Election, www.pilch.org.au

people experiencing homelessness as being eligible to vote under these provisions.⁴⁴

- Amends Commonwealth and State electoral legislation so that people experiencing homelessness can reside in a 'real place of living' for up to six months rather than only one month before they become ineligible to enrol as an Itinerant Elector.⁴⁵

(d) The right to freedom of association

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

Respect for the right to freedom of association is guaranteed by article 22 of the *ICCPR*, article 4(d)(ix) of *CERD*, article 7(c) of *CEDAW*, and article 15 of the *CRC*. This right enables people experiencing homelessness to participate in, and integrate with, the community.

Public space laws and laws which prohibit begging have the effect of criminalising poverty and homelessness. They also disproportionately impact upon homeless people. Not only might these laws be unconstitutional,⁴⁶ they do nothing to address the root of the problem which is clearly poverty and lack of adequate housing and income. In his Concluding Remarks following his mission to Australia, the Special Rapporteur concluded that 'laws that such as begging laws, public drinking laws and public space laws, should be revised and amended to ensure that fundamental human rights are protected.'⁴⁷

We refer to the submission of the Queensland Public Interest Law Clearing House Homeless Persons' Legal Clinic (*QPILCH HPLC*), which discusses the punitive nature and ineffectiveness of move-on powers and public nuisance offences in more detail and we endorse the specific recommendations of QPILCH HPLC in this regard.

The Clinic calls upon the Australian Government, as part of a holistic response to homelessness, to undertake in partnership with the States, a review of begging laws, public drinking laws and public space laws (including laws relating to sleeping in and storing belongings in public space) to ensure that homeless people are not inadvertently or disproportionately affected by existing legislation (refer to recommendation 2 above).

(e) The right to a fair hearing and effective remedy in the event of a violation of any human right

It is a crucial component of the rights of people experiencing homelessness that they have access to an independent and impartial body with the power to consider complaints,

⁴⁴ The Clinic notes that in 2004, the Victorian Government introduced the *Electoral Legislation (Amendment) Act 2004* (Vic). This piece of amending legislation introduced a definition of homelessness under section 3A of the *Electoral Act 2002* (Vic). Section 3A also makes clear that people who fall within the homelessness definition are eligible to vote as itinerant electors.

⁴⁵ This recommendation recognises it is very common for people experiencing homelessness to live in temporary accommodation such as a on a friend's couch, or in a caravan, a crisis shelter or a domestic violence refuge for up to six months.

⁴⁶ Tamara Walsh, 'Defending Begging Offenders' [2004] *QUTLJJ* 4.

⁴⁷ Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Miloon Kothari, UN Doc A/HRC/4/18/Add.2 (2007).

initiate investigations, and make determinations and orders in relation to the violation of those rights.⁴⁸

Article 14(1) of the *ICCPR* guarantees that, in the determination of any rights against him or her, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. International law also requires that Governments provide effective remedies for human rights violations.⁴⁹ In order to ensure a fair hearing and an effective remedy for violations of human rights, the justice system must be accessible and available to all individuals.

There are many barriers that inhibit the access of homeless persons to legal assistance, to representation and to redress in courts and tribunals. Those barriers include:

- Lack of awareness of rights and knowledge of the law and legal system;
- Location and accessibility of legal services;
- Confidence to access services;
- Limited funding for Legal Aid, which is generally restricted to the provision of legal assistance for criminal, family or immigration matters and some limited civil proceedings; and
- Limited resources and funding provided to Community Legal Centres.

The Clinic submits that funding of legal aid bodies around Australia be greatly increased. This is particularly the case for civil and administrative law matters (such as tenancy proceedings, discrimination, social security etc) which are currently significantly underfunded. The Clinic further submits that funding to community legal centres (**CLC**) must also be greatly increased across the board. We note the Federal Government's recent one-off payments to a number of CLCs across Australia, including the Clinic. The Clinic recommends that this funding continue on a recurrent basis.

While pro bono services are no substitute for adequately funded and resourced legal aid bodies, they do make a critical contribution to the realisation of access to justice for marginalised and disadvantaged members of society.⁵⁰ The Federal Government's commitment to review how to promote pro bono legal assistance should involve consideration of the Victorian Government's legal services scheme, which uses the Government's purchasing power of legal services to advance social justice.⁵¹

Finally, in order for people experiencing homelessness to have their grievances heard and investigated, the Clinic also proposes that a Housing Ombudsman be appointed in each State and Territory. The Housing Ombudsman would:

⁴⁸ Various authors, "Homelessness and Human Rights in Australia: Submission to the Supported Accommodation Assistance Program (SAAP IV) National Evaluation", November 2003, 96.

⁴⁹ *Universal Declaration of Human Rights*, article 8, *ICCPR*, article 2(3) see also article 9(5) and article 14(6). The United Nations Human Rights Committee notes that, where appropriate, reparation for human rights violations can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

⁵⁰ Kristen Hilton and Hugh De Krester, *Working hard for the needy*, the Age, 24 June 2008.

⁵¹ *Ibid.*

- Receive and investigate complaints relating to breaches of national standards for adequate housing by State based public housing bodies;
- Make recommendations to Government and State based public housing bodies regarding the Ombudsman's findings of a breach of national standards for adequate housing; and
- Refer complaints relating to alleged breaches by federally funded service providers or federal bodies to the Federal Housing Ombudsman.

The above recommendation was suggested by participants at the Consumer Forum.⁵²

Recommendation 10

The Federal Government should provide federal funding to the Clinic on a recurrent basis.

Recommendation 11

The Federal Government in its legal procurement policies should incorporate social justice obligations similar to those currently in place in Victoria.

Recommendation 12

A Housing Ombudsman should be established in each State and Territory with the powers and functions set out above.

(f) The Right to Social Security

An adequate income is necessary to ensure an adequate standard of living, and facilitate participation in the civil, political, economic, social and cultural aspects of community life. As Daryl said at the Consumer Forum: 'I believe income (lack of) and homelessness to be synonymous'. Recognising this as fundamental, article 9 of the *ICESCR* provides that all people have the right to social security.

Although international human rights law does not prescribe social security payment levels, it does stipulate that income support must be sufficient to ensure a dignified human existence and to meet people's needs, particularly in relation to housing and health.⁵³ A person's needs vary based on factors including housing status, age, health, cultural background, family responsibilities, and other factors. The *CESCR* has recognised that '[s]uch support should reflect the special needs for assistance and other expenses often associated with disability'.⁵⁴

In Australia, the absence of a guaranteed minimum income, together with the fact that social security payments are generally pegged and paid below the Henderson Poverty

⁵² Comments made during Consumer Forum 'open mic' session by Kirra and Bec.

⁵³ *Benefits Case* (1994) Constitutional Court of Hungary, Decision No 43/1995; *V v Einwohnerrgemeinde X und Regierungsrat des Kantons Bern* (1995) Federal Court of Switzerland, BGE/ATF 121 I 367.

⁵⁴ *CESCR, General Comment 5: Persons with Disabilities*, 28, UN Doc HRI/GEN/1/Rev.5 (2001).

Line, is a significant contributor to people either living in or being at risk of poverty and homelessness. Indeed, approximately 80 per cent of homeless people surveyed at the Consumer Forum considered that the level of social security they received was inadequate to meet their basic needs. As Robyn said at the Consumer Forum, 'No money, no freedom'.

Another way in which current income support and social security arrangements fail to protect human rights is that not all people who require social security are able to access it, including newly arrived migrants (many of whom become homeless), people unable to provide adequate proof of identity, and homeless people unable to satisfy mutual obligation requirements. Fifty-one per cent of participants in the Consumer Forum stated that, at some point they had been deemed ineligible for social security. Forty three per cent of those people attributed this ineligibility to an unfair Centrelink assessment, and 26 per cent said that it was because they were unable to provide adequate proof of identity.⁵⁵

The Clinic refers to and endorses the submission of NSW HPLS, which further considers the issue of the inadequacy of income support in Australia.

In 2006, the Howard Government introduced the "Welfare to Work" changes to social security laws, which severely cut social security payments to several vulnerable groups already facing financial hardship. Further changes by the Howard Government introduced compliance penalty provisions such that a person who failed to meet a participation requirement (such as training) three times would have their payments suspended for a period of 8 weeks, regardless of the fact that this person may not have access to any other income.⁵⁶

Social security compliance penalty regimes have had a significant negative impact of social security recipients. Persons experiencing homelessness, who are also likely to be members of other marginalised groups (such as persons with disabilities) and who are also likely to have limited support networks, have disproportionately affected by these changes.⁵⁷ Fifty three per cent of Consumer Forum participants stated that their social security benefit had been withheld at some point during their homelessness. Clearly then, the legislation can often operate as punishment for those who are already homeless.

A 2001 Salvation Army survey demonstrated that in the context of breach provisions existing at the time, up to 84 per cent of people who are 'breached' were unable to afford food or medication, 63 per cent were unable to pay bills and up to 16.5 per cent might have been rendered homeless as a result of the breach penalty involved.⁵⁸ Thus the effect of a compliance regime that withholds welfare payments to this extent perpetuates a cycle of poverty and homelessness for severely disadvantaged members of our community who are forced to focus on surviving rather than securing employment as well as finding and keeping long term-housing.

⁵⁵ For further comments about Centrelink proof of identity issues see the NSW HPLS submission.

⁵⁶ Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Miloon Kothari, UN Doc A/HRC/4/18/Add.2 (2007) 15.

⁵⁷ See: The Salvation Army Australia, Southern Territory, *Stepping into the Breach: A report on Centrelink Breaching and Emergency Relief* (2001); Melbourne City Mission, *Still Looking for a Break: Welfare to Work – So What's Changed?* (2007).

⁵⁸ Ibid.

The Clinic considers that the 8 week penalty regime violates the right not only to social security but to an adequate standard of living as well as the right of access to highest standard of physical and mental health. The Clinic therefore welcomes the proposed changes to the Welfare to Work legislation, which are detailed in the recently published Federal Government discussion paper *The Future of Employment Services in Australia*. We particularly support the proposed amendments to the harsh non-compliance penalty scheme and the recognition by the Federal government that ceasing welfare payments has a serious and alarming impact on those who are disadvantaged or at risk of homelessness.⁵⁹ In our view, the proposed 'No Show, No Pay' compliance model is a more effective way to encourage social security recipients to participate in training and other opportunities. Furthermore, the development of a 'comprehensive compliance scheme', which assesses the level of penalty before implementation, is a more flexible, effective and understanding approach, more consistent with a human rights framework.

Despite the Clinic's support for these proposed changes, we remain concerned about the proposed retention and continued use of the eight-week penalty regime (albeit in more limited circumstances). The Clinic considers that the proposed comprehensive assessment schemes should never recommend ceasing a job seeker's welfare payments for any period of time. Indeed the eight-week penalty regime should be repealed.

Recommendation 13

That the Federal Government introduce express protection of the human right to social security to ensure that access to social security for the most vulnerable is realised.

Recommendation 14

That the Federal Government review income support levels and ensure they sit above the poverty line

Recommendation 15

That the Federal Government repeal the eight-week penalty regime for non-compliance with Centrelink participation requirements.

5. An Integrated Approach to Service Delivery

5.1 Introduction

Recognising that homelessness results in multiple human rights violations requires an integrated and holistic approach to service delivery so that all underlying causes and effects of homelessness are adequately addressed. This clearly demonstrates the need for a human rights approach to service delivery models. In the following section we argue that the Clinic's service delivery model is an example of best practice and should be implemented to provide other services.

The need for holistic and integrated services was also a topic of much discussion at the Consumer Forum. One of the participants suggested that 'all services should work together so

⁵⁹ Commonwealth Government of Australia, *The Future of Employment Services in Australia – A Discussion Paper* (2008) 22.

that transition is easy and seamless.’ Another participant, Adrian, suggested a ‘general free call number for all services’ so that people experiencing homelessness don’t have to shop around, rather they call one number and are linked in to housing, health and other essential services.

5.2 Integrated approaches – the Clinic as a model

In terms of integrated approaches, the Clinic provides legal services through an outreach model and adopts ‘whole of person’ approach. First, pro bono legal services are provided at agencies and locations already frequented by people experiencing homelessness. Second, Clinic lawyers are encouraged to get to know their clients and their non-legal needs, get to know the social service providers that can assist clients with their needs, develop strong collaborative relationships with those providers, and develop effective and integrated intake and referral procedures to ensure that clients’ needs are met in a real and positive way. Finally, the Clinic runs very effectively as a tripartite partnership between us, as community legal centre, homelessness agencies that host our outreach clinic and the private profession that provides a large amount of pro bono legal services.⁶⁰

The Clinic submits that the Clinic model should be promoted as an example of best practice. The model started in Victoria and as a result of its huge success it has been implemented in South Australia, Western Australia, Queensland and New South Wales. As a best practice model and given its significant contribution to access to justice for homeless people, the Clinic and its counterparts around Australia should receive recurrent Federal funding.

In the Clinic’s view the model can also be implemented to provide other services such as medical and general health services and financial counselling, amongst others. The Government must encourage and facilitate through funding and other means the transposition of this model into other service sectors in a way that promotes integrated service delivery such as through ‘community hubs’ where legal, health and financial services are provided at the one location. While pro bono services are no substitute for an adequately funded and resourced community services sector, they do make a critical contribution to the realisation of access to essential services for marginalised and disadvantaged members of society.

Recommendation 16

The Federal Government should provide the Clinic and its counterparts with recurrent funding to enhance the service provision of these organisations.

Recommendation 17

The Government must encourage and facilitate the transposition of the Clinic model into other service sectors in a way that promotes an integrated mode of service delivery such as through ‘community hubs’ where legal, health and financial services are provided at the one location.

6. The Way Forward

A human rights approach to the issue of homelessness in Australia requires the Government to adopt an integrated and holistic legislative framework which acknowledges the

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The legal services provided by the Clinic are valued at more than \$3.5 million per year.

interconnectedness of human rights. Any consideration of homelessness in Australia must not only consider the right to adequate housing, it must consider *all* human rights violations and obstacles that are encountered by people experiencing homelessness. The overwhelming response from 85 per cent of participants at the Consumer Forum was that laws should be changed to better protect human rights. As one Consumer Forum participant said:

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

The Clinic recommends that in addition to a Federal *Homelessness Act*, the Government must go further and enact a Federal Charter of Rights to ensure the promotion and protection of the human rights of *all* individuals in Australia. Such a Charter of Rights would include a positive obligation on the Federal Government to ensure that all legislation and statutory instruments are consistent with human rights, thereby creating the impetus for review and amendment of laws, policies and practices that cause marginalisation and disadvantage within society (refer to recommendation 2 above).

The Clinic urges the Government to move forward with its consultation on a Federal Charter of Rights with the issue of homelessness in Australia at the forefront of its considerations. In particular, the Government's approach in relation to a possible Federal Charter of Rights (as well as its development of the White Paper) must consider the voices of people experiencing homelessness. Here are some of their thoughts:

I think as humans we deserve to be treated justly, with respect and dignity – we should all be treated as individuals. (Anonymous).

All Australians have a human right to have affordable and suitable housing, this is something that is not available to all people at the moment. (Sonia).

Recommendation 18

The Federal Government should enact a legally enforceable human rights document in the form of a Charter of Rights.

Recommendation 19

The Federal Charter of Rights should protect all rights included in the ICCPR and ICESCR:

Recommendation 20

The Charter of Rights should apply to all institutions comprising the Federal Government – including the Parliament, the Executive, the Judiciary and public authorities, including private entities entrusted with government functions – and require that those institutions respect, protect and fulfil human rights.

7. Appendix 1 – Consumer Forum Survey
