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Submission No. 82	
(homelessness legislation)	
A.O.C.	Date: 28/08/09

Realising the Right to Housing:

**Submission to the House of Representatives Standing
Committee on Family, Community, Housing and Youth
Inquiry into the Content of Homelessness Legislation**

28 August 2009

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The Human Rights Law Resource Centre would like to acknowledge the substantial contribution of leading Australian law firm Mallesons Stephen Jaques in the research and drafting of this submission; in particular the following members of the Mallesons Stephen Jaques Human Rights Law Group: Leana Papaelia, Jonathan Kelp, Sharyn Broomhead, Ben Dendle, Chris Forward, Varun Ghosh, Michal Jorek, Aruni Jayakody, Rachel Lawson, Tim Ma, Catherine McComish and Joanna Siopis.

The Human Rights Law Resource Centre would also like to thank Claire Mahon and Greg Oke for their comments and insights.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**), Australia's first specialist human rights legal service, is an independent community legal centre.

The HRLRC aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. The HRLRC also aims to support and build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims by undertaking and supporting the provision of legal services, litigation, education, training, research, policy analysis and advocacy regarding human rights.

The HRLRC works in four priority areas:

- (a) the development, operation and entrenchment of human rights legislation at a national, state and territory level;
- (b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- (c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the rights to adequate housing and health care; and
- (d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

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1. Executive Summary

1. Homelessness is a human rights issue. Homelessness is both a cause and a consequence of poverty and other human rights violations. The Australian Government's response to homelessness should adopt a human rights-based approach in order to address the complex human rights issues that homelessness raises.
2. In particular, Australia has obligations under international human rights law to respect, protect and fulfil a range of human rights, including the right to adequate housing. This means that the Australian Government must establish a housing system:
 - that provides legal security of tenure;
 - where services, materials and infrastructure are available; and
 - in which housing is affordable, habitable, accessible, located near amenities and culturally appropriate.
3. The right to adequate housing also requires proper protection against forced or arbitrary evictions and the prohibition of all forms of discrimination in access to housing.
4. The HRLRC submits that in order to implement the right to adequate housing and a human rights-based approach, the Australian Government should adopt the following measures:

Recommendation 1:

The Australian Government should adopt a Human Rights Act that provides protection of all civil, political, economic, social and cultural rights.

Recommendation 2:

The Australian Government should adopt a human rights-based approach in considering the introduction and content of national homelessness legislation.

Recommendation 3:

The Australian Government should implement homelessness legislation to address the causes and consequences of homelessness and inadequate housing in Australia.

Recommendation 4:

A justiciable right to adequate housing should be afforded legislative protection in Australia.

Recommendation 5:

Homelessness legislation should require the Australian Government to take reasonable legislative and other measures to progressively realise the right to adequate housing, as defined in international law.

Recommendation 6:

Homelessness legislation should provide priority to vulnerable groups through an immediately enforceable right of access to emergency accommodation. Within a 10 year period, this right should be progressively expanded to apply to all persons in need.

Recommendation 7:

Homelessness legislation should adequately protect persons from forced evictions, including providing for necessary procedural protection and effective remedies.

Recommendation 8:

Homelessness legislation should expressly require meaningful participation by persons experiencing homelessness during policy development and in the delivery of homelessness services.

Recommendation 9:

The Australian Government should empower people and communities to fulfil their own housing needs, by the provision of education and the allocation of grants to the homeless, with priority being given to those who are most vulnerable, for the purposes of buying land, improving housing quality (including rental accommodation) and providing for access to services, materials, facilities and infrastructure.

Recommendation 10:

Homelessness legislation should require the Australian Government to adopt a comprehensive national housing strategy.

In accordance with that requirement, the government, in partnership with local authorities and in consultation with affected people and communities, should develop a homelessness strategy. The strategy should provide for:

- (a) the upgrade of existing public and social housing;
- (b) the development of public, social and low cost housing, including by requiring developers to develop a certain volume of affordable housing;
- (c) accessibility to services, materials, facilities and infrastructure;
- (d) cultural needs;
- (e) protecting those that are in the most desperate of conditions and addressing any discrimination in access to adequate housing; and
- (f) genuine consultation and meaningful participation by persons who are homeless or at risk of homelessness and their representatives.

Recommendation 11:

Homelessness legislation, or other anti-discrimination legislation, should clearly provide for the right to adequate housing to be protected and provided on a non-discriminatory basis, ensuring equal access to housing.

The protection against non-discrimination should include discrimination on the ground of, among other things, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Recommendation 12:

Homelessness legislation should require that, in the development of a national housing strategy, consideration is given to particular social groups who are at a disadvantage in enjoying the right to adequate housing. Homelessness legislation should ensure that under no circumstances should housing costs cause housing stress.

Recommendation 13:

Homelessness legislation should require that where resources are limited, priority for accommodation be given to those who are most vulnerable.

Recommendation 14:

Homelessness legislation should require that rental for public housing be calculated by reference to the income of its occupants.

Recommendation 15:

Homelessness legislation should require the Australian Government to refrain from taking any retrogressive measures that impinge on the right to adequate housing.

Recommendation 16:

Homelessness legislation must provide for a range of remedies for breaches of the right to adequate housing.

Recommendation 17:

Homelessness legislation should require that local authorities provide all persons with reasonable access to adequate advice and assistance in relation to housing and related matters.

Recommendation 18:

Homelessness legislation should require that an applicant for housing be provided with reasons for any adverse decision with respect to the applicant's assessment and that the applicant be informed of his/her right of review.

Recommendation 19:

Homelessness legislation should require that where an applicant is not satisfied with a decision made with respect to the applicant's assessment, at the applicant's request, the assessment:

- (a) be reviewed internally by the authority;
- (b) where the applicant is still not satisfied, that the matter be able to be conciliated by an independent body; and
- (c) where the applicant is still not satisfied, that the matter be referred to court.

Recommendation 20

A Housing Commission should be established and an independent Housing Commissioner appointed to investigate and conciliate complaints relating to the right to adequate housing, and to investigate systemic issues.

Recommendation 21:

Homelessness legislation should provide for appropriate judicial remedies for the violation of the right to adequate housing.

Recommendation 22:

The Australian Government should set appropriate structural, process and outcome indicators to monitor the progressive realisation of the right to adequate housing, in particular the enjoyment of the right by vulnerable groups.

Recommendation 23:

All relevant Australian laws and policies should be reviewed to determine whether they conform with the Australian Government's obligation to respect, protect and progressively fulfil the right to adequate housing. Laws and policies that detract from the full implementation of the right to adequate housing should be repealed or amended in accordance with the right.

2. Introduction

5. The HRLRC welcomes the inquiry by the House of Representatives Standing Committee on Family, Community, Housing and Youth (the **Standing Committee**) into proposed homelessness legislation for Australia (the **Inquiry**) and the opportunity to make a submission to the Standing Committee.
6. The HRLRC submits that any homelessness legislation in Australia should adopt a human rights-based approach and guarantee the right to adequate housing.
7. This submission sets out the requirements of a human rights-based approach and then focuses on the content of the right to adequate housing in international law, in order to understand:
 - (a) the human rights principles that should underpin the provision of services to Australians who are homeless or at risk of homelessness;
 - (b) the scope of any proposed homelessness legislation with respect to related government initiatives in the areas of social inclusion and rights; and

- (c) the features of legislative, administrative and budgetary schemes that would improve the enjoyment of the right to adequate housing in Australia.
8. This submission covers both theoretical issues and concrete ideas for their practical implementation.
9. The theoretical basis is set out in three sections:
- (a) Part 3, which covers the content and benefits of a human rights-based approach
 - (b) Part 4, which covers the content of the right to adequate housing under international law; and
 - (c) Part 6, which discusses the nature of Australia's obligations to implement the right to adequate housing under international law.
10. Part 7 then provides 12 types of practical measures that the Australian Government should take in order to implement the right to housing in Australia using a human rights-based approach.
11. The breadth of human rights issues raised by homelessness is broader than the scope of this submission. The HRLRC has had the opportunity to consider the submission of the Homeless Persons' Legal Clinic and endorses those submissions in relation to the causes and incidence of homelessness (in parts 3.2 to 3.5), the discussion of intersecting human rights violations (part 4.3), the state of adequate housing on the ground (part 4.4) and the effectiveness of the current homelessness legislative framework (part 5.3) Australia.

3. A Human Rights-based Approach to Homelessness

3.1 Australia's Human Rights Obligations

12. Human rights belong to all people. Those rights arise from the fact that all persons are human beings and, as such, are born free and equal in dignity and rights.¹

¹ UDHR, GA Res. 217A(III), 10 December 1948, Article 1. The ICCPR also states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.

13. The International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and the International Covenant on Civil and Political Rights (**ICCPR**) enshrine the civil, political, economic, social and cultural minimum standards that must be respected, protected and fulfilled to enable people to live with dignity.² By ratifying both of those Covenants, Australia has committed to respect, protect and fulfil the rights set out in those Covenants.
14. Under international human rights law, all human rights are universal, indivisible and interdependent and interrelated.³ Human rights provide a comprehensive scheme of core minimum standards that conceptually should not – and practically cannot – exist in isolation. Interdependence and indivisibility means that priority should not be provided to certain rights or sets of rights.⁴ It also means that the full enjoyment of certain rights is dependent on the full enjoyment of other rights.
15. Australia's obligations under Article 28 of the ICESCR extend 'to all parts of federal States without any limitations or exceptions'. Australia has thereby agreed that the ICESCR will be effected by Commonwealth, state and territory governments, having regard to their respective powers and arrangements concerning their exercise.⁵

3.2 Homelessness is a Human Rights Issue

16. Homelessness can be both a cause and a consequence of poverty and other human rights violations. The UN High Commissioner for Human Rights has acknowledged that '[s]ocially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalization'.⁶ The Special Rapporteur on Adequate Housing has also stated that 'homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the

² International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 003 UNTS 3 (entered into force 2 January 1976); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

³ The Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, [A/CONF.157/23], [5]. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [4].

⁴ The Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, [A/CONF.157/23], [5].

⁵ For Australia's reservation, see the ICCPR. Note, however, the provisions of the *Draft Articles of Responsibility of States for Internationally Wrongful Acts*, arts 2-5.

- basis of race, colour, sex, language, national or social origin, birth or other status'.⁷ Indeed the Australian Government has recognised the many causes of homelessness in its White Paper, including long term unemployment, people experiencing issues relating to mental health and emotional wellbeing, substance abuse and family breakdown.⁸
17. By definition, homelessness engages, and in many cases constitutes a violation of, the right to adequate housing (ICESCR, Article 11).⁹ In addition, homelessness by its very nature 'renders people subject to, or at least unusually susceptible to' violations of a range of fundamental rights and freedoms', for example the right to life (ICCPR, Article 6); the right to liberty and security of the person (ICCPR, Article 9(1)); the right to be free from cruel, inhuman or degrading treatment (ICCPR, Article 7); the right to privacy (ICCPR, Article 17)¹⁰ and the right to freedom of expression (ICCPR, Article 19(2)).¹¹
18. Homelessness also impacts certain groups in society more profoundly, in particular women, children, young people, Indigenous people and persons with a disability, including persons with a mental illness. It therefore also engages the right to non-discrimination (ICCPR Article 26 and ICESCR Article 2(2)).¹²
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⁶ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002) 48.

⁷ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [3].

⁸ Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), *The Road Home: A National Approach to Reducing Homelessness* (2008), Foreword, www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Documents/default.htm (viewed 2 August 2009).

⁹ In addition to Article 11 of ICESCR, the obligation to take steps towards realising the right to adequate housing (including addressing homelessness) is set out in a number of international instruments and treaties to which Australia is a party, namely the *Universal Declaration of Human Rights*, the *Convention on the Rights of the Child* (Article 27(3)), the *Convention on the Elimination of All Forms of Discrimination against Women* (Article 14(2)(h)) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (Article 5(e)). See discussion in Special Rapporteur's report 2005, [15].

¹⁰ In the UK and Europe, recent court decisions have held that the eviction of a woman from public housing in circumstances where the public authority had not ensured that she had adequate alternative accommodation constituted a violation of the right to respect for private life and the home: *Stankova v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

¹¹ For a discussion of the manner in which homelessness relates to each of the rights in the list, see Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 145. See also McRae R & Nicholson M, 'No place like home: Homelessness in Australia', (2004) 10(2) *AJHR* 27, 41.

¹² See discussion by the Special Rapporteur on the causes and manner in which different groups face homelessness, Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [46] – [63].

3.3 Understanding a Human Rights-Based Approach to Homelessness

19. A human rights-based approach to law and policy-making provides the appropriate framework through which to address homelessness. This is because a human rights-based approach includes all the standards that are necessary for people to live with human dignity and to fully participate in and contribute to our community.
20. There is a strong positive correlation between a state's respect for human rights and that state's success in addressing homelessness and poverty. The effective protection and promotion of human rights can ensure the underlying enabling conditions of social inclusion, meaningful participation and empowerment.¹³ An effective, workable and practical response to homelessness therefore requires government to address the range of human rights issues that relate to homelessness. This is also consistent with the Australian Government's commitment to social inclusion.
21. A human rights-based approach identifies the relevant factors (the individual rights and correlating State obligations) that need to be incorporated into social policy and laws to address homelessness. Under a human rights-based approach, homelessness is not an individual problem, but a community matter which engages the responsibilities of the state.¹⁴ It recognises that, in responding to homelessness, governments must do more than abstain from interfering with rights; governments must take pro-active steps to ensure the enjoyment of all rights by members of the community.¹⁵
22. The Special Rapporteur on Adequate Housing (the **Special Rapporteur**) has stated that a human rights-based approach responds to the causes and consequences of homelessness by recognising the indivisibility of rights, gender equality and non-discrimination.¹⁶

¹³ See generally, Amartya Sen, *Development as Freedom* (1999) 49, 87, 90, 144; UN OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004); UN OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

¹⁴ Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of international Law* 139, 173.

¹⁵ Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of international Law* 139, 175.

¹⁶ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [67].

23. A human rights-based approach also requires that the development of legislation, policies, programs and the delivery of services be:
- (a) **fair and non-discriminatory** — this requires that the policy or service be targeted at the alleviation of disadvantage and the elimination of discrimination;¹⁷
 - (b) **participatory and empowering** — this requires that the policy or service be informed by the active participation of key stakeholders and expand their range of choice and freedoms;¹⁸
 - (c) **holistic** — this requires that the policy or service have regard to the civil, political, economic, social and cultural determinants of wellbeing of affected persons;¹⁹ and
 - (d) **transparent and accountable** — this requires that the policy or service identify the persons or entities responsible for implementation, sets targets and indicators to measure progress, and establishes mechanisms to ensure accountability.²⁰

3.4 Benefits of a Human Rights-Based Approach to Homelessness

24. A human rights-based approach to homelessness will improve social policy outcomes. The experience of adopting a human rights framework to social policy in the UK has demonstrably improved such policy. A major report by the Department of Constitutional Affairs concluded that human rights have exerted a 'powerful' and 'positive and beneficial' impact on the development and delivery of public policy and services.²¹
25. Human rights principles are not merely the domain of lawyers; they are used to guide government and community services. In particular:

¹⁷ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002) 2.

¹⁸ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002) 2, 4. See also Gerry Stoker, Public Value Management (PVM): A New Resolution of the Democracy/Efficiency Tradeoff (draft paper) (2003) 9 Institute for Political and Economic Governance <http://www.ipeg.org.uk/Paper%20Series/PVM.pdf> at 1 August 2005.

¹⁹ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002) 2-3.

²⁰ UN OHCHR, Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (2002) 2, 4-5. See also Geoff Mulgan and Andrea Lee, Better Policy Delivery and Design: A Discussion Paper (2001) and Mark Moore, Creating Public Value: Strategic Management in Governance (1995) 10.

²¹ See generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006).

- (a) the language and ideas of human rights have a dynamic life beyond the courtroom and empower a wide range of individuals and organisations to improve people's experience of public services and their quality of life generally;²²
 - (b) human rights are an important practical tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality beyond just anti-discrimination;
 - (c) human rights principles can help decision-makers and others see seemingly intractable problems in a new light;
 - (d) human rights frameworks guide ethical and workable policies and practices, particularly for aspects of government responsibility that have multi-dimensional human rights concerns, such as Corrections and Police,²³ and
 - (e) awareness-raising about human rights empowers people to take action.²⁴
26. A human rights-based approach can therefore deliver better homelessness services because it requires services to be more consumer-focused, integrated and efficient.
27. According to a formal review of the implementation of the UK Human Rights Act, 'the Human Rights Act has led to a shift away from inflexible or blanket policies towards those which recognise the circumstances and characteristics of individuals'.²⁵ In other words, a human rights-based approach has made services more responsive to humans than bureaucratic needs.
28. According to the British Institute of Human Rights, a culture of respect for human rights, supported by legislative protection of human rights, assists and

²² Note that in the ACT there has been 'a small, but growing impact beyond government': ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review - Report* (2006) 16, available at http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf.

²³ VEOHRC, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (27 February 2009) 16, available at <http://www.humanrightscscommission.vic.gov.au/pdf/2008charterreport.pdf>.

²⁴ British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007) 5, available at <http://www.bihhr.co.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf>.

²⁵ UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006).

protects marginalised or vulnerable individuals and groups 'to challenge poor treatment and, through this, to improve their own and others' quality of life'.²⁶

3.5 Recommendations

29. Given the interdependence and interrelationship of all human rights, it is clear that comprehensive protection of all human rights is needed in order to ensure the full enjoyment of the right to adequate housing and to properly address the intersecting causes and consequences of homelessness.
30. The Australian Government should also adopt a human rights-based approach to addressing homelessness.

Recommendation 1:

The Australian Government should adopt a Human Rights Act that provides protection for all civil, political, economic, social and cultural rights.

Recommendation 2:

The Australian Government should adopt a human rights-based approach in considering the introduction and content of national homelessness legislation.

4. The Right to an Adequate Standard of Living and to Housing

31. Australia is a signatory to all of the major human rights treaties, including the ICESCR.²⁷ The ICESCR sets out the basic economic, social, and cultural rights (**ESC rights**) necessary to live with human dignity. In particular, Article 11 of the ICESCR recognises the right to an adequate standard of living, which includes the right to adequate housing. Article 11 provides:

²⁶ See generally, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007). See also Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

²⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

32. Over the past decade, interpretive work by the Committee on Economic, Social and Cultural Rights (the **CESCR Committee**)²⁸ and the Special Rapporteur has confirmed that the right to adequate housing is a distinct human right.²⁹

4.1 The Right to Adequate Housing in International Law

33. The right to adequate housing is 'of central importance for the enjoyment of all economic, social and cultural rights'.³⁰ The CESCR Committee has stated that all individuals and families are entitled to enjoy adequate housing, without discrimination on the basis of age, economic status, group or other affiliation or status.³¹

(a) The concept of 'adequacy'

34. The CESCR Committee has stated that 'adequate housing' should not be construed in a narrow or restrictive sense, such as merely the requirement of shelter, but should be seen 'as the right to live somewhere in peace, security and dignity'.³² The concept of 'adequacy' is significant. The following seven factors are determinative of whether housing is adequate for the purposes of the right to adequate housing.³³

²⁸ The CESCR Committee has two key roles: (i) to monitor the implementation of the ICESCR by State parties, by reviewing periodic State reports on compliance; and (ii) to interpret articles of the ICESCR through the publication of General Comments. The general comment on adequate housing is found at UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23.

²⁹ See in particular the UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23; UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV; and the Special Rapporteur's 2002 report to the Commission on Human Rights at [21].

³⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [1].

³¹ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [6].

³² UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [7].

³³ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [8].

- (a) **Legal security of tenure:** a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.
 - (b) **Availability of services, materials, facilities and infrastructure:** including safe drinking water, heating and lighting, sanitation and washing facilities and refuse disposal.
 - (c) **Affordability:** adequacy of housing means that the costs of housing are not so high as to threaten other basic needs.
 - (d) **Habitability:** adequacy requires sufficient space and protection from cold, heat, rain and threats to health. The physical safety of occupants must also be guaranteed.
 - (e) **Accessibility:** disadvantaged groups, including the elderly, the mentally and physically ill and the disabled, should be given priority consideration in both law and policy on housing.
 - (f) **Location:** housing must be in a location that allows access to employment, health-care, schools and other social facilities.
 - (g) **Cultural adequacy:** the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.
35. Consistently with the CESCR Committee, the Special Rapporteur has defined the right of adequate housing as:³⁴
- The right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.
36. In addition to endorsing the seven indicia of adequacy, the Special Rapporteur has further elucidated that the right to adequate housing includes:³⁵
- (a) privacy and security;
 - (b) participation in decision-making;

³⁴ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), Section 1, [10] and Appendix, [55].

³⁵ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), Section 1, [10] and Appendix, [55].

- (c) freedom from violence; and
 - (d) access to remedies for any violations suffered.
- (b) *The prohibition on forced eviction***
37. The right to adequate housing is particularly threatened by the act of forced eviction.³⁶ Forced eviction has been defined as:³⁷
- The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.
38. The CESCR Committee has recognised the unique nature of forced evictions and emphasised the obligation of States to ensure that evictions should not result in individuals being rendered homeless or vulnerable to the violation of other rights.³⁸ Prima facie, forced evictions constitute an infringement of the right to adequate housing.³⁹
- (c) *Non-discrimination as an aspect of the right to adequate housing***
39. Article 2(2) of ICESCR prohibits discrimination in the guarantee and exercise of the right to adequate housing. It provides:
- 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.
- These grounds of non-discrimination are considered to be non-exhaustive.

³⁶ Forced eviction may also infringe other ESC rights and civil and political rights such as the right contained in Article 16 of the ICCPR not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence.

³⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [3].

³⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [16].

³⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [18]; UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV; Kothari, M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2004/48), [11].

40. Equality and non-discrimination form part of the core of the right to adequate housing.⁴⁰ Discriminatory access to housing will also affect other civil and political and ESC rights, such as the right to freedom of movement and residence.⁴¹ Protection of equality against discrimination is particularly important given that homelessness has been found to disproportionately affect women, children, Indigenous Australians and the mentally ill.⁴²

5. Homelessness in Australia

41. According to the most recent ABS statistics, at least 105,000 people experience homelessness across Australia on any given night (53 in 10,000 of the population).⁴³ This figure has been steady over the past two census periods, indicating current measures are not producing a positive net effect in reducing homelessness in Australia.⁴⁴ The submission of the Homeless Persons' Legal Clinic provides important information about the definition and extent of homelessness in Australia (in parts 3.2 and 3.4 of that submission).
42. Australia has recently been criticised by international bodies for its failure to properly implement the right to adequate housing, including by the CESCR Committee and the Special Rapporteur.

5.1 The Report of the Special Rapporteur

43. Following a country visit to Australia, on 11 May 2007 the then UN Special Rapporteur, Miloon Kothari, released a critical report acknowledging a serious national housing crisis in Australia and expressing concern that Australian authorities do not acknowledge the situation.⁴⁵ He found that the right to adequate housing was not properly protected in Australia and that:

⁴⁰ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), Part 1 [9].

⁴¹ ICCPR, Article 12.

⁴² *Counting the homeless 2001*, Australian Bureau of Statistics report (2003) [http://www.ausstats.abs.gov.au/ausstats/free.nsf/Lookup/5AD852F13620FFDCCA256DE2007D81FE/\\$File/20500_2001.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/Lookup/5AD852F13620FFDCCA256DE2007D81FE/$File/20500_2001.pdf)

⁴³ *Counting the Homeless 2006*, Australian Bureau of Statistics, p vii.

⁴⁴ *Counting the Homeless 2006*, Australian Bureau of Statistics, p vii.

⁴⁵ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard*

current indicators from diverse sources show regressive results: reductions in public housing, soaring private rental rates, an acknowledged housing affordability crisis and no real reduction in the number of people who are homeless in Australia.⁴⁶

44. He further noted that Australia lacks a clear, consistent, long-term and holistic housing strategy, and that:

...there is no national legislative and policy framework against which the outcomes of government programmes and strategies can be evaluated to assess to what extent Governments are progressively realizing the human right to adequate housing...⁴⁷

45. The Special Rapporteur found that Australia had not implemented the right to adequate housing and that lack of housing for Indigenous Australians must be addressed urgently.⁴⁸ He also recommended that governments ensure the availability of an adequate housing stock suitable for people with diverse housing needs (including culturally appropriate housing and appropriate housing for people with disabilities).⁴⁹

5.2 The CESCR Committee's Concluding Observations on Australia

46. In May 2009, the CESCR Committee reviewed Australia's compliance with its obligations under ICESCR. The CESCR Committee also expressed its concern that the incidence of homelessness has increased in Australia over the last decade, particularly among Indigenous peoples, in spite of the policy

of living: Mission to Australia (31 July to 15 August 2006), UN Doc A/HRC/4/18/Add.2 (Annex) (2007), Summary (p2).

⁴⁶ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007), [126].

⁴⁷ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007), [126].

⁴⁸ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007), [126]-[140].

⁴⁹ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007), [126]-[140].

measures undertaken by the State party to address homelessness in Australia.⁵⁰

Recommendation 3:

The Australian Government should implement homelessness legislation to address the causes and consequences of homelessness and inadequate housing in Australia.

6. The nature of State Obligations in relation to ESC rights

47. As a party to the ICESCR, Australia has committed to ensuring the right to adequate housing. Australia's obligations under ICESCR are set out in Article 2 of the Covenant, which states:

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**. [Emphasis added]

48. States parties are obliged to use 'all appropriate means, including particularly the adoption of legislative measures'. However, the enactment of statutory measures does not exhaustively discharge the States parties' obligations to use 'all appropriate means'.⁵¹

6.1 Broad Obligations to Respect, Protect and Fulfil

49. Under international human rights law, including the ICESCR, Australia (as well as all other State parties) has a tripartite duty to respect, protect and fulfil *all*

⁵⁰ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version), [26].

⁵¹ The CESCR Committee observes that, while in many instances legislation is highly desirable, in some cases it is indispensable if full realisation of the Covenant rights is to be achieved. UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [3].

human rights in that Covenant, including the right to adequate housing.⁵² This means that a State must refrain from unduly encroaching upon the rights of those who fall within its jurisdiction ('respect'), prevent such interference by third parties and provide forums for redress if this occurs ('protect') and promote and facilitate access to ESC rights ('fulfil'). Common examples of the respect, protect, fulfil typology in the housing context are as follows:

- Respect – the requirement that there be no forced evictions by the State;
- Protect – setting up frameworks to prevent forced evictions by private landlords and discrimination in private rental; and
- Fulfil – taking legislative, policy and budgetary measures to ensure the enjoyment of rights in the community including public housing and rent assistance.⁵³

50. All human rights therefore require a State both to refrain from acting in certain cases and to be proactive in others.

51. Within this tripartite typology, states are obliged to do what is *reasonable* to realise the right to adequate housing. This approach has been taken by the South African Constitutional Court in implementing the right to adequate housing in South Africa. The remedial effect of taking a reasonableness approach does 'not always create a tangible and immediate benefit [for a rights holder], but often does create guidelines to assist governments in realising their mandate'.⁵⁴

52. Appropriately, the South African Constitutional Court has, in its own words, been 'slow to interfere with rational decisions taken in good faith by the political organs ... whose responsibility it is to deal with such matters'.⁵⁵

53. In South Africa, the Courts consider the reasonableness of government action in relation to ESC rights, including the right to adequate housing, rather than

⁵² See discussion of the respect, protect, fulfil typology in UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1999/5 (1995) available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. See also UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The right to water*, 29th sess, UN Doc E/C.12/2002/11, (2003), [20], in which the CESCR Committee states that all human rights impose the respect, protect and fulfil obligations on State Parties.

⁵³ McRae R & Nicholson M, 'No place like home: Homelessness in Australia', (2004) 10(2) AJHR 27, 39.

⁵⁴ Chief Justice Pius Langa, 'Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR', (2009) 27:1 *Nordisk Tidsskrift For Menneskerettigheter*, 32.

whether a particular policy is more desirable or rights-compliant than another. According to the Court in *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*⁵⁶, which concerned the right to adequate housing:

A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.⁵⁷

6.2 Particular Obligations in relation to the Right to Adequate Housing

54. As stated above, under international human rights law States have duties to respect, protect and fulfil all human rights. In accordance with those broad obligations, States also have the following particular obligations to implement ESC rights, including the right to adequate housing:

- (a) the requirement to immediately take concrete steps towards fulfilment of the right;
- (b) the immediate attainment of minimum core standards;
- (c) the immediate prohibition of discrimination;
- (d) the deployment of the maximum available resources;
- (e) the prohibition against retrogressive steps or measures;
- (f) the monitoring of the enjoyment of the right to housing among different groups; and
- (g) progressive full attainment of the right to adequate housing for all.

Each of these is discussed in turn.

(a) *Taking Concrete Steps*

⁵⁵ *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].

⁵⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

⁵⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

55. Although Article 2 of the ICESCR requires States to progressively realise the rights subject to the availability of resources, this does not provide an excuse for inaction. States are required immediately to 'take steps' that are 'deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'.⁵⁸ While the full scope of the guarantee of adequate housing for all may be progressively realised by States, the obligation to 'take steps' is an immediate one.⁵⁹

(b) Minimum Core Standards

56. In General Comment 3, the CESCR stated that States have core minimum obligations to ensure, at the very least, a minimum essential level of enjoyment of ESC rights.⁶⁰ Minimum core state obligations can be said to refer to the essential requirements for a State party to be considered to be in compliance with its international obligations.⁶¹ The CESCR Committee has adopted this latter view:

Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.⁶²

57. Minimum core obligations are particularly useful for identifying a minimum, and ensuring that States do not abrogate entirely their obligations under the Covenant. However, the minimum core obligations can be seen as more relevant to developing States.⁶³ Minimum requirements will be easily achieved

⁵⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [2].

⁵⁹ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [12].

⁶⁰ See UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991). See also Maastricht Guidelines, [9].

⁶¹ Audrey Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights' in Shareen Hertel and Lanse Minker (eds) *Economic Rights: Conceptual Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007), 154.

⁶² UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [10]

⁶³ McRae R & Nicholson M, 'No place like home: Homelessness in Australia', (2004) 10(2) AJHR 27, 35-36.

by developed States such as Australia, whose focus should be on the progressive realisation of rights.

(c) Non-discrimination

58. As stated above, Article 2(2) of the ICESCR requires Australia to ensure that the rights in the Covenant are provided without discrimination. This is not limited to legislative and administrative discrimination. It is an immediate obligation to 'detect existing discriminatory norms and repeal them, identify current discriminatory practices and adopt normative and other types of measures to eradicate them'.⁶⁴

(d) Deployment of the Maximum Available Resources

59. Insufficient expenditure or misallocation of public resources which result in the non-enjoyment of the right to adequate housing constitute a violation of the right to adequate housing.⁶⁵
60. In particular, budgetary and financial allocations should be carried out in good faith to promote equal access to civic services that are necessary for the realisation of the right to adequate housing.⁶⁶ However, the obligation does not require the State to do more than its available resources permit; there is a balance between the goals and the means.⁶⁷

(e) The Prohibition Against Retrogressive Steps or Measures;

61. The prohibition against deliberate retrogression is the natural corollary of the obligation to progressively realise rights recognised by the ICESCR. States are prohibited from adopting measures which deliberately reduce the level of protection already attained by the rights set out in the Covenant.⁶⁸
- Deliberately retrogressive measures include any restriction or limitation of rights that have already been provided for, or the abrogation of legislation

⁶⁴ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [19].

⁶⁵ UN Committee on Economic, Social and Cultural Rights *General Comment 15: The right to water*, 29th sess, UN Doc E/C.12/2002/11, (2003), [44].

⁶⁶ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59), [46](b).

⁶⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

necessary to exercise or enforce a right recognised under the ICESCR.⁶⁹ Such measures contravene the Covenant unless the State can show it was fully justified by reference to the totality of the rights set out in the ICESCR and in the context of the maximum resources available to the State party.⁷⁰

(f) Monitoring the Enjoyment of the Right to Housing

62. Monitoring is extremely important in international human rights law and an essential factor in the discharge of state obligations with respect to the right to adequate housing.⁷¹ The CESCR Committee has also indicated that monitoring the implementation and progressive realisation of ESC rights is a core minimum state obligation and an obligation of immediate effect.⁷²
63. Given that governments must take steps to address homelessness and the situation of particular social groups, monitoring is also a vital method of ensuring that policy is directed appropriately.

(g) Progressive Realisation Within Available Resources

64. The obligation under Article 2(1) to achieve the realisation of the rights in the ICESCR, including the right to adequate housing, is limited to some extent by the availability of State resources and also the notion that rights are 'progressively realised'.⁷³ It is inherent in the notion of progressive realisation that *progress* is made over time. However, the underlying objective of the ICESCR is to impose an obligation to move as efficiently and effectively as possible towards the ultimate goal of the full realisation of the rights.⁷⁴

⁶⁸ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [15].

⁶⁹ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [15].

⁷⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [9].

⁷¹ Under the ICESCR, the CESCR Committee is established to monitor compliance with the rights in the Covenant and Article 16 of ICESCR requires State parties to produce reports about 'the measures which they have adopted and the progress made in achieving the observance' of the ESC rights in the Covenant.

⁷² UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [11].

⁷³ Compare this with the requirement in Article 2(1) of the ICCPR, which requires States to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights in that Covenant.

⁷⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [9].

65. The language of Article 2(1) of the ICESCR shows that the framers of the Covenant acknowledged that the complete attainment of rights would most likely be gradual and dependent on available resources.⁷⁵ This provides States with a 'margin of appreciation' that enables them to prioritise certain demands over others without being at risk of contravening the ICESCR.⁷⁶

7. Implementing the Right to Adequate Housing in Australia

66. Homelessness legislation should enshrine and guide the discharge of Australia's obligations to respect, protect and fulfil the right to adequate housing. The following part sets out the particular legislative, administrative or budgetary measures that the Australian Government should take to implement the right to adequate housing.
67. For each measure suggested, there is a reference to the particular obligation on the Australian Government under international law.
68. Ideas for the types of measures that a government should take in implementing its obligations are drawn from:
- (a) the recommendations of the Special Rapporteur following his mission to Australia;⁷⁷
 - (b) the CESCR Committee following its review of the right to adequate housing in Australia;⁷⁸ and
 - (c) legislative schemes in comparable domestic jurisdictions that have implemented aspects of the right to adequate housing. (A detailed discussion of the legislative schemes in overseas jurisdictions is provided in the Annexure to this submission.)

⁷⁵ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [12]-[13].

⁷⁶ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [13].

⁷⁷ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007).

⁷⁸ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version), [26].

7.1 Legislative Protection and Promotion of the Right to Adequate Housing

69. Legal protection of the right to adequate housing is essential to realising the full potential of the right. Homelessness legislation should expressly protect and promote the right to adequate housing. It should do this in a number of ways:
- (a) by making the achievement of the right to adequate housing an express object and purpose of the legislation;
 - (b) by requiring all delegated legislation and housing policy to respect, protect and promote the right to adequate housing; and
 - (c) by requiring all homelessness services to be delivered in accordance with the right to adequate housing (through its contractual arrangements with state and territory governments).
70. The definition of the right should reflect Australia's obligations under international law and should adopt the standards of adequacy set out by the CESCR Committee (see paragraph 34 above).
71. Legislative protection of the right to adequate housing would partially discharge Australia's obligations under the ICESCR.⁷⁹ The CESCR Committee recently reminded Australia that the Federal government bears principal responsibility for enacting legislation that protects rights and establishes effective judicial remedies.⁸⁰
72. An appropriate form of legislative wording might resemble the wording of the right to access adequate housing in the South African Constitution, which provides (section 25):
1. Everyone has the right to have access to adequate housing.
 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

⁷⁹ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version), [11].

⁸⁰ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version), [11].

3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
73. This form of right places an obligation on the State to take reasonable legislative and other measures to progressively realise the right to adequate housing. (The content of the requirement to take reasonable steps to progressively realise the right is explored further in the following sections.)

Recommendation 4:

A justiciable right to adequate housing should be afforded legislative protection in Australia.

Recommendation 5:

Homelessness legislation should require the Australian Government to take reasonable legislative and other measures to progressively realise the right to adequate housing, as defined in international law.

7.2 Provision of Emergency Accommodation

74. In accordance with the government's obligation to take steps to progressively realise the right to adequate housing, homelessness legislation should require a reasonable government programme to be established to provide emergency accommodation and housing relief to indigent and vulnerable people. This provision will need to be supported with administrative and budgetary resources to ensure it can be implemented.
75. Provision of emergency accommodation is a key state obligation – and a core minimum standard – under the right to adequate housing. In the leading South African case on the right to adequate housing, *Grootboom*, the Constitutional Court of South Africa found that the right to housing did not equate to a right of all citizens to housing on demand, but to a reasonable government programme

- to provide emergency accommodation and housing relief to indigent and vulnerable people.⁸¹
76. Homelessness legislation in Australia could initially provide a right of vulnerable groups to access emergency accommodation, as has been implemented in Scotland. Under the *Housing (Scotland) Act 1987*, before making a final determination as to whether a person is entitled to housing assistance, if the local authority has reason to believe that the applicant is homeless and has a priority need, the local authority must secure accommodation for that person pending any decision being made.
77. However, as part of the obligation to progressively realise the right to adequate housing, homelessness legislation should aim to provide access to emergency accommodation for everyone in need, not just those who fall within certain 'priority groups' within a time period. This would mirror the approach in Scotland, where the *Homelessness Act 2003* also sets the goal of guaranteeing the right to access emergency accommodation in Scotland by 2012 (a ten year period from the date on which the goal was set).

Recommendation 6

Homelessness legislation should provide priority to vulnerable groups through an immediately enforceable right of access to emergency accommodation. Within a 10 year period, this right should be progressively expanded to apply to all persons in need.

7.3 Prohibition on Forced Evictions

78. Homelessness legislation should protect people from forced evictions. Forced eviction is a prima facie violation of the right to adequate housing.⁸²

⁸¹ In *Grootboom* the State fell short of the requirements of section 26(2) in that there was no express provision in the government policy to facilitate access to *temporary* relief for people who had no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters or because their homes are under threat of demolition.

⁸² UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [1].

Legislation prohibiting forced evictions is an essential tool in any system to protect the right to adequate housing.⁸³ Specifically, such legislation should:⁸⁴

- (a) include measures which provide the greatest possible security of tenure to occupiers of houses and land; and
- (b) strictly control the circumstances in which evictions or displacements may be carried out.

(a) Improving security of tenure

79. Homelessness legislation should provide that people cannot be evicted or displaced into homelessness. This would implement the government's international law obligation to ensure that where people are evicted, the government takes 'all appropriate measures, to the maximum of available resources' to find and make available alternative housing.⁸⁵ Clearly in addition to legislative protection, the government will need to take administrative and budgetary measures to support the protection, by planning and providing resources for temporary or alternative accommodation services.
80. An approach similar to South Africa's may be appropriate. In South Africa, the right to adequate housing means that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.⁸⁶ Importantly, whether a person will be homeless upon eviction is a relevant circumstance.
81. Another form of protection against arbitrary or forced evictions is to ensure that courts making decisions about whether to evict a person are able to take into account all the relevant circumstances. The fact that rent arrears are caused

⁸³ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [9].

⁸⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [9].

⁸⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [9].

⁸⁶ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005). In *Modderklip*, it was held that by failing to provide an appropriate mechanism to give effect to the eviction order of the Johannesburg High Court, the State had infringed the property rights, entrenched in section 25 of the Constitution, of Modderklip Boerdery (Pty) Ltd, a private company. Section 25 states that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.

- by a delay in receiving government benefits should be a relevant consideration, as is the case in Scotland.⁸⁷
82. The homelessness legislation should also protect the security of tenure of persons who are detained under mental health laws or otherwise temporarily detained by the State, such as persons serving short terms of imprisonment.
- (b) Procedural protections against forced evictions**
83. Procedural protection and due process are highly relevant in forced evictions. Homelessness legislation should include procedural measures such as:⁸⁸
- (a) an opportunity for genuine consultation with those affected by a forced eviction or displacement;
 - (b) adequate and reasonable notice for all affected persons prior to the date of eviction;
 - (c) information on the proposed eviction;
 - (d) provision of legal remedies; and
 - (e) provision of legal aid to persons who are in need of it to seek redress from the courts.
84. Legal remedies in the legislation should include:⁸⁹
- (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
 - (b) legal procedures for seeking compensation following an illegal eviction; and
 - (c) a complaints mechanism for redress against illegal actions carried out or supported by landlords in relation to rent levels, dwelling maintenance and racial or other forms of discrimination.

⁸⁷ *Housing (Scotland) Act 1987*, section 31(4).

⁸⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [15].

⁸⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [17].

Recommendation 7:

Homelessness legislation should adequately protect persons from forced evictions, including providing for necessary procedural protection and effective remedies.

7.4 Ensuring Meaningful Participation in Decision-Making Processes

85. Homelessness legislation should expressly require meaningful participation by persons experiencing homelessness during policy development and in the delivery of homelessness services. An important aspect of a human rights-based approach is meaningful participation of people in the decision making that affects them (see paragraph 23 above).
86. On a practical level, meaningful participation can be facilitated through institutional mechanisms, such as consumer advisory groups, or through meaningful consultations with persons affected. The government should require homelessness services to establish participatory processes to enable consumers to input their experiences of homelessness into service delivery decisions.

Recommendation 8:

Homelessness legislation should expressly require meaningful participation by persons experiencing homelessness during policy development and in the delivery of homelessness services.

7.5 Empowering Communities

87. Homelessness legislation should require policy makers, to the extent it is appropriate, to adopt an approach to housing needs which empowers people and communities to fulfil their own needs. This is more likely to ensure long-term security of housing for those involved.
88. In that regard, section 2 of the South African *Housing Act 1997* sets out some general principles of housing development. Relevantly, these include requiring

the government to encourage and support communities to fulfil their own housing needs and to thereby become empowered.

Recommendation 9:

The Australian Government should empower people and communities to fulfil their own housing needs, by the provision of education and the allocation of grants to the homeless, with priority being given to those who are most vulnerable, for the purposes of buying land, improving housing quality (including rental accommodation) and providing for access to services, materials, facilities and infrastructure.

7.6 Implementation of a Comprehensive National Housing Strategy

89. As part of the obligation to take necessary steps to progressively realise the right to adequate housing, states must adopt a national housing strategy.⁹⁰
90. Homelessness legislation should require the adoption of a comprehensive and coordinated national housing strategy which addresses structural problems and embodies an overarching human rights-based approach, particularly focused on meeting the needs of the most vulnerable groups in Australian society.⁹¹
91. In accordance with Australia's international obligations, a national housing strategy should:⁹²

⁹⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [12].

⁹¹ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007). See also *Grootboom*. In that case, a community of squatters, who had been evicted from an informal settlement in Wallacedene and had set up a shelter adjacent to the Wallacedene community centre, brought a claim for action by various levels of government in relation to the right to adequate housing. The Constitutional Court held that the right obliges the state to devise and implement a coordinated housing plan and that the government's housing plan, which did not provide for those living in the most desperate of conditions, meant that the government had failed to take reasonable measures to progressively realise the right to housing.

⁹² UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [12]. The CESCR Committee's recent Concluding Observations recommended that Australia take effective measures, in line with General Comment No 4 (1991): see UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version).

- (a) define the objectives for the development of shelter conditions;
 - (b) identify the resources available to meet those objectives and the most cost-effective way of using them;
 - (c) set out the responsibilities and time frame for the implementation of the necessary measures;
 - (d) reflect extensive genuine consultation with and meaningful participation by all stakeholders, including the homeless, the inadequately housed and their representatives; and
 - (e) coordinate strategies and programs between the State and Federal governments to reconcile policies related to the housing strategy.⁹³
92. A national housing strategy should be evidence-based, reflecting the outcomes of comprehensive independent monitoring and reporting of the right to adequate housing in Australia (see discussion of monitoring in part 7.11 below). On the basis of evidence, a national housing strategy can properly address discrimination and ensure equal access to housing.
93. A national housing strategy could also establish minimum service standards that would apply to housing services across Australia and which would reflect the standards of a human rights-based approach, in particular adequacy of housing and the rights of people to participate in processes that affect them.
94. To a limited extent, legislation in domestic overseas jurisdictions requires the development of housing plans. For example, the *Homelessness Act (Scotland) 2003* provides a mechanism for local authorities to:
- (a) carry out a homelessness review;
 - (b) develop a homelessness strategy for their area to prevent homelessness; and
 - (c) provide accommodation and/or support for people who are or may become homeless.

⁹³ McRae R & Nicholson M, 'No place like home: Homelessness in Australia', (2004) 10(2) AJHR 27, 45.

Recommendation 10:

Homelessness legislation should require the Australian Government to adopt a comprehensive national housing strategy.

In accordance with that requirement, the government, in partnership with local authorities and in consultation with affected people and communities, should develop a homelessness strategy. The strategy should provide for:

- (a) the upgrade of existing public and social housing;
- (b) the development of public, social and low cost housing, including by requiring developers to develop a certain volume of affordable housing;
- (c) accessibility to services, materials, facilities and infrastructure;
- (d) cultural needs;
- (e) protecting those that are in the most desperate of conditions and addressing any discrimination in access to adequate housing; and
- (f) genuine consultation and meaningful participation by persons who are homeless or at risk of homelessness and their representatives.

7.7 Ensuring Non-discrimination in the Enjoyment of Adequate Housing

95. As stated above, non-discrimination is an obligation under Article 2(2) of the ICESCR and forms a core part of the right to adequate housing. Homelessness legislation should ensure access to adequate housing, without discrimination. The principle of non-discrimination should expressly guide all aspects of program design and implementation in a range of policy areas connected to the right to adequate housing.⁹⁴ This requires that the right to non-discrimination on grounds of race, class, gender, poverty, nationality and citizenship be protected in legislation.⁹⁵

⁹⁴ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [69].

⁹⁵ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59), [43]-[45].

96. Where necessary, governments should undertake affirmative action to diminish, eliminate and compensate for conditions that cause discrimination in the realisation of the right to adequate housing.⁹⁶
97. Monitoring and reporting that evaluates the enjoyment of human rights by particular groups in society is essential to discharging the state obligation of non-discrimination. Monitoring and reporting provides the evidence base upon which policy can be developed to address the special needs of particular groups. (See discussion of monitoring and report in part 7.11 below).

Recommendation 11:

Homelessness legislation, or other anti-discrimination legislation, should clearly provide for the right to adequate housing to be protected and provided on a non-discriminatory basis, ensuring equal access to housing.

The protection against non-discrimination should include discrimination on the ground of, among other things, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7.8 Providing for Social Groups in Particularly Vulnerable Conditions

98. As part of its obligation to progressively realise the right to adequate housing, the government must, in developing a national housing strategy, give consideration to particular social groups which are at a disadvantage in enjoying the right.⁹⁷ Governments are under an obligation not to implement policies and legislation that are designed to benefit already advantaged social groups at the expense of others.⁹⁸

⁹⁶ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59), [46](e).

⁹⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [11]; Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59).

⁹⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [11].

99. In particular, States should work to provide recognition of the collective property rights of Indigenous peoples and other local communities to ensure that they have security of land ownership.⁹⁹
100. Homelessness legislation should expressly provide that in circumstances where limited resources are available, it is important that priority for housing is given to those most in need, such as persons with dependent children or persons who are vulnerable as a result of mental illness or learning or physical disability.
101. This approach has been adopted in a number of overseas jurisdictions.
102. The *Housing (Scotland) Act 1987* provides that priority be given to those most vulnerable (see Annexure at paragraph 6 for details on persons to whom priority is given). The position in England, as set out in the *Housing Act 1996*, is similar. In South Africa, section 2 of the *Housing Act 1997* sets out some general principles of housing development, which relevantly include requiring the government to give priority to the needs of the poor.
103. In Scotland, the need for people to fall within a priority category will be phased out, which reflects the progressive realisation of the right to adequate housing in that jurisdiction.
104. In important aspect of providing for vulnerable people is ensuring that housing is affordable. Homelessness legislation should ensure that under no circumstances should housing costs cause housing stress. 'Housing stress' means that housing costs are so great relative to the income as to jeopardise the ability of meeting other basic needs. It is estimated that 35 per cent of low income people experience housing stress in Australia.¹⁰⁰
105. Another way to accommodate the needs of the most vulnerable and the different levels of income of those that live in public housing is to calculate rental for public housing by reference to the level of income per household.
106. That approach has been adopted in New Zealand. The New Zealand *Housing Restructuring and Tenancy Matters Act 1992* provides that the rent for public

⁹⁹ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [70](a)(ii).

¹⁰⁰ See NGO Submission to the UN Committee on Economic, Social and Cultural Rights 'Freedom, Respect, Equality Dignity: Action', April 2008.

housing be calculated by reference to the income of its occupants. In assessing the eligibility of prospective tenants for public housing, consideration can be given to factors such as disability, age, family status and income.

Recommendation 12:

Homelessness legislation should require that, in the development of a national housing strategy, consideration is given to particular social groups who are at a disadvantage in enjoying the right to adequate housing. Homelessness legislation should ensure that under no circumstances should housing costs cause housing stress.

Recommendation 13:

Homelessness legislation should require that where resources are limited, priority for accommodation be given to those who are most vulnerable.

Recommendation 14:

Homelessness legislation should require that rental for public housing be calculated by reference to the income of its occupants.

7.9 Prohibiting Deliberately Retrogressive Measures

107. Homelessness legislation should prohibit retrogressive measures by the Australian government.
108. Under international law, States must not deliberately take measures that reduce the enjoyment of the right to adequate housing. Therefore, States must carefully consider any deliberately retrogressive measures and fully justify such measures by reference to the achievement of other human rights and the full use of available resources.¹⁰¹ A general decline in living and housing conditions that is directly attributable to legislation and government policy is inconsistent with the State obligations under the ICESCR.¹⁰²

¹⁰¹ UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), [9].

¹⁰² UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [11].

Recommendation 15:

Homelessness legislation should require the Australian Government to refrain from taking any retrogressive measures that impinge on the right to adequate housing.

7.10 Providing Remedies for Violations of the Right to Adequate Housing

109. The right to adequate housing is a justiciable right¹⁰³ and Australia is obliged to provide adequate and effective remedies for any violations of the right. The failure to provide effective remedies may, in itself, constitute a violation of Australia's international obligations.¹⁰⁴
110. The HRLRC acknowledges that there are some existing remedies for breaches of housing rights in Australian law, particularly in relation to rights upon eviction. This submission does not address in detail the content of existing protections, but notes that there is no comprehensive judicially enforceable remedy for breach of a right to adequate housing. The CESCR Committee recently criticised Australia for its failure to provide comprehensive effective judicial remedies for breach of the right to adequate housing.¹⁰⁵
111. Effective remedies may range from provision of reasons for adverse decisions, to complaint mechanisms, to judicially enforceable remedies. Different types of remedies that homelessness legislation might provide are discussed below.
112. Obviously effective remedies must be supported by accessible and affordable legal advice and efficient administration of justice.¹⁰⁶

¹⁰³ Kothari, M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2001/51), Section H.

¹⁰⁴ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), 29.

¹⁰⁵ See UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version), [11].

¹⁰⁶ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59), [46](l).

Recommendation 16:

Homelessness legislation must provide for a range of remedies for breaches of the right to adequate housing.

(a) Provision of advice

113. In order to educate people in relation to their rights and options, homelessness legislation should require authorities to provide advice in relation to housing rights and in particular homelessness..
114. This has been provided for in England where, pursuant to the *Housing Act 1996*, a local authority has an obligation to provide advisory services about homelessness and the prevention of homelessness to any person in their district free of charge.¹⁰⁷

Recommendation 17:

Homelessness legislation should require that local authorities provide all persons with reasonable access to adequate advice and assistance in relation to housing and related matters.

(b) Provision of reasons for adverse decisions

115. Homelessness legislation should also give people a right to seek reasons for adverse public housing decisions. Where a person is subject to assessment in relation to housing and a decision is made that is adverse to that person's interests, reasons should be provided to the person in order to arm them with the necessary information with which to challenge the decision.
116. Under the *Housing (Scotland) Act 1987*, once a decision is made, the local authority must notify the applicant. Where a decision is made that is contrary to the applicant's interest, the local authority must provide reasons for their decision.

¹⁰⁷ *Housing Act 1996*, section 192.

Recommendation 18:

Homelessness legislation should require that an applicant for housing be provided with reasons for any adverse decision with respect to the applicant's assessment and that the applicant be informed of his/her right of review.

(c) Review of decisions

117. Homelessness legislation should provide the right for a person who is subject to an adverse public housing decision to have that assessment reviewed.
118. This right is currently protected in Scotland where the *Housing (Scotland) Act 2001* incorporates the right to review decisions. Similarly, under the English *Housing Act 1996*, applicants for housing have a right of review.¹⁰⁸

Recommendation 19:

Homelessness legislation should require that where an applicant is not satisfied with a decision made with respect to the applicant's assessment, at the applicant's request, the assessment:

- (a) be reviewed internally by the authority;
- (b) where the applicant is still not satisfied, that the matter be able to be conciliated by an independent body; and
- (c) where the applicant is still not satisfied, that the matter be referred to court.

(d) Complaints mechanism: Housing Commissioner

119. Provision should be made for a complaints mechanism for persons who are homeless or at risk of homelessness and who are subject to adverse decisions in relation to public and emergency housing. An independent Housing Commissioner should be established to investigate and conciliate complaints relating to the rights of homeless persons. Complaints to the Housing

¹⁰⁸ *Housing Act 1996*, section 183.

Commissioner should be free of charge to persons who are homeless or at risk of homelessness.

120. This type of complaints-handling process would be more accessible and efficient than a court application. The HRLRC does not make any submission on the institutional details of the Housing Commissioner. However, the Housing Commissioner could sit within the Australian Human Rights Commission and have complaints handling jurisdiction similar to, for example, the Disability Discrimination Commissioner.¹⁰⁹

Recommendation 20:

A Housing Commission should be established and an independent Housing Commissioner appointed to investigate and conciliate complaints relating to the right to adequate housing and to investigate systemic issues.

(e) Judicial enforcement of the right to adequate housing

121. Homelessness legislation should provide for a judicially enforceable right to adequate housing. This could be similar to the protection of the right to adequate housing in South Africa, where the right does not create 'rights on demand' but rather obliges the state to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources. The question of whether the government has acted reasonably in the development of policy or legislation is subject to review by the courts.
122. In South Africa, the Courts consider the reasonableness of government action, rather than whether a particular policy is more desirable or rights-compliant than another. According to the Court in the *Grootboom Case*, which concerned the right to adequate housing:

A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public

¹⁰⁹ The *Disability Discrimination Act 1992* (Cwth) establishes the office of the Disability Discrimination Commissioner. The Commissioner's office is part of the Australian Human Rights and Equal Opportunity Commission and his/her main function is to conciliate complaints. The Australian Human Rights and Equal Opportunity Commission is able to enquire into complaints and make determinations. Those determinations, though not binding on the parties, are enforceable in the Federal Court.

money could have been better spent ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.¹¹⁰

123. Importantly, in considering reasonableness, courts may also recognise minimum core State obligations, such as the obligation to provide minimum services to vulnerable groups. In the *Grootboom* case, the right to housing did not equate to a right of all citizens to housing on demand, but to a reasonable government programme to provide emergency accommodation and housing relief.

Recommendation 21:

Homelessness legislation should provide for appropriate judicial remedies for the violation of the right to adequate housing.

7.11 Establishing Effective and Independent Monitoring Mechanisms

124. The homelessness legislation should require independent monitoring to be conducted to assess the extent to which the right to adequate housing is being implemented and enjoyed in Australia. This would include monitoring the extent of homelessness and persons at risk of homelessness in Australia. The legislation should also require that detailed and disaggregated monitoring is conducted to understand the levels of enjoyment of human rights by particular groups.
125. The Office of the High Commissioner for Human Rights (**OHCHR**) has done a significant amount of work on monitoring human rights, which stresses the need for government to set proper benchmarks and indicators to assess the progressive realisation of human rights.¹¹¹ The OHCHR recommends three types of indicators:

¹¹⁰ *Grootboom*.

¹¹¹ Office of the High Commissioner for Human Rights, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights', UN Doc HRI/MC/2008/3, 2008.

- **Structural indicators** – These are indicators of ratification and adoption of legal instruments and also the adoption of institutional mechanisms necessary for facilitating realisation of a human right. Examples of structural indicators for the right to adequate housing would be the enactment of laws that implement the right to adequate housing or the existence and number of NGOs working in the promotion and protection of the right to adequate housing.
 - **Process indicators** – These look at policy instruments (such as public programmes) and their impact on the realisation of rights. Process indicators relevant to the right to adequate housing might include the proportion of complaints received on the right to adequate housing that are investigated and adjudicated or the share of public expenditure on social and community housing.
 - **Outcome indicators** – These capture the achievements of policies and reflect the status of the enjoyment of human rights. Examples of outcomes indicators would be the reported cases of ‘forced evictions’ or the proportion of the population living in a permanent structure.
126. The OHCHR has prepared a table of illustrative indicators of the right to adequate housing, which could be incorporated into administrative decision-making.¹¹²
127. Homelessness legislation should include high level benchmarks for ensuring the progressive realisation of the right to adequate housing. For example, the Government’s commitment to halve homelessness and offering supported accommodation to all rough sleepers by 2020 might be included in the legislation.¹¹³
128. Monitoring could be conducted by the Housing Commissioner as an independent body.
129. Persons who are homeless or at risk of homelessness should also be provided with the opportunity to participate in monitoring and assessing the impact of

¹¹² Office of the High Commissioner for Human Rights, ‘Report on Indicators for Promoting and Monitoring the Implementation of Human Rights’, UN Doc HRI/MC/2008/3, 2008, Annex , page 29.

¹¹³ Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), The Road Home: A National Approach to Reducing Homelessness (2008), Foreword,

government laws and policies as part of the participatory aspect of a human rights-based approach.

130. Monitoring and reporting on the exercise and enjoyment of the right to adequate housing is a fundamental means of ensuring transparency and accountability; a key aspect of a human rights-based approach (see paragraph 23 above). The inadequacy of current monitoring was raised by the CESCR Committee when it recently asked Australia to provide disaggregated data and information in order to assess the progress made in improving the housing situation in its territory, in particular with respect to indigenous peoples.¹¹⁴

Recommendation 22:

The Australian Government should set appropriate structural, process and outcome indicators to monitor the progressive realisation of the right to adequate housing, in particular the enjoyment of the right by vulnerable groups.

7.12 Review of Relevant Legislation

131. The Australian Government should review relevant existing laws for compliance with the right to adequate housing. In particular, residential tenancy laws should be reviewed to ensure that there is appropriate protection against forced eviction, which is illegal under international law (see part 4.1(b) above).¹¹⁵
132. The review should cover other particularly relevant laws (such as public space laws and laws relating to the regulation of residential tenancy databases) which should be amended to ensure compliance with the right to adequate

www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Documents/default.htm (viewed 2 August 2009), p viii.

¹¹⁴ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) (Advanced Unedited Version), [26].

¹¹⁵ The Special Rapporteur recommended that residential tenancy laws be reviewed to ensure compliance with international human rights standards (particularly in relation to guaranteed minimum acceptable accommodation standards and prohibiting forced eviction): Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (Annex) (2007), [126]-[140].

- housing. Anti-discrimination laws should also be reviewed, particularly in relation to the protection against discrimination on the grounds of social status.
133. The right to adequate housing imposes an obligation on governments to examine existing laws and policies to determine whether they conform with their obligation to respect and progressively implement the right to adequate housing. Laws and policies that detract from the right to adequate housing require repeal or amendment.¹¹⁶ In particular, laws that criminalise homelessness should be repealed and replaced with legislation that recognises the right to adequate housing for the homeless.¹¹⁷

Recommendation 23:

All relevant Australian laws and policies should be reviewed to determine whether they conform with the Australian Government's obligation to respect, protect and progressively fulfil the right to adequate housing. Laws and policies that detract from the full implementation of the right to adequate housing should be repealed or amended in accordance with the right.

8. The Utility of Existing Australian Legislative Models

134. Australia has various regulatory and legislative models in place to address the rights of marginalised groups in society. The terms of reference for the Inquiry refer to the possibility of adopting in the area of homelessness a regulatory model similar to those used in the provision of disability, aged care or child care services.
135. The HRLRC does not support utilising in totality any of the existing Australian legislative models in proposed homelessness legislation, as the existing models do not adopt a human rights based approach.

¹¹⁶ CESCR, *Factsheet No.21: The Human Right to Adequate Housing*, page 8; UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [9].

¹¹⁷ Kothari, M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2004/48), [70](c)(i); Kothari M, *Report of the Special Rapporteur on*

136. However, some aspects of those models may be useful. For example, the offices of the Disability Discrimination Commissioner and Age Care Commissioner provide useful models for establishing a Housing Commission that can investigate and conciliate complaints relating to the rights of homeless persons.

Annexure – Legislation in Comparative Jurisdictions

1. Legislative provision for the protection of the right to housing has been made in a number of overseas jurisdictions.

Scotland

(i) Legal protection

2. The *Housing (Scotland) Act 1987*¹¹⁸ (**Housing Act**), in which the *Housing (Homeless Persons) Act 1977* is consolidated, places specific and comprehensive duties on local authorities in Scotland for dealing with homelessness in their area. The Housing Act was amended by the *Housing (Scotland) Act 2001* (**2001 Amendment**) and then later by the *Homelessness Act (Scotland) 2003* (**2003 Amendment**).

Housing Act

3. According to the Housing Act, a person is homeless if:¹¹⁹
 - (a) he/she has no accommodation in Scotland, England or Wales;
 - (b) he/she has accommodation but:
 - (i) cannot secure entry to it;
 - (ii) it is probable that occupation of it will lead to violence;
 - (iii) it consists of a movable structure, vehicle or vessel and there is no place where he/she is entitled or permitted to place it and reside in it; or
 - (iv) it is overcrowded.
4. A person is considered to be threatened with homelessness if it is likely that he/she will become homeless within one month.¹²⁰

¹¹⁸ Scottish Council for Single Homeless, <http://www.scsh.org.uk/information/features/homelessness/policy.htm> as at 27 July 2009.

¹¹⁹ *Housing (Scotland) Act 1987*, section 24.

¹²⁰ *Housing (Scotland) Act 1987*, section 24.

(a) *Limitations*

5. The Housing Act, as adopted, was limited in scope, requiring local authorities to provide temporary accommodation only to those who:¹²¹

- (a) had a priority need;
- (b) were unintentionally homeless; and
- (c) had a local connection.

(i) *Priority need*

6. The requirement that a person have a priority need was incorporated to ensure that where resources were limited, persons more vulnerable would obtain priority. A person will be found to have a priority need for many reasons including if he/she has dependent children or if he/she is vulnerable as a result of mental illness or learning or physical disability.¹²²

(ii) *Unintentionally homeless*

7. The requirement that a person be unintentionally homeless was included as a result of a fear that persons would give up their homes deliberately to obtain better accommodation. According to the Housing Act, a person becomes homeless intentionally if he/she deliberately does or fails to do anything in consequence of which he/she ceases to occupy accommodation which is available for his/her occupation and which it would have been reasonable for him/her to continue to occupy.¹²³

(iii) *Local connection*

8. The local connection requirement was included to prevent cities that had a better housing situation being overwhelmed by people in need of housing. According to the Housing Act, a person has a local connection with a district if:¹²⁴

- (a) he/she is, or in the past was, normally resident in it and his/her residence in it is or was of his/her own choice;

¹²¹ *Housing (Scotland) Act 1987*, section 25.

¹²² *Housing (Scotland) Act 1987*, section 25.

¹²³ *Housing (Scotland) Act 1987*, section 26.

¹²⁴ *Housing (Scotland) Act 1987*, section 27.

- (b) he/she was employed in it;
 - (c) he/she has family associations with it; or
 - (d) any special circumstances apply.
- (b) *Obligations*
9. Before making a final determination as to whether a person is homeless and satisfies each of the three elements referred to above, if the local authority has reason to believe that the applicant is homeless and has a priority need, the local authority must secure accommodation for that person pending any decision being made.¹²⁵
10. Once a final decision is made, the local authority must notify the applicant and, where a decision is made that is contrary to the applicant's interest, the local authority must provide reasons for that decision. While the local authority is required to provide reasons for any adverse decision, the Housing Act did not incorporate a review mechanism.
11. If a local authority determines that a person does not have a local connection with the district to whom the application was made and has a local connection with another district, the local authority may refer that person to the local authority for that district.¹²⁶
12. Where a person does not meet the requirement for referral to another district and the local authority is satisfied that the person has a priority need and is not satisfied that the person became homeless intentionally, the local authority is required to secure accommodation for that person.¹²⁷ If, however, a person had a priority need and the authority is satisfied that the person is homeless intentionally, the local authority is only under a duty to provide temporary accommodation to that person for such time as the local authority considers would give that person the opportunity to secure accommodation for him/herself.¹²⁸

¹²⁵ *Housing (Scotland) Act 1987*, section 29.

¹²⁶ *Housing (Scotland) Act 1987*, section 33.

¹²⁷ *Housing (Scotland) Act 1987*, subsection 31(2).

¹²⁸ *Housing (Scotland) Act 1987*, subsection 31(3).

13. Where the person does not have a priority need, the local authority is only required to provide that person with advice and such assistance that it considers appropriate.¹²⁹

2001 Amendment

14. The 2001 Amendment made the following enhancements to the Housing Act:¹³⁰
- (a) placing a duty on local authorities to produce homelessness strategies;
 - (b) placing a duty on local authorities to provide temporary accommodation to all homeless people and not just those who have a priority need;
 - (c) strengthening the advice and assistance duty;
 - (d) extending the definition of 'threatened with homelessness' from a person who is likely to become homeless in one month to a person who is likely to become homeless in two months;
 - (e) incorporating a right to review of decisions; and
 - (f) creating new rights for hostel residents.

2003 Amendment

15. The 2003 Amendment widened the scope of the application of the Housing Act by:¹³¹
- (a) setting the goal of phasing out the test for 'priority need' within 10 years so that the duties of local authorities are owed not just to homeless persons with a priority need but to all homeless persons;
 - (b) updating the law surrounding 'unintentional homelessness' so that it will not be a necessary consideration but only a relevant consideration where the local authority thinks fit;

¹²⁹ *Housing (Scotland) Act 1987*, subsection 31(4).

¹³⁰ *Housing (Scotland) Act 2001*.

¹³¹ *Homelessness Act (Scotland) 2003*.

- (c) conferring certain duties on local authorities to provide housing assistance to those who are intentionally homeless;
- (d) suspending the 'local connection' test, which required a person to have a local connection with a district for the local authority to have more than only an interim duty to secure accommodation for that person;
- (e) placing a duty on private-sector landlords to inform local authorities if they evict or repossess someone from their house;
- (f) enabling courts to take into account circumstances including where rent arrears are caused by a delay in receiving housing benefit payments and thereby avoiding unnecessary evictions;
- (g) requiring all local authorities to:
 - (i) carry out a homelessness review;
 - (ii) develop a homelessness strategy for their area to prevent homelessness; and
 - (iii) provide accommodation and/or support for people who are or may become homeless.

(ii) Evaluation

16. Scotland has adopted a human rights framework to protect the right to housing. While currently the legislation does not protect all homeless people, persons are afforded protection of the right in a non-discriminatory manner and, as evidenced by both the 2001 Amendment and the 2003 Amendment, steps are being taken for the progressive realisation of the right. Such steps, evidencing the progressive realisation of the right, include:
- (a) the phasing out of the 'priority need' test so that duties of local authorities are owed not just to homeless persons with a priority need but to all homeless persons;
 - (b) the extension of the definition of 'threatened with homelessness' from a person who is likely to become homeless in one month to a person who is likely to become homeless in two months;
 - (c) the updating of the law surrounding 'unintentional homelessness' so that it is no longer a necessary consideration, but only a relevant consideration where the local authority thinks fit;

- (d) the suspension of the 'local connection' test;
 - (e) the placing of a duty on local authorities to produce homelessness strategies; and
 - (f) the incorporating of a right to review decisions.
17. While the 'priority need' test is appropriate where resources are lacking as it ensures accessibility to housing for the most vulnerable, Scotland's goal of phasing out the requirement so that duties are owed to all homeless people is a welcome objective.
18. The suspension of the local connection test is also welcome as a person who chooses to relocate is likely to be facing extreme hardship and is likely to be the most in need of protection.
19. The incorporation of a right to review decisions made by local authorities is an important development. While it does not provide for the justiciability of the right to housing, it ensures that persons have recourse where the decisions of local authorities are unreasonable.
20. The major limitation with the Scottish approach is the arbitrary distinction between intentional and unintentional homelessness. The concept of 'intentional' homelessness is fraught - a person who chooses homelessness for themselves and/or their family over their existing accommodation does not have accommodation which it would have been reasonable for him/her to occupy.
21. Further, Scottish legislation does little to address the affordability and habitability of housing.

England and Wales

(i) Legal protection

22. Part 7 of the *Housing Act 1996* (**Housing Act**), as amended by the *Homelessness Act 2002*, provides the framework in England and Wales for the protection of homeless persons and housing.
23. Under the *Housing Act*, a local authority has an obligation to provide advisory services about homelessness and the prevention of homelessness to any

- person in their district free of charge.¹³² They also may give assistance to voluntary organisations who are concerned with homelessness by way of a grant or loan or by permitting the organisation to use premises belonging to the authority.¹³³
24. Pursuant to the Housing Act, if a local authority has reason to believe that an applicant may be homeless or threatened with homelessness, they must make inquiries to satisfy themselves whether that person is eligible for assistance and what duties are owed to that person. Similar to the regime in Scotland, relevant considerations include whether the person has a priority need, whether the person is homeless intentionally or unintentionally and whether the person has a local connection. The authority must notify the applicant of their decision and provide reasons where that decision is against the applicant's interests. The applicant has a right of review.¹³⁴
25. Similar to the position in Scotland before the 2001 Amendment and 2003 Amendment:
- (a) pending a determination, if the authority has reason to believe that an applicant may be eligible for assistance and has a priority need, the authority must secure accommodation for that person pending the decision;¹³⁵
 - (b) if the authority decides that a person is homeless, is of priority need and is not homeless intentionally, the authority must secure housing for that person (unless the person is referred to another local authority with which the person has a connection);¹³⁶
 - (c) if a local authority finds a person is homeless, has priority need, but that the person is homeless intentionally, the authority must secure accommodation is available for his/her occupation for such period as they consider will give him/her a reasonable opportunity of securing

¹³² *Housing Act 1996*, section 192.

¹³³ *Housing Act 1996*, sections 179-180.

¹³⁴ *Housing Act 1996*, section 183.

¹³⁵ *Housing Act 1996*, section 193.

¹³⁶ *Housing Act 1996*, section 193.

accommodation for him/herself and provide advice and such other assistance as they consider appropriate.¹³⁷

26. The duty to provide accommodation to a person who is homeless, of priority need and not homeless intentionally remains for a minimum period of two years, after which time a review must be conducted.¹³⁸ The duty also ceases to apply if the applicant refuses an offer of accommodation which the authority is satisfied is suitable for him or her.¹³⁹

(ii) Evaluation

27. The current legislative protection of the right to adequate housing in England and Wales is similar to that provided for in Scotland prior to the 2001 Amendment and 2003 Amendment. The legislation does not currently protect all homeless people, drawing distinctions based on whether a person has a priority need, is intentionally homeless and has a local connection. As was done in Scotland, reviews should be conducted to assess whether further realisation of the right could be achieved.

South Africa

28. The Constitution of the Republic of South Africa enshrines the right to adequate housing. Legislation and government policies also protect the right.

(a) Legal Protection

(i) Constitution

29. Section 26 of the Constitution protects the right to adequate housing. Section 26 provides:
1. Everyone has the right to have access to adequate housing.
 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹³⁷ *Housing Act 1996*, section 190.

¹³⁸ *Housing Act 1996*, section 194.

¹³⁹ *Housing Act 1996*, section 193.

30. Section 28(1)(c) of the Constitution further protects the right of children to basic shelter.
31. The South African Constitutional Court considered section 26 of the Constitution in the seminal case of *Grootboom*.¹⁴⁰ In that case, a community of squatters, who had been evicted from an informal settlement in Wallacedene and had set up a shelter adjacent to the Wallacedene community centre, brought a claim for action by various levels of government under section 26 of the Constitution. The Constitutional Court held that article 26 obliges the state to devise and implement a coordinated housing plan and that the government's housing plan, which did not provide for those living in the most desperate of conditions, meant that the government had failed to take reasonable measures to progressively realise the right to housing. Further, it held that the government was required to enable non-state actors to improve housing, by creating 'the conditions for access to adequate housing for people at all economic levels of society'. This decision, amongst others, lays the foundation for the justiciability of economic, social and cultural rights, including the right to housing, in South Africa.

(ii) Legislation

32. The South African government has passed legislation to further realise the right to adequate housing. The legislation includes:¹⁴¹
- (a) the *Housing Act 1997* [No 107 of 1997] (**Housing Act**);
 - (b) the *Extension of Security of Tenure Act 1997* [No 62 of 1997] (**EST Act**);
 - (c) the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998* [No 19 of 1998] (**PIE Act**);
 - (d) the *Home Loan and Mortgage Disclosure Act 2000* [No 63 of 2000] (**HLMD Act**); and
 - (e) the *Social Housing Act 2008* [No 16 of 2008] (**Social Housing Act**).

Housing Act

¹⁴⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

33. Section 2 of the Housing Act sets out some general principles of housing development. Relevantly to a human rights-based approach, these include requiring the government to:
- (a) give priority to the needs of the poor;
 - (b) consult meaningfully with people and communities affected by development;
 - (c) employ good governance in housing;
 - (d) encourage and support communities to fulfil their own housing needs and thereby become empowered;
 - (e) promote the elimination of discrimination in housing;
 - (f) promote the housing needs of marginalised women and other disadvantaged groups;
 - (g) promote the expression of cultural identity and diversity in housing;
and
 - (h) respect, protect, promote and fulfil human rights in the application of housing policy.

EST Act

34. The EST Act deals with the manner in which a lawful occupant may be evicted. It acknowledges the rights of occupiers to rights set out in the Constitution, including dignity, privacy and freedom of movement.¹⁴²
35. The EST Act provides that an occupier's right of residence may only be terminated if it is fair and equitable having regard to all the circumstances, including:¹⁴³
- (a) the fairness of the agreement relied upon;
 - (b) the conduct giving rise to the termination;
 - (c) the potential hardship to the occupier or tenant; and

¹⁴¹ For a complete list of South African housing legislation and policy see: South African Government Information, <http://www.info.gov.za/aboutsa/housing.htm>.

¹⁴² EST Act, section 5.

¹⁴³ EST Act, subsection 8(1).

- (d) the fairness of the termination, including whether the occupier should have had the opportunity to make representations.
36. Evictions may only take place pursuant to a court order¹⁴⁴ with a minimum of two months notice being given to an evictee.¹⁴⁵
37. A breach of the eviction procedures is actionable and can be remedied with restoration of occupancy or damages.¹⁴⁶

PIE Act

38. Illegal occupants and their eviction were previously governed by the *Prevention of Illegal Squatting Act 1958* [No 52 of 1958]. This Act gave little protection to occupants, making squatting an offence and permitting truncated evictions.¹⁴⁷ When the PIE Act replaced that act, it protected the right of landowners to evict unlawful occupants, while giving occupants the right to a fair eviction, in accordance with the right set out at subsection 26(3) of the Constitution.
39. Under the PIE Act, if a tenant occupying a property without the owner's consent is to be evicted, the owner must follow set procedures. For example, a landlord must:
- (a) not evict a person without a court order;¹⁴⁸
- (b) serve the tenant effectively with any court documents;¹⁴⁹ and
- (c) participate in a mediation and, if necessary, an arbitration with the tenant.¹⁵⁰
40. Following this process, the Court can order eviction or demolition, but will always consider whether the proposed eviction/demolition (and its timing) is

¹⁴⁴ EST Act, subsection 9(1).

¹⁴⁵ EST Act, subparagraph 8(2)(d).

¹⁴⁶ EST Act, section 14.

¹⁴⁷ National Association of Social Housing Organisations, 'Land Amendment Bill 2005: Prevention of Eviction' (5 May 2005), accessed on 26 July 2009, available at http://www.nasho.org.za/article.php?a_id=8.

¹⁴⁸ PIE Act, Preamble, section 8.

¹⁴⁹ PIE Act, subsection 4(2). "Effective' notice may require that the documents are translated or broadcast by microphone, as the case may be': *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2000 2 SA 67 (C).

¹⁵⁰ PIE Act, section 7.

just and equitable in all the circumstances.¹⁵¹ The circumstances include the period of occupation, the circumstances in which occupation came about, the availability of suitable alternative accommodation and any relevant needs of elderly people, children, disabled people or households headed by women.¹⁵²

HLMD Act

41. The HLMD Act has the express purpose of eliminating unlawful discrimination in lending and progressively realising the right to adequate housing.¹⁵³ It requires banks to disclose information to a watchdog regarding the quantum of loans approved and declined for different geographic areas and applicants (by gender, race, income bracket and so on).¹⁵⁴ By mandating this disclosure, the HLMD Act seeks to identify discrimination in lending practices and promote fairness in lending.¹⁵⁵ An authority is also entrusted with ensuring that financial institutions disclose the required information and do not discriminate between lenders.¹⁵⁶

Social Housing Act

42. In its preamble, the Social Housing Act refers to the right to adequate housing and the need for the government to progressively realise that right. It also provides as guiding principles the prioritisation of special needs groups, human dignity, privacy, consultation and non-discrimination.¹⁵⁷
43. In line with the Constitutional Court's decision in *Grootboom*, the Social Housing Act requires municipalities to facilitate and encourage the development of new housing stock and the upgrade of old stock.¹⁵⁸ Social

¹⁵¹ PIE Act, section 4.

¹⁵² PIE Act, subsection 6(3).

¹⁵³ HLMD Act, Preamble.

¹⁵⁴ HLMD Act, subsection 3(1); Notice 842 of 2007, published in South African Government Gazette No 30050, 13 July 2007.

¹⁵⁵ South African Government Information, <http://www.info.gov.za/aboutsa/housing.htm>

¹⁵⁶ HLMD Act, section 5.

¹⁵⁷ Social Housing Act, subsection 2(1).

¹⁵⁸ Social Housing Act, subsection 5(b).

housing institutions must endeavour to provide quality housing to residents¹⁵⁹ and must ensure that residents are aware of their rights.¹⁶⁰

(b) Government policies

(i) Breaking New Ground Policy

44. In 2004, the South African government released its 'comprehensive plan for sustainable human settlements', the 'Breaking New Ground' policy (**BNG Policy**). The key planks of this policy include:

- (a) accelerated housing delivery;
- (b) inclusionary housing;
- (c) upgrading informal settlements; and
- (d) infrastructure delivery.

45. The BNG Policy aims to upgrade or demolish all informal settlements, such as shanty towns/slums by 2015. The upgrade of shanty-towns/slums in situ allows residents to remain. Where upgrades occur, a participatory planning approach is adopted, which allows residents to have input into and control over home size, design and quality.

46. Community-based organisations have taken those efforts one step further. For example, the Development Action Groups (**DAG**) of the 'Freedom Park' informal settlement aim to take residents from having no access to sanitation, water or electricity, to having access to those and other essential services. The residents are involved in the project decision-making, through which the DAG hopes to facilitate the development of the residents' association. DAG will also attempt to provide for other community needs such as childcare and income generation. The aim is to create a sustainable and meaningfully improved community.¹⁶¹

(ii) Human Settlement Development Programme

¹⁵⁹ Social Housing Act, subparagraph 14(1)(c).

¹⁶⁰ Social Housing Act, subparagraph 14(1)(g).

¹⁶¹ United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, *Report on Mission to South Africa* (29 February 2008), A/HRC/7/16/Add.3, 10; SASIX, 'Upgrading the Freedom Park informal settlement' (undated) accessed 26 July 2009, available at <http://www.sasix.co.za/projects/view/HCD-WC-MAY-0001/>.

47. Another policy, the Human Settlement Development Programme seeks to ensure that settlements become socially and economically viable and to avoid poorly constructed, planned or located settlements.

(iii) *Inclusionary Housing Policy*

48. One of apartheid's many legacies in South Africa are highly spatially-segregated residential patterns. South Africa's Inclusionary Housing Policy is designed to encourage the development of low-cost housing within areas with higher socio-economic status for the purpose of increasing social integration. Private sector developers have also undertaken such housing initiatives. Housing projects designed to be mixed-income involve cross-subsidisation of housing.¹⁶²

(iv) *Acquisition and settlement grants*

49. Grants are available to South Africans to buy land, get secure tenure to property already occupied and to improve housing quality, water supply and internal roads.¹⁶³ Applications are means-tested and priority is given to groups such as the landless, women in rural areas, people without secure tenure and labour tenants.¹⁶⁴ Recent changes to those grants allow for grants to be awarded on a sliding scale, depending on the applicant's own contribution to land/improvements. In this way, investment and self-advancement are encouraged.¹⁶⁵ This model is sometimes described as 'community-driven' land redistribution.¹⁶⁶

¹⁶² South African Government Information, <http://www.info.gov.za/aboutsa/housing.htm>; Speech by LN Sisulu, Minister Of Housing, at the Occasion of The Budget Vote 2007/8 for the Department of Housing (8 June 2007) National Assembly, Cape Town, accessed on 26 July 2009, available at <http://www.housing.gov.za/2007%20Budget%20Speech%20-%20Version%202.htm>.

¹⁶³ South African Government Information, <http://www.paralegaladvice.org.za/docs/chap05/02.html#acquisition>.

¹⁶⁴ Ibid.

¹⁶⁵ Lungisile Ntsebeza and Ruth Hall, *The land question in South Africa* (2007) HSRC Press, 175-176.

¹⁶⁶ Ibid.

(c) Evaluation

50. The legislative measures and government policies adopted by the South African government demonstrate how a multi-faceted, human rights-based approach can lead to creative and progressive housing policies.
51. Manifesting in the emergence of new legislation and policies over time, the South African government has complied with its Constitutional obligation to progressively realise the right to adequate housing.
52. The justiciability of the right to adequate housing in South Africa ensures that people can seek a remedy if their right has not been respected, protected or fulfilled. The justiciability of the right enhances its enforceability and leads to the development of jurisprudence that informs the meaning and content of the right. The law can then develop to meet the needs of its citizens. For example, the right to receive 'sufficient' notice of an impending eviction provides for the special needs of people who speak other languages and of those who are illiterate.
53. The South African system encourages fairness in evictions. This both encourages security of tenure and respects the dignity and privacy of occupants. The special needs of the elderly, disabled and other vulnerable persons are taken into account during evictions, ensuring the accessibility of housing to disadvantaged groups. As failure to apply eviction procedures is actionable and can be remedied with restoration of occupancy or damages, the courts are required to ensure that violations of the right are remedied.
54. The various measures employed also allow the South African government to engage with private organisations to foster the protection of housing rights. For example, a watchdog has the capacity to investigate possible discrimination by financial institutions in approving housing loans. This scheme promotes the affordability of housing.
55. The requirement that housing institutions endeavour to provide quality housing to residents serves to ensure the habitability of housing. The requirement that priority be given to special needs groups ensures the accessibility of housing and, the requirement that consultation be had with those affected by housing initiatives, will bring with it the benefits of societal participation. Despite these commendable legislative measures, the Special Rapporteur has noted a

- failure in new housing developments to take into account the special needs of particular residents.¹⁶⁷
56. The policies designed to upgrade informal settlements and to ensure that they become socially and economically viable to protect the habitability of housing and the requirement that housing be located in a place that allows access to employment, health-care, schools and other social facilities.
57. The availability of means-tested grants for the buying of land is a measure designed to empower people to obtain security of tenure, to improve the habitability of housing and to provide for access to services. Despite this commendable policy, the Special Rapporteur has noted that the purchase of land by the poor from the wealthy has been impeded by the overvaluing of land.¹⁶⁸ It has also been noted that there have been problems providing accessible and appropriately serviced accommodation through the scheme.¹⁶⁹

New Zealand

(a) Legislative Protection

58. There is no legislation in New Zealand which enshrines the right to adequate housing, nor is there legislation that directly regulates homelessness. However, homelessness is indirectly regulated by a number of acts pertaining to housing and tenancies, including:
- (i) the *Housing Corporation Act 1974*;
 - (ii) the *Residential Tenancies Act 1986*;
 - (iii) the *Housing Restructuring and Tenancy Matters Act 1992*; and
 - (iv) the *Affordable Housing: Enabling Territorial Authorities Act 2008*.

(i) Housing Corporation Act 1974

¹⁶⁷ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), 13.

¹⁶⁸ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), 11.

¹⁶⁹ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), 12.

59. The *Housing Corporation Act 1974* establishes, and confers powers upon, the Housing New Zealand Corporation (**Housing Corporation**). The Housing Corporation's objectives include:

- (a) to give effect to the Crown's social objectives by providing housing and services related to housing, in a businesslike manner;
- (b) to ensure that the Minister of Housing receives appropriate policy and other advice and information on housing and services related to housing; and
- (c) to arrange for territorial authorities applying the *Affordable Housing: Enabling Territorial Authorities Act 2008* to receive appropriate advice and information, of a policy or other nature, about housing and services related to housing.

(ii) Residential Tenancies Act 1986

60. The *Residential Tenancies Act 1986* deals with matters including the rights and obligations of landlords and tenants and termination of tenancies. It also establishes the Tenancy Tribunal to determine disputes between landlords and tenants.

61. It is noteworthy that the *Residential Tenancies Amendment Bill (2009)*, a Bill to amend the *Residential Tenancies Act 1986 (RTA)*, was introduced into Parliament on 13 May 2009. According to the Explanatory Note, one relevant purpose of this Bill is to encourage the development of a rental market that provides stable, quality housing to those who rent their homes. The Bill, if passed, will extend the protection of the RTA (including access to advice, information and dispute resolution services) to more people involved in renting, such as tenants in boarding houses. It will also introduce clearer and fairer processes for terminating and renewing tenancies.

(iii) Housing Restructuring and Tenancy Matters Act 1992

62. The *Housing Restructuring and Tenancy Matters Act 1992* provides that the rent for housing let by (or on behalf of) the Housing Corporation is to be calculated by reference to the income of its occupants. In assessing the eligibility of prospective tenants for Housing Corporation housing, consideration can be given to factors such as disability, age, family status and income.

(iv) Affordable Housing: Enabling Territorial Authorities Act 2008

63. Under the *Affordable Housing: Enabling Territorial Authorities Act 2008*, territorial authorities (that is, city or district councils) are given power to, in consultation with its community, require persons doing developments to facilitate the provision of affordable housing. The act enables territorial authorities to conduct housing needs assessments, in order to ascertain whether there is enough affordable housing in their districts and to make, where appropriate, affordable housing policies. The act then confers the necessary powers upon the territorial authorities to implement such policies.

(b) Evaluation

64. While New Zealand does not adopt a human-rights based approach to regulating homelessness and housing, there are some legislative measures that protect the right to housing.
65. The requirement that the rental for public housing be calculated by reference to the income of its occupants protects security of tenure. Further, the requirement that, with respect to the provision of public housing, consideration be given to factors including disability, age, family status and income serves to ensure the accessibility of housing for disadvantaged groups.
66. The power conferred on territorial authorities to require that persons doing developments facilitate the provision of affordable housing serves to guarantee the availability of affordable housing.

Canada

67. There is no obligation enshrined in any legislative instrument which requires the Canadian governments to provide adequate housing. Legislation directed at housing and homelessness, however, is found at both the Federal and Provincial levels.

(a) Legal Protection

(i) Federal Acts

68. The Canadian legislation regulating housing in Canada include:
- (a) the *Department of Human Resources and Skills Development Act 2005 (DHRSD Act)*; and
 - (b) the *National Housing Act 1985 (NH Act)*.

DHRSD Act 2005

69. The Federal Government of Canada currently pursues its homelessness initiatives under the DHRSD Act. That act establishes the Department of Human Resources and Skills Development, a department instituted to design and implement programs and to support projects or other activities that contribute to the development of the human resources of Canada and the skills of Canadians. The act also provides for allocation of public funding in that regard.
70. Given the broad nature of the powers and discretions conferred under the act, the Canadian Federal Government is not under any obligation to allocate funding to or to support programs that address homelessness. Using the broad power, however, the Federal Government has established the 'Homelessness Partnering Strategy'. The Homeless Partnering Strategy is largely driven by the executive branch of government and, as such, is not set out in any legislative instrument.
71. The Strategy provides for the Federal Government to make contributions or grants to partners, such as provincial governments, not-for-profit organisations, for-profit organisations, individuals and research organisations to fund activities that contribute to its objectives. The objectives include:
- (a) providing homeless people with longer-term housing solutions;
 - (b) strengthening partnerships with other government departments and the private and non-for-profit sectors to address homelessness; and
 - (c) increasing knowledge to support better informed policies, investment decision-making and provision of services.
72. Eligible activities for funding include:
- (a) supportive housing facilities and emergency shelter facilities;
 - (b) housing-loss prevention services;
 - (c) support services; and
 - (d) knowledge development.

NH Act

73. The *National Housing Act 1985* gives the Canada Mortgage and Housing Corporation (**Housing Corporation**) (a government owned corporation) power to address housing needs. It allows for the Housing Corporation to:

- (a) undertake jointly with provincial authorities to acquire and develop land for housing purposes; and
 - (b) make loans to a province or public housing authority to acquire or service land for housing purposes, to make loans to refinance debt, and to forgive amounts owing on those loans.
74. These provisions provide another basis for allocating funding to public housing.
75. Section 73 of the NH Act provides:
- It is the responsibility of the Corporation to cause investigations to be made into housing conditions and the adequacy of existing housing accommodation in Canada or in any part of Canada and to cause steps to be taken for the distribution of information leading to the construction or provision of more adequate and improved housing accommodation and the understanding and adoption of community plans in Canada.

(b) Evaluation

76. As initiatives designed to protect homeless people are largely driven by the executive branch of government, there is no protection of the right to adequate housing in legislation. Nevertheless, the executive has chosen to support initiatives to protect the homeless.
77. The Canadian Government has introduced housing initiatives that provide funding to various groups to respond to the needs of the homeless. These grants to various bodies, however, do not provide for a coordinated approach to the problem of homelessness.
78. While the Housing Corporation has an obligation to research and distribute information in relation to adequate housing, there is no obligation on the Housing Corporation to respond to that research and actually provide adequate housing.