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Standing Committee on Family, Community, Housing and Youth
Department of House of Representatives
Parliament House
CANBERRA ACT 2600
By email: fchy.reps@aph.gov.au

14 August 2009

Dear Inquiry Secretary

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Joint Committee in its Inquiry into homelessness legislation.

James Farrell, Riley Power and myself are the primary authors, in Sydney, Brisbane and Canberra. We stand ready to give evidence at a hearing if required.

Kind regards

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Submission to the
House Standing Committee on
Family, Community, Housing and Youth

Inquiry into homelessness legislation

August 2009

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Executive Summary

- 1 Australian Lawyers for Human Rights Inc (**ALHR**) welcomes the opportunity to provide this submission to the Inquiry into Homelessness Legislation (**Inquiry**) conducted by the House Standing Committee on Family, Community, Housing and Youth (**Committee**).
- 2 ALHR commends the Commonwealth Government on its commitment to eradicating homelessness. Homelessness is a fundamental breach of human rights, and any attempt to prevent homelessness should recognise those human rights implications. The Commonwealth Government committed to the Inquiry in its White Paper on Homelessness, released in December 2008 and entitled '*The Road Home: A National Approach to Reducing Homelessness*':

The Australian Government will enact new legislation to ensure that people who are homeless receive quality services and adequate support. In addition, service standards encouraging best practice and achievement of outcomes would be set out in the legislation, ensuring national consistency and quality of the services offered to people experiencing homelessness. The best features of the Supported Accommodation Assistance Act 1994 and the Disability Services Act 1986 would be incorporated into new legislation on homelessness.¹
- 3 Under its terms of reference, the Committee is required to make inquiries into the principles and service standards that could be incorporated in homelessness legislation.

Recommendations

- 4 ALHR **recommends** that the starting principle for any such legislation is a intersectional human rights-based approach, which should underpin the provision of services to Australians who are homeless or at risk of homelessness.
- 5 ALHR notes the importance and influence of legislation on policies and practices within government, and **recommends** the introduction of a new Homelessness Act, which:
 - (a) has a primary objective of progressive realisation of the right to adequate housing;
 - (b) has a broad definition of homelessness, consistent with international law norms;

¹ Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home – Homelessness White Paper* (2008) 44.

- (c) ensures funding of social support services is conditional upon continuing compliance with individuals' human rights; and
 - (d) introduces an Office of the Commissioner for Adequate Housing and a Housing Ombudsman to safeguard individuals' rights.
- 6 ALHR **recommends** the use of international legislation to model the new Homelessness Act. The *Supported Accommodation Assistance Act 1994* (Cth) and existing Australian legislative and regulatory models used in other community service systems (such as disability services, aged care and child care) fail to appreciate the complexity and interrelationship of issues of homelessness.
 - 7 ALHR **recommends** that the scope of any legislative program contains provisions directed towards developing and maintaining positive public health outcomes with a focus on mental health targeted at those people most at risk of homelessness.
 - 8 ALHR **recommends** that the scope of any legislative program address the high rate of application of 'fines' laws on homeless people.
 - 9 ALHR **recommends** that any review of the law relating to homelessness adequately address those impediments to access to the social security system.
 - 10 ALHR **recommends** that the relevant anti-discrimination acts are amended to include the state of homelessness within the definition of an 'attribute' for the purposes of the legislation.
 - 11 ALHR **recommends** that the Government draft a 'statute of rights' reflecting the content of those international rights instruments that Australia has ratified and that has been drafted in such a way as to confer on the Government a positive obligation to take action to ensure that these rights are protected and that breaches, such as is represented through homelessness, are remedied.
 - 12 ALHR **recommends** that domestic violence and child protection as a path to homelessness be given priority concern in any legislative or policy response.

About ALHR

- 13 Australian Lawyers for Human Rights Inc (**ALHR**) was established in 1993, and incorporated as an association in NSW in 1998.
- 14 ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 1,300 people, with active National, State and Territory committees.
- 15 Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.
- 16 ALHR is a member of the Australian Forum of Human Rights Organisations. It is a member of the Commonwealth Attorney General's NGO Forum on Human Rights, and the Department for Foreign Affairs Human Rights NGO Consultations.
- 17 Issues addressed by ALHR include anti-terrorism laws, refugee and asylum seeker issues, proposed reforms of the Human Rights and Equal Opportunity Commission, amendments to anti-discrimination laws, and Australia's National Human Rights Action Plan.
- 18 To help lawyers use human rights remedies in their daily legal work, ALHR runs seminars on the use of international human rights standards in daily legal practice, in areas such as family law, tenancy, anti-discrimination, crime, corporations, land and environment, and employment.
- 19 The ALHR National Committee oversees State and Territory committees currently active in Queensland, the ACT, Victoria, New South Wales and Western Australia.

Human rights as the underpinning principle

- 20 Homelessness is a human rights violation.² The violation of these rights must be met with positive, rather than negative, indirect or passive, action by the Government to remedy these breaches.
- 21 The natural corollary of the characterising homelessness as a human rights violation, is that the traditional assumptions and values that homeless people or those at risk of homelessness are to be granted welfare or charity from the society will be replaced with a recognition that the Government will be assisting these people in attaining what they are entitled to as of right. It is well established that people experiencing homelessness are subject to multiple and intersectional human rights violations.³
- 22 Australia has recognised, through its commitments to international human rights instruments including the Universal Declaration of Human Rights, the ICCPR and the ICESCR, that all people are invested with certain rights and through that commitment has undertaken to protect those rights as a 'strong framework for establishing and maintaining the enabling conditions necessary for social inclusion'.⁴
- 23 The Federal Government is obligated under international law to redress these violations. Its obligations are found in a number of the major international human rights treaties to which Australia is a party, including:
- The International Covenant on Civil and Political Rights (**ICCPR**);
 - The International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
 - The International Convention on the Rights of People with Disabilities (**CPRD**);
 - The Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**);
 - The International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); and
 - The Convention on the Rights of the Child (**CRC**).
- 24 Australia's ratification of these instruments commits the Government, at the Federal, State and local levels, to the full implementation of the human rights contained in that treaty. For example, article 2(1) of ICESCR provides that:

² Phillip Lynch and Jacqueline Cole, 'Homelessness and human rights: regarding and responding to homelessness as a human rights violation', [2003] 4 *MJIL* 139

³ Human Rights and Equal Opportunity Commission (**HREOC**), *Homelessness is a Human Rights Issue* (2008). These human rights violations include, violations of the right to dignity and respect, the right to participation, the right to liberty and security, the right to freedom from cruel, inhuman or degrading treatment, the right to freedom from discrimination, the right to privacy, the right to social security, the right to the highest attainable standard of health and, of course, the right to adequate housing.

⁴ Phillip Lynch, 'Homelessness, human rights and social inclusion', (2005) 30 (3) *Alternative Law Journal* 116.

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁵

- 25 Approaching homelessness from a human rights perspective should therefore be the starting point for any effective national response aimed at tackling homelessness and promoting social inclusion.⁶ Only when the right to adequate housing and other inter-related rights are recognised and enshrined in law will national goals and targets for the reduction of homelessness sit within a robust policy framework.
- 26 The development, implementation and ongoing operation of any legislation and/or programs and policies should necessarily require that those experiencing homelessness are involved at all levels to ensure that the ultimate service delivery in these matters reflects the actual legal, social and other needs of homeless people or people at risk of homelessness.⁷ This is a fundamental requirement as it should be considered that 'top-down' solutions alone, if at all, will not be apt to understand and adequately address the 'real-world' practical implications of homelessness and the strategies required to address these matters.
- 27 At the heart of the visible effects of homelessness are multiple 'unseen' causes and contributing, or even exacerbating, factors including, but not limited to, mental illness, substance abuse, domestic violence, exclusion from family life or the family home as a result of 'coming out' as gay, lesbian, bisexual or transsexual to one's family, approaches to policing and the application of the criminal law to certain activities.⁸ To this end it should be recognised that strategies implemented in terms of improving access to appropriate accommodation must be complimented by strategies designed at providing support to homeless people and people at risk of homelessness in relation to the underlying causes of this state.⁹

The right to adequate housing

⁵ ICESCR article 2. Refer to CESCR, *The nature of States parties obligations* (Art. 2, par.1) (General Comment 3) 1990.

⁶ HREOC, above n 3.

⁷ Phillip Lynch, 'From "cause" to "solution": using the law to respond to homelessness' (2003) 28 (3) *Alternative Law Journal* 127 at 129

⁸ Tamara Walsh and Heather Douglas, 'Homelessness and legal needs: a South Australia and Western Australia Case Study', (2008) 29 *Adelaide Law Review* 359; Phillip Lynch, 'From "cause" to "solution": using the law to respond to homelessness' (2003) 28 (3) *Alternative Law Journal* 127 at 129

⁹ Tamara Walsh and Heather Douglas, 'Homelessness and legal needs: a South Australia and Western Australia Case Study', (2008) 29 *Adelaide Law Review* 359.

- 28 Pursuant to article 11 of ICESCR,¹⁰ all people have the right to adequate housing, which includes a right to live somewhere in security, peace and dignity.¹¹ Australia ratified ICESCR in 1976.
- 29 According to the United Nations Committee on Economic, Social and Cultural Rights (**CESCR**), at a minimum, housing must be affordable, accessible to disadvantaged groups, habitable, culturally appropriate, provide occupants with security of tenure and afford access to appropriate services, materials, facilities and infrastructure, including employment, health care, schools and other social facilities.¹²
- 30 Article 2(1) of the ICESCR obliges Australia to take concrete steps, using the maximum available resources, to progressively fulfil economic, social and cultural rights. The steps taken must be targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures, including budgetary prioritisation.¹³
- 31 Retrogressive measures, such as cuts in funding to homelessness assistance services, public housing or health care, are generally prohibited by international law and may only be justified by exceptional circumstances which do not exist in Australia following over a decade of substantial economic growth and prosperity.¹⁴
- 32 Further, even while Australia is developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, it is under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including in relation to the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.¹⁵
- 33 Australia's failure to provide adequate housing has not gone unnoticed by the international community. In August 2006, the United Nations Human Rights Council Special Rapporteur on Adequate Housing (**Special Rapporteur**) led a mission to Australia to examine the status of realisation of adequate housing as a component of the right to an adequate standard of living.¹⁶

¹⁰ Opened for signature 19 December 1966, 993 UNTS 2 (entered into force 3 January 1976).

¹¹ CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

¹² Ibid.

¹³ CESCR, *General Comment No 3: The Nature of States Parties' Obligations* (Article 2, Para 1), UN Doc HRI/GEN/1/Rev.5 (2001) 18.

¹⁴ Ibid; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 4–5.

¹⁵ CESCR, above n 13, 18.

¹⁶ Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, UN Doc A/HRC/4/18/Add.2 (2007) 2.

- 34 His report concluded that Australia had failed to implement the human right to adequate housing, and lacked a complaint mechanism for alleged violations of housing rights.¹⁷ He went on to urge that:

Australian legislation should explicitly incorporate human rights and the right to adequate housing, and the recommendation on housing and land made to the Australian authorities by various United Nations human rights bodies should be fully implemented.¹⁸

- 35 The CESCR released its Concluding Observations for Australia on 25 May 2009 (available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>), also recognising housing issues as a concern. The international community recognises the importance of the right to adequate housing.
- 36 Unsurprisingly, people experiencing homelessness have the same view. Homelessness and insecure housing was a key feature in many public submissions and community roundtables for the National Human Rights Consultation, currently in progress.
- 37 ALHR submits that for the Federal Government to fulfil its stated commitment to social inclusion and human rights, and if the country's homelessness crisis is to be addressed in any meaningful way, the right to adequate housing must be recognised formally by the Federal Government. Any legislative implementation of the right to adequate housing needs to take into account the scope of that right in international law.

¹⁷ Ibid, 7.

¹⁸ Ibid, 2.

Mental health

- 38 There is a strong correlation between homelessness and incidences of mental illness, previously estimated at rates in the order of 50% to 80% of homeless people with a mental illness of some form.¹⁹ There is also the connection with the level of substance abuse associated with this mental illness. This gives rise to issues concerning the approach to dealing with mental illness and substance abuse in this context in as much as the mischaracterisation of a particular behaviour as one or the other.
- 39 ALHR **recommends** that the scope of any legislative program contains provisions directed towards developing and maintaining positive public health outcomes with a focus on mental health targeted at those people most at risk of homelessness.

Domestic violence and child protection

- 40 On 29 April, the Prime Minister launched *Time for Action: National Council's Plan for Australia to reduce violence against Women and Children 2009-2021*. The Government will take this to COAG and turn it into a Government plan by 2010. Then on 1 May, the PM launched the COAG report *Protecting Children is Everyone's Business: National framework for protecting Australia's children 2009-2020*. These reports will join the *The Road Home: A National Approach to Reducing Homelessness* as part of a social policy reform agenda, with a Disability strategy on the way. The report *'Shut Out: The Experience of People with Disabilities and their Families in Australia'* was launched by the National People with Disabilities and Carer Council on 5 August 2009.
- 41 We know there is a strong link between these social policy issues—domestic violence, child abuse, disability and homelessness. The Protecting Children report states that in 2007-08, there were 55,120 reports of child abuse and neglect substantiated by child protection services. The rate has more than doubled over the past 10 years. Indigenous children are six times more likely to be the subject of neglect or abuse than other children. It is also clear that removing children is not always in the best interests of the child in the long term, with children in out-of-home care experiencing significantly poorer long-term outcomes. Despite this, the numbers of children being removed from their parents has also more than doubled over the past decade. At 30 June 2008, there were 31,166 young people in out-of-home care.
- 42 One in five children will be reported to statutory child protection services by the time they are 18 in NSW. Morgan Disney's 2006 report on the costs of

¹⁹ Alana Ebert, 'Homelessness, Mental Health and Law Enforcement' (2005) 12 *Psychiatry, Psychology and Law* 152

transition from care indicated the huge cost to government and the community of young adults coming out of foster care with poorer outcomes on all major life trajectories – homelessness, mental health, employment, education, criminal justice and more. This cost is estimated at \$2 billion per year.

- 43 Twenty years since the HREOC report *Our Homeless Children, the Report of the National Inquiry into Homeless Children* (1989, undertaken by Brian Burdekin) our policy responses on homelessness, violence and state care could be somewhat further progressed by a human rights-based approach. The facts in 2008 remain unchanged: a substantial number of children and young people become homeless while still under State guardianship and coming into care, or attempting to have a child committed to care, provides a clear path to homelessness. In a 2007 radio interview, Burdekin once again re-iterated that state care is the single predictive factor of homelessness. Not only is this unsustainable in terms of economic cost but it also unsustainable in terms of human cost.
- 44 ALHR **recommends** that domestic violence and child protection as a path to homelessness be given priority concern in any legislative or policy response.

Criminal law

- 45 Studies into the legal issues arising from homelessness have identified fines laws and the application of criminal sanctions as one of the key issues affecting homeless people.²⁰ The level of fines issued to homeless people has been linked to the fact that many offences attracting fines are ‘street’ offences and that a large proportion of homeless people are carrying on their activities on the street.
- 46 The impact these fines have include:²¹
- They impose a penalty on people who have no means of paying;
 - Even if the person is a social security recipient, the amount of the fine represents to high a proportion of their income; and
 - Create disincentives to seek assistance from authorities as the fines listed against their names will ‘follow’ them.
- 47 ALHR **recommends** that the scope of any legislative program address the high rate of application of ‘fines’ laws on homeless people.

20 Tamara Walsh, ‘The Overruled Underclass: The impact of the law on Queensland’s homeless people’ (2005) 28 (1) *UNSW Law Journal* 122

21 As above.

Social security

- 48 The social security system in its current form, as administered by Centrelink, is not adequately equipped to deal with the realities facing homeless people. In practical terms, the interaction of the social security system and homeless people, or people at risk of homelessness, creates issues of:²²
- The maintenance of appropriate identifying information to be able to establish identity to Centrelink's satisfaction;
 - Maintaining adequate contact or lines of communication between Centrelink and homeless people, or those at risk of being homeless;
 - Multiple and frequent breaches of reporting requirements by homeless people due partly to the accommodation and identity issues
 - Breaches leading to debt and overpayment of benefits with no means to pay it back
- 49 ALHR **recommends** that any review of the law relating to homelessness adequately address those impediments to access to the social security system.

Discrimination and possible amendments to the state and federal anti-discrimination regimes

- 50 Homeless people are subjected to indirect and direct discrimination on the basis of the matters described above.
- 51 Currently, the state and federal anti-discrimination regimes do not include the state of homelessness as an attribute upon the basis of which it is unlawful to discriminate.
- 52 ALHR **recommends** that the relevant anti-discrimination acts are amended to include the state of homelessness within the definition of an 'attribute' for the purposes of the legislation.

Statutory recognition of human rights

- 53 As highlighted in the discussion of the principles that should underpin any government legislation on this issue, homelessness should be characterised as a human rights violation in that it impairs the capacity of a person to enjoy the rights and freedoms enjoyed by other members of society;

22 Tamara Walsh and Heather Douglas, 'Homelessness and legal needs: a South Australia and Western Australia Case Study', (2008) 29 *Adelaide Law Review* 359.

- 54 Safeguarding these rights requires positive and coordinate action from the Government. While international rights instruments may provide a broad statement of intent subject to interpretation as to whether it has been, or needs to be, adhered to, the substantive rights contained in the Universal Declaration, the ICCPR and the ICESCR have not been explicitly enshrined in domestic legislation;
- 55 ALHR **recommends**, therefore, that the Government draft a 'statute of rights' reflecting the content of those international rights instruments that Australia has ratified and that has been drafted in such a way as to confer on the Government a positive obligation to take action to ensure that these rights are protected and that breaches, such as is represented through homelessness, are remedied.

The role of legislation

- 56 Legislation does have an important role in improving the quality of services for people who are homeless or at risk of homelessness.
- 57 It is recognised that in certain situations it is necessary to legislate to ensure that appropriate measures are in place to safeguard and protect the interests of the public. Legislation is necessary to underpin activities that infringe on the rights of others or require people to act in certain ways.²³
- 58 According to a leading academic, Efrosini Stefanou-Haag:
- The existence of legislation is significant not only because legislation provides a direct means of seeking redress. The power of legislation, lies in the fact that it serves to affirm in public ways the core values of a nation ... Legislation encourages values clarification, and gives educators and employers the opportunity to examine their own practices against the values underpinning the Act ...²⁴
- 59 Legislation can have effects in forums other than courts and can be viewed from the perspectives of persons other than lawyers and their clients. Relevantly, laws can be the basis for political discourse and can influence administrative and political behaviour. Indeed, the less scope there is for legal checking, the greater scope there is for the provisions to have political impact.²⁵
- 60 So, for example, Justice Yvonne Mokgoro notes that the inclusion of economic, social and cultural rights in the South African constitution was

²³ NSW Health Department *Review of the Public Health Act 1991: Issues Paper* (December 1999).

²⁴ Efrosini Stefanou-Haag, 'Antiracism - From Legislation to Education' [1994] *Australian Journal of Human Rights* 2.

²⁵ Jeffrey Barnes, 'The role of legislation in the advancement of community education: Part 2: Is exhortation the key?' (1999) *Australian Journal of Emergency Management* 60.

intentionally linked to the denial of those rights in the apartheid era.²⁶
Nelson Mandela made this clear when delivering the Presidential Inaugural Address in Pretoria, South Africa on 10 May 1994:

Let there be justice for all.

Let there be peace for all.

Let there be work, bread, water and salt for all.

- 61 For these reasons, ALHR supports the introduction of a Homelessness Act and a legislative framework to provide a framework for the provision of services to Australians who are homeless or at risk of homelessness.

²⁶ 'The Role of Legislation and Courts in Promoting Socio-Economic Rights', delivered at ANU, Canberra, 24 July 2009.

A new Homelessness Act

- 62 ALHR considers that it is imperative that a Federal Homelessness Act be enacted.
- 63 ALHR **recommends** that the new Homelessness Act includes an overarching recognition of and commitment to Australia's obligations under the ICESCR, in particular the Government's responsibility to ensure the progressive realisation of the right to adequate housing.

Primary objective

- 64 The legislative objects of the new Homelessness Act should set out the responsibility of Government to progressively realise the right to adequate housing in accordance with Australia's obligations under the ICESCR. The key function of the Act must be to ensure the provision of both short and long term housing and support services for people who are homeless or at risk of homelessness.

Definition of homelessness

- 65 The new Homelessness Act should incorporate the broad definition of homelessness currently provided under the *Supported Accommodation Assistance Act 1994* (Cth) (**SAA Act**). Furthermore, any definition of homelessness should recognise the right to adequate housing as it appears in international law, incorporating:
- security of tenure;
 - availability of services;
 - affordability;
 - habitability;
 - accessibility;
 - proximity; and
 - cultural appropriateness.

Funding social support services

- 66 Provision for Government funding of social support services under the Homelessness Act should be conditional upon their continuing compliance with individuals' human rights, particularly the right to adequate housing and associated rights that are relevant for people experiencing homelessness or at risk of homelessness.

New agencies to safeguard individuals' rights

- 67 In addition to, and as a part of, implementing a new Homelessness Act, the Government should establish an Office of the Commissioner for Adequate Housing (**Commissioner**) for the purpose of safeguarding individuals' rights. The United Nations Special Rapporteur on Adequate Housing identified the lack of mechanisms for people to complain about breaches of housing rights as a significant problem in Australia.²⁷
- 68 The Commissioner should have the power to:
- develop grievance and appeals procedures in respect of public housing matters and general social support services;
 - refer grievances to the Housing Ombudsman for further investigation;
 - develop a Charter of rights and responsibilities that service providers must adhere to in order to access Government funding;
 - develop, review and monitor national standards for the provision of adequate housing;
 - report on an annual basis to the Federal Government on the progressive realisation of the right to adequate housing; and
 - any other powers as are necessary and convenient for the Commissioner to perform his or her function of promoting and protecting people's right to adequate housing.
- 69 In addition to appointing a Commissioner, the Government should establish a Housing Ombudsman that has the power to hear and investigate complaints in respect of Federally funded service provision, including whether or not service providers are acting compatibly with the rights of individuals. The Ombudsman should also be given the power to conduct investigations and reviews of Federal Government departments and Federally funded public authorities, including service providers, on its own initiative.

²⁷ Human Rights Council, above n 16, [16].

The effectiveness of existing legislation

- 70 ALHR submits that existing legislation fails to appreciate the interrelated issues that affect homelessness. The existing legislation is ineffective in addressing the causes of homelessness, and fails to provide adequate support to people who are experiencing homelessness. .
- 71 The international definition of ‘homelessness’ developed by the United Nations Committee on Economic, Social and Cultural Rights (**CESCR**), provides in effect that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity.²⁸
- 72 The causes of homelessness are complex and varied. However, they are generally acknowledged to include:
- (a) structural causes (such as poverty, unemployment and inadequate supply of affordable housing);²⁹
 - (b) fiscal, social and public policy causes;
 - (c) periods of incarceration;
 - (d) individual causes, including family violence and family fragmentation; and
 - (e) cultural causes, particularly for Indigenous women and women from a non-English speaking background.
- 73 In many cases of homelessness, these causes are intersectional and interrelated.³⁰ The intersectional and interrelated nature of the causes of homelessness also illustrate that homelessness is not just an issue of housing, rather it is much more complex and gives rise to multiple and interdependent human rights issues.
- 74 In that context, existing legislation is ineffective and inappropriate to adequately address the issue of homelessness.

SAA Act

- 75 While the SAA Act recognises international human rights protection standards in its preamble, it does not provide for any clear mechanisms by which those human rights standards must be achieved (i.e. there is no clear correlation between the funding mechanisms in the SAA Act and the need to ensure that services have the effect of realising human rights). We note

²⁸ CESCR, *General Comment No 4: The Right to Adequate Housing*, UN Doc E/CN4/1991/4 (12 December 1991).

²⁹ Following the 2001 Census, the ABS identified unemployment and inadequate income as significant structural factors contributing to and causing homelessness across Australia: Australian Bureau of Statistics (**ABS**), *Counting the Homeless 2001* (2003).

³⁰ See generally, ABS, above n 29; Australian Institute of Health and Welfare (**AIHW**), *Homeless People in SAAP: National Data Collection Annual Report 2003–04* (2005); Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004).

that this legislation, which was developed in the 1980s, has provided an important first step in legislative protection for people experiencing homelessness; however, it is now time for the reach of this legislative protection to be greatly extended.

- 76 Although Supported Accommodation and Assistance Program (**SAAP**) service standards exist, and might be expected to require accommodation of a standard adequate under human rights law, they do not ensure that SAAP accommodation meets the standards of adequacy under human rights law.³¹
- 77 Under the SAA Act, particular groups of people may be excluded from SAAP services, including people:
- who use, are dependent on, or are affected by drugs and/or alcohol;
 - who exhibit or who have previously exhibited violence or other challenging behaviour;
 - affected by mental illness;
 - with disability, including people with physical disability, intellectual disability or acquired brain injury.³²
- 78 The SAA Act also fails to recognise children and young people below school leaving age as a specific group for the purpose of making service agreements, unless they are part of families or accompanying women.³³ It is assumed that these children and young people will be looked after by state child protection authorities.³⁴ This means there are no targeted resources to assist children and young people experiencing homelessness.
- 79 Further, Australia's current anti-discrimination laws do not prohibit discrimination on the grounds of social status or housing status.³⁵ Discrimination on these grounds is widely experienced by homeless people in the areas of accommodation and the provision of goods and services.
- 80 Accordingly, while the SAA Act remains important today, ALHR submits that it must be transformed into a Federal Homelessness Act that takes a broad and holistic approach to solving homelessness through a human rights framework and creates an enforceable mechanism to ensure the promotion and protection of human rights for people experiencing homelessness.
- 81 Without a legislative framework in place, homelessness service provision would be reliant on political leadership and goodwill and the Government

³¹ See definition of 'adequacy' in CESCR, above n 11, [8].

³² NSW Ombudsman, *Summary Report: Assisting homeless people – the need to improve their access to accommodation and support services*, May 2004, p8.

³³ *Supported Accommodation Assistance Act 1994* (Cth) section 13(1).

³⁴ National Youth Commission, *Australia's Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness*, 2008, Brunswick, para 9.8.

³⁵ HREOC, *Homelessness and Human Rights in Australia*, Submission to the Supported Accommodation Assistance Program (SAAP IV) National Evaluation (2003) 11. See eg *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act 1995* (Vic) s 6; *Equal Opportunity Act 1984* (WA).

and service providers could not be held accountable for their actions. People experiencing homelessness will continue to be the subject of human rights violations unless the Government enacts a Federal Homelessness Act, which builds on the existing legislative framework in the SAA Act.

Other Australian legislation

- 82 ALHR notes that the Committee's terms of reference require it to consider *'applicability of existing legislative and regulatory models used in other community service systems, such as disability services, aged care and child care, to the homelessness sector'*.
- 83 For the reasons set out below, ALHR believes that these models are not transferable to the homelessness sector.

Disability services legislation

- 84 The Disability Services Act 1986 (DSA) provides a legislative framework to assist people with a permanent intellectual, psychiatric, sensory or physical impairment that reduces a person's ability to communicate, learn or get around.
- 85 The DSA views the provision of services to the disabled, as, primarily a way to promote and assist their integration in the community, self-esteem and prospects (employment opportunities, rehabilitation etc).
- 86 A range of services are supported under the DSA, including advocacy, accommodation support, employment services, rehabilitation, independent living training and information services (to the disabled and the broader community). There is provision in the DSA for the Commonwealth to provide a range of rehabilitation services where the disabled person:
- is aged between 14 and 65; or
 - has a substantially reduced capacity to obtain paid employment or live independently.
- 87 Accrediting authority grants accreditation to certification bodies, who provide certificates of compliance to States or eligible organisations if they are satisfied that they are providing employment or rehabilitation programs to the required standards. Such organisations receive grants of financial assistance if the grant furthers the objects of the DSA and the organisation complies with the requirements in the DSA. Research and development grants can also be provided.
- 88 The DSA also provides for a Disability Standards Review Panel.
- 89 ALHR contends that the DSA model is not appropriate in a homelessness context, as the DSA does not operate to protect 'rights'. Rather, the DSA promotes and assists community integration, rehabilitation etc (see

paragraph 86 above). It does not regard community integration or employment, for example, as the rights of disabled people.

- 90 While similar services are required for people experiencing homelessness (such as employment support, rehabilitation, community integration, etc), a rights based approach views those services as essential to the human rights of people experiencing homelessness.
- 91 The DSA's failure to facilitate the participation and empowerment of the disabled is another reason why this legislative model is inappropriate in the context of homelessness legislation. For a marginalised group such as people experiencing homeless, the possibility of contributing to the legislative process, or the ongoing provision of services may be as valuable as the services themselves.

Aged care legislation

- 92 The *Aged Care Act 1997* (Cth) (**ACA**) governs all aspects of the provision of residential care, flexible care and Community Aged Care Packages (**CACPs**) to older Australians. The ACA sets out matters relating to the planning of services, the approval of service providers and care recipients, payment of subsidies, and responsibilities of service providers.
- 93 Under the ACA, aged care homes must be accredited under the Accreditation Standards for Residential Aged Care in order to receive public subsidies. The standards cover such things as: management, care, lifestyle, quality and safety issues. There are four standards, and 44 outcomes under these standards which must be met.
- 94 The Aged Care Standards and Accreditation Agency is responsible for accrediting homes and monitoring them against the standards. Homes are visited by accreditation assessors who talk to staff, residents and their families about the home and how it meets the required Standards, which relate to:
- (1) the achievement of all the standards;
 - (2) residents' health and personal care needs;
 - (3) lifestyle; and
 - (4) a safe and comfortable environment that ensures quality of life, your welfare and that of your visitors and the home's staff.
- 95 We note that the ACA provides for the statutory appointment of an Aged Care Commissioner, and support the introduction of a similar statutory appointment (discussed at **paragraphs 67 to 69** above).
- 96 ALHR contends that the ACA model is not appropriate in a homelessness context, as the ACA does not operate to protect 'rights'. Rather, the ACA deals with standards for residential and health services to older Australians, and funding those services.

- 97 While similar services are required for people experiencing homelessness, a rights based approach views those services as essential to the human rights of people experiencing homelessness. Further, the limited services regulated by the ACA would fail to understand the complex and interrelated causes and effects of homelessness (discussed at **paragraph 72** above).

Child care legislation

- 98 The *Child Care Act 1972* (Cth) (**CCA**) provides funding for long day care centres. Instead of legislation, federal funding conditions are largely imposed administratively, through agreements, administrative guidelines and bulky handbooks.
- 99 The operation of the CCA was reviewed by the Australian Law Reform Commission in 1994,³⁶ which found a need for new legislation to not only to encompass the variety of child care operations but also to fulfil Australia's obligations under international law such as the CRC and to keep pace with social change. The report accounted for, and recommended, priority for children with special needs including financial hardship, Indigenous children, children from non-English speaking backgrounds, sole-parent families, families in remote and rural areas, children with a disability (or whose parents are disabled) and children at risk of neglect and abuse.
- 100 The main recommendations of the ALRC review included:
- (a) New legislation based on the principles of access, equity, affordability and quality should govern federally funded children's services.
 - (b) The welfare of the child for whom child care is provided should be paramount.
 - (c) Government policy about children should be developed and monitored through a national agency.
 - (d) Planning processes should be transparent, and based on principles set out in the legislation.
 - (e) National standards that can be monitored according to benchmarks such as physical environment and quality assurance mechanisms should be established to ensure quality child care services are maintained.
 - (f) To ensure that parents have appropriate mechanisms to resolve complaints, it should be a condition of funding that there be appropriate complaints procedures. There should also be an independent, external body to deal with complaints.
 - (g) The ALRC found an urgent need to clarify the rights and responsibilities of the family day carers, who provided child care for other people's

³⁶ Australian Law Reform Commission, *ALRC 70: Child Care For Kids – Review of legislation administered by Department of Human Services and Health* (1994).

children in the carer's own home. There should be written agreements or policies addressing the roles and responsibilities of carers, the parents and the central coordination unit that organises the network of carers.

- (h) Providers of child care services may hold sensitive personal information about family relationships, child illnesses and other matters. The Commonwealth also holds personal information about families and sensitive commercial information about child care providers. This confidential information should be protected.

- 101 While ALHR agrees with these recommendations, the failings identified in the ALRC report demonstrate the inappropriateness of this form of legislation to the homelessness context.
- 102 ALHR contends that the CCA model is not appropriate in a homelessness context, as the CCA does not operate to protect 'rights'. Rather, the ACA deals primarily with funding and regulation of child care services.

International comparables

- 103 ALHR notes that other jurisdictions such as the United Kingdom and Scotland have made progressive and comprehensive steps towards constitutional and legislative protection of housing rights. Although they are necessarily culturally contingent, ALHR contends that these and other legislative instruments form an excellent example from which Australia develop its own governmental and political framework. Discussed below are two examples of homelessness legislation from countries with a similar constitutional and legal history, and an example of constitutional protection of the Right to Adequate Housing. These examples should provide the Federal Government with comfort that legislation enshrining the right to adequate housing has been adopted elsewhere with success.

Homelessness Act 2002 (UK)

- 104 In 2002, the United Kingdom introduced the *Homelessness Act*, which has application in England and Wales. The Act requires that local authorities (similar to our local councils) implement five yearly action plans to tackle homelessness, to conduct annual censuses of rough sleeping and to give temporary accommodation to 'unintentionally homeless' people in priority need until they can be provided with more permanent housing. The Act also insists on new safeguards to prevent homeless families with children and vulnerable homeless people being housed in inappropriate accommodation.³⁷

³⁷ Iain Byrne and Andrew Blick, 'Home Truths' in Stuart Weir (ed) *Unequal Britain: Human Rights as a Route to Social Justice*, 200.

- 105 Under the Act, the government also added new vulnerable groups to those already recognised as being in 'priority need.' The positive aspect of this legislation is that it creates an obligation on local authorities to find temporary accommodation to the small group of the most vulnerable. However, it suffers from several drawbacks, including a limitation of the target group to those who are 'unintentionally homeless'.³⁸ Nevertheless and importantly, people seeking accommodation have the right to appeal the decision of a local authority internally and then to the County Court on a question of law.

Homelessness Act 2003 (Scotland)

- 106 The Scottish *Homelessness Act* guarantees the right of homeless people to secure adequate housing and requires local authorities to recognise this right. This right is to be progressively implemented over ten years, after which time every homeless person in Scotland will have a right to access housing.³⁹
- 107 Under the Act, local authorities have both corporate duties to the Scottish Executive to develop their own homelessness strategy and ongoing monitoring and evaluation strategies as well as duties to homeless individuals. The extent of this duty is contingent upon how a person is assessed under the Act. In essence, under the legislation there is a duty on local authorities to consider an applicant's case and if that person is homeless then find him or her accommodation.
- 108 The Act's ten year target is to be achieved by gradually expanding the categories of people defined as being in 'priority housing need' and giving households classified as 'intentionally homeless', accommodation with greater social support. For example, the categories of priority need will be gradually broadened until in ten years time there is no distinction drawn between any homeless person who is categorised as unintentionally homeless. The Act also gives Ministers the powers to make regulations banning the use of unsuitable accommodation, such as bed and breakfasts, and requires local councils to accommodate homeless people who apply for rehousing in their area rather than shuffling them off, as many local authorities do, to other areas where they have a local connection.

South Africa

- 109 In South Africa, the right to adequate housing is protected under the South African Constitution.⁴⁰ The South African courts have dealt with the obligations on government authorities to prevent homelessness arising from evictions, including evictions from private housing. The courts have decided that, before making an order to evict a person into homelessness, government housing authorities may be required to advise the court

³⁸ Intentional homelessness is defined as someone falling into rental arrears or committing an act of anti-social behaviour. The Act also makes it possible to exclude or suspend people from tenancies for quite arbitrary reasons. See: Iain Byrne and Andrew Blick, 'Home Truths' in Stuart Weir (ed) *Unequal Britain: Human Rights as a Route to Social Justice*, 200.

³⁹ *Housing (Homeless Persons) Act 1977; Housing (Scotland) Act 2001; Homelessness etc. (Scotland) Act 2003.*

⁴⁰ *South African Constitution*, s 26.

whether the person will be housed following the eviction.⁴¹ The court is then able to ensure that the eviction does not lead to the person being made homeless.

⁴¹ *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* (Unreported, High Court of South Africa, Witwatersrand Local Division, Mogagabe AJ, 16 October 2007).

Conclusion

- 110 ALHR submits that the starting principle for any such legislation is a human rights-based approach, which should underpin the provision of services to Australians who are homeless or at risk of homelessness.
- 111 ALHR notes the importance and influence of legislation on policies and practices within government, and recommends the introduction of a new Homelessness Act, which:
- (e) has a primary objective of progressive realisation of the right to adequate housing;
 - (f) has a broad definition of homelessness, consistent with international law norms;
 - (g) ensures funding of social support services is conditional upon continuing compliance with human rights obligations; and
 - (h) introduces an Office of the Commissioner for Adequate Housing and a Housing Ombudsman to safeguard individuals' rights.
- 112 ALHR suggests that international legislation be used as a model for the new Homelessness Act, especially section 26 of the South African Constitution, so that a court can review the decision to forcibly evict someone into homelessness. The SAA Act and other existing Australian legislative and regulatory models used in other community service systems (such as disability services, aged care and child care) fail to appreciate the complexity and interrelationship of issues of homelessness.