

# HOMELESSNESS AND HUMAN RIGHTS: REGARDING AND RESPONDING TO HOMELESSNESS AS A HUMAN RIGHTS VIOLATION

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*[This article argues that homelessness is a violation of fundamental human rights and freedoms, including the right to liberty and security of the person, the right to freedom from discrimination, the right to privacy, the right to freedom of expression, the right to freedom of association, the right to vote, the right to social security, the right to health, and the right to an adequate standard of living. Recognising homelessness as a human rights violation is of significant normative value and legal import. The article attempts to encourage and equip people working for and on behalf of people experiencing homelessness to invoke human rights law in litigation and public policy advocacy.]*

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## I INTRODUCTION

Typically, discourse about homelessness and human rights in Australia focuses on the right to housing. This is a topic of crucial importance, particularly in light of the lack of appropriate, adequate and affordable housing across Australia. Relatively little discussion tends to take place, however, about other human rights relevant and related to homelessness.

In this article, we assert that homelessness is in itself a human rights violation. We argue that homelessness constitutes an infraction of such fundamental human rights and dignities as the right to security of the person, the right to be free from cruel, inhumane or degrading treatment or punishment, the right to freedom from discrimination, the right to privacy, the right to freedom of expression, the right to freedom of association, the right to vote, the right to social security, the right to health and, of course, the right to adequate housing.

Regarding and responding to homelessness in a human rights framework represents a shift away from the prevailing ‘welfare’ response. This shift is important. Whereas a welfare framework tends to conceptualise responses to homelessness as *gratuities* provided by a well-resourced and compassionate society, a rights-based framework enables marginalised and disadvantaged people to make claims against the state *as of right*. Crucially, it also imposes an obligation on the state to immediately ensure all homeless persons’ civil and political rights (such as the right to vote and the right to freedom of expression) and to take steps, to the maximum of its available resources, to progressively realise all homeless persons’ economic, social and cultural rights (such as the right to social security and the right to an adequate standard of living).

In this article we seek to encourage people working for and on behalf of homeless people to name and reframe homelessness as a human rights violation. We also attempt to equip them to utilise human rights principles both in their casework and their public policy advocacy.

Regarding and responding to homelessness in a human rights framework is not a panacea to homelessness in Australia, but it does impose minimum obligations on federal, state, territory and local governments with respect to addressing homelessness. Importantly, it also provides a means by which to measure, and to some extent enforce, the satisfaction of those obligations.

## II WHAT DOES HOMELESSNESS HAVE TO DO WITH HUMAN RIGHTS?

### A *Definitions, Extent and Causes of Homelessness*

Definitions of homelessness — and an understanding of its nature, extent and underlying causes — are relevant to whether we regard, and how we respond to, homelessness as a human rights violation.

In Australia, a person is defined at law to be homeless if he or she has inadequate access to safe and secure housing. Section 4(2) of the *Supported*

*Accommodation Assistance Act 1994* (Cth) provides that a person is taken to have inadequate access to safe and secure housing if the only housing to which he or she has access

- (a) damages, or is likely to damage, the person's health; or
- (b) threatens the person's safety; or
- (c) marginalises the person through failing to provide access to:
  - (i) adequate personal amenities; or
  - (ii) the economic and social supports that a home normally affords; or
- (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security or affordability of that housing.<sup>1</sup>

This is consistent with the international law definition of 'homelessness' developed by the United Nations Committee on Economic, Social and Cultural Rights ('CESCR') which provides, in effect, that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity.<sup>2</sup>

It is also consistent with definitions of homelessness that are identified by people experiencing homelessness themselves. Andrew, a client of Sacred Heart Mission, St Kilda, Victoria, reflects on the experience of sleeping rough:

With life on the street, you don't know what's going to happen next. You're forever on the edge. You don't know if you're going to overdose or if someone's going to give you a 'hot shot'. You don't know if you're going to get enough money to get on.<sup>3</sup>

Having a home means more than just having a roof over your head.<sup>4</sup> Ned, another client of Sacred Heart Mission, regards himself as homeless despite the fact that he lives in a boarding house: 'Boarding houses segregate people. You have walls but no real freedom. You can't bring anyone to your room, and you have to be in by a certain time. You lose your choices in boarding houses.'<sup>5</sup>

For the purpose of identifying the extent of homelessness and assisting governments to appropriately develop and deliver services, the Australian Bureau of Statistics has adopted the definition of homelessness proposed by Chamberlain and MacKenzie,<sup>6</sup> who argue that homelessness is best defined in relation to common community standards regarding the minimum accommodation necessary to live according to the 'conventions of community life'.<sup>7</sup> In Australia, the accepted minimum community standard is said to be a small, rented flat with basic amenities such as a bedroom, bathroom and

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<sup>1</sup> This definition is used to determine eligibility for federal and state funded transitional supported accommodation and related support services.

<sup>2</sup> CESCR, *CESCR General Comment 4: The Right to Adequate Housing*, [7], UN Doc E/1992/23 (1992).

<sup>3</sup> Peter Cullen and Carol Ann Marshall (eds), *Voices of the Streets* (1999) 69.

<sup>4</sup> Ian Charles, 'A Roof Over Your Head Doesn't Guarantee the Safety of a Home' (2002) 2 *Urban Seed* 2, 2.

<sup>5</sup> Cullen and Marshall, above n 3, 2.

<sup>6</sup> Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274; Chris Chamberlain, 'Counting the Homeless: Implications for Policy Development' (Occasional Paper, Australian Bureau of Statistics, 1999).

<sup>7</sup> Chamberlain, above n 6, 9–11, 49.

kitchen.<sup>8</sup> Having regard to this standard, Chamberlain and MacKenzie identify three categories of homelessness:

Primary homelessness

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

Secondary homelessness

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

Tertiary homelessness

People who live in boarding houses on a medium to long-term basis. Residents of private boarding houses do not have a separate bedroom and living room; they do not have kitchen and bathroom facilities of their own; their accommodation is not self-contained; they do not have security of tenure provided by a lease.<sup>9</sup>

Using this definition, the Australian Bureau of Statistics enumerated that on census night in August 1996, there were over 105 000 people experiencing homelessness across Australia and more than 17 800 people experiencing homelessness in Victoria.<sup>10</sup> More than 80 per cent of these people were classified in the categories of primary or secondary homelessness (with 20 per cent sleeping rough or in improvised dwellings, 12 per cent staying in hostels, refuges and other forms of emergency accommodation, and 46 per cent staying temporarily with other households).<sup>11</sup>

The pathways into homelessness are complex and varied.<sup>12</sup> They include structural causes,<sup>13</sup> government fiscal and social policy causes,<sup>14</sup> individual causes<sup>15</sup> and in some instances include cultural causes.<sup>16</sup> In many cases of homelessness, the causes are intersectional and interrelated. Identifying and addressing these issues in a rights framework requires governments, at least in

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<sup>8</sup> Ibid. We recognise that notions such as 'conventions of community life' and 'minimum community standards' are culturally contingent and that any definition derived from such notions does not necessarily reflect whether persons the subject of the definition self-identify as 'homeless'. To the extent that definitions are used to assess need and eligibility for services, *and to appropriately target and deliver such services*, it is important that they account for subjective understandings of homelessness.

<sup>9</sup> Chamberlain, above n 6, 1, 9–11, 13, 49; see also Chamberlain and MacKenzie, above n 6.

<sup>10</sup> Ibid 3–4.

<sup>11</sup> Ibid 2, 26. It is expected that the census figures from 2001 will disclose a higher incidence of homelessness in all categories.

<sup>12</sup> See generally the Council to Homeless Persons' symposium entitled 'The Changing Face and Causes of Homelessness': (2002) 15(9) *Parity*.

<sup>13</sup> Examples include poverty, inadequate affordable housing, unemployment and an inability to earn a sufficient livelihood.

<sup>14</sup> Some examples are economic reform, the availability of public housing, welfare expenditure, health services and education.

<sup>15</sup> This includes: mental illness, disability or disorder; gambling, substance and alcohol addiction; domestic violence; family fragmentation; and severe social dysfunction.

<sup>16</sup> For instance, the provision of culturally inappropriate housing or support services to indigenous communities.

theory, to promote and protect the human rights of some of the most marginalised and disadvantaged people in society and to provide remedies for rights violations by addressing underlying causes of homelessness.<sup>17</sup> Our role as homeless persons' advocates is to measure and enforce the practical realisation of this theory.

## B Sources of Australia's Human Rights Obligations

Australia's *moral* and *ethical* obligation to promote, protect and realise human rights is said to derive from the inherent dignity of the human person. This is reflected in the preamble to the *Universal Declaration of Human Rights* which states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace'.<sup>18</sup>

Australia's *legal* obligation to promote, protect and realise human rights derives from two key sources: treaties and customary international law. The civil, political, economic, social and cultural rights discussed in this article are enshrined in either or both of the *International Covenant on Civil and Political Rights*<sup>19</sup> and the *International Covenant on Economic, Social and Cultural Rights*<sup>20</sup> and arguably constitute norms of customary international law.

### 1 International Covenant on Civil and Political Rights

The *ICCPR* codifies a body of civil and political rights. Pursuant to art 2(2) of the *ICCPR*, states parties such as Australia agree to take all necessary steps, including the adoption of legislative or socioeconomic measures, to give immediate effect to all *ICCPR* rights. Under art 40(1) of the *ICCPR*, Australia is obliged to submit periodic reports to the UN Human Rights Committee ('HRC') in relation to its respect, protection and fulfilment of *ICCPR* rights. The HRC is empowered to receive and consider these reports and, pursuant to art 40(4), to make such comments and observations regarding Australia's observance and realisation of civil and political rights as it considers appropriate.

Although the *ICCPR* has not been legislatively enacted in Australia (and therefore does not confer directly enforceable rights on persons in Australia), Australia has ratified the *Optional Protocol to the International Covenant on Civil and Political Rights*.<sup>21</sup> The *Optional Protocol* vests the HRC with jurisdiction to receive and consider complaints from individuals in Australia

<sup>17</sup> For a discussion of the structural and substantive boundaries to a 'human rights approach', see David Kinley, 'The Legal Dimension of Human Rights' in David Kinley (ed), *Human Rights in Australia: Principles, Practice and Potential* (1998) 2.

<sup>18</sup> *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948) ('*UDHR*'). See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 366 ('*Kartinyeri*'), in which Gaudron J stated that human rights are 'taken to inhere in each and every person by reason of his or her membership of the human race'.

<sup>19</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980) ('*ICCPR*').

<sup>20</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force generally 3 January 1976 and for Australia 10 March 1976) ('*ICESCR*').

<sup>21</sup> Opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976) ('*Optional Protocol*').

claiming to be victims of violations of *ICCPR* rights,<sup>22</sup> and to make recommendations to the Australian Government regarding remedies in connection with substantiated complaints.<sup>23</sup> For a complaint to be heard by the HRC, the individual must demonstrate that he or she has exhausted all available domestic remedies.<sup>24</sup> Domestically, the Human Rights and Equal Opportunity Commission is responsible for monitoring compliance with the *ICCPR*.<sup>25</sup>

*ICCPR* rights considered in this article include the right to life, liberty and security of the person; the right to be free from cruel, inhumane or degrading treatment or punishment; the right to freedom from discrimination; the right to privacy; the right to freedom of expression; the right to freedom of association; and the right to vote.

## 2 International Covenant on Economic, Social and Cultural Rights

*ICESCR* sets out a range of economic, social, cultural and developmental rights. In accordance with art 2(1) of *ICESCR*, Australia agrees to take steps, to the maximum of its available resources, to progressively achieve the full realisation of *ICESCR* rights, including the adoption of legislative and all other necessary measures. Like the *ICCPR*, *ICESCR* has not been legislatively implemented in Australia. Unlike the *ICCPR*, *ICESCR* does not have an individual complaints mechanism. However, pursuant to art 16(1) of *ICESCR*, Australia has an obligation to submit periodic reports regarding its observance and realisation of *ICESCR* rights to CESCR, a committee of the United Nations Economic and Social Council. Under art 21 of *ICESCR*, the Economic and Social Council may then provide these reports to the United Nations General Assembly with recommendations of a general nature.

*ICESCR* rights considered in this article include the right to freedom from discrimination, the right to social security, the right to an adequate standard of living (including adequate food, clothing and housing), and the right to the highest attainable standard of physical and mental health.

## 3 Customary International Law

Customary international law, like the *ICCPR* and *ICESCR*, is a binding source of human rights obligations. Customary international law is said to be established through state practice and *opinio juris* (the commitment a state is considered to exhibit when it treats a norm of conduct as legally binding).<sup>26</sup> Thus, the existence of a rule of customary international law requires that the state

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<sup>22</sup> Ibid art 1.

<sup>23</sup> Ibid arts 4(2), 5(4).

<sup>24</sup> Ibid arts 2, 5(2)(b).

<sup>25</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(k).

<sup>26</sup> See generally *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3, 44 ('*North Sea Continental Shelf*'); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 97 ('*Nicaragua*'); Brian Fitzgerald, 'International Human Rights and the High Court of Australia' (1994) 1 *James Cook University Law Review* 78, 81.

practice upon which the rule is founded be generally followed because states believe that they are legally obliged to obey the norm.<sup>27</sup>

Many of the rights enumerated in the *ICCPR* and *ICESCR* constitute part of customary international law binding upon Australia.<sup>28</sup> The rights considered in this article that have almost certainly attained customary status include the right to life, liberty and security of the person; the right to freedom from discrimination; and the right to be free from cruel, inhumane or degrading treatment or punishment.<sup>29</sup>

### C *Human Rights Violated by Homelessness*

As discussed above, discourse about the human rights of people experiencing homelessness typically focuses on the right to housing.<sup>30</sup> Relatively little attention, however, is given to the human rights violations that may be associated with, or are an incidence of, a lack of adequate housing. As Cassandra Austin writes:

Housing can be seen to help safeguard the rights to privacy, self-determination and the right to development. It facilitates a range of freedoms including freedom of speech, to religious practice and other cultural expression ... [it] allows us security from cruel, inhumane or degrading treatment ... [it] is a primary means of protecting health and well-being, offering a space to prepare and cook foods hygienically, to shelter from weather, and to store clothing and other substantive possessions connected with our satisfactory functioning ... [it] is an essential adjunct to the rights of education and work, and it supports a range of other activities necessary for survival — providing a place to eliminate bodily wastes, to sleep and to relax ... The right to adequate housing is a right with far reaching implications for the fulfilment of other rights and therefore our quality of life.<sup>31</sup>

The state of homelessness renders people subject to, or at least unusually susceptible to, violations of the fundamental rights and freedoms discussed below.

#### 1 *Right to Life, Liberty and Security of the Person*

In accordance with art 6(1) of the *ICCPR*, every human being has the inherent right to life. The HRC recognises the supremacy of this right, ‘from which no derogation is permitted’,<sup>32</sup> while the Supreme Court of Canada has recently

<sup>27</sup> See generally *North Sea Continental Shelf* [1969] ICJ Rep 3, 44; *Nicaragua* [1986] ICJ Rep 14, 97.

<sup>28</sup> See generally Richard Lillich, ‘The Growing Importance of Customary International Human Rights Law’ (1996) 25 *Georgia Journal of International and Comparative Law* 1, 8; Hurst Hannum, ‘The Status of the *Universal Declaration of Human Rights* in National and International Law’ (1996) 25 *Georgia Journal of International and Comparative Law* 287.

<sup>29</sup> HRC, *CCPR General Comment 24: Issues Relating to Reservations Made on Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, [8], UN Doc CCPR/C/21/Rev.1/Add.6 (1994).

<sup>30</sup> For an exception to this generalisation, see Cassandra Goldie, ‘Living in Public Space: A Human Rights Wasteland?’ (2002) 27 *Alternative Law Journal* 277.

<sup>31</sup> Cassandra Austin, ‘Rights for the Homeless’ (Working Paper No 5, Australian Housing and Urban Research Institute, 1996) 16.

<sup>32</sup> HRC, *CCPR General Comment 6: The Right to Life*, [1], UN Doc HRI/GEN/1/Rev.5 (2001).

remarked that it is a prerequisite to the enjoyment of all other rights.<sup>33</sup> The right to life protected by art 6(1) of the *ICCPR* is complemented by art 9(1), which provides that every person has the right to liberty and security of the person.

A homeless person without a secure place of residence is especially vulnerable to random attacks of violence threatening both his or her security of the person and, potentially, right to life. In 1999–2000, 22 per cent of homicides in Australia occurred in streets or open areas.<sup>34</sup> During the same period, in 56.6 per cent of reported homicides the victim was not in paid employment.<sup>35</sup> A lack of stable employment and a reliance on occupying public spaces are both attributes of many people experiencing homelessness. Poverty, which is an issue for any person experiencing homelessness, is also recognised as a main risk factor of homicide for both the victim and the offender.<sup>36</sup>

Although there is often a complex web of circumstances and emotions behind any homicide,<sup>37</sup> in the period from 1989 to 99, between 25 and 38 per cent of offenders had an unknown or non-apparent motive.<sup>38</sup> This is a chilling statistic for homeless people who have no secure place to stay. In June 2002, Andrew, a 23 year old homeless man, was sleeping with a group of other homeless people on the steps of the Baptist Church on Collins Street, Melbourne. While Andrew slept, he was fatally stabbed in the head.<sup>39</sup> Only months before, a homeless man, Claude, was stabbed in the stomach by a man at a Salvation Army Open Door shelter. In May 2003, a homeless man in Sydney was set alight by a group of youths and burnt to death.<sup>40</sup> Unfortunately, these attacks are not uncommon, as the reflections of a man who has ‘survived’ homelessness attest:

‘roughing’ it in the streets as a ‘street kid’, I lived in constant fear of violence. There was no door I could lock to separate me from the rest of the world. There was no safe place for me to just be. I found the concentrations of people in crisis accommodation threatening and so rarely accessed these kinds of services preferring the relative safety of the solitude of the streets.<sup>41</sup>

For people without the protection of a safe and secure place to live, the right to life, liberty and security of the person is under constant threat.

While the cases of Andrew and Claude provide paradigmatic examples of the threat to life, liberty and security of the person occasioned by homelessness, a broad and positive definition of the right recognises that a state’s dereliction of its duty to ensure an adequate standard of welfare itself violates the right. As

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<sup>33</sup> *Gosselin v Québec (A-G)* (2002) 221 DLR (4<sup>th</sup>) 257, [346] (Arbour J dissenting) (*‘Gosselin’*).

<sup>34</sup> Jenny Mouzos, ‘Homicide in Australia 1999–2000’ (Trends and Issues in Crime and Criminal Justice Paper No 187, Australian Institute of Criminology, 2001) 6.

<sup>35</sup> *Ibid* 5. Similar statistics were reported for the period 1989–99: Jenny Mouzos, ‘Homicidal Encounters: A Study of Homicide in Australia 1989–1999’ (Research and Public Policy Series Paper No 28, Australian Institute of Criminology, 2000) 39–40.

<sup>36</sup> Mouzos, ‘Homicidal Encounters’, above n 35, 39.

<sup>37</sup> Mouzos, ‘Homicide in Australia’, above n 34, 5.

<sup>38</sup> Mouzos, ‘Homicidal Encounters’, above n 35, 44–6.

<sup>39</sup> Angela O’Connor, ‘Church Attack Presents Dilemma for Tim Costello’, *The Age* (Melbourne, Australia), 29 August 2002, 7; ‘Stab Victim Critical’, *Herald Sun* (Melbourne, Australia), 15 June 2002, 7.

<sup>40</sup> ‘Man May Have Been Set Alight’, *The Age* (Melbourne, Australia, 19 May 2003) 3.

<sup>41</sup> Matt Gleeson, ‘Obstacles to Surviving Homelessness’ (2000) 13(10) *Parity* 7, 7.

Arbour J of the Supreme Court of Canada (with L'Heureux-Dubé J concurring) stated in *Gosselin*:

Freedom from state interference with bodily or psychological integrity is of little consolation to those who ... are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their rights [to life, liberty and security].<sup>42</sup>

Similarly, the Supreme Court of India has declared that 'the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter'.<sup>43</sup>

The HRC also explicitly places a positive obligation on states in its interpretation of their obligations in respect of the right to life.<sup>44</sup> The HRC has expressed concern that the right to life has often been too narrowly interpreted, stating that, while the right clearly requires protection against such threats to security as evidenced by the case studies above, it also requires action to prevent against such issues as malnutrition and epidemics.<sup>45</sup> On several occasions, the HRC has expressed grave concerns that homelessness leads to 'serious health problems and even to death'.<sup>46</sup> Such enunciations suggest that it is not sufficient that the Australian Government simply respond to violations of the person, or breaches of security. In addition, it must take active steps to ensure an adequate standard of welfare necessary to prevent physical and psychological contraventions of the right to liberty and security, and at the extreme, the right to life.

## 2 *Right to be Free from Cruel, Inhumane or Degrading Treatment or Punishment*

Pursuant to art 7 of the *ICCPR*, no person shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. According to the HRC, the aim of art 7 is to 'protect both the physical and mental integrity ... and the dignity'<sup>47</sup> of the human person by prohibiting not only 'acts that cause physical pain, but also acts that cause mental suffering'.<sup>48</sup> The HRC recognises that the issue as to whether treatment or punishment is proscribed by art 7 is contingent upon the nature, purpose and severity of the treatment having regard to the

<sup>42</sup> *Gosselin* (2002) 221 DLR (4<sup>th</sup>) 257, [377] (Arbour J dissenting); see also *ibid* [141] (L'Heureux-Dubé J dissenting).

<sup>43</sup> *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 68 All India Reporter SC 746, [7].

<sup>44</sup> HRC, *General Comment 6*, above n 32, [5].

<sup>45</sup> *Ibid*.

<sup>46</sup> See, eg, HRC, *Concluding Observations of the Human Rights Committee: Canada*, [12], UN Doc CCPR/C/79/Add.105 (1999).

<sup>47</sup> HRC, *CCPR General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, [2], UN Doc HRI/GEN/1/Rev.5 (2001) (emphasis added).

<sup>48</sup> *Ibid* [5].

conduct being punished.<sup>49</sup> In our view, laws that target or disproportionately impact upon activities associated with the state of homelessness — such as laws that criminalise sleeping, bathing, urinating, drinking or storing belongings in public space — violate the right to be free from cruel, inhumane or degrading treatment or punishment.<sup>50</sup> Such laws discriminatorily affect homeless people on the grounds of their housing status and the necessary location of their conduct, not on the basis that their behaviour itself is reprehensible and therefore ought to be criminal.<sup>51</sup> In so doing, these laws violate common standards of decency and constitute punishment that is disproportionately severe to the ‘crime’.

Brian, a client of the Homeless Persons’ Legal Clinic (‘Clinic’), suffers from an acquired brain injury, chronic alcoholism and manic depression. On the many nights when Melbourne’s crisis accommodation shelters are full, he sleeps rough. During the summer months, his bed is a park bench; during the winter months, it is a train carriage. In the three years since 1999, Brian has received more than A\$2000 in fines for sleeping, swearing, drinking and travelling without a valid ticket on public transport, and over A\$1000 in fines for sleeping, swearing, littering and urinating in a public place. Nonpayment of such fines can result in imprisonment for up to one day for every A\$100 owing. In each case, it has been the location, rather than the nature, of Brian’s conduct that has rendered his behaviour unlawful. Brian would not (and could not) have been charged had he been sleeping, drinking, swearing, urinating or littering in a conventional home.

In our view, the impact of prohibiting the performance of essential human acts in public on those experiencing homelessness is cruel, unusual and degrading. As critical social theorist and lawyer Jeremy Waldron opines:

If urinating is prohibited in public places (and if there are no public lavatories) then the homeless are simply unfree to urinate. These are not altogether comfortable conclusions, and they are certainly not comfortable for those who have to live with them.<sup>52</sup>

Waldron goes on to say:

Though ... there is nothing particularly dignified about sleeping or urinating, there is certainly something deeply and inherently undignified about being prevented from doing so. ... We should be ashamed that we have allowed our laws of public and private property to reduce a million or more citizens to something approaching this level of degradation.<sup>53</sup>

We consider that the impact of fining homeless people for breaches of public space regulations is also cruel, unusual and degrading. As the United States

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<sup>49</sup> Ibid [4].

<sup>50</sup> See generally National Coalition for the Homeless, US, *Illegal to be Homeless: The Criminalisation of Homelessness in the United States* (2001) 37.

<sup>51</sup> For examples of such laws in Victoria, see, eg, *Summary Offences Act 1966* (Vic); *Vagrancy Act 1966* (Vic) (‘*Vagrancy Act*’); numerous local laws (see, eg, *City of Melbourne Activities Local Law 1999*) made under the *Local Government Act 1989* (Vic). See also *Police Offences Act 1935* (Tas) pt II; *Police Act 1892* (WA) pts VI–VII; *Summary Offences Act 1953* (SA); *Summary Offences Act 1996* (NT) pts VIA, VII; *Summary Offences Act 1988* (NSW) pt 2; *Vagrants, Gaming and Other Offences Act 1931* (Qld); *Criminal Code Act 1899* (Qld) pt 2.

<sup>52</sup> Jeremy Waldron, ‘Homelessness and the Issue of Freedom’ (1991) 39 *UCLA Law Review* 295, 315.

<sup>53</sup> Ibid 320.

Supreme Court analogised in *Robinson v California*, imprisonment and fines do not, in the abstract, constitute cruel and unusual punishment, but '[e]ven one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.'<sup>54</sup>

Moreover, taking Brian as an example, fines do not serve the principle purposes of sentencing — namely, deterrence and rehabilitation. They are neither commensurate with, or justified by, the nature and gravity of his conduct, nor his culpability and degree of responsibility for his conduct, in light of his homeless state. In fact, fining Brian for his conduct tends to exacerbate the underlying causes of his poverty, disengagement, depression and frustration. This is particularly the case when Brian is specifically targeted for the selective enforcement of laws.<sup>55</sup>

Rather than punishing homeless people for acts that they necessarily perform in public, it is imperative that we, as a community, develop humane responses. Such responses could not only afford homeless people greater dignity and respect, but could also address legitimate concerns (such as sanitation in the case of a person who urinates in public) through constructive responses (such as the provision of adequate and accessible public restrooms).<sup>56</sup> As Maria Foscarinis, Executive Director of the National Law Centre on Homelessness and Poverty in the US, writes:

[E]veryone has an interest in pleasant public places ... no one has an interest in living on the street. Activism and debate should focus on addressing the conditions that require people to live on the street, by defining and implementing solutions to homelessness.<sup>57</sup>

### 3 *Right to Freedom from Discrimination*

The right to be free from discrimination and to be treated equally before and under the law is entrenched in both the *ICCPR* and *ICESCR*. It may also constitute a non-derogable principle of customary international law.<sup>58</sup>

The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination is set out in art 26 of the *ICCPR*:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any

<sup>54</sup> 370 US 660, 667 (1962). See generally June Rene Fox, 'Constitutionality of the Arrest of the Homeless under the Basis of Cruel and Unusual Punishment' (1993) 20 *Western State University Law Review* 649.

<sup>55</sup> It is the Clinic's experience that a homeless person in Swanston Street, Melbourne, is far more likely to be 'moved on', harassed or fined for drinking in public than a non-homeless person consuming alcohol at a picnic beside the Yarra River.

<sup>56</sup> Caitlin English, 'Legal Services to Homeless People in the United States' (Paper presented at the Council to Homeless Persons Forum, Melbourne, Australia, 18 July 2000) 12. See also Maria Foscarinis, 'Downward Spiral: Homelessness and its Criminalization' (1996) 14 *Yale Law and Policy Review* 1, 58; Donald Baker, 'Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless' (1990) 45 *University of Miami Law Review* 417, 457; Mary Gaudron, 'Human Rights for the Homeless' (1999) 8a *Human Rights Defender* 17, 17–18.

<sup>57</sup> Foscarinis, 'Homelessness and its Criminalization', above n 56, 3.

<sup>58</sup> See generally, Peter Bailey and Annemarie Devereux, 'The Operation of Anti-Discrimination Laws in Australia' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (1998) 292.

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>59</sup>

Although ‘discrimination’ is not defined in the *ICCPR*, the HRC has defined it as

any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>60</sup>

Article 26 prohibits unfair, unjust or less favourable treatment in law or in fact, in any field regulated and protected by public authorities. It imposes an obligation on Australia to ensure that its legislation, and its application is non-discriminatory, and to take positive steps to address the special needs of vulnerable groups so as to enable them to realise *all* of their rights and freedoms.<sup>61</sup>

The norm of nondiscrimination is also enshrined in *ICESCR*, art 2(2) of which 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.

In a legislative sense, this requires that social and economic rights be included in domestic human rights legislation to prevent discrimination against homeless and impoverished people.<sup>62</sup> In a more substantive sense, art 2(2) obliges states to devote their maximum available resources to develop and implement programs to ameliorate homelessness.

The norm of nondiscrimination on the grounds of social origin or status may also constitute a peremptory (or non-derogable) principle of customary international law.<sup>63</sup> In *Namibia*, Vice-President Ammoun of the International Court of Justice stated that ‘[o]ne right which must be considered a pre-existing binding customary norm which the *Universal Declaration of Human Rights* codified is the right to equality’.<sup>64</sup>

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<sup>59</sup> See also *UDHR*, above n 18, art 7.

<sup>60</sup> HRC, *CCPR General Comment 18: Non-Discrimination*, [7], UN Doc HRI/GEN/1/Rev.5 (2001).

<sup>61</sup> *Ibid* [12].

<sup>62</sup> See, eg, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, [51], UN Doc E/C.12/1/Add.31 (1998). See also CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, [22], UN Doc E/C.12/1/Add.35 (1999), in which the Committee recommended that: ‘the State Party incorporate justiciable economic, social and cultural rights in the proposed amendment to the *Constitution*’.

<sup>63</sup> See, eg, Karen Parker and Lyn Neylon, ‘Jus Cogens: Compelling the Law of Human Rights’ (1989) 12 *Hastings International and Comparative Law Review* 411, 441–2.

<sup>64</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 76 (‘*Namibia Case*’). See also *Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v Spain)* [1970] ICJ Rep 3, 34.

Under the terms of international treaty law and customary international law, Australia therefore has an obligation to prohibit, and provide effective remedies for, any discriminatory or less favourable treatment on the grounds of social origin or other status, including homelessness.

At present, this obligation is not being satisfactorily discharged. According to the St Vincent de Paul Society:

Our extensive experience in the [homelessness] sector leads us to believe that there is a significant issue in relation to discrimination against this particular group in the community who have very complex needs and are very vulnerable.<sup>65</sup>

Similarly, St Mary's House of Welcome reports:

Our service users include homeless people, people in financial crisis, people who are suffering hardship, people with alcohol, drug and gambling addictions, mentally ill people and others of low social status. They experience discrimination because of their social status, their appearance, and the results of their lack of access to amenities and services. The effect of this discrimination can be detrimental to health and well-being, result in further financial hardship, and impact negatively on ability to cope.<sup>66</sup>

A recent report produced by the Clinic found that discrimination against people who are homeless, unemployed or social security recipients is widespread in Victoria, particularly in relation to the provision of goods and services or accommodation.<sup>67</sup> The report contends that the failure of equal opportunity and anti-discrimination legislation in Australia to prohibit discrimination on the basis of social status, including status as a homeless person, an unemployed person or a social security recipient, is inconsistent with international human rights law, including *ICCPR* rights, *ICESCR* rights and customary international norms.

International human rights law demands that Australia take immediate and necessary steps to ensure that the homeless enjoy the same freedom from discrimination as people with homes — including by way of legislative protection and the development of programs aimed at addressing poverty — so as to enable homeless people to fully enjoy all of their rights. Reform is imperative to protect some of the most marginalised and disadvantaged members of our community from unfair, unjust or less favourable treatment.

#### 4 *Right to Privacy*

The right to privacy is contained in art 17 of the *ICCPR*, which provides for the right of every person to be protected against arbitrary or unlawful interference with his or her privacy, family, home or correspondence.

An individual's right to privacy is multifaceted. The HRC recognises that this right includes the protection of the integrity and confidentiality of communications, restrictions on searches of a person's home, and the

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<sup>65</sup> Letter from St Vincent de Paul Society to the Clinic, 12 August 2002.

<sup>66</sup> Letter from St Mary's House of Welcome to the Clinic, 20 August 2002.

<sup>67</sup> Philip Lynch and Bella Stagoll, *Promoting Equality: Homeless Persons and Discrimination — Submission Regarding Discrimination on the Ground of Social Status* (2002). See also Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

requirement that personal and body searches be conducted with dignity.<sup>68</sup> The HRC also requires that the collection and holding of personal information — either by public authorities, private individuals or bodies — be regulated by law.<sup>69</sup>

The protection of this privacy is necessarily relative.<sup>70</sup> Clearly, the sharing of relevant personal information is essential for the provision of services. This is undeniably so when providing assistance to the homeless, especially in the provision of services towards the realisation of their rights. However, the HRC requires that the relevant authorities should only be able to request and access information relating to an individual's private life if it is essential to the 'interests of society as understood under the *Covenant*'.<sup>71</sup>

People experiencing homelessness can be disproportionately affected by privacy breaches. Those who are the subject of a privacy breach often lack the information or resources to respond to the breach through the available channels. For example, many people who are homeless, or at risk of homelessness, have to overcome huge barriers when attempting to enter or stay in the rental market. These difficulties are exacerbated by the existence of real estate 'black lists' that arguably breach the right to privacy as recognised under the *ICCPR*.

Real estate black lists (or tenancy database services) allow people such as landlords and agents to record information about their tenants, which, in turn, is provided to other landlords or agents upon request. The type of information collected includes details as to rental arrears, breaches of tenancy agreements, damage to property, taking possessions without consent, bankruptcy and rental bond claims. Although such databases are now subject to the *Privacy Act 1988* (Cth),<sup>72</sup> the manner in which they operate is controversial and arguably prejudicial against those who have previously had difficulties in the rental market, a situation common for many homeless people.

The most crucial problem with the databases is that the information captured is often based on mere allegations.<sup>73</sup> Chris Martin, Policy Officer for the New South Wales Tenants' Union, has said that the 500 000 names listed on one major database is 'disproportionate' to the average 44 000 tenancy disputes that are heard each year before the New South Wales Residency Tribunal.<sup>74</sup> In an inquiry into privacy in the private sector, the Senate Legal and Constitutional Committee noted that:

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<sup>68</sup> HRC, *CCPR General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, [8], UN Doc HRI/GEN/1/Rev.5 (2001).

<sup>69</sup> *Ibid* [10].

<sup>70</sup> *Ibid* [7].

<sup>71</sup> *Ibid*.

<sup>72</sup> The provisions of the *Privacy Act 1988* (Cth) (*'Privacy Act'*) were extended from 21 December 2001 to cover private sector organisations (with certain exemptions). The *Privacy Act* was further extended from 21 December 2002 so that the National Privacy Principles also cover small businesses dealing in personal information.

<sup>73</sup> Chris Martin, quoted in Kirsty Needham, 'Tenants Get Chance to Challenge Blacklist', *The Sydney Morning Herald* (Sydney, Australia), 11 November 2002, 3.

<sup>74</sup> Needham, above n 73, 3. This comment was made in specific reference to the Tenancy Information Centre Australasian Holdings Ltd database (*'TICA database'*), a tenancy database reported to have most impact in northern New South Wales.

data collected is unlikely to take into account the reasons why some tenants may have defaulted on a tenancy lease. Loss of employment, cuts in social welfare benefits, illness, late workers' compensation payments, domestic violence can all force tenants to fall into rent arrears.<sup>75</sup>

One of the largest tenancy databases in Australia is the TICA database. The TICA website clearly articulates a commitment to compliance with the National Privacy Principles set out in the *Privacy Act*.<sup>76</sup> However, in practice, there are still issues regarding this commitment. One specific concern is the inadequate dispute resolution procedures and the lack of notice given to a tenant when he or she is listed on a database.<sup>77</sup> Research regarding the TICA database has found that 70 per cent of homeless people listed were unaware of their listing.<sup>78</sup> A person's lack of awareness of his or her listing (or of the database itself) means that personal information is made available to others without his or her knowledge. In our view, this is a gross violation of the right to privacy, particularly when considered in the context of the strong correlation between listing on a tenancy database and homelessness.<sup>79</sup>

Although the *Privacy Act* requires that those listed on the databases be able to access their records and amend them if appropriate, this does not redress the difficulties that many homeless people experience. For example, the TICA database charges A\$5.45 per minute on its only telephone number accessible to the public. The alternative means of contact are email and mail. It is difficult for a homeless person with no fixed address to receive postal replies, and the cost of telephoning or accessing email is a significant barrier to many homeless persons who may wish to query their entries. In addition, even if a person is able to have his or her entry corrected to accurately reflect his or her situation, once entered into the database people still appear to encounter numerous rental difficulties.<sup>80</sup>

Although it is acknowledged that a rental database may be a useful and valuable tool in the rental market, the collection, use and dissemination of personal information must be managed having regard to the right to privacy. In particular, the impact on people who are homeless or at risk of homelessness must be monitored. Additionally, the mechanisms necessary to monitor and respond to breaches of the right to privacy must be effective and accessible.

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<sup>75</sup> Senate Legal and Constitutional Committee, Parliament of Australia, *Privacy in the Private Sector: Inquiry into Privacy Issues, Including the Privacy Amendment Bill 1998* (1999) [2.43].

<sup>76</sup> Tenancy Information Centre Australasian Holdings Ltd, *The TICA Group* <<http://www.tica.com.au>> at 1 May 2003.

<sup>77</sup> Special Government Backbench Committee, Parliament of Queensland, *Report of Special Government Backbench Committee to Inquire into the Operation of Tenancy Databases* (2002) 19.

<sup>78</sup> Catherine Mahoney, 'Ticked Off: Regional Research on Tenancy Databases and Homelessness', *NCOSS News* (Sydney, Australia), December 2002, 7.

<sup>79</sup> This is also a proposition asserted by Catherine Mahoney: *ibid*, 1, 7. See also Special Government Backbench Committee, above n 77, 49, citing Tenancy Database Action Group, *Survey Analysis of the Impact of Tenant Databases in Homeless Services* (2002).

<sup>80</sup> See, eg, the case studies cited in Special Government Backbench Committee, above n 77, 25–7.

5 *Right to Freedom of Expression*

Pursuant to art 19(2) of the *ICCPR*, all persons have the right to freedom of expression, including the right to seek, receive and impart information through any media, including orally, in writing or in the form of art. Article 19(3) recognises that freedom of expression may be limited by law, but only to the extent necessary to respect the rights and reputations of others or to protect national security or public order. We consider that the proscription and criminalisation of begging constitutes an infraction of the fundamental human right to freedom of expression.<sup>81</sup>

In most Australian states, begging is a criminal offence punishable by imprisonment.<sup>82</sup> For example, s 6(1)(d) of the *Vagrancy Act* provides that '[a]ny person who begs or gathers alms ... shall be guilty of an offence.' The prescribed maximum penalty for a first offence is one year of imprisonment, while for a second or subsequent offence it is two years of imprisonment. Anti-begging provisions such as those contained in the *Vagrancy Act* violate the right to freedom of expression in two basic respects.

First, the proscription of begging renders peaceful verbal or written communication unlawful. Anti-begging provisions apply whether a person adopts passive begging techniques (such as sitting or standing in one spot with a cup, a hat or a sign) or more active begging techniques (such as approaching passers-by and entreating them to donate money).<sup>83</sup> In each case, it is the act of expressing a need for money, rather than the conduct associated with that expression, that is the target of anti-begging provisions.<sup>84</sup> The law does not otherwise proscribe peaceful passive communication (such as a newspaper vendor sitting in one spot with his or her newspapers) or even more active peaceful communication (such as a tourist approaching passers-by and asking them for directions).<sup>85</sup>

Second, anti-begging provisions infringe the right to freedom of expression in that they proscribe the imparting (and, by extension, the receiving) of communications regarding the way in which society treats its poor and disenfranchised. In many cases, begging amounts to an expression of poverty, alienation, homelessness, dislocation and the effects of inadequate social security, public housing and public health systems. This is supported by the

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<sup>81</sup> In the US, many anti-begging provisions have been struck down or narrowed on the basis of inconsistency with the First Amendment right to freedom of expression: see, eg, *Benefit v Cambridge*, 424 Mass 918 (1997); *Heathcott v Las Vegas Metropolitan Police Officers*, CV-S-93-045-LDG (Unreported, D Nev, 3 March 1994); *Loper v New York City Police Department*, 999 F 2d 699 (2<sup>nd</sup> Cir, 1993).

<sup>82</sup> See, eg, *Vagrancy Act* s 6(1)(d); *Transport (Passengers and Rail Freight) Regulations 1994* (Vic) reg 325(d); *Police Offences Act 1935* (Tas) s 8(1)(a); *Police Act 1892* (WA) s 65(3); *Summary Offences Act 1953* (SA) s 12; *Summary Offences Act 1996* (NT) s 56(1)(c).

<sup>83</sup> It is acknowledged that begging may, in some instances, be accompanied by aggressive or undesirable conduct. This conduct is, however, already adequately regulated by the common law and legislation. In Victoria, for example, *Crimes Act 1958* (Vic) div 1 renders unlawful conduct including battery, assault and other crimes against the person. It is not necessary to criminalise begging in order to continue to proscribe such aggressive or undesirable behaviour.

<sup>84</sup> See, eg, *Cohen v California* 403 US 15, 18 (1971); Helen Hershkoff and Adam Cohen, 'Begging to Differ: The First Amendment and the Right to Beg' (1991) 104 *Harvard Law Review* 896, 908.

<sup>85</sup> Hershkoff and Cohen, above n 84, 906.

results of a study conducted by Hanover Welfare Services (in collaboration with Victoria Police and the City of Melbourne) to investigate the nature, extent and underlying causes of begging within Melbourne's central business district.<sup>86</sup> Hanover's research revealed that people who beg are usually the most marginalised, disadvantaged and disenfranchised in society. The study found that, of the persons observed to be engaged in begging behaviours over a four month period in 2000, 93 per cent were long term unemployed, 71 per cent were sleeping rough or in squats (and a further 28 per cent were living in crisis accommodation or with family or friends), 43 per cent were long-term homeless, 71 per cent suffered from substance addictions, and 93 per cent were receiving social security payments (although 28 per cent had payments reduced or terminated as a result of Centrelink 'breaches').<sup>87</sup> As Hanover concludes, each of these indicators supports the conclusion that begging is an income supplement necessary for survival at some level, related to the need for food, accommodation or addictive behaviours.<sup>88</sup> The main reasons given for begging included poverty, mental illness, inadequate or non-existent social security payments, and heroin, alcohol and gambling addictions.<sup>89</sup> The criminalisation of begging therefore not only denies to persons who beg a form of expression that may be necessary for survival, but also denies them the right to impart, and society the right to receive, information regarding poverty, inequality, structural inadequacies and the need for urgent social reform. By silencing people who beg, anti-begging provisions stifle debate about social policies regarding the poor.<sup>90</sup>

## 6 *Right to Freedom of Association*

Article 22(1) of the *ICCPR* provides that all persons have the right to freedom of association with others. No restrictions are permitted to be placed on the exercise of this right other than those necessary to protect the interests of national security, public safety, public order, public health or morals, or the rights and freedoms of others.<sup>91</sup>

Anti-consorting provisions, which exist across Australia and the United Kingdom, constitute an infraction of the fundamental right to freedom of association.<sup>92</sup> For example, in Victoria, pursuant to s 6(1)(a)–(c) of the *Vagrancy*

<sup>86</sup> Michael Horn and Michelle Cooke, *A Question of Begging: A Study of the Extent and Nature of Begging in the City of Melbourne* (2001). See also Kate Driscoll and Liz Wood, *A Public Life: Disadvantage and Homelessness in the Capital City* (1998). Hanover Welfare Service's research is corroborated by extensive research conducted in UK and the US, including Hartley Dean (ed), *Begging Questions: Street Level Economic Activity and Social Policy Failure* (1999); P A Kemp, 'The Characteristics of Single Homeless People in England' in Roger Burrows, Nicholas Pleace and Debra Quilgars (eds), *Homelessness and Social Policy* (1997) 69; Joe Hermer, *Policing Compassion: The Governance of Begging in Public Space* (2002); David Taylor, *Begging for Change: A Social Ecological Study of Aggressive Panhandling and Social Control in Los Angeles* (PhD Thesis, University of California, 1999).

<sup>87</sup> Horn and Cooke, above n 86, 15–16.

<sup>88</sup> *Ibid* 15, 24.

<sup>89</sup> *Ibid* 16, 21.

<sup>90</sup> Hershkoff and Cohen, above n 84, 898.

<sup>91</sup> *ICCPR*, above n 19, art 22(2).

<sup>92</sup> See, eg, *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 4(d); *Summary Offences Act 1953* (SA) s 13; *Police Offences Act 1935* (Tas) s 6; *Police Act 1892* (WA) ss 65(7), (9); *Crimes Act 1900* (NSW) s 546A.

*Act*, it is an offence, punishable by imprisonment, to consort with ‘reputed thieves’. The term ‘consorts’ means ‘associates’ or ‘keeps company’.<sup>93</sup> The consorting provisions therefore proscribe association with certain classes of persons. This proscription is founded on the notion that such persons are ‘undesirable’ or ‘discreditable’<sup>94</sup> and may tempt ‘innocent persons’ to criminal activity. The offence of consorting is made out if a person regularly associates with or keeps the company of reputed thieves. It is not necessary that such association be for an unlawful or criminal purpose. In our view, anti-consorting provisions violate the right to freedom of association in two basic respects.

First, as discussed above, anti-consorting provisions are intended to inhibit people from associating with persons of a designated class. This not only offends the right to freedom of association, but may operate to ostracise and isolate persons in the designated class, thereby cutting them off from companionship, friendship and support. It seems clear that such isolation and alienation is likely to exacerbate rather than address the underlying causes of a person falling within the designated class. The inconsistency of anti-consorting provisions with the right to freedom of association is perpetuated by the manner in which the provisions vest law enforcement officers with arbitrary and discriminatory powers.<sup>95</sup> As the Supreme Court of Illinois concluded in *People v Belcastro*, a person’s reputation might be ‘good among one class of people or in one section of the city and bad among other classes or in other localities’.<sup>96</sup> The power of law enforcement officers to make a determination as to a person’s reputation and then, on the basis of that determination, to charge associates of that person with the criminal offence of consorting, is vague, excessive, arbitrary and potentially open to differential application or abuse.

The second way in which anti-consorting provisions are inconsistent with the right to freedom of association is that they are predicated on guilt by association. As Murphy J opined in *Johanson v Dixon*, ‘[i]t is disturbing that a person can be sentenced to imprisonment for twelve months for associating with others even if the association is innocent of “sinister, illicit or illegal” purpose.’<sup>97</sup>

Consorting offences which deem it to be a crime to be in the ‘company of’ or ‘consorting with’ reputed thieves have a disproportionate impact on homeless persons. As discussed above, many homeless people suffer from drug or alcohol addictions. Many have psychological illnesses or mental disorders and are regularly ‘preyed upon’. Some homeless people resort to petty crime to satisfy subsistence needs. Others have spent time in prison and are seeking to reconnect and reintegrate with the community. Each of these classes of person is substantially more likely to associate with reputed thieves than persons who are not in such a position of disadvantage and marginalisation.<sup>98</sup>

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<sup>93</sup> *Johanson v Dixon* (1979) 143 CLR 376, 384.

<sup>94</sup> *Ibid.*

<sup>95</sup> See generally Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report* (2002) 12–13. See also *People v Belcastro*, 190 NE 301, 304 (Ill, 1934).

<sup>96</sup> 190 NE 301, 304 (Ill, 1934).

<sup>97</sup> (1979) 143 CLR 376, 393. See also Scrutiny of Acts and Regulations Committee, above n 95, 12–13.

<sup>98</sup> See generally Scrutiny of Acts and Regulations Committee, above n 95, 12–13.

7 *Right to Vote*

Article 25(2) of the *ICCPR* recognises and protects the right of every citizen to vote. Whatever the form of constitution or government adopted by a state, art 25(2) requires that the state adopt all such legislative and other measures as may be necessary to ensure that all citizens have an effective opportunity to enjoy and realise the right to vote.<sup>99</sup> No distinctions are permitted between citizens in the enjoyment of the right to vote on the grounds of, inter alia, social origin, property or other status.

According to the HRC, states must take effective measures to ensure that all persons eligible to vote are able to practically exercise this right. The HRC has stated that, where registration of voters is required, it should be properly facilitated. In this respect, the HRC recognises that realisation of the right may require the adoption of positive measures to overcome specific difficulties (such as illiteracy or poverty) that may operate to prevent persons entitled to vote from exercising their rights effectively.<sup>100</sup> Residency requirements must not be imposed or applied in such a way as to exclude the homeless from the right to vote.<sup>101</sup>

Contrary to the requirements of art 25 of the *ICCPR* and the recommendations of the HRC, many homeless people in Australia are unable to practically exercise their right to vote. Of the approximately 88 000 homeless people who are eligible voters in Australia,<sup>102</sup> it is estimated that between 33 and 90 per cent are not registered to vote.<sup>103</sup> This suggests that between 29 000 and 80 000 homeless people did not vote in the 2001 federal election.<sup>104</sup>

Impediments to homeless people registering and exercising their right to vote arise from both the terms and the application of the *Commonwealth Electoral Act 1918* (Cth) (*'Electoral Act'*). For example, s 99 requires that a person must have lived in an electorate for at least one month in order to vote in that electorate. Many homeless people live in temporary or transient accommodation and do not satisfy this requirement. Similarly, voter registration forms produced pursuant to s 98 require that a person provide a 'residential address' to be included on the electoral roll. Many homeless people do not have a recognised residential address. Additionally, monetary penalties associated with s 101 (which provides that it is an offence for an elector to fail to give notice of a change of address within 21 days) and s 245 (which provides that it is an offence for an elector to

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<sup>99</sup> HRC, *CCPR General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, [1], UN Doc HRI/GEN/1/Rev.5 (2001).

<sup>100</sup> *Ibid* [12].

<sup>101</sup> *Ibid* [11].

<sup>102</sup> Michael Horn, *Social and Democratic Exclusion: Giving Voice to the Homeless* (2001) 2.

<sup>103</sup> Hanover Welfare Services estimates that approximately one-third of homeless people are not registered to vote: Hanover Welfare Services, *Stats and Facts: Homelessness and the Federal Election* (2001) 3. The Australian Federation of Homelessness Organisations estimates that more than 90 per cent of homeless people are not registered to vote: Australian Federation of Homelessness Organisations, 'Proposals Threaten Voting Opportunities for Homeless and Young Australians' (Press Release, 27 June 2001) 1.

<sup>104</sup> Homeless Persons' Legal Clinic, 'Giving Voice to the Voiceless' (Submission No 145, Joint Standing Committee on Electoral Matters Inquiry into the 2001 Federal Election, Parliament of Australia, 2002) 5 <<http://www.aph.gov.au/house/committee/em/elect01/subs/sub145.pdf>> at 1 May 2003.

fail to vote at an election) operate as significant disincentives to homeless persons to register as electors.

Some steps have been taken to overcome these impediments and disincentives through the enactment of s 96 of the *Electoral Act*, which entitles certain persons with no 'real place of living' to enrol as itinerant electors. However, enrolment as an itinerant elector is administratively burdensome and is not possible if the person has resided in an electorate for a month or longer. Further, a person ceases to be entitled to be treated as an itinerant elector if, while so enrolled, a general election is held at which the person neither votes nor applies to vote.

It is imperative that the Australian Government, in conjunction with the Australian Electoral Commission, take immediate steps to enable homeless people to realise and exercise their right to vote. Such steps could include amendment of the *Electoral Act* to enable homeless people to register to vote in an electorate with which they have a 'close connection', to exempt homeless persons from the monetary penalties associated with failure to notify a change of address or failure to vote, and to simplify and streamline the itinerant voter provisions.<sup>105</sup> In accordance with the recommendations of the HRC, the Australian Electoral Commission must also adopt positive measures to educate and assist homeless persons regarding their right to vote. This could include locating polling booths, and conducting voter education and registration programs at crisis accommodation centres and homelessness agencies.<sup>106</sup>

## 8 *Right to Social Security*

The right of all persons to receive social security is recognised by art 9 of *ICESCR*. Article 9 imposes a positive obligation on the Australian Government to provide basic means of subsistence to those who cannot provide for themselves. Thus, although art 9 does not specify the type or level of social security to be guaranteed, CESCR has commented that it must be available to 'cover all the risks involved in the loss of means of subsistence beyond a person's control'.<sup>107</sup>

In addition to being codified in *ICESCR*, the right to social security may also constitute a component of the right to life, liberty and security of the person. Arbour J of the Supreme Court of Canada recently held in *Gosselin* that:

a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.<sup>108</sup>

Importantly, Arbour J also noted that, consistent with the right to social security, it would be a 'rare case indeed' in which a government could successfully claim that the deleterious effects of denying access to social security payments to

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<sup>105</sup> Ibid 5.

<sup>106</sup> Ibid 6.

<sup>107</sup> CESCR, *CESCR General Comment 6: The Economic, Social and Cultural Rights of Older Persons*, [26], UN Doc E/1996/22 (1995).

<sup>108</sup> *Gosselin* (2002) 221 DLR (4<sup>th</sup>) 257, [358] (Arbour J dissenting); see also [141] (L'Heureux-Dubé J dissenting).

persons in need is justifiable in contemplation of ‘long-term benefits’<sup>109</sup> (such as ‘forcing’ such persons into the workforce).

It is therefore submitted that, although the right to social security may be subject to such reasonable access requirements as are imposed by law, it must be at least realisable to a subsistence level by all persons unable to earn a sufficient livelihood. This includes the homeless, persons with disabilities or impairments, the elderly, and those persons involuntarily unemployed or underemployed.<sup>110</sup>

In Australia, the *Social Security Act 1991* (Cth) (*‘Social Security Act’*) regulates eligibility for, and payment of, social security. Pensions and allowances payable under the *Act* include the Disability Support Pension,<sup>111</sup> Youth Allowance,<sup>112</sup> parenting, carer and family payments,<sup>113</sup> the Age Pension<sup>114</sup> and Newstart.<sup>115</sup> Eligibility for most pensions and allowances is contingent upon satisfying stringent assets and income tests.<sup>116</sup> The *Social Security Act* does not guarantee a minimum living wage and, with the exception of Special Benefit (which is paid at the absolute discretion of Centrelink), is not payable to persons merely because they are unable to earn a sufficient livelihood.<sup>117</sup> Further, the *Social Security Act* does not confer an enforceable ‘right’ to social security, but instead confers a benefit or privilege that can be expanded or revoked at the Government’s discretion.<sup>118</sup>

The right to social security under art 9 of *ICESCR* is a right that is either denied to, or not capable of effective realisation by, many homeless people. Many homeless people face significant systemic difficulties with respect to complying with qualification requirements for social security payments. Moreover, once qualified for payment, many homeless people are disproportionately susceptible to, and impacted by, social security penalties. We will consider Newstart as an example.

In order to access Newstart, a claim must be submitted to Centrelink on the mandated claim form. The claim form must be supported by, inter alia, documentation establishing the identity of the person making the claim and that of their partner, if applicable. Current Centrelink practice requires that a person adduce ‘100 points’ of identification to prove identity (and, by extension, to access Newstart). This represents a regressive step from the former proof of identity system which simply required that a person produce three forms of identification, one of which could include a letter from a youth or social worker. Proof of identity requirements operate discriminatorily against the homeless, many of whom are unlikely to hold the requisite documents or have the money or

<sup>109</sup> Ibid.

<sup>110</sup> See, eg, CESCR, *CESCR General Comment 5: Persons with Disabilities*, [28], UN Doc E/1995/22 (1994). Cf *Green v Daniels* (1977) 51 ALJR 463 (Stephen J).

<sup>111</sup> This is payable to persons who suffer from an ‘impairment’ and a ‘continuing inability to work’: *Social Security Act* s 94.

<sup>112</sup> This is an unemployment and student-related payment for persons under 25 years of age: *Social Security Act* s 540.

<sup>113</sup> This is payable to low-income parents and carers: *Social Security Act* ss 500, 198.

<sup>114</sup> This is payable to persons over 65 years of age: *Social Security Act* s 43.

<sup>115</sup> An unemployment benefit: see *Social Security Act* s 593.

<sup>116</sup> See generally *Social Security Act*.

<sup>117</sup> This is a discretionary benefit payable only to those who do not qualify for any other support payment: *Social Security Act* s 729.

<sup>118</sup> *Green v Daniels* (1977) 51 ALJR 463, 469 (Stephen J).

resources to obtain them. Accessing documents may be especially difficult, if not impossible, for women and children fleeing domestic violence and for refugees and asylum seekers.

Where a homeless person is able to establish identity, eligibility for payment of Newstart is generally contingent upon the claimant complying with a 'Preparing for Work Agreement'.<sup>119</sup> Preparing for Work Agreements often impose conditions — such as regularly attending job interviews or promptly responding to Centrelink correspondence<sup>120</sup> — with which homeless people are unable or unlikely to comply.<sup>121</sup> Many homeless people have more pressing concerns than attending a job interview — like finding somewhere safe to sleep and something to eat. With no fixed address, many homeless people do not receive Centrelink correspondence. When correspondence is received, lack of access to education and concomitant rates of illiteracy may mean that a homeless person is unable to comprehend it. Failure to comply with the requirements of a Preparing for Work Agreement usually result in a person being 'breached', meaning that the payment of the unemployment 'benefit' is reduced or terminated.<sup>122</sup>

While breaches may represent a 'saving' to the government, they occasion significant physical, financial and psychological hardships to the people penalised.<sup>123</sup> Breaches often result in a vicious cycle of poverty and homelessness as an individual's energies and resources are directed towards surviving rather than securing employment.<sup>124</sup> Reflecting on the plight of a young homeless woman unable to access social security payments adequate to meet basic subsistence needs, Arbour J of the Supreme Court of Canada recently stated:

The psychological and social consequences of being excluded from the full benefits of the social assistance regime were ... devastating. The hardships and marginalisation of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction.<sup>125</sup>

As this statement recognises, the cost of breaches is not only felt by welfare agencies and service providers to which people turn during nonpayment periods, but by our community as a whole.

Taken together, the inadequate coverage of the *Social Security Act*, and the difficulties confronted by people experiencing homelessness in relation to obtaining and maintaining social security payments for which they are eligible, constitute a violation of the right to social security. By extension, denying the income necessary to obtain food, shelter, health care and clothing (access to

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<sup>119</sup> *Social Security Act* pt 2.12, div 1(A)–(C).

<sup>120</sup> *Social Security Act* pt 2.12, div 1(C).

<sup>121</sup> See generally Australian Council of Social Service, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties* (2002). For a discussion of this issue in the US context, see Foscarinis, 'Homelessness and its Criminalization', above n 56, 15.

<sup>122</sup> *Social Security Act* pt 2.12, div 1(F)–(G).

<sup>123</sup> Australian Council of Social Services, *Breaching the Safety Net*, above n 121, 22–3.

<sup>124</sup> See, eg, the story of Aron: *ibid* 20. See also *Gosselin* (2002) 221 DLR (4th) 257 [373]–[377] (Arbour J dissenting).

<sup>125</sup> *Gosselin* (2002) 221 DLR (4th) 257, [376] (Arbour J dissenting); see also [141] (L'Heureux-Dubé J dissenting).

which is axiomatic to autonomy, dignity and survival) also constitutes a violation of the fundamental right to life, liberty and security of the person.

Article 9 of *ICESCR*, when read in conjunction with art 2(1) of *ICESCR* demands that the Australian Government take steps, to the maximum of its available resources, to create an integrated package of social security assistance to homeless persons that includes housing, employment assistance and personal support to ensure sustainable outcomes.<sup>126</sup> In accordance with the obligation to immediately realise all *ICCPR* rights, the Australian Government must also take all necessary steps to ensure that basic subsistence requirements necessary to realise the right to life, liberty and security of the person are provided.

### 9 *Right to Adequate Standard of Living*

The right to an adequate standard of living is encapsulated in art 11(1) of *ICESCR*. Components of the right include the right to adequate housing, the right to adequate food, the right to clothing and the right to the continuous improvement of living conditions. Additionally, although water is not specifically referred to in art 11, *ICESCR* recognises the essential impact that access to safe, sufficient and affordable drinking water has on maintaining an adequate standard of living.<sup>127</sup>

The right to adequate housing is multifaceted. It requires not only a roof over one's head, but 'the right to live somewhere in security, peace and dignity'.<sup>128</sup> In two *General Comments* relating to the right to adequate housing, *ICESCR* has identified a number of factors essential to the realisation of this right, including: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.<sup>129</sup>

By definition, a homeless person does not have access to adequate housing. Those experiencing primary homelessness lack nearly all the fundamental requirements of adequate housing. A person moving frequently from one form of temporary shelter to another will often lack privacy and security. Even those suffering tertiary homelessness do not have the security of tenure of a lease and may also be without the requisite privacy and security required to fully realise the right to housing. Take, for example, the circumstances of one woman:

After a housing crisis, Ms P is allocated a flat by a Transitional Housing Service. She signs the lease, and a week later, the THM [Transitional Housing Manager] receives a sixty-day eviction notice. The Department of Human Services has leased the flat from a private owner, who has decided to take advantage of the booming property market, and sell the flat. Mrs P and her THM search for replacement housing, but are unable to secure adequate accommodation in the same area. Facing an on-going crisis of housing, Ms P decides to move to rural

<sup>126</sup> Michael Horn, 'The More Things Change, the More They Stay the Same' (2002) 15(9) *Parity* 5. See also Australian Council of Social Service, *Breaching the Safety Net*, above n 121, 21.

<sup>127</sup> *ICESCR*, *ICESCR General Comment 15: The Right to Water*, [3], UN Doc E/C.12/2002/11 (2002).

<sup>128</sup> *ICESCR*, *General Comment 4*, above n 2, [7].

<sup>129</sup> *Ibid* [8]. With regard to legal security of tenure, see also *ICESCR*, *ICESCR General Comment 7: The Right to Adequate Housing: Forced Evictions*, [7], UN Doc E/1998/22 (1998).

Victoria, where she is more easily able to access housing, despite the disruption it will cause to her children. She is then penalised by Centrelink for moving to an area of higher unemployment.<sup>130</sup>

CESCR has specifically noted that security of tenure should guarantee protection against forced eviction<sup>131</sup> and that evictions should not result in a person being rendered homeless.<sup>132</sup> If an individual is constantly at risk of eviction and lacks safe and secure alternatives, then they cannot be considered to be residing in adequate housing with an adequate standard of living. In such cases, the Australian Government has a positive obligation to take all appropriate measures, to the maximum of its available resources, to ensure adequate alternative housing or resettlement.

As discussed above, the right to an adequate standard of living also includes the right to food. The right to adequate food involves physical and economic access to adequate food or the means for its procurement.<sup>133</sup> CESCR considers that the adequacy of this food requires that it be 'sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture'.<sup>134</sup> The accessibility of food must be such that it does not interfere with the enjoyment of other human rights.<sup>135</sup> Homeless persons often have poor and inadequate food intake. A number of reasons for this have been articulated, including irregular food consumption, alcohol abuse, poor dental health, and general health problems (such as gastrointestinal problems) which result in malnutrition.<sup>136</sup> Other factors contributing to inadequate food intake include an inability to plan and budget for food, inadequate food preparation facilities, inadequate food preparation skills, and the general cost of purchasing nutritious food.<sup>137</sup>

An important component of the right to an adequate standard of living is the affordability of housing, food, water and clothing. Both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have set out that

adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities — all at a reasonable cost.<sup>138</sup>

The National Housing Strategy proposes that housing is 'affordable' when it constitutes no more than 30 per cent of household income.<sup>139</sup> Since 1986, the

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<sup>130</sup> Anecdotal evidence from Women's Housing Ltd, cited in Caroline Lambert, 'Women's Housing as a Human Right' (2002) 15(8) *Parity* 4, 4. For a similar scenario, see also Salvation Army Australia Southern Territory, *Stepping into the Breach: A Report on Centrelink Breaching and Emergency Relief* (2001) 13.

<sup>131</sup> CESCR, *General Comment 7*, above n 129, [1].

<sup>132</sup> *Ibid* [16].

<sup>133</sup> CESCR, *CESCR General Comment 12: The Right to Adequate Food*, [6], UN Doc E/C.12/1999/5 (1999).

<sup>134</sup> *Ibid* [8].

<sup>135</sup> *Ibid*.

<sup>136</sup> Department of Human Services, Victoria, *Primary and Acute Health Responses to People Who Are Homeless or at Risk of Homelessness: Information Paper* (2000) 5.

<sup>137</sup> *Ibid*.

<sup>138</sup> CESCR, *General Comment 4*, above n 2, [7].

number of poor households in major capital cities in Australia spending more than 30 per cent of their income on housing has risen from 90 000 to over 250 000.<sup>140</sup> A case study provides a good example:

In 1972, I used to dream of owning a new Kingswood station wagon. By 1992, I was living in one. That was my introduction to living on the street. I live on the street by choice. The idea of shelling out more than half my income to a landlord or investor for a shoe box sized room and bed, complete with cockroaches and the constant smell of bacon and lamb fat has no appeal.<sup>141</sup>

The rising cost of private housing in Australia, when considered in conjunction with recent major funding cuts to the public housing sector,<sup>142</sup> is incompatible with the requirement that housing 'be ensured to all persons irrespective of income or access to economic resources'.<sup>143</sup>

Article 11(1) of *ICESCR*, when read in conjunction with the implementation obligations arising under art 2(1), requires that the Australian Government take all measures to realise the right to an adequate standard of living for every person in the shortest possible time in accordance with its maximum available resources.<sup>144</sup> At the very least, the Australian Government must adopt a national housing policy and demonstrate that a 'substantial portion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed'.<sup>145</sup> It must also take steps to ensure access to, and affordability of, adequate food, water and clothing for all Australians.

## 10 *Right to Health*

After an absence of adequate housing, the right to health is probably one of the most visibly violated human rights for those experiencing homelessness. As one homeless person reflects:

Hungry, hungry  
Always hungry  
Searching dustbins  
Shivering cold  
Sleeping in parks  
And railway stations

Gentle prod  
'You can't sleep here, son  
Haven't you got a home to go to?'  
'Well, to tell the truth...?'

<sup>139</sup> Dianne Otto and Philip Lynch (eds), *UN Special Rapporteur on Adequate Housing: Questionnaire on Women and Adequate Housing — An Australian Submission* (2002) 8.

<sup>140</sup> Affordable Housing National Research Consortium, *Affordable Housing in Australia: Pressing Need, Effective Solution* (2001) 2.

<sup>141</sup> Anecdotal evidence cited in Mission Australia Social Policy and Research Department, *Snapshot — Hidden Homelessness* (2001) 2.

<sup>142</sup> In 2002, it was estimated that over 221 000 Australians remain on public housing waiting lists: Australian Council of Social Service, *Public and Community Housing: A Rescue Package Needed* (2002) 1.

<sup>143</sup> CESCR, *General Comment 4*, above n 2, [7].

<sup>144</sup> *Ibid* [14].

<sup>145</sup> *Ibid* [19].

How I'd love a bacon sandwich  
 How I'd love a nice warm sweater  
 Pay a visit to the op shop  
 'Sorry, haven't got two bucks'  
 Can't afford a nice warm sweater  
 Can't afford to phone my mother  
 Wonder why and what it's for ...<sup>146</sup>

The mental impact of homelessness, together with its common underlying causes and associated circumstances, is a gross violation of the right to health.

The right to health is contained in art 12(1) of *ICESCR*, which provides for a right to the 'highest attainable standard of physical and mental health'. It is also a concomitant of the right to an adequate standard of living; art 25(1) of the *UDHR* establishes that 'adequacy' is a standard of living 'adequate for health'.

Although the right to health is not the right to be healthy (CESCR acknowledges that health is relative to an individual's biological conditions and a state's available resources),<sup>147</sup> the right does impose important substantive obligations on the state to establish conditions designed to ensure that people have the best possible chance of being healthy. Having regard to this, CESCR has pronounced that the attainment of the right to health must be achieved by the enjoyment of a variety of facilities, goods, services and conditions necessary to ensure an individual's health.<sup>148</sup> This includes access to appropriate health care and also access to safe water, adequate sanitation, an adequate supply of safe food, nutrition, housing, occupational health, a healthy environment and access to health-related information.<sup>149</sup> Services must be provided in a culturally appropriate<sup>150</sup> and non-discriminatory manner.<sup>151</sup>

The homeless are vulnerable to ill-health by nature of their circumstances. People experiencing homelessness are at greater risk of most adverse health conditions than the general population.<sup>152</sup> For example, a research project of the Royal District Nursing Service Homeless Persons Program found that 71 per cent of homeless young women (aged 18–25) had suffered an illness in the last two years, with 24 per cent of this group suffering asthma.<sup>153</sup> The incidence of asthma in Australia generally for this age group of women is only 16 per cent.<sup>154</sup> The research also found that 62 per cent of young homeless women reported a

<sup>146</sup> C Wallenborn, 'Hungry', *The Big Issue* (Melbourne, Australia), 26 December 2002 – 7 January 2003, 35.

<sup>147</sup> CESCR, *CESCR General Comment 14: The Right to the Highest Attainable Standard of Health*, [9], UN Doc E/C.12/2000/4 (2000).

<sup>148</sup> *Ibid* [4], [9].

<sup>149</sup> *Ibid* [11].

<sup>150</sup> *Ibid* [12(c)], [27], [37].

<sup>151</sup> *Ibid* [43(a)].

<sup>152</sup> Royal District Nursing Service Homeless Persons Program, *A Framework: Improving Health Outcomes for People Experiencing Homelessness in Victoria* (1999), cited in Department of Human Services, Victoria, *Primary and Acute Health Responses to People Who Are Homeless or at Risk of Homelessness: Information Paper* (2000) 4.

<sup>153</sup> Pip Nicholson, 'The Health Status of Homelessness — Young Women in Melbourne: An Investigation into the Health Status of Homeless Women in Melbourne' (Paper presented at the Young Women 2000 Conference, Melbourne, Australia, 22–23 March 2000) 2.

<sup>154</sup> *Ibid*.

psychiatric diagnosis of depression.<sup>155</sup> In Australia generally, the national lifetime incidence of major depression is estimated at 6.3 per cent.<sup>156</sup> This is strong evidence that homelessness is an infraction of the right to physical health and mental wellbeing.

Health problems that are particularly evident in those experiencing homelessness include problematic substance use, mental health problems, poor liver function, poor dental health, poor nutritional status, eyesight problems and infectious diseases.<sup>157</sup> Many of these problems arise from poor routine health care, lack of access to services, inability to receive continuity of care, and limited knowledge of general health matters.<sup>158</sup>

Notwithstanding homeless persons' propensity to fall ill, once ill or injured they generally fail to have the support needed to treat their condition. As one person describes:

I was assaulted several years ago while having no fixed address. I was admitted to the Accident and Emergency department of a major hospital bruised and battered and with two sprained ankles. There was no avenue for effective after care. Who has ever heard of a hospital admission for sprained ankles! For somebody with a safe and secure home, limited use of both legs can be a major inconvenience. For somebody who has no secure home, limited use of their legs can be a serious threat to their continued well-being.<sup>159</sup>

Without adequate support, many homeless people have their health needs only partially satisfied, or only receive spasmodic (and therefore inadequate) treatment. This is a sensitive issue as many homeless persons have had negative experiences in the public health system and consequently are reluctant to be treated in a hospital or tend to discharge themselves from hospital before completing their treatment.<sup>160</sup> Society, and in particular the organisations providing these services, must recognise the particular needs of this group of vulnerable people when providing them with access to the appropriate services as needed.

### III RESPONDING TO HOMELESSNESS IN A HUMAN RIGHTS FRAMEWORK

#### A *Naming Homelessness as a Human Rights Violation*

Recognising, naming and reframing homelessness as a human rights violation carries significant normative value, moral authority and legal import. The normative value of rights discourse lies in the fact that, when we acknowledge that homelessness constitutes a human rights violation, we understand that the

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<sup>155</sup> Ibid 3.

<sup>156</sup> Ibid 3.

<sup>157</sup> Royal District Nursing Service Homeless Persons Program, *Improving Health Outcomes for People Experiencing Homelessness*, above n 152, 4

<sup>158</sup> See generally *ibid*.

<sup>159</sup> Gleeson, above n 41, 7.

<sup>160</sup> Royal District Nursing Service Homeless Persons Program, *It Can Be Done: Health Care for People who are Homeless* (1992), cited in Department of Human Services Department of Human Services, Victoria, *Primary and Acute Health Responses to People Who Are Homeless or at Risk of Homelessness: Information Paper* (2000) 3.

issue is not ‘just’ lack of affordable housing, but the rights, dignity and freedom of over 105 000 people.

The moral authority of rights discourse derives from the notion that, if human rights inhere in and belong to all, then their violation should be a concern to all.<sup>161</sup> As African-American cultural theorist and critic bell hooks so powerfully asserts, ‘we can never ensure the safety of our freedom to self-actualise if we do not wish to claim those rights for everyone, our brothers and sisters’.<sup>162</sup> A human rights framework implores us to acknowledge that homelessness is not merely of concern to the individual experiencing homelessness, but of concern to us all:

Homelessness must be understood as detrimental to the general welfare of our society, so that the need to prevent it is imperative. Only within the rights context will homelessness be understood as an abuse of human rights that legitimates redress. Further, safeguarding human rights will be understood as the best way to prevent conditions that result in homelessness; as a key element in the protection of the homeless ... and as a means of keeping the goal of social justice firmly planted.<sup>163</sup>

Recognising, naming and reframing homelessness as a human rights violation requires that we observe our own dignity and humanity by ensuring conditions that enable people experiencing homelessness to do the same.<sup>164</sup>

Using the language of human rights also enables the potentially powerful impact of the law to be brought to bear on homelessness and governmental policy. As Cassandra Austin recognises:

Utilising the human rights discourse when referring to homelessness allows the articulation of rights for the individual and the collective, a recognition of the commensurate responsibility incurred with each right, and most importantly highlights the link between the aspiration and the reality through standards, benchmarks and indicators.<sup>165</sup>

The legal import of analysing homelessness in a human rights framework is discussed further below.

## B *The Use of Human Rights by Homeless Persons’ Advocates*

International treaties to which Australia is a party are not self-executing in Australia. This means that legislative enactment of treaty provisions is required for such provisions to confer directly enforceable rights in the domestic legal system.<sup>166</sup> As Mason CJ and Deane J stated in *Teoh*, a treaty which has not been incorporated by legislation into Australian law ‘can not operate as a direct source

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<sup>161</sup> Maria Foscarinis, ‘Homelessness and Human Rights: Towards an Integrated Strategy’ (2000) 19 *Saint Louis University Public Law Review* 327, 353.

<sup>162</sup> bell hooks, *Salvation: Black People and Love* (2001) 205.

<sup>163</sup> Austin, above n 31, 15.

<sup>164</sup> Paulo Freire, *Pedagogy of the Oppressed* (Myra Bergman Ramos trans, 1996 ed) 25–6 [trans of: *Pedagogia del oprimido*].

<sup>165</sup> Austin, above n 31, 1.

<sup>166</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J) (‘*Teoh*’). See also *Chow Hung Ching v The King* (1948) 77 CLR 449, 478 (Dixon J) (‘*Chow Hung Ching*’); *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ and Gibbs J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 211–12 (Stephens J), 224–5 (Mason J); *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ) (‘*Kioa*’).

of individual rights and obligations under the law.<sup>167</sup> As discussed above, neither the *ICCPR* nor *ICESCR* has been legislatively enacted in Australia.

The position of customary international law in Australian law is unsettled.<sup>168</sup> However, the courts have tended towards the view that, as is the case with ratified but unincorporated treaties, some legislative action is required to make customary international human rights norms enforceable in domestic law and justiciable in domestic courts.<sup>169</sup> This position was articulated by Dixon J in *Chow Hung Ching*:

international law is not a part, but is one of the sources of [domestic] law. In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of [domestic] law.<sup>170</sup>

However, the fact that the provisions of an international human rights treaty have not been legislatively implemented, or that a norm of customary international human rights law has not been incorporated into domestic law, does not mean that international human rights law has no bearing on Australian law or is of no use to Australian lawyers.

As discussed above, part IV of the *ICCPR* and part IV of *ICESCR* require that the Australian Government submit periodic reports regarding its observance and realisation of the rights contained in those *Covenants*. Both the *ICCPR* monitoring body (HRC) and the *ICESCR* monitoring body (CESCR) encourage non-governmental organisations to submit written and oral information regarding Australia's compliance with international human rights obligations to supplement or 'shadow' the Australian Government's report. Increasingly, this information is relied upon by the HRC and CESCR to formulate their observations and make recommendations.<sup>171</sup> Homeless persons' advocates can, and should, submit such reports. Homeless persons' advocates should also consider initiating individual complaints to the HRC under the *Optional Protocol* where the civil or political rights of a homeless person have been violated and that person has exhausted all effective and available local remedies seeking redress for the violation.<sup>172</sup> Although determinations of individual complaints made under the *Optional Protocol* are not enforceable under Australian domestic

<sup>167</sup> (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

<sup>168</sup> Sir Anthony Mason, 'International Law as a Source of Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 212.

<sup>169</sup> See generally *Kartinyeri* (1998) 195 CLR 337; *Nulyarimma v Thompson* (1999) 96 FCR 153; Gillian Triggs, 'Customary International Law and Australian Law' in Manfred Ellinghaus, Adrian Bradbrook and Tony Duggan (eds), *The Emergence of Australian Law* (1989) 376; James Crawford and W Edeson, 'International Law and Australian Law' in Kevin Ryan (ed), *International Law in Australia* (2<sup>nd</sup> ed, 1984) 71.

<sup>170</sup> (1948) 77 CLR 449, 477. See also *Bonser v La Macchia* (1969) 122 CLR 177, 214 (Windeyer J).

<sup>171</sup> See, eg, CESCR, *NGO Participation in Activities of the Committee on Economic, Social and Cultural Rights*, UN Doc E/C.12/1993/WP.14 (1993).

<sup>172</sup> For a more detailed discussion of the individual complaints procedure under the *Protocol*, see Hilary Charlesworth, 'Australia's Accession to the *First Optional Protocol to the International Covenant on Civil and Political Rights*' (1991) 18 *Melbourne University Law Review* 428.

law, they can be politically and publicly persuasive and perform a significant educative function.<sup>173</sup>

On the home front, as discussed below, international human rights law may have a powerful bearing on the development of the common law, the interpretation and application of statutes and the *Australian Constitution*, the process of administrative decision-making (and the review of administrative decision-making), and the development and application of social justice policies. Lawyers and advocates working with and for people experiencing homelessness should have regard to these principles and mechanisms when regarding and responding to homelessness in a human rights framework.

### 1 *Development of the Common Law*

The common law is an important element in the legal framework of human rights promotion and protection in Australia.<sup>174</sup> As Brennan J (with Mason CJ and McHugh J concurring) enunciated in *Mabo v Queensland [No 2]*:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>175</sup>

Kirby J took this proposition further in *Kartinyeri*, in which his Honour argued that the violation of fundamental human rights and dignities is ‘forbidden by the common law’.<sup>176</sup>

Accordingly, in *Dietrich v The Queen*,<sup>177</sup> the High Court had regard to art 14 of the *ICCPR* (which confers minimum rights on an accused with respect to the preparation and presentation of a defence) in declaring that the common law recognises the right to a fair trial. As a concomitant of this declaration, the Court exercised its discretion to stay proceedings in which the unrepresented accused was charged with a serious offence in order to avoid derogation from, or abrogation of, the right to a fair trial.<sup>178</sup>

Lawyers and advocates working with and for people experiencing homelessness need to think constructively and creatively about how the important influence of international human rights law could be brought to bear

<sup>173</sup> For example, in *Toonen v Australia*, HRC, Communication No 488/1992, UN Doc CCPR/C/50/D/488 (1994), the HRC found that the criminalisation of certain homosexual conduct under the *Criminal Code* (Tas) violated Toonen’s right to privacy under art 17 of the *ICCPR*. Following the HRC’s determination, the Federal Parliament enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth), which prohibited arbitrary interferences with the privacy of adults engaged in consensual sexual conduct.

<sup>174</sup> See, eg, Sir Anthony Mason, ‘The Role of the Judiciary in the Development of Human Rights in Australian Law’ in David Kinley (ed), *Human Rights in Australian Law* (1998) 29. See also CESCR, *CESCR General Comment 9: The Domestic Application of the Covenant*, [12], UN Doc E/C.12/1998/24 (1998).

<sup>175</sup> (1992) 175 CLR 1, 42 (‘*Mabo*’).

<sup>176</sup> *Kartinyeri* (1998) 195 CLR 337, 418. See also *Mabo* (1992) 175 CLR 1, 41–2, in which Brennan J stated that where a common law doctrine is founded upon a notion of international law no longer commanding general support that doctrine ‘demands reconsideration’ and ‘can hardly be retained’.

<sup>177</sup> (1992) 177 CLR 292 (‘*Dietrich*’).

<sup>178</sup> *Ibid* 304–9 (Mason CJ and McHugh J); 328–37 (Deane J); 351, 357, 360–1 (Toohey J); 370–3 (Gaudron J).

on the development and application of the common law. Following *Dietrich*, for example, it may be open to argue that the proscription on cruel, inhumane or degrading treatment or punishment in the *ICCPR* and customary international law forms a part of the common law and that the Court should exercise its inherent jurisdiction to stay any criminal proceedings relating to public space offences where there is a nexus between the offender's conduct and his or her housing status. It is cruel, inhumane and degrading to proceed against a person experiencing homelessness in relation to essential acts that are necessarily conducted in public. As Waldron argues:

If not as a constitutional matter, then certainly as a matter of justice, those who have the power to regulate public places must pay special attention to the difference between the impact of a given regulation on a person who has a home and its impact on someone who is homeless. In the case of a person who has a home, compliance with an ordinance prohibiting, for example, sleeping in public places is simply a matter of relocation. For someone who has no home ... compliance means that *he or she must not sleep*[.]<sup>179</sup>

On a grander scale, international human rights law may be relevant to the development of the common law insofar as it relates to the duty of care owed by governments to homeless persons, or even by the broader community to persons experiencing homelessness.

## 2 *Statutory Interpretation and Application*

It is a broadly accepted principle of statutory interpretation that 'a statute of the Commonwealth or of a state is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with established rules of international law'.<sup>180</sup> This canon of construction is founded on the general principle that Parliament is presumed to legislate in conformity with principles of international law<sup>181</sup> — a principle which is, in turn, an adoption of the customary international law rule that 'fundamental rights may not be abrogated or curtailed otherwise than by express words or by an unambiguous and unmistakable manifestation of a statutory intention to the contrary'.<sup>182</sup>

It is a less broadly accepted (but nonetheless developing) principle that international human rights law is also relevant to the interpretation and application of the *Australian Constitution*. In *Newcrest Mining Ltd v Commonwealth*, Kirby J stated:

<sup>179</sup> Jeremy Waldron, 'Homelessness and Community' (2000) 50 *University of Toronto Law Journal* 371, 397 (emphasis in original).

<sup>180</sup> *Kartinyeri* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ). See also *Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J); *Mabo* (1992) 175 CLR 1, 42 (Brennan J); *Dietrich* (1992) 177 CLR 292, 306, (Mason CJ and McHugh J); 321 (Brennan J). See also CESCR *General Comment* 9, above n 174, [15].

<sup>181</sup> *Polites v Commonwealth* (1945) 70 CLR 60, 67 (Latham CJ).

<sup>182</sup> Mason, 'The Role of the Judiciary', above n 174, 30. See also Stephen Donaghue, 'Balancing Sovereignty and International Law: The Domestic Application of International Law in Australia' (1995) 17 *Adelaide Law Review* 213.

The purpose [of the *Constitution*] is to be the basic law for the government of a free people in a nation which relates to the rest of the world in a context in which the growing influence of international law is of ever increasing importance.<sup>183</sup>

Having regard to this purpose, Kirby J argued in *Kartinyeri* that:

Where the *Constitution* is ambiguous, this Court should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.<sup>184</sup>

The principles that statutes and the *Australian Constitution* should be interpreted and applied, so far as is possible, in conformity with international human rights norms is of significant potential import for homeless people and their advocates.

Consider, for example, the right to vote. A canon of statutory construction requiring that the *Electoral Act* be interpreted and applied in conformity with the basic human right to vote may mean that the s 98 requirement that, in effect, a voter have a ‘fixed residential address’, be interpreted to include any place with which a homeless person has a ‘close connection’.

A principle of constitutional construction requiring that the *Australian Constitution* be interpreted and applied having regard to the right to vote may mean that s 24 of the *Australian Constitution*, which provides that the House of Representatives be comprised of members ‘directly chosen by the people’, be interpreted to require that the Commonwealth take immediate steps to enable homeless people to realise and practically exercise their right to vote.<sup>185</sup>

### 3 Administrative Decision-Making

The principles of natural justice and procedural fairness, and the availability of judicial review of executive action, are axiomatic to the ‘protection of individual rights against arbitrary state power’.<sup>186</sup>

Although, as discussed above, ratification of an international human rights treaty does not, by itself, incorporate the terms of that treaty into domestic law, the High Court recognised in *Teoh* that

ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights ... Rather, ratification of a convention is a positive statement by the executive government of this country to

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<sup>183</sup> (1997) 190 CLR 513, 661 (*Newcrest*).

<sup>184</sup> *Kartinyeri* (1998) 195 CLR 337, 598. See also *Newcrest* (1997) 190 CLR 513, 657 (Kirby J); Justice Michael Kirby, ‘Some Notes — The Bangalore Principles on “The Domestic Application of International Human Rights Norms”’ (1988) *Commonwealth Law Bulletin* 1196, 1197.

<sup>185</sup> Such a construction would be consistent with the recognition by the High Court that representative government is an evolving concept, such that the s 24 franchise cannot, unlike in 1900, exclude groups such as females: *McGinty v Western Australia* (1996) 186 CLR 140, 166–7 (Brennan CJ), 200–1 (Toohy J), 216 (Gaudron J), 286–7 (Gummow J).

<sup>186</sup> John McMillan and Neil Williams, ‘Administrative Law and Human Rights’ in David Kinley (ed), *Human Rights in Australia: Principles, Practice and Potential* (1998) 82. See, eg, *Kioa* (1985) 159 CLR 550. See also CESCR, *General Comment 9*, above n 174, [2].

the world and to the Australian people that the executive government and its agencies will act in accordance with the convention.<sup>187</sup>

The High Court went on to say that this positive statement gives rise to a 'legitimate expectation' that administrative decision-makers will act in conformity with the terms of relevant international human rights conventions.<sup>188</sup>

The existence of a legitimate expectation that an administrative decision-maker will act in accordance with international human rights principles does not necessarily compel him or her to act in that way. However, if a decision-maker proposes to render a decision which is inconsistent with a legitimate expectation, procedural fairness requires that the persons affected by the decision be given notice of that intention and an adequate opportunity to present a case as to why the decision should be made in conformity with the relevant international human rights treaty provisions.<sup>189</sup> Failure to do so may be a ground for setting aside an administrative decision.

To date, the potential of the decision in *Teoh* has not been adequately brought to bear by legal practitioners on the review of administrative action. It is not commonplace, for example, for submissions regarding the 'right to adequate housing' to be made to the Office of Housing in a public housing application or in the review of a decision to evict a public tenant.

By fully familiarising ourselves with the terms of international human rights treaties, particularly the *ICCPR* and *ICESCR*, homeless persons' legal advocates could ensure greater consonance between administrative decision-making and basic human rights. The area of social security law provides an example.

As discussed above, eligibility for payment of unemployment benefits is generally contingent upon the claimant complying with activity test requirements (such as attending a job interview) and satisfying Centrelink administrative requirements (such as providing information to Centrelink).<sup>190</sup> Failure to discharge activity test obligations, or to satisfy Centrelink's administrative requirements, usually results in a person being 'breached', meaning that the payment of the unemployment benefit is reduced or terminated.<sup>191</sup> Although a person does not commit an administrative or activity test breach if he or she provides a 'reasonable excuse' for failure to comply, this presupposes that the person has the knowledge and resources to furnish such an excuse. Further, although Centrelink must give a person written notice informing him or her of a decision to reduce or terminate payments, reduction or nonpayment commences on the day on which the notice is served. It is strongly arguable that Centrelink practice is inconsistent with the legitimate expectation, arising from Australia's ratification of *ICESCR*, that Centrelink will give due consideration to the right to social security in making any decision to reduce or terminate a recipient's payment. Having regard to this expectation, the rules of procedural fairness

<sup>187</sup> (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid* 292. See also *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80 ('*Tien*'); *Luu v Minister for Immigration and Multicultural Affairs* [2001] FCA 1136 (Unreported, Marshall J, 17 August 2001) [60]–[62], [86]–[88]. This decision was affirmed on appeal: *Luu v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 369 (Unreported, Gray, North and Mansfield JJ, 27 November 2002).

<sup>190</sup> *Social Security Act*, pt 2.12, div 1(A)–(C).

<sup>191</sup> *Social Security Act*, pt 2.12, div 1(F)–(G).

surely require that Centrelink give prior notice to the person who is to be breached. An adequate opportunity to present a case as to why he or she should not be breached should also be provided, particularly in light of the fundamental human right to social security, to an adequate standard of living, and to life, liberty and security of the person. Appeals to the Social Security Appeals Tribunal and applications for judicial review to the Federal Court or the Federal Magistrates' Court under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are mechanisms pursuant to which compliance with this requirement could be systemically enforced.

Practices pertaining to the eviction of mentally ill persons from public housing comprise another area in which the powerful influence of international human rights standards could be brought to bear on administrative decision-makers. Richard, a client of the Clinic, lived in a flat provided by the Office of Housing in North Melbourne. During his tenancy, Richard's mental state deteriorated and he was admitted to a psychiatric institution, in a catatonic state, as an inpatient for a period of four months. Records disclose that the Office of Housing was made aware of Richard's mental illness at the time of his application for housing. While an inpatient, Richard was evicted from his flat for nonpayment of rent, despite receiving no rental arrears notices or notices of an intention to repossess the premises. Following his discharge, Richard was required to reapply for public housing and, after spending several weeks on the streets, was eventually placed in a flat in Footscray. The actions of the Office of Housing in Richard's case arguably failed to appropriately consider his right to adequate housing. Further, they arguably breached rules of natural justice in that he was not given notice of an intention to evict or an opportunity to present a case as to why the Office of Housing should act in accordance with this basic *ICESCR* right. An application for judicial review to the Supreme Court of Victoria under s 3 of the *Administrative Law Act 1978* (Vic) is one strategy pursuant to which greater consonance between Richard's right to adequate housing and his housing status could be ensured.<sup>192</sup>

#### 4 Law Reform and Social Policy Development

Both international human rights treaties and customary international human rights norms can play a significant role in the areas of law reform and social policy advocacy and development. Although international human rights law may not confer directly enforceable rights in Australia, it does establish minimum standards by which governmental policy and action can be judged. It also evinces a commitment by Australia to and before the international community to conform to those standards.

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<sup>192</sup> A possible impediment to this strategy is that it is not certain whether the *Teoh* principle binds state and local decision-makers. Although this issue was not directly addressed by the majority in *Teoh* (Mason CJ, Deane and Toohey JJ), McHugh J dissented because, among other reasons, he could not countenance the judgment of the majority, which appeared to lead to the proposition that the actions of the Federal Government in ratifying a treaty could alter the decision-making capacity of state decision-makers: *Teoh* (1995) 183 CLR 273, 316–17.

Despite the ‘Australian reluctance about rights’<sup>193</sup> and the progressive withdrawal of Australia from UN treaty monitoring mechanisms, we continue to consider ourselves responsible global citizens and leaders in the realm of human rights. Clothing public policy discussion in human rights raiments infuses such discussion with a degree of moral authority and legal scrutiny and accountability. As Maria Foscarinis identifies in an US context:

The appeal to international norms places debate outside the US and current political climates. By invoking the world stage, it appeals to US policy makers to consider a bigger perspective. How will the US be perceived? How are its national policies affecting its international standing? How can homelessness and dire poverty be tolerated in a country with resources? An international perspective encourages us to look at the US reality from a stranger’s perspective, one in which these questions may appear more starkly.<sup>194</sup>

An appeal to international human rights standards also holds governmental policy and practice to account to its own citizens. As Dianne Otto observes:

Legal discourse can provide an essential check on the reasonableness or justifiability of governmental action in light of its effects on human well-being, and ensure that fundamental guarantees of human dignity are safeguarded.<sup>195</sup>

No government likes to be regarded, at home or abroad, as a human rights violator.

As advocates for homeless persons, we need to start invoking human rights discourse in our law reform and social policy work. Reference could be made both to Australia’s international human rights obligations and to how other states (such as New Zealand, Sweden or Canada) may be ‘doing it better’.

A human rights approach to public policy advocacy enables debates about, and responses to, homelessness to be framed in the context of state responsibilities. The notion that homelessness is an individual’s concern (generally deriving from some weakness or depravity of spirit) is not sustainable in a human rights framework. Governmental policy that ignores or exacerbates homelessness must be exposed as a human rights violation rather than as a legitimate legislative choice. The complacency of Australian governments with respect to addressing and remedying homelessness is unacceptable precisely because it is a choice.

### C *Homelessness, Human Rights and Governmental Obligations*

By ratifying both the *ICCPR* and *ICESCR*, the Australian Government has committed to giving effect to the rights enshrined in both *Covenants*. As discussed above, this commitment requires that the Government take all necessary steps to give immediate effect to all civil and political rights, and take positive steps, to the maximum of its available resources, towards the realisation

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<sup>193</sup> Hilary Charlesworth, ‘The Australian Reluctance about Rights’ in Philip Alston (ed) *Towards an Australian Bill of Rights* (1994) 21.

<sup>194</sup> Foscarinis, ‘Homelessness and Human Rights’, above n 161, 353.

<sup>195</sup> Dianne Otto, ‘Resisting the Erosion of Economic and Social Rights: What Role Can Discourse Play?’ (Paper presented at the Human Rights and Global Challenges Conference, Melbourne, Australia, 10–11 December 2001) <<http://www.law.monash.edu.au/castancentre/conference2001/papers/otto.html>> at 1 May 2003.

of all economic and social rights. Steps taken must be 'expeditious and effective',<sup>196</sup> 'deliberate, concrete and targeted',<sup>197</sup> and, in addition to legislative reform, should include administrative, financial, educational and social measures.<sup>198</sup>

Australians generally have little real comprehension of the extent to which homelessness exists in their country. A survey by Mission Australia found that 51 per cent of respondents believed that 10 000 or fewer people were experiencing homelessness each night in Australia.<sup>199</sup> As discussed above, the actual number is over 105 000. Mission Australia reports that only 11 per cent of people surveyed believed there were over 100 000 homeless persons in Australia.

The obligation, therefore, rests with governments to educate the general population as to the social situation that exists within our country. Education is crucial to seeing homelessness not as a situation deserving pity, despair and reaction, but rather as a violation of rights which all individuals are entitled to enjoy; rights which we must take positive steps to guarantee. It should be offensive to those who live in a society alongside the homeless that the framework of our society allows such a state of affairs to exist.

A Victorian Government report makes the following observation:

Our social system assumes everyone has a home that provides adequate shelter as well as a base from which to participate in the social and economic life of the community. Being without a home effectively disenfranchises a person from a broad range of rights, and the responsibilities we all share as community members, that together constitute citizenship.<sup>200</sup>

Homeless people rarely, if ever, choose to be homeless. Homelessness and living in public places create a very 'visible and extreme state of destitution and despair'.<sup>201</sup> As discussed earlier, the causes of homelessness are many and varied. Mental or physical illnesses are often contributing factors. Similarly, a financial crisis or domestic violence situation can cause a person to leave a secure housing situation. Arguably, these situations are unavoidable in any society. They do not, however, have to result in homelessness. What causes homelessness is a community's failure to adequately deal with these situations. It is the obligation of governments to develop the mechanisms and programs to provide the support necessary to deal with these problems.

Studies conducted in the US and Canada demonstrate that establishing long-term solutions to homelessness reduces the use of other government services and substantially reduces the total cost to the government. For example, a Canadian study found that the cost of providing major government health care, criminal justice and social services (excluding housing) to the homeless

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<sup>196</sup> CESCR, *CESCR General Comment 3: The Nature of States Parties' Obligations*, [9], UN Doc E/1991/23 (1990).

<sup>197</sup> *Ibid* [2].

<sup>198</sup> *Ibid* [7].

<sup>199</sup> Mission Australia, *Homelessness: What Australia Says* (2002) 1.

<sup>200</sup> Department of Human Services, Victoria, *Victorian Homelessness Strategy: Executive Summary — A Collaborative Approach to Improving Our Response to Homelessness* (2002) 6.

<sup>201</sup> Foscarinis, 'Homelessness and its Criminalization', above n 56, 15.

individuals who participated in the study cost, on average, 33 per cent higher than that of the housed individuals in the study.<sup>202</sup>

A New York study monitored 4679 homeless people suffering psychiatric disabilities over a seven-year period who were placed in affordable housing and provided with clinical and social support.<sup>203</sup> The study found that a mentally ill individual used *more than three times* the amount of publicly funded services when they were homeless, compared to when they were placed in service-enriched housing.<sup>204</sup>

These social and economic costs of homelessness are also being recognised by Australian state governments:

There is a compelling case for government to provide quality homelessness services as a way of containing expenditure across a broad range of social programs used by people who have multiple or complex needs.<sup>205</sup>

Responding to homelessness in a human rights framework requires more of governments than merely abstaining from violating, or interfering with, rights. It requires that governments take proactive steps to assist all members of their community to realise their fundamental rights and freedoms.<sup>206</sup> It also requires that governments be affronted by homelessness and deal with its underlying causes. Failure to take these steps will mean that homelessness will always exist. This comes at an enormous social and financial cost to the community.

#### IV CONCLUSION

In addition to imposing positive obligations on Australian governments and decision-makers to take all necessary steps to ameliorate (and eventually eliminate) homelessness, human rights discourse empowers people experiencing homelessness themselves. For African-American lawyer, activist and academic, Patricia Williams, the promise of rights resides in their capacity to force others to recognise us as human and to accord us dignity and respect. To a group of young white males who afforded her no room to pass on the footpath she exhorts, ‘Don’t I exist for you? See me! And deflect, godammit! ... I have my rights!’<sup>207</sup>

Regarding and responding to homelessness in a human rights framework also challenges us to recognise that all is not well and that we must do better. Most weekdays, Pauline stands at the entrance of a large metropolitan Melbourne railway station with a sign stating, ‘I am homeless. I am a single mother. I care for my son and cannot work. Please help us.’ How we regard and respond to Pauline’s predicament is attributable, at least in part, to the normative framework in which we understand homelessness. If we consider that homelessness is a consequence of individual weakness and dysfunction, we are likely to avoid or

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<sup>202</sup> Margaret Eberle et al, *Homelessness — Causes and Effects* (2001), vol 3 ‘The Costs of Homelessness in British Columbia’, 29.

<sup>203</sup> Dennis Culhane, Stephen Metraux and Trevor Hadley, *The New York/New York Agreement Cost Study: The Impact of Supportive Housing on Services Use for Homeless Mentally Ill Individuals, Corporation for Supportive Housing* (2001) 4.

<sup>204</sup> *Ibid* 1 (emphasis in original).

<sup>205</sup> Department of Human Services, *Victorian Homelessness Strategy*, above n 200, 6.

<sup>206</sup> See generally Foscarinis, ‘Homelessness and its Criminalization’, above n 56, 46–7.

<sup>207</sup> Patricia Williams, *The Alchemy of Race and Rights* (1991) 235–6.

ignore Pauline.<sup>208</sup> If, however, we consider Pauline's predicament — and the predicaments of at least 105 000 like her — as a human rights violation, our responses are more likely to involve indignation and action.<sup>209</sup> Our responses are more likely to meet the aspirations of poet, activist and scholar, Sonia Sanchez:

if *we the people* work, organize, resist,  
come together for peace, racial, social  
and sexual justice  
it'll get better  
it'll get better.<sup>210</sup>

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<sup>208</sup> There are, of course, other reasons why people may avoid or ignore Pauline. As Waldron identifies, 'people do not want to be confronted with the sight of the homeless — it is uncomfortable for the well-off to be reminded of the human price that is paid for a social structure like theirs': Waldron, 'Homelessness and the Issue of Freedom', above n 52, 314.

<sup>209</sup> See generally Gary Blasi, 'Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness' (2000) 19 *Saint Louis University Public Review* 207.

<sup>210</sup> Sonia Sanchez, 'Poem for July 4, 1994' in Sonia Sanchez, *Shake Loose My Skin: New and Selected Poems* (1999) 105 (emphasis in original).