

THE ROAD HOME: Australians' right to adequate housing

JAMES FARRELL

The right to housing goes further than the right not to be subjected to arbitrary or forced eviction. It also involves a duty on the State to take effective action to enable its people to meet their need for a safe and secure home where they can live with dignity. That is not achieved easily or overnight, but ... it is now internationally recognised that States must take appropriate action to ensure the realisation of this right.

Nelson Mandela, Former President of South Africa¹

In December 2008, the Australian government released its White Paper on homelessness, *The Road Home: A National Approach to Reducing Homelessness* ('White Paper'). This White Paper proposed the introduction of new legislation that would 'underpin the national response to homelessness, setting standards to deliver the best quality services possible'. Such legislation will essentially replace the *Supported Accommodation Assistance Act 1994* (Cth) ('SAA Act'), which has governed the provision of funding to homelessness specific services for the past 15 years.

In June 2009, the Minister for Housing, Tanya Plibersek, announced that the House of Representatives Standing Committee on Family, Community, Housing and Youth ('FCHY Committee') would hold an inquiry into homelessness legislation. The FCHY Committee tabled its report on 25 November 2009, and recognised the importance of situating homelessness within a human rights context.

This article considers the important overarching question of how to improve and strengthen the current legislative response to homelessness in Australia, and principally considers the need to situate the problem of homelessness within a human rights framework. Using this framework as a starting point, legislative mechanisms based on human rights principles and norms must be adopted to ensure the most effective response to tackle the homelessness crisis in Australia.

The problem of homelessness in Australia

The increase in homelessness in Australia over the past decade has coincided with a period of unprecedented prosperity. This 'poverty gap' was identified by former Special Rapporteur on adequate housing, Miloon Kothari ('the Special Rapporteur'), as a component of the right to an adequate standard of living when he visited Australia in 2006. Kothari's report on his mission here, condemned Australia — 'a rich and prosperous country' — for its regressive policies that resulted in increasing homelessness, 'reductions in public housing stock, soaring private rental rates, [and] an

acknowledged housing affordability crisis'.² The Special Rapporteur concluded that Australia had failed to implement the human right to adequate housing and was in the midst of 'a serious national housing crisis'.³ The comments of the Special Rapporteur demonstrate that past Australian governments have not fulfilled their duty to ensure realisation of the right to adequate housing. As a result, there are currently over 105 000 Australians without access to and enjoyment of a safe and secure home where they can live with dignity.⁴ In its recent Concluding Observations on Australia, the UN Committee on Economic, Social and Cultural Rights ('CESCR') noted 'with concern that the incidence of homelessness has increased ... over the last decade, mainly affecting indigenous peoples'.⁵

The CESCR recommended that Australia take effective measures to address homelessness in its territory.

Between 2004 and 2008, the number of people accessing homelessness specific services, under the Supported Accommodation Assistance Program ('SAAP'), increased by almost 30 per cent.⁶ Approximately 202 500 people now access these services each year.⁷ The growing rate of homelessness has placed significant strain on social services, resulting in 57 per cent of people requiring accommodation being turned away.⁸ In other words, more than one in two people experiencing homelessness who seek accommodation from relevant services are turned away every day, due to lack of beds.⁹

The definition of homelessness, provided in section 4 of the *SAA Act*, states that a person is considered to be homeless if they have inadequate access to safe and secure housing. The definition sets out a number of factors to be considered when determining whether the housing is safe and secure, including: adequacy, health and hygiene, safety, security, affordability, and location in relation to social supports and structures. These factors are strikingly similar to the seven indicia used to determine 'adequacy' of housing under the right to adequate housing in international human rights law (discussed below).

The causes of homelessness are complex and varied.¹⁰ Generally, they include:

- *structural factors*, for example: poverty, severe financial hardship and lack of access to adequate income support, unemployment, lack of affordable housing etc;
- *economic and social policy causes*, for example: economic and housing strategies that focus on

REFERENCES

1. Nelson Mandela, *Foreword*, in Scott Leckie (ed), *National perspectives on housing rights* (2003), xvii.
2. Miloon Kothari, Implementation of Resolution 60/251 of the General Assembly of 15 March 2006 entitled 'Human Rights Council Of Rights', Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Mission to Australia: Addendum, A/HRC/4/18/Add.2*, 32 (2007).
3. *Ibid.*
4. See Australian Bureau of Statistics, *Counting the Homeless 2006* (2008).
5. *Concluding Observations of the Committee on Economic, Social and Cultural Rights – Australia*, UN ESCOR, 42nd sess, UN Doc E/C.12/AUS/CO/4 [26] (2009).
6. See further Australian Institute of Health and Welfare (AIHW), *Homeless People in SAAP: SAAP National Data Collection Agency Report Series, Annual Report 2004 – 2005* (2006), xvii; *Annual Report 2006 – 2007* (July 2008), ix; *Annual Report 2007 – 2008* (April 2009), vii.
7. AIHW, *Women, children and teens, heavy users of SAAP*, Media Release (3 April 2009), <aihw.gov.au/mediacentre/2009/mr20090403.cfm> at 23 October 2009. See also AIHW, *Annual Report 2007–2008*, above n 7.
8. AIHW, *Demand for SAAP Accommodation by homeless people 2006–2007: Summary*, Bulletin 64, October 2008, 2.
9. *Ibid.* See also AIHW, *Demand for somewhere to stay continues to exceed available places for Australia's homeless*, Media Release (10 October 2008), <aihw.gov.au/mediacentre/2008/mr20081010.cfm> at 23 October 2009.
10. Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 142.

homeownership models and housing as a commodity, lack of access to education opportunities and resource allocation to the welfare sector; and

- *individual causes*, for example: domestic and family violence, mental illness, lack of access to appropriate health care and support, drug and alcohol dependency, gambling and legal problems.

In many cases, these causes are intersectional and interrelated.¹¹ Given the multiple causes of homelessness, it is understandable that the experience of homelessness affects a diversity of people from different backgrounds, social groups and across ages. However, there are some social groups that are particularly vulnerable to homelessness. People from socially marginalised groups including indigenous Australians, women, children and youth, people with a mental illness, and refugees are all disproportionately affected by homelessness.¹² The intersectional and interrelated causes of homelessness, coupled with its discriminatory impact on certain social groups, illustrates that responding to homelessness is not just a matter of improving houses and services for the homeless. Homelessness is a complex issue that gives rise to multiple and interdependent human rights concerns and raises difficult social problems. These factors must all be addressed in any effective response to homelessness.

Homelessness within a human rights framework

The federal government has obligations under international law to respect, protect and fulfil the human rights found in a number of international human rights treaties to which Australia is a party.¹³ Australia's ratification of these instruments commits the government, at the federal, state and local levels, to the full implementation of the human rights contained in each treaty. For example, article 2(1) of *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁴

While all levels of government in Australia are responsible for ensuring that all people enjoy human rights, ultimate responsibility lies with the federal government even when the means for protecting such rights fall under the jurisdiction of state and territory governments.¹⁵ For example, art 28 of the ICESCR states that it extends 'to all parts of federal states without limitations or exceptions'.

The right to adequate housing

The most established and comprehensive statement of the right to adequate housing is that contained in art.11(1) of the ICESCR.¹⁶ Article 11(1) requires that governments:

Recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions...

The right to adequate housing is a component of the right to an adequate standard of living and is considered to be 'of central importance for the enjoyment of all economic, social and cultural rights'.¹⁷ The right to adequate housing should be interpreted broadly to apply to all people and should be understood to mean 'the right to live somewhere in security, peace and dignity'.¹⁸ According to the CESCR, at a minimum, housing must be affordable, accessible to disadvantaged groups, habitable, culturally appropriate, provide occupants with security of tenure and afford access to appropriate services, materials, facilities and infrastructure, including employment, health care, schools and other social facilities.¹⁹

Article 2(1) of the ICESCR obliges Australia to take concrete steps, using the maximum available resources, to progressively fulfil economic, social and cultural rights. The steps taken must be targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures, including budgetary prioritisation.²⁰ Retrogressive measures, such as cuts in funding to homelessness assistance services, public housing or health care, are generally prohibited by international law and may only be justified by exceptional circumstances which cannot be said to exist in Australia following many years of substantial economic growth and prosperity.²¹ Further, even while Australia is developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, it is under a 'core obligation' to ensure that certain non-derogable 'minimum essential standards' relating to fundamental human rights are met, including the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.²²

Even leaving aside the government's legal imperative in relation to human rights, there are clear benefits to adopting a human rights approach. In particular, such an approach would provide government with a strategy and policy position for responding to homelessness. This strategy is underpinned by the fundamental features of the human rights normative framework including: the notion of accountability; the principle of universality, non-discrimination and equality; the principles of participation and empowerment; and recognition of the interdependence and indivisibility of rights.²³ These essential characteristics of a human rights approach operate to 'set standards'²⁴ and function as a 'model'²⁵ for government decision-making, law reform, policy development, programmatic design and service delivery.²⁶

Another fundamental component of a human rights approach — meaningful and genuine participation of homeless people in the development of laws, policies and programs that affect them²⁷ — is essential in promoting empowerment and a sense of value and

11. *Ibid* 141.

12. Human Rights and Equal Opportunity Commission, *Homelessness and Human Rights* (2008), 2–6.

13. These include the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); and Convention on the Rights of Persons with Disabilities (CRPD).

14. *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)*, UN ESCOR, 5th sess, UN Doc E/1991/23 (1990), <unhcr.org/refworld/docid/4538838e10.html> at 27 October 2009.

15. Dianne Otto and David Wiseman, 'In search of "effective remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) *Australian Journal of Human Rights* 2. See also Rowan McRae and Dan Nicholson, 'No place like home: homelessness in Australia and the right to adequate housing' (2004) *Australian Journal of Human Rights* 3.

16. CESCR, *General Comment 4: The Right to Adequate Housing* (1991).

17. *Ibid*.

18. *Ibid*.

19. *Ibid* 22.

20. CESCR, above n 14, 18.

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

22. CESCR, above n 16, 8.

23. *Ibid*.

Human rights are an important practical tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality beyond simply anti-discrimination

independence among marginalised and vulnerable members of the community.²⁸ Participation not only enhances an individual's personal autonomy and self-confidence, it also results in more effective and targeted policies and programs.²⁹

The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand that enshrine human rights protections in law, is that a human rights approach to the development by governments of laws, policies and programs can have significant positive impacts. Some of the benefits of using a human rights approach, which are relevant to Australia, include:³⁰

- 'A significant, but beneficial effect upon the development of policy';³¹
- Increased scrutiny of government, which improves transparency and accountability mechanisms;³²
- 'The language and ideas of human rights have a dynamic life beyond the courtroom.' For example, individuals can and do use the language and concepts of human rights to challenge unfair treatment and to negotiate improved service delivery;³³
- Human rights are an important practical tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality beyond simply anti-discrimination;³⁴
- Human rights principles can help decision-makers see seemingly intractable problems in a new light;³⁵
- Awareness raising and education about human rights empowers people to take action, and leads to better public service delivery and outcomes;³⁶
- Improved public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowered policy development processes and more individualised, flexible and responsive public services.

The recent introduction of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') in Victoria has similarly resulted in 'new ways of thinking' within government, including giving people greater say in decisions that affect them and further support calls for the introduction of federal human rights protections.³⁷

Legislating to protect the right to adequate housing

While approaching homelessness from a human rights perspective should be the starting point for any effective national response aimed at tackling the issue

and promoting social inclusion, adopting a human rights framework is not enough. Australia must enshrine these human rights through legislation, which has an important role to play in society generally. Legislation is an important tool to provide the general public with direction and guidance about appropriate conduct and behaviour. It is also necessary to draw boundaries around activities that infringe on the rights of others, require people to act in certain ways, ensure proper processes and promote accountability, fairness and good governance.

Enshrining the right to adequate housing in a new Federal Homelessness Act would require government to take reasonable and effective steps to progressively realise the right to adequate housing in Australia. To ensure that the right is practically realised, the legislation must also provide effective remedies for individuals whose rights are violated. A new Federal Homelessness Act could specify action that would be a violation of the right to adequate housing. For example, it could provide that that no person be *arbitrarily* evicted by the government (ie from government funded accommodation) into homelessness.

Effectiveness of the current legislative framework

Arguably, existing legislation is ineffective in addressing the causes of homelessness and fails to provide adequate support to people who are experiencing homelessness.

While the SAA Act recognises human rights principles in its preamble, it falls short of incorporating these rights into law and providing effective remedies to those whose rights are violated. The SAA Act does not provide any clear mechanism by which human rights standards must be achieved and there is no clear correlation between the funding mechanisms in the legislation and the need to ensure that services have the effect of realising human rights, including the right to adequate housing.

Although SAAP service standards exist, and might be expected to require accommodation of a standard adequate under human rights law, they do not ensure that SAAP accommodation meets the standard of adequacy under human rights law. While the content of the standards differs across states, none of them provide guarantees of accommodation that are adequate. Similarly, the nature of rights provided under

24. Maria Foscarinis, 'Homelessness and Human Rights: Towards an Integrated Strategy' (2000) 19 *St Louis University Public Law Review* 327, 347.

25. Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *A Human Rights Based Approach to Development* (undated).

26. See also Philip Lynch, 'Homelessness, Human Rights and Social Inclusion' (2005) 30(3) *Alternative Law Journal* 116, 117.

27. Deena R Hurwitz, 'Lawyering for Justice and the Inevitability of International Human Rights Clinics' (2003) 28 *Yale Journal of International Law* 505, 516.

28. Lynch, above n 26. See also Office of the High Commissioner of Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

29. *Ibid.* Refer also to Office of the High Commissioner of Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002). See also Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 81, 106; Anne Gosley, *Stop and Listen ... Don't Assume - Why the Homeless People's Association was formed* (Paper presented at 3rd National Homelessness Conference, Brisbane, 6-8 April 2003).

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

31. Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), United Kingdom, 19.

32. *Ibid.*

33. BIHR, above n 30.

34. *Ibid.* See also Human Rights Law Resource Centre, *A Human Rights Act for All Australians* (May 2009), 68.

35. BIHR, above n 30.

36. *Ibid.*

service standards is insufficient to protect the human rights that should be associated with housing assistance.

The FCHY Committee recognised the importance of these standards in its recent 'Housing the Homeless' report, recognising that 'a unified system could provide service users with increased confidence about the quality of services ... through the adoption and delivery of best practice'.³⁸

Overseas examples of homelessness legislation

Based on the review set out below of existing legislation and regulations governing homelessness in other Western nations, no other comparable jurisdiction has yet created a legal framework that can truly be said to implement the right to adequate housing and other associated rights. This creates an opportunity for Australia to take a lead and demonstrate to the international community that governments are able to incorporate the provisions of *ICESCR* into legislation and give practical effect to its *ICESCR* obligations without placing undue constraints on the policy and budgetary discretion which is properly reserved to elected governments.

The Republic of South Africa

The nation which has created the clearest nexus between its *ICESCR* commitments and domestic law is the Republic of South Africa. Section 26 of the South African Constitution states:

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

This provision in the South African Constitution is neither a panacea for resolving homelessness, nor is it an undue restraint on the discretion of the elected government to set policies and budgets in accordance with what it regards as the national interest. This demonstrates that the practical implications for governments of incorporating article 11 of *ICESCR* into domestic law are quite modest, particularly given the three distinct elements of the government's obligations outlined in section 26(2) of the South African Constitution. The right to access adequate housing is not an absolute right; the government's obligations are highly qualified to reflect the fact that no law, regulation, treaty or constitutional right can solve the complex, long-term challenges of homelessness.

The South African model creates an appropriate balance between giving practical effect to *ICESCR* commitments and reserving for government the discretion to set appropriate policies and budgets to implement those commitments.

The Australian government has recently demonstrated its willingness to incorporate its international obligations into domestic law through its decision to give practical effect to the Kyoto Protocol by proposing legislation for an Australian carbon pollution reduction scheme. The same approach is available in relation to the government's stated priority of addressing Australia's homelessness challenge. It is a question of priority, not of precedent or practicality.

Scotland

The *Housing (Scotland) Act 2001* sets an ambitious goal of effectively guaranteeing the right of access to emergency accommodation in Scotland within 10 years (by 2012). Under the Act, local authorities have corporate duties to the Scottish Executive to develop their own homelessness strategy and ongoing monitoring and evaluation strategies as well as duties to homeless individuals.

The extent of this duty is contingent on how a person is assessed under the Act. Under the legislation there is a duty on local authorities to consider an applicant's case and if that person is homeless, to find them accommodation. Under the Act social housing providers must, where requested to do so by a local government authority, provide housing for a homeless person. If the local government and the registered social landlord cannot achieve this outcome by consensus within a set period (generally six weeks), the matter is required to be arbitrated. The arbitration process is designed to be speedy and simple with a view to achieving housing for the individual. This model demonstrates that, even in the absence of direct application of *ICESCR* commitments into domestic law, it is still possible to create clear legislative rights for people experiencing homelessness to have their matter considered not just by funded service providers but by an independent arbiter with enforceable powers.

Reflecting the 'progressive realisation' principle outlined in the South African Constitution, Scotland's ten year target is to be achieved by gradually expanding the categories of people defined as being in 'priority housing need' and giving those who are classified as 'intentionally homeless', accommodation with greater social support. For example, the categories of priority need will be gradually broadened until there is no distinction drawn between any homeless person who is categorised as unintentionally homeless.

United Kingdom

The UK *Homelessness Act 2002* is less prescriptive than the Scottish Act and consequently less effective at the macro level (in raising the policy bar for future government action) and at the micro level (in creating enforceable rights for people experiencing homelessness). The main duties are owed to people who are homeless, eligible for assistance, have a priority need, and did not become homeless intentionally.

If a person is eligible, the local housing authority must take reasonable steps to secure that accommodation does not cease to be available for that person. Persons who do not have a priority need are also entitled to

37. Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (2009), 3.

38. FCHY Committee, *Housing the Homeless: Report on the inquiry into homelessness legislation* (November 2009), 85.

... meaningful and genuine participation of homeless people in the development of laws, policies and programs that affect them ... is essential in promoting empowerment and a sense of value and independence among marginalised and vulnerable members of the community.

assistance, but this is limited to advice and assistance to secure accommodation. A person has a right to request review of certain decisions by the local authority, including the suitability of accommodation secured for them, and to appeal to the county court on points of law only.

The major weakness of the UK legislation is the limits on the right to assistance. For example, people who are 'intentionally homeless' or who do not have a priority need have more limited duties owed to them. The definition of who is homeless is also unduly restrictive. However, the legislation does provide assistance for those defined to be in the greatest need, and provides a framework which could be used to expand the targeted groups over time.

There are also limited standards imposed on local authorities to measure their performance or the overall performance of authorities in reducing homelessness. The UK model is not recommended as a template for Australia's proposed reforms.

United States

Following the election of President Obama, the US approach to homelessness has undergone significant change, the detail and results of which are still to emerge. On 20 May 2009, President Obama signed into law the *Homeless Emergency Assistance and Rapid Transition to Housing Act* ('HEARTH Act'), which will reauthorise various homeless assistance programs established under Reagan era (1980s) legislation. The HEARTH Act is more accurately characterised as a new funding commitment rather than a paradigm shift in the United States' approach to homelessness.

Canada

Canada has no specific legislation or regulatory framework which addresses homelessness and there is no explicit recognition by the Canadian legislature of a right to adequate housing.

A statutory 'right' to security of tenure exists under provincial legislation generally referred to as the Residential Tenancies Act (or similar), with the legislation permitting termination of tenancy only for particular reasons.³⁹ As in Australia, this 'right' often does not afford vulnerable individuals protection (for example, if they are staying in emergency or transitional housing).

The *Canadian Charter of Rights and Freedoms* ('*Canadian Charter*') entrenches the rights and freedoms necessary in a free and democratic society, but does not explicitly recognise economic, social and cultural rights.

However, the Supreme Court has recognised that the *Canadian Charter* must be interpreted consistently with Canada's international human rights obligations. While ratified human rights treaties are not directly enforceable as law, they are recognised as values and rights that inform the *Canadian Charter* and the reasonable exercise of judicial decision-making must conform with these values.⁴⁰ Case law has furthermore established that discretionary decision-making must be properly informed by reference to the values of international human rights law.⁴¹

This 'discretionary decision-making' approach means that decisions affecting the lives of people living in poverty can be challenged as unreasonable if they are inconsistent with rights recognised in international law.⁴² Case law suggests that 'social condition' should be interpreted in a broad, liberal and flexible manner, and should take into account a variety of factors,⁴³ although the Supreme Court has recently held that discrimination on the basis of poverty is not unlawful.⁴⁴ In most provinces, the ground of 'social condition' (or equivalent) has been interpreted as prohibiting discrimination with respect to the 'occupancy of residential accommodation'.⁴⁵

Existing Australian models: community/human services legislation

Outside the homelessness context, there are numerous pieces of legislation which purport to regulate access to, and quality of, community and human services in Australia. It has been suggested, primarily in the White Paper, that it may be appropriate to transpose one of these legislative frameworks for use in the homelessness context. Given the multifaceted and complex contributors to homelessness, it is not appropriate to simply adopt one of the existing community service frameworks and apply it to homelessness.

These frameworks are all designed to meet a particular type of need or regulate providers of a particular type of service. This means, generally speaking, each of the existing frameworks is too specific to the need they are addressing to be a direct fit for the homelessness sector. This is not to say that there are not aspects of each framework that could be adopted. Indeed, some of the existing frameworks contain interesting ideas on how to impose service standards and improve accountability. The most relevant pieces of legislation are the *Aged Care Act 1997* (Cth) ('AC Act'), the *Disability Services Act 1986* (Cth) ('DS Act'), the

39. Bruce Porter, 'Homelessness, human rights, litigation and law reform: A view from Canada' (2004) *Australian Journal of Human Rights* 133, 137.

40. *Ibid.*

41. *Baker v Canada (Minister of Citizenship & Immigration)* (1997)

42. In *Vriend v Alberta* (1998) SCJ No 29/1998, the Supreme Court held that no category of government decision-making is exempt from constitutional review, and that the Court has a constitutional duty to uphold rights, including those infringed by the failure of government to act.

43. *Québec Commission des Droits de la Personne du Québec v Gauthier* (1993) 19 CHRR D/312 (TDPO)

44. *Boulter v Nova Scotia Power Incorporated* [2009] NSCA 17.

45. CERA, *Human Rights in Housing in Canada: An Advocate's Guide* (2008) 16.

Disability Act 2006 (Vic) and the *Children's Services Act 1996 (Vic)*.

None of these regulatory models are suitable for the homelessness sector, as they address specific problems and particular forms of services and are not broad or flexible enough to be transposed to the homelessness sector. The manner in which those models address issues of services providers, delivery standards and funding are either inapplicable or unacceptably narrow for any proposed homelessness legislation.

The funding mechanisms and service regulations contained in the AC Act are a clear example of why simple transposition of an existing framework would fail in the homelessness context. In the AC Act, the government funds a particular number of places, of a particular type, at particular locations — eligible providers then compete against each other for the right to provide these places to clients. While the targeting of government funds to particular geographical regions could be of benefit in the homelessness sector, the concept of funding individual 'places' is inflexible and, with the possible exception of accommodation providers, would not accurately reflect the providers' operating models in the homelessness sector.

The prescriptive nature of the standards and operational requirements imposed on aged care services providers by the AC Act is also problematic. Detailed operational requirements and standards are only possible when they are targeted at a specific service — if applied to the homelessness sector, such an approach would limit the scope of services regulated, result in an inordinate number of standards being created and/or unduly inhibit the ability of service providers to adequately respond to client's complex circumstances.

The DS Act suffers from similar issues as it exhaustively sets out the types of services it will cover. Although the Act provides that additional services can be added, requiring Ministerial approval every time a new type of service is added reduces the responsiveness of the framework.

The regulatory models examined above are not appropriate in the area of homelessness because they do not enshrine human rights protections. Although some of these frameworks will seek to protect particular rights within minimum standards, those protections apply only in the context of a person's dealing with a service provider. This approach means that there is no obligation on government to protect the rights of vulnerable individuals. As a starting point, any legislation seeking to address homelessness in Australia must provide for this human rights protection.

Conclusion

As the FCHY Committee recently recognised new legislation is required to protect Australians' rights to realise their right to adequate housing. Current legislation is inadequate, in that it fails to recognise individual rights, and fails to provide a framework to support the attainment of these rights.

Legislative and regulatory responses to homelessness adopted by other Western nations provide some guidance for what is possible and, in some instances, what should be avoided in Australia. Comparative international legislation provides some positive and negative guidance, and the Scottish model provides the most appropriate model for any new Federal Homelessness Act. Australian legislation in other community and human service contexts is inappropriate to address the many, varied and interrelated causes and effects of homelessness. However, there are features of Australian legislation that provide (limited) guidance on appropriate mechanisms to address homelessness service provision. While no existing framework is entirely appropriate, a new model designed to address homelessness may incorporate some of the features in various existing frameworks.

Australia must take leadership and develop a holistic Federal Homelessness Act. It falls to Australia to take a leadership position and demonstrate to other Western nations that a rights-based approach to homelessness is both practical and responsible.

JAMES FARRELL is the Manager/Principal Lawyer of the PILCH Homeless Persons' Legal Clinic. Special thanks to Caroline Adler and Amy Barry-Macaulay, and the Clinic lawyers, volunteers and consumers who have contributed their expertise and visions to this article.

© 2009 James Farrell