



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:655729

17 October 2012

The Hon. Brendan O'Connor MP
Minister for Housing and Homelessness
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By email: Brendan.O'Connor.MP@aph.gov.au

Dear Minister,

Homelessness Bill 2012

The Human Rights Committee of the Law Society of NSW ('Committee') is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee thanks you for your letter of July 2012 and notes that it has since made its submission (attached for your information) on the exposure draft *Homelessness Bill 2012* (the 'exposure draft Bill').

The Committee has asked me to write to you again to note that while it commends the Government for recognising that homelessness is a legal issue, the Committee's view is that the exposure draft Bill does not go far enough. The Committee notes that as a signatory to the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR)¹ the Australian Government is obliged to respect, protect and fulfill the right to adequate housing.² The Committee echoes the United Nations Committee on Economic, Social and Cultural Rights in noting that: "The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights."³

Given the centrality of this obligation, the Committee respectfully submits that in its legislative efforts to address homelessness, the Government should be seeking to

¹ Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967)

² Article 11(1) of the ICESCR.

³ "CESCR General Comment 4: The Right to Adequate Housing" UN OHCHR, Article 11(1) of the ICESCR, Sixth Session, 1991 contained in document E/1992/23 online from here: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument#**%20Contained%20j](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument#**%20Contained%20j) (accessed 15 October 2012).

create a legally enforceable right to adequate housing. The Committee further submits that the Commonwealth has the power to give full force to treaties it has ratified under the External Affairs power in section 51 of the Constitution, and that Parliament is therefore able to create an enforceable right to adequate housing. The Committee's view is that when measuring whether the Government has fulfilled the right to adequate housing, the proper indicator is whether housing is actually delivered to individuals.

The Committee's view is that the right to adequate housing should not only relate to the provision of new housing but also the protection of housing that already exists through the appropriate regulation of eviction and other similar processes.

The Committee submits that if Parliament does not create an enforceable right to adequate housing in the exposure draft Bill, the value of the resulting legislation would be limited only to encouraging service providers, Government decision makers and policy makers to consider the unique vulnerabilities of persons experiencing, or at risk of experiencing homelessness. While this is an important step, the Committee submits that this exposure draft Bill represents the opportunity for the Government to achieve real progress in the protection of those who are homeless or are at risk of homelessness.

The Committee notes the statistic that currently across Australia, there are 105,000 homeless people⁴. The Committee notes that homelessness undermines the ability of individuals to enjoy other rights, such as the right to the highest attainable standard of health. Homelessness may also affect individuals' abilities to exercise a range of civil and political rights, such as the right to vote. The Committee therefore commends the Government on its initiative in relation to addressing this urgent priority, but urges the Government to properly implement the right to adequate housing.

If your office has any queries, please contact Vicky Kuek, policy lawyer for the Committee on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,


Justin Dowd
President

⁴ 105,000 is the figure given on Census night 2006. In NSW the number was 27,374. The figure has not changed in other literature found at www.homelessnessnsw.org.au, and appears to have remained constant through to the present time.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:637305

24 July 2012

The Homelessness Bill Consultation
Homelessness Branch
C/- FaHCSIA,
PO Box 7576
Canberra Business Centre,
CANBERRA ACT 2610

By email: homelessnesslegislation@fahcsia.gov.au

Dear Sir/Madam,

Exposure draft Homelessness Bill 2012

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

Thank you for the opportunity to consider the exposure draft Bill. Enclosed is the Committee's submission.

If you have any questions please contact Vicky Kuek, policy lawyer for the Committee, on (02) 9926 0345 or victoria.kuek@lawsociety.com.au

Yours sincerely

Justin Dowd
President



THE LAW SOCIETY
OF NEW SOUTH WALES

Law Society of NSW Human Rights Committee Submission on the Exposure Draft Homelessness Bill 2012

Introduction

1. The Human Rights Committee of the Law Society of NSW ("Committee") is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.
2. The Committee notes the statistic that currently across Australia, there are 105,000 homeless people¹. The Committee notes that homelessness undermines the ability of individuals to enjoy other rights, such as the right to the highest attainable standard of health. Homelessness may also affect individuals' abilities to exercise a range of civil and political rights, such as the right to vote. The Committee therefore commends the Government on its initiative in relation to addressing this urgent priority. However, the Committee submits that there are several issues that should be further considered in relation to the *Homelessness Bill 2012* ("the Bill"), and sets these matters out in this submission.
3. Australia is a signatory to the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR). Article 11 of the ICESCR² provides for the right to an adequate standard of living, including adequate housing. State parties to the ICESCR are required to take appropriate steps to ensure the realisation of this right. The Committee notes further that Article 25 of the *Universal Declaration of Human Rights*³ (UDHR) also recognises the right to adequate housing.
4. The Committee's view is that protection from homelessness and the risk of homelessness can only be successfully achieved if legislation gives force to Article 11 of the ICESCR and creates an enforceable right to adequate housing. The Committee notes that section 12(2) of the Bill acknowledges that reducing the number of people who are, or are at risk of, homelessness is part of meeting Australia's international human rights obligations.
5. However, the Committee is aware that the Government's view is that "The Commonwealth does not have express constitutional power in relation to housing or homelessness."⁴ While the Committee agrees that there is no express constitutional power, with respect the Committee notes that the Commonwealth has the power to give full force to treaties it has ratified under the External Affairs power in section 51 of the Constitution.⁵ The Committee submits that the Commonwealth, as it is a party to the ICESCR, does indeed have the power to create enforceable rights and obligations to ensure that it is able to realise the right to adequate housing. The Committee's view is that the realisation of this right should be measured by whether adequate housing is actually delivered to individuals. The Committee notes also that this power, as with all Commonwealth powers, is not restricted by any States' residual power.⁶

¹ 105,000 is the figure given on Census night 2006. In NSW the number was 27,374. The figure has not changed in other literature found at www.homelessnessnsw.org.au, and appears to have remained constant through to the present time.

² Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967)

³ G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). It is referred to in the Bill at section 12(1)(h).

⁴ "Introduction to the Homelessness Bill 2012" found online: <http://www.fahcsia.gov.au/our-responsibilities/housing-support/programs-services/homelessness/introduction-to-the-homelessness-bill-2012> (accessed 19 July 2012)

⁵ The jurisprudence, including *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 supports this contention.

⁶ See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineer's Case)* (1920) 27 CLR 129.

Suggested Amendments to the Bill

6. The Committee notes that social isolation is often a part of the condition of homelessness, and the provision of services to Australians who are homeless should be governed by the same principles applicable to people experiencing social isolation. The Committee submits that the Bill should include provision for the making of detailed regulations to ensure that socially isolated people have proper access to services and to people who can assist in articulating their needs to policy makers and frontline providers.
7. Section 8(1) of the Bill recognises relevant barriers in achieving social inclusion but merely attributes them to the condition of homelessness (as defined in section 5) as a stand-alone phenomenon. The Committee submits that the Bill should approach homelessness and the risk of homelessness as a particular symptom of a more general problem of marginalisation and disadvantage experienced by homeless people along with Aboriginal and Torres Strait Islander peoples, refugees, the mentally ill and those fleeing family violence.
8. The Committee suggests that prior to section 6 of the Bill an express provision should be inserted recognising the substance of the right to adequate housing articulated in Article 11 of the ICESCR and Article 25 of the UDHR.
9. The Committee submits that section 6 of the Bill should be amended as follows:
 - In section 6(1) remove the word "should" so that it reads "*6(1) The Commonwealth recognises that persons who are, or are at risk of, experiencing homelessness have the same rights, choices and opportunities as other Australians...*"
 - In section 6(3) remove the word "should" so that it reads "*6(3) The Commonwealth recognises that children and young people who are, or are at risk of, experiencing homelessness have the same rights as all children and young people and should be supported to reach their full potential.*"⁷
10. Crucially, the Committee submits that the Bill should create a legally enforceable right to adequate housing, and that the express limitations set out in section 13 of the Bill should be removed. The Committee's view is that the right to housing should not only relate to the provision of new housing but also the protection of housing that already exists through regulation of eviction and other similar processes. The Committee submits that if the Government does not create an enforceable right to adequate housing, the value of the Bill would be limited to encouraging service providers, government decision makers and policy makers to consider the unique vulnerabilities of persons experiencing, or at risk of experiencing homelessness. While this is an important step, the Committee submits that this Bill represents the opportunity for the Government to achieve real progress in the protection of those who are homeless or are at risk of homelessness.
11. The Committee submits that section 14 of the Bill should be removed. The Committee's view is that the way it is worded purports to potentially override the existing constitutional prevalence of federal legislation over State laws. The Committee's view is that if the Government's intent is to preserve State supremacy in relation to this evolving area of the law, section 14 as it is currently worded does not achieve this purpose. There is currently no statutory right in any Australian State or Territory which would be at risk of exclusion by the operation of the Bill should it become law.
12. Finally, the Committee submits that there should be a provision in the Bill for reviewing its efficacy should it become law. Legislation in this vital area should be reviewed annually. Homeless people in the Australian community are often without an effective "voice", and frequent and regular review would ensure that advocacy on behalf of some of the most vulnerable people in the community can continue to take place.

⁷ The use of the word should in those two subsections which are declaratory (unlike its action-based usage in sections 6(5) and 6(6) and 6(7)) dilutes the significance of the currency of these rights as reflected in the UDHR and other international instruments.