

# **Homelessness and Human Rights in Australia**

**Submission to the Supported  
Accommodation Assistance  
Program (SAAP IV) National  
Evaluation**

**November 2003**

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## Submission to the Supported Accommodation Assistance Program (SAAP IV) National Evaluation

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## List of Acronyms

<b>AEC</b>	<b>Australian Electoral Commission</b>
<b><i>CEDAW</i></b>	<b><i>Convention on the Elimination of all forms of Discrimination Against Women</i></b>
<b>CESCR</b>	<b>United Nations Committee on Economic, Social and Cultural Rights</b>
<b>CHP</b>	<b>Council to Homeless Persons</b>
<b>COHRE</b>	<b>Centre on Housing Rights and Evictions</b>
<b><i>CROC</i></b>	<b><i>Convention on the Rights of the Child</i></b>
<b>HPA</b>	<b>Homeless People's Association</b>
<b>HRC</b>	<b>United Nations Human Rights Committee</b>
<b><i>ICCPR</i></b>	<b><i>International Covenant on Civil and Political Rights</i></b>
<b><i>ICERD</i></b>	<b><i>International Covenant on the Elimination of all Forms of Racial Discrimination</i></b>
<b><i>ICESCR</i></b>	<b><i>International Covenant on Economic, Social and Cultural Rights</i></b>
<b>PILCH</b>	<b>Public Interest Law Clearing House (Vic) Inc</b>
<b>SAAP</b>	<b>Supported Accommodation Assistance Program</b>
<b>SARS</b>	<b>Support and Accommodation Rights Service</b>
<b><i>UDHR</i></b>	<b><i>Universal Declaration of Human Rights</i></b>
<b>VEC</b>	<b>Victorian Electoral Commission</b>

# 1. Executive Summary and Recommendations

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## 1.1 Overview

This submission is made by the PILCH Homeless Persons' Legal Clinic, the Council to Homeless Persons, the Centre on Housing Rights and Evictions, the Support and Accommodation Rights Service, the Homeless People's Association, the Homelessness Legal Rights Project of the Gilbert + Tobin Centre of Public Law at the University of New South Wales, Youthlaw, Tamara Walsh of the Queensland University of Technology Faculty of Law and Dianne Otto of the University of Melbourne Faculty of Law.

The submission responds to Term of Reference 1 and Term of Reference 9 of the National Evaluation of the Supported Accommodation Assistance Program IV.

Specifically, the submission:

1. examines the extent to which SAAP IV is promoting and protecting the rights of people who are homeless or at risk of homelessness as required by both the Preamble to, and section 5 of, the *Supported Accommodation Assistance Act 1994* (Cth); and
2. proposes options for promoting and protecting the human rights of people who are homeless or at risk of homelessness under future Commonwealth/state arrangements.

The submission contends that many people who are homeless or at risk of homelessness are subject to multiple and intersectional human rights violations. These violations are often associated with, or are an incidence of, a lack of adequate housing. The submission concludes that future Commonwealth/state arrangements which aim to address homelessness must not only address the lack of adequate, affordable housing across Australia, but must comprehensively address the human rights violations to which people who are homeless or at risk of homelessness are subject by consequence of Commonwealth and state policies and practices.

A summary of findings and recommendations is set out below.

## 1.2 Findings and Recommendations

### Key Findings and Recommendations

- Many people who are homeless or at risk of homelessness are subject to multiple and intersectional human rights violations. These violations are often associated with, or an incidence of, a lack of adequate housing.
- Australia's legal and constitutional structure does not adequately promote or protect the human rights of people experiencing homelessness, nor provide effective remedies for their violation.

### **Key Recommendation 1**

*The Commonwealth Government has undertaken international obligations to ensure that all civil, political, economic, social and cultural human rights are enjoyed in Australia. Therefore, through SAAP, it must protect, respect and fulfil the fundamental human rights and dignity of people who are homeless or at risk of homelessness, including:*

- *the right to adequate housing;*
- *the right to participation and freedom of expression;*
- *the right to freedom from discrimination;*
- *the right to social security;*
- *the right to life, liberty and security of the person;*
- *the right to vote;*
- *the right to the highest attainable standard of health;*
- *the right to freedom of association;*
- *the right to freedom of movement;*
- *the right to education*
- *the right to participate in cultural life;*
- *the right to be treated with dignity and respect;*
- *the right to a fair hearing and effective remedy in the event of a violation of any human right; and*
- *the special rights of children and young people.*

### **Key Recommendation 2**

*The Commonwealth Government should commence a process of reform in order to secure protection of the human rights of people in the Australian Constitution.*

*As an interim measure, the Government should amend the Human Rights and Equal Opportunity Act 1986 (Cth) to provide people in Australia with an effective judicial remedy for breach of their human rights, including their civil and political, economic, social and cultural rights as recognised in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.*

### **Findings and Recommendations in Relation to the Right to Adequate Housing**

- The right to adequate housing, recognised by article 11(1) of *ICESCR*, article 5(e)(iii) of *ICERD*, article 14(2)(h) of *CEDAW*, and article 27(3) of *CROC*, requires that the Commonwealth Government devote the maximum of available resources towards progressively ensuring that all people have somewhere to live in security, peace and dignity. In a country as affluent as

Australia, the fact that the size of the homeless population remained constant at around 100 000 people between 1996 and 2001 is, prima facie, a breach of this requirement.

- International human rights law requires that, even while a state is progressing towards full realisation of the right to adequate housing, it must ensure that 'core minimum standards' are met, including by providing sufficient emergency accommodation to ensure that all people in need of such accommodation can access it as of right. Having regard to this requirement, SAAP must be expanded to provide a comprehensive safety net to 'complete homelessness'.
- Adequacy of housing is determined having regard to: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. Not all accommodation currently provided under SAAP is adequate with regard to these criteria, which apply, in large part, to supported accommodation as well as long-term housing.
- The Commonwealth Government has a responsibility to ensure that evictions – whether from SAAP accommodation, public or private housing – do not render people homeless.
- Homeless people are often forced to stay in SAAP services beyond the period that they need housing support because the pathway from supported accommodation to long-term adequate housing is not assured.

### **Recommendation 1**

*The Supported Accommodation Assistance Act 1994 (Cth) should be amended to include a right of access to emergency housing and related services for those defined as homeless. Such a right could be progressively implemented by gradually broadening the categories of people who may rely on the right. As a model, Australian governments should look to Scotland's Homelessness Act 2002.*

### **Recommendation 2**

*The Supported Accommodation Assistance Act 1994 (Cth) should be amended to include national standards providing for the provision of adequate housing, as defined by CESCR. In particular, the standards should ensure that all accommodation provided under SAAP guarantees: security of tenure; availability of services; affordability; habitability, including safety; accessibility for disadvantaged groups; location that is sufficiently close to employment, education, and health facilities; and cultural adequacy. Funding of SAAP services should correlate with the real costs of implementation of the national standards and be appropriately indexed on an annual basis.*

### **Recommendation 3**

*SAAP service standards should ensure that eviction from SAAP accommodation shall be an act of absolute last resort, and that no person may be evicted from accommodation until adequate alternative accommodation is found, as required by CESCR. The Supported Accommodation Assistance Act 1994 (Cth) should be amended to ensure that:*

- *the decision to evict a person from a SAAP service is subject to review by an independent complaints body in accordance with principles of natural justice; and*
- *administrative and judicial decisions regarding the Act are consistent with Australia's international human rights obligations.*

### **Recommendation 4**

*The Supported Accommodation Assistance Act 1994 (Cth) should include guarantees of funding that are sufficient to meet demand for such services and discharge the obligation to implement the human right to housing to the maximum of available resources. Pathways out of supported accommodation to independent living should be clear and readily available to SAAP clients who are ready to make that transition.*

### **Recommendation 5**

*A national housing strategy must be developed immediately, as recommended by CESCR in its Concluding Observations after the examination of Australia's last state party report. As CESCR requires, this strategy should be developed in consultation with people who are homeless or formerly homeless, people who are inadequately housed, and their representatives. The strategy should enshrine the responsibilities of various levels of government in relation to housing and homelessness, ensuring greater co-ordination between government departments and programs and analysing the short- and long-term priority needs for policies, programs, timelines and budgets. The level of expenditure required to implement the right to adequate housing in Australia should be identified, with long-term commitments from all levels of government and other possible sources of funds sought.*

### **Recommendation 6**

*In order to create effective remedies for those whose rights are violated, independent oversight of all government actions in relation to housing should be guaranteed to complement the rights of individuals to pursue legal remedies. An independent Homeless Persons' Commissioner should be appointed, with real power. The obligations to respect, protect and fulfil the human rights of homeless people could be progressively made subject to this oversight.*

## **Findings and Recommendations in Relation to the Right to Participation and Freedom of Expression**

- The rights to participation and freedom of expression are recognised in articles 19 and 25 of the *ICCPR*, article 5(c) of *ICERD*, articles 7 and 14(2) of *CEDAW* and articles 12 and 13 of *CROC*. Together, they require that people experiencing homelessness have the opportunity to be involved in the development of policies relating to, or impacting upon, them.
- Many people experiencing homelessness feel deeply alienated from the community due to an inability to have their say in public policy formulation and decision-making processes.
- The involvement of people experiencing homelessness in policy development and decision-making processes, both at a government and service provision level, would result in more sensitive and effective responses to homelessness and would empower homeless people to participate more fully in social, cultural, economic and political life.

### ***Recommendation 7***

*Australian governments should support and fund people who are homeless or formerly homeless to have a say and to participate in decision-making processes and projects that affect them, including by funding community groups and other organising processes by homeless people, establishing SAAP service user groups and appointing SAAP service users to governmental and bureaucratic reference groups and committees.*

### ***Recommendation 8***

*SAAP service providers should support and assist people who are homeless or formerly homeless to have a say and to participate in decision-making processes and service delivery development, including by involving such people in service provider governance and facilitating the formation and development of community groups and other organising processes by homeless people, such as service user groups.*

## **Findings and Recommendations in Relation to the Right to Freedom from Discrimination**

- The right to be free from discrimination of any kind is a fundamental tenet of international human rights law and is recognised by article 2(2) of *ICESCR*, articles 2(1) and 26 of *ICCPR*, *ICERD*, *CEDAW* and article 2 of *CROC*.
- The current provisions of anti-discrimination and equal opportunity laws across Australia are not comprehensive and, of special significance for homeless people, do not prohibit discrimination on the grounds of homelessness or social status. Discrimination on these grounds is

widespread, particularly in the areas of accommodation and the provision of goods and services.

- Discrimination is a major causal factor of homelessness.

#### **Recommendation 9**

*The Human Rights and Equal Opportunity Commission Act 1986 (Cth) should be amended to recognise that economic, social and cultural rights are human rights by including ICESCR as a Schedule for the purpose of defining 'human rights' under the Act.*

#### **Recommendation 10**

*Commonwealth equal opportunity and anti-discrimination legislation should be amended to prohibit discrimination on the ground of social status, including a person's status of being homeless or at risk of homelessness.*

#### **Recommendation 11**

*Equal opportunity and anti-discrimination legislation in each state and territory should be amended to prohibit discrimination on the ground of social status, including a person's status of being homeless or at risk of homelessness.*

#### **Recommendation 12**

*Australian governments should devote the maximum of their available resources to developing and implementing programs to ameliorate homelessness so as to equally guarantee to all people the exercise and enjoyment of their civil, political, economic, social and cultural rights, without discrimination.*

### **Findings and Recommendations in Relation to the Right to Social Security**

- The right to social security, enshrined by article 9 of *ICESCR*, article 5(e)(iv) of *ICERD*, article 11(1)(e) of *CEDAW* and article 26 of *CROC*, requires that all people be entitled to a level of income sufficient to enable them to meet their basic needs, live a dignified human existence and participate in community life.
- Australia's social security regime, administered by Centrelink under the *Social Security Act 1991* (Cth), does not meet international human rights standards in that eligibility requirements are often too stringent, the level of income support is inadequate to meet needs and enable participation, and the breach penalty regime can result in a loss of income beyond a person's control.
- Lack of access to an adequate income is a major causal and prolonging factor in homelessness.

**Recommendation 13**

*The Commonwealth Government should commit to raising the level of social security benefits to a level at or above the poverty line, to ensure that social security recipients are able to meet their material needs and participate in society. Payments should be sufficient to ensure that recipients can afford adequate, appropriate housing in the private rental market, and to enable recipients to access the 'basket of goods' that is considered essential for social inclusion.*

**Recommendation 14**

*The Commonwealth Government should take steps towards ensuring that the reasons for a breach in mutual obligation requirements by a social security recipient, including as relevant their homelessness status, are taken into account before a decision is made to impose a breach penalty on that person. Only those people who wilfully and intentionally breach their mutual obligation requirements should be breached.*

**Recommendation 15**

*The severity of breach penalties should be significantly reduced so that the penalty is proportionate to the 'offence' committed, and so that those who are breached are still able to provide themselves, and their dependents, with the necessities of life during the penalty period.*

**Recommendation 16**

*Centrelink's 'proof of identity' requirements should be changed to enable homeless people to use a letter from a SAAP worker, social worker or case worker as legitimate identification.*

**Recommendation 17**

*Homeless people should have access to free post office boxes. With no fixed address, many homeless people do not receive Centrelink correspondence.*

**Recommendation 18**

*The Commonwealth Government should develop and implement an integrated package of social security assistance to homeless people that includes access to adequate housing, employment assistance and personal support to ensure sustainable outcomes.*

## **Findings and Recommendations in Relation to the Right to Life, Liberty and Security of the Person**

- The right to life, liberty and security of person is protected by articles 6 and 9 of the *ICCPR*, article 11 of *ICESCR*, and articles 6, 27 and 37 of *CROC*. This requires states parties to safeguard life, but also to take positive steps to ensure that all people have access to the requirements of human dignity, including adequate nutrition, clothing, health care and shelter.
- People living in public space are disproportionately susceptible to physical assaults and attacks.
- Given the strong associations between homelessness, low life expectancy, mental illness, and other health problems, homelessness may itself be a violation of the right to life, liberty and security of the person.

### **Recommendation 19**

*The Supported Accommodation Assistance Act 1994 (Cth) should be amended to recognise that people who are homeless or at risk of homelessness have a right of access to the core minimum level of housing, nutrition and health care necessary to protect their life, liberty and security of the person.*

### **Recommendation 20**

*Without reducing expenditure on longer-term responses to homelessness, Australian governments should, as a matter of priority, increase the availability and accessibility of crisis accommodation, adequate nutrition and primary health care for people experiencing homelessness, such that these services are available as of right.*

## **Findings and Recommendations in Relation to the Right to Vote**

- The right to vote is guaranteed in article 25 of the *ICCPR*, article 5(c) of *ICERD*, and article 7 of *CEDAW*. Exercise of the right to vote can provide people experiencing homelessness with a sense of agency and empowerment.
- Given that the needs of people experiencing homelessness are often different to those of people with adequate housing, it is crucial that they vote in federal and state elections to articulate their special interests and concerns. This is important for the development of policies that are sensitive and responsive to homelessness.
- It is estimated that up to 80 000 homeless people did not vote at the 2001 federal election.
- The primary barriers to homeless people voting are: the requirement to provide a residential address to enrol as a 'normal elector'; the threat of monetary penalties for failing to vote; proof of identity issues; lack of voter

education; and the low priority given to voting in light of other more pressing concerns.

**Recommendation 21**

*Section 96(2A) of the Commonwealth Electoral Act 1918 (Cth) should be amended so that itinerant electors are registered to vote in the electorate with which they have the 'closest connection'. Registration in an electorate in respect of which an elector has a 'close connection' is more appropriate than registration in an electorate for which the applicant last had an entitlement to be enrolled or has a next of kin. It is important that homeless people be able to enrol in the electorate in which they live, so as to directly choose those who represent them.*

**Recommendation 22**

*Section 96(8) of the Commonwealth Electoral Act 1918 (Cth) should be amended to increase the period of time that an itinerant voter may have a 'real place of living' from one month to six months. Many homeless people live in accommodation such as a friend's house, a caravan, a crisis shelter or a domestic violence refuge for up to six months. Notwithstanding the temporary and insecure nature of these accommodations, they constitute 'real places of living' within the current definition in the Act and people who stay in such accommodation for more than one month are ineligible to enrol as itinerant electors. Homeless people should be able to reside in one 'real place of living' for up to six months rather than only one month before they become ineligible as an itinerant elector.*

**Recommendation 23**

*Section 96(12) of the Commonwealth Electoral Act 1918 (Cth) should be amended such that a person shall be taken to reside at a place if, and only if, the person has his or her 'real place of living' at that place and that place of living constitutes safe and secure housing within the meaning of section 4 of the Supported Accommodation and Assistance Act 1994 (Cth). This would ensure that homeless people who live in non-conventional accommodation such as cars, squats, shelters or refuges for a period of longer than six months are not ineligible as itinerant electors.*

**Recommendation 24**

*The AEC should amend Itinerant Elector enrolment forms to make them more user-friendly and relevant for people experiencing homelessness.*

**Recommendation 25**

*The AEC should promote the Itinerant Elector Provisions within the Commonwealth Electoral Act 1918 (Cth) to make clear their application to people experiencing homelessness.*

### **Recommendation 26**

*The AEC should engage SAAP services to act:*

- *in an advisory capacity, by providing useful information to the AEC regarding the particular difficulties faced by homeless people around getting information about how to participate in elections, going through the process of enrolment, attending polling booths, providing original identification documents etc;*
- *as a facilitator of the AEC's consultations on this issue with people experiencing homelessness, or people who have previously experienced homelessness;*
- *as a conduit or gateway for the provision of information to SAAP clients around enrolment and voting issues (voter education);*
- *as a possible location for actual enrolment and voting; it has been suggested that enrolment stations or polling booths could be co-located at certain SAAP agencies (voter registration and participation); and*
- *in an advocacy role, publicly supporting the introduction of measures to improve access to the vote and the exercise of voting rights for people experiencing homelessness.*

### **Findings and Recommendations in Relation to the Right to the Highest Attainable Standard of Health**

- The right to enjoy the highest attainable standard of physical and mental health is recognised by article 12 of *ICESCR* and article 24 of *CROC*. Further protections against discrimination in the field of health care are provided by article 5(e)(iv) of *ICERD* and article 12 of *CEDAW*.
- A person's health impacts significantly on their self-esteem, their ability to live independently and self-reliantly, and their capacity to participate in and contribute to community life.
- The right to the highest attainable standard of physical and mental health requires adequate access to appropriate health care, food, nutrition, housing, occupational health, a healthy environment, and health related information.
- Due to inadequate access to appropriate health care, nutrition, housing and health related information, people experiencing homelessness are at a much greater risk of adverse health conditions than the general population.

### **Recommendation 27**

*The Commonwealth Government should increase funding to SAAP services to ensure that, as a component of an integrated package of housing and related support services, people experiencing homelessness have adequate access to the facilities, goods, services and conditions necessary to ensure their enjoyment*

*of the highest attainable standard of health. This includes access to appropriate and affordable health care, safe food, safe water, adequate sanitation, nutrition, occupational health, a healthy environment and health related information.*

#### **Recommendation 28**

*Having regard to the requirement that services should be provided in an accessible, culturally appropriate and non-discriminatory manner, health care and related services should be available to people experiencing homelessness at locations already accessed by them for other needs, including food and housing, wherever possible.*

### **Findings and Recommendations in Relation to the Right to Freedom of Association**

- Respect for the right to freedom of association is guaranteed by article 22 of the *ICCPR*, article 4(d)(ix) of *ICERD*, article(c) of *CEDAW* and article 15 of *CROC*. Enjoyment of this right enables people experiencing homelessness to participate in, and integrate with, the community.
- The increased commercialisation, regulation, privatisation and policing of public spaces in which many homeless people congregate, particularly young people and Indigenous people, can violate their rights to public space and freedom of association.

#### **Recommendation 29**

*The Commonwealth Government should work with the non-government sector to address negative perceptions in sections of the community regarding homeless people, including Aboriginal people, ethnic and racial minorities and young people in public areas, 'hanging around' and 'congregating'. The SAAP program should be part of this process and engage with its outcomes.*

#### **Recommendation 30**

*SAAP services should:*

- *assist homeless people, including homeless young people and Indigenous people, to feel and be safe in public places;*
- *acknowledge that public space is often a place of safety for young people and others because of the proximity to people;*
- *acknowledge that Indigenous people may occupy public space as an aspect of cultural identity and association;*
- *work within the community to address perceptions of safety which are often unfounded, particularly for other members of the public;*

- *lobby authorities and other institutions such as business against exclusionary practices and for alternatives to increased regulation and uniformity; and*
- *acknowledge and work to address discrimination against Aborigines and ethnic or racial minorities occurring as a result of the increased visibility that accompanies living in public spaces.*

### **Recommendation 31**

*Australian governments should improve the participation of homeless people, including Indigenous communities and homeless or at risk young people, in the planning, design, control, regulation, monitoring and policing of public space.*

## **Findings and Recommendations in Relation to the Right to Freedom of Movement**

- The right to freedom of movement, enshrined by article 12 of the *ICCPR* and article 5(d)(i) of *ICERD*, provides that all people lawfully within a territory have the right to move freely and determine their own residence within that territory.
- The rate of homelessness in Australia varies significantly on a state by state and territory basis. In 2001, one in 237 people were homeless in New South Wales while one in 35 people were homeless in the Northern Territory.
- The allocation of SAAP funds to states and territories on a per capita basis, rather than on the basis of the rate of homelessness in that state or territory, often forces homeless people to move to areas where there are more services and may also result in governments enacting public space policies to 'move on' homeless people.

### **Recommendation 32**

*Without decreasing recurrent funding to SAAP in New South Wales, Victoria, Tasmania and the Australian Capital Territory, the Commonwealth Government should increase recurrent funding to SAAP in the Northern Territory, Queensland, Western Australia and South Australia, such that the distribution of SAAP funding is proportionate and commensurate to state and territory rates of homelessness.*

### **Recommendation 33**

*Australian governments should immediately repeal all laws that criminalise essential human behaviours – such as sleeping, bathing, lying down, drinking or storing belongings in public space – and that impact on homeless people on the ground of their housing status and the necessary location of their conduct. In collaboration with homeless people, Australian governments should develop and implement policies and procedures to ensure that people experiencing financial*

*and social disadvantage receive the social services they want as well as appropriate recognition of their rights to the use of public space.*

### **Findings and Recommendations in Relation to the Right to Education**

- Realisation of the right to education, recognised by article 13 of *ICESCR*, article 5(e)(v) of *ICERD*, article 10 of *CEDAW* and articles 28 and 29 of *CROC*, can assist people to overcome poverty and participate fully in the civil, political, social, economic and cultural lives of their communities.
- Lack of education and early school leaving are key risk indicators of homelessness.
- SAAP should respond to, and conduct advocacy regarding, the barriers that prevent young people and adults from entering or remaining in education. These barriers – which particularly impact children and adults who are Indigenous, from culturally and linguistically diverse backgrounds, living with disabilities, living in remote and rural locations, and discriminated against on the basis of gender or sexuality – include access, costs, bullying, curriculum content, lack of human rights education, physical punishment and exclusion.

#### **Recommendation 34**

*Commonwealth and state governments should implement Recommendations 38, 39, 40, 41, 42, 45 and 50 contained in Seen and Heard: Report of the National Inquiry into Children and the Legal Process.*

#### **Recommendation 35**

*Commonwealth and state governments should allocate more resources to the classroom to give teachers more support in assisting disadvantaged young people and adults.*

#### **Recommendation 36**

*SAAP services should receive additional funding to take a lead role in ensuring that schools, in co-operation with local communities and support services, provide greater access to support services to assist disadvantaged young people. Improved access requires increasing the availability of remedial teachers and teachers of English as a second language, disability support workers, and a range of counselling options for dealing with family violence and breakdown, substance abuse and mental health issues. This requires a greater commitment of resources across the board, but particularly in rural and remote communities where the youth suicide rate is high.*

### **Recommendation 37**

*Adult education programs, and retraining and vocational education schemes, should be made accessible to homeless people through the introduction of specific support structures and outreach programs.*

## **Findings and Recommendations in Relation to the Right to Participate in Cultural Life, including Indigenous and Minority Group Rights**

- Indigenous people are more likely to experience homelessness than any other cultural or social group in Australia.
- Indigenous people have a range of needs, issues, values and perspectives with respect to the provision of housing and accommodation that are directly associated with Indigenous culture.
- Overarching this issue is the context of historical dispossession and the extent to which Indigenous communities continue to experience the 'imposition of frameworks, definitions, policy development processes and implementation.'

### **Recommendation 38**

*SAAP reforms must give Indigenous communities appropriate control over and participation in identifying their concerns and problems, and the development of solutions to Indigenous homelessness. Solutions to Indigenous homelessness, including through the reform of SAAP, should be given the highest priority.*

## **Findings and Recommendations in Relation to the Right to be Treated with Dignity and Respect**

- The right to be treated with dignity and respect, a key feature of SAAP, is the cornerstone of international human rights law. For example, article 1 of the *UDHR* commences with the declaration that 'all human beings are born free and equal in dignity and rights'.
- A dignified human existence requires that the basic necessities of life, including food, clothing, shelter, cultural identity and health care, are available beyond mere survival levels and at levels that are adequate to enable people to engage with their fellow humans and, more broadly, with social, political, civil and community life.
- Homelessness may be, of itself, a violation of the right to be treated with dignity and respect. Homeless people experience consistent violations of the right to be treated with dignity and respect both inside and outside the SAAP system.

### **Recommendation 39**

*The Commonwealth Government should develop and implement a Charter of Rights for Homeless People which enshrines a right to adequate housing; a right to adequate assistance from the homelessness and related service systems for people without access to adequate housing; and service user rights, including the right to be treated with dignity and respect, for people accessing the homelessness and related service systems.*

## **Findings and Recommendations in Relation to the Right to a Fair Hearing and Effective Remedy**

- Both section 5(4)(f) of the *Supported Accommodation Assistance Act 1994* (Cth) and articles 2(3) and 14 of the *ICCPR* require that SAAP safeguard the rights of people experiencing homelessness, including by developing both internal and external grievance and appeals procedures. The implementation of these provisions is woefully inadequate and needs to be strengthened.
- To accord with other aims and key features of SAAP, it is axiomatic that grievance and appeal mechanisms be independent and impartial, culturally appropriate, and operate in a manner that is fair, unbiased and unprejudiced. They must also include the power to determine and enforce effective remedies.
- Having regard to the power disparities between service users on the one hand, and service providers and governments on the other, it is critical that homeless people have access to free, independent advocacy support for both internal and external grievance procedures.

### **Recommendation 40**

*The Commonwealth Government should create an independent and impartial statutory office of the Homeless Persons' Commissioner to initiate investigations, undertake inquiries, receive and consider complaints, make determinations, and make such orders as are necessary to remedy violations of homeless people's human rights and dignity. The Commissioner would report directly to Parliament and should also promote and protect the rights and interests of homeless people, assist homelessness service providers to achieve 'best practice' standards, and advise governments as to the further promotion and protection of the human rights of people experiencing homelessness.*

### **Recommendation 41**

*When undertaking inquiries, considering complaints and making determinations, a homeless persons' complaints mechanism must include the following key features:*

- *the complaints body must afford complainants the right to make complaints, give evidence and make submissions orally or in writing;*

- *the complaints body must afford complainants a right of access to legal or other representation or advocacy at no cost;*
- *the complaints body must use language and procedures that are easy to understand and as user-friendly as possible;*
- *the complaints body must afford a right of access to an interpreter at no cost;*
- *the complaints body must be independent and impartial;*
- *the complaints body must ensure that all complainants have a fair hearing;*
- *hearings must be conducted in accordance with the requirements of natural justice;*
- *hearings must be conducted in such a way as to permit the ascertainment of the facts as they are and as they bear on the right in issue;*
- *where requested, the complaints body must give reasons for its decisions; and*
- *decisions of the complaints body must be binding and subject to review in a court of law.*

**Recommendation 42**

*Commonwealth and state governments should provide funds to establish an independent service, or to extend the service of an existing body, to carry out the functions of:*

- *providing advocacy services for SAAP service users;*
- *providing casework planning and support for services users;*
- *providing education and training in user rights for SAAP service users and service providers;*
- *providing information and advice to SAAP service users; and*
- *undertaking research and, on the basis of the research, advocacy for appropriate policy and law reform.*

**Findings and Recommendations in Relation to the Rights of Children and Young People**

- Children and young people aged 12-18 comprise the single largest age group accessing SAAP, accounting for 26 per cent of SAAP service users.
- The fundamental rights and dignities of children and young people are set out in *CROC* which, in article 3, requires that ‘in all actions concerning children, whether undertaken by private or public social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the paramount consideration’.

- At present, neither the *Supported Accommodation Assistance Act 1994* (Cth) nor many SAAP service providers have regard to the fundamental rights of, and treatment principles for, children and young people in granting access to services or actually providing services. In addition to the principle of the best interests of the child, these principles include: parental guidance and recognition of the evolving capacity of the child; the right to personal development; preservation of identity; the right to expression of an opinion; the right to freedom of expression; and the right to an adequate standard of living.

### **Recommendation 43**

*The Commonwealth Government should undertake the following steps in relation to the rights of children and young people under CROC:*

- *enact specific legislation to implement CROC and create a Commission for Children to review SAAP agency compliance with CROC;*
- *develop and adopt a National Agenda for Children to ensure that CROC principles are taken into account when developing SAAP policy and legislation;*
- *establish administrative arrangements to ensure compliance with CROC in the laws, policies and practices of all levels of government and non-government organisations involved in SAAP;*
- *establish formal arrangements for consultation between government, relevant community organisations and young people regarding the adequacy of government performance in relation to people who are homeless or at risk of homelessness. Evaluation of the performance of SAAP services for children and young people should have a rights-based approach based on CROC;*
- *create a centralised Office for Children and Young People in the Department of Prime Minister and Cabinet, to coordinate and monitor policy across Government and Government agencies, as it relates to the implementation of SAAP. Create mandatory annual reporting mechanisms on the implementation of such CROC principles to the Office; and*
- *incorporate into all Government policy and tenders for public contracts in relation to SAAP matters, commercial or otherwise, a requirement of compliance with CROC principles as part of specified performance criteria and reporting on achievement of criteria.*

### **Recommendation 44**

*The Commonwealth Government and SAAP services should develop a definition and explanation of the principle of acting in the ‘best interests of children’ and*

*incorporate a process for considering 'best interests' in decision-making at all levels, such as through Child Impact Assessment processes.*

**Recommendation 45**

*SAAP services should develop a framework for developing an understanding of issues that affect gay, lesbian, transgender and transsexual young people and culturally and linguistically diverse young people.*

**Recommendation 46**

*SAAP services must acknowledge the historical context around the parent and child balance of power. SAAP services need to acknowledge differing cultural perceptions of the parent and child relationship.*

**Recommendation 47**

*At a SAAP service level, policies need to be developed around who is the client: parents or children? Policies also need to be put in place to respect young people's requests for confidentiality (especially about sharing information with their parents) and to ensure policies accord young people procedural fairness in decisions made about them.*

**Recommendation 48**

*Special consideration needs to be given by SAAP programs to problems still faced by Indigenous children and children from culturally and linguistically diverse backgrounds with regard to their enjoyment of the same standards of living and levels of service, particularly in relation to health support services. SAAP policies also need to consider the particular needs of children and young people in rural, regional and remote areas.*

**Recommendation 49**

*SAAP services need to be responsive to the needs of Indigenous clients and those of culturally and linguistically diverse backgrounds to support clients' ability to maintain their own identity, and this should be enshrined in the Supported Accommodation Assistance Act 1994 (Cth).*

**Recommendation 50**

*SAAP services need to adopt policies in relation to the accessibility of SAAP services to asylum seeker children and young people who are accepted under Australia's off-shore humanitarian program, and those awaiting on-shore determination of their status or on temporary protection visas. This is especially the case where the right to family reunion is not expedient (it can take up to 2*

years). Australia has a responsibility to the children of asylum seekers and refugees, including those who are not yet within Australian borders.

**Recommendation 51**

*SAAP support services need to take into account the limits upon access to services and resources (including Centrelink benefits), for many asylum seekers (including holders of temporary protection visas), in determining appropriate services for these clients.*

**Recommendation 52**

*SAAP services should be required as an aspect of their service agreement to create an Agency policy/Charter about involvement of young people in decision-making in all levels of that agency's policy development, service delivery and program evaluation.*

**Recommendation 53**

*Recognising that SAAP programs have a preventative role, SAAP services should assist children and young people at risk of becoming homeless, in line with the CROC principle of the best interests of the child. Services should aim to address the underlying reasons that the client is at risk and attempt to resolve them prior to the client becoming homeless.*

## 2. Introduction

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### 2.1 Background

The purpose of the *Supported Accommodation Assistance Act 1994* (Cth) is to grant financial assistance to the states to administer a program of transitional supported accommodation and related support services to assist people who are homeless or at risk of homelessness. The program, known as SAAP, aims to achieve the maximum possible degree of self-reliance and independence. The Preamble to the Act provides the following:

- That Parliament recognises the need to redress social inequalities and to achieve a reduction in poverty;
- That homeless people form one of the most powerless and marginalised groups in society. SAAP therefore aims to empower people experiencing homelessness and maximise their independence;
- That Australia recognises and seeks to protect the universal human rights and fundamental freedoms of all of its citizens, including people who are homeless or at risk of homelessness, making specific reference to six international human rights instruments; and
- That legislation relating to homeless people should focus on the individual needs of people experiencing homelessness and their right to non-discrimination and equality.

These aspirations are reflected in section 5 of the Act, which provides, inter alia, that SAAP must:

- Provide transitional supported accommodation and related support services to homeless people;
- Assist people who are homeless or at risk of homelessness to achieve the maximum possible degree of self-reliance and independence;
- Promote and protect the dignity of people experiencing homelessness;
- Ensure that homeless people are empowered to participate fully in social, cultural, economic and political life;
- Encourage innovation in the provision of services to people who are homeless; and
- Help people who are homeless to obtain long-term, secure and affordable housing.

In short, SAAP aims to promote and protect the rights of people experiencing homelessness.

Section 7 of the Act recognises the relationship between the achievement of these objectives and the increased access of people experiencing homelessness to such fundamental resources as:

- employment;

- education and training;
- health services (including mental health services);
- disability and rehabilitation services;
- income support;
- other appropriate opportunities and resources; and
- adequate housing.

Within the framework of these aims and objectives of the Act, this submission responds to Terms of Reference 1 and 9 of the National Evaluation of the Supported Accommodation Assistance Program IV. Specifically, the submission:

1. examines the extent to which SAAP IV is promoting and protecting the rights of people who are homeless or at risk of homelessness; and
2. proposes options for promoting and protecting the human rights of people who are homeless or at risk of homelessness under future Commonwealth/state arrangements.

The submission contends that, contrary to the aims and objectives of SAAP, many people who are homeless or at risk of homelessness are subject to multiple and intersectional human rights violations. These violations are often associated with, or are an incidence of, a lack of adequate housing. Having regard to this, future Commonwealth/state arrangements that aim to address homelessness must not only address the lack of adequate, affordable housing across Australia, but must comprehensively address the human rights violations to which people who are homeless or at risk of homelessness are subject by consequence of Commonwealth and state policies and practices. The submission makes key recommendations in this regard.

The submission is made by the following organisations and individuals.

## **2.2 PILCH Homeless Persons' Legal Clinic**

The PILCH Homeless Persons' Legal Clinic ('Clinic'), a joint project of the Public Interest Law Clearing House (Vic) Inc ('PILCH') and the Council to Homeless Persons ('CHP'), provides free advice and advocacy in the areas of civil, administrative and summary criminal law to people who are homeless or at risk of homelessness.

The Clinic was established in October 2001 and was originally funded as an 18-month pilot by the Victorian Department of Human Services through the Supported Accommodation Assistance Program. It is now funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Program Fund administered by Victoria Legal Aid. This funding is supplemented by fundraising efforts and by donations from Arnold Bloch Leibler and the National Australia Bank Legal Department. The Clinic does not receive any monies from the Commonwealth of Australia.

Legal services are provided by volunteer lawyers from Allens Arthur Robinson, Blake Dawson Waldron, Clayton Utz, Hunt & Hunt, Mallesons Stephen Jaques, Minter

Ellison, the National Australia Bank Legal Department and Phillips Fox. The services are offered on a weekly basis at eight outreach locations that are already accessed by homeless people for more basic subsistence needs, such as soup kitchens and crisis accommodation facilities. The legal service delivery model is, so far as possible, integrated with the welfare service delivery model of the host homelessness agency. For example, Clayton Utz lawyers provide free legal advice over a bowl of spaghetti each Tuesday to clients at Credo Café, an open lunch program for Melbourne's homeless which operates in the basement of Collins Street Baptist Church. At Flagstaff Crisis Accommodation, an emergency shelter operated by the Salvation Army in West Melbourne, lawyers from Minter Ellison and Hunt & Hunt offer free legal advice on a drop-in basis each Tuesday night after clients have finished their evening meals.

Since the inception of the Clinic in October 2001, over 200 lawyers have contributed more than 10 000 hours of assistance, at a commercial value exceeding A\$2.5 million, to over 750 clients. The matters ranged from fines, to debt, to social security, to housing, to personal injury, to mental health, to guardianship and administration. Many of these clients are children and young people or are parents with primary carer responsibilities for children or young people. The most common matters for which children and young people seek assistance relate to public space and public transport offences, discrimination, social security and access to adequate housing.

In addition to delivering direct legal services, the Clinic also aims to use the law to promote, protect and realise the human rights of people experiencing homelessness, to redress unfair and unjust treatment of people experiencing homelessness, and to reduce the extent to which homeless people are disadvantaged and marginalised by the law. In this respect, it undertakes extensive law reform work, public policy advocacy and community legal education.

### **2.3 Council to Homeless Persons**

The Council to Homeless Persons ('CHP') is a peak body representing homeless persons' agencies in Victoria. CHP's members are services that deal directly with people who are homeless. This includes large organisations like the The Salvation Army, St Vincent de Paul, Hanover Welfare Services, Catholic Social Services and Jesuit Social Services, as well as many smaller community based agencies. CHP's members provide a range of services for single people, families and young people who are homeless. The role of CHP is to represent the views of these agencies and advocate on behalf of homeless people about issues of homelessness. This involves policy analysis and research aiming to ensure that homelessness is kept on both government and public agendas.

### **2.4 Support and Accommodation Rights Service**

The Support and Accommodation Rights Service ('SARS') is a program of the Council to Homeless Persons (Vic). The program seeks to provide a range of advocacy services to people experiencing homelessness who have engaged with a Victorian

homelessness service provider and who wish to make a complaint about an aspect of service provision. In addition, the program and its auspice seek to actively participate within community processes designed to improve and secure the human rights of people experiencing homelessness.

The SARS program was established ten years ago as a response to widespread support in the Victorian SAAP sector for the enhancement and further development of user-rights principles. The service is underpinned by the premise that structures in society can leave clients feeling confused, powerless and of low worth, and that advocacy is a means of equalising the power imbalance which may exist between service providers and service users. Further, advocacy is a process which can assist people to assert their rights and fully express their needs and interests.

## **2.5 Homeless People's Association**

The Homeless People's Association ('HPA') was formed in June 2001 by the Client Representatives of St Mary's House of Welcome, a drop-in day centre for people who are homeless or at risk of homelessness. HPA began as an independent focus group run by homeless people for homeless people. The five founding members had all experienced homelessness and, from their experiences, identified the need for a fresh approach to dealing with issues of service delivery and the provision of housing. They saw that resources within the SAAP sector tended to be used in a way that was building a 'welfare industry', which promoted a culture of passive dependency. As people who had been through the experience they were experts in homelessness from an important and specific perspective, and were in a position, given the opportunity and resources, to come up with the solutions needed to seriously address homelessness.

The HPA platform was originally to involve homeless people in building their own housing by arranging to convert a disused building into accommodation, using the construction as a training process to assist people to get back into the workforce, and as a form of engagement for those who would be living in the accommodation. For the next 18 months, HPA built membership and support as an independent group based at St Mary's House of Welcome and supported by the Community Development worker. They were unfunded and, despite the limitations of their resources, held a series of public meetings, BBQs, spoke at many forums, and met with a range of people, businesses and advocacy and rights organisations to promote HPA. Over this time, HPA's platform became more focussed on advocacy, human rights and the need for homeless people to be treated with respect.

At the end of 2002, HPA received a Community Support Fund seeding grant and with a dedicated project worker and some financial resources began to formalise the group and take on a series of workshops, speaking engagements, consultation activities and representative functions. Representatives of HPA participated in the 3<sup>rd</sup> National Homelessness Conference in April 2003. HPA has since positioned itself as a recognised stakeholder in the homeless sector. More than ever, HPA sees the necessity for people who are homeless to have the control over issues of their own welfare, promote the inherent dignity of people who use SAAP services, and argue

that SAAP must be directed towards these ends instead of perpetuating a system of disempowerment, dependency and disengagement.

## **2.6 Centre on Housing Rights and Evictions**

The Centre on Housing Rights and Evictions ('COHRE') is one of the largest and most influential human rights organisations dedicated to securing economic, social and cultural rights. COHRE's work focuses on protecting housing rights and preventing forced evictions.

COHRE was founded in 1994 and now has some 45 staff working from offices in Geneva (Switzerland), Bangkok (Thailand), Rotterdam (Netherlands), Accra (Ghana), Porto Alegre (Brazil), Duluth (USA) and Melbourne (Australia), where the Asia and Pacific Regional Programme is based.

In its ten years of work, COHRE has played a principal role in addressing land, housing rights and eviction issues in dozens of countries. Working closely with key civil society organisations across the world, COHRE has fundamentally reshaped international law standards on housing rights and eviction issues through lobbying for the adoption of over 50 new international standards on these issues. COHRE has put entirely new issues on the global human rights agenda, including the right of refugees to reclaim their former homes, the right to water as a human right, and the right of women to assert inheritance rights.

In its work in Australia, COHRE aims to bring a human rights approach to questions of inadequate housing and homelessness – an approach which has been largely neglected by governments and other groups in the sector. COHRE conducts research and training on the human right to housing with groups working in the housing and homelessness sector.

## **2.7 Homelessness Legal Rights Project**

The Homelessness Legal Rights Project ('Project') is an initiative of the Gilbert + Tobin Centre of Public Law at the University of New South Wales, in partnership with the PILCH Homeless Persons' Legal Clinic in Melbourne.

The Project is a research and community development initiative to foster the sharing of information across Australia about human rights and legal issues that are related to homelessness. Participation in the Project includes people who are or have been homeless, lawyers and legal academics, public policy workers, housing and homelessness workers, government officers, journalists and human rights advocates.

The Project administers a national email group entitled 'Homelessness, Human Rights and the Law' and publishes a monthly Resource E-Bulletin on Homelessness, Human Rights and the Law. The Resource Bulletin provides updates on programs and services, campaigns and advocacy initiatives, research and publications, case-law and international developments. A host website is under development.

## **2.8 Youthlaw**

Youthlaw is Victoria's state-wide community legal centre for young people. Youthlaw was established in October 2001 and works to achieve systematic responses to the legal issues facing young people, through legal advice and casework, policy development, advocacy and preventative legal education programs.

Youthlaw is based at Frontyard Youth Services in central Melbourne. Frontyard consists of an integrated team of co-located services, which work collaboratively to address the needs of young people at risk, including accommodation, financial, legal and health needs.

Youthlaw is funded by the Commonwealth Attorney-Generals Department, through the community legal centre funding program administered by Victoria Legal Aid. Youthlaw receives a total of \$92,301 per annum from the Commonwealth and Victorian Governments. In addition, Youthlaw is generously supported by Blake Dawson Waldron, a major commercial law firm. Youthlaw also receives in-kind contributions from the City of Melbourne and Blake Dawson Waldron, including serviced office space, stationery, IT support, assistance with promotional materials and library resources.

## **2.9 Tamara Walsh**

Tamara Walsh is an Associate Lecturer and PhD candidate in the Faculty of Law at the Queensland University of Technology. Tamara's doctoral research focuses on the human rights of people who are homeless or at risk of homelessness.

## **2.10 Dianne Otto**

Dianne Otto is an Associate Professor in the Faculty of Law at the University of Melbourne. Dianne researches, teaches and writes in the area of human rights law, particularly economic, social and cultural rights. She has also worked in the SAAP sector during the 1980s.

### 3. Extent to which SAAP IV Promotes and Protects the Human Rights of Homeless People (Term of Reference 1)

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#### 3.1 Overview

In response to Term of Reference 1, this section examines the extent to which SAAP IV promotes and protects the human rights of people who are homeless or at risk of homelessness as required by both the Preamble to, and section 5 of, the *Supported Accommodation Assistance Act 1994* (Cth). In relation to each of the rights examined, it considers:

1. the relevance of the right to SAAP;
2. the substantive content of the right;
3. the nature and scope of Australia's obligation to implement, and ensure realisation of, the right; and
4. the extent to which current Commonwealth/state arrangements implement, and ensure realisation of, the right.

#### 3.2 Right to Adequate Housing

##### ***How is the right to adequate housing relevant to SAAP?***

The primary purpose of SAAP is to provide transitional supported accommodation and related support services to help people who are homeless to become self-reliant and independent, consistent with Australia's international human rights obligations. International human rights law requires that such accommodation is 'adequate'. An ancillary of this aim is the obligation of governments and service providers, pursuant to section 7(c) of the *Supported Accommodation Assistance Act 1994* (Cth), to assist people who are homeless to obtain long-term, secure, appropriate and affordable housing.

##### ***What is the right to adequate housing?***

The human right to adequate housing is recognised in many important human rights documents, including the *Universal Declaration of Human Rights*<sup>1</sup> and several human rights treaties ratified by Australia.<sup>2</sup>

The most important human rights treaty relating to housing rights is the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').<sup>3</sup> Article 11(1) of ICESCR recognises the right of everyone to 'an adequate standard of living for

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<sup>1</sup> GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948) art 25(1).

<sup>2</sup> See, eg *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, art 14(2)(h) (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 27(3) (entered into force 2 September 1990); *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 21 (entered into force 22 April 1954).

<sup>3</sup> Opened for signature 19 December 1966, 993 UNTS 2 (entered into force 3 January 1976).

himself (sic) and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’

This right has been defined by the United Nations Committee on Economic, Social and Cultural Rights (‘CESCR’) through *General Comment 4: Adequate Housing*<sup>4</sup> and *General Comment 7: Forced Evictions*.<sup>5</sup> These two documents are the most authoritative interpretations of the right to adequate housing as set out in article 11(1) of *ICESCR*.

According to CESCR, the right to adequate housing should be interpreted broadly, to apply to all people, regardless of gender, family status or other status, and should be understood to mean ‘the right to live somewhere in security, peace and dignity’.<sup>6</sup>

CESCR has identified seven indicia which should be taken into account when considering whether housing is ‘adequate’. These are:

1. Legal security of tenure — all persons, regardless of their form of tenure, including those in emergency accommodation, should possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats.
2. Availability of services, materials, facilities and infrastructure — adequacy of housing means sustainable access to natural and common resources including, among others, safe drinking water, heating, lighting, sanitation, washing facilities and refuse disposal.
3. Affordability — adequacy of housing means that the costs of housing should not be so high as to threaten other basic needs.
4. Habitability — adequacy requires sufficient space and protection from cold, heat rain and threats to health. The physical safety of occupants must also be guaranteed.
5. Accessibility — disadvantaged groups, including the elderly, mentally and physically ill and the disabled, should be given priority consideration in both law and policy on housing.
6. Location — housing must be in a location that allows access to employment, health-care, schools and other social facilities.
7. Cultural adequacy — the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.<sup>7</sup>

CESCR has identified forced evictions, in particular, as a violation of the human right to adequate housing. CESCR notes that:

evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures,

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

<sup>5</sup> CESCR, *General Comment 7: The Right to Adequate Housing: Forced Evictions*, UN Doc HRI/GEN/1/Rev.5 (2001) 49.

<sup>6</sup> CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 23.

<sup>7</sup> CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 23-5.

to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.<sup>8</sup>

CESCR has identified a number of procedural steps that must be taken in order to conduct evictions consistently with human rights.

The Commonwealth Government's obligation to provide emergency and supported accommodation for homeless people needs to be understood as an incident, or sub-right, of the right to adequate housing. It forms a part of the minimum core obligation of the Government to ensure 'basic housing', which cannot be derogated from except in the most exceptional of circumstances.<sup>9</sup> In a developed state like Australia, it would be expected that the minimum core of the right to adequate housing would be more than satisfied and, indeed, that the Government would be very close to fully implementing the right to adequate housing.

### ***Australia's implementation obligations in relation to the right to adequate housing***

Under article 2(1) of *ICESCR*, each state party, including Australia, undertakes to:

take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This section has been interpreted by CESCR through two General Comments,<sup>10</sup> and in the work of a number of human rights scholars, as follows:

- 'to take steps' — states are required to take steps that are 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant'.<sup>11</sup>
- 'to the maximum of its available resources' — this means that comparatively wealthy countries, such as Australia, will be judged according to a higher standard than less wealthy countries. While an objective standard to measure this requirement has not yet been established, in 1993 CESCR criticised Canada for spending just 1.3 per cent of its total government expenditure on social housing.<sup>12</sup> Coupled with the notion of progressive realisation, this concept means that, where a right such as that to adequate housing is not fully enjoyed in the country and where cuts to expenditure will have a negative effect on the enjoyment of that right, such cuts will not be

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<sup>8</sup> CESCR, *General Comment 7: The Right to Adequate Housing: Forced Evictions*, UN Doc HRI/GEN/1/Rev.5 (2001) 52.

<sup>9</sup> CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 10.

<sup>10</sup> CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 18; CESCR, *General Comment 9: The Domestic Application of the Covenant*, UN Doc HRI/GEN/1/Rev.5 (2001) 58.

<sup>11</sup> CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

<sup>12</sup> CESCR, *Concluding Observations of the Committee on Economic Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31 (1998) [20].

justifiable and will amount to a violation of that country's human rights obligations.

- 'with a view to achieving progressively the full realization of the rights recognised in the present Covenant' — this provision requires states 'to move as expeditiously and effectively as possible' towards full realisation of the rights in *ICESCR*, and notes that any 'deliberately retrogressive measures' would need to be fully justified in order to avoid constituting violations of the right.<sup>13</sup> Furthermore, certain 'core minimum standards', including basic housing and shelter, should immediately be realised.<sup>14</sup>
- 'by all appropriate means' — CESCR has made it clear that states have considerable flexibility when it comes to the means used to implement their obligations. Options include: directly incorporating the treaty into domestic law (as has been done, for example, in Portugal and East Timor); legislation directly protecting the rights in *ICESCR*; judicial remedies for those whose rights are violated; and administrative, social and financial programs.

The provision of effective remedies is fundamental to the implementation of human rights obligations. Those whose rights are violated must have access to a means of remedying or rectifying that violation. In the case of some aspects of the right to housing, appropriate mechanisms to remedy breaches of the right already exist. For example, a person evicted from his or her house without a proper process can go to court or a residential tenancies tribunal to challenge the eviction. However, effective remedies for other violations of the right to adequate housing are yet to be established. In the case of someone made homeless, an effective remedy would be one that gave them access to emergency housing and support services. Such remedies may be judicial, administrative or policy-based.

With respect to rights implementation in a broader sense, CESCR has declared that states' obligations can be viewed as comprising obligations of conduct and of result.<sup>15</sup> In other words, states must not only take actions through legislation, policy and programs to improve the enjoyment of rights (obligations of conduct), they must also achieve actual improvements in the enjoyment of rights (obligations of result).

States' obligations can be seen as comprising the following measures to respect, protect and fulfil rights:

- the obligation to respect requires states to refrain from violating rights. For example, states should refrain from discrimination in the provision of housing services;
- the obligation to protect requires states to prevent violations by third parties. For example, the state must stop a service-provider or private landlord from providing inadequate housing or from carrying out evictions that render people homeless; and

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<sup>13</sup> CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 18, [9].

<sup>14</sup> CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 18, [10].

<sup>15</sup> CESCR, *General Comment 3: The Nature of States Parties' Obligations*, UN Doc HRI/GEN/1/Rev.5 (2001) 18, [1].

- the obligation to fulfil requires states to take positive actions towards the enjoyment of rights, such as providing support services and adequate housing for the homeless.<sup>16</sup>

***The extent to which Australia is currently discharging its obligation to implement the right to adequate housing***

**General remarks on the implementation of the right to adequate housing in Australia**

On the evening of the last census in 2001, 99 900 people were homeless across Australia.<sup>17</sup> Around 250 000 people currently pay more than 30 per cent of their gross income in rent, a common indicator of affordability.<sup>18</sup> More than 89 000 people live in 'extreme housing stress', spending more than 50 per cent of their income on rent.<sup>19</sup> These people do not enjoy the right to adequate housing, along with thousands of other Australians whose accommodation does not meet the seven criteria of adequacy set out under international human rights standards. Indigenous Australians, children and young people, women and children fleeing domestic violence, asylum seekers and temporary protection visa-holders, people with disabilities and people from non-English speaking backgrounds are particularly affected by problems of homelessness and inadequate housing.

These statistics indicate that the human right to adequate housing is far from universally enjoyed in Australia. Alone, they may represent a violation of Australia's obligations under *ICESCR* in a number of ways. Firstly, they surely represent a violation of the minimum core obligations, including basic shelter. Secondly, Australia may have failed to pursue its obligation to progressively realise rights to the maximum of available resources, given the lack of full realisation of the right to adequate housing in the face of Australia's relative wealth and the fact that it ratified *ICESCR* over 25 years ago.

These statistics represent a failure by Australia to discharge its obligations of result and, at the very least, place a strong onus on the Commonwealth Government to take strong actions towards this end. Fulfilling its obligations of conduct is not enough.

Instead of directly implementing the right to adequate housing into Australian domestic law, the Government relies on a series of indirect measures by way of legislation, policy and programs to implement the right. The statistics speak to the fact that the indirect measures adopted by Australian governments have failed to fully implement the right to adequate housing. While a comprehensive study of all Australia's policies and laws relating to homelessness is beyond the scope of this submission, some of the key failings include:

<sup>16</sup> 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691. This typology of rights was adopted by CESCR in its *General Comment 15: The Right to Water*, UN Doc E/C 12/2002/11 (2002) [20]-[29].

<sup>17</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003).

<sup>18</sup> Affordable Housing National Research Consortium, *Affordable Housing in Australia: Pressing Need, Effective Solution* (2001) 2.

<sup>19</sup> Australian Council of Social Service, *Public and Community Housing: A Rescue Package Needed* (2002) 4.

- Australia has no national housing strategy, which CESCR considers ‘almost inevitably necessary’;<sup>20</sup>
- Australia’s Constitution does not recognise the human right to adequate housing or most other human rights
- the *Human Rights and Equal Opportunity Act 1986* (Cth) does not create an effective remedy for breach of many of the human rights of people in Australia, including the right to adequate housing;
- the human right to housing and other *ICESCR* rights are not part of the definition of ‘human rights’ for the purposes of the mandate of the Human Rights and Equal Opportunity Commission under the *Human Rights and Equal Opportunity Act 1986* (Cth);
- no national standards exist in relation to the security of tenure or quality and affordability of private rental housing. Many state legislative schemes are below international human rights standards; and
- key programs, such as social housing, do not provide a right of access, and are under-funded and subject to cuts in expenditure.<sup>21</sup>

### **Supported Assistance Accommodation Programme (‘SAAP’)**

As Australia has not directly incorporated the right to adequate housing into law, it relies on various programs to protect various aspects of the right, or sub-rights. SAAP is one such program, aiming to provide supported accommodation and other services to the homeless. However, the question is whether it does so in a manner that discharges Australia’s human rights obligations.

SAAP fails to implement the human right to adequate housing in three key ways.

Firstly, it fails to provide homeless people with a right of access to services or assistance.

Secondly, the scheme provides insufficient guarantees that the accommodation provided fulfils the adequacy requirements of emergency and supported housing and, therefore, may even lead to the further violation of housing rights.

Thirdly, the level of funding to SAAP is insufficient to discharge the obligation to implement the right to adequate housing progressively to the maximum of available resources.

These deficiencies are discussed in further detail below.

#### *1. Right to Access SAAP Services*

As noted above, Australia is obliged to provide effective remedies to those whose rights, including the right to adequate housing, are violated. The most effective remedy for homelessness is the provision of adequate housing. However, SAAP

<sup>20</sup> CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22, [12], [14].

<sup>21</sup> The net value of Commonwealth funding under the Commonwealth State Housing Agreement fell by nearly 30 per cent between 1984 and 1998. Waiting lists for public housing are growing at an average of three per cent per annum across Australia.

provides an important interim measure in the form of emergency and supported accommodation and related services. The problem, however, is that access to SAAP services is not available as a right to homeless people. In fact, SAAP services turn away a significant number of people every day.<sup>22</sup>

The failure to ensure access to SAAP services, as of right, may well constitute a violation of the minimum core obligation of the Government to provide basic housing to everyone. An alternative model is provided by Scotland's *Homelessness Act 2002*, which guarantees a right of access to permanent, adequate housing for increasingly broad categories of homeless people until, in ten years time, all homeless people in Scotland will have a right to access housing.<sup>23</sup> A similar approach could be taken to progressively realising a right to access a SAAP service.

## 2. *The Provision of Adequate Emergency and Supported Housing*

The Commonwealth Government has a responsibility to ensure that the housing provided in the SAAP program conforms to international human rights standards. As a means of implementing Australia's minimum core obligation under article 11(1), the housing provided must be, at least, basic. However, further to this, the minimum core needs to be understood in the context of Australia's overall wealth and stability, which means that SAAP accommodation should meet the standard of 'adequate,' as applicable to emergency and supported housing.

Although there are service standards in SAAP, these are inadequate in a number of ways.

Firstly, although the content of the standards varies across states, none of them provide guarantees of accommodation that are adequate in all the respects required by human rights standards. Security of tenure is a particular concern in much supported accommodation provided under SAAP.

Secondly, the nature of rights provided under service standards is insufficient to adequately protect the human rights that should be associated with housing assistance. In many SAAP services, user-rights are made conditional upon responsibilities, which are frequently more numerous than the rights. Where responsibilities are not fulfilled, or there are breaches, rights are withdrawn. The effect of this is that those rights that appear to be guaranteed in the service standards are not protected. For example, people are frequently evicted from SAAP services and then refused referral to another service in such a way as to render them homeless. This is a violation of their human right to housing under *ICESCR*. Rather than protecting rights, therefore, service standards can be used as a means to further violate them.

Thirdly, even if the content and nature of the rights provided for in service standards were consistent with human rights standards, the accountability mechanisms to ensure their enforcement are inadequate. Other than in New South Wales, service standards are enforced only by internal grievance procedures, with no right to appeal to an independent administrative or judicial body, and no external monitoring of the

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<sup>22</sup> Australian Institute of Health and Welfare, *Demand for SAAP Assistance by Homeless People 2000-01: A Report from the SAAP National Data Collection* (2002) 46-47.

<sup>23</sup> See further, Shelter Scotland <<http://www.shelterscotland.org.uk>> at 1 December 2003.

effectiveness of these internal procedures or compliance with service standards. Clearly, as it now stands, this level of enforcement does not provide an effective remedy for violations of housing rights, as required under *ICESCR*. It is not even consistent with the existing SAAP legislation.

### *3. Implementation to the Maximum of Available Resources*

The level of funding provided to SAAP under current arrangements calls into question whether Australia is fulfilling its *ICESCR* obligation to progressively implement the right to adequate housing to the maximum of available resources.

Of the 105 000 people counted as homeless on census night in 1996, just 12 per cent were accommodated under SAAP-funded services.<sup>24</sup> The need for SAAP services has since increased. While funding to SAAP services increased 10 per cent in real terms between 1996-97 and 2000-01,<sup>25</sup> it is not clear whether this has had the effect of meeting the increased need for services, which would be necessary for progressive implementation of the right to adequate housing to be taking place. The fact that some 99 900 people were homeless on the night of the 2001 Census, of which just 14 per cent were accommodated in SAAP accommodation, indicates that funding has not kept pace with growing need for SAAP services. While the level of expenditure required to discharge the obligation of taking steps to the maximum of available resources is not clear, it is arguable that Australia has the capacity to fund programs to ensure that all homeless people have access to emergency housing, and that this obligation is not met by the current funding arrangements for SAAP.

Recommendations in relation to the right to adequate housing are set out in section 4.2.

## **3.3 Right to Participation and to Freedom of Expression**

### ***How are the rights to participation and freedom of expression relevant to SAAP?***

The Preamble to the *Supported Accommodation Assistance Act 1994* (Cth) provides that it is essential that people experiencing homelessness have the opportunity to be involved in the development of policies relating to, or impacting upon, them. SAAP's aim to enable people experiencing homelessness to participate fully in community life is recognised in section 5(4)(d) of the Act.

The right to participate fully in decision-making processes and public policy formulation is also a fundamental tenet of international human rights law.

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<sup>24</sup> Australian Social and Economic Rights Project, *Community Perspectives: Australia's Compliance with the UN Covenant on Economic, Social and Cultural Rights* (2000) 41.

<sup>25</sup> Dianne Otto, 'Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with Its International Obligations?' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Human Rights Protection: Boundaries and Challenges* (2003) 15.

### ***What are the rights to participation and freedom of expression?***

Article 25 of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>26</sup> provides that all persons shall have the right, and the opportunity without discrimination, to participate in public affairs.

The United Nations Human Rights Committee ('HRC') has stated that the right to participate covers all aspects of public administration and the formulation and implementation of policy at international, national, regional and local levels.<sup>27</sup>

The right to participate is also associated with the right to freedom of expression. Pursuant to article 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.

### ***Australia's implementation obligations in relation to the rights to participation and freedom of expression***

In relation to the rights to participation and freedom of expression, Australian governments are obliged to take all necessary steps and use all available resources to enable people from all groups in society to participate in public affairs and to freely develop and express their opinions. This requires formulating policies and strategies that provide for the inclusion of groups and individuals with special needs, including the use of accessible, safe, appropriate venues, and procedures that are able to be accessed and understood by people who are illiterate, have disabilities, come from culturally and linguistically diverse backgrounds, and who are suffering the debilitating effects of homelessness. It also requires the provision of effective remedies for people who have been denied these rights.

### ***The extent to which Australia is currently discharging its obligation to implement the rights to participation and freedom of expression***

Australia is not satisfactorily meeting its obligations in relation to the rights to participation or freedom of expression for homeless people. A July 2003 survey of homeless people in Brisbane, conducted by the QPILCH Homeless Persons' Legal Clinic in conjunction with Tamara Walsh of the Queensland University of Technology, found that 58 per cent of respondents thought that they enjoyed fewer rights than other members of the community. Perhaps even more alarming is the finding that, notwithstanding that 96 per cent of respondents were, at law, Australian citizens, only 52 per cent stated that they felt like Australian citizens.<sup>28</sup> These findings indicate a

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<sup>26</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

<sup>27</sup> HRC, *General Comment 25: Article 25*, UN Doc HRI/GEN/1/Rev.5 (2001) 157.

<sup>28</sup> Tamara Walsh and Carla Klease, 'Down and Out? Homelessness and Citizenship' (2004) *Australian Journal of Human Rights* (forthcoming).

deep sense of alienation among the homeless population from the socio-political process.

One of the most significant challenges for Australian governments and SAAP service providers is to listen, *hear*, give primacy, and respond to what SAAP service users really want. As Anne Gosely, a formerly homeless woman and a founder of HPA, implores:

We understand that you think you are doing your best but until such time as you stop and ask the people themselves what their needs are you will keep going around in circles and wasting money that could be put to good use.<sup>29</sup>

Too often, governments and SAAP service providers disregard what the service user is saying and impose their own conceptualisations of the service user's best interests. It is important that both governments and service providers are fully responsive to service users' instructions so as to deal with their issues in the most comprehensive and sustainable way possible; however, it is equally important that they are faithful to what the service user says and wants.<sup>30</sup> Two examples illustrate this.

Leonie, a client of the PILCH Homeless Persons' Legal Clinic at Melbourne Citymission, sought assistance to deal with an unpaid phone bill in relation to which she was being harassed by a debt collector. Leonie was provided with comprehensive advice regarding possible grounds for challenging the mobile phone contract, causes of action against the debt collection agency under the *Trade Practices Act 1974* (Cth), and the feasibility of negotiating either a waiver of, or instalment arrangement for, the debt. Notwithstanding this advice, Leonie instructed the Clinic that she was prepared to pay the debt. All she wanted was an opportunity to tell her story – to explain to the debt collector why payment was late and to demand that, when he called her on the phone, he spoke politely and treated her with dignity and respect. The Clinic honoured these instructions and Leonie was empowered as a result.

John, on the other hand, approached the Clinic because, in his words, he was being 'continually hassled and fined for drinking in the street'. Clinic lawyers assisted to ensure that all outstanding enforcement orders and warrants for John were revoked. They were then successful in having all of John's matters listed together for hearing and determination on the Special Circumstances List of Melbourne Magistrates' Court. At this hearing, over \$10 000 of fines were dismissed and John was given a clean slate. The Clinic lawyers did not stop there, however. They consulted with him about how he wanted to improve his life. John was an alcoholic, so they arranged for him to attend a residential rehabilitative program. John had also lost contact with his children, so they made an appointment for him to meet with the Salvation Army Family Tracing Service. Finally, John remained concerned about the regulation of public space and policing practices that appeared to target the homeless for arbitrary or selective law enforcement. Consequently, Clinic lawyers lobbied and advocated

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<sup>29</sup> Anne Gosely et al, 'Stop and Listen ... Don't Assume: Why the Homeless People's Association was Formed' (Paper presented at Beyond the Divide: The 3<sup>rd</sup> National Homelessness Conference, Brisbane, 6-8 April 2003) 1.

<sup>30</sup> Jonathan Hafetz, 'Homeless Legal Advocacy: New Challenges and Directions for the Future' (2003) 30 *Fordham Urban Law Journal* 1215, 1246-7.

for John's appointment to the Victorian Government's recently established Homeless Persons' Rights Reference Group. John is now paid to provide expert advice and guidance to the Victorian Department of Human Services in relation to the development of a Charter of Rights and a strengthened complaints mechanism for people who are homeless or at risk of homelessness.

As the cases of Leonie and John attest, the ultimate duty of governments and SAAP service providers is to provide service users with a full range of choices and explain their consequences so that the service users are empowered to make educated decisions.<sup>31</sup> As the SAAP service system now operates, people experiencing homelessness are not considered as stakeholders in the provision of services, the use of homeless sector resources, and the formulation of service providers' policies and practices. For example, none of the authors of this submission are aware of a SAAP service that directly involves people experiencing homelessness in corporate governance and decision making at a board or management committee level. The effect is to sideline service users from 'ownership' of resources. This is entirely inconsistent with the aim of SAAP, articulated in section 5 of the Act, that homeless people should be empowered to participate fully in social, cultural, economic and political life.

Recommendations in relation to the right to participation and freedom of expression are set out in section 4.3.

### **3.4 Right to Freedom from Discrimination**

#### ***How is the right to freedom from discrimination relevant to SAAP?***

The need to redress social inequality and the right of all people to an equitable share of the community's resources is recognised in the Preamble to the *Supported Accommodation Assistance Act 1994* (Cth). This recognition reflects the importance at international law of the right to equality and the right to be free from discrimination. Realisation of the right to be free from discrimination is also a precondition to a person's self-esteem, dignity, capacity to live independently, and ability to belong to a strong community – all of which are aims and key features of SAAP pursuant to section 5 of the Act.

#### ***What is the 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 well constitute a non-derogable principle of customary international law.<sup>32</sup>

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<sup>31</sup> Robert A Solomon, 'Representing the Poor and Homeless: A Community-Based Approach' (2000) 19 *St Louis University Public Law Review* 475, 476.

<sup>32</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) 292-318.

The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination is set out in article 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 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>33</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>34</sup>

The norm of non-discrimination is also enshrined in article 2(1) of the *ICCPR* and article 2(2) of *ICESCR* which provide:

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 addition to being enshrined in other international human rights treaties, like *ICERD*, *CEDAW* and *CROC*, the norm of non-discrimination probably constitutes a peremptory (or non-derogable) principle of customary international law.<sup>35</sup> In the *Namibia Case*, Ammoun J of the International Court of Justice stated:

One 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>36</sup>

### ***Australia's implementation obligations in relation to the right to freedom from discrimination***

The norm of non-discrimination prohibits unfair, unjust or less favourable treatment in law, in fact, or in the realisation of rights in the political, economic, social, cultural, civil or any other field. It is a norm that is immediately realisable, which means it is not subject to progressive realisation with respect to economic, social and cultural rights. That is, the Government has no excuse, in international law, for any discriminatory aspects of SAAP.

The implementation of this norm has two key facets.

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<sup>33</sup> See also *Universal Declaration of Human Rights*, art 7.

<sup>34</sup> HRC, *General Comment 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (2001) 136.

<sup>35</sup> See, eg, K Parker and L B Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411, 441-2.

<sup>36</sup> *Namibia Case* [1971] ICJ Rep 16. See also *Barcelona Traction, Light and Power Company Limited Case (Belgium v Spain) Second Phase* [1970] ICJ Rep 3, 34.

First, the right to freedom from discrimination imposes an immediate obligation on Australian governments to ensure that their legislation, and the application thereof, prohibits discrimination and is itself non-discriminatory.

Second, the right imposes a further substantive obligation on governments 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>37</sup> These steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources.

***The extent to which Australia is currently discharging its obligation to implement the right to freedom from discrimination***

At present, Australian governments are not satisfactorily discharging their obligation to protect, respect and fulfill the right to freedom from discrimination for people who are homeless or at risk of homelessness. The current provisions of anti-discrimination and equal opportunity legislation in every Australian jurisdiction fall short of being comprehensive, as required by human rights law. In particular, none of the legislation prohibits discrimination on the basis of homelessness or social status. Discrimination on these grounds is lawful and, according to many homelessness service providers, widespread. 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>38</sup>

The effects of such discrimination are deleterious to the individuals who are subject to the unfair, unjust or less favourable treatment, and to the community as a whole. As 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>39</sup>

A recent report produced by the PILCH Homeless Persons' Legal Clinic found that there is a very high incidence of discrimination against people who are homeless, unemployed or social security recipients in Victoria, particularly in relation to the provision of goods and services or accommodation.<sup>40</sup> The report contends that the failure of equal opportunity and anti-discrimination legislation in Australia to prohibit

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<sup>37</sup> HRC, *General Comment 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (2001) 136.

<sup>38</sup> Letter from St Vincent de Paul Society to the Clinic, dated 12 August 2002.

<sup>39</sup> Letter from St Mary's House of Welcome to the Clinic, dated 20 August 2002.

<sup>40</sup> Philip Lynch and Bella Stagoll, *Promoting Equality: Homeless Persons and Discrimination – Submission Regarding Discrimination on the Ground of Social Status* (September 2002). See also Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

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 the *ICCPR*, *ICESCR* and customary international norms. Without a statutory prohibition on discrimination on the ground of social status, homeless people are left without any legal remedy and often find themselves powerless and further marginalised in the face of discriminatory treatment. As the Jesuit Social Services have recognised:

Discrimination, especially in the areas of private housing, room and caravan rental, and also in health, is both widespread and can result in significant psychological deterioration as well as material deprivation of the recipient. Indeed, consistent discrimination of this nature results in deepening of identification with the marginalised condition so as to make negotiation through their issues more difficult.<sup>41</sup>

The failure of equal opportunity and anti-discrimination legislation across Australia to prohibit discrimination on the ground of social status, when assessed in the context of the high incidence of discrimination on this ground in the provision of accommodation, undermines several key aims of SAAP, including:

- redressing social inequality;
- empowering homeless people; and
- promoting and protecting the dignity and rights of homeless people.

The norm of non-discrimination should not, however, be taken to prohibit specialised services for particular groups within the homelessness population. Indeed, substantive enjoyment of non-discrimination in SAAP services will often require that special measures be taken with respect to particular groups like Aborigines and Torres Strait Islanders, young people, women and girls, elderly people and so on.

Recommendations in relation to the right to freedom from discrimination are set out in section 4.4.

### **3.5 Right to Social Security**

#### ***How is the right to social security relevant to SAAP?***

Access to a secure, adequate income is necessary to live independently and self-reliantly and to participate fully in community life. The relationship between access to a secure, adequate income and these aims of SAAP is recognised by section 7(b)(vi) of the Act which encourages the integration of people who are homeless into the community by increasing access to income support.

Access to adequate income support is also a right at international law.

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<sup>41</sup> Letter from Jesuit Social Services to the Clinic, dated 22 August 2002.

### ***What is the right to social security?***

The right of all persons to receive social security is enshrined in article 9 of *ICESCR*, which provides that states parties recognise the right of everyone to social security, including social insurance. Although article 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>42</sup> Several European constitutional courts have affirmed this formulation, holding that although the right to social security does not necessarily entail a guaranteed or minimum income, welfare benefits must not be reduced below a minimum threshold and must, at least, be sufficient to ensure a dignified human existence.<sup>43</sup> Article 9 therefore imposes a positive obligation on the Commonwealth Government to provide basic means of subsistence to those who cannot provide for themselves.

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 person. L'Heureux-Dube and Arbour JJ of the Supreme Court of Canada recently held (in dissent) 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>44</sup>

### ***Australia's implementation obligations in relation to the right to social security***

Implementation of the right to social security has three main elements.

First, the right to social security requires that all people be entitled to a level of income sufficient to enable them to meet their needs. A person's needs vary based on their age, state of health, cultural background, family responsibilities, and other factors. For example, in relation to persons with disabilities, CESCR has recognised that '[s]uch support should reflect the *special needs for assistance and other expenses* often associated with disability.'<sup>45</sup> Thus, a system of social security that fulfils international human rights law requirements must be flexible and responsive enough to ensure that differing levels of needs are catered for, and that the level of social security provided to individuals is sufficient to enable them to meet their unique expenses.

Second, further to the need for a sufficient level of income, the right to social security requires that deprivation in a more general sense be addressed. Poverty discourse both within Australia<sup>46</sup> and around the world<sup>47</sup> has broadened to encompass

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<sup>42</sup> CESCR, *General Comment 6: The Economic Social and Cultural Rights of Older Persons*, UN Doc. HRI/GEN/1/Rev.5 (2001) 43.

<sup>43</sup> *Benefits Case* (1994) Constitutional Court of Hungary, Decision No 43/1995; *V v Einwohnergemeine X und Regierungsrat des Kantons Bern* (1995) BGE/ATF 121 I 367, Federal Court of Switzerland.

<sup>44</sup> *Gosselin v Quebec (Attorney-General)* 2002 SCC 84, [358] (Arbour J) and [141] (L'Heureux-Dube J).

<sup>45</sup> CESCR, *General Comment 5: Persons with Disabilities*, UN Doc HRI/GEN/1/Rev.5 (2001) 28 (emphasis added).

<sup>46</sup> See especially Gianni Zappala, Vanessa Green and Ben Parker, *Social Exclusion and Disadvantage in the New Economy* (2000); Michael Bittman, 'Social Participation and Family Welfare: The Money and Time Costs of Leisure' (Paper presented at the Australian Institute of Family Studies Conference,

additional indices of deprivation such as social exclusion. It is now generally recognised that if members of society do not have access to a sufficient level of material resources (or 'basket of goods'), they will be excluded from ordinary social life. For example, in Australia, social exclusion might involve lack of access to information sources (such as the internet or television), lack of access to methods of communication (such as a home telephone and/or computer) and exclusion from participation in leisure activities.<sup>48</sup> Thus, the right to social security requires the Commonwealth Government to ensure that income support benefits are pegged at a level sufficient for all Australians – regardless of their age, state of health, cultural background and family responsibilities – to meet their material needs and to facilitate social inclusion.

The third component of the implementation of the right to social security requires that Australia, at a minimum, fulfils its core minimum obligation to ensure that everyone has access to minimum levels of subsistence. However, Australia is also required to devote the maximum of its available resources towards progressively ensuring an adequate income for everyone. A diminution of expenditure on social security, or welfare reform that narrows eligibility for social security payments, is, *prima facie*, a violation of the obligation to ensure the progressive realisation of the right to social security.

### ***The extent to which Australia is currently discharging its obligation to implement the right to social security***

Australia does have a national system of social security in place. This system is principally administered by Centrelink under the *Social Security Act 1991* (Cth). However, this system falls short of realising Australia's international obligations in relation to the right to social security in three main ways.

#### *1. Eligibility Requirements are often too Stringent*

International human rights treaties state that 'everyone' has a right to social security. However, not all people in Australia who require income support are eligible to receive benefits under Australia's social security scheme. For example:

- newly arrived migrants (who are not permanent residents) cannot access income support until a two year waiting period from the time of their arrival to Australia has lapsed;
- recent changes to the Parenting Payment may mean that some parents caring for sick children over the age of 13 will be ineligible to receive income support, due to an inability to comply with new mutual obligation requirements. Only parents with 'profoundly disabled' children and children whose disability is recognised under the Child Disability Assessment Tool will

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Changing Families, Challenging Futures, 25-27 November 1998); Peter Townsend, *Poverty in the United Kingdom: A Survey Of Household Resources and Standards of Living* (1979).

<sup>47</sup> See United Nations Development Program, *Human Development Report* (1997).

<sup>48</sup> Tamara Walsh and Carla Klease, 'Down and Out? Homelessness and Citizenship' (2004) *Australian Journal of Human Rights* (forthcoming).

be exempt from participation requirements under the new *Australians Working Together* scheme; and<sup>49</sup>

- Centrelink's proof of identity requirements operate discriminatorily against the homeless, many of whom are unlikely to hold the requisite documents or have the money or resources to obtain them. Accessing documents may be especially difficult for women and children fleeing domestic violence and for refugees and asylum seekers. 'Proof of identity' requirements need to be changed to enable homeless people to use a letter from a social worker or case worker as legitimate identification.

In view of these restrictions on eligibility, it may be argued that Australia is failing to discharge its obligation to implement the right to social security in relation to these population groups.

### 2. *The Level of Income Support Provided is Inadequate to Meet Recipients' Needs*

Currently, most income support payments are pegged at levels below the poverty line. Newstart recipients receive income support amounting to only 79 per cent of the poverty line (ie \$187 per week for a single person without children excluding rent assistance), and Youth Allowance recipients receive income support amounting to only 67 per cent of the poverty line (ie \$155 per week for a single person without children excluding rent assistance). This level of payment is insufficient to allow recipients to provide themselves with the necessities of life, let alone enable them to participate in social life at an acceptable level. For many people, social security payments are insufficient to access adequate food, housing, clothing and health care. This is demonstrated by the fact that, in 2002, more than 83 per cent of people accessing SAAP-funded homelessness services listed social security as their primary income source.<sup>50</sup> Thus, Australia may be considered to be in breach of its obligation to implement the right to social security because the amount of income support provided to recipients is too low to enable them to meet their expenses.

### 3. *Mutual Obligation and the Breach Penalty Regime*

Access to social security and social assistance in Australia is also restricted through the concept of 'mutual obligation' and the breach penalty regime. The vast majority of social security recipients, including parents of children aged 13 years and over, and mature aged job seekers (aged 50 years and over), are subject to mutual obligation requirements. These requirements impose a significant burden on social security recipients, requiring them to attend job interviews, training courses, paid work, work experience and self-help courses at a level 'agreed upon' between the social security recipient and Centrelink. Recipients receive no respite from these requirements, despite the fact that four weeks annual leave is available to most workforce participants.<sup>51</sup>

Should social security recipients breach their mutual obligation requirements (for example by failing to attend a job interview or failing to provide certain information to

<sup>49</sup> See *Social Security Act 1991* (Cth) s501A.

<sup>50</sup> Australian Institute of Health and Welfare, *Homeless People in SAAP: Data Collection Annual Report* (2002).

<sup>51</sup> Dennis Pearce, Julian Disney and Heather Ridout, *Report of the Independent Review of Breaches and Penalties in the Social Security System* (March 2003) [5.10].

Centrelink), they are subject to extremely harsh penalties. Penalties include a payment reduction of 18 per cent for 26 weeks for a person's first breach, a 24 per cent reduction for 26 weeks for their second breach, and an eight week period of non-payment for any breach thereafter. These penalties are clearly disproportionate to the 'offence' committed, and result in severe hardship for breached individuals. A survey conducted by The Salvation Army demonstrated that up to 84 per cent of people who are breached are subsequently unable to afford food or medication, 63 per cent are unable to pay bills, and up to 16.5 per cent may be rendered homeless as a result of the breach penalty imposed.<sup>52</sup> Breaches often result in a vicious cycle of poverty and homelessness as an individual's energies are directed towards surviving rather than securing employment. Reflecting on the plight of a young homeless woman unable to access social security payments adequate to meet basic subsistence needs, Arbour J (with L'Heureux-Dube concurring) 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>53</sup>

Unfortunately, a large number of penalties are imposed on social security recipients for breaches beyond their control. This is particularly the case with respect to homeless people. The main means by which Centrelink communicates with social security recipients is via ordinary mail, yet homeless people, by definition, lack a fixed address. Further, people with disabilities or mental illness may fail to meet their mutual obligations owing to a period of illness or hospitalisation. In 2000-01, approximately 350 000 breach penalties were imposed, however only 2854 cases of welfare fraud were prosecuted. Thus, less than 1 per cent of people who are breached are judged by the Department of Family and Community Services to be engaging in fraudulent behaviour.

The operation of the breach penalty regime, to the extent that it denies people in need access to social security, contravenes the fundamental right to social security enshrined in article 9 of *ICESCR*.

More generally, the difficulties faced by homeless people in obtaining and maintaining payments, together with the inadequate levels of such payments, seriously undermine SAAP's aims, enshrined in section 5 of the Act, to assist homeless people to become self-reliant and to participate fully in social, cultural, economic and political life.

Recommendations in relation to the right to social security are set out in section 4.5.

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<sup>52</sup> The Salvation Army Australia, Southern Territory, *Stepping into the Breach: A Report on Centrelink Breaching and Emergency Relief* (2001).

<sup>53</sup> *Gosselin v Quebec (Attorney-General)* 2002 SCC 84, [376] (Arbour J) and [141] (L'Heureux-Dube J).

### 3.6 Right to Life, Liberty and Security of the Person

#### ***How is the right to life, liberty and security of the person relevant to SAAP?***

The promotion, protection and realisation of the right to life, liberty and security of person is a precondition to the achievement of any of the aims and purposes of SAAP, including the aims of respecting the dignity of homeless people, increasing the independence and self-reliance of homeless people, and empowering homeless people to participate fully in community life.

#### ***What is the right to life, liberty and security of the person?***

Article 6(1) of the *ICCPR* provides that every human being has the inherent right to life and that this right shall be protected by law. The HRC recognises that the right to life is a 'supreme right' from which no derogation is permitted,<sup>54</sup> while the Supreme Court of Canada has recently remarked that it is a prerequisite to the enjoyment of all other rights.<sup>55</sup>

The right to life protected by article 6(1) of the *ICCPR* is complemented by article 9(1), which provides that every person has the right to liberty and security of person and that no person shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

The HRC has consistently stated that the right to life enunciated in article 6 of the *ICCPR* should not be interpreted narrowly. In *General Comment 6*, the HRC declared that the expression 'inherent right to life' cannot properly be understood in a restrictive manner and that the protection of the right requires that states adopt positive measures, including measures to reduce infant mortality, to increase life expectancy, and to eliminate malnutrition and epidemics. The HRC developed this jurisprudence further in *General Comment 28*, in which it requested information from states in relation to the ways in which poverty and deprivation may pose a threat to life, particularly the lives of women.<sup>56</sup>

The Supreme Court of Canada, the Supreme Court of India, the European Commission on Human Rights and the European Court of Human Rights also consider that the right to life imposes positive obligations on states.

In the recent case of *Gosselin v Quebec (Attorney General)*, several judges of the Supreme Court of Canada considered the nature and extent of the right to life, liberty and security of person recognised by clause 7 of the *Canadian Charter of Rights and Freedoms*. In that case, Arbour J (with L'Heureux-Dube J concurring) stated that:

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

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<sup>54</sup> HRC, *General Comment 6: Article 6*, UN Doc. HRI/GEN/1/Rev.5 (2001) 114.

<sup>55</sup> *Gosselin v Quebec (Attorney General)* 2002 SCC 84, [346] (Arbour J).

<sup>56</sup> HRC, *General Comment 28: Article 3 (Equality of Rights between Men and Women)*, UN Doc. HRI/GEN/1/Rev.5 (2001) 168, 169.

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.<sup>57</sup>

Similarly, in the case of *Francis Coralie Mullin v Administrator, Union Territory of Delhi & Ors*, the Supreme Court of India considered that:

The question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think 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 ... Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self.<sup>58</sup>

More recently, the Supreme Court of India has asserted that 'the right to life ... takes within its sweep the right to food ... and a reasonable accommodation to live in'.<sup>59</sup>

In addition to being codified in the *ICCPR*, the right to life is also a norm of customary international law.<sup>60</sup>

### ***Australia's implementation obligations in relation to the right to life, liberty and security of the person***

In the case of *X v UK*, the European Commission on Human Rights determined that the right to life requires not only that states refrain from taking life, but that they take appropriate measures to safeguard life.<sup>61</sup> This was affirmed by the European Court of Human Rights in the recent case of *Oneryildiz v Turkey*.<sup>62</sup> In that case, the Court stated that the right to life

enjoins the States not only to refrain from the intentional and unlawful taking of life, but also guarantees the right to life in general terms and ... imposes an obligation on States to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>63</sup>

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<sup>57</sup> *Gosselin v Quebec (Attorney General)* 2002 SCC 84, [141] (L'Heureux-Dube J) and [377] (Arbour J).

<sup>58</sup> *Francis Coralie Mullin v Administrator, Union Territory of Delhi & Ors* (1981) 2 SCR 516, 524.

<sup>59</sup> *Shanti Star Builders v Narayan K Totama* (1990) 1 SCC 520. See also *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123.

<sup>60</sup> HRC, *General Comment 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 541 of the Covenant*, UN Doc HRI/GEN/1/Rev.5 (2001) 150.

<sup>61</sup> (1978) 14 DR 31.

<sup>62</sup> (No 48939/99), European Court of Human Rights, 18 June 2002.

<sup>63</sup> *Oneryildiz v Turkey* (No 48939/99), European Court of Human Rights, 18 June 2002, [62]. See also *LCB v United Kingdom* (No 23413/94), European Court of Human Rights, 9 June 1998.

The obligation to take 'appropriate steps' is an obligation to take all concrete measures within the scope of a state's powers to prevent a person's life being avoidably put at risk, including through health and housing interventions.<sup>64</sup>

The jurisprudence of the European Commission on Human Rights and the European Court of Human Rights in relation to the implementation of the right to life, liberty and security of the person is consistent with the implementation obligations set out in article 2(2) of the *ICCPR*. As discussed above, article 2(2) of the *ICCPR* obliges the Commonwealth Government to take all necessary steps to adopt such legislative or other measures as are required to give immediate effect to the right to life, liberty and security of the person.

***The extent to which Australia is currently discharging its obligation to implement the right to life, liberty and security of the person***

Homelessness will often be a violation of the right to life, liberty and security of the person.

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 in Collins Street, Melbourne. While Andrew slept he was fatally stabbed in the head.<sup>65</sup> Only months before, another homeless man, Claude, was stabbed in the stomach by a man at a Salvation Army Open Door shelter.<sup>66</sup> In May 2003, a homeless man was set alight while he slept in an arcade near Bankstown Railway Station in Sydney.<sup>67</sup> Most recently, in November 2003, a homeless man, Arthur, was burnt to death after four youths allegedly torched his squat in Mildura, Victoria.<sup>68</sup>

In 1999-2000, 22 per cent of homicides in Australia occurred in streets or open areas.<sup>69</sup> During the same period, in 56.6 per cent of reported homicides, the victim was not in paid employment.<sup>70</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 recognised as a main risk indicator for homicide for both the victim and the offender.<sup>71</sup>

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<sup>64</sup> *Oneryildiz v Turkey* (No 48939/99), European Court of Human Rights, 18 June 2002, [63]. See also *LCB v United Kingdom* (No 23413/94), European Court of Human Rights, 9 June 1998, [36]; *Calvelli and Ciaglo v Italy* (No 32967/96), European Court of Human Rights, 17 June 2002, [49].

<sup>65</sup> Angela O'Connor, 'Church Attack Presents Dilemma for Tim Costello', *The Age* (Melbourne), 29 August 2002, 7.

<sup>66</sup> Carol Nader, 'Looking for a Place to Call Home as Twilight Closes In', *The Age* (Melbourne), 28 August 2002, 13.

<sup>67</sup> 'Man May Have Been Set Alight', *The Age* (Melbourne), 19 May 2003, 3.

<sup>68</sup> John Elder, 'In the Heat of the Night, a "River Rat" Dies Hard', *The Age* (Melbourne), 9 November 2003, 10.

<sup>69</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>70</sup> <sup>70</sup> Jenny Mouzos, 'Homicide in Australia 1999-2000' (Trends and Issues in Crime and Criminal Justice Paper No 187, Australian Institute of Criminology, 2001) 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>71</sup> 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.

While the cases of Andrew, Claude and Arthur provide paradigmatic examples of the threat to life, liberty and security of the person occasioned by homelessness, a positive definition of the right recognises that a state's dereliction of its duty to ensure an adequate standard of living – including adequate health, housing and access to basic subsistence needs – itself violates the right. There are strong associations between homelessness, mental illness, social exclusion, low life expectancy, health problems, substance abuse, depression and long-term unemployment. As Cassandra Austin identifies, '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>72</sup>

Although the right to life, liberty and security of the person is enshrined as a fundamental right of international law, the promotion and protection of the right in Australia is ad hoc and piecemeal at best. In the absence of any constitutional or legislative guarantee of the right to life, it is left to the criminal law to provide some protection from physical harm and the civil law to provide some remedies in respect of wrongful acts or omissions injuring the person. This legal framework does not, however, impose any positive obligation on the Commonwealth Government to ensure an adequate standard of living and may not even impose an obligation to intervene to prevent violations of the right to life such as occurred in connection with the attacks on Andrew, Claude and Arthur. This situation clearly undermines SAAP's key aim to safeguard the rights and dignity of people experiencing homelessness.

Recommendations in relation to the right to life, liberty and security of the person are set out in section 4.6.

### **3.7 Right to Vote**

#### ***How is the right to vote relevant to SAAP?***

The Preamble to the *Supported Accommodation Assistance Act 1994* (Cth) provides that it is essential that people experiencing homelessness have the opportunity to have a say in policy development, while section 5(4)(d) of the Act requires that SAAP assist homeless people to participate fully in civil and political life. Realisation of the right to vote is the most basic expression of these aims.

#### ***What is the right to vote?***

Article 25 of the *ICCPR* recognises and protects the right of every citizen to vote.

Whatever the form of constitution or government adopted by a state, this article 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>73</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.

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<sup>72</sup> Cassandra Austin, 'Rights for the Homeless' (Australian Housing and Urban Research Institute Working Paper No 5, 1996) 16.

<sup>73</sup> HRC, *General Comment 25: Article 25*, UN Doc HRI/GEN/1/Rev.5 (2001) 157.

According to the HRC, states must take effective measures to ensure that all persons eligible to vote are able to practically exercise that 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>74</sup> There are also procedural implications of this call to take ‘effective measures’; for example, residency requirements must not be imposed or applied in such a way as to exclude the homeless from the right to vote.<sup>75</sup>

It is vital that people experiencing homelessness are able to enrol and exercise their right to vote. It is also vital that they are not penalised if they do enrol, but subsequently fail to vote. Homelessness is most often accompanied by enormous stress and disadvantage, as well as urgent and pressing survival needs that must take priority over legal obligations regarding voting. It is unfair to impose penalties on homeless people who enrol but who do not vote.

Although the right to vote may seem largely formal, the capacity to exercise that right is a key component of full participation in society. At a symbolic or ritual level, the right to vote speaks volumes; regardless of a person’s personal circumstances, on that single day the voter knows that he or she shares the same power and relevance as his or her fellow citizens. People experiencing homelessness are already marginalised and silenced in our society. The fact that voting is currently so difficult for them further compounds their already significant disadvantage.

In addition to enhancing homeless people’s sense of agency and empowerment, the enfranchisement of homeless people is fundamental to public policy formulation and development. Given that the needs of people experiencing homelessness are often different to those of people with adequate housing, it is crucial that they vote in federal and state elections in order to articulate their special circumstances, interests and concerns. This is important for the development of policies that are sensitive to homelessness and for the construction of sustainable pathways out of homelessness.

### ***Australia’s implementation obligations in relation to the right to vote***

Article 25 of the *ICCPR*, read in conjunction with article 2, requires that the Commonwealth Government and all state governments immediately take all such legislative and administrative steps as may be necessary to ensure that all people experiencing homelessness are informed of their right to vote, are able to enrol to vote, and can practically exercise their right to vote on polling day.

### ***The extent to which Australia is currently discharging its obligation to implement the right to vote***

Currently, a significant proportion of Australia’s homeless population is not able to vote in elections. Although definitive figures are not available, both anecdotal

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<sup>74</sup> HRC, *General Comment 25: Article 25*, UN Doc HRI/GEN/1/Rev.5 (2001) 158.

<sup>75</sup> HRC, *General Comment 25: Article 25*, UN Doc HRI/GEN/1/Rev.5 (2001) 157.

evidence and smaller-scale research projects suggest that the proportion of homeless people who exercise their right to vote is very low and that the barriers that stand between these citizens and the ballot box are significant.

Hanover Welfare Services estimates that approximately one-third of homeless people who are eligible voters are not registered to vote.<sup>76</sup> The Australian Federation of Homeless Organisations ('AFHO') estimates that more than 90 per cent of homeless people who are eligible to vote are not registered to vote.<sup>77</sup> Taking into account that, according to 1996 Census data, there are 88 000 homeless Australians who are of voting age, the Clinic has used these figures to estimate that the number of homeless people who may have been eligible to vote in the 2001 federal election, but did not do so, ranged from 29 000 to 80 000 people.

The primary barriers that prevent people experiencing homelessness from exercising their democratic rights at a Commonwealth level are:

- Lack of permanent address – Section 98 of the *Commonwealth Electoral Act 1918* (Cth) sets out the requirements for enrolling to vote as a 'normal' elector. Eligible claimants must provide a full residential address and a postal address. Section 99 of the Act requires that the person must be living at the address shown at the time the claim is lodged and must have been living there for at least one month. The requirement that a person give a residential address and a mailing address to enrol to vote as a normal elector is a major impediment to homeless people completing a claim for enrolment or re-enrolment. This is due to two main characteristics of homelessness, namely, non-conventional housing or lack of stability and security of housing.
  - Non-conventional housing: Where the homeless person resides or stays in non-conventional shelter such as a neglected warehouse or on the streets, he or she will not be able to provide an 'address' which is suitably particular and therefore will be ineligible to enrol as a normal elector.
  - Stability and security of housing: For most homeless people, it is not the lack of address per se, but the lack of a stable and consistent address which is the major barrier preventing them from enrolling as normal electors. Section 99(2) of the Act requires not only that the person be 'living' at an 'address' within the Subdivision, but also that the person have lived in that Subdivision for at least one month.
- The threat of monetary penalties – The threat of a fine for failure to vote or failure to notify a change of address within 21 days acts as a real deterrent to enrolling for people whose living circumstances are unstable or transient. The upheaval and distress that accompanies homelessness mean that voting is not always possible. People experiencing homelessness are often compelled to prioritise more urgent survival needs (for example, securing a

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<sup>76</sup> Michael Horn, *Social and Democratic Exclusion: Giving Voice to the Homeless* (Research Paper, Hanover Welfare Services, November 2001).

<sup>77</sup> AFHO, 'Proposals Threaten Voting Opportunities for Homeless and Young Australians' (Press Release, 27 June 2001) <[http://www.afho.org.au/3\\_news/media\\_releases/27.06.01.htm](http://www.afho.org.au/3_news/media_releases/27.06.01.htm)> at 1 December 2003.

safe place to sleep, finding food, resolving issues of financial hardship, protecting themselves from the risk of physical harm or sexual assault) over the exercise of their right to vote. In addition, their transience and lack of access to resources often means they find it difficult to obtain information about voting, and attending polling booths can be difficult. Homeless people should not be penalised if they enrol but subsequently fail to vote.

- Proof of identity issues – It is worth noting that there have also been major concerns raised over the proposed introduction of requirements for all voters to produce original forms of identity. If adopted, this measure would further disadvantage people who are in transient or unstable life situations and who do not have access to these documents – for example, women fleeing domestic violence or people sleeping rough.

In addition, homeless voters have never been a target group for the Australian Electoral Commission. By way of contrast, there has been a huge push to get more young people, and more rural people, onto the roll – that is, those who are in secure housing. The AEC even has special ‘remote mobile polling’ teams to visit isolated communities, and recently launched an extensive four-year study, described as a ‘major investment in Australia’s future’, aimed at increasing enrolment rates among young people. However, at the time of writing, no sustained effort had ever been made to make the vote more accessible for people experiencing homelessness.

Recommendations in relation to the right to vote are set out in section 4.7.

### **3.8 Right to the Highest Attainable Standard of Health**

#### ***How is the right to the highest attainable standard of health relevant to SAAP?***

A person’s health impacts significantly on their self-esteem, their ability to live independently and self-reliantly, and their capacity to participate in community life. This is reflected in sections 7(b)(iii) and 7(b)(iv) of the *Supported Accommodation Assistance Act 1994* (Cth), which obliges SAAP service providers to assist people experiencing homelessness to access health services (including mental health services) and disability and rehabilitation services.

The importance of a person’s health to the realisation of other rights and freedoms is also recognised by international human rights law.

#### ***What is the right to the highest attainable standard of health?***

The right to health is contained in article 12 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, with article 25(1) of the *UDHR* establishing 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 socio-economic

context),<sup>78</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. 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>79</sup> Services must be provided in a culturally appropriate and non-discriminatory manner.

### ***Australia's implementation obligations in relation to the right to the highest attainable standard of health***

Pursuant to article 2(1) of *ICESCR*, Australian governments have an obligation to take steps, using the maximum of their available resources, to ensure that all persons have access to adequate health care and related goods, services and conditions.

### ***The extent to which Australia is currently discharging its obligation to implement the right to the highest attainable standard of health***

People experiencing homelessness are at greater risk of most adverse health conditions than the general population.<sup>80</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>81</sup> The incidence of asthma in Australia generally for this age group of women is only 16 per cent.<sup>82</sup> The research also found that 62 per cent of young homeless women reported a psychiatric diagnosis of depression.<sup>83</sup> In Australia generally, the national lifetime incidence of major depression is estimated at 6.3 per cent.<sup>84</sup> This is strong evidence that homelessness is an infraction of the right to physical health and mental wellbeing.

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<sup>78</sup> CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc. HRI/GEN/1/Rev.5 (2001) 90, 91.

<sup>79</sup> CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc. HRI/GEN/1/Rev.5 (2001) 90, 92. See also CESCR, *Draft General Comment 15: The Right to Water*, UN Doc. E/C.12/2002/11 (2002) 1.

<sup>80</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>81</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>82</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>83</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) 3.

<sup>84</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) 3.

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>85</sup> Many of these problems arise from inadequate routine health care, lack of access to services, inability to receive continuity of care, and limited knowledge of general health matters.<sup>86</sup>

In addition to being disproportionately susceptible to illness or injury, people experiencing homelessness also often fail to receive the care or 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>87</sup>

Without adequate support, many homeless people have their health needs only partially satisfied, or only receive spasmodic (and therefore inadequate) treatment. This is exacerbated by the fact that 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>88</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.

Recommendations in relation to the right to the highest attainable standard of health are set out in section 4.8.

### 3.9 Right to Freedom of Association

#### ***How is the right to freedom of association relevant to SAAP?***

According to the Preamble to, and section 5 of, the *Supported Accommodation Assistance Act 1994* (Cth), SAAP aims to enable people experiencing homelessness

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<sup>85</sup> Royal District Nursing Service Homeless Persons Program, *Improving Health Outcomes for People Experiencing Homelessness*, 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>86</sup> Royal District Nursing Service Homeless Persons Program, *Improving Health Outcomes for People Experiencing Homelessness*, 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>87</sup> Matt Gleeson, 'Obstacles to Surviving Homelessness' (2000) 13(10) *Parity* 7, 7.

<sup>88</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.

to participate in, and integrate with, the community. This requires that their rights to freedom of association are respected.

### ***What is the right to freedom of association?***

Article 22 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, the protection of public health or morals, or the protection of the rights and freedoms of others.

The *Convention on the Rights of the Child* ('*CROC*') echoes these rights for children and young people in article 15. The focus for this section is young people, Indigenous people and public space.

### ***Australia's implementation obligations in relation to the right to freedom of association***

The issues faced by children and young people in their access to public space and freedom of association has been the subject of much research.<sup>89</sup>

At a time when many societies are (re)constructing young people as 'intruders' and a 'threat' in public spaces, there is a need to determine the issues and the impact of aggressive social interventions and exclusionary practices on young people's experiences of urban life.<sup>90</sup>

There is also recognition of the significance of public spaces to Indigenous communities for gathering and engaging in cultural practices.<sup>91</sup>

Cultural practices of Indigenous people, which express comfort using outdoor space, may conflict with the rules and regulations of the mainstream community. For example, different Indigenous groups may make choices about indoors or outdoors cooking and sleeping, in line with a perfectly acceptable cultural norm and not necessarily due to a lack of shelter...<sup>92</sup>

As the Brisbane City Council recently recognised:

Whilst a disproportionate number of Indigenous people experience homelessness in comparison to other cultural groups, community gatherings in public spaces are an integral part of life for some members of the Indigenous community.<sup>93</sup>

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<sup>89</sup> UNESCO, *Growing Up in Cities Project*.

<sup>90</sup> Karen Malone and Lindsay Hasluck, 'Geographies of Exclusion' (1998) 49 *Family Matters* 20, 20.

<sup>91</sup> Anne Coleman, 'Public Spaces, Public Stories: Long-term Homelessness in Fortitude Valley' (2002) 15(1) *Parity* 7; Paul Memmott, 'Responses to Indigenous People Living in Public Spaces' (2002) 15(1) *Parity* 15; Cassandra Goldie, 'Why Government is Treating Us Like Animals?' *Legal and Human Rights Perspectives on Living in Public Space* (2003) 16(9) *Parity* 16.

<sup>92</sup> Mike Berry et al, *Indigenous Homelessness: A Discussion Paper on Indigenous Homelessness in Victoria* (2001) 4.

<sup>93</sup> Brisbane City Council, *Your City, Your Say Newsletter Homelessness Edition* (2003) Brisbane City Council <[http://ycys.brisbane.qld.gov.au/newsletters\\_reports/current\\_newsletter.jsp?code=14](http://ycys.brisbane.qld.gov.au/newsletters_reports/current_newsletter.jsp?code=14)> at 3 December 2003.

Many of these issues are relevant to the right to freedom of association for those who are homeless or at risk of homelessness, including children, young people and Indigenous people.

The factors which impact on the rights of homeless or at risk people to the right to freedom of association and use of public spaces, which need to be taken into account when devising SAAP services, and ensuring the preservation of the dignity of at risk people include the following:

- Commercialisation of public spaces – one of the major barriers to people engaging in activities and utilising community and commercial facilities is the cost. Positioning at risk young people, Indigenous people and homeless people as consumers serves to disadvantage and ultimately preclude their access to public spaces as a result of their lack of disposable income.
- Restricted mobility – the causes of restricted mobility include lack of or expensive public transport; children and young people being too young to drive; children and young people not wanting to go places with their parents or relatives; having nowhere to go; and fears for personal safety.
- Personal safety, dangers and fears – the UNESCO Growing Up in Cities Project identified a number of mediums through which young peoples' images of danger and fear are fostered. These include: lived experience; harassment and policing of young people by regulatory agencies; parents projecting fears as a mechanism for scaring young people into containment; media sensationalisation of the problems and young people being stereotyped as perpetrators of violence; and videos, television and games.<sup>94</sup> These types of fears would be shared by many people who are homeless or at risk of homelessness, and are important considerations for SAAP services, both for at risk, young people and more broadly within their client base.
- Police and security guards 'moving on' homeless and young people who are then forced to find another space – a comment by a Somalian young person reflects a common experience of homeless youth:

Police often discriminate against us, they pick on us. Once we were walking on the street with a friend and a policeman in a car stopped and asked me my name and address for no reason. He said to me don't speak bloody African language. This made me feel really angry because he didn't respect my language or culture. He pushed my friend over when he came to help me.<sup>95</sup>

Similar experiences are particularly of concern for Indigenous people using public space.

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<sup>94</sup> UNESCO, *Growing Up in Cities Project*.

<sup>95</sup> Karen Malone, 'Growing Up in Cities as a Model of Participatory Planning and "Peace-Making" with Young People' (June 1999) *Youth Studies Australia* 17, 20.

We all saltwater people and we like listening to saltwater coming in and going out, same time feeling the breeze. Why them city council and policy always telling us move away?<sup>96</sup>

Why government is treating us like we are animals? We are not animal, we are family.<sup>97</sup>

One of the particular issues for young people at risk is that community needs are currently understood as adult needs not young people's needs; public space becomes adult space and young people are forced to occupy the fringes. For Indigenous people, the experiences of being constantly moved on in public space leads to intense feelings of alienation and lack of recognition of their rights to the use of public space in order to associate with others in their communities.

- Lack of authentic participation in planning, design and development of urban spaces – participation for Indigenous people and people at risk, including young people, in a way that is meaningful and truly consultative, needs to occur in the planning of public places. This need is exacerbated by the increasing commercial transformation of public space into privately owned space.

#### ***The extent to which Australia is currently discharging its obligation to implement the right to freedom of association***

The UN Committee on the Rights of the Child expressed concern in its 1997 report on Australia that local legislation in some states and territories still allows police to remove children and young people congregating. The Committee considered that this is an infringement of children's civil rights, including the right to assembly. This comment could easily be extended to homeless people and those at risk of homelessness when congregating within a public space.

The *Supported Accommodation Assistance Act 1994* (Cth) refers to the human dignity of homeless people and that homeless people are entitled to opportunities to allow them to fully participate within the community. For children and young people (pursuant to *CROC*) and other homeless people (pursuant to the *ICCPR*), SAAP support services need to have an advocacy role and ensure that their service delivery models preserve this right to public space and of association.

Recommendations in relation to the right to freedom of association are set out in section 4.9.

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<sup>96</sup> Longgrass Association, 'Threats and Abuse at Mindil Beach: Interview with Ruby Rose' (2003) 1 *Longgrass Magazine* 4.

<sup>97</sup> Dulcie Malimara, Long Grass Protest, Parliament House, Darwin, 2001.

### 3.10 Right to Freedom of Movement

#### ***How is the right to freedom of movement relevant to SAAP?***

Freedom of movement and the right to choose one's own residence are components of personal empowerment, community integration and capacity to participate.

Restrictions on a person's movement and choice of residence are likely to diminish that person's independence and self-reliance.

The allocation of SAAP monies to states on a per capita basis, rather than on a basis that has regard to the population size and needs of people who are homeless or at risk of homelessness, has the capacity to restrict a person's freedom of movement and dictate a person's choice of residence on the basis of the availability of services.

#### ***What is the right to freedom of movement?***

Article 12 of the *ICCPR* provides that all persons lawfully within a territory have the right to move freely and to determine his or her own residence within that territory.

The HRC recognises that liberty of movement is an indispensable condition for the free development of a person.<sup>98</sup>

#### ***Australia's implementation obligations in relation to the right to freedom of movement***

Australian governments have an obligation to immediately ensure that their policies and practices, including in relation to the allocation of SAAP monies and the accessibility of SAAP services, are such that people have a genuinely free choice as to where they move and live rather than a choice that is significantly determined by the availability of services.

#### ***The extent to which Australia is currently discharging its obligation to implement the right to freedom of movement***

The right to choose one's residence, enshrined in article 12(1) of the *ICCPR* means that:

Any person lawfully within the territory of a given state may choose where he (sic) wants to live, whether that be a city, a town, a village or in the countryside. He may also freely choose which city, town or village or district he will make the centre of his life.<sup>99</sup>

People who are homeless live in all parts of Australia. This is verified by the findings from the 1996 Census and the 2001 Census. The 2001 Census data confirms that the national rate of homelessness has remained relatively constant during the five year period from 1996 to 2001.<sup>100</sup> However, it also confirmed that, once again, there

<sup>98</sup> HRC, *General Comment 27: Article 12*, UN Doc HRI/GEN/1/Rev.5 (2001) 163.

<sup>99</sup> A Grahl-Madsen, *The Universal Declaration of Human Rights: A Commentary* (1992) 209.

<sup>100</sup> While the national figure between 1996 and 2001 dropped from 105 304 to 99 900, this decline in the statistics was a result in a change of the rules for the enumeration of homelessness in remote Indigenous communities: Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 2.

is a significant variation in the number of people who are homeless on a state by state and territory basis (see Table 1 below).

Table 1: Homeless People by State and Territory<sup>101</sup>

	<b>NSW</b>	<b>Vic</b>	<b>Qld</b>	<b>SA</b>	<b>WA</b>	<b>Tas</b>	<b>NT</b>	<b>ACT</b>
<b>2001</b>	26 676	20 305	24 569	7 586	11 697	2 415	5 423	1 229
<b>1996</b>	29 608	17 840	25 649	6 837	12 252	2 014	9 606	1 198

There was also a significant variation in the rate of homelessness (ie the number of people who are homeless on a per capita basis, eg per 10 000 people) on a state by state and territory basis (see Table 2 below).

Table 2: Rate of Homelessness per 10,000 of the Population<sup>102</sup>

	<b>NSW</b>	<b>Vic</b>	<b>Qld</b>	<b>SA</b>	<b>WA</b>	<b>Tas</b>	<b>NT</b>	<b>ACT</b>
<b>2001</b>	42.2	43.6	69.8	51.6	64.0	52.4	288.3	39.6
<b>1996</b>	49.4	41.0	77.3	48.1	71.5	43.9	523.1	40.3

As can be seen from Table 2, the rates of homelessness in the Northern Territory, Queensland and Western Australia respectively were significantly and consistently higher in both 1996 and 2001, compared to New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory. In addition, with the exception of the Northern Territory,<sup>103</sup> the rates of homelessness in each state and territory did not vary significantly between 1996 and 2001, indicating that there is a systemic and sustained differential on a state by state and territory basis regarding which places people who are homeless are living.

This variation in the rate of homelessness across Australia has significant implications for the SAAP Program regarding implementation of the international human right to freedom of movement. The international human right to freedom of movement recognises that, subject to certain exceptional circumstances (discussed below), people in Australia have a right to move freely between states and territories and to choose their place of residence. The significance of this international human right is that it requires SAAP to respond to the needs of homeless people *where they are living*, rather than implementing policies in different parts of Australia to 'deal with homeless people'. Such policies include trying to 'move on' homeless people when

<sup>101</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 6.

<sup>102</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 44.

<sup>103</sup> The variation between 1996 and 2001 in the Northern Territory (and to a lesser extent in Queensland and Western Australia) is attributed to the change in ABS rules regarding enumeration of homelessness in remote Indigenous communities, rather than a change in the circumstances under which people are living. In other words, the trend shown in the Northern Territory is not to be necessarily attributed to an improvement in the housing and accommodation conditions of people over that time.

there is a disproportionate lack of services and accommodation available to them, including through SAAP, compared to other parts of Australia.

The need for SAAP to respond to the findings of the national estimates of homelessness was noted in 1996<sup>104</sup> and again in 2001,<sup>105</sup> as part of the analysis of the Census data. Chamberlain and MacKenzie identified two key issues: the size of the program and its national distribution. In relation to size, it was noted that

[o]ver many years, decisions have been taken about how funds ought to be shared across the Commonwealth using overall population figures. *The size of the homeless population is larger than was previously thought* and the scale of the program response would be one issue. The National Data Collection Agency reports that 'SAAP agencies are operating to capacity with respect to accommodation. The low daily turnover rate for accommodation and the relatively low referral rate for those requiring immediate accommodation suggest that finding accommodation in a SAAP agency may be difficult.' The demand for supported accommodation is a complex issue because only some people in the homeless population will be seeking accommodation on any night. There may also be 'discouraged accommodation seekers' who no longer request assistance because they believe services are full.<sup>106</sup>

In addition to the inadequacy of the size of the program, the Census data indicates that the current approach to national distribution does not reflect the actual need. SAAP funding is allocated on a per capita basis, with some adjustment for smaller jurisdictions, against the total population of each state and territory. Yet, as set out above, the rates of homelessness vary significantly (see Table 3).

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<sup>104</sup> Chris Chamberlain, 'Counting the Homeless: Implications for Policy Development 1996' (Australian Bureau of Statistics, 1999) 56.

<sup>105</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 58-9.

<sup>106</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 59 (emphasis added and citations omitted).

Table 3: Total Recurrent SAAP Funding Allocations 2001-2002 and Percentage of Homeless Population<sup>107</sup>

	Total Recurrent Funding 2001-02		Homeless Population	
	\$'000	%	No.	%
<b>NSW</b>	94 517	33.2	26 676	26.7
<b>Vic</b>	65 435	23.0	20 305	20.3
<b>Qld</b>	44 587	15.6	24 569	24.6
<b>WA</b>	26 908	9.4	11 697	11.7
<b>SA</b>	24 743	8.7	7 586	7.6
<b>Tas</b>	11 554	4.1	2 415	2.4
<b>ACT</b>	9 916	3.5	1 229	1.2
<b>NT</b>	7 379	2.6	5 423	5.4
<b>Australia</b>	<b>285 039</b>	<b>100.0</b>	<b>99 900</b>	<b>100.0</b>

Accordingly, locations such as the Northern Territory, Queensland and Western Australia receive a disproportionately low level of SAAP funding compared to the size and rate of homelessness in those jurisdictions. Chamberlain and MacKenzie comment that the statistics indicate that:

There may also be variation across different communities. One issue for policy makers is the extent to which the provision of supported accommodation sufficiently matches the population in need.<sup>108</sup>

It is suggested that the inadequacy and inequitable distribution of SAAP services when referenced against the size and distribution of the homeless population is effectively operating to place pressure on homeless people to move to locations where there may be more assistance available. This is contrary to their international human right to freedom of movement.

The case study of Darwin in the Northern Territory illustrates this point.<sup>109</sup> In Darwin, a range of laws operate to prevent a homeless person, living in public space, from being able to carry out essential human functions, such as sleeping. Darwin City Council by-law 103, for example, makes it an offence for a person to fall asleep between sunset and sunrise in a public place. The defences available under this by-law are extremely limited and difficult to prove. Compliance with the by-law is monitored by the Darwin City Council Public Places Program. The Program involves council officers undertaking sunset and sunrise patrolling of areas particularly occupied by homeless people. Officers are required to warn people to move on, under threat of formal prosecution. There is an estimated population of between 200

<sup>107</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 59.

<sup>108</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 59.

<sup>109</sup> Marcia Langton, 'The Long Grass People of Darwin' (1998) 11(4) *Parity* 24; Mary-Lynn Griffith, 'By the By!' (1999) 24(5) *Alternative Law Journal* 245; Cassandra Goldie, 'Living in Public Space: A Human Rights Wasteland?' (2002) 27(6) *Alternative Law Journal* 277.

to 1000 people living in public space in and around Darwin.<sup>110</sup> In 2001, Council officers spoke to people about possible infringement of the by-laws on 33 805 occasions, with 94 formal infringement notices being issued (of which 29 were subsequently withdrawn). When the Council is queried about the impact of this level of patrolling and regulation on homeless people, it contends that it is not responsible for the housing and accommodation needs of the Darwin population. According to the Council's previous Director of Community Services,

[h]ousing and provision of accommodation is not a function carried out by municipal councils in the Northern Territory and the Council has a responsibility not to carry out those functions for which it does have responsibility. Housing is a permissive not mandatory function of local government in the Northern Territory.<sup>111</sup>

In Darwin, as in most other urban centres, SAAP is considered to be the primary response by government to meeting the short- to medium-term accommodation needs of homeless people. Yet, the Northern Territory receives an inadequate level of funding to, inter alia, meet the needs of people living in the urban centres such as Darwin. Combined with the impact of the regulation of public space described above, this inadequate level of funding leads to a breach of people's rights to live in the place of their choice. People are constantly told to 'move on' but, in Darwin, there is nowhere for them to move on to. The level of monitoring and warning of people living in public space, in the context of inadequate SAAP services, has a direct impact on people's sense of legitimacy to be living in Darwin. There is also authority to support the proposition that the surveillance of people's movements and their location is also contrary to their international human right to freedom of movement.<sup>112</sup>

As noted above, the international human right to freedom of movement may be subject to certain kinds of restrictions in 'exceptional circumstances'. Those exceptional circumstances are set out in article 12(3) of the *ICCPR*:

This provision authorises the State to restrict these rights only to protect national security, public order, public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognised by the Covenant.<sup>113</sup>

Accordingly, restrictions on people's movement (where direct or indirect) may be for the purpose of public order and/or public health. A restriction under article 12(3) may be permissible if it 'responds to a pressing public and social need, pursues a legitimate aim and is appropriate to that aim.'<sup>114</sup> Such restrictions may include

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<sup>110</sup> Paul Memmott and Shanneen Fantin, '*The Long Grassers*': *A Strategic Report on Indigenous 'Itinerants' in the Darwin and Palmerston Area* (2001) 56.

<sup>111</sup> *Simmering v Darwin City Council* (2003) Federal Magistrates Court of Australia in Darwin, File Number DZ 4 of 2003, Affidavit of Diana Leeder dated 16 April 2003, 2.

<sup>112</sup> *Cooper v Union of India* (1971) 1 SCR 512; *Maneka Ganhi v Union of India and Anor* (1978) SCR 312.

<sup>113</sup> HRC, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc HRI/GEN/1/Rev.5 (2001) 163.

<sup>114</sup> *Strasbourg Declaration on the Right to Leave and Return*, adopted 26 November 1996, art 4(c).

measures to exert control over the population and to prevent sanitation problems.<sup>115</sup> The Darwin City Council, in part, justifies the level of regulation of sleeping in public places on the basis of safety, sanitation, cleanliness and environmental amenity.<sup>116</sup> However, it must be shown that the restrictions are necessary for meeting that purpose. In the case of the impact of inadequate SAAP funding and its inequitable distribution on homeless people living in public spaces, it could not be argued that the situation is necessary. It is clear that there is scope for reviewing the methods by which the distribution of SAAP funding is calculated in light of the locations of homeless people, and the level of SAAP funding that is required to meet their needs for short- to medium-term accommodation.

In order for people to avoid the impact of the operation of laws such as by-law 103, it is crucial that they have equitable and appropriate access to SAAP services. Otherwise, the alternatives faced by homeless people are reduced to a life of constantly seeking to avoid prosecution or to leave the place where they are living. This is in breach of their international human right to freedom of movement.

Recommendations in relation to the right to freedom of movement are set out in section 4.10.

### 3.11 Right to Education

#### ***How is the right to education relevant to SAAP?***

According to CESCR, education is both a human right in itself, and a necessary component of the realisation of other rights. In CESCR's view, education should be empowering and a primary vehicle by which economically and socially marginalised people can overcome poverty and participate fully in the civil, political, economic, social and cultural lives of their communities.<sup>117</sup> This is reflected in section 7(b)(ii) of the *Supported Accommodation Assistance Act 1994* (Cth), which recognises the importance of increased access to education as essential to the further integration of people experiencing homelessness into the broader community.

#### ***What is the right to education?***

The right to education is recognised by article 13 of *ICESCR*. Education must be adequate, accessible, appropriate and affordable.

The right to education and the aims of education are also articulated in articles 28 and 29 of *CROC*.

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<sup>115</sup> S Jagerskiold, 'The Freedom of Movement' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 166, 177.

<sup>116</sup> *Simmering v Darwin City Council* (2003) Federal Magistrates Court of Australia in Darwin, File Number DZ 4 of 2003, Affidavit of Diana Leeder dated 16 April 2003, 6.

<sup>117</sup> CESCR, *General Comment 13: The Right to Education*, UN Doc HRI/GEN/1/Rev.5 (2001) 74.

### ***Australia's implementation obligations in relation to the right to education***

Implementation of the right to education, enshrined in *CROC* and *ICESCR*, needs to recognise the discrimination that many at risk people, particularly young people, face when trying to access educational services. This includes the discrimination faced by Indigenous children and children of culturally and linguistically diverse backgrounds (as, for both groups, language and culturally appropriate curricula and appropriate integration education are not always available), children with disabilities, those children and young people living in rural and remote locations, those young people discriminated against on the basis of their sexuality. Implementation of the right to education must also take place having regard to the barriers posed by gender inequality and the specific barriers to accessing services for children in care.

Research has clearly shown that:

If young people remain at school and located in their local community, then they are less likely to become deeply involved in the homeless sub-culture. It is only when young people drop out of school and leave behind their local ties, that they tend to make the transition to chronic homelessness.<sup>118</sup>

Acknowledging that early school leaving is a key at risk indicator of homelessness, SAAP has a clear role to play in ensuring that barriers outlined below, which prevent young people either entering or remaining in education, are dismantled.

- Access – Education is, in principle, compulsory, free and universal. In practice, access to school activities is restricted for many children as a result of incurred costs (eg costs of books, equipment and some school activities such as school excursions and swimming lessons) and some voluntary fees.
- Bullying – Students who are the target of violence and bullying often leave school altogether, which seriously compromises their employment prospects.<sup>119</sup> Research has shown that the effects of harassment at school can have serious health consequences and these young people are at greater risk of suicide than their peers.<sup>120</sup> Research also indicates that violence against lesbian and gay students has consequences such as truancy and dropping out of school.<sup>121</sup>
- Curriculum content – In an on-line survey and in one-to-one interviews, young gay, lesbian, bisexual and transgender people have identified that the school curriculum does not and needs to include and address issues relating to sexual orientation. Schools also need to adopt an anti-harassment policy and affirm diversity.
- Human rights education – Few young people are aware of their rights or know that legislation in most states and nationally prohibit discrimination on

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<sup>118</sup> Chris Chamberlain and David MacKenzie, *Youth Homelessness – Early Intervention and Prevention* (1998) 171.

<sup>119</sup> See K Rigby, *Bullying in Schools: And What to do About It* (Australian Council for Education Research, Melbourne) (1996) 52.

<sup>120</sup> K Rigby, 'Can Adverse Peer-Relations at School Drive Children to Suicide?' (Paper presented at 20<sup>th</sup> International School Psychology Colloquium, University of Melbourne, 15-19 July 1997) 20.

<sup>121</sup> J Griffin, 'Anti-Lesbian/Gay Violence in Schools' in G Mason & S Tomsen (eds) *Homophobic Violence* (1997) 107.

the ground of age. Many young people are not aware that mechanisms are available to protect their rights or of how to access these mechanisms.

- Physical punishment – *CROC* requires that the administration of school discipline be consistent with students' human dignity and other rights, including their rights to be heard on matters affecting them (articles 28(2) and 12). Disciplinary measures in schools range from informal provisions such as additional homework and detention to formal sanctions such as exclusion from school and corporal punishment. Statutory provisions in most states and territories only apply to public schools. New South Wales and the Australian Capital Territory are the only jurisdictions that regulate discipline in private/independent schools by legislation – both have a statutory ban on corporal punishment in all schools. In Victoria, legislation banning corporal punishment applies only to government schools.
- Exclusion – Temporary and permanent suspensions and expulsions from school are used arbitrarily as forms of punishment without adequate safeguards for the rights of the child.

***The extent to which Australia is currently discharging its obligation to implement the right to education***

The United Nations Committee on the Rights of Child identified concerns in relation to Australia's implementation of the rights in *CROC*, which are important for the provision of services by SAAP support services. These included the special problems still faced by Indigenous Australians, and children of culturally and linguistically diverse backgrounds with regard to their enjoyment of the same levels of education services. SAAP services should also acknowledge the lack of legislative prohibition of the use of corporal punishment in schools. SAAP should be responsive to children and young people subject to such cruel and degrading treatment, which contributes to making them at risk.

Recommendations in relation to the right to education are set out in section 4.11.

**3.12 Right to Participate in Cultural Life, including Indigenous and Minority Group Rights**

***How is the right to participate in cultural life relevant to SAAP?***

Indigenous people are more likely to experience homelessness than any other cultural or social group in Australia. According to Chamberlain and MacKenzie:

Indigenous people are more likely to experience homelessness than other Australians. Two per cent of the population identified as Indigenous at the 2001 census, but 16 per cent of SAAP clients were Aboriginal in 2000-2001...Indigenous people were over-represented in all sections of the

homeless population...Overall, 2 per cent of people identify as Aboriginal, but 9 per cent of the homeless were Indigenous.<sup>122</sup>

Indigenous people have a range of needs, issues, values and perspectives with respect to the provision of housing and accommodation that are directly associated with Indigenous culture.

Indigenous culture is fundamental to every aspect of life: 'We can't forget who we are, but we should not keep having to explain Aboriginal culture to government authorities'.<sup>123</sup>

Recent research into homelessness and Indigenous issues confirmed a range of cultural issues associated with housing needs that need to be addressed. Those issues included, although were not limited to:

- the importance of extended family;
- observing family obligations and sharing income amongst family members and assisting family members when they need financial help;
- complexity in service systems and insufficient Indigenous specific workers; and
- housing and service design.

Overarching this issue is the context of historical dispossession and the extent to which Indigenous communities continue to experience the 'imposition of frameworks, definitions, policy development processes and implementation'.<sup>124</sup>

### ***What is the right to participate in cultural life?***

Article 27 of the *ICCPR* provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Australian governments are under a range of obligations regarding the implementation of this right. These obligations are expanded upon in the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.<sup>125</sup> For example, national policies and programmes must be planned with due regard for the legitimate interests of people belonging to minorities,<sup>126</sup> In addition, measures must be taken to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, with some limited exceptions.

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<sup>122</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003) 5.

<sup>123</sup> Mike Berry et al, *Indigenous Homelessness: A Discussion Paper on Indigenous Homelessness in Victoria* (2001), 11.

<sup>124</sup> Mike Berry et al, *Indigenous Homelessness: A Discussion Paper on Indigenous Homelessness in Victoria* (2001).

<sup>125</sup> *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, United Nations General Assembly Resolution 47/135, 18 December 1992.

<sup>126</sup> *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, United Nations General Assembly Resolution 47/135, 18 December 1992, art 5(1).

Aboriginal and Torres Strait Islanders constitute a minority of the Australian population, representing some 2 per cent at the 2001 Census. In addition, their cultural rights as members of a minority group are augmented by their status as the Indigenous peoples of Australia.

The human rights of Indigenous people, including the right to participate in cultural life, are expanded upon in the Draft Declaration on the Rights of Indigenous Peoples.<sup>127</sup> Whilst the Draft Declaration has not yet been adopted by the United Nations General Assembly, and by virtue of being a Declaration would not be legally binding, '[i]t is likely... that the Draft Declaration will contribute to a growing body of customary international law in the area of Indigenous peoples' rights.'<sup>128</sup> The Draft Declaration makes it clear that Indigenous people have the right to 'practise and revitalise their cultural traditions and customs'<sup>129</sup> and 'special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of ...housing...'<sup>130</sup>

The human rights described above are linked to the right to be free from discrimination, in particular on the grounds of race and culture. For example, generic policies and programs such as SAAP or public housing that operate to unreasonably prevent a particular cultural group from engaging in their cultural practices may amount to unlawful indirect discrimination.<sup>131</sup>

In addition, a core human right is the right of Indigenous and minority groups to participate in the public policy decision-making processes that will affect them.<sup>132</sup>

### ***Australia's implementation of the right to participate in cultural life***

A range of reports and research confirm that public policy processes regarding homelessness continue to be inadequate to respond to Indigenous homelessness, including failing to take the special measures that are required to ensure that Indigenous people are in control of or are able to effectively participate in the development of solutions.<sup>133</sup>

A powerful summation of the extent to which Indigenous people continue to experience a denial of their human rights to culture life was provided during the 2003 Indigenous Homelessness Forum:

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<sup>127</sup> *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994).

<sup>128</sup> Aboriginal and Torres Strait Islander Commission, 'An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples' (ATSIC, 1999).

<sup>129</sup> *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994) art 12.

<sup>130</sup> *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994) art 22.

<sup>131</sup> Tenants Advice Service (WA), *Journey to Justice: Submission to the Equal Opportunity Commission's Investigation into the Provision of Public Housing to Aboriginal and Torres Strait Islander People in Western Australia* (2003); Cassandra Goldie, *Homelessness, Public Housing and Racial Discrimination in the Northern Territory* (2002) Gilbert + Tobin Centre of Public Law <<http://www.gtcentre.unsw.edu.au/Cassandra%20article%20homeless%202.doc>> at 20 May 2003.

<sup>132</sup> *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994) art 23; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, United Nations General Assembly Resolution 47/135, 18 December 1992, art 2(3).

<sup>133</sup> Indigenous Housing Association, *Submission - Needs of Urban Dwelling Aboriginal and Torres Strait Islander Peoples -Commonwealth Parliamentary Inquiry* (2000).

The image of Indigenous people living in bush camps and other more traditional lifestyles is one of government neglect that can be ameliorated by the provision of single family dwellings. Yet each of the contexts of traditional obligations and nomadic lifestyles can be an acceptable form of living for some Indigenous people ... The values and philosophical assumptions that attach to definitions of homelessness do not operate well for Indigenous people. They presuppose what is good and what is bad, without consideration of the unique qualities of the cultural obligations and roles that influence the way in which many Indigenous people live their lives and satisfy their family and cultural obligations ... Many of these people neither seek nor want any form of intervention into the way in which they are living. At the same time they look for acceptance and understanding that the lives that they lead should be respected and with that respect should come supports and assistance at the time, and in the way, which most support their individual views of how their lives should be led ... The delivery of the vision [to address Indigenous homelessness] will need new models of communication and dialogue ;which place at the centre of their decision-making the preferences, obligations and aspirations of Indigenous people ... Programs should enhance independence, respect individual rights to free association and movement, support individual choices and reduce unnecessary intrusion into individual lifestyles.<sup>134</sup>

***The extent to which Australia is currently discharging its obligation to implement the right to participate in cultural life***

This submission has not been prepared by or in appropriate consultation with Indigenous communities. Accordingly, it is not proposed to detail further the nature of the issues and concerns of Indigenous communities at the present time regarding implementation of their cultural rights as Indigenous people particularly in relation to SAAP.

However, in light of the recent findings of the 2001 Census regarding the ongoing extensive and disproportionate incidence of homelessness within Indigenous communities, it is crucial that SAAP reforms give Indigenous communities appropriate control over and participation in identifying concerns and problems, and the development of solutions to Indigenous homelessness. Solutions to Indigenous homelessness, including through the reform of SAAP should be given the highest priority.

**3.13 Right to be Treated with Dignity and Respect**

***How is the right to be treated with dignity and respect relevant to SAAP?***

The right to be treated with dignity and respect is a cornerstone of the *Supported Accommodation Assistance Act 1994* (Cth). Section 5(4) of the Act provides that a

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<sup>134</sup> Chris MacQueen, 'Developing a Vision to Address Indigenous Homelessness' (2003) (March) *Australian Federation of Homelessness Organisations News* 6.

key feature of SAAP is that it should promote and emphasise the human dignity of people who are homeless. The Preamble to the Act similarly provides that Commonwealth, state and territory governments, and service providers themselves, should ensure that supported accommodation and related support services are delivered to people experiencing homelessness in a manner which promotes and respects their human dignity.

***What is the right to be treated with dignity and respect?***

The right to be treated with dignity and respect is also a cornerstone of the international human rights framework and is enshrined in the preambles to the *ICCPR* and *ICESCR*. Both Covenants provide that ‘recognition of human dignity ... is the foundation of freedom, justice and peace’ and state that it is from the inherent dignity of the human person that human rights derive.

As recognised by article 10 of the *ICCPR*, the right to dignity and respect is of especial importance to people who are marginalised or vulnerable, particularly people who are in some way deprived of their liberty by the state. This includes people who are detained in psychiatric hospitals or correctional facilities, or people whose freedom is fettered by way of a judicial or administrative order, such as a community treatment order, guardianship order or administration order.

***Australia’s implementation obligations in relation to the right to be treated with dignity and respect***

Australian governments at both a Commonwealth and state level have an obligation under international human rights law and the *Supported Accommodation Assistance Act 1994* (Cth) to take all necessary steps to immediately ensure that people who are homeless or at risk of homelessness are treated with dignity and respect. The Act imposes an additional obligation on service providers to ensure that services are delivered to clients in a manner that is respectful and has regard to their inherent human dignity.

***The extent to which Australia is currently discharging its obligation to implement the right to be treated with dignity and respect***

Homelessness is, by definition, a violation of the right to be treated with dignity and respect. A dignified human existence requires that people have a sense of legitimacy and control over the place that they consider home, together with access to the basic necessities of life, including food, clothing, shelter and health care beyond mere survival levels. It requires availability at levels that are adequate to enable people to engage with their fellow humans and, more broadly, with social, political, civil and community life.

In addition to this broad infraction, people experiencing homelessness are susceptible to more specific violations of the right to be treated with dignity and respect both inside and outside the SAAP service system.

For people inside the SAAP service system, violations of the right include:

- being spoken to by workers in a condescending, patronising or derogatory manner;
- being evicted or excluded without a proper complaints or grievance process;
- being required to eat or live in unclean, unsanitary or unhygienic conditions;
- receiving services and support on the basis of worker assumptions rather than meaningful consultation and participation; and
- being forced to live in ways that are contrary to cultural obligations.

For people outside the service system, many of whom fall into the 'primary homelessness'<sup>135</sup> category, life 'on the street' can be demeaning and humiliating. As critical social theorist and lawyer Jeremy Waldron argues, although there is nothing particularly dignified about sleeping or urinating, for many there is something deeply and inherently undignified about being forced to do so in a public place.<sup>136</sup> For others, their sense of dignity and respect is denied by the ways in which they are treated as outsiders from mainstream society, experience discrimination or are 'demonised'. For people outside the SAAP service system, other violations of the right to be treated with dignity and respect include:

- exclusion from, or the denial of access to, SAAP services on the basis of assumed behaviours, a person's 'high and complex needs' or 'dual diagnosis', or inadequate appropriate supports within a service;
- being discriminated against on the basis of social status; and
- being targeted by law enforcement officers for minor public space or public order infringement notice offences.

Although section 5(4) of the *Supported Accommodation Assistance Act 1994* (Cth) provides that SAAP should safeguard the rights of people who are homeless or who are at risk of homelessness through the development and implementation of a charter of rights and a grievance or complaints mechanism, this has not occurred to date. A charter could ensure that the human dignity of people experiencing homelessness

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<sup>135</sup> The Australian Bureau of Statistics recognises 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: Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003). See also 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>136</sup> Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295, 320.

was promoted and protected, both in terms of accessing and receiving SAAP services, while a complaints mechanism could ensure that violations of the rights of people experiencing homelessness could be identified, investigated and remedied.

Recommendations in relation to the right to be treated with dignity and respect are set out in section 4.13.

### **3.14 Right to a Fair Hearing and Effective Remedy**

#### ***How is the right to a fair hearing and effective remedy relevant to SAAP?***

Section 5(4)(f) of the *Supported Accommodation Assistance Act 1994* (Cth) provides that SAAP is to safeguard the rights of people experiencing homelessness, including by developing grievance and appeals procedures. To accord with other aims and key features of SAAP, it is axiomatic that grievance and appeal mechanisms be independent and impartial, culturally appropriate, and operate in a manner that is fair, unbiased and unprejudiced. They must also be empowered to determine and enforce effective remedies. In addition to being required by the Act, these features are required by international human rights law.

#### ***What is the right to a fair hearing and effective remedy?***

Article 2(3) of the *ICCPR* provides that each state party undertakes:

- (a) to ensure that any person whose rights and freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and
- (c) to ensure that the competent authorities shall enforce such remedies when granted.

Article 14 of the *ICCPR* provides that all people are equal before and under the law. Importantly, it also provides that people are entitled to the proper administration of justice, including: the right to a fair hearing in a competent, independent and impartial tribunal; the right to a presumption of innocence; the right to counsel or an advocate; the right to adequate time and facilities to prepare and present a case; the right to a free interpreter; and the right to appeal.

The right to a fair hearing is also enshrined in the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination Against Women*.<sup>137</sup>

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<sup>137</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

### ***Australia's implementation obligations in relation to the right to a fair hearing and effective remedy***

Pursuant to both section 5(4)(f) of the *Supported Accommodation Assistance Act 1994* (Cth) and articles 2(3) and 14 of the *ICCPR*, the Commonwealth Government has an obligation to take all necessary steps to immediately ensure that all people experiencing homelessness have adequate access to effective remedies for violations of their human rights and dignity. Such remedies must be determined after a full and fair hearing and must be enforceable.

### ***The extent to which Australia is currently discharging its obligation to implement the right to a fair hearing and effective remedy***

In Victoria, there are in excess of 300 SAAP-funded services providing a range of assistance to people who are homeless and/or at risk of becoming homeless. Although these services are diverse with respect to size, target group, funding levels, service coverage, a common framework ties these services together. Funded services sign and commit through their respective Funding and Service Agreements to operate in accordance with the intention of the *Supported Accommodation Assistance Act 1994* (Cth) and to adhere to and implement a range of guidelines, tools and standards designed to promote the rights of a person.

One such requirement for services in Victoria is that they operate in accordance with the 'SAAP Standards'. Although limited, 'these standards have been devised with the broad spectrum of the SAAP program in mind' and serve as a useful resource in the provision of support, accommodation, information and advice with respect to these service environment and user rights.

The SAAP Standards in the context of '1.3 – Service Rules', stipulate that 'service rules, within the SAAP service, and the enforcement of those rules, should respect the dignity of individual service users and should not infringe upon basic personal rights and freedoms of individuals'. The Standards explicitly refer to the *UDHR* as a 'guide to the basic personal rights and freedoms of individuals'. This requires access to both internal and external grievance procedures and to effective advocacy services.

#### ***1. Internal Grievance Procedures***

It is a requirement of all SAAP funded services that they ensure the development, implementation and promotion of their respective internal grievance procedures.

The experience of the Support and Accommodation Rights Service ('SARS') suggests that there are pockets of service providers with well-articulated internal grievance procedures, consisting of streamlined processes and procedures for grievances and complaints raised by a client engaged with the program to be taken seriously and acted upon by the agency. However, SARS has also found that people are often not informed of the existence of an agency's internal grievance procedures and that the processes involved in raising a complaint or grievance are often confusing, difficult to navigate, intimidating for the person or non-existent. This

statement is most clearly substantiated with reference to a number of case studies recorded at the SARS program:

- **Case Study 1**

*A pregnant woman with a small child was evicted from a women's refuge service. She was not provided with any information on the agency's internal grievance procedure, appeals processes or information and referral to an appropriate advocate to assist in raising the matter formally with the agency. The woman only became aware of her rights as a result of becoming homeless again and contacting another agency for assistance with crisis accommodation.*

- **Case Study 2**

*Clients accommodated by crisis providers in Victoria are not afforded the legislative rights secured by people accommodated in transitional support services. There have been numerous examples of people being evicted with relatively short notice from the service, with no information on grievance and appeals processes or advocacy assistance.*

- **Case Study 3**

*A male client reported to the SARS program that, following his request to meet with the program manager to discuss some of his concerns with the program, he was informed that his crisis accommodation and support arrangements would not be extended by the program as it seemed that the program was not 'right' for him.*

It is vital that SAAP promotes and strongly regulates the sentiments expressed within the *Supported Accommodation Assistance Act 1994* (Cth) regarding the right of a person connected to SAAP to raise a complaint about any aspect of the program and, in turn, receive a fair hearing. Too often, SARS is confronted with many examples of people's rights being breached, people not being made aware of their service rights and more general rights, and the complete absence of fair and reasonable processes to ensure just outcomes.

## 2. *External Grievance Procedures*

In Victoria there do exist a number of external bodies that people may access to seek to redress particular grievances, such as the Privacy Commissioner. However the matter needs to be specific to the jurisdiction of these bodies. In some instances where a person may wish to appeal a decision made by management or to raise a programmatic issue, there is no appropriate body to which a person can appeal.

As part of the broader directions of the Victorian Homelessness Strategy, clients' rights have been recognised by the Victorian Government 'as being a central to the development of the homelessness service system'. There are a number of projects underway to progress the rights of people who are experiencing homelessness, including a strengthened complaints mechanism. It is evident that while such efforts may raise the awareness of people's rights, unless they are appropriately established, regulated and resourced, we may see very little change for people.

The Commonwealth Government has a vital role to play in facilitating processes and providing leadership to ensure that all states and territories within Australia are implementing the intentions of the *Supported Accommodation Assistance Act 1994* (Cth). This should include the establishment of, or extension of the current powers of, independent bodies to raise and regulate the rights and responsibilities of people engaged with SAAP. It should also include the establishment of independent complaints mechanism bodies.

### 3. Advocacy

As part of ensuring that Australia is working towards achieving a right to a fair hearing and effective remedy for people experiencing homelessness, it is critical that homeless people have access to independent, free advocacy support.

It is evident and too often reported to SARS, via the first hand experiences of homeless people, that a power imbalance exists between the provider or possible provider of resources and assistance; and the receiver or possible receiver of assistance. This power imbalance is most evident in instances where a person engaged with a program seeks to raise a complaint or issue with some aspect of the organisation and is confronted with complicated internal grievance processes to navigate, forms to complete, management involvement and little or no information on available advocacy support options.

Recommendations in relation to the right to a fair hearing and effective remedy are set out in section 4.14.

## 3.15 Rights of Children and Young People

### ***How are the rights of children and young people relevant to SAAP?***

Children and young people aged 12-18 comprise the single largest age group accessing SAAP, accounting for 26 per cent of SAAP service users.<sup>138</sup>

The Preamble to the *Supported Accommodation Assistance Act 1994* (Cth) clearly sets out the considerations that have been taken into account by the Parliament of Australia in drafting this legislation. Reference is made to ratification of specific international human rights instruments, including *CROC*,<sup>139</sup> for children and young people, as an indication of the Australian Parliament's commitment to the human rights and fundamental freedoms of people who are homeless or at risk of homelessness.

As discussed above, some of the key features of SAAP outlined in the Act include the entitlement to opportunities that will allow SAAP clients to participate fully in community life, and the safeguarding of SAAP clients' rights through the development of charters of clients' rights and responsibilities.

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<sup>138</sup> Chris Chamberlain and David MacKenzie, *Counting the Homeless 2001* (2003).

<sup>139</sup> Opened for signature 20 November 1989, 1577 UNTS 3, art 27(3) (entered into force 2 September 1990).

For SAAP clients who are children and young people, *CROC* should provide the guiding principles for implementation of the objectives of the Act and SAAP services. The importance of *CROC* is that it replicates for children and young people fundamental human rights and freedoms as set out in other international human rights covenants. It also articulates further rights, which recognise the vulnerability and special needs of children and young people.

### ***Australia's implementation obligations in relation to the rights of children and young people***

Pursuant to article 4 of *CROC*, Australian governments must undertake all appropriate legislative, administrative and other measures for the implementation of rights. With regard to economic, social and cultural rights, this obligation must be undertaken to the maximum extent of available resources.

### ***The extent to which Australia is currently discharging its obligation to implement the rights of children and young people under CROC***

The rights enshrined in *CROC*, particular to children and young people, are not clearly articulated in the *Supported Accommodation Assistance Act 1994* (Cth) as those to which providers of SAAP services must have regard when children and young people are their clients, or in relation to the internal policies of a SAAP organisation. The Act and SAAP service agreements for clients who are children and young people should include consideration of and reference to the following *CROC* rights:

- best interests of the child (article 3);
- parental guidance and the evolving capacity of the child or young person (article 5);
- the right to survival and development (article 6);
- preservation of identity (article 8);
- expression of an opinion (article 12);
- freedom of expression (article 13); and
- standard of living (article 27).

These are discussed in further detail below.

#### ***1. Best Interests of the Child***

Article 3 of *CROC* states that all actions concerning the child should take full account of his or her best interests. The state is to provide adequate care when parents or others responsible fail to do so.

This right is often in conflict with article 12: the right of children and young people to freely express an opinion and have that opinion taken into account. It is important to understand human rights principles generally, such that all rights are interrelated and interdependent.

Australia has an obligation to children and young people to ensure that their best interests are taken into account. Those children and young people most disadvantaged through lack of housing options, or poverty, and who need to access services for support and assistance as part of a family or as an individual, have the right to have their best interests central to any decision affecting them.

The *Supported Accommodation Assistance Act 1994* (Cth) does not prescribe a 'best interests' rights based model for services working with children and young people. It is essential that all SAAP services adopt the principles of article 3 and related articles of *CROC* to ensure that the needs and voices of children and young people are central to the organisation's service delivery and policies.

## *2. Parental Guidance and the Evolving Capacity of the Child or Young Person*

*CROC* balances a respect for the responsibilities of parents and carers of children with the evolving capacities of the child or young person of rights articulated in *CROC*. This principle is not clearly articulated in the *Supported Accommodation Assistance Act 1994* (Cth), nor at this stage does it appear a requirement of the implementation of SAAP programs.

## *3. The Right to Survival and Development*

Children and young people have an inherent right to life, and the Commonwealth Government has an obligation to ensure each child's survival and development. SAAP support services for children and young people need to ensure that the needs of those clients living in rural, regional and remote areas are taken into account when assessing equitable access to SAAP health support services. SAAP services need to ensure that any particular needs of Indigenous children and young people, children and young people of culturally and linguistically diverse backgrounds and same sex attracted young people, are appropriately addressed.

## *4. Preservation of Identity*

Children and young people have a right to preserve their identity, and where necessary have the ability to re-establish basic aspects of the child's identity. SAAP services and indeed the *Supported Accommodation Assistance Act 1994* (Cth) should articulate this principle and have appropriate support services available to reconnect a child or young person who is homeless in a SAAP service with their identity. This is of particular importance for Indigenous children and young people experiencing homelessness, including those children of families of the Stolen Generation.

## *5. Expression of Opinion and Freedom of Expression*

Children and young people have a right to express an opinion and have that opinion taken into account in matters affecting them, and to obtain information and express views. SAAP services need to reflect these rights of children and young people, and ensure that policies dealing with issues such as confidentiality of information provided by a young person are clear to that person when such views are expressed.

## *6. Standard of Living*

Where those responsible for the care of children and young people are unable to themselves ensure an adequate standard of living for a child, then the Commonwealth Government under *CROC* has an obligation to provide an adequate

standard of living. In light of this, it is with concern that we note that while the Preamble to the *Supported Accommodation Assistance Act 1994* (Cth) refers to people 'at risk of homelessness', the Act itself refers only to people who *are* homeless. SAAP services clearly have a role in early intervention and in preventing homelessness, rather than only supporting a person once he or she has become homeless. Preventative strategies appropriate to 'at risk' children and young people and their families should be an essential part of the aims of the Act and SAAP services. The *Supported Accommodation Assistance Act 1994* (Cth) should be amended accordingly.

Recommendations in relation to the right to the rights of children and young people are set out in section 4.15.

## 4. Options for Promoting and Protecting the Human Rights of Homeless People under Future Commonwealth/State Arrangements (Term of Reference 9)

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### 4.1 Overview – the Human Rights of Homeless People

In response to Term of Reference 9, and having regard to both the Preamble to, and section 5 of, the *Supported Accommodation Assistance Act 1994* (Cth), this section makes recommendations to ensure that future Commonwealth/state arrangements to address homelessness ensure that the fundamental human rights of people who are homeless or at risk of homelessness are protected, respected and fulfilled.

In addition to the specific recommendations that are set out below regarding reform to the SAAP program, the following key recommendations are made regarding the protection of the human rights of homeless people:

#### **Key Recommendation 1**

*The Commonwealth Government has undertaken international obligations to ensure that all civil, political, economic, social and cultural human rights are enjoyed in Australia. Therefore, through SAAP, it must protect, respect and fulfil the fundamental human rights and dignity of people who are homeless or at risk of homelessness, including:*

- *the right to adequate housing;*
- *the right to participation and freedom of expression;*
- *the right to freedom from discrimination;*
- *the right to social security;*
- *the right to life, liberty and security of the person;*
- *the right to vote;*
- *the right to the highest attainable standard of health;*
- *the right to freedom of association;*
- *the right to freedom of movement;*
- *the right to education;*
- *the right to participate in cultural life;*
- *the right to be treated with dignity and respect;*
- *the right to a fair hearing and effective remedy in the event of a violation of any human right; and*
- *the special rights of children and young people.*

## **Key Recommendation 2**

*The Commonwealth Government should commence a process of reform in order to secure protection of the human rights of people in the Australian Constitution.*

*As an interim measure, the Government should amend the Human Rights and Equal Opportunity Act 1986 (Cth) to provide people in Australia with an effective judicial remedy for breach of their human rights, including their civil and political, economic, social and cultural rights as recognised in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.*

## **4.2 Right to Adequate Housing**

### ***Proposals to ensure that Australia discharges its obligation to implement the right to adequate housing***

#### ***Recommendation 1***

*The Supported Accommodation Assistance Act 1994 (Cth) should be amended to include a right of access to emergency housing and related services for those defined as homeless. Such a right could be progressively implemented by gradually broadening the categories of people who may rely on the right. As a model, Australian governments should look to Scotland's Homelessness Act 2002.*

#### ***Recommendation 2***

*The Supported Accommodation Assistance Act 1994 (Cth) should be amended to include national standards providing for the provision of adequate housing, as defined by CESCR. In particular, the standards should ensure that all accommodation provided under SAAP guarantees: security of tenure; availability of services; affordability; habitability, including safety; accessibility for disadvantaged groups; location that is sufficiently close to employment, education, and health facilities; and cultural adequacy. Funding of SAAP services should correlate with the real costs of implementation of the national standards and be appropriately indexed on an annual basis.*

#### ***Recommendation 3***

*SAAP service standards should ensure that eviction from SAAP accommodation shall be an act of absolute last resort, and that no person may be evicted from accommodation until adequate alternative accommodation is found, as required by CESCR. The Supported Accommodation Assistance Act 1994 (Cth) should be amended to ensure that:*

- *the decision to evict a person from a SAAP service is subject to review by an independent complaints body in accordance with principles of natural justice; and*

- *administrative and judicial decisions regarding the Act are consistent with Australia's international human rights obligations.*

#### **Recommendation 4**

*The Supported Accommodation Assistance Act 1994 (Cth) should include guarantees of funding that are sufficient to meet demand for such services and discharge the obligation to implement the human right to housing to the maximum of available resources. Pathways out of supported accommodation to independent living should be clear and readily available to SAAP clients who are ready to make that transition.*

#### **Recommendation 5**

*A national housing strategy must be developed immediately, as recommended by CESCR in its Concluding Observations after the examination of Australia's last state party report. As CESCR requires, this strategy should be developed in consultation with people who are homeless or formerly homeless, people who are inadequately housed, and their representatives. The strategy should enshrine the responsibilities of various levels of government in relation to housing and homelessness, ensuring greater co-ordination between government departments and programs and analysing the short- and long-term priority needs for policies, programs, timelines and budgets. The level of expenditure required to implement the right to adequate housing in Australia should be identified, with long-term commitments from all levels of government and other possible sources of funds sought.*

#### **Recommendation 6**

*In order to create effective remedies for those whose rights are violated, independent oversight of all government actions in relation to housing should be guaranteed to complement the rights of individuals to pursue legal remedies. An independent Homeless Persons' Commissioner should be appointed, with real power. The obligations to respect, protect and fulfil the human rights of homeless people could be progressively made subject to this oversight.*

### **4.3 Right to Participation and to Freedom of Expression**

#### ***Proposals to ensure that Australia discharges its obligation to implement the rights to participation and freedom of expression***

Australian governments and SAAP service providers must take immediate and necessary steps to ensure that people who are homeless have the opportunity to form and express their opinions and to participate fully in all aspects of social, political, economic and cultural life.

In this respect, it is essential that SAAP programs and resources are shaped by people who are homeless and that the principles of empowerment are embedded in all future services, legislation and policies that affect the wider community, particularly

for young people and Indigenous people. The empowerment and increased independence of people experiencing homelessness requires that homeless people themselves be a primary voice in public policy advocacy and decision-making processes that affect them. Cassandra Goldie, Director of the Homelessness Legal Rights Project at the Gilbert + Tobin Centre of Public Law at the University of New South Wales, calls attention to this:

Homeless people must be supported to speak and be listened to, to organise locally, to come together to articulate their needs, concerns and problems and to be involved in the delivery of solutions.<sup>140</sup>

### ***Recommendation 7***

*Australian governments should support and fund people who are homeless or formerly homeless to have a say and to participate in decision-making processes and projects that affect them, including by funding community groups and other organising processes by homeless people, establishing SAAP service user groups and appointing SAAP service users to governmental and bureaucratic reference groups and committees.*

In Victoria, CHP, SARS, COHRE and the PILCH Homeless Persons' Legal Clinic have all assisted HPA, a group of homeless or formerly homeless people, to come together, to incorporate and to become a vigorous voice in public policy development concerning the homeless. However, the relationship between these services and HPA is far from one way. Recently, representatives of HPA provided extensive training to over 150 lawyers who volunteer with the Clinic in relation to their experiences of homelessness and how to communicate effectively with people experiencing homelessness. This included conducting mock client interviews and providing critical feedback to lawyers regarding their use of plain English, their communication and interpersonal skills, and the extent to which they ascertained what the 'client' really wanted to achieve. For SAAP service providers, forming strong, symbiotic relationships with organisations such as HPA is central to effective homelessness advocacy, service user empowerment and community building. As a founder of HPA, Anne Gosely, states:

From our experience with housing we have been there and done that. We in the community are the key to help you solve these housing matters if we teach and you listen.<sup>141</sup>

Institutions such as HPA are critical in helping to inform SAAP service providers of community needs and the most appropriate way to respond to those needs.<sup>142</sup>

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<sup>140</sup> Cassandra Goldie, 'Rights versus Welfare' (2003) 28 *Alternative Law Journal* 132, 133.

<sup>141</sup> Anne Gosely et al, 'Stop and Listen ... Don't Assume: Why the Homeless People's Association was Formed' (Paper presented at Beyond the Divide: The 3<sup>rd</sup> National Homelessness Conference, Brisbane, 6-8 April 2003) 1.

<sup>142</sup> Robert Solomon, 'Representing the Poor and Homeless: A Community-Based Approach' (2000) 19 *St Louis University Public Law Review* 475, 483.

### **Recommendation 8**

*SAAP service providers should support and assist people who are homeless or formerly homeless to have a say and to participate in decision-making processes and service delivery development, including by involving such people in service provider governance and facilitating the formation and development of community groups and other organising processes by homeless people, such as service user groups.*

## **4.4 Right to Freedom from Discrimination**

### ***Proposals to ensure that Australia discharges its obligation to implement the right to freedom from discrimination***

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.

### **Recommendation 9**

*The Human Rights and Equal Opportunity Commission Act 1986 (Cth) should be amended to recognise that economic, social and cultural rights are human rights by including ICESCR as a Schedule for the purpose of defining 'human rights' under the Act.*

### **Recommendation 10**

*Commonwealth equal opportunity and anti-discrimination legislation should be amended to prohibit discrimination on the ground of social status, including a person's status of being homeless or at risk of homelessness.*

### **Recommendation 11**

*Equal opportunity and anti-discrimination legislation in each state and territory should be amended to prohibit discrimination on the ground of social status, including a person's status of being homeless or at risk of homelessness.*

### **Recommendation 12**

*Australian governments should devote the maximum of their available resources to developing and implementing programs to ameliorate homelessness so as to equally guarantee to all people the exercise and enjoyment of their civil, political, economic, social and cultural rights, without discrimination.*

#### **4.5 Right to Social Security**

##### ***Proposals to ensure that Australia discharges its obligation to implement the right to social security***

In order to ensure that Australia's human rights obligations are fulfilled, the Commonwealth Government must take urgent steps to ensure that all those in need of social assistance receive sufficient income support to enable them to fulfil their material needs, and to participate in community life at an acceptable level.

##### ***Recommendation 13***

*The Commonwealth Government should commit to raising the level of social security benefits to a level at or above the poverty line, to ensure that social security recipients are able to meet their material needs and participate in society. Payments should be sufficient to ensure that recipients can afford adequate, appropriate housing in the private rental market, and to enable recipients to access the 'basket of goods' that is considered essential for social inclusion.*

##### ***Recommendation 14***

*The Commonwealth Government should take steps towards ensuring that the reasons for a breach in mutual obligation requirements by a social security recipient, including as relevant their homelessness status, are taken into account before a decision is made to impose a breach penalty on that person. Only those people who wilfully and intentionally breach their mutual obligation requirements should be breached.*

##### ***Recommendation 15***

*The severity of breach penalties should be significantly reduced so that the penalty is proportionate to the 'offence' committed, and so that those who are breached are still able to provide themselves, and their dependents, with the necessities of life during the penalty period.*

##### ***Recommendation 16***

*Centrelink's 'proof of identity' requirements should be changed to enable homeless people to use a letter from a SAAP worker, social worker or case worker as legitimate identification.*

##### ***Recommendation 17***

*Homeless people should have access to free post office boxes. With no fixed address, many homeless people do not receive Centrelink correspondence.*

### **Recommendation 18**

*The Commonwealth Government should develop and implement an integrated package of social security assistance to homeless people that includes access to adequate housing, employment assistance and personal support to ensure sustainable outcomes.*

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

### ***Proposals to ensure that Australia discharges its obligation to implement the right to life, liberty and security of the person***

Articles 6(1) and 9 of the *ICCPR*, when read in conjunction with article 2(2), oblige the Commonwealth Government to take all necessary steps to adopt such legislative or other measures as are required to give immediate effect to the right to life, liberty and security of the person. In a legislative sense, this requires that the Government enact legislation or undertake constitutional reform that enshrines the right to life, liberty and security of person in law. Pursuant to article 2(3) of the *ICCPR*, this implementation obligation also requires that the Government ensure that any person whose right to life, liberty or security is violated has access to an effective, enforceable remedy, including against state officials and authorities.

### **Recommendation 19**

*The Supported Accommodation Assistance Act 1994 (Cth) should be amended to recognise that people who are homeless or at risk of homelessness have a right of access to the core minimum level of housing, nutrition and health care necessary to protect their life, liberty and security of the person.*

In a socio-economic sense, Australia's international human rights obligations require that, as a matter of priority, the Government take immediate steps to ensure that all persons within its jurisdiction have adequate access to sufficient resources to ensure that they are able to live in security and with human dignity.

### **Recommendation 20**

*Without reducing expenditure on longer-term responses to homelessness, Australian governments should, as a matter of priority, increase the availability and accessibility of crisis accommodation, adequate nutrition and primary health care for people experiencing homelessness, such that these services are available as of right.*

#### 4.7 Right to Vote

##### ***Proposals to ensure that Australia discharges its obligation to implement the right to vote***

The Joint Standing Committee on Electoral Matters tabled its 'Report of the Inquiry into the 2001 Federal Election and Matters Related Thereto' in Federal Parliament on 23 June 2003. In the Report, the Committee makes over 30 recommendations to increase voter participation, improve electoral management and maintain the integrity of the electoral roll.

The franchise of homeless people – as discussed in the submissions of the PILCH Homeless Persons' Legal Clinic, the Big Issue and CHP– is considered in detail in the Report at pages 83-95. In particular, the Committee acknowledges that up to 80 000 homeless people who may have been eligible to vote in the 2001 federal election did not do so due to voter registration requirements. The Committee makes several recommendations in relation to the enfranchisement of homeless people, including:

- that the itinerant elector provisions outlined in section 96 of the *Commonwealth Electoral Act 1918* (Cth) be amended to clearly apply to homeless people;
- that the AEC simplify its itinerant elector application form to assist homeless people; and
- that the AEC target homeless people in a public awareness campaign, informing them about itinerant elector enrolment.

In response to these recommendations, the AEC has undertaken to include homeless people as a target group in its public awareness campaign for the next federal election. The AEC has also foreshadowed that it will work with welfare agencies to ensure that enrolment forms and registration assistance are available on-site.

It is imperative that the Government accepts and implements the recommendations of the Committee. In particular, section 96 of the *Commonwealth Electoral Act 1918* (Cth) should be amended in the following ways:

##### ***Recommendation 21***

*Section 96(2A) of the Commonwealth Electoral Act 1918 (Cth) should be amended so that itinerant electors are registered to vote in the electorate with which they have the 'closest connection'. Registration in an electorate in respect of which an elector has a 'close connection' is more appropriate than registration in an electorate for which the applicant last had an entitlement to be enrolled or has a next of kin. It is important that homeless people be able to enrol in the electorate in which they live, so as to directly choose those who represent them.*

##### ***Recommendation 22***

*Section 96(8) of the Commonwealth Electoral Act 1918 (Cth) should be amended to increase the period of time that an itinerant voter may have a 'real place of living' from one month to six months. Many homeless people live in accommodation such*

*as a friend's house, a caravan, a crisis shelter or a domestic violence refuge for up to six months. Notwithstanding the temporary and insecure nature of these accommodations, they constitute 'real places of living' within the current definition in the Act and people who stay in such accommodation for more than one month are ineligible to enrol as itinerant electors. Homeless people should be able to reside in one 'real place of living' for up to six months rather than only one month before they become ineligible as an itinerant elector.*

**Recommendation 23**

*Section 96(12) of the Commonwealth Electoral Act 1918 (Cth) should be amended such that a person shall be taken to reside at a place if, and only if, the person has his or her 'real place of living' at that place and that place of living constitutes safe and secure housing within the meaning of section 4 of the Supported Accommodation and Assistance Act 1994 (Cth). This would ensure that homeless people who live in non-conventional accommodation such as cars, squats, shelters or refuges for a period of longer than six months are not ineligible as itinerant electors.*

It is also imperative that the AEC work consultatively and collaboratively with SAAP services and SAAP clients to develop and implement a program aimed at increasing homeless voter education, enrolment and participation, including by adopting the following recommendations:

**Recommendation 24**

*The AEC should amend Itinerant Elector enrolment forms to make them more user-friendly and relevant for people experiencing homelessness.*

**Recommendation 25**

*The AEC should promote the Itinerant Elector Provisions within the Commonwealth Electoral Act 1918 (Cth) to make clear their application to people experiencing homelessness.*

**Recommendation 26**

*The AEC should engage SAAP services to act:*

- in an advisory capacity, by providing useful information to the AEC regarding the particular difficulties faced by homeless people around getting information about how to participate in elections, going through the process of enrolment, attending polling booths, providing original identification documents etc;*
- as a facilitator of the AEC's consultations on this issue with people experiencing homelessness, or people who have previously experienced homelessness;*

- *as a conduit or gateway for the provision of information to SAAP clients around enrolment and voting issues (voter education);*
- *as a possible location for actual enrolment and voting; it has been suggested that enrolment stations or polling booths could be co-located at certain SAAP agencies (voter registration and participation); and*
- *in an advocacy role, publicly supporting the introduction of measures to improve access to the vote and the exercise of voting rights for people experiencing homelessness.*

To date, the SAAP program itself has done little or nothing to improve its clients' access to the vote, or to promote the issue of voting rights for people experiencing homelessness. However, supporting people who are experiencing homelessness to fully participate in society is central to SAAP's role, and full participation in society includes being able to exercise one's democratic rights. Protecting and improving the democratic rights of people experiencing homelessness should be a primary concern of SAAP. Indeed, section 5(4)(d) of the *Supported Accommodation Assistance Act 1994* (Cth) dictates that SAAP must promote and protect the rights of people experiencing homelessness and ensure that homeless people are empowered to participate fully in social, cultural, economic and political life. SAAP should work to ensure that people who engage with the program have their right to vote right protected and enshrined, and that they are able to exercise this right.

It should be noted here that in addressing this issue, the question of resources is a vital one. SAAP-funded services already struggle to meet demand and cannot be expected to take on significant additional work without adequate resources being attached. Thus, the AEC needs to be the driving force in taking on the resource-heavy work associated with improving access to the vote for people experiencing homelessness, and SAAP services will need to be properly resourced if they are to take on any significant extra work around the issue of voting rights and participation.

#### **4.8 Right to the Highest Attainable Standard of Health**

##### ***Proposals to ensure that Australia discharges its obligation to implement the right to the highest attainable standard of health***

In accordance with sections 7(b)(iii) and 7(b)(iv) of the *Supported Accommodation Assistance Act 1994* (Cth) and article 12 of *ICESCR*, SAAP should ensure that people who are homeless or at risk of homelessness are accorded the highest attainable standard of physical and mental health.

##### ***Recommendation 27***

*The Commonwealth Government should increase funding to SAAP services to ensure that, as a component of an integrated package of housing and related support services, people experiencing homelessness have adequate access to the facilities, goods, services and conditions necessary to ensure their enjoyment of the highest*

*attainable standard of health. This includes access to appropriate and affordable health care, safe food, safe water, adequate sanitation, nutrition, occupational health, a healthy environment and health related information.*

**Recommendation 28**

*Having regard to the requirement that services should be provided in an accessible, culturally appropriate and non-discriminatory manner, health care and related services should be available to people experiencing homelessness at locations already accessed by them for other needs, including food and housing, wherever possible.*

**4.9 Right to Freedom of Association**

***Proposals to ensure that Australia discharges its obligation to implement the right to freedom of association***

The following recommendations pertain to the regulation of public space and its inter-relationship with SAAP.

**Recommendation 29**

*The Commonwealth Government should work with the non-government sector to address negative perceptions in sections of the community regarding homeless people, including Aboriginal people, ethnic and racial minorities and young people in public areas, 'hanging around' and 'congregating'. The SAAP program should be part of this process and engage with its outcomes.*

**Recommendation 30**

*SAAP services should:*

- assist homeless people, including homeless young people and Indigenous people, to feel and be safe in public places;*
- acknowledge that public space is often a place of safety for young people and others because of the proximity to people;*
- acknowledge that Indigenous people may occupy public space as an aspect of cultural identity and association;*
- work within the community to address perceptions of safety which are often unfounded, particularly for other members of the public;*
- lobby authorities and other institutions such as business against exclusionary practices and for alternatives to increased regulation and uniformity; and*
- acknowledge and work to address discrimination against Aborigines and ethnic or racial minorities occurring as a result of the increased visibility that accompanies living in public spaces.*

**Recommendation 31**

*Australian governments should improve the participation of homeless people, including Indigenous communities and homeless or at risk young people, in the planning, design, control, regulation, monitoring and policing of public space.*

**4.10 Right to Freedom of Movement**

***Proposals to ensure that Australia discharges its obligation to implement the right to freedom of movement***

The current allocation of SAAP funding to states and territories on a per capita basis, rather than on a basis that is proportionate and commensurate to the distribution and rate of homelessness throughout Australia, impinges on people's freedom of movement and residence in so far as they are forced to either:

- move to an area where SAAP funding is proportionally higher in order to access SAAP services; or
- live in public spaces and thereby be subject to the application of laws that criminalise essential human activities in public spaces.

**Recommendation 32**

*Without decreasing recurrent funding to SAAP in New South Wales, Victoria, Tasmania and the Australian Capital Territory, the Commonwealth Government should increase recurrent funding to SAAP in the Northern Territory, Queensland, Western Australia and South Australia, such that the distribution of SAAP funding is proportionate and commensurate to state and territory rates of homelessness.*

**Recommendation 33**

*Australian governments should immediately repeal all laws that criminalise essential human behaviours – such as sleeping, bathing, lying down, drinking or storing belongings in public space – and that impact on homeless people on the ground of their housing status and the necessary location of their conduct. In collaboration with homeless people, Australian governments should develop and implement policies and procedures to ensure that people experiencing financial and social disadvantage receive the social services they want as well as appropriate recognition of their rights to the use of public space.*

#### 4.11 Right to Education

##### ***Proposals to ensure that Australia discharges its obligation to implement the right to education***

A number of major reports have made recommendations as to the implementation of the right to education within the community. For children and young people, the predominant report is *Seen and Heard*.<sup>143</sup>

*Seen and Heard* made many recommendations in relation to this right, which are relevant to the support services provided by SAAP for homeless young people and their families, including:

- that the National Campaign Against Violence and Crime (NCAVAC) should conduct a specific project aimed at reducing school violence. (Recommendation 38)
- all teachers and school counsellors should receive training in identifying children at risk and referring them to appropriate government and non-government support services. State and territory education departments should provide this training. (Recommendation 39)
- in recognition of the relationship between early intervention and diverting involvement with the juvenile justice system, the Students at Risk (STAR) program should be re-established. (Recommendation 40)
- local programs to identify and support at-risk students and to encourage continued participation in education should be developed by state and territory education departments in conjunction with DEETYA, peak bodies from independent school sector and community groups. (Recommendation 41)
- national standards for student support services (health, nutrition and counselling) in primary and secondary schools should be developed by DEETYA in conjunction with state and territory education departments. This should include identifying specialist services and intervention programs to support disadvantaged families and young people aimed at meeting the needs of children who are homeless or at risk of homelessness. (Recommendation 42)
- the Commonwealth Government should coordinate and implement a national strategy to reduce truancy, in consultation with state and territory education departments, peak groups from independent schools sector, community groups and the Australian Council for Education Research. (Recommendation 45)
- corporal punishment should be banned in all schools (including independent schools). (Recommendation 50).

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<sup>143</sup> Australian Law Reform Commission, *Seen and Heard: Report of the National Inquiry into Children and the Legal Process*, Report No 84 (1997).

**Recommendation 34**

*Commonwealth and state governments should implement Recommendations 38, 39, 40, 41, 42, 45 and 50 contained in Seen and Heard: Report of the National Inquiry into Children and the Legal Process.*

**Recommendation 35**

*Commonwealth and state governments should allocate more resources to the classroom to give teachers more support in assisting disadvantaged young people and adults.*

**Recommendation 36**

*SAAP services should receive additional funding to take a lead role in ensuring that schools, in co-operation with local communities and support services, provide greater access to support services to assist disadvantaged young people. Improved access requires increasing the availability of remedial teachers and teachers of English as a second language, disability support workers, and a range of counselling options for dealing with family violence and breakdown, substance abuse and mental health issues. This requires a greater commitment of resources across the board, but particularly in rural and remote communities where the youth suicide rate is high.*

**Recommendation 37**

*Adult education programs, and retraining and vocational education schemes, should be made accessible to homeless people through the introduction of specific support structures and outreach programs.*

**4.12 Right to Participate in Cultural Life, including Indigenous and Minority Group Rights**

**Recommendation 38**

*SAAP reforms must give Indigenous communities appropriate control over and participation in identifying their concerns and problems, and the development of solutions to Indigenous homelessness. Solutions to Indigenous homelessness, including through the reform of SAAP, should be given the highest priority.*

**4.13 Right to be Treated with Dignity and Respect**

***Proposals to ensure that Australia discharges its obligation to implement the right to be treated with dignity and respect***

As discussed above, section 5(4) of the *Supported Accommodation Assistance Act 1994* (Cth) provides that SAAP should safeguard the rights of people who are homeless or who are at risk of homelessness through the development and implementation of a charter or rights and a grievance or complaints mechanism.

Recognising the right of all people to an adequate standard of living, including adequate housing, a charter of rights for homeless people could promote and protect their dignity by enshrining:

- a right to adequate housing imposing an obligation on governments to take steps, to the maximum of their available resources, to progressively ensure that all people can access adequate housing;
- a right to adequate assistance (being the level of assistance required to live a dignified life) from the homelessness and related service systems in cases in which a person can not access adequate housing; and
- service user rights, including the right to be treated with dignity and respect, for people accessing the homelessness and related service systems.

**Recommendation 39**

*The Commonwealth Government should develop and implement a Charter of Rights for Homeless People which enshrines a right to adequate housing; a right to adequate assistance from the homelessness and related service systems for people without access to adequate housing; and service user rights, including the right to be treated with dignity and respect, for people accessing the homelessness and related service systems.*

**4.14 Right to a Fair Hearing and Effective Remedy**

***Proposals to ensure that Australia discharges its obligation to implement the right to a fair hearing and effective remedy***

It is axiomatic to the promotion and protection of the dignity and rights of people experiencing homelessness that they have access to an independent, impartial body with the power to:

- initiate and undertake investigations and inquiries regarding homeless people's human rights and dignity;
- receive and consider complaints regarding the violation of homeless people's human rights and dignity;
- make determinations regarding the violation of homeless people's human rights and dignity; and
- make such orders as are necessary to remedy violations of homeless people's human rights and dignity.

Other functions of the body should include:

- educating people experiencing homelessness about their human rights;
- public education regarding the human rights and dignity of people experiencing homelessness;
- assisting service providers to develop internal charters of rights and grievance procedures;

- assisting service providers to achieve ‘best practice’ standards; and
- advising governments as to the further promotion and protection of the human rights of people experiencing homelessness.

These proposed powers and functions are substantially similar to those of the New South Wales Community Services Commission, which has recently been amalgamated with the New South Wales Ombudsman.

**Recommendation 40**

*The Commonwealth Government should create an independent and impartial statutory office of the Homeless Persons’ Commissioner to initiate investigations, undertake inquiries, receive and consider complaints, make determinations, and make such orders as are necessary to remedy violations of homeless people’s human rights and dignity. The Commissioner would report directly to Parliament and should also promote and protect the rights and interests of homeless people, assist homelessness service providers to achieve ‘best practice’ standards, and advise governments as to the further promotion and protection of the human rights of people experiencing homelessness.*

**Recommendation 41**

*When undertaking inquiries, considering complaints and making determinations, a homeless persons’ complaints mechanism must include the following key features:*

- *the complaints body must afford complainants the right to make complaints, give evidence and make submissions orally or in writing;*
- *the complaints body must afford complainants a right of access to legal or other representation or advocacy at no cost;*
- *the complaints body must use language and procedures that are easy to understand and as user-friendly as possible;*
- *the complaints body must afford a right of access to an interpreter at no cost;*
- *the complaints body must be independent and impartial;*
- *the complaints body must ensure that all complainants have a fair hearing;*
- *hearings must be conducted in accordance with the requirements of natural justice;*
- *hearings must be conducted in such a way as to permit the ascertainment of the facts as they are and as they bear on the right in issue;*
- *where requested, the complaints body must give reasons for its decisions; and*
- *decisions of the complaints body must be binding and subject to review in a court of law.*

As part of ensuring that Australia is working towards achieving a right to a fair hearing and effective remedy for people experiencing homelessness, it is critical that homeless people have access to independent, free advocacy and support.

The necessary scope and functions of such an advocacy and support service was set out in Kennedy and Lamers, *Grievance Procedures and Appeals Mechanisms in SAAP* (1991) and are repeated in the recommendation below.

**Recommendation 42**

*Commonwealth and state governments should provide funds to establish an independent service, or to extend the service of an existing body, to carry out the functions of:*

- *providing advocacy services for SAAP service users;*
- *providing casework planning and support for services users;*
- *providing education and training in user rights for SAAP service users and service providers;*
- *providing information and advice to SAAP service users; and*
- *undertaking research and, on the basis of the research, advocacy for appropriate policy and law reform.*

**4.15 Rights of Children and Young People**

***Proposals to ensure that Australia discharges its obligation to implement the rights of children and young people***

**Recommendation 43**

*The Commonwealth Government should undertake the following steps in relation to the rights of children and young people under CROC:*

- *enact specific legislation to implement CROC and create a Commission for Children to review SAAP agency compliance with CROC;*
- *develop and adopt a National Agenda for Children to ensure that CROC principles are taken into account when developing SAAP policy and legislation;*
- *establish administrative arrangements to ensure compliance with CROC in the laws, policies and practices of all levels of government and non-government organisations involved in SAAP;*
- *establish formal arrangements for consultation between government, relevant community organisations and young people regarding the adequacy of government performance in relation to people who are homeless or at risk of homelessness. Evaluation of the performance of SAAP services for children and young people should have a rights-based approach based on CROC;*

- *create a centralised Office for Children and Young People in the Department of Prime Minister and Cabinet, to coordinate and monitor policy across Government and Government agencies, as it relates to the implementation of SAAP. Create mandatory annual reporting mechanisms on the implementation of such CROC principles to the Office; and*
- *incorporate into all Government policy and tenders for public contracts in relation to SAAP matters, commercial or otherwise, a requirement of compliance with CROC principles as part of specified performance criteria and reporting on achievement of criteria.*

**Recommendation 44**

*The Commonwealth Government and SAAP services should develop a definition and explanation of the principle of acting in the ‘best interests of children’ and incorporate a process for considering ‘best interests’ in decision-making at all levels, such as through Child Impact Assessment processes.*

**Recommendation 45**

*SAAP services should develop a framework for developing an understanding of issues that affect gay, lesbian, transgender and transsexual young people and culturally and linguistically diverse young people.*

**Recommendation 46**

*SAAP services must acknowledge the historical context around the parent and child balance of power. SAAP services need to acknowledge differing cultural perceptions of the parent and child relationship.*

**Recommendation 47**

*At a SAAP service level, policies need to be developed around who is the client: parents or children? Policies also need to be put in place to respect young people’s requests for confidentiality (especially about sharing information with their parents) and to ensure policies accord young people procedural fairness in decisions made about them.*

**Recommendation 48**

*Special consideration needs to be given by SAAP programs to problems still faced by Indigenous children and children from culturally and linguistically diverse backgrounds with regard to their enjoyment of the same standards of living and levels of service, particularly in relation to health support services. SAAP policies also need to consider the particular needs of children and young people in rural, regional and remote areas.*

**Recommendation 49**

*SAAP services need to be responsive to the needs of Indigenous clients and those of culturally and linguistically diverse backgrounds to support clients' ability to maintain their own identity, and this should be enshrined in the Supported Accommodation Assistance Act 1994 (Cth).*

**Recommendation 50**

*SAAP services need to adopt policies in relation to the accessibility of SAAP services to asylum seeker children and young people who are accepted under Australia's off-shore humanitarian program, and those awaiting on-shore determination of their status or on temporary protection visas. This is especially the case where the right to family reunion is not expedient (it can take up to 2 years). Australia has a responsibility to the children of asylum seekers and refugees, including those who are not yet within Australian borders.*

**Recommendation 51**

*SAAP support services need to take into account the limits upon access to services and resources (including Centrelink benefits), for many asylum seekers (including holders of temporary protection visas), in determining appropriate services for these clients.*

**Recommendation 52**

*SAAP services should be required as an aspect of their service agreement to create an Agency policy/Charter about involvement of young people in decision-making in all levels of that agency's policy development, service delivery and program evaluation.*

**Recommendation 53**

*Recognising that SAAP programs have a preventative role, SAAP services should assist children and young people at risk of becoming homeless, in line with the CROC principle of the best interests of the child. Services should aim to address the underlying reasons that the client is at risk and attempt to resolve them prior to the client becoming homeless.*