

# Homeless Persons' Legal Service

Legal help for the homeless and those at risk of homelessness  
A joint initiative of the Public Interest Law Clearing House Inc  
and the Public Interest Advocacy Centre Ltd



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## **SUBMISSION IN RESPONSE TO THE EXPOSURE DRAFT OF THE *HOMELESSNESS BILL 2012***

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## Homeless Persons' Legal Service position on National Homelessness Legislation

The Homeless Persons' Legal Service (HPLS) is a joint initiative of the Public Interest Advocacy Centre (PIAC) and the Public Interest Law Clearing House (PILCH) NSW. Since 2004, HPLS has provided free legal advice and representation to over 5,000 people who are homeless or at risk of homelessness.<sup>1</sup>

HPLS welcomes the opportunity to comment on the Exposure Draft of the *Homelessness Bill 2012*. In offering comments on the Bill, HPLS refers the Department to the HPLS submission to the House of Representatives Standing Committee on Family, Community Housing and Youth Inquiry into homelessness legislation, *More than just a roof over our heads!* (attached).<sup>2</sup> In particular, we refer the Department to the following recommendations included in that submission:

- That national homelessness legislation protect the human right of homeless people to adequate housing.
- That national homelessness legislation should recognise and protect the rights of homeless people to participation in law reform and public policy development processes.
- That national homelessness legislation provide an enforceable right to adequate health care.
- That national homelessness legislation recognise the human rights of homeless people to personal safety.
- That national homelessness legislation recognise and protect other human rights of homeless people including the right to social security, the right to freedom of association and the right to vote.

HPLS maintains the importance of a rights-based framework for the Bill, and the comments in this submission regarding specific provisions in the Bill reflect this position.

### Constitutional position of Commonwealth homelessness legislation

It is our understanding that that the Government was attracted to the idea of taking a rights-based approach to homelessness. However, the reason the Government has given for not taking a rights-based approach is that it is of the opinion that the Commonwealth does not have an express Constitutional power to comprehensively regulate housing and homelessness and that, therefore, the legislation cannot impose any obligations or confer any rights.

HPLS, and its auspicing partner, the Public Interest Advocacy Centre (PIAC), have taken a different view of the constitutional position vis-à-vis national homelessness legislation. Following a meeting between our organisations and Minister Brendan O'Connor on 8 June 2012, PIAC sought expert advice on this question from Mr Arthur Moses SC and eminent constitutional law academic, Professor Patrick Keyzer.

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<sup>1</sup> Further information about PIAC, PILCH NSW and HPLS is provided as Appendix A.

<sup>2</sup> Homeless Persons' Legal Service (2009), *More than Just a roof over our heads!*, Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth Inquiry into homelessness legislation, 2009.

We refer the Department to the attached Memorandum of Advice, which Mr Moses SC and Professor Keyzer have consented to our making available. This advice considers High Court authority decided since the Exposure Draft was released, and concludes that the Commonwealth *does* have constitutional authority to legislate more substantively in this area. That authority derives from the external affairs power in combination with section 96 of the Constitution.

We respectfully agree with this advice. HPLS suggests that, especially in the light of the most recent constitutional authority, the Government should re-consider its scope of legislative power in this area. In HPLS's view, the Government has the constitutional power to take a rights-based approach – an approach that represents sound policy in this area.

Comments regarding specific provisions in the Exposure Draft Bill are detailed below.

### **Section 3: Object of Act**

HPLS is concerned that the object of the Act, as it reads in the exposure draft, would be so limited as to bring about no measurable or identifiable benefit for people who are homeless.

HPLS submits that section 3 should be redrafted to include the following as objects of the Act:

The objects of this Act are –

- (a) to increase recognition and awareness of persons who are, or are at risk of, experiencing homelessness;
- (b) to promote compliance with Australia's international human rights obligations as they relate to persons who are, or are at risk of, experiencing homelessness;
- (c) to provide a conceptual framework to guide the development and operation of the Commonwealth-State-Territory Funding Agreements for mainstream and specialist homelessness services;
- (d) to provide a definition of homelessness to be used in Commonwealth-State-Territory Funding Agreements for mainstream and specialist homelessness services, and in national measurements; and
- (e) to detail the minimum human rights obligations of mainstream and specialist homelessness services in delivering services to persons who are, or are at risk of, experiencing homelessness.

### **Section 4: Definitions**

#### *specialist homelessness services*

The definition is restricted to those services that assist persons who are, or are at risk of, *sleeping rough or living in an improvised dwelling*.

It is submitted that the definition should incorporate the term "homelessness" as defined in section 5 of the Bill. The definition is more encompassing and comprehensive, and reflects the diverse nature and experiences of homelessness. Limiting the definition of 'specialist homelessness services' to those who are, or at risk of, 'sleeping rough or living in an improvised dwelling' creates an internal inconsistency in the legislation that effectively undermines the definition of homelessness in section 5.

Moreover, as this provision only refers to services that provide assistance to people who are, or at risk of primary homelessness, it excludes services that assist people in transition housing, hostels, boarding houses, or who resort to temporarily living with friends or relatives. This will negatively impact on homeless women and children who are less inclined to sleep rough, and more often come under secondary and tertiary homelessness.

## **Section 5: Definition of homelessness**

HPLS endorses legislative recognition of a broad definition of homelessness, which includes the elements of primary, secondary and tertiary homelessness. However, HPLS submits that paragraph (c), should be amended by deleting the words: ‘... and the person is not living in that accommodation by choice’.

HPLS submits that the inclusion of this phrase introduces an element of subjective judgment into the equation of determining whether a person’s accommodation status comes within the definition of homelessness. This creates potential for discriminatory assessment of whether a person can be regarded as homeless. HPLS notes that this phrase did not form part of the recommended definition of homelessness used in the Government’s White Paper on homelessness, *The Road Home*, nor did it form part of the definition recommended by the House of Representatives Standing Committee on Family, Community, Housing and Youth Inquiry into homelessness legislation.

## **Section 7: Adequate housing**

HPLS submits that the wording of section 7 in the exposure draft is likely to have unintended, negative consequences.

HPLS is concerned that by referring to the Commonwealth’s ‘aspiration’ that all persons in Australia have access to adequate housing, the section is inadvertently incompatible with Australia’s International human rights obligations under the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 11 of ICESCR states:

Everyone has the right to a standard of living, adequate for health and well being of himself or herself and his/her family, including food, clothing, housing and medical care.

Under article 2 of ICESCR, Australia has an obligation to take steps to achieve progressively the full realisation of this right. Such an obligation is a minimum requirement. To refer to this minimum requirement as an ‘aspiration’ is a significant derogation of the obligations imposed on Australia under ICESCR. In addition, it is noted that section 7 makes no mention of the other elements of a right to an adequate standard of living, as articulated in Article 11 of ICESCR.

In accordance with the recommendations made by HPLS to the House of Representatives Standing Committee it is submitted that section 7 should be amended to read as follows:

- (1) In accordance with Australia’s international obligations under the International Covenant on Economic, Social and Cultural Rights, ratified in New York on 16 December 1966, the Commonwealth recognises that all persons living in Australia –
  - a) Have the right to adequate housing;

- b) Have the right to adequate food and clothing;
- c) Have the right to adequate health care.

(2) In accordance with Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights, the Commonwealth recognises its obligations to take steps in cooperation with the Commonwealth States and Territories to achieve progressively the full realisation of the rights in sub-section (1).

## **Express recognition of other rights for people experiencing homelessness**

In its submission to the House of Representatives Standing Committee, HPLS stated that incorporation of a human rights framework within national homelessness legislation was critical in ensuring that the central impact that human rights violations have in causing, exacerbating and maintaining homelessness is not overlooked. In accordance with the HPLS recommendations to that Inquiry, it is submitted that the *Homelessness Bill 2012* should also include express recognition of the following rights for people experiencing or at risk of homelessness:

- (1) The Commonwealth recognises the following rights for people who are, or at risk of homelessness:
  - a) The right rights of homeless people to participation in law reform and public policy development processes;
  - b) The right to freedom of association;
  - c) The right to personal safety;
  - a) The right to vote and be elected at periodic Commonwealth, State and municipal elections that guarantee the free expression of the will of the electors.

HPLS submits that the legislation include a requirement that the Minister promote compliance with all rights protected in the legislation, by all mainstream and specialist homelessness services.

## **Section 13: Act does not create or give rise to rights or obligations**

HPLS is concerned that this section reduces the preceding sections to nothing more than aspirational statements of intent. This provision would mean that the Act's practical effect would be dramatically curtailed for people who are homeless or at risk of homelessness. HPLS draws attention to the following comments by Mr Moses SC and Professor Keyzer in paragraph 1.3 of the attached advice:

The Homelessness Bill does not seek to make any payments, agree to any grants or provide any explicit service. It merely involves a definition of homelessness, an outline of strategies to treat homelessness and recognition of the importance of such strategies.

In this regard, the *Homelessness Bill* is already extremely limited in its effect. The inclusion of section 13 further limits the effect and appears to undermine the Government's stated objective of ensuring that homeless people receive quality services and adequate support, as articulated in the Government's White Paper on homelessness, *The Road Home*.

Given that there are no compelling Constitutional reasons to adopt a provision in the nature of section 13, HPLS submits that this provision be removed.

## **Accessible and effective complaint mechanisms – a homelessness services ombudsman scheme**

HPLS submits that this legislation provides an important opportunity to establish a non-government Ombudsman complaint-handling service that is accessible to consumers of mainstream and specialist homelessness services. HPLS submits that such a body can provide an effective and efficient dispute resolution process for consumers of mainstream and specialist homelessness services, who allege that the services have acted in a manner that is not compliant with the rights protected in the legislation.

In its submission in respect of the Options Paper for a National Quality Framework to support quality services for people experiencing homelessness,<sup>3</sup> HPLS referred to the comments expressed by members of its homeless consumer advisory committee, StreetCare, about the need for an independent, accessible complaints-handling body that can investigate concerns raised by consumers of homelessness services about the services they have accessed, and have determinative powers:

*We need an independent body. It should be set up from scratch, but is involved with other groups out there.*

*We need a group that only deals with complaints.*

*What about a peak body that deals with complaints.*

*Should have an independent person who receives the complaint and then goes and talks to the service.*

*People need to have faith that their complaints will be followed through.*

*You need to build the trust in the homeless community to get the complaint system working. You can put all the mechanics in place but if people don't have trust, they won't complain.*

*The Homeless ombudsman should report problem services to the funding body in an annual report.*

*Where the ombudsman identifies concerns that arise from funding issues, these should be reported to the funders.<sup>4</sup>*

HPLS submits that such a non-government ombudsman complaint-handling service must have determinative powers, and have the ability to investigate and give directions in relation to complaints about mainstream and specialist homeless services by homeless consumers.

There would be resource implications from establishing such a scheme, but they are likely to be relatively modest and HPLS anticipates that those costs would be off-set by greater

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<sup>3</sup> Homeless Persons' Legal Service (2011), *Quality – Ensuring Rights, Respect and Dignity for Homeless People*, Comments on the Options Paper for a National Quality Framework to Support Quality Services for People Experiencing Homelessness, 2011.

<sup>4</sup> Comments made to consultation with members of StreetCare, the HPLS Consumer Advisory Committee, February 2011.

efficiency in the services provided to people who are homeless. HPLS submits that given that most mainstream and specialist homelessness services are non-government, not-for-profit organisations, the majority of resourcing for a Homelessness Services Ombudsman scheme should be provided through a Commonwealth budget allocation for recurrent funding.

HPLS submits that the Homelessness Bill provides the appropriate mechanism for establishing a homelessness services ombudsman scheme. Such a provision could be based on the legislative framework for the Telecommunications Industry Ombudsman (section 128, *Telecommunications (Consumer Protection and Service Standards) Act 1999*). This provision could read as follows:

- (1) Each mainstream and specialist homelessness service must, in association with other mainstream and specialist homelessness services, enter into a scheme providing for a Homelessness Services Ombudsman scheme.
- (2) The scheme is to be known as the Homelessness Services Ombudsman scheme.
- (3) The scheme must provide for the Homelessness Services Ombudsman to:
  - (a) investigate; and
  - (b) make determinations relating to; and
  - (c) give directions relating to;

complaints about mainstream and specialist homelessness services by consumers of those services.

- (4) The membership of the scheme must be open to all:
  - (a) Mainstream services that provide services to homeless people; and
  - (b) Specialist homelessness services.

## Conclusion

HPLS submits that the Homelessness Bill 2012 provides an important opportunity to recognise the considerable role that human rights violations play in causing and further exacerbating homelessness, and preventing people from exiting homelessness. In its submission to the House of Representatives Standing Committee on Family, Community Housing and Youth Inquiry into homelessness legislation, HPLS cautioned that the homelessness legislation should not simply pay 'lip service' to the protection of human rights for homeless people, but should provide concrete standards, enforceable in respect of service providers and all levels of government. Further,

Recognition, promotion and fulfilment of human rights of homeless people in new national homelessness legislation will go a long way towards ensuring the ambitious targets of reducing homelessness contained in the White Paper on Homelessness.<sup>5</sup>

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<sup>5</sup> See n 2 above, p 16.

## **APPENDIX A**

### **The Public Interest Advocacy Centre**

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC receives funding from Industry & Investment NSW for its work on energy and water, and from

Allens Arthur Robinson for the Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

### **The Public Interest Law Clearing House**

The Public Interest Law Clearing House (PILCH) NSW was established in 1992 by the Law Society of New South Wales, the Public Interest Advocacy Centre and the private legal profession to respond to the growing incidence of unmet legal needs within the community. Underlying the establishment of PILCH is the commitment from lawyers that the provision of legal services on a pro bono publico ('for the public good') basis is intrinsic to legal professional responsibility. The aims of PILCH are:

- to identify matters of public interest that warrant legal assistance pro bono publico;
- to identify the legal needs of non-profit organisations;
- to match disadvantaged and under-represented individuals, groups and non-profit organisations with a need for otherwise unavailable legal assistance with PILCH member firms and barristers;
- to utilise the diverse skills and resources of lawyers in a broad range of public interest matters;
- to expand the participation of private practitioners in the law reform process;
- to seek the integration of pro bono work with legal practice;



- to encourage co-operation between private practitioners and public interest lawyers:  
and
- to establish/coordinate public interest projects which seek systemic reform.

PILCH provides services to community organisations and individuals for free. It is a membershipbased organisation with members including small, medium and large private law firms, corporate law departments, individual barristers, barristers' chambers, law schools, accounting firms, Legal Aid NSW, the Law Society of NSW, the NSW Bar Association, and PIAC.

### **Homeless Persons Legal Service**

HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area. The clinics are hosted by the following welfare agencies:

- Edward Eagar Lodge (Wesley Mission);
- Matthew Talbot Hostel (St Vincent de Paul Society);
- Newtown Mission in Partnership with Newtown Neighbourhood Centre;
- Norman Andrews House (Uniting Care);
- Parramatta Mission (Uniting Church);
- Streetlevel Mission (Salvation Army);
- The Station, Vincentian House (St Vincent de Paul Society);
- Vincentian Village (St Vincent de Paul Society);
- Wayside Chapel (Uniting Church); and
- Women's and Girls' Emergency Centre.