



THE HUMAN RIGHT TO HOUSING IN AUSTRALIA

Dan Nicholson

Produced for the Housing is a Human Right Project

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CENTRE ON HOUSING RIGHTS AND EVICTIONS

Produced for the Housing is a Human Right Project

A collaborative project of VCOSS, Shelter Victoria,

Centre on Housing Rights and Evictions

and Women's Housing Ltd



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CONTENTS

Summary of Abbreviations	4
Executive Summary	5
Introduction	9
Housing Rights in International Law	11
Comparative Examples of Housing Rights Implementation	23
Australia's Implementation of its Housing Rights Obligations	33



SUMMARY OF ABBREVIATIONS

UN	United Nations	CERA	Centre for Equality Rights in Accommodation
ICESCR	International Covenant on Economic, Social and Cultural Rights	HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights		
CERD	International Convention on the Elimination of All Forms of Racial Discrimination		
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women		
CROC	International Convention on the Rights of the Child		
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment		
CESCR	Committee on Economic, Social and Cultural Rights		
ECHR	European Convention on Human Rights		
AFHO	Australian Federation of Homelessness Organisations		
SAAP	Supported Accommodation Assistance Programme		
CSHA	Commonwealth-State Housing Agreement		
UNGA	United Nations General Assembly		
LHA	Local Housing Authority		



EXECUTIVE SUMMARY

This paper examines the human right to housing in Australia. Housing rights are among the most pervasive and best developed rights under international law. No country can claim to be free of legally binding obligations in relation to housing rights under international law, particularly when, as in Australia's case, it has ratified most of the major international human rights treaties. Sadly, though, the gap between housing rights rhetoric and realisation is extremely broad in almost every country in the world. Australia is no exception to this, and indeed lags behind much of the rest of the world in many facets of its implementation of these housing rights obligations. This study concludes that Australian governments are in violation of their international human rights obligations relating to housing.

INTERNATIONAL LAW

Australia's housing rights obligations under international law derive from two main sources: customary international law (which is not dealt with in detail in this paper) and treaties. Australia has ratified almost all of the major international human rights covenants and conventions, including those on civil and political rights, economic, social and cultural rights, children's and women's rights, racial discrimination and refugees. These human rights obligations are enforced in the United Nations (UN) system

through charter-based organisations, such as the Commission on Human Rights, and treaty-based organisations. Each human rights treaty has a committee mandated to receive and comment on reports from States that have signed up to it, to interpret the rights in the treaties in more detail, and, in some cases, to receive and adjudicate on complaints received from individuals whose rights have been violated.

While rights relating to housing pervade literally every single human rights treaty, the most important statement on housing rights comes from the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognises the right of everyone to adequate housing. This right has been more extensively defined by the UN Committee on Economic, Social and Cultural Rights through two General Comments. In the first of these, the Committee sets out that the right is more than the idea of shelter, but rather 'the right to live somewhere in security, peace and dignity,' and sets out seven indicia of adequacy, including security of tenure and affordability. In the second, the Committee notes that forced evictions are a violation of the covenant, and that in particular, evictions should not render people homeless.

Government obligations relating to housing rights have often been the source of legal controversy and many governments have used a claimed lack of clarity as a justification for failure to implement the rights. However, such an argument

can no longer be sustained. The obligation under ICESCR to implement rights progressively requires States to move as expeditiously as possible towards full realisation and prohibits unjustified retrogressive measures. The obligation to implement rights to the maximum of available resources requires States to refrain from unjustified cuts to expenditure that will have a retrogressive effect, among other things.

While States are given considerable discretion in the way they implement their housing rights obligations, the provision of effective remedies, that enable those without adequate housing to a remedy for the violation of their rights, is required. Such remedies may be judicial, administrative or policy-based. States are also required to take a number of other specific steps, including developing a national housing strategy. Government obligations can also be considered in terms of typologies of rights. Firstly, governments are required to respect, protect and fulfil rights - to refrain from interfering with rights, to prevent third parties from doing so, and to take positive actions to guarantee rights. Secondly, governments have obligations of conduct and of result.

COMPARATIVE EXAMPLES OF IMPLEMENTATION

Few if any countries have succeeded in fully realising the right to adequate housing. This paper examines aspects of implementation in the United Kingdom (UK), Canada and South Africa. The UK and Canada have a similar legal history to that of Australia, with a common law system. Like Australia, although both are affluent nations, the prevalence of inadequate housing and homelessness remains disappointingly high. Unlike Australia, however, both have introduced a form of a charter of rights. Although neither charter directly includes the right to housing, creative use of the charter rights has led to some judicial consideration of government actions affecting housing rights, using the right to life and the right to protection of privacy, the home and family life. While this jurisprudence does not yet provide adequate protection of housing rights, it is developing rapidly, and demonstrates the value of charters of rights.

Other laws in Canada and the UK also provide for protection of housing rights in ways that are

not available in Australia. In the UK, the Homelessness Act provides a right to access to housing for a limited number of homeless people (those classified as 'unintentionally' homeless and in 'priority need') - effective remedy, albeit for a very limited number of people. In Scotland, more far-reaching legislation has been passed that will progressively extend the groups of people with a right of access to housing until it effectively applies to all homeless people. In Ontario, Canada, anti-discrimination legislation in relation to housing prohibits landlords from discriminating against tenants on the basis of their rent-to-income ratio, because of a lack of references or rental history, or because they receive social assistance. Such laws could be applied in Australia.

South Africa's legal history is different from Australia's, and its housing rights issues are complicated by the legacy of apartheid and its comparative lack of resources. While many housing rights problems remain in South Africa, the legal framework established since the fall of apartheid is in many respects a model for nations such as Australia to follow. The constitution provides extensive, explicit recognition of the right to adequate housing. Housing White Papers provide co-ordinated set of laws, policies and programmes for the government. Legislation and programmes in key areas, identified as priorities in the White Papers, have generally conformed with international housing rights standards. The Constitutional Court, meanwhile, continues to oversee the government's progress in implementing constitutional rights, and has ordered the government to devise and implement emergency housing measures where they were not available.

AUSTRALIA'S IMPLEMENTATION

Australia's implementation of its housing rights obligations has been marked by an aversion to the language of rights, inadequate funding, and above all a failure to rectify the widespread and worsening violations of the right to adequate housing. There can be little doubt that Australia is in violation of its international housing rights obligations.

If one examines Australia's record in respect of its obligations of result, it becomes clear how far Australia is from full realisation of the right to adequate housing.

On the last census night, 105 000 Australians were homeless. At least a quarter of a million live in unaffordable housing. Neither social housing nor emergency shelter programmes can cope with demand. Women, migrants and indigenous Australians are particularly badly affected by homelessness and inadequate housing. If not a violation of Australia's human rights obligations per se, this record at least places a strong onus on Australian governments to show they are taking appropriate steps to remedy the situation.

The situation is not much brighter when one turns to Australia's record in relation to its obligations of conduct. Human rights, including housing rights, do not apply directly in Australian law, although they may affect the development of the common law, statutory interpretation and some aspects of administrative decision making. The Commonwealth has not used either its constitutional power or its strong bargaining position as the provider of funds for housing programmes to the States to set standards and priorities in relation to housing or even co-ordinate different programmes. Australia has no national housing strategy. Private rental legislation does not conform to a national or international standard, and in many cases fails to protect the right to adequate housing effectively. The Human Rights and Equal Opportunity Commission does not have economic, social and cultural rights, including the right to adequate housing, under its mandate. It is difficult to see how Australia can fulfil its human rights obligations without national co-ordination and clear strategies.

The various pieces of legislation upon which Australians are reliant to implement their rights, do not provide for formal processes to protect those rights. Housing schemes such as the Supported Accommodation Assistance Programme (SAAP), which provides emergency accommodation for the homeless, and the Commonwealth State Housing Agreement (CSHA), through which social housing is funded, do not give rights of access. Instead, they focus on user rights, and the effective delivery of services - which do not provide an effective remedy for those Australians without adequate housing.

Finally, consistent cuts to spending at the Victorian and Commonwealth level call into question whether governments are fulfilling their obligation to implement the right to adequate housing to the maximum of available resources. Key programmes, such as the CSHA and State housing assistance, have been consistently cut back, at a time when the housing situation continues to deteriorate and these programmes remain important parts of alleviating problems of homelessness and inadequate housing.





INTRODUCTION

As one of the most affluent and stable societies in the world, Australia has as great a capacity to adequately house its people as any nation in the world. Yet many, including governments, are resigned to the continuing existence of homelessness and other forms of inadequate housing in Australia.

Like the majority of nations in the world, Australia has voluntarily signed up to legal obligations to protect the human rights of all people, including specific obligations to protect the right to adequate housing. Yet rarely in the many laws and programmes relating to housing in Australia are those rights proclaimed, and nowhere are they adequately protected.

Homelessness, inadequate housing and eviction attack the dignity of all those affected, and drastically reduce their capacity to participate in society. The right to be free from such abuses is surely what the drafters of the Universal Declaration of Human Rights considered when they recognised 'the inherent dignity and ... the equal and inalienable rights of all members of the human family'.¹ As such, homelessness, inadequate housing and forced evictions represent violations of human rights.

The right to adequate housing has undergone unprecedented legal development recently, through covenants, legislation, court decisions and other jurisprudence at the national, regional and international levels. No government can claim that the right and its concurrent obligations

are uncertain or insubstantial any longer. Yet Australia is increasingly isolated in its refusal to incorporate any human rights into its domestic legal system.

This paper seeks to elucidate the content of the right to adequate housing, to assist those working in the housing sector with little expertise in the area of law to take a rights approach to their work, and to facilitate the development of a housing rights framework and culture in Australia. The first section examines the right to adequate housing according to international law. The second examines some of the means used in other countries to implement this right. The third examines Australia's record in implementing the right to adequate housing.

Notes

- 1 Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly resolution 217A (III) on 10 December 1948, preamble.





HOUSING RIGHTS IN INTERNATIONAL LAW

This chapter examines the sources and content of Australia's human rights obligations, according to international law, and particularly in relation to the right to adequate housing. The first section examines the broad international human rights framework, including the sources of obligations, and the enforcement mechanisms in the United Nations (UN) system. The second section analyses rights associated with housing as they appear in the major international human rights treaties, with a particular focus on the most important of these, the International Covenant on Economic, Social and Cultural Rights (the ICESCR). The third looks at the legal content of government obligations to implement rights under the ICESCR.

THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The history of international human rights law is inextricably linked with the emergence and development of the UN system. While prior to the establishment of the UN, national bills of rights had been proclaimed, notably by the French and American revolutionaries at the end of the 18th Century, it is through the United Nations that human rights have most powerfully entered the domain of international law.

The United Nations Charter of 1945 recognises promoting and encouraging respect for human rights as one of the purposes of the UN,¹ and

calls on member States to take action to promote the respect for and observance of human rights.² The Charter also sets up a number of institutions to monitor human rights, the most important of which is the Commission on Human Rights. However, the Charter focuses on the promotion of human rights, and does not necessarily bind States in the treatment of their own subjects.

On 10 December 1948, the UN General Assembly proclaimed the *Universal Declaration of Human Rights*, recognising 'the inherent dignity and ... the equal and inalienable rights of all members of the human family.'³ The Declaration is probably the most important enunciation of human rights, and has since been the source of constitutions, bills of rights and legal decisions all over the world. Article 25(1) of the Declaration recognises the right to adequate housing. However important and groundbreaking, the Declaration was conceived as 'a common standard of achievement for all peoples and all nations,'⁴ and was not in and of itself intended to create binding obligations on States in relation to the rights enunciated in the Declaration.

After the proclamation of the Declaration, the Commission on Human Rights was instructed to develop legally binding human rights treaties that would form the basis for legal obligations under international law. After extensive political lobbying and debate, this was achieved through the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The obligations imposed by these covenants exist at the level of public international law. This means that States, the main actors in international law, undertake to other States, who have also agreed to the covenants, to comply with their terms. Additionally, however, as human rights instruments, they create third-party beneficiaries, namely the persons whose human rights are to be respected, protected and fulfilled under the terms of the treaty. In practice, the covenants are supervised by UN Committees.

During the Cold War period, ideological divides hindered the legal development of international human rights law. The West focused on civil and political rights at the expense of economic and social rights, the Communist Bloc on economic and social rights at the expense of civil and political rights, and the UN system was hamstrung by the necessity of finding compromise. Since the end of the Cold War, the development of the jurisprudence of human rights has accelerated, in both civil and political and economic and social rights. The rest of this chapter examines the current state of the rights and obligations, especially in relation to housing.

Sources of international human rights obligations

As noted above, the main source of human rights obligations according to international law are treaties. Another source is customary international law.

Treaties

A treaty is 'an international agreement concluded between States in written form and governed by international law.'⁵ Treaties impose binding international legal obligations on the parties to the treaty to comply with their terms. Treaties may be bilateral (signed between two countries), such as the Timor Gap Treaty, or the Australia-US Free Trade Agreement, or multilateral (signed by many countries).

The main treaties relating to international human rights law are multilateral treaties signed by very large numbers of countries. As noted above, the two most important of these are the *International Covenant on Civil and Political Rights* (ICCPR)⁶ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁷ which have been ratified by 149 and 146 countries respectively, and, together with the Universal

Declaration, are often known as the International Bill of Rights.

Other notable international human rights treaties include:

- *The International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),⁸ ratified by 165 countries;
- *The Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW),⁹ ratified by 170 countries;
- *The International Convention on the Rights of the Child* (CROC),¹⁰ ratified by 191 countries;
- *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),¹¹ ratified by 132 countries; and
- *The International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families*,¹² ratified by 21 countries.

The process by which treaties become binding international obligations is as follows:

- Adoption: the text of the treaty is agreed between the parties. International human rights covenants and conventions are generally first adopted by the United Nations General Assembly and then opened for signature.
- Signature: the text adopted is approved and referred to governments for ratification. This does not generally bind states, although they undertake to not actively violate the rights contained in the treaty.
- Ratification: the treaty is referred to countries for approval, and upon ratification a country becomes bound by the treaty at international law.
- Accession: a state becomes party to a treaty after the original parties. The effect is the same as ratification.
- Entry into force: the time at which the treaty becomes binding on the state parties that have ratified it. In the case of the ICCPR, this was three months after the 35th country had ratified it, which was almost ten years after it was adopted and opened for signature.

Those countries that have legal obligations under a treaty are referred to as States parties.

Customary International Law

Customary international law is another binding source of human rights obligations for governments. Customary international law transforms practices followed by a large number

of States because they believe they are legally required to do so into binding legal obligations for all States. Unlike treaties, which countries must ratify before they are bound by them, customary international law applies to all States. For example, customary international law has been used to resolve disputes between countries about where to draw their maritime boundaries in the absence of a treaty. The content of customary international law is a complex and contentious issue.

Customary international law has relevance as a source of human rights law because many distinguished commentators believe that the entire text of the Universal Declaration has passed into customary international law.¹³ Other commentators are more cautious, arguing that only violations of certain rights, or a 'consistent pattern of gross violations' represents a violation of customary international law.¹⁴ Human rights norms that have entered into customary international law are significant because they bind all countries, including those that have not ratified relevant human rights treaties.

For the purposes of this study, customary international law is far less important as a source of human rights obligations than treaties. Australia has ratified all of the major human rights treaties, with the exception of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. The obligations under these treaties are much more developed and certain than those under customary international law. Finally, the enforcement of international human rights law treaties is much stronger than that relating to customary international law.

Enforcement of human rights obligations

Within the United Nations system there is a two-track system of human rights enforcement: Charter-based organisations and treaty-based organisations.

Charter-based organisations

A large number of UN institutions set up by the United Nations Charter deal with human rights issues. The most important of these is the Commission on Human Rights, which was set up in 1946. It consists of 53 elected member governments, and meets annually in March and April, although it has also met in emergency

sessions on certain occasions. The scale of the Commission's work can be seen from the 1999 session, where some 3 240 people attended, including representatives of the 53 member States and 91 other States, of 29 international organisations and 212 NGOs. 485 documents were issued for the session, and some 82 resolutions were adopted.¹⁵

Henry Steiner and Philip Alston note three problems with the work of the Commission and other Charter-based institutions: firstly, the concern is overwhelmingly with civil and political rights rather than economic, social and cultural ones. Secondly, the emphasis is on gross and noticeable violations of human rights rather than persistent, endemic and commonplace violations. Thirdly, the Commission gives little attention to education and other consciousness-raising activities.¹⁶

The Commission has mandated a number of special rapporteurs, including one on adequate housing. The rapporteur on adequate housing, has played a major role in defining the human right to adequate housing and in researching the problems of inadequate housing worldwide.

The Commission has also set up a Sub-Commission on the Promotion and Protection of Human Rights, made up of independent experts rather than government representatives. The Sub-Commission has compiled a number of detailed studies on particular human rights questions including: the right to adequate housing; housing and property restitution for displaced persons; rape and armed conflict; and human rights and income distribution. According to Steiner and Alston, the Sub-Commission has played a role in pressuring the Commission to 'go further' than it previously had.¹⁷

A number of other Charter-based organisations have dealt with human rights issues to lesser degrees, including the International Court of Justice, the Economic and Social Council, the Commission on the Status of Women, the Security Council and the General Assembly. Since 1994, the Secretary General has appointed a High Commissioner for Human Rights with a significant number of staff and a presence in many UN missions.

Treaty-based organisations

The seven main general human rights treaties listed above have committees, (see Table 1) charged with monitoring the implementation of the respective treaties by States parties.

All committees receive reports of States parties to the treaty in question. In some cases, there is a complaints mechanism through which individuals can seek redress if their rights under the treaty are violated. Some committees also have the capacity for more proactive urgent action or early warning procedures.

The most important body in relation to the right to adequate housing is the Committee on Economic, Social and Cultural Rights (CESCR), the committee charged with the implementation of the ICESCR. The CESCR is made up of 18 independent experts, meeting twice a year. The main functions of the CESCR are:¹⁸

1. Receiving the required States parties' reports every five years on implementation of their obligations under the treaty;
2. Receiving parallel or shadow reports from NGOs;
3. Requesting further information and clarification of particular issues that may constitute violations of rights contained in the ICESCR;
4. Conducting oral hearings where it questions representatives of States parties regarding laws and policies related to economic, social and cultural rights;
5. Listening to oral submissions from NGOs;
6. Assessing all of the information it has received throughout the review process;
7. Drafting and adopting **Concluding Observations** which evaluate each State party's performance based on this information;
8. Developing law by writing and adopting **General Comments** elaborating on the content and meaning of specific rights and key implementation issues to assist States parties with their reporting obligations and domestic implementation of the the ICESCR. During the Cold War, General Comments were generally short and not particularly illuminating. More recently they have become longer and more

Table 1 United Nations Human Rights Committees

Human Rights Treaty	Treaty Body	Reporting Obligations	Individual Complaints Mechanisms	Other Monitoring Procedures
International Covenant on Civil and Political Rights	Human Rights Committee	Yes	First Optional Protocol to the ICCPR	Urgent Action Procedure
International Covenant on Economic, Social and Cultural Rights	Committee on Economic, Social and Cultural Rights established by Economic and Social Council of the UN	Yes	Under discussion	No
International Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination	Yes	Article 14 of the Convention	Early Warning and Urgent Action Procedures
Convention on the Elimination of All Forms of Discrimination Against Women	Committee on the Elimination of Discrimination Against Women	Yes	Optional Protocol to CEDAW	No
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee Against Torture	Yes	Article 22 of the Convention	Investigative powers
Convention on the Rights of the Child	Committee on the Rights of the Child	Yes	No	No
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families	Yes	Article 77 of the Convention	No

detailed interpretations of the meaning of rights and obligations - part of the international jurisprudence of human rights;

9. Reaching out to UN specialized agencies and programmes such as UNHCR, ILO, and UNICEF;
10. Occasionally, in emergency situations, **communicating directly** with governments to inquire about particularly serious or emerging situations.

The CESCR generally adopts a 'constructive' approach in its Concluding Observations relating to States parties' reports. It lists positive aspects, principal subjects of concern and suggestions and recommendations: only rarely does it explicitly accuse any country of violating its obligations.

THE HUMAN RIGHT TO HOUSING

Housing rights under human rights treaties

The most important international human rights treaty recognising the human right to adequate housing is the International Covenant on Economic, Social and Cultural Rights (the ICESCR). The rights and obligations under this covenant are examined in detail below.

However, a number of other important human rights treaties, almost all of which have been ratified by Australia, set out human rights that are relevant to housing and homelessness:

Non-discrimination: Non-discrimination is an essential element of the enjoyment of human rights:

- the ICESCR requires that the rights in the covenant, including that to adequate housing, be enjoyed without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁹ The term 'other status' has been interpreted broadly and the Committee has explicitly included age, disability and sexual orientation within its meaning.
- The *International Covenant on Civil and Political Rights* (ICCPR) protects equality before the law and requires that all rights, not merely those in the ICCPR, be enjoyed without discrimination as to race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.²⁰

- The *International Convention On The Elimination Of All Forms of Racial Discrimination* (CERD) guarantees equality before the law, and requires that rights, including specifically the right to housing, be enjoyed without distinction as to race, colour, or national or ethnic origin.²¹

Housing: In addition to the ICESCR, a number of other covenants protect the rights of groups such as women, children and refugees who are particularly affected by inadequate housing:

- The *Convention On The Elimination Of All Forms Of Discrimination Against Women* (CEDAW) protects in particular the right of rural women to participate in development and to the enjoyment of the right to housing.²²
- The *Convention On The Rights Of The Child* (CROC) requires States to take appropriate measures and in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.²³
- The *Convention Relating To The Status Of Refugees* requires States to treat refugees as favourably as possible regarding housing, and not less favourably than other foreigners.²⁴
- The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (which has not been ratified by Australia) requires States to treat migrant workers equal to their nationals in relation to access to housing, including social security schemes, and protection against exploitation in respect of rents.

Forced evictions: As is noted below, forced evictions constitute a violation of the right to adequate housing under the ICESCR. Forced evictions may also constitute a violation of other human rights:

- The ICCPR prohibits arbitrary or unlawful interference with the home.²⁵ Forced evictions have been found to violate similar provisions in the European and Inter-American human rights conventions.
- The *Convention Against Torture* prohibits cruel, inhuman or degrading treatment or punishment.²⁶ Recently, the Committee Against

Torture found that Yugoslavia had breached its obligations by failing to stop the forced eviction of a Roma community by a mob.²⁷

Homelessness and other violations of human rights: In addition to the rights directly associated with housing and eviction, homelessness, and in particular the treatment of homeless people in Australia, may also violate a number of other human rights. These include:

- The right to life²⁸
- The right to social security²⁹
- The right to privacy³⁰
- The right to freedom of expression³¹
- The right to freedom of assembly and association³²
- The right to vote.³³

The ICESCR and the right to adequate housing

The right to adequate housing is recognised in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) as follows:

The States parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and **housing**, and to the continuous improvement of living conditions.³⁴

The right to adequate housing is one of the best-developed and frequently cited examples of economic, social and cultural rights. Two General Comments on the right to adequate housing have been adopted by the CESCR. These General Comments are the most authoritative, legally binding interpretations of the right to adequate housing as set out in Article 11(1) of the ICESCR.

The first of these is the CESCR's *General Comment No. 4 on the Right to Adequate Housing*, adopted unanimously on 12 December 1991, which has been described as the 'single most authoritative legal interpretation' of the right under international law.³⁵

The General Comment notes that the clause in the Covenant should be read broadly in terms of its applicability. Firstly, whatever impression the wording of the Covenant gives, enjoyment of the right applies to all people regardless of gender or

family situation, without discrimination, as required by Article 2(2) of the ICESCR.³⁶ Secondly, the notion of housing should not be limited to the idea of shelter, but rather understood to mean '**the right to live somewhere in security, peace and dignity**'.³⁷

In the General Comment, the Committee sets out seven aspects of the notion of adequacy contained in the right that should be taken into account. These are:³⁸

1. **Legal security of tenure:** all persons, regardless of their form of tenure, should possess a degree of security of tenure which 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 safe drinking water, heating and lighting, sanitation and washing facilities and refuse disposal among others.
3. **Affordability:** adequacy of housing means that the costs of housing are not so high as to threaten other basic needs. In Australia, there is no universally accepted benchmark for affordability. While most State housing authorities use a 25% benchmark, the 1991 National Housing Strategy used a 30% benchmark. Affordable housing advocates have argued that for people on low incomes, even 25% is too high a rental cost to leave adequate income remaining to meet other costs of living.³⁹
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.

The second, *General Comment No. 7*, focuses on forced evictions.⁴⁰ Forced evictions are defined as:

the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.⁴¹

The Committee describes forced evictions as *prima facie* incompatible with the Covenant.⁴² The General Comment notes:

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, 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.⁴³

Where evictions do take place, the General Comment requires that eight procedural protections be in place:

1. An opportunity for genuine consultation with those affected;
2. Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
3. Information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
4. Especially where groups of people are involved, government officials or their representatives must be present during an eviction;
5. All persons carrying out the eviction must be properly identified;
6. Evictions are not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
7. Provision of legal remedies; and
8. Provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

STATES PARTIES

IMPLEMENTATION OBLIGATIONS

States parties' obligations relating to the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) have been the subject of debate throughout the development of international human rights law. Economic, social and cultural rights have remained unfulfilled in many wealthy nations where the rule of law and civil and political rights are well-established. States have frequently exploited a perceived lack of definition of their obligations under the ICESCR as a pretext for this lack of fulfilment of their international obligations.

As Scott Leckie notes:

Perhaps no other treaty is violated in as obdurate or frequent a way as the International Covenant on Economic, Social and Cultural Rights, despite much conceptual and interpretative progress in this area of law over the past decade. This state of affairs has little, however, to do with the nature of the obligations and rights established in the Covenant. It remains a problem of perception and resolve rather than any inevitable limitation of law or jurisprudence which have kept economic, social and cultural rights wallowing in the relative purgatory of global efforts to secure human rights.⁴⁴

This section will examine the obligations relating to economic and social rights, and particularly the right to adequate housing, through a comparison with civil and political rights; an examination of the words of the ICESCR relating to State parties' obligations; and an examination of two typologies of rights developed by human rights experts.

Economic and social vs civil and political rights

As noted above, after the *Universal Declaration of Human Rights* was finalised in 1948, the Commission on Human Rights was instructed to develop a single legally binding covenant. However, in 1951 the General Assembly, after intense diplomatic pressure from western countries, agreed to draft two separate covenants.

Many western countries have since sought to downgrade the importance of their obligations under the ICESCR, referring to them as 'societal goals' rather than human rights. In Australia, despite the fact that Australia has ratified the ICESCR, it is not included in the treaties annexed to the *Human Rights and Equal Opportunity Act*, unlike the ICCPR and the Convention on the Rights of the Child. However, despite the diplomatic efforts of certain countries, the 1993 Vienna World Conference on Human Rights reaffirmed that all human rights are 'indivisible and interdependent and interrelated'.⁴⁵

There are differences in the wording of the obligations of the ICESCR and the ICCPR. Most significantly, whereas the ICCPR requires immediate implementation,⁴⁶ the ICESCR allows for progressive realisation according to a State's resources. However, differences in the nature of obligations do not mean that obligations are not real, concrete and legally binding.

Another common misconception is that civil and political rights entail negative obligations only - obligations to refrain from infringing rights - whereas economic, social and cultural rights entail only positive obligations - obligations to take positive actions - which are more difficult to define and enforce. Negative obligations, unlike positive obligations, are immediately realisable regardless of the resources available. Such a division is inaccurate. Many obligations under the ICESCR are immediately realisable, such as the prohibition on forced evictions, and many obligations under the ICCPR, such as the right to a fair trial through the development of a judicial system that will not violate rights, require substantial investments of time and money. The typologies of obligations examined below illustrate the range of obligations that apply equally to all human rights.

Obligations under the ICESCR

Under Article 2(1) of the ICESCR, each State party undertakes to:

take steps... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁷

The meaning of this Article has been interpreted by *General Comment No. 3* of the Committee on Economic, Social and Cultural Rights and by the work of many noted human rights scholars.

To take steps: This phrase was preferred in the drafting process of the Covenant to the more onerous obligation 'to guarantee' rights.⁴⁸ However, it does impose a clear obligation to take action: a failure to take positive steps therefore would represent a violation of the ICESCR.⁴⁹ Specifically, as the CESCR noted in *General Comment No. 3*, '[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant'.⁵⁰

To the maximum of its available resources: This phrase has proven to be one of the most difficult to interpret in the ICESCR. Much of the difficulty stems from the fact that resource distribution is thought of as primarily a political consideration, and that an objective measurement of this is difficult. The CESCR has never declared a state to be in violation of the Covenant due exclusively to reductions in public spending.⁵¹

However, in this area as in any relating to the implementation of human rights, as Robertson notes, 'matters to which States have accepted international obligations are, by hypothesis, of international concern and no longer exclusively a matter of their domestic jurisdiction'.⁵² Thus, while the Covenant gives considerable discretion to governments, retrogressive measures and unjustifiable cuts to expenditure would appear to constitute violations of the Covenant.⁵³ While no benchmarks for resource allocation have been developed, the CESCR appeared to make a start on this development, when it criticised Canada in 1993 for spending just 1.3% of its government expenditure on social housing.⁵⁴

With a view to achieving progressively the full realisation of the rights recognised in the present Covenant: Perhaps the most controversial section of this clause is that calling for States parties to achieve progressively the full realisation of the Covenant rights. As noted above, this mode of realisation contrasts clearly with that set out in the corresponding article of the ICCPR which calls for immediate implementation.⁵⁵

The CESCR has made clear that this phrase imposes clear obligations 'in respect of the full realisation of the rights': specifically 'to move as expeditiously and effectively as possible towards that goal' and that any 'deliberately retrogressive

measures' would need to be fully justified.⁵⁶ Furthermore, certain 'core minimum standards', including basic housing and shelter, should now be realised.⁵⁷

While advocates of rights are at pains to point out that legally, this phrase does not constitute an 'escape hatch',⁵⁸ Scott Leckie notes with regret its increasing use as such by 'recalcitrant States' and notes that new interpretations of this principle may be needed.⁵⁹

By all appropriate means: There are many means by which the ICESCR may be implemented, including:

- Direct incorporation into national law, as Portugal has done,⁶⁰ and which the CESCR has described as 'desirable'.⁶¹
- Legislation, which although specifically mentioned as advisable in the ICESCR is probably not mandatory. Legislation is not necessarily sufficient on its own either.
- Judicial remedies: while it is quite clear that the provision of judicial remedies for all the rights in the ICESCR is not a requirement, they are available for a large number of rights in many countries.
- Other appropriate measures listed by the CESCR include administrative, financial, educational and social measures.⁶²
- The CESCR, in *General Comment No. 9 on the Domestic Application of the Covenant*, has emphasised the need for effective remedies. As Di Otto notes, effective remedies:

[enable] individuals and groups to enforce their rights guaranteed in the ICESCR. The term "effective remedy" is not limited to judicial remedies and the CESCR accepts that administrative remedies will often be appropriate. Thus, remedies may be provided by independent statutory bodies established by parliaments, such as ombuds offices and human rights commissions (like HREOC) or by other forms of alternative dispute resolution. In addition, remedies may be policy-based, such as developing a plan for implementation, establishing benchmarks and time frames, or explicitly articulating human rights principles to guide programme development.⁶³

In *General Comment No. 4 on Adequate Housing*, the Committee hints at the kinds of measures required to implement the right to adequate housing. It makes clear that considerable discretion is accorded to States on, for example, what mix of private and public sector measures, or degree of investment in public housing or other 'enabling strategies' they choose.⁶⁴ However, the Committee does emphasise the importance of the adoption of a national housing strategy (which it considers 'almost inevitably' necessary)⁶⁵ and of the provision of certain domestic legal remedies, including:

- Legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
- Legal procedures seeking compensation following an illegal eviction;
- Complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination;⁶⁶
- Allegations of any form of discrimination in the allocation and availability of access to housing; and
- Complaints against landlords concerning unhealthy or inadequate housing conditions.

Finally, Article 28 of the ICESCR refers particularly to States with federal systems such as Australia, and notes that: 'the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.'⁶⁷ The effect of this, as Di Otto and David Wiseman summarise, is that the Federal Government has primary responsibility to 'ensure that the rights enumerated in the ICESCR are enjoyed throughout Australia, even where they fall under the jurisdiction of State and Territory Governments.'⁶⁸ However, it should not be seen as absolving State and Territory Governments from obligations to implement Australia's human rights obligations.

Typologies of obligations

Another important project in the legal development of economic, social and cultural rights and in understanding the nature of State parties' obligations has been the enumeration of typologies of rights. These typologies of human rights obligations can be applied equally to civil and political rights on the one hand, and

economic, social and cultural rights on the other, demonstrating practically the indivisibility and equality of these rights.⁶⁹

The most important and widely accepted of these typologies is the *Maastricht Guidelines*, which describe State parties' duties to respect, protect and fulfil human rights.⁷⁰ A failure to perform any of these constitutes a human rights violation.⁷¹ Briefly, as noted in the *Maastricht Guidelines*:

- The obligation to respect requires State parties to refrain from interfering with the enjoyment of rights;
- The obligation to protect involves prevention of violations by third parties; and
- The obligation to fulfil requires a State to take positive action towards the enjoyment of rights, including legislative and budgetary measures.

Table 2 has examples of how each of these three obligations relates to housing rights.^a

Another helpful analysis from the *Maastricht Guidelines* is that of obligations of conduct and of

Table 2^a

Respect	Protect	Fulfil
Prevention of Illegal Evictions and Forced Evictions by Government Actors	Preventing Violations of Housing Rights, such as protecting persons from forced evictions carried out by private actors	Combating, Preventing and Ending Homelessness
Prevention of All Forms of Discrimination	Domestic Remedies and the Domestic Application of International Law	Increase and Properly Target Public Expenditure on Housing
Prevention of any Measures of Retrogressivity	Ensuring Equality of Rights for All Groups	Legislative Review and Recognition of Housing Rights
Housing-Based Freedoms	Access for All to Affordable Housing and the Development of an Affordability Benchmark	Develop National Housing Rights Strategies
Right to Privacy and Respect for the Home	Accessibility of Housing to Disadvantaged Groups Requiring Special Measures	Access to Housing Information
Popular Participation in Housing	Democratic Residential Control of Housing	Popular Housing Finance and Saving Schemes
Respecting the Cultural Attributes of Housing	Regulating Rent Levels and Activities in the Private Housing Sector	Social Housing Construction

a. adapted from a similar table prepared by the UN Housing Rights Programme

result.⁷² Significantly, this interpretation contradicts a statement by the International Law Commission in 1977 that the ICESCR imposed obligations of result only.⁷³ The applicability of this analysis was confirmed in the CESCR's *General Comment No. 3* on State parties' obligations.⁷⁴ The obligation of result implies a requirement to meet a certain standard; while that of conduct refers to the need to take policy or other steps to achieve such a standard. In relation to housing, for example, obligations of result would be the elimination of or significant reduction in homelessness; obligations of conduct would entail the development of a national housing strategy.⁷⁵ As Leckie notes, these two analyses form an 'inseparable and mutually inclusive' way of understanding States' obligations, as 'obligations to respect, protect and fulfil consist simultaneously of conduct and result.'⁷⁶

CONCLUSION

The development of binding human rights obligations at the level of international law is one of the enduring legacies of the United Nations'

work since 1945. No State can claim to be free of such obligations. In the case of countries like Australia, which have ratified most of the major human rights treaties, these obligations are extensive and clear.

Many of these rights and their concurrent obligations relate to issues of housing and homelessness. The major human rights covenants ban discrimination on many grounds, they protect many particular groups' right to housing, they prohibit forced evictions and protect many other rights which are frequently violated during homelessness.

The most extensive and important rights and obligations in relation to housing stem from the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR). The Committee on Economic, Social and Cultural Rights has interpreted the right to adequate housing extensively, through legally binding General Comments. These have given us extensive insight into the meaning of adequate housing and imposed clear obligations with respect to the legality of evictions.

While many countries have sought to downplay the importance of their obligations relating to economic, social and cultural rights and to hide behind the progressive nature of obligations under the ICESCR, there can no longer be any doubt that such obligations are real, concrete and frequently specific. States must move as expeditiously as possible towards full realisation of rights, and any retrogressive measures, such as unjustified cuts to funding, must be explained if they are not to be regarded as violations of the Covenant. The presence of effective remedies for those affected to enforce their rights is also necessary.

Finally, progress has been made in analysing State parties' compliance with their obligations through the development of typologies requiring States to protect, respect and fulfil rights, and to observe obligations of conduct and result.

Using these tools, then, one can examine some of the steps taken by States including the UK, Canada and South Africa to realise housing rights, and analyse Australia's response to its obligations.

Notes

1 *United Nations Charter* Article 1(3).

2 *United Nations Charter* Articles 55 & 56.

- 3 *Universal Declaration of Human Rights*, adopted and proclaimed by the United Nations General Assembly resolution 217A (III) on 10 December 1948, preamble.
- 4 ...
- 5 *Vienna Convention on the Law of Treaties*, adopted on May 1969, opened for signature on 23 May 1969 (entered into force on 27 January 1980), Art 2.
- 6 *Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).
- 7 *International Convention on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966 (entered into force 3 January 1976).
- 8 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965 (entered into force 4 January 1969).
- 9 *Convention on the Elimination of all Forms of Discrimination Against Women*, opened for signature on 18 December 1979 (entered into force on 3 September 1981).
- 10 *International Convention on the Rights of the Child*, opened for signature on 20 November 1989 (entered into force 2 September 1990).
- 11 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984 (entered into force 26 June 1987).
- 12 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990) (entered into force 1 July 2003).
- 13 Hirst Hannum, 'The Status and Future of the Customary International Law of Human Rights: the Status of the Universal Declaration of Human Rights in National and International Law', *The Georgia Journal of International and Comparative Law* 25 (1996): 312-3; see also Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Morals, Politics* (Oxford: Oxford University Press, 2000) 142.
- 14 D.J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 1998) 725-30.
- 15 Figures from Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Morals, Politics* (Oxford: Oxford University Press, 2000), pp. 600-01.
- 16 Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Morals, Politics* p. 602.
- 17 ..., p. 601
- 18 adapted from www.cohre.org
- 19 ICESCR Article 2(2).
- 20 ICCPR Article 2(2), 26.
- 21 CERD Article 5(e)(iii).
- 22 CEDAW Article 14(2)(h)
- 23 CROC Article 27(3).
- 24 *International Convention Relating To The Status Of Refugees* (1951), adopted by UNGA resolution 429(V) on 28 July 1951, entered into force on 22 April 1954, Article 21.
- 25 ICCPR Article 17.

- 26 CAT Article 16.
- 27 *Hijrizi v. Yugoslavia*, Communication No. 161/2000: Yugoslavia, UN Doc. CAT/C/29/D/161/2000 (2 December 2002).
- 28 ICCPR Article 6.
- 29 ICESCR Article 9.
- 30 ICCPR Article 17.
- 31 ICCPR Article 19.
- 32 ICCPR Article 21, 22.
- 33 ICCPR Article 25.
- 34 ICESCR Article 11(1).
- 35 Centre on Housing Rights and Evictions, *Legal Resources for Housing Rights* (Centre on Housing Rights and Evictions, Geneva, 2000) 73. General Comments are authoritative interpretations of the standards enshrined in the Covenant. The United Nations Economic and Social Council authorized the Committee to "develop a fuller appreciation of the obligations of the States Parties under the Covenant," Economic and Social Council Resolution 1990/45, UN Doc. E/RES/1990/45 (1990).
- 36 CESCR, *General Comment no.4 on the Right to Adequate Housing*, UN Doc E/CN.4/1991/4, para 6.
- 37 CESCR, *General Comment no.4 on the Right to Adequate Housing* para 7.
- 38 CESCR, *General Comment no.4 on the Right to Adequate Housing*, para 8.
- 39 <http://www.shelter.net.au/docs/Affordable%20housing%20primer.doc>. For a detailed examination of this question, see the Summer 2002 edition of *Tenancy Quarterly*, produced by the Tenants Union of Victoria and Terry Burke & Liss Ralston, *Analysis of Expenditure Levels of household Indebtedness of Public and Private Rental Households, 1975 to 1999* (April 2003) AHURI.
- 40 CESCR *General Comment no.7 on Forced Evictions* UN Doc E/C.12/1997/4.
- 41 CESCR *General Comment no.7 on Forced Evictions*, para 3.
- 42 CESCR, *General Comment no.4 on the Right to Adequate Housing*, para 18.
- 43 CESCR *General Comment no.7 on Forced Evictions*.
- 44 Scott Leckie, 'Violations of Economic Social and Cultural Rights', *SIM Special no 20*, p. 2.
- 45 *Vienna Declaration and Programme of Action*, by the World Conference on Human Rights on 25 June 1993.
- 46 ICCPR Article 2: 'each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'
- 47 ICESCR, Art 2(1).
- 48 Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly*, pp. 157, 165
- 49 Scott Leckie, Cees Flinterman and Victor Dankwa, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly*, pp. 705, 714.
- 50 CESCR, *General Comment no.3 on the Nature of States parties' obligations*, para 2.
- 51 Scott Leckie, *SIM Special number 20*, p. 35.
- 52 cited in Philip Alston and Gerard Quinn, *Human Rights Quarterly* pp 157, 163.
- 53 CESCR, *General Comment no.3 on the Nature of States parties' obligations*, E/1991/23, para 3; Scott Leckie, Cees Flinterman and Victor Dankwa, *Human Rights Quarterly*, pp. 705, 739.
- 54 CESCR, *Concluding observations: Canada*, 10/12/98, E/C.12/1/Add.31, para 20.
- 55 ICCPR Article 2.
- 56 CESCR, *General Comment no.3 on the Nature of parties' obligations*, para 9.
- 57 ...
- 58 Philip Alston and Gerard Quinn, *Human Rights Quarterly*, pp. 157, 175.
- 59 Scott Leckie, *SIM Special number 20*, p. 18.
- 60 Philip Alston and Gerard Quinn, *Human Rights Quarterly*, pp. 157, 167.
- 61 CESCR *General Comment no.9 on the Domestic Application of the Covenant*, E/1999/22, para 8.
- 62 CESCR, *General Comment no.3 on the Nature of States parties' obligations*, para 7.
- 63 Di Otto, 'Homelessness and Human Rights', 27 (6) *Alternative Law Journal* (December 2002) p.273.
- 64 CESCR, *General Comment no.4 on the Right to Adequate Housing*, para 14.
- 65 ..., paras 12, 14.
- 66 ..., para 17.
- 67 ICCPR Article 28.
- 68 Di Otto and David Wiseman, 'In search of "effective remedies": applying the International Covenant on Economic, Social and Cultural Rights in Australia' (2001) 7(1) *Australian Journal of Human Rights* 5, 13.
- 69 Steiner and Alston propose a five part typology involving the requirements to respect rights of others, create institutional machinery essential to the realisation of rights, protect rights and prevent violations, provide goods to satisfy rights, and promote rights: Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Morals, Politics* (Oxford: Oxford University Press, 2000) 182-184.
- 70 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', *SIM Special No. 20*, <http://www.law.uu.nl/english/sim/specials/simsp20.asp>, para 6.
- 71 ..., *SIM Special No. 20*.
- 72 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', *SIM Special No. 20*, para 7.
- 73 Scott Leckie, Cees Flinterman and Victor Dankwa, *Human Rights Quarterly*, pp. 705, 715.
- 74 CESCR, 'General Comment no.3 on the Nature of States parties' obligations', para 1.
- 75 ...
- 76 Scott Leckie, 'Violations of Economic Social and Cultural Rights', *SIM Special number 20*, p.16.



COMPARATIVE EXAMPLES OF HOUSING RIGHTS IMPLEMENTATION

This chapter examines some of the legal means used to implement housing rights in the United Kingdom (UK), Canada and South Africa.

The UK and Canada are both countries with similar legal systems and histories to that of Australia. In the UK and Canada, like in Australia, despite the affluence of the country, high levels of violations of housing rights persist. These violations include homelessness and unaffordable and inadequate housing. In the UK and Canada, like in Australia, the ICESCR does not automatically apply in domestic law and has not been systematically implemented. However, despite these failings, both the UK and Canada have implementation measures of interest that are not available in Australia.

South Africa, by contrast, is a much less affluent country with more complex housing rights issues due to the legacy of apartheid. While many housing rights problems remain, including evictions and inadequate implementation of laws, policies and programmes, the legal framework for housing rights is in many respects a model for other countries.

THE UNITED KINGDOM

The United Kingdom has a similar constitutional and legal history to that of Australia. As in Australia, treaties are not self-executing in the UK; rather, they must be implemented through

legislation or some other creation of domestic law. Like Australia, the UK does not have a Bill of Rights, although the *European Convention on Human Rights* now has some effect because of the *Human Rights Act* (see below).

Homelessness remains a major problem in the UK. In 2001, 184 290 households were identified as homeless by local authorities they approached for assistance. Shelter UK, the largest homelessness charity in Britain, estimates that this represents 440 000 people, and that many more homeless people do not approach local authorities for assistance either because they do not know about their right to do so, or because they believe they will not receive assistance.¹ Furthermore, Shelter UK estimates that about 2.7 million households live in poor housing conditions and 500 000 in overcrowded conditions.

Clearly, in a wealthy country such as Britain, these figures are more than disappointing, and call into question whether Britain is meeting its obligations of result regarding the right to adequate housing. The Committee on Economic, Social and Cultural Rights (CESCR), in its concluding observations on the UK's 2002 report, stated that it was 'concerned at the persistence of homelessness' and noted with concern 'that poor quality housing ... [continued] to be a problem for a large number of families and individuals.'²

Given the disappointing level of realisation of the UK's obligations of result, there is a strong onus on the UK Government to show that it is fulfilling

its obligations of conduct. However, the CESCR expressed its concerns at the UK's position that the provisions of the covenant are 'principles and programmatic objectives rather than legal obligations that are justiciable',³ and at the failure of the UK to take a number of measures including:

- Incorporation of the Covenant into the domestic legal order, except in the case of a few laws;
- The development of a national human rights plan of action;
- The provision of human rights education to those responsible for the implementation of the covenant.⁴

Shelter UK estimates that 90 000 affordable homes will be needed each year in order to combat the lack of affordable housing in Britain. However, during 2000/01, only 18 000 were completed. Housing expenditure has decreased from almost £9 500 million per year to under £6 000 million per year in the past ten years. This calls into question whether Britain is implementing its obligations 'to the maximum of its available resources'.¹⁵ Certainly, on the basis of this brief analysis it is difficult to conclude that the UK is fulfilling its obligations of conduct either, and its compliance with the covenant in relation to housing rights must be called into question.

While the ICESCR has not been incorporated into the domestic law in the UK, some pieces of legislation do give effect to some sub-rights in a way that is not available in Australia. Three of these are examined below: the *Homelessness Act 2002*, the *Scottish Homelessness Act*, and the *Human Rights Act*, which implements the *European Convention on Human Rights*.

The Homelessness Act 2002

The *Homelessness Act 2002* imposes a duty on local housing authorities (LHAs) in Britain to provide accommodation for people classified as unintentionally homeless and in priority need until a settled housing solution is found. This accommodation can be found from the stock of the authority, private or registered social landlords, or even in bed and breakfasts. Bed and breakfasts, which account for 15% of accommodation, represent about 50% of spending on temporary accommodation.

In order for an applicant to have the right to the provision of accommodation from a LHA, an applicant must show that they:

- Are homeless within the terms of the legislation;
- Are eligible for assistance under the Act;
- Fall within one of the defined priority need categories;
- Did not make themselves intentionally homeless within the terms of the Act;
- Have a local connection to the authority where the application is being made.⁶

According to the Act, a person becomes intentionally homeless if they deliberately do or fail to do anything which causes them to lose accommodation that it would have been reasonable for them to continue to occupy. In a recent case, a woman who did not pay her rent because to do so would have left her living below subsistence level was found not have rendered herself intentionally homeless. The court found that the LHA had to take affordability into account in considering the question of intentionality.⁷ However, in another case where the court found the applicant could have paid the rent but failed to do so and was rendered homeless, the homelessness was found to be intentional.⁸ It is, however, not reasonable for a person to remain in accommodation if they face any violence or threats of violence.

Perhaps the major limitation on the application of the Act is the requirement that people be in priority need. Those deemed to be in priority need include those who:

- Are pregnant
- Have dependent children
- Are vulnerable because of old-age, mental illness, physical disability or other special reason
- Are homeless as a result of a disaster such as flood or fire
- Are vulnerable as a result of fleeing violence or threats of violence
- Are vulnerable as a result of having spent time in the armed forces or in prison.⁹

Those who are found either to be intentionally homeless or to not be in priority need are entitled only to advice and assistance. This assistance must include information about the availability,

location and sources of local accommodation. LHAs are encouraged, but not required, to house those not in priority need as defined by the Act. All applicants have the right to appeal any decisions by an LHA internally, through review of the decision by the LHA, and then to the County Court on a question of law.

While this Act does give a small group of the most vulnerable access to remedies to enforce their right to accommodation, it does not fully realise the right to adequate housing. Nor, clearly, does it give effect to the right to adequate housing for all people in Britain, which the ICESCR requires the government to implement progressively. It is worth noting that not even such limited remedies are available in Australia. And, as the Scottish version of the Act below illustrates, this Act provides the basis for a rights-based approach to be taken in the provision of housing to the homeless.

The Scottish Homelessness Act 2002

When the Scottish Parliament passed the *Scottish Homelessness Act*, Shelter UK described it as ‘the most progressive homelessness law in Europe.’¹⁰ Over the next decade, it will give everyone who is homeless in Scotland the right to a home.

The Act is based on the general *UK Homelessness Act* examined above. However, it goes much further in a number of respects:

- **Priority need:** the requirement that those homeless people receiving assistance be in priority need is removed. This will occur by gradually broadening the categories of people covered under the definition of priority need until, in ten years time, there is no distinction drawn between any homeless people categorised as unintentionally homeless.
- **Intentionality:** households that are categorised as being intentionally homeless will be given accommodation with greater support. First, they will be granted a temporary short tenancy for a year. Those who sustain that tenancy will be given a full tenancy. Those who do not sustain the tenancy must be given either another short tenancy or a form of more intensively supported accommodation until they are ready for a full tenancy.
- **Local connection:** Rather than being able to refer homeless people to another area where

they have a local connection, local councils must accommodate homeless people in the area where they apply for assistance.

- **Suitability of accommodation:** The Act gives the Minister the right to make regulations which ban the use of unsuitable accommodation in certain circumstances. One of the stated aims of this provision is to end the use of bed and breakfast accommodation.

Clearly, if properly implemented, this law has the potential to eliminate homelessness in Scotland and to implement a major part of the right of all people in Scotland to an adequate house.

The Human Rights Act and the European Convention on Human Rights

In 1951, the British Government signed the *European Convention on Human Rights* (ECHR). The Convention is a regional human rights treaty, which sets up international legal obligations in the same way as other treaties. Unlike almost every other country in Europe, Britain has not incorporated the Convention into its domestic law. Rather, the *Human Rights Act* requires courts to interpret legislation consistently with the Convention as far as this is possible. Ensuring that legislation is consistent with the Convention remains the responsibility of the Parliament. Any new piece of legislation must be accompanied by a human rights statement analysing its compliance with the Convention. Any piece of legislation found to be inconsistent with the Convention is fast-tracked back to Parliament for reconsideration.

The ECHR does not include the right to adequate housing. However, Article 8 states that: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’¹¹ In the British case *Lee v Leeds City Council; Ratcliffe and others v Sandwell MBC*, the Court of Appeal found that this article imposed an obligation on local authority landlords to maintain social housing so as to avoid letting out stock that was unfit for human habitation. This decision is significant because it imposes a positive duty on landlords to protect the right of respect for one’s private and family life and one’s home. However, this right did not extend as far as keeping the housing in good condition, and the right was not breached in this case, where a house contained condensation and mould.

Article 8 of the ECHR has also been used in a number of cases where injunctions were sought under planning laws that would force gypsy families to move off land they were occupying.¹² In these cases, the courts took into consideration the gypsies' rights to protection of the family and home in deciding whether to grant injunctions. While these cases had the effect of making the laws more likely to protect housing rights, they did not necessarily stop evictions from taking place, and in fact the validity of the planning scheme was upheld in the European Court of Human Rights in a challenge under Article 8 of the ECHR.

In a recent case, the European Court of Human Rights has also interpreted the right to life in a way that imposes positive obligations on governments, rather than just requiring abstention from injurious actions.¹³ Although the case in question did not directly relate to housing issues, it could be applied in such a way in the future. In two cases involving Italy, the Court held that there may be cases in which governments have positive obligations to respect peoples private lives. In particular, a refusal to provide housing assistance to an individual suffering from a serious disease may breach Article 8 of the ECHR where there is a direct link between the measures the individual requests and their private life.¹⁴

While there is some possibility for using the European Convention to protect some elements of the right to adequate housing, it does not by any means guarantee the right to adequate housing as defined in the ICESCR in the UK.

CANADA

Canada's legal and political history is similar to that of Australia and the United Kingdom: it had no Bill of Rights included in the Constitution at the time it was written, and although it has ratified the ICESCR, this has no automatic domestic application and has not been comprehensively implemented through legislation.

After Canada's last report to the CESCR in 1998, the Committee was extremely critical of Canada in relation to its implementation of the right to adequate housing. The Committee was 'gravely concerned that such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to

such proportions that the mayors of Canada's ten largest cities have now declared homelessness a national disaster'.¹⁵ The Committee criticised the decrease in housing affordability, the shortage of adequate housing for Aboriginal people, and cuts to social assistance that would lead to homelessness.

However, unlike Australia, Canada now has a Bill of Rights, the *Canadian Charter of Rights and Freedoms*, which was adopted in 1980. The Charter is a Constitutional instrument which cannot be overruled by the government but which can override laws which violate the rights it enunciates. Some of Canada's provinces (the equivalent of States in Australia) also have human rights codes which in some cases overrule inconsistent law.

None of these charters explicitly includes the right to adequate housing or other economic, social and cultural rights. Generally, the rights in the Charter have been interpreted by governments and courts in a narrow way so as to exclude the protection of economic, social and cultural rights, an interpretation that was criticised by the CESCR in 1998.

However, recent developments are more encouraging. The section below examines the *Gosselin* decision, in which Canada's Supreme Court began to move towards a more expansive interpretation of the Charter, and another example of the increasing willingness of Canadian judicial bodies to review the government's record in relation to economic and social rights - a recent coronial inquest, the *Kimberley Rogers* inquest. It also examines the Ontario *Human Rights Code*, which includes an expansive definition of discrimination, and the application of this code to housing issues.

The Canadian Charter and the Gosselin case

The *Canadian Charter of Rights and Freedoms* does not explicitly include the right to adequate housing or other economic, social and cultural rights. However, Section 7 of the *Canadian Charter of Rights and Freedom* States that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In the case of *Irwin Toy*, the Supreme Court of Canada found this section could be interpreted to include rights enunciated in international covenants, including economic and social rights such as that to adequate housing. This interpretation of the Charter has the potential, therefore, to give Canadians effective remedies against violations of their rights under the ICESCR.

The *Gosselin* case was a class action run against the Quebec Government because of the social security policies they adopted in the 1980s, which were not dissimilar to Australia's policies of mutual obligation adopted in the 1990s.¹⁶ Louise Gosselin was a young woman who was unemployed during this period and had her social assistance reduced under the Quebec law. As a result she became homeless, which in turn led to sexual harassment, the need for her to engage in sex work, and led to depression and a suicide attempt.

Louise Gosselin argued that the Government measures were a violation of section 7 of the Charter that guarantees security of person, and section 15, which guarantees the right to equality. In particular, she argued that the Government had a positive duty to ensure that Canadians unable to provide for themselves had an adequate income. This was the first time that it had been argued that this right involved a positive duty on the Government. The majority of the Supreme Court found that this case did not present the circumstances to justify such a 'novel' interpretation of section 7, although they did leave open the possibility of imposing positive obligations on government in the future. Two dissenting judges found that such positive obligations did exist in this case.¹⁷

Although Louise Gosselin and others were not successful in this case, the decision does indicate a small but important shift in the thinking of the Canadian Supreme Court. Particularly, as the Canadian Centre for Equality Rights in Accommodation (CERA) notes, for the first time 'some members of the Court have indicated that Canada has a legal obligation to provide adequate social assistance under the Charter.' This, the CERA notes, can be used 'to support further claims to ensure that the rights of those most in need are protected and that governments take meaningful steps to eliminate poverty and homelessness in Canada.'¹⁸ The judgments of the

judges in the minority are of particular interest.

This case illustrates how rights charters, even those that do not explicitly contain provisions relating to economic, social and cultural rights, can be used creatively to place governments under scrutiny regarding their records on economic, social and cultural rights. The case illustrates the general value of having judicial review of government policy on economic, social and cultural rights.

The Kimberley Rogers Inquest

Kimberley Rogers died, apparently from a drug overdose, during a heat wave in Ontario, Canada, while eight months pregnant. She had previously been convicted of welfare fraud for failing to disclose that she was studying, and had been placed under house arrest. At the time of her death, she was suffering from depression and the effects of insufficient social assistance. After her death, the Ontario Government introduced lifetime bans on social benefits as punishment against social security fraud.

Although the Coroner excluded any reference to international human rights law during the hearing, they did examine the underlying reasons for Rogers' death, rather than the immediate causes.¹⁹ The coroner's recommendations to the Government included: ensuring adequate housing and food for those under house arrest; regular assessment of the adequacy of assistance rates; and the elimination of lifetime bans from social assistance.²⁰ This is another example of judicial review of the Canadian Government's record in relation to economic and social rights, and one that is not reliant on the availability of any charter of rights.

The Ontario Human Rights Code

The Ontario Human Rights Code, the equivalent of a piece of state legislation in Australia, overrules all inconsistent legislation, unless that legislation specifically states that it applies despite the code. It has been described as the 'most important piece of legislation in Ontario.'²¹

The Code aims to 'provide for equal rights and opportunities without discrimination'.²² According to CERA, the code relates to housing in several ways. Some of the acts outlawed by the code include:

- Discrimination or refusal to rent on grounds

including race, nationality, religion, sex, sexual orientation, age, marital status, family status, disability or receipt of public assistance. Prohibited discrimination can be direct or constructive (i.e. conduct that, while not obviously discriminatory, has a discriminatory effect);

- Harassment by landlords on the same grounds;
- The selection of tenants based on rent to income ratio;²³
- Refusal to rent because of a lack of references or credit checks; and
- Refusal to rent to those whose rent is being paid by social assistance.

Most of these measures are not included in Victoria's anti-discrimination legislation.

SOUTH AFRICA

In the post-apartheid era, the South African Government has been among the most progressive in legally implementing the right to adequate housing - constitutionally, legislatively, through policy decisions and through the decisions of its Constitutional Court. Although there are undoubtedly still many problems relating to the enjoyment of the right to adequate housing in South Africa, due in part to a lack of resources and the legacy of apartheid, in terms of providing legal remedies and focused policy, many of the measures taken by the South African Government are models for other States around the world.

This section examines a number of aspects of South Africa's implementation of its international housing rights obligations, including its Constitutional provisions, the landmark *Grootboom* case, legislative provisions relating to evictions and security of tenure, and policy measures.

The South African Constitution

The South African Constitution provides extensive explicit protection of housing rights. Among other relevant rights, it recognises:

- The right of everyone to access to adequate housing (Section 26[1])
- The obligation on the State to take reasonable

legislative and other measures, within its available resources, to achieve the progressive realisation of this right (Section 26[2])

- That no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances; and that no legislation may permit arbitrary evictions (Section 26[3])
- The right of all children to basic shelter (Section 28[1][e])
- The right to equality, including the prohibition of discrimination on grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (Section 9[3])
- The right to human dignity (Section 10)
- The right to just administrative action (Section 33).²⁴

POLICY, LEGISLATION AND PROGRAMMES

The South African Government has taken numerous steps to implement these constitutional rights in a systematic way.²⁵ The first of these was the first South African Housing White Paper, which was adopted by the Government in 1995, and set out the Government's post-apartheid strategies and policies in relation to housing. The second White Paper, which includes a review of past policies and projects and sets out new priorities, is due to be adopted soon. These White Papers represent a comprehensive national housing policy of the kind that CESCR sees as an important part of implementing the ICESCR.

Some of the laws and policies enacted by the South African Government are:

- ***The Housing Act 1997***: This act repeals and dissolves the apartheid housing laws and structures and sets out the basic principles guiding housing development in South Africa, including the roles and duties of different levels of government.
- ***The Extension of Security of Tenure Act 1997***: This act covers those people occupying land in rural and semi-rural areas with the permission of the owner. The act protects these occupiers from eviction except under

certain circumstances. Broadly, eviction can only be ordered by the court if it believes that it would be just and equitable to do so, and must consider whether the person who would be evicted is able to find suitable alternative accommodation. Some South African housing advocates believe this act has in fact increased evictions.

- ***The Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 1998:*** This act protects so-called unlawful occupants of land from illegal eviction and regulates the way in which eviction can take place. In short, again it requires that a court order be granted in order for an eviction to take place, and requires the court to be satisfied that it is just and equitable for an eviction to take place, and that it must consider factors including whether suitable alternative accommodation is available in doing so.
- ***The National Housing Subsidy Scheme:*** This scheme grants subsidies to individuals to buy or improve their own home, and to institutions who are creating affordable housing.

It is, however, worth noting that some South African housing advocates have criticised the poor implementation of many of these policies, and their hidden traps and unintended consequences.

The Grootboom case

Although planning and policy implementation of the constitutional right to adequate housing has been systematic, the South African system allows the court to oversee not merely the implementation of these programmes and laws, but also the overall realisation of Constitutional rights. The *Grootboom* case, one of the most important housing rights cases in the world, is an example of where the court found the Government in breach of its duty because of its failure to act in implementing part of the right into policy.

Irene Grootboom and other complainants in this case applied to the court for an order to require the Government to provide them with temporary shelter until they were able to find permanent accommodation. They had moved illegally onto private land from the appalling conditions in which they were previously living. After the eviction, they moved onto a nearby sports field, but since their building material had been

destroyed, they were unable to build adequate shelter there.

The case reached South Africa's highest court, the Constitutional Court. Although it was originally argued on the basis of the right of children to shelter, the argument was later broadened to include consideration of the broader right to housing recognised in Section 26 of the Constitution.

The court found that socio-economic rights including that to adequate housing were justiciable under the Constitution. The Government's obligations involved both positive and negative obligations. The Government's negative obligations included ensuring that evictions were conducted humanely. In this case, where the complainants' possessions and building materials were destroyed, the Government had breached these negative obligations.

The court found that Government's positive obligations were to 'create the conditions for access to adequate housing for people at all economic levels of our society.'²⁶ In other words, the state alone was not responsible for the provision of housing, but should enable others to provide housing through legislative and other measures. Access to adequate housing, the court found, is 'more than bricks and mortar', but includes appropriate land, services and the building of the house itself.²⁷

The complainants argued that the right entailed a minimum core obligation to basic shelter available immediately. The court rejected this claim, and said that the right should be realised progressively within available resources. The key question was, taking this into account, 'whether the legislative and other measures taken by state are reasonable.'²⁸ According to the Community Law Centre, a measure will pass this test if it is 'comprehensive and well-coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances.'²⁹

In this case, the court found that although generally the Government's housing programmes were reasonable, it was unreasonable to have no programme for emergency relief of those in desperate need. The court ordered the Government to devise, fund, implement and supervise measures aimed at providing emergency relief to those in desperate need.

CONCLUSION

Few if any countries can claim to have fully implemented the right to adequate housing, a situation which is particularly disappointing in affluent countries that ratified the ICESCR over a decade ago. All countries, therefore, have a strong onus to show that they are taking targeted steps to fulfil their obligations and realise the right to adequate housing.

In terms of the steps taken to afford legal recognition to the right to adequate housing, South Africa is in many ways a model for other countries. Rights related to housing are afforded extensive protection in the constitution. Policy and legislative implementation has been systematic and targeted. In addition, the courts have a broad power to review the actions of governments and have imposed positive obligations on government to create the conditions for all to have access to adequate housing. In the *Grootboom* case, this led South Africa's Constitutional Court to order the government to devise, implement and supervise new programmes.

Canada and the United Kingdom, despite their superior resources, have no such comprehensive programme of implementation. However, aspects of their legal systems do provide access to remedies for the enforcement of certain aspects of the right to adequate housing.

Firstly, the existence of different kinds of bills of rights in the UK and Canada, albeit bills that do not explicitly include the right to adequate housing, provide situations where judicial review of government action with reference to rights can take place. This illustrates the potential value of such bills to be used creatively by rights advocates to hold the government to account to its human rights obligations. Secondly, as in the case of the UK *Homelessness Act 2002*, the protection, even of limited sub-rights, provides a starting point which can lead to more extensive protection of housing rights, such as can be seen in the Scottish *Homelessness Act 2002*.

While unsatisfactory compared with both South Africa's approach and that required under the ICESCR, Canada and the UK's legal recognition of rights relating to housing go further in many respects than Australia's does.

Notes

- 1 Shelter UK, *Housing and homelessness in England: the facts*, available at http://www.shelter.org.uk/images/pdfs/factsheets/Homeless_in_E_gland_july_02.pdf
- 2 CESCR, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland, United Kingdom of Great Britain and Northern Ireland - Dependent Territories*, 05/06/2002. E/C.12/1/Add.79, paras 19-20.
- 3 ..., para 11.
- 4 ..., pp. 11-14.
- 5 It should be noted, however, that the amount lost in the funding of the construction of housing has largely been moved into housing benefits to assist in the paying of rent.
- 6 www.homelessact.org.uk
- 7 *Quinton v East Hertfordshire DC*: Luton County Court, 16 September 2002
- 8 *Bratton v Croydon LBC*: Court of Appeal, 26 July 2002.
- 9 www.shelter.org.uk
- 10 <http://www.shelterscotland.org.uk/page.asp?pageid=308>
- 11 *European Convention on Human Rights*, Art 8.
- 12 *South Buckingham District Council v Porter* [2001] EWCA Civ 1549; *Everett v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 701 *inter alia*.
- 13 *Öneriyildiz v Turkey* (No. 48939/99), European Court of Human Rights, 18 June 2002: www.echr.coe.int/Eng/Judgments.htm.
- 14 *Botta v Italy* (No 153/1996/772/973), European Court of Human Rights, 24 February 1998; *Marzari v Italy* (No. 36448/97), European Court of Human Rights, 4 May 1999.
- 15 CESCR, *Concluding observations: Canada*, 10/12/98, E/C.12/1/Add.31.
- 16 Di Otto, 'Addressing Homelessness as a Violation of Human Rights in the Australian Context', *Paper Presented at the 3rd National Homelessness Conference*, Brisbane, Australia, 6-8 April 2003.
- 17 ...
- 18 CERA, *Human Rights and Housing Groups See Positive Signs in Supreme Court Poverty Decision* (Louise Gosselin v. Quebec) (<http://www.equalityrights.org/cera/docs/gosselin.htm>)
- 19 COHRE, *Housing & ESC Rights Case Law Update*, Issue 1, May 2003, 7.
- 20 ...
- 21 CERA, *Human Rights in Housing*, <http://www.equalityrights.org/cera/docs/hrguide.htm>
- 22 ...
- 23 see also *Kearney v Bramalea* (No. 98-021), Ontario Human Rights Commission, 22 December 1998.
- 24 *Constitution of the Republic of South Africa* (1996) (<http://www.polity.org.za/html/govdocs/constitution/saconst.html>)
- 25 The information in this section was taken from: Sandra Liebenberg and Karrisha Pillay (eds), *Socio Economic Rights in South Africa: A Resource Book* (Community Law Centre).

26 *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom)* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), para 35, cited in the Community Law Centre Socio-Economic Rights Project, *Case Reviews: the South African Constitutional Court*, available at http://www.communitylawcentre.org.za/ser/casereviews/2001_1_SA_46.php

27 Community Law Centre Socio-Economic Rights Project, *Case Reviews: the South African Constitutional Court*.

28 ...

29 ...





AUSTRALIA'S IMPLEMENTATION OF ITS HOUSING RIGHTS OBLIGATIONS

Australia last reported to the CESCR in August 2000, with the Committee's Concluding Observations handed down on 1 September 2000.¹ The Committee's review of the Australian report took place in two stages: a CESCR working group compiled a list of issues to which the Federal Government was to respond in May 2000, and then the full Committee met in August to consider Australia's report, their response to the list of issues, and information from NGOs.² A shadow report was submitted by a working group of NGOs under the title of the Australian Social and Economic Rights Project (ASERP).³

In its Concluding Observations, the Committee, as is its practice, did not cite specific violations as such, preferring to list positive aspects, principle subjects of concern, and suggestions and recommendations. However, this should not lead to the conclusion that Australia has not violated any of its obligations. As Scott Leckie notes, the Committee rarely describes States parties as violators for a variety of reasons including a desire to make the Committee a place of constructive dialogue and the damage such descriptions would do to the re-election prospects of some members.⁴

This section will analyse Australia's compliance with its obligations under the ICESCR in relation to the right to adequate housing, examining in turn Australia's record in terms of its obligations of result and obligations of conduct.

OBLIGATIONS OF RESULT

Over 100 000 people were counted as homeless in Australia on census night in 1996.⁵ Only 12 percent of these were accommodated by supported accommodation programmes.⁶ The number of homeless people seeking assistance increased by over 11 per cent in the period 1997-98.⁷

A quarter of a million low-income households pay more than 30 per cent of income in rent, a common benchmark for measuring the point at which housing becomes unaffordable.⁸ Over 88 000 households pay more than 50 per cent of their income in rent.⁹ Given that affordability is one of the aspects of adequacy described by the CESCR in the *General Comment No. 4*, this means these families are not living in adequate housing. This problem is particularly acute in areas that are sufficiently proximate to job opportunities, another aspect of the notion of adequacy.¹⁰

Meanwhile, according to the communiqué of a recent summit on affordable housing, public and community housing in Australia are 'facing collapse'.¹¹ The Australian Federation of Homelessness Organisations (AFHO) reports that this can be attributed to decreased funding and increased demands and costs.¹² AFHO notes that, as a result of this, 'social housing has become a residual welfare housing system accessible not to all low income households, but only to the most disadvantaged, which impacts on both equity and

sustainability.¹³ Over 200 000 Australians are on public housing waiting lists.¹⁴

Indigenous Australians are the most disadvantaged group on any social indicator in Australia.¹⁵ In the area of housing, indigenous Australians are less likely to own their own homes than other Australians, and are less likely to find private rental housing because of discrimination.¹⁶ Indigenous Australians are over-represented among those seeking assistance from homelessness programmes.¹⁷

Migrants, asylum seekers and others from culturally and linguistically diverse backgrounds are also particularly disadvantaged. These groups have particular difficulty accessing the private rental market and housing assistance due to factors including racial discrimination, language barriers and lack of references and rental history. Asylum seekers suffer particular difficulties. They are not entitled to normal social security benefits and almost half have no work rights.¹⁸ As a result of either direct ineligibility or indirect ineligibility, based on lack of income or access to social security, asylum seekers are not able to access public housing and other forms of housing assistance. As a result, many asylum seekers face periods of homelessness.¹⁹ This situation has worsened in recent years as a direct result of government action to reduce asylum seekers' access to income and support services.²⁰

Women are particularly affected by housing problems in Australia, according to a recent submission to the UN *Special Rapporteur on Adequate Housing*.²¹ Since women make up the majority of low income earners, they are disproportionately affected by the lack of affordable housing.²² Women face a particular risk of homelessness and inadequate housing because of domestic violence, and there is insufficient supply of both short-term and long-term adequate accommodation for those fleeing domestic violence.²³

This data suggests the right to adequate housing has not been universally implemented in Australia. However, one must return to Australia's obligations to see if this, in itself, represents a violation of Australia's obligations. As noted above, the progressive nature of implementation of the ICESCR rights tends to complicate this issue, or at least provides the opportunity for States to obfuscate their obligations.

The CESCR has made clear that certain core minimum standards are required almost

immediately upon ratification, including the provision of basic housing.²⁴ As Di Otto notes, such minimum core obligations are not a particularly useful yardstick in an affluent society such as Australia.²⁵ Nevertheless, one could certainly argue that the absence of housing for over 100 000 people could constitute a violation even of this core obligation.

In the case of a wealthy country such as Australia, some 27 years after ratification, full realisation of the right to adequate housing should arguably have been achieved. If full realisation is not to be seen as an obligation in today's Australia, one would find it difficult to find a situation in which it is, which would suggest that the obligation is meaningless. Di Otto suggests that, if not a violation per se, 'anything less than full enjoyment of an adequate standard of living [in Australia] raises fundamental questions about resource allocation.'²⁶ Although the CESCR has been somewhat reluctant to make blanket statements about States' violations, it did note in Canada's case that 'considering Canada's enviable situation with regard to ... resources, the Committee expresses concern about the persistence of poverty in Canada.'²⁷

Australia could also be considered to have breached its obligations of result given that housing affordability and homelessness are worsening. As in the cases above, one could argue that Australia's obligations of progressive achievement forbid any such retrogression. At least, as Di Otto notes, a heavy onus is placed on the government to show that it is not violating its obligations²⁸ under the ICESCR, and that the government is implementing appropriate measures and sufficient resources to satisfy its obligations.³ With this in mind, we can therefore look to Australia's conduct towards implementing its obligations in terms of law and policy.

OBLIGATIONS OF CONDUCT

The ICESCR and other human rights treaties Australia has ratified do not automatically apply in the domestic law of Australia. Unlike New Zealand, Canada, the US and the UK, other common law countries, Australia has no Bill of Rights or Charter of Rights or other explicit source of human rights in its Constitution. The right to adequate housing has not been directly implemented into domestic law through legislation.

Rather, Australia relies on indirect implementation of rights, including the right to adequate housing, through various pieces of legislation and policies. In this mode of implementation, the Federal Government prefers the approach of ‘inquiry, conciliation and report’, rather than providing judicial remedies, as they believe ‘rights are more readily promoted by [such] less formal processes.’²⁹ In the case of implementation of the right to adequate housing, these various pieces of legislation and policy are not co-ordinated through a national housing strategy, despite the fact that the CESCR regards this as ‘almost inevitably’ necessary.³⁰

As a recent Australian submission by the Public Interest Law Clearing House (PILCH) to the UN Special Rapporteur on Adequate Housing noted, Australia’s

complex web of legislative and policy measures [used] to implement women’s right to adequate housing ... together with the complications of federalism, makes scrutiny of its compliance with its international obligations extremely difficult.³¹

In this section, I will examine various ways human rights law may have an effect on the law in Australia, despite the non-implementation of these rights systematically, and then examine a number of important programmes and laws in relation to housing issues and their compatibility with Australia’s obligations under the ICESCR.

The status of international covenants in Australian domestic law

International covenants ratified by the Australian Federal Government are not automatically incorporated into the domestic law in Australia: that is to say they are not self-executing. The reason for this is that under the Australian Constitution, the power to make and ratify treaties is given to the executive (such as the prime minister and foreign minister), while the power to make domestic laws is given to the legislature (the houses of parliament). In other words, it is up to the parliament to incorporate Australia’s human rights obligations into the domestic legal order. The federal parliament, although given only certain subject matters about which it can legislate under the constitution, has the power to make laws relating to external

affairs. This power has been used to implement international human rights treaties in legislation relating to unfair dismissals and the legislation on sex between consenting males in Tasmania.

The main body charged with the implementation of Australia’s human rights treaties is the *Human Rights and Equal Opportunity Commission* (HREOC). HREOC’s mandate is generally very limited. In relation to economic, social and cultural rights, HREOC has no direct mandate, as the ICESCR is not among the treaties scheduled to the Act to define human rights, unlike the ICCPR and other human rights treaties Australia has ratified.

Although human rights treaties do not directly enter Australian law, they are relevant in three areas of law in Australia. Firstly, they are an influence in the development of the common law, or judge-made law. As Justice Brennan said in the High Court decision *Mabo*:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of human rights.³²

However, the High Court has been at pains to point out that this is not a ‘backdoor’ way of incorporating into domestic law treaties that the parliament has chosen not to implement in legislation.³³

Secondly, international human rights treaties are relevant in the way in which the courts interpret legislation. According to the landmark *Teoh* High Court decision, where legislation is ambiguous, the courts will interpret the legislation in such a way that it accords with Australia’s obligations under a treaty to which Australia is a party.³⁴ This will be done particularly when a statute is enacted after or in contemplation of ratification of a treaty, in the belief that parliament intends to give effect to Australia’s obligations under international law.

Moreover, the High Court held in *Teoh* that the concept of ambiguity will be interpreted broadly. Chief Justice Mason and Justice Deane stated that:

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the

obligations which it imposes on Australia, then that construction should prevail.³⁵

However, again the Court points out that without incorporation into legislation by the parliament, treaties cannot directly be the source of rights or obligation.

Thirdly, human rights law may have an effect on administrative decision making. Human rights treaties can become the source of a legitimate expectation in administrative law according to the *Teoh* case. This means that an applicant has a legitimate expectation that an administrative decision-maker will take into account human rights treaties in the making of a decision. This does not mean that the decision maker is compelled to act in accordance with the rights in the treaty: rather, it means that if the decision-maker proposes to make a decision inconsistent with the legitimate expectation (such as the provisions of a human rights treaty), the person affected should be notified and given adequate opportunity of presenting a case against the proposed decision. The expectation is procedural and not substantive. According to the High Court in *Teoh*, the person affected need not be personally aware of the human rights treaty in question or to personally have the expectation. This decision could be relevant to housing issues in Australia, given that eviction orders are administrative in nature.

However, the legal authority for these effects is weak. Although the decision in *Teoh* has not been overruled, it is questionable whether it still applies. Firstly, in the aftermath of the decision the Government attempted to overrule the *Teoh* decision by issuing a statement saying that the Government did not intend, in entering into international treaties, to create a legitimate expectation as the court found existed in the *Teoh* decision. This was done because the Court acknowledged that the legitimate expectation could be displaced by executive indications to the contrary. However, whether this has had the effect the Government wished is not clear.

Secondly, in a recent case, *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*,³⁶ the majority of the High Court referred with disapproval to the decision in *Teoh*. These comments were made in a case to which *Teoh* was not directly relevant, and therefore are not binding, and do not have the effect of overruling *Teoh*. However, it indicates that the present High

Court would be likely to overrule the *Teoh* case if a similar case came before them. It would also encourage a decision maker to appeal such a case to the High Court.

Human rights obligations may also be a relevant consideration in review of administrative decisions in other situations, although the legal authority for this is weaker than in the *Teoh* situation. It remains an area for further research and consideration by lawyers working on housing issues.

The Supported Accommodation Assistance Programme³⁷

The Supported Accommodation Assistance Programme (SAAP) is a major programme aimed at providing assistance to homeless people in Australia. It funds NGOs who provide supported accommodation and other services. The programme is jointly funded by the Federal and State Governments and is administered by State Governments. In its latest report to the CESCR, the Federal Government described SAAP as 'one of the primary Government responses to homelessness'.³⁸ The preamble to the SAAP agreement of 1994 recognised 'the protection of universal human rights', including the ICESCR, as one of the considerations that informed the legislation.³⁹

SAAP does not implement the right to adequate housing directly: that is to say nowhere in the substantive provisions does it provide for the right to adequate housing. Nor does it implement any sub-rights relating to the right to adequate housing, such as the right to assistance in the case of homelessness, as does, for example, the Scottish *Homelessness Act 2002*. There is no right to access to the services provided for in SAAP, even of a limited nature as in the case of the UK *Homelessness Act*. No rights contained in SAAP are inherently available to people by virtue of their humanity.

There are references to rights in the SAAP legislation. As Otto notes, however, these rights are between clients and service providers, and thus are more service standards than real human rights.⁴⁰ Responsibility for the development of these rights rests with the States, and so standards vary across Australia.⁴¹ These rights are enjoyed as part of a non-legal contract between service provider and user, and as such there is no effective legal mechanism for enforcing these

rights other than internal grievance procedures. According to Otto, there is no mechanism for effectively monitoring SAAP providers' compliance with these standards or the operation of their internal grievance procedure.⁴² Furthermore, these rights are only enjoyed in the context of responsibilities, consistent with the Federal Government's move to a principle of 'mutual obligation' in the welfare sector. Where these obligations are not met, rights are no longer enjoyed.⁴³ Otto gives the example of clients who are violent not merely being excluded from SAAP services, but also refused referral to another service.⁴⁴

There is also the question of whether Australia is taking steps to the maximum of available resources as required by the ICESCR in the level of funding provided to SAAP, as one of its major schemes to address homelessness. As the ASERP report noted, of the 105 000 counted as homeless on census night in 1996, just 12 per cent were accommodated under SAAP-funded services.⁴⁵ The demand for SAAP services has been increasing since. While funding to SAAP services increased 10 per cent in real terms between 1996-1997 and 2000-2001,⁴⁶ it is not clear whether this has had the effect of meeting the increased demand for services, which would be necessary for progressive implementation of the right to adequate housing to be taking place. The worsening situation regarding homelessness described above would tend to suggest that it is not. 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 programmes to ensure that all homeless people have access to emergency housing, and that this obligation is not met by the current level of funding for SAAP.

The Commonwealth State Housing Agreement

The *Commonwealth State Housing Agreement* (CSHA) is a series of agreements between the Commonwealth and each of the State and Territory Governments under the *Housing Assistance Act 1989* that governs the financing and provision of housing assistance. The most significant program of the CSHA is the provision of social housing, made up of public housing, which is built, owned and managed by government; and community housing, which is

owned or managed by NGOs. Both are rented to tenants at below market-value rent.⁴⁷ Since 1945, a social housing stock has been acquired totalling almost 400 000 dwellings, representing 6 per cent of the total housing stock, valued at over \$31 billion.⁴⁸ Other programs funded under the CSHA include various minor forms of rental assistance, assistance to home owners suffering financial hardships, and tenancy advice.⁴⁹

Housing policy in Australia and the role of the CSHA in particular has changed since the 1970s, and markedly in the 1990s. Emphasis has moved from Commonwealth control of public housing stock to an increased focus on rent support.⁵⁰ Between 1984-85 and 1994-95, per capita spending on the CSHA declined by twenty-five percent in real terms.⁵¹ The proportion of government spending on rent assistance increased markedly from the early 1980s, and in 1992 exceeded spending on the CSHA.⁵² Overall funding for the two programs has declined in real terms since 1993-94. The Howard Government's reform attempts have been described as adopting a 'pure market model'.⁵³ The first two years of the Howard Government saw around \$200 million taken out of housing funding.⁵⁴

The current CSHA covers the period from July 1999 to June 2003. On 25 October 2002, the Federal Minister for Family and Community Services, Senator Amanda Vanstone, announced details of a new CSHA funding arrangement.⁵⁵ Senator Vanstone claims that the new five year agreement represents an increase in funding, and that indexing on the new agreement will maintain the real value of the funding.⁵⁶ National Shelter spokesperson Mary Perkins, while welcoming the commencement of indexing, responded that 'the quantum amount of money available in this deal represents, we think, a cut and certainly doesn't come anywhere near meeting the needs of people'.⁵⁷ These claims were backed by state housing ministers.⁵⁸ Given that no other details of the new agreement have been released, my analysis here will be based on the text of the 1999 CSHA, but taking into account the new CSHA in relation to funding questions.

The CSHA clearly does not represent a direct implementation of the right to adequate housing into Australian law. The CSHA does not mention in its objectives or indeed anywhere in the document the right to adequate housing in anything resembling the same terms as the ICESCR. However, the question of indirect

implementation is less clear-cut. The guiding principles to the CSHA note that ‘the purpose of the funding is to assist those whose needs for appropriate housing cannot be met by the private market.’⁵⁹ Thus one could argue that the agreement grants the sub-right to assistance to those few people amongst the well-housed majority who, in the words of the Federal Government report to the CESCR, ‘are sometimes unable to compete in the housing market.’⁶⁰

It is true that for many people unable to compete in the private market, the CSHA is the means by which governments assist them to find housing. However, it does not follow that the CSHA is an appropriate or effective measure to grant even that sub-right. Like SAAP, CSHA does not provide for any right of access to services: as Devereux notes, the language is cast more in discretionary terms.⁶¹ Rather than rights, the main focus of the aims of the agreement is on the delivery of these services in a cost-effective and transparent way. Some rights-related aims do appear, such as the principle of non-discrimination,⁶² but, as in SAAP, in the form of unenforceable consumer rights, not human rights.

This is particularly disappointing given the potential an agreement like the CSHA has to play a major role in the realisation of housing rights in Australia. Through the CSHA, the Federal Government could ensure compliance with international standards. Given that it is a negotiated agreement where the Federal Government is in a strong bargaining position because of the amount of funding it provides to the States, this implementation could take place through the Government’s preferred conciliation approach, and without recourse to the external affairs power.

The policy positions of two national peak body NGOs demonstrate how the CSHA could act in a way that would more effectively implement Australia’s housing rights obligations.⁶³ One states that ‘[t]he next CSHA should include an in-principle agreement by all governments to a nationally co-ordinated strategic approach to housing policy and programs, through a National Housing Policy.’⁶⁴ The new CSHA framework could include such features as setting policy objectives and priorities,⁶⁵ setting out the roles and responsibilities of different areas of government,⁶⁶ and in providing leadership in the development of standards.⁶⁷

The funding cuts to the CSHA arguably constitute

a violation of Australia’s obligations under the ICESCR, particularly the obligation to take steps ‘to the maximum of its available resources’.

As noted above, cuts to expenditure with retrogressive effects would need to be justified by States parties to not be considered a violation of obligations.

Funding for the CSHA was cut by 25 per cent from the mid-80s to the mid-90s. Between 1992 and 2002, a further 30 per cent funding cut has taken place in real terms, including through the introduction of so-called ‘efficiency dividends’ since 1996.⁶⁸ It appears that in the change from the current to the next CSHA there will be a reduction in expenditure. Although the introduction of indexing appears to mean that funding will at least stay constant during the life of the next CSHA, given that Australia is continuing to experience economic growth, its available resources are expanding, and thus the resources devoted to the enjoyment of economic and social rights should also grow unless the government can show full realisation of the right.⁶⁹ Given the housing situation illustrated above, this seems unlikely in the near future.

The Government may well argue that the use of its resources in other programs, such as rent assistance, rather than in funding the CSHA is a matter for its discretion and not for international scrutiny. While it is true that governments do have such discretion, this discretion is not unlimited, since as Quinn and Alston note, the Committee does have scope to at least consider whether the decision-making process shows awareness and respect for the ICESCR rights.⁷⁰ Although a comparison of the respective merits of rental assistance and social housing schemes in realizing Australia’s housing rights obligations is beyond the scope of this study, it is worth noting that the Australian Federation of Homelessness Organisations has written that rental assistance ‘does not achieve housing affordability and has a limited impact on the key housing assistance objectives of security, adequacy and appropriateness,’ while social housing ‘offers homeless people and those at risk of homelessness an important and viable housing option’.⁷¹

It would be difficult for the Government to argue that the CSHA has been de-prioritised as a program to the extent that such significant cuts to funding would be justified. In fact, in both its most recent report to the CESCR and more

recently in the Minister's statement following the announcement of the new CSHA funding arrangements, the CSHA was trumpeted for its 'vital role in providing housing assistance' and as an instance of the Government's 'commitment' to 'families and individuals in need.'⁷²

In any case, recent cuts to the CSHA funding have not been part of a transferral of resources within the housing assistance sector (or indeed any other aspect of the ICESCR implementation): rather, as noted above, they are part of overall cuts in Commonwealth funding to housing programmes since 1993-94. This is a clearly retrogressive step in Australia's obligations of conduct under the ICESCR, and in combination with the clear retrogression in the complimentary obligations of result, would appear to represent a violation of the ICESCR rights.

Victorian State Government assistance measures

Although the Federal Government has primary overall responsibility for the implementation of Australia's housing rights obligations, State Governments are also bound to abide by Australia's human rights obligations in their conduct in relation to housing. In Victoria, for example, the State Government has committed \$88 million from the 2003-2004 budget for affordable housing, in addition to its obligations under the CSHA.⁷³ This money will go into programmes such as long-term housing assistance, including social housing, neighbourhood renewal and youth homelessness services.

Unfortunately, far from filling the breach created by the retrogressive measures taken by the Federal Government, the State Government seems to be following its lead. The Victorian Council for Social Service estimates that the 2003-2004 budget includes the following cuts in relation to housing:

- A 19 per cent reduction in appropriations for homelessness assistance in real terms;
- A 12 per cent reduction in appropriations for long-term housing assistance in real terms; and
- A reduction in appropriations for new houses from \$142 million per annum to \$88 million.⁷⁴

Given that the national problems of inadequate housing are also present in Victoria, such cuts to

expenditure would tend to indicate that the Victorian Government is also violating its obligations in relation to the right to adequate housing.

Tenancy laws

In its last report to the ICESCR, the Federal Government noted that 'legislation covering landlord/tenant rights and obligations fall within the separate province of each state and territory' and that 'the specifics of each piece of legislation vary'.⁷⁵ As noted above, Article 28 of the ICESCR states that 'the provisions of the present Covenant shall extend to all parts of federal States without any limitations of exceptions.'⁷⁶ As such, the Federal Government cannot use federalism as an excuse to avoid its obligation to protect human rights by ensuring that tenancy laws conform with the requirements of the ICESCR. Currently, no national minimum standards regarding housing standards, security of tenure or evictions exist in Australia.

The Federal Government also claims in its report that 'tenants are protected by the *Racial Discrimination Act*, the *Sex Discrimination Act*, and the *Disability Discrimination Act*', with the aim of ensuring that 'accommodation is not denied to people on the basis of race, gender or disability.'⁷⁷ Discrimination on the basis of socio-economic status is not prohibited, despite the fact that the ICESCR and the ICCPR prohibit discrimination in the enjoyment of rights on the basis of social status.⁷⁸ Studies have shown that discrimination even on the prohibited bases provisions remains widespread in Australia.⁷⁹

The Victorian *Residential Tenancies Act 1997*, for example, is arguably inconsistent with Australia's human rights obligations in a number of ways. Firstly, security of tenure, an important aspect of adequacy of housing, is arguably insufficiently protected under the Act. Landlords can give tenants 120 days' notice to vacate for no reason. In order to challenge this notice, tenants must prove that it was served in retaliation for tenants exercising their rights, such as to have repairs done to the house; an application that is usually unsuccessful.⁸⁰ Research by the Tenants Union of Victoria indicates landlords often misuse these notices, either for disputes not related to the tenancy agreement, or in lieu of other notices where the landlord's case is weak.⁸¹ The result is that tenants are often reluctant to exercise their rights under the tenancy agreement because of fear of eviction.

The Act also provides little protection of housing affordability. Landlords can increase the rent with 60 days' notice at intervals of 6 months or more. Although tenants can challenge reasonableness of the increase, this requirement is difficult to establish, especially given that rent exceeding the market rent can still be considered to be reasonable by the courts.⁸² If a tenant falls more than 14 days behind in their rent, they can be given a 14-day notice to vacate.

The provisions covering evictions also arguably violate the right to adequate housing. The Act provides that evictions can only be carried out in accordance with a legal process and by the police, not by the landlord, and provides for a number of the procedural protections required by the CESCR in *General Comment No.7*. However, there is no consideration in the decision about an eviction as to whether the eviction will cause homelessness – even where the landlord is a social housing provider. There seems little doubt that Australia has the resources to provide alternative accommodation to those evicted, as required by the CESCR. However, the reality is that evictions frequently do cause homelessness in Victoria: some 44.3% of people accessing homelessness services come directly from the private rental market.⁸³

CONCLUSION

There can be little doubt that Australian governments' responses to housing and homelessness constitute a violation of Australia's obligations under Article 11(1) of the ICESCR. Australia's record regarding its obligations of result is poor, with homelessness and unaffordable housing significant, worsening problems. Inadequate housing also particularly affects women and indigenous communities. This alone arguably constitutes a violation of Australia's obligations under the ICESCR, given Australia's level of resources and the amount of time since Australia ratified the Covenant. At the very least, Australia's current rate of homelessness and inadequate housing places a strong onus on Australian governments to be taking strong measures to fulfil its obligations of conduct in relation to adequate housing.

Human rights treaties signed by the Australian Federal Government do not automatically apply domestically. Although human rights can affect the development of the common law, statutory

interpretation and administrative decisions in various ways, the courts have been at pains to point out that it is up to the parliament to enact rights into law. No direct enactment into legislation has taken place. To analyse Australia's compliance with its obligations of conduct, therefore, it is therefore necessary to examine the combined effect of the various indirect ways that Australia claims to be implementing the right.

If one examines the major programmes that address questions of inadequate housing in Australia such as the Supported Accommodation Assistance Programme (SAAP) and the Commonwealth State Housing Agreement (CSHA), it is clear that they do not implement the right to adequate housing. While the rhetoric of rights is used at times, notably in the SAAP programme, it is used in the context of discretionary user rights, not inherent or legally enforceable rights to the services provided. Furthermore, the level of funding raises questions as to whether Australia is taking steps to the maximum of available resources, as required by the ICESCR. In the case of the CSHA in particular, funding levels have continued to drop, despite the fact that the scheme is an important part of Australia's housing programmes and the need for increased funding to meet demand.

Finally, in the area of tenancy law, no national standards apply that could ensure compliance with the ICESCR. In the case of the relevant Victorian law, for example, there is arguably insufficient legal security of tenure, protection of housing affordability, protection against forced eviction and protection against discrimination in accessing housing.

While a detailed set of recommendations of steps that Australian governments should take to discharge their housing rights obligations is beyond the scope of this study, some general points are worth making, based on the above analysis of international legal obligations, comparative examples of implementation and the Australian approach.

A model approach would be one similar in many respects to that taken by South Africa, which includes: a legally enforceable right under the constitution or bill of rights; a systematic approach to analysing needs and priorities for policies; laws in specific areas which are consistent with international human rights law relating to the right to adequate housing, and which create sub-rights to adequate housing

effectively; and a continuing oversight by the courts of acts and omissions of the government in the implementation of the right.

Such a comprehensive approach is the ultimate intent of advocates of housing rights in Australia. While working towards this end, a number of short- to medium-term steps should be taken to move progressively towards the implementation of the right to adequate housing:

- A national housing strategy must be developed immediately, identifying the responsibilities of various levels of government towards issues of housing and homelessness; ensuring greater co-ordination between programmes; and analysing the short- and long-term priority needs for policies and programmes, and also committing appropriate timelines and budgets.
- The major programmes dealing with emergency accommodation and social housing should incorporate rights to access to the services they provide. This could be done in a progressive manner, as in the example of the Scottish *Homelessness Act*. This should entail a move away from rights based on a user-provider basis as is currently the case.
- An analysis of legislation relating to housing and homelessness should be done at the state and national levels to ensure consistency with international human rights standards. This should include laws relating to tenancy, to protect security of tenure and housing affordability and to prevent forced evictions. It should also take in laws relating to begging, voting and social security to stop violations of other human rights that frequently occur in association with homelessness.
- 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.
- In order to create effective remedies for those whose rights are violated, independent oversight of government actions should be guaranteed. This could occur either through a statutory body with real power or through oversight by the courts. The obligations to respect, protect and fulfil could be progressively made subject to this oversight.

These are only preliminary recommendations: it is clear that human rights and particularly the right

to adequate housing relate to all aspects of work done in the area of housing and homelessness. It is therefore up to workers in every area of the sector to consider the relevance of the rights examined in this study to their work, and how these rights may be realised. I hope this paper may assist in that process.

Notes

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- 29 Third Periodic Report to CESCR: Australia 23/7/98, E/1994/104.Add/22, para 21.
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