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Protecting the Right to Housing in Law and in Practice

**Submission to the
Family and Community Development Committee
Inquiry into the Adequacy and Future Directions of
Public Housing in Victoria**

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Introduction and Overview

1. The Family and Community Development Committee (the **Committee**) has been asked to inquire into the adequacy and future directions of public housing in Victoria (the **Inquiry**).
2. The Terms of Reference for the Inquiry refer, among other things, to the future directions of public housing, including:
 - (a) the adequacy, quality and standards of Victorian public housing; and
 - (b) the housing needs of specific community groups such as women, seniors, homeless people, Indigenous Victorians, refugees, people with mental health issues, people with disabilities and people with substance dependence.
3. In short, the Human Rights Law Resource Centre (**Centre**) submits that the future direction of public housing requires a holistic rights-based approach from government, including the legislative entrenchment of the right to adequate housing. The Centre submits that the legislative protection of a right to adequate housing would provide a principled and workable framework in which to address the future of public housing and interconnected issues, such as homelessness, disadvantage and poverty. It would also provide a comprehensive and coherent framework within which to address other issues identified in the terms of reference, including access to public housing, impacts on marginalised and disadvantaged groups, and safety and location.
4. Legislative protection of the right to adequate housing, and its proper implementation in law and practice, would also complement and support the government's obligations under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the **Victorian Charter**), as homelessness and unsafe and insecure housing are associated with a range of other human rights violations. For example, homelessness by its very nature 'renders people subject to, or at least unusually susceptible to' violations of a range of fundamental rights and freedoms', for example the right to life;¹ the right to liberty and security of the person; the right to be free from cruel, inhuman or degrading treatment; the right to privacy² and the right to freedom of expression, each of which is protected by the Victorian Charter.³

¹ The British Columbia Court of Appeal has recently held that a city bylaw which prohibited homeless people from erecting any form of temporary shelter at night in a public park, in circumstances where the number of homeless people exceeded the number of shelter beds available, is a violation of the right to life, liberty and security of the person: *Victoria (City) v Adams*, 2009 BCCA 563 (9 December 2009).

² In the UK and Europe, recent court decisions have held that the eviction of a woman from public housing in circumstances where the public authority had not ensured that she had adequate alternative accommodation constituted a violation of the right to respect for private life and the home: see, eg, *Stankova v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

³ For a discussion of the manner in which homelessness relates to each of the rights in the list, see Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a

5. In summary, the Victorian Government has the opportunity to be a leader in the protection of housing rights in Australia by protecting and implementing the right to adequate housing. There are good international comparative legislative frameworks that provide guidance on how this might be done, including in particular South Africa, Scotland and England.
6. This remainder of this submission sets out:
 - (a) how the Victorian Government should protect the right to adequate housing in legislation; and then
 - (b) guidance as to concrete steps to implement the right to adequate housing in law and practice.

2. How to Protect the Right to Adequate Housing *in Law*

7. Housing is an issue that matters every day in peoples' lives. In September 2009, the National Human Rights Consultation, the biggest public consultation in Australia's political history, confirmed that housing is one of three rights that matter most to Australians.⁴ In November 2009, a Commonwealth Parliamentary Committee, in the *Housing the Homeless* report, unanimously recommended that the right to adequate housing be enshrined in Commonwealth legislation.⁵
8. Yet, whilst Victorian law provides protection of some property rights, and whilst the Government does in practice provide housing and other support that in part protects and promotes housing rights, the right to adequate housing is not comprehensively protected in Victorian law.
9. Legal protection of the right to adequate housing is essential to realising the full potential of the right. Legislation should expressly protect and promote the right to adequate housing in a number of ways:
 - (a) by making the achievement of the right to adequate housing an express object and purpose of housing legislation;
 - (b) by requiring all delegated legislation and housing policy to respect, protect and promote the right to adequate housing; and

Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 145. See also Rowan McRae & Dan Nicholson, 'No Place Like Home: Homelessness in Australia', (2004) 10(2) *Australian Journal of Human Rights* 27, 41.

⁴ It found that 'for most Australians, the main concern is the realisation of economic and social rights such as the rights to education, housing and the highest attainable standard of health': National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009, 365.

⁵ See House Standing Committee on Family, Community, Housing and Youth, *Housing the Homeless: Report on the inquiry into homelessness legislation*, November 2009, Canberra, Recommendation 7.

- (c) by requiring all public housing services to be delivered in accordance with the right to adequate housing (through its contractual arrangements with state and territory governments).
10. The definition of the right to adequate housing should be taken from international human rights law. In particular, Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, to which Australia is a party, recognises the right to an adequate standard of living, which includes the right to adequate housing.⁶ (For further discussion of the scope and nature of the right, see the Human Rights Law Resource Centre submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth inquiry into proposed homelessness legislation for Australia.)⁷
11. An appropriate form of legislative wording might resemble the wording of the right to access adequate housing in the South African Constitution, which provides (at section 25):
1. Everyone has the right to have access to adequate housing.
 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
12. Importantly, this form of right does not mean that citizens can assert a right to housing on demand. Instead it places an obligation on the State to take *reasonable* legislative and other measures to *progressively realise* the right to adequate housing *within the limits of available resources*.

Recommendation 1:

The Committee should recommend that the Victorian Government legislate to enshrine the right to adequate housing in Victorian law.

⁶ See discussion of the right in the UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23; UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV; and the Special Rapporteur's 2002 report to the UN Commission on Human Rights at [21].

⁷ Human Rights Law Resource Centre, 'Realising the Right to Housing: Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth inquiry into proposed homelessness legislation for Australia' (2009) (available at <http://www.hrlrc.org.au/content/topics/esc-rights/housing-rights-submission-to-australian-parliament-on-homelessness-legislation-aug-2009/>).

3. Concrete Steps to Implement the Right to Adequate Housing

3.1 Core Minimum Obligation to Ensure Access to Emergency Accommodation

13. The provision of emergency accommodation is a key state obligation under the right to adequate housing. In the leading South African case on the right to adequate housing, *Grootboom*, the Constitutional Court of South Africa found that the right to housing did not equate to a right of all citizens to housing on demand, but did oblige government to develop and deliver a reasonable programme to provide emergency accommodation and housing relief to indigent and vulnerable people.⁸ This provision will need to be supported with administrative and budgetary resources to ensure it can be implemented.
14. Legislation in Victoria could initially limit the right to emergency accommodation to vulnerable groups, as has happened in Scotland. Under the *Housing (Scotland) Act 1987*, before making a final determination as to whether a person is entitled to housing assistance, if the local authority has reason to believe that the applicant is homeless and has a priority need, the local authority must secure accommodation for that person pending any decision being made.⁹ Priority needs include people with dependent children, pregnant women, elderly people or people who are ill.
15. The Scottish experience is shown to have worked. In particular, placing a duty on governments to house people means that people receive appropriate services before being forced to sleep on the streets. Since 2003, when the laws were implemented, the number of people sleeping rough applying for assistance decreased from 10% to 6%.¹⁰
16. However, as part of the obligation to progressively realise the right to adequate housing, housing legislation should aim to provide access to emergency accommodation for everyone in need, not just those who fall within certain 'priority groups' within a time period. This would mirror the approach in Scotland, where the *Homelessness Act 2003* also sets the goal of guaranteeing the right to access emergency accommodation in Scotland by 2012 (a ten year period from the date on which the goal was set).

⁸ In *Grootboom* the State fell short of the requirements of section 26(2) in that there was no express provision in the government policy to facilitate access to *temporary* relief for people who had no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters or because their homes are under threat of demolition. *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

⁹ A detailed discussion of the operation of the Scottish Act is set out in E Tars and C Egleson 'Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housings Rights Movement in the United States' (2009) 16(1) *Georgetown Journal on Poverty Law and Policy* 187.

¹⁰ See E Tars and C Egleson 'Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housings Rights Movement in the United States' (2009) 16(1) *Georgetown Journal on Poverty Law and Policy* 187, 206.

Recommendation 2

The Victorian Government should provide priority to vulnerable groups through an immediately enforceable right of access to emergency accommodation. Within a 10 year period, this right should be progressively expanded to apply to all persons in need.

3.2 Legislative Protection Against Arbitrary, Unlawful or Forced Evictions

17. Housing legislation should be passed to protect people from arbitrary, unlawful or forced evictions. Such evictions constitute a prima facie violation of the right to adequate housing.¹¹ Therefore legislation should:¹²

- (a) include measures which provide the greatest possible security of tenure to occupiers of houses and land; and
- (b) strictly control the circumstances in which evictions or displacements may be carried out.

(a) Laws should protect security of tenure of occupiers

18. Legislation should provide that people cannot be evicted or displaced into homelessness.¹³ Clearly in addition to legislative protection, the government will need to take administrative and budgetary measures to support this protection, by planning and providing resources for temporary or alternative accommodation services.

19. An approach similar to South Africa's may be appropriate. In South Africa, the right to adequate housing means 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.¹⁴ Importantly, whether a person will be homeless upon eviction is a relevant circumstance.

¹¹ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [1].

¹² UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [9].

¹³ This would implement the government's international law obligation to ensure that where people are evicted, the government takes 'all appropriate measures, to the maximum of available resources' to find and make available alternative housing: UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [9].

¹⁴ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005). In *Modderklip*, it was held that by failing to provide an appropriate mechanism to give effect to the eviction order of the Johannesburg High Court, the State had infringed the property rights, entrenched in section 25 of the Constitution, of Modderklip Boerdery (Pty) Ltd, a private company. Section 25 states that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.

20. Another form of protection against arbitrary or forced evictions is to ensure that courts making decisions about whether to evict a person are able to take into account all the relevant circumstances. The fact that rent arrears are caused by a delay in receiving government benefits should be a relevant consideration, as is the case in Scotland.¹⁵
21. Housing legislation should also protect the security of tenure of persons who are detained under mental health laws or otherwise temporarily detained by the State, such as persons serving short terms of imprisonment.
- (b) Procedural protections must be provided against arbitrary or forced evictions**
22. Procedural protection and due process are highly relevant in arbitrary or forced evictions. Housing legislation should include procedural measures such as:¹⁶
- (a) an opportunity for genuine consultation with those affected by a forced eviction or displacement;
 - (b) adequate and reasonable notice for all affected persons prior to the date of eviction;
 - (c) information on the proposed eviction;
 - (d) provision of legal remedies; and
 - (e) provision of legal aid to persons who are in need of it to seek redress from the courts.
23. Legal remedies in the legislation should include:¹⁷
- (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
 - (b) legal procedures for seeking compensation following an illegal eviction; and
 - (c) a complaints mechanism for redress against illegal actions carried out or supported by landlords in relation to rent levels, dwelling maintenance and racial or other forms of discrimination.

Recommendation 3:

Victorian law should adequately protect persons from arbitrary, unlawful or forced evictions, including providing for necessary procedural protection and effective remedies.

¹⁵ *Housing (Scotland) Act 1987*, section 31(4).

¹⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [15].

¹⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing - Forced Evictions (Art 11.1 of the Covenant)* UN Doc E/1998/22, annex IV, [17].

3.3 Participation in Housing Policy Development and Service Delivery

24. Victorian legislation should expressly require meaningful participation of persons who are homeless or in public housing in the development of delivery of housing and homelessness policy and services. The meaningful participation of people in the decision making that affects them is an important way of empowering people, and also contributes to the development of smart, targeted policies that address both the symptoms and causes of homelessness and poverty.
25. On a practical level, meaningful participation can be facilitated through institutional mechanisms, such as consumer advisory groups, or through meaningful consultations with persons affected. The Government should require homelessness services to establish participatory processes to enable consumers to input their experiences of public housing and homelessness into service delivery decisions.

Recommendation 4:

Victorian law should expressly require meaningful participation by persons in public housing during policy development and in the delivery of public housing services.

3.4 Non-Discrimination in Housing

26. Homelessness impacts certain groups in society more profoundly, in particular women, children, young people, Indigenous people and persons with a disability, including persons with a mental illness. It therefore also engages the right to non-discrimination.¹⁸
27. As stated above, addressing the future of public housing is not something that can be done in a vacuum. Homelessness is both a cause and a consequence of poverty and other human rights violations. There are a large number of Commonwealth, State and local laws and policies that impact disproportionately on people who are homeless and at risk of homelessness.¹⁹ It is therefore extremely important that other policies that impact disproportionately on people experiencing homelessness are amended so as not to discriminate.
28. The Victorian Government should review of all laws and policies that, whether directly or indirectly, disproportionately impact on people who are homeless or living in public housing, and amend them to accord with human rights, including:

¹⁸ See discussion by the Special Rapporteur on the right to housing on the causes and manner in which different groups face homelessness, Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [46] – [63].

¹⁹ *Housing the Homeless* report, 82.

- (a) anti-discrimination laws;
 - (b) residential tenancy laws; and
 - (c) public space laws.
29. This audit of laws was recommended in the Federal context in the *Housing the Homeless* report.²⁰

3.5 Effective Remedies for Breach of the Right to Adequate Housing

30. The Centre acknowledges that there are some existing remedies for breaches of housing rights in Victorian law, particularly in relation to procedural rights prior to eviction. This submission does not address in detail the content of existing protections, but notes that there is no comprehensive judicially enforceable remedy for breach of a right to adequate housing.
31. Effective remedies may range from provision of reasons for adverse decisions, to complaint mechanisms, to judicially enforceable remedies. Different types of remedies that housing legislation might provide are discussed below.
32. Obviously effective remedies must be supported by accessible and affordable legal advice and efficient administration of justice.²¹

Recommendation 5:

Housing legislation must provide for a range of remedies for breaches of the right to adequate housing.

- (a) ***Provision of advice***
33. In order to educate people in relation to their rights and options, housing legislation should require authorities to provide advice in relation to housing rights and in particular homelessness..
34. This has been provided for in England where, pursuant to the *Housing Act 1996*, a local authority has an obligation to provide advisory services about homelessness and the prevention of homelessness to any person in their district free of charge.²²

²⁰ *Housing the Homeless* report, Recommendation 10.

²¹ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59), [46](l).

²² *Housing Act 1996*, section 192.

Recommendation 6:

Housing legislation should require that local authorities provide all persons with reasonable access to adequate advice and assistance in relation to housing and related matters.

(b) Provision of reasons for adverse decisions and the chance to review

35. Housing legislation should also give people a right to seek reasons for adverse public housing decisions, similar to the position in Scotland.
36. Under the *Housing (Scotland) Act 1987*, once a decision is made, the local authority must notify the applicant. Where a decision is made that is contrary to the applicant's interest, the local authority must provide reasons for their decision.
37. Housing legislation should also provide the right for a person who is subject to an adverse public housing decision to have that assessment reviewed. This right is currently protected in Scotland where the *Housing (Scotland) Act 2001* incorporates the right to review decisions. Similarly, under the English *Housing Act 1996*, applicants for housing have a right of review.²³

(c) Complaints mechanism: Housing Commissioner

38. Provision should be made for a complaints mechanism for persons who are homeless or at risk of homelessness and who are subject to adverse decisions in relation to public and emergency housing. An independent Housing Commissioner should be established to investigate and conciliate complaints relating to the rights of persons who are homeless or at risk of homelessness. Complaints to the Housing Commissioner should be free of charge to persons who are homeless or at risk of homelessness.
39. This type of complaints-handling process would be more accessible and efficient than a court application. The Centre does not make any submission on the institutional details of the Housing Commissioner. However, the Housing Commissioner could sit within the Victorian Equal Opportunity and Rights Commission, and have complaints-handling jurisdiction similar to the existing commissioners.

Recommendation 7:

A Housing Commission should be established and an independent Housing Commissioner appointed to investigate and conciliate complaints relating to the right to adequate housing and to investigate systemic issues.

²³ *Housing Act 1996*, section 183.

(d) Judicial enforcement of the right to adequate housing

40. Housing legislation should provide for a judicially enforceable right to adequate housing. This could be similar to the protection of the right to adequate housing in South Africa, where the right does not create 'rights on demand' but rather obliges the state to take reasonable steps to ensure the progressive realisation of the right within the maximum of available resources. The question of whether the government has acted *reasonably* in the development of policy or legislation is subject to review by the courts.
41. In South Africa, the Courts consider the reasonableness of government action, rather than whether a particular policy is more desirable or rights-compliant than another. According to the Court in the *Grootboom Case*, which concerned the right to adequate housing:
- A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.²⁴
42. Importantly, in considering reasonableness, courts may also recognise minimum core State obligations, such as the obligation to provide minimum services to vulnerable groups. As mentioned above, in the *Grootboom* case, the right to housing did not equate to a right of all citizens to housing on demand, but to a reasonable government programme to provide emergency accommodation and housing relief.

Recommendation 8:

Victorian law should provide for appropriate judicial remedies for the violation of the right to adequate housing.

²⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).