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# ADDRESSING HOMELESSNESS THROUGH A HUMAN RIGHTS FRAMEWORK

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## Background to Homeless Persons Legal Service

The Homeless Persons' Legal Service in Sydney is a joint initiative of the Public Interest Advocacy Centre (PIAC) and the Public Interest Law Clearing House (PILCH). The HPLS provides free legal advice and representation to individuals who are homeless or at risk of homelessness in the Sydney metropolitan area, in relation to a wide range of legal problems. During 2010-11, the service helped 738 clients; since its inception in 2004, HPLS has assisted over 4,500 clients.

The primary points of contact between HPLS and its clients are the weekly clinics offered in the inner city, Bondi and Parramatta.

Ten clinics are operated on a roster basis at welfare agencies that provide direct services, such as food and accommodation, to people in housing crisis. The clinics staffed by lawyers acting *pro bono* from PILCH members. The HPLS team at PIAC continues to co-ordinate and supervise all of the work done at the clinics and to provide support for the *pro bono* solicitors from the partner legal practices.

In 2008 the Service employed a Solicitor Advocate to provide court representation for people who are homeless and charged with minor criminal offences. The purpose of the Solicitor Advocate position is to

establish a dedicated point of contact for people who are homeless or at risk of homelessness to access legal representation in minor criminal matters.

The role was established to overcome some of the barriers homeless people face accessing legal services which are not sufficiently addressed by legal aid duty lawyers.

From 1 January 2010 to 30 June 2011, the HPLS Solicitor Advocate provided court representation to 104 individual clients. Of these:

- 53 per cent disclosed that they had a mental illness;
- 62 per cent disclosed that they had drug or alcohol dependency;
- 76 per cent said that they had either a mental illness or drug/alcohol dependency;
- 38 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 45 per cent indicated that they had previously been in prison.

**Snapshot of Homelessness in NSW**

While the 2011 Census figures are not available, based on the 2006 figures, on Census night in 2006, there were 104, 676 people who reported being homeless across Australia, and 27, 374 who were homeless in New South Wales.

The definition of homeless adopted by the ABS is the widely accepted three –part definition of homeless as devised by social policy researchers Chris Chamberlain and David McKenzie, namely -

1. Primary homelessness – people sleeping rough, on the streets, in parks, under bridges, deserted buildings, etc.
2. Secondary homelessness – people moving between various

forms of temporary shelter including friends, relatives – sometimes referred to as ‘couch surfing’ - emergency accommodation, youth refuges, hostels, boarding houses,

3. Tertiary homelessness – people living in single rooms in private boarding houses without their own bathroom, kitchen and without security of tenure.

Of the total number of 27, 374 who are homeless in NSW, an estimated 3,500 people sleep rough every night.

Studies in Australia and internationally have consistently documented that people experiencing homelessness report a horrendous and disproportionate level of victimisation, including repeated experiences of childhood abuse, domestic and family violence. Studies have revealed that over 70% of young homeless women and 30% of young homeless men can be expected to be survivors of sexual abuse and that over 70% of young homeless men and 30% of young homeless women can be expected to be survivors of physical abuse.

There is also a well-documented relationship between having a mental illness and experiences of homelessness. In 2011 a study conducted by RMIT Researchers of 4,300 homeless people in Melbourne found that 31 per cent of the sample had a mental illness (not including any form of alcohol or drug disorder). According to the ABS the prevalence of mental illness in the homeless population is three times the prevalence of mental illness amongst people who have never experienced homelessness.

Significantly, the RMIT study also found that the vast majority of homeless people do not have a mental illness when they become homeless, but acquired their mental illness after becoming homeless.

There is also a well-documented relationship between drug and alcohol disorders and homelessness. A 2001 study of 210 homeless people in emergency hostels in inner Sydney reported that 48 percent of the sample had a drug use disorder and 55 per cent reported an alcohol disorder. 75 per cent of their sample had either mental health problems, drug use disorder or alcohol disorder.

**Jamie's story – an HPLS Case Study**

Jamie (not his real name) is one of our consumer advisers and also a client of the Homeless Persons Legal Service. He is now in his 40s.

Jamie first became homeless when he was 14, leaving home to escape from his step-father who subjected him to sexual and physical abuse. He lived on the street, worked as a sex worker, and also was in and out of foster care and juvenile justice institutions. Whilst he was in foster care he was further sexually assaulted. He was also sexually assaulted and physically assaulted in a juvenile correctional training centre.

About 18 months ago, Jamie had finally secured stable accommodation from the Office of Housing, after being on and off priority lists for housing for the previous 3 years. In the period leading up to that time, he had relied on a number of different accommodation options, including sleeping rough, accessing hostels and homelessness accommodation services for 1-2 nights at a time, and some periods in both licensed and unlicensed boarding houses. He was in a methadone treatment program to address his substance abuse problems. And he was also in a job-training scheme. And he had an outstanding unpaid fine for travelling on the train without a valid ticket – one of the most common issues to come into the HPLS.

Through the fine enforcement system, this unpaid fine resulted in Jamie

having his driving licence disqualified for non-payment. And yes, whilst driving his car one night he was pulled over and charged with driving whilst disqualified. Jamie has a criminal history, and has previously served time in prison and in juvenile detention. At his court hearing he was sentenced to 8 months imprisonment.

He was released last November after serving the full 8 months. He had no job. He had lost his public housing unit and could not get further priority listing because:

a. He had an outstanding debt for unpaid rent to Housing NSW;

b. Housing NSW regarded that he had been in stable accommodation for the previous 6 months.

Jamie is currently back on the streets, sometimes in hostels. I am not aware whether he has resumed methadone treatment.

Jamie's story is an example of systemic failure at several levels – from the inadequate response to his experiences of childhood abuse, the failure to provide protection when in state care, an excessive, punitive sentencing regime, an inadequate response to his needs upon release from prison, and a bureaucratic inflexibility to provide him with safe, secure, adequate housing.

With this case study in mind, the issues I want to discuss today are what do we mean by responding to homelessness within a human rights framework.

While Jamie's story gives rise to a number of recognized human rights, including the rights of the child to a safe and secure environment, the rights of the child to be protected from physical, mental, emotional and sexual abuse, the right of a child in care to special protection from further harm and abuse, the right to adequate housing, the right to

adequate health and medical services, the right to necessary social services …..

However, what I want to specifically focus on today is the right to adequate housing, and the right to not to be subjected to unlawful or arbitrary interference with one's privacy, home and family life, and how these have been applied both in International Law and also through domestic human rights charters.

**International Law - The right to a home**

*The International Covenant on Economic, Social and Cultural Rights*

Perhaps the clearest and most definitive articulation of the right to adequate housing is Article 11 of the International Covenant on Economic, Social and Cultural Rights, to which Australia is a party:

It says:

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

The United Nations Committee on Economic, Social and Cultural Rights has extensively defined the right to adequate housing, stating that it involves more than just having shelter but that it is the 'right to live somewhere in security, peace and dignity.' Included in the indicia for what amounts to 'adequacy of housing' are issues of security of tenure and affordability.

The provisions in the ICESCR are about to have greater significance in the development of legislation in Australia at the national level. With the passage of the *Human Rights (Parliamentary Scrutiny) Act 2010* in

November, all new legislation to be introduced into the Australian Parliament will have to be assessed in terms of its compatibility with Australia's obligations under seven UN human rights conventions, including ICESCR, and for our purposes today, Article 11 which provides for the right to adequate housing, medical care, and social services. In addition, all legislation will have to be considered by a joint parliamentary human rights committee in terms of its compatibility with Australia's international human rights obligations as articulated in the seven specified UN human rights treaties.

In addition, it is expected that this year the Government will introduce National Homelessness legislation which provides for legislative recognition of the right to adequate housing in accordance with Australia's international human rights obligations. It is expected that this legislation will also require an audit of all legislation and policies that impact disproportionately on people experiencing homelessness, to assess as to whether they conform with Australia's international human rights obligations. The Government, through COAG, is also expected to seek the cooperation of all state and territory governments to conduct similar legislative and policy audits at the state/territory level.

*The International Covenant on Civil and Political Rights*

Despite the strong principle of human rights being indivisible, it is often the rights which come under the International Covenant on Civil and Political Rights which receive priority by western countries in terms of implementation and attention, particularly in terms of the development of domestic human rights instruments.

However, the ICCPR is not silent on the importance of the right to a

home.

Article 17 of the ICCPR states:

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

This article has been replicated in domestic human rights legislative charters in Australia, namely in Victoria and the ACT, and as we shall see, has been used to considerable effect in protecting public and social housing tenants from arbitrary evictions.

*The European Convention on Human Rights*

The European Convention on Human Rights contains a similar provision to this. Article 8 of the European Convention states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights has made a number of decisions as to how this right is to be defined.

In 1999, the Court decided in *Marzari v Italy* [1999] ECHR 178, that:

> "… the essential object of Article 8 is to protect the individual against

> arbitrary interference by public authorities ... this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in the effective respect for private life."

In that case, a man with a serious disability and chronic illness who rented a public housing apartment, refused to continue to pay his rent, on the basis that he had requested the housing authority to undertake certain works in his apartment to make it more suitable to his particular needs given his significant disabilities. He was subsequently evicted, whereupon his physical and mental health significantly deteriorated.

The Court held that the eviction of from his public housing unit was an unjustified interference with his Article 8 right for respect for a private life. This was in spite of the fact that the eviction was based on the relevant domestic legislation and complied with all the necessary procedural requirements. The Court found that the man's medical condition was a particularly relevant issue to consider in determining whether the eviction was justified.

The Court also decided that local authorities had a positive obligation to provide positive assistance to an individual suffering from a severe disease to solve their housing problems. While this does not guarantee the right to have one's housing problem solved by authorities, the refusal of authorities to provide such assistance may amount to a violation of the person's rights under Article 8 of the Convention.

The processes by which a landlord may seek to evict a tenant have been the subject of a number of decisions by the European Court of Human Rights.

In *McCann v United Kingdom* [2008] ECHR 1909/04 the Court held that:

> "… the loss of one's home is a most extreme form of interference with this right."

In McCann, the Court held that Article 8 was violated where a tenant was dispossessed of his home without any possibility to have the proportionality of the measure determined by an independent tribunal. In effect, an eviction by a landlord by recourse to a merely technical process, confirmed by a court or tribunal would not satisfy the human rights requirements of the European Convention. The European Court of Human Rights has decided that the proportionality of the measure must be determined by an independent tribunal. In summary, the existence of adequate procedural safeguards is central to the protection of the right to a home.

The Court re-emphasised this in 2009 in the decision of *Cosic v Croatia* [2009] ECHR 80:

> "… the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end."

That case involved the eviction of a single mother from a protected tenancy which had been arbitrarily terminated by the State during the period of Balkan conflict in Croatia.

More recently, in 2010, in *Kay v United Kingdom* [2010] ECHR 1322, the Court emphasised the need for procedural safeguards to ensure that social housing tenants with limited security of tenure, are able to raise

factual issues which may be relevant in assessing the proportionality of the action of evicting the tenants.

In particular, the Court said that a judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (ie. one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues.

These decisions have become particularly important in the UK in terms of identifying the obligations on local councils and public authorities under the UK Human Rights Act, which provides domestic recognition of the human rights contained in the European Convention. And, as we shall see, decision by UK Courts in relation to the Human Rights Act have been a significant influence in the development of Australian domestic jurisprudence in Victoria regarding the Charter of Human Rights and Responsibilities.

**The UK Human Rights Act**

Enacted in 1999, the UK Human Rights Act was intended to provide domestic remedies for violations of the human rights recognised in the European Convention on Human Rights. The Human Rights Act is an ordinary piece of legislation, requiring pre-legislative scrutiny to assess the compatibility of new legislation with the protected human rights. The Act also creates a process of dialogue between the courts and the Parliament where if courts cannot interpret legislation in a way which is compatible with the protected human rights, they can make a declaration of incompatibility, requiring Parliament to respond, either by amending

the legislation, or confirming that the intention for the legislation to be incompatible with human rights.

The Act also makes it unlawful for a public authority to act in a way which is incompatible with the protected rights. A public authority includes courts, tribunals and any persons whose functions are functions of a public nature.

The Act provides domestic recognition and protection within the UK of all human rights included in the European Convention on Human Rights, including article 8, which I referred to earlier, which states that “everyone has the right to respect for his private and family life, his home and his correspondence.”

The Act has resulted in the strong influence of decisions made by the European Court of Human Rights on the development of UK human rights jurisprudence. The previous Strasbourg decisions to which I have referred, which state that “… the loss of one’s home is a most extreme form of interference with this right to respect of one’s home”, have been adopted by UK courts.

Specifically, the ECHR decisions regarding the need for procedural safeguards to ensure that social housing tenants with limited security of tenure, are able to raise factual issues which may be relevant in assessing the proportionality of the action of evicting the tenants, were followed by the UK Supreme Court in 2010 in *Manchester City Council v Pinnock* [2010] UKSC 45. In that matter, the Court recognised that a person at risk of eviction from home by a local authority should be able to question the proportionality of the eviction, even though there is no right under domestic law to remain.

As to the interplay between decisions of the UK courts and the European

Court, the Supreme Court noted that although it is not bound to follow all decisions of the European Court. However, where there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of UK law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, the Court stated that it would be wrong for this Court not to follow that line.

The decisions of *Pinnock* and the European Court clearly favour the ability to litigate human rights issues in housing matters in the first instance and such an approach provides major benefits for access to justice by disadvantaged and vulnerable tenants.

In 2011, the UK Court of Appeal considered the issue that was raised in *Mazaro v Italy* in the European Court, namely whether the State has a positive obligation to provide housing. In *TG v London Borough of Lambeth* [2011] EWCA Civ 526, the Court of Appeal considered whether a local council's failure to provide housing and other supports to a vulnerable young person breached their positive obligation to respect the right to a private life. The case involved a troubled teenager who had been thrown out of home, and had been in trouble with the police. He was referred to the council's housing department which provided him with accommodation for some seven months, when he was aged 16 and 17. However, because the housing was provided under the wrong scheme for a young person, he failed to receive some of the support services and benefits to which he was entitled, including continuing access to housing. The Council considered that he was not eligible for further support however.

The Court decided that if the Council's failure to provide adequate services amounted to inhuman and degrading treatment, then the

Council's conduct would amount to a breach of human rights and make them liable to damages.

Cases such as TG show that, while there may be positive obligations imposed on states, these matters will be balanced with the competing rights, responsibilities and obligations of governments and peoples. The case acknowledges that where the state infringes and neglects the human rights of vulnerable people to whom it owes a positive duty, that remedies may need to be provided. This approach ensures that governments are accountable for the services that they provide, while courts have a role to play in ensuring that human rights are enforced in significant breaches of human rights.

Finally, in early 2011, the UK Supreme Court gave further consideration to the question of the need to consider the proportionality of evictions from public housing. In *Hounslow London Borough Council v Powell* [2011] UKSC 8, Ms Powell, was the subject of an application by her local council for possession of the public housing property she lived in.

Ms Powell was provided with accommodation by Hounslow London Borough Council (Hounslow) under the homelessness regime. She lived there with her four children and her partner. Ms Powell's housing benefit was suspended on three occasions causing her to fall behind in rent. On the first and second occasions, she was able to catch up; on the third she was issued with a notice to quit and, although her benefit and rental payments resumed, she remained 11 weeks in arrears. Hounslow then applied for possession.

During the course of the litigation, and in response to the decision in Pinnock, the council offered Ms Powell suitable alternative accommodation (still on a non-secure basis).

The Court held that, if Ms Powell had not been offered a property, there may have been grounds to remit the case to the county court for consideration of proportionality of the decision to evict Ms Powell. The Court stated that, because of her homelessness, it would have been important to give her an opportunity for the proportionality of the order to be considered in light of her personal circumstances.

One significant message from Ms Powell's matter is that justiciable human rights are an important mechanism for alerting public authorities to the hardships of clients. Given that the decision in Pinnock's case was the catalyst for the Lambeth Council to find Ms Powell alternative suitable accommodation, this case illustrates how an effective outcome was achieved for Ms Powell through negotiation, in the shadow of justiciable rights for adequate housing. This provides a good launching pad for consideration of the Victorian Charter of Human Rights and Responsibilities.

## The Victorian Charter of Human Rights and Responsibilities 2006

The Victorian Charter of Human Rights and Responsibilities is similar in its effect to the UK Human Rights Act, in that it is an ordinary piece of legislation, requiring pre-legislative scrutiny to assess the compatibility of new legislation with the protected human rights. The Charter also creates a process of dialogue between the courts and the Parliament where if courts cannot interpret legislation in a way which is compatible with the protected human rights, the matter may be referred to the Supreme Court, who may make a statement of inconsistent interpretation, to which Parliament must respond.

In 2008, the Victorian Charter came into full effect, with public authorities having an obligation to act compatibly with human rights protected under the Charter, and to give proper consideration to the protected human rights when making a decision.

The Charter has a very lengthy, and in many ways complex definition of what is a 'public authority'. It includes a public official, local government, a Minister, government department, or an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the state. That last class of organisations is intended to cover organisations performing services under government contract. However, it does not include courts and tribunals except when acting in administrative capacity. I will return to this exclusion a little later.

One section of the Charter which has come under considerable criticism from human rights advocates is section 39, which significantly limits an individual's ability to initiate legal proceedings for non-compliance with the Charter. The section states that a person can only seek relief or remedy under the Charter if they have a co-existent cause of action for unlawfulness apart from the Charter.

However, in spite of these difficulties, the Victorian Charter has been used in a number of housing and tenancy disputes to advance the right to privacy and a home, particularly for those at risk of homelessness.

The relevant section in the Charter which has been used to great effect in this regard is section 13(a) which states:

> A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

This section parallels article 17 of the ICCPR and article 8 of the ECHR, which was incorporated into the UK *Human Rights Act*.

The Victorian Civil and Administrative Tribunal has made a number of decisions drawing on the Charter in relation to applications for possession by public housing or community housing landlords, in circumstances in which the tenant would have been made homeless. However, a recent decision of the Victorian Court of Appeal may have closed off this important avenue for redress by public housing tenants at risk of being evicted into homelessness.

In 2009, VCAT dismissed an application for possession by a transitional housing provider as being incompatible with the Charter. In *Homeground Services v Mohamed*, VCAT held that the applicant for termination, a private welfare agency that provided transitional housing to tenants who would otherwise be facing the prospect of being homeless, had acted unlawfully under the Charter. The agency had a pre-existing policy that required tenants who were under 24 years of age, to have a long term housing plan in place within 14 months of starting the tenancy, so that they could exit from transitional housing. The policy provided that unless the tenant had applied for and been approved for public housing within the 14 month period, a notice to vacate would be given.

The tenant was aged 21 years of age, spoke little English, and relied heavily on support services. He relied on Social Security for his income, and met all the criteria for being eligible for public housing. He was diligent in his rent payments, and he maintained his premises appropriately. However, neither he nor his support services had made an application for public housing – an apparent oversight of his support service. The social landlord agency, Homeground Services, issued a notice to vacate, and applied to VCAT for a possession order.

VCAT decided that the landlord's application for possession amounted to interference with the tenant's right to a home, and that this was an

arbitrary interference, as the tenant would be made homeless through no wrong-doing or fault on his part. The implementation of the landlord's policy in these circumstances was arbitrary.

The effect of the decision at the time was significant, particularly in relation to evictions by public authorities which are based on a no-reason notice to vacate. The decision acknowledges the extreme circumstances of an eviction when this results in a person being made homeless. It also highlights the lack of procedural protections for a tenant when eviction is based on a no-reason notice to vacate. The effect of the decision at the time was to require every application for possession based on a no-reason notice to vacate to engage with the Charter right to a home. Accordingly, such evictions will have to be justified by the landlord in accordance with the Charter.

The other aspect in this decision which is interesting is the acceptance by the landlord that it was a public authority under the Charter, even though it was a private welfare agency. It accepted its status as a public authority on the basis that it was performing a function of a public nature on behalf of the state. This drew on the reasoning adopted in an earlier VCAT decision in 2009 in *Metro West v Sudi*, in which a non-profit housing agency was held to be a public authority with obligations to consider the Charter in its decision-making and to comply with the Charter in its actions.

Metro West Housing Services was a provider of transitional housing to those at risk of homelessness in the western suburbs of Melbourne. Although a private company, its primary function regarding the allocation and management of housing stocks is governed by a service agreement with the Victorian Government. Metro West receives government funding to provide these services and exercises delegated

statutory powers under s 35 of the *Housing Act 1983* on behalf of the government, allowing it to lease, sub-lease, acquire and dispose of property.

Metro West had introduced a policy of automatically issuing notices to vacate to its tenants at the beginning of their tenancy, and regularly throughout the tenancy, in order to ensure that the tenants did not overstay. They sought to rely upon one of these automatic notices in applying for orders for possession.

In providing a detailed analysis of what amounts to a 'function of a public nature' the then president of VCAT Justice Bell determined that the provision of social housing is a public function which the government exercises on behalf of the community in the public interest. Together with the provision of public funding to various groups who exercise this function, he held that this would be sufficient to characterise the functions exercised by Metro West as being of a public nature.

In addition, the president found that the statutory foundation of housing policies and programs contributed to the finding that Metro West carried out 'public functions'.

His Honour held that the question of whether the functions in question are functions of a public nature turns upon the nature of the *functions* and whether they are being exercised in the public interest, rather than the nature of the entity exercising those functions. In finding that the functions exercised by Metro West in providing transitional housing services were of a public nature, his honour found that it was relevant to consider the responsibility which government has for the care and protection of vulnerable and disadvantaged people, especially those who are at risk of homelessness.

As an aside, in that decision, Justice Bell made the statement:

> "Disadvantaged people in need of social housing are among the most vulnerable in the community. Their human rights are imperiled by their circumstances"

Up until September last year, VCAT was an important vehicle by which the Department of Housing could be held accountable for failing to consider human rights implications in decisions involving terminations of tenancies for public housing tenants, including those situations where a tenant was faced with homelessness as a result of a tenancy termination decision. In particular, VCAT tended to follow the series of decisions from the European Court of Human Rights to which I referred earlier, in which it asserted that it had jurisdiction to consider human rights issues in relation to whether the Department of Housing had taken into account all relevant human rights issues in deciding to evict a tenant.

This issue came to the attention of VCAT in the matter of *Director of Housing v Sudi* in 2010. That case involved a decision by the Department of Housing to evict a young man, together with his 3 year old son. The man had come to Australia in 1995 as a refugee from Somalia with his mother and siblings. He lived in the house with his mother until 2005 when he married. He returned to the house in 2007 to look after his mother who had become unwell. She subsequently passed away and Mr Sudi moved into the house with his son on a permanent basis. The Director of Housing then issued a termination notice to him and applied to VCAT for a possession order.

The VCAT decision followed the principles laid down by the European Court of Human Rights and also the UK Supreme Court in Pinnock, that a person at risk of eviction from home by a public housing authority

should be able to question the proportionality of the eviction, even though there is no right under domestic law to remain.

VCAT also took the view that the tenant should have the ability to litigate human rights issues in housing matters in the first instance, and not have to make a separate application to the Supreme Court to consider the relevant human rights issues relating to their housing matter. The president stated:

> People must be able to come to tribunals and rely on human rights which are relevant to their case. It is contrary to the principle of access to justice that people should have to bring their administrative applications to the tribunal and take their Charter arguments somewhere else, such as a court…All the issues should if possible be resolved in the one justice institution at the one time.

Underlying this decision was the principle that human rights remedies must be accessible in order to be effective.

The Department of Housing appealed the decision to the Victorian Court of Appeal, which overturned the VCAT decision in September last year. In what the Human Rights Law Centre described as striking a "collateral blow" to the Victorian Human Rights Charter, Court of Appeal has decided that in an application for a possession order under the *Residential Tenancies Act*, VCAT does not have power to consider whether, by making the application for the possession order the Director of Housing had acted unlawfully under the Charter.

It concluded that a proper construction of the *Residential Tenancies Act* and the VCAT Act meant that not only did VCAT not possess the requisite judicial review jurisdiction to undertake such a review, but it

also did not have the power to undertake collateral review of the Director's administrative decision.

The Court of Appeal basically stated VCAT can not deal with Charter issues in the same expert way as the Supreme Court and distinguished authorities to the contrary in the UK and the European Court of Human Rights on the basis that there is no requirement in the Charter for a tribunal to satisfy itself that the procedure has been followed.

This decision has disappointing implications, particularly when the Court of Appeal has highlighted the importance of providing inexpensive and quick resolution of disputes and recognised the Supreme Court is effectively inaccessible to many of the individuals the Charter seeks to protect.

The reality is, that people such as Mr Sudi, when faced with a termination notice from the Office of Housing, are unlikely to bring a separate application in the Supreme Court to consider whether the Office of Housing have complied with human rights obligations in deciding to terminate the tenancy.

The decision has exposed a significant flaw in the Charter, namely the limitation on a persons' ability to commence legal proceedings for non-compliance with the Charter under section 39 of the Charter.

Section 39 requires that a person may seek relief or remedy on a ground of unlawfulness under the Charter only if a person may seek a relief or remedy on the grounds of unlawfulness for something other than the Charter. The effect of the Court of Appeal decision in Sudi means that it is not sufficient for another cause of action, such as a termination proceeding or an application for possession, to exist.

Several human rights groups have been critical of the confusion surrounding section 39, and its application in the Sudi decision. The concerns would be addressed by a provision similar to that which exists in the ACT Human Rights Act which states that where a person claims that a public authority has contravened its Charter obligations, the person may rely on their protected rights in other legal proceedings, including proceedings for termination and possession in VCAT.

This illustrates a broader concern about the Charter, in that a more thorough protection of human rights would require a free-standing cause of action for breaches of rights protected by the Charter.

**The effect of the Charter on decision making-processes of public authorities**

While the Charter has been successfully employed to help protect disadvantaged people maintain their social or public housing arrangements, there have also been some significant improvements in the processes of government and public authorities, particularly in relation to decision-making about maintaining tenancies where possible.

In the matter of TK, which came before VCAT in 2010, the Office of Housing led evidence of the changes in processes they have implemented following the commencement of Charter obligations on public authorities in 2008. In particular, the Director of Housing led evidence of its processes and policies in ensuring tenants' rights are considered in decision-making processes. This is significant, as it demonstrated that the Department had made some changes in response to the Charter, to engage in constructive and thoughtful consideration of human rights in making decisions about vulnerable tenants.

According to the Victorian Homeless Persons' Legal Clinic, the Charter has proved to be an effective tool for negotiation and discussion, providing quick, affordable and effective remedies, which help disadvantaged tenants maintain their accommodation and avoid being evicted into homelessness. The Clinic has employed the Charter in negotiations with the Department of Housing, including finding alternative accommodation, or through the internal appeals processes. The Clinic stated that the Charter has provided an important framework by which Departmental policies, procedures and decision-making processes have been reviewed, allowing for a more nuanced approach for considering the individual circumstances of public housing tenants in hardship or complex circumstances, who may otherwise be facing eviction for rent arrears.

In its submission to the Scrutiny of Acts Committee Review of the Charter last year, the clinic estimated that it has used the Charter to negotiate and advocate to prevent 42 people (including 21 children) from being evicted from social housing into homelessness.

In addition, several charitable and non-government service providers of transitional and crisis accommodation services have undertaken a thorough review of their policies, procedures and decision-making processes in response to the Charter's obligation on public authorities, in acknowledgement that they may well be covered by such obligations. Some of the initiatives undertaken include ensuring new tenants are aware of their rights, including review and appeal rights, providing a transparent process for decision in relation to terminations and evictions, provision of information about legal options and supporting advocacy services, undertaking human rights audits across relevant programs, ensuring human rights training for transitional housing managers.

Transitional housing providers such as such as Hanover Welfare Services, Uniting Care, The Loddon Mallee Homelessness Network, Salvation Army, have all implemented specific programs to ensure that their activities and services are Charter compliant.

## The future of the Victorian Charter

Last year the Victorian Parliament Scrutiny of Acts Committee conducted the legislated four-year review of the Victorian Charter. The resulting report recommended significant amendments to the Charter, including restricting the definition of public authority, and limiting the ability to hold public authorities to account for failing to respect the protected human rights in the Charter. The Victorian Government is currently considering its response to the Committee's report, however, the Attorney-General has previously indicated his preference to significantly amend the Charter with a view to limiting its potential to be used in the ways in which I have described.

The Government's response is expected within the next two months.

## Conclusion

Addressing homelessness will substantially remain an economic and budgetary responsibility of governments. Issues of housing affordability, inadequacy of availability of public and crisis accommodation, and the ability of welfare agencies to provide crisis support services will remain as key areas for addressing the needs of people who are homeless or at risk of homelessness.

However, what I have endeavoured to show today is that even working within the exigencies of budgetary constraints, legislated human rights

instruments can provide significant protections to people who are homeless or at risk of homelessness.

These people are often reliant on the decisions of powerful state (and often non-state) actors in terms of securing and maintaining their accommodation, or accessing accommodation options. By imposing human rights obligations on those actors to:

- consider the implications of their policies and processes on individuals,
- require fair and transparent decision-making processes,
- ensure rights to appeal, and access to information and about tenants' rights and available services,

people with a history of homelessness or vulnerable to further experiences of homelessness have some recognition of their rights to adequate housing.

# Addressing Homelessness through a Human Rights Framework

14 January 2012

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Homeless Persons' Legal Service



## The International Covenant on Economic, Social and Cultural Rights

**Article 11 –**

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

**UN C'ee on ESCR:**

'right to live somewhere in security, peace and dignity.'



## Outline

- Background –
  - The Homeless Persons' Legal Service
  - Snapshot of Homelessness in NSW
- International Human Rights Law & the right to a home
- The UK Human Rights Act
- The Victorian Charter of Human Rights and Responsibilities



## The International Covenant on Civil and Political Rights

**Article 17 :**

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."



## International Law – the right to a home



## European Convention on Human Rights

**Article 8:**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## European Court of Human Rights

***Marzari v Italy* [1999] ECHR 178**

"… the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities ... this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in the effective respect for private life."

***McCann v United Kingdom* [2008] ECHR 1909/04**

"… the loss of one's home is a most extreme form of interference with this right."



## Background to HRA

- Domestic remedies for violations of European Convention on Human Rights
- Ordinary piece of legislation
- Pre-legislative scrutiny
- Dialogue model
- Unlawful for a public authority to act in a way which is incompatible with the protected rights
- Domestic recognition of all rights included in European Convention including Article 8.
- Strong influence of Strasbourg decisions in UK courts



## European Court of Human Rights

***Cosic v Croatia* [2009] ECHR 80**

"… the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end."

***Kay v United Kingdom* [2010] ECHR 1322**

Social housing tenants with limited security of tenure, should be able to raise factual issues which may be relevant in assessing the proportionality of the action of evicting the tenants.



## HRA - UK Court decisions

***Manchester City Council v Pinnock* [2010] UKSC 45**

A person at risk of eviction from home by a local authority should be able to question the proportionality of the eviction, even though there is no right under domestic law to remain

Although not bound to follow all decisions of the European Court, where there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of UK law, it would be wrong not to follow that line.



## UK Human Rights Act



## HRA - UK Court decisions

***TG v London Borough of Lambeth* [2011] EWCA Civ 526**

While there may be positive obligations imposed on states, these matters will be balanced with the competing rights, responsibilities and obligations of governments and peoples.

Where the state infringes and neglects the human rights of vulnerable people to whom it owes a positive duty, remedies may need to be provided.

***Hounslow London Borough Council v Powell* [2011] UKSC 8**

Homelessness is a factor making it important to provide an opportunity for the proportionality of the order to be considered in light of personal circumstances.

Justiciable human rights are an important mechanism for alerting public authorities to the hardships of clients.

## Victorian Charter of Human Rights and Responsibilities 2006



## VCAT Decisions

***Homeground Services v Mohamed* [2009] VCAT 1131**

Notes the extreme circumstances of an eviction when this results in a person being made homeless.

Lack of procedural protections for a tenant when eviction is based on a no-reason notice to vacate.

Every application for possession based on a no-reason notice to vacate must engage with the Charter right to a home. Such evictions will have to be justified by the landlord in accordance with the Charter.



## Background to Victorian Charter

- Ordinary piece of legislation
- Pre-legislative scrutiny
- Dialogue model
- Unlawful for a public authority to act in a way which is incompatible with the protected rights
- Detailed definition of 'public authority'
- Limited remedies for violations.



## VCAT Decisions

***Metro West v Sudi* [2009] VCAT 2025**

The provision of social housing is a public function which the government exercises on behalf of the community in the public interest.

Combined with public funding and the statutory foundation of housing policies and programs, this is sufficient to characterise the functions exercised by Metro West as being of a public nature.

Government has responsibility for the care and protection of people at risk of homelessness.

Bell, J:

**"Disadvantaged people in need of social housing are among the most vulnerable in the community. Their human rights are imperiled by their circumstances."**



## Victorian Charter

Section 13(a):

A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.



## VCAT Decisions

***Director of Housing v Sudi* [2010] VCAT 328**

Followed decisions from Strasbourg & Pinnock in UK.

A person at risk of eviction from home by a public housing authority should be able to question the proportionality of the eviction, even though there is no right under domestic law to remain.

"People must be able to come to tribunals and rely on human rights which are relevant to their case. It is contrary to the principle of access to justice that people should have to bring their administrative applications to the tribunal and take their Charter arguments somewhere else, such as a court…All the issues should if possible be resolved in the one justice institution at the one time."

## Victorian Court of Appeal – *Director of Housing v Sudi* [2011] VSCA 266

- Overturned VCAT decision.
- VCAT did not have human rights jurisdiction on public housing matter.
- Exposes problems with s 39 – limiting relief/remedy under the Charter.
- Need for person to rely on protected rights in termination proceedings where there are concerns that public authority has acted unlawfully under the Charter.



## Conclusion

Legislated human rights obligations require government and non-government public/transitional housing providers to:

- Consider the implications of their policies and processes on individual tenants in hardship,
- Require fair and transparent decision-making processes in relation to transfer and terminations,
- Ensure the provision of information regarding tenants' rights, avenues of appeal, and available support and advocacy services.



## The effect of the Charter on public and transitional housing providers

- Changes in Office of Housing policies and procedures.
- Consideration of tenant's rights in decisions regarding transfers, terminations, etc.
- Use in negotiation in housing disputes, to avoid eviction into homelessness.
- Changes implemented by non-government transitional housing providers.



## The future of the Charter

- Uncertain whether enforceability mechanisms will be retained
- Scrutiny of Acts and Regulations Committee review of Charter
- SARC recommended further limiting the enforceability of protected rights against violations by public authorities.
- Public criticism of the Charter by current Victorian A-G.
- Government response expected in next 2 months.

**???**