

## HOMELESSNESS LEGISLATION FOR AUSTRALIA: A MISSED OPPORTUNITY

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### I INTRODUCTION

On any given night, around 105 000 people experience homelessness in Australia.<sup>1</sup> In 2012–13, specialist homelessness services<sup>2</sup> provided assistance to more than 244 000 people in the form of accommodation, meals, laundry and shower facilities, and information and advice.<sup>3</sup> Social housing can be difficult to access for those in need, and in June 2012, there were close to 200 000 applicants on social housing waiting lists in Australia.<sup>4</sup> For a small, prosperous country, these numbers are high.

All states and territories have Housing Acts that govern the administration of social housing.<sup>5</sup> None of these Acts, however, create any rights to accommodation or duties to house. The Commonwealth has also legislated in the area of housing. The *Housing Assistance Act 1996* (Cth) sets up the framework within which the Commonwealth and the states and territories jointly fund social housing initiatives. It establishes the broad goals of targeting housing assistance to those most in need and ensuring that appropriate housing options are offered to people who require assistance.<sup>6</sup> The *Housing Assistance Act 1996*

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1 Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness* (2012) 16 ('*Census of Population and Housing*').

2 Specialist homelessness services are service providers that deliver services to individuals and households who have become homeless or are at risk of homelessness. They are non-government organisations delivering services on behalf of government. See Australian Institute of Health and Welfare, *Specialist Homelessness Services 2012–13* (2013) 1.

3 Ibid 5, 21.

4 Social housing is public housing and state-owned and state-managed Indigenous housing. As to waiting lists, see Australian Institute of Health and Welfare, *Housing Assistance in Australia* (2013) 48.

5 *Housing Assistance Act 2007* (ACT); *Housing Act 2001* (NSW); *Housing Act 1982* (NT); *Housing Act 2003* (Qld); *Community Housing Providers* (National Law) (South Australia) *Act 2013* (SA); *Homes Act 1935* (Tas); *Housing Act 1983* (Vic); *Housing Act 1980* (WA).

6 *Housing Assistance Act 1996* (Cth) s 4(2).

(Cth) acknowledges housing and shelter as ‘basic human needs’ but it creates no right to accommodation for those who are homeless.<sup>7</sup>

At the Commonwealth level, the provision of services to people experiencing homelessness has long been governed by the *Supported Accommodation Assistance Act 1994* (Cth). This Act established the Supported Accommodation Assistance Program (‘SAAP’) which was the program through which homelessness services were funded jointly by the Commonwealth and the states and territories to provide crisis support and accommodation to homeless individuals and families. SAAP was replaced with a new form of agreement by the Rudd Government in 2008. The National Affordable Housing Agreement (‘NAHA’) and the National Partnership Agreement on Homelessness were entered into by the Council of Australian Governments (‘COAG’) and commenced on 1 January 2009.<sup>8</sup> They were made pursuant to the new *Federal Financial Relations Act 2009* (Cth), making the *Supported Accommodation Assistance Act 1994* (Cth) redundant and practically inoperable.

With a view to replacing the *Supported Accommodation Assistance Act 1994* (Cth), the previous Labor Government drafted the Homelessness Bill 2013 (Cth) (‘Homelessness Bill’) and the Homelessness (Consequential Amendments) Bill 2013 (Cth).<sup>9</sup> The Bills lapsed in November 2013 and their fate in the hands of the new government remains undecided.

The homelessness sector has for many years called for a rights-based approach to be taken to homelessness in Australia,<sup>10</sup> but these calls have largely been ignored. The Homelessness Bill 2013 (Cth) addressed many of the sector’s concerns – it included provisions recognising the structural causes of homelessness, it emphasised Australia’s obligations under international human rights law, and it committed to improving individuals’ access to housing. It did not, however, establish a right to housing or a duty on the part of the state to accommodate those in need.

This article will trace the history of the Homelessness Bill. It will examine some key provisions in the Bill, and it will compare the response to homelessness it embodies with legislation in other jurisdictions. Its symbolic nature will be discussed, and the appropriateness of such an approach will be analysed. Finally, some options for the future of homelessness legislation in Australia will be suggested.

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7 *Housing Assistance Act 1996* (Cth) Preamble.

8 See COAG, *Intergovernmental Agreement on Federal Financial Relations* (2008). These agreements were entered into under the *Federal Financial Relations Act 2009* (Cth).

9 The Homelessness Bill was the substantive Bill, and the Homelessness (Consequential Amendments) Bill was to repeal the *Supported Accommodation Assistance Act 1994* (Cth).

10 See especially Human Rights Law Centre, Joint NGO Submission to the Universal Periodic Review of Australia, July 2010. See also Philip Lynch and Jacqueline Cole, ‘Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation’ (2003) 4 *Melbourne Journal of International Law* 139.

## II A RECENT HISTORY OF NATIONAL HOMELESSNESS LEGISLATION IN AUSTRALIA

Prior to 2009, the *Supported Accommodation Assistance Act 1994* (Cth) regulated funding and service provision related to homelessness. SAAP came into operation in 1985. It was a national program aimed at delivering services to people experiencing, and at risk of, homelessness, and it continued to represent Australia's primary response to homelessness for over 20 years. Under the Act, the Commonwealth granted financial assistance to the states under negotiated SAAP agreements, which were periodically revised.<sup>11</sup> The goals of SAAP were stated in the Act to be the provision of transitional supported accommodation and related support services to help people who are homeless achieve the 'maximum possible degree of self-reliance and independence'.<sup>12</sup> The Act states that the key features of SAAP include cooperative partnerships between all levels of government and service providers, and innovation in service delivery.<sup>13</sup> The Act notes the importance of promoting an image of people who are homeless that emphasises their human dignity and the fact that they are entitled to opportunities to enable them to participate fully in community life.<sup>14</sup> The Act also seeks to protect the rights of SAAP clients as consumers through the development of grievance and appeal processes, and charters of rights and responsibilities.<sup>15</sup>

Yet, Australia lacked a coordinated affordable housing strategy. The *Housing Assistance Act 1996* (Cth) recognises, in its Preamble, that housing and shelter are 'basic human needs' and that not having adequate housing can 'have adverse effects on health and ... quality of life'. However, the *Supported Accommodation Assistance Act 1994* (Cth) merely creates a framework for the creation of agreements and the provision of funds for homelessness services to the states. It does not present an overarching strategy, nor does it provide much policy direction.

During the Howard Government years, the absence of a coordinated response to homelessness culminated in a substantial reduction of social housing stock in real terms and high unmet demand for social housing.<sup>16</sup> In 2006, the UN Special Rapporteur on adequate housing<sup>17</sup> visited Australia and said

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11 The final such agreement was signed by the Commonwealth and all states and territories in 2005: Commonwealth et al, *SAAP v Multilateral Agreement: Multilateral Agreement in Relation to the Supported Accommodation Assistance Program* (2005).

12 *Supported Accommodation Assistance Act 1994* (Cth) s 5(2).

13 *Supported Accommodation Assistance Act 1994* (Cth) ss 5(4)(b), (e).

14 *Supported Accommodation Assistance Act 1994* (Cth) s 5(4)(d).

15 *Supported Accommodation Assistance Act 1994* (Cth) s 5(4)(f).

16 Australian Institute of Health and Welfare, *Housing Assistance in Australia*, above n 4, 7.

17 The full title of the position is Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.

the Indigenous housing situation in Australia amounted to a ‘humanitarian tragedy’.<sup>18</sup>

A priority for the Rudd Labor Government after coming to power in 2007 was to develop a national affordable housing strategy.<sup>19</sup> By 2009, this had been achieved with the creation of the NAHA, and related National Partnership Agreements on Homelessness, Social Housing and Remote Indigenous Housing. The NAHA formed part of the Intergovernmental Agreement on Federal Financial Relations, signed by all COAG members.<sup>20</sup> In these Agreements, commitments were made to achieving sustainable housing and social inclusion outcomes for people who are homeless or at risk of homelessness, and performance indicators were outlined.

These agreements are not mentioned in legislation, and they were not made pursuant to the *Supported Accommodation Assistance Act 1994* (Cth). Rather, they were made pursuant to the *Federal Financial Relations Act 2009* (Cth). The *Federal Financial Relations Act 2009* (Cth) provides for ongoing financial support for state programs by the Commonwealth, including ‘housing services’ in general terms.<sup>21</sup> However, unlike the *Supported Accommodation Assistance Act 1994* (Cth), it contains no legislative requirement that the Commonwealth continue to provide housing assistance to people experiencing homelessness, ensure security of tenure for people at risk of homelessness, or reduce homeless numbers.

Since the change of government in 2013, there has been some anxiety within the homelessness service sector about funding. Indeed, in February 2014, the National Commission of Audit said that housing and homelessness were the responsibility of state and territory governments, and recommended that the Commonwealth limit its involvement in ensuring housing affordability and preventing homelessness.<sup>22</sup> In the 2014–15 budget, the Abbott Government did not take up this recommendation. The National Partnership Agreement on Homelessness, which expired on 30 June 2014, was extended by the Federal Government for another year to provide certainty. However, the current Minister for Social Services has indicated that Commonwealth responses to housing and homelessness are under review.<sup>23</sup>

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18 Miloon Kothari, Special Rapporteur, *Mission to Australia (21 July to 31 August 2006)*, UN Human Rights Council, 4th sess, Provisional Agenda Item 2, UN Doc A/HRC/4/18/Add.2 (11 May 2007) 33 [133].

19 See generally Australian Government, *Which Way Home? A New Approach to Homelessness* (2008).

20 COAG, above n 8.

21 Section 14.

22 National Commission of Audit, *Towards Responsible Government – The Report of the National Commission of Audit: Phase One* (2014) 181–2.

23 Kevin Andrews, ‘Coalition Government to Renew Homelessness Funding’ (Media Release, 30 March 2014) <<http://kevinandrews.dss.gov.au/media-releases/71>>.

### III THE HOMELESSNESS BILL 2013 (Cth)

#### A Background

The Homelessness Bill 2013 (Cth), together with the Homelessness (Consequential Amendments) Bill 2013 (Cth), was first introduced by the Labor Government in 2012. The Bills were read a first and second time in the House of Representatives, and then read a first time in the Senate. However they lapsed in November 2013.

The introduction of the Bills was preceded by an extensive consultation process initiated by the Rudd Government around housing and homelessness generally. Consultations commenced in 2008 with a Green Paper, which called for public submissions in response,<sup>24</sup> and a White Paper, which set out the government's proposed approach.<sup>25</sup> The 'vision' of the Australian Government set out in the White Paper was to 'halve overall homelessness by 2020' and to 'offer supported accommodation to all rough sleepers who need it by 2020'.<sup>26</sup> The Rudd Government's '12 year reform agenda' was to be implemented through three 'strategies':

- intervening early to prevent homelessness;
- connected and responsive service delivery aimed at achieving sustainable housing, improving economic and social participation, and ending homelessness; and
- supporting people to move quickly through the crisis support system to stable housing.<sup>27</sup>

Specific initiatives were proposed under each strategy, and specific targets for service delivery, the creation of social housing stock, and reductions in homeless numbers were clearly set out.<sup>28</sup>

As Parsell, Jones and Head note, the reforms heralded by the White Paper represented a fundamental shift in Australia's approach to the problem of homelessness.<sup>29</sup> Previously, law and policy had centred around *managing* the problem of homelessness by providing services and crisis accommodation to those in greatest need.<sup>30</sup> The Rudd Government's White Paper, however, set

24 Australian Government, *Which Way Home?*, above n 19.

25 Australian Government, *The Road Home: A National Approach to Reducing Homelessness* (2008).

26 Ibid 17.

27 Ibid ix–xi.

28 Ibid 19. See generally at chs 3 ('Turning Off the Tap'), 4 ('Improving and Expanding Services'), 5 ('Breaking the Cycle').

29 Cameron Parsell, Andrew Jones and Brian Head, 'Policies and Programmes to End Homelessness in Australia: Learning from International Practice' (2013) 22 *International Journal of Social Welfare* 186, 188.

30 In 2012, 41 per cent of public housing households had at least one member with a disability: Australian Institute of Health and Welfare, *Housing Assistance in Australia*, above n 4, 40.

ambitious targets to reduce the number of people experiencing homelessness, to accommodate all rough sleepers, and to end homelessness permanently for clients.<sup>31</sup> By 2009, the homelessness sector was optimistic about the future.<sup>32</sup> Advocates argued that supportive legislation represented the final step towards an effective homelessness strategy.<sup>33</sup>

## B Right to Housing

An inquiry into homelessness legislation by the House of Representatives Standing Committee on Family, Community, Housing and Youth commenced in 2009.<sup>34</sup> The Committee's final report recommended that new legislation be drafted, incorporating a commitment to the reduction of homelessness by supporting early intervention strategies, and providing an adequate supply of accommodation options for people experiencing homelessness.<sup>35</sup> Controversially, the report recommended that the new legislation incorporate a right to adequate housing, to be progressively realised,<sup>36</sup> in accordance with Australia's international human rights obligations.<sup>37</sup>

In 2012, an exposure draft of the Homelessness Bill was released for public comment.<sup>38</sup> The draft Bill accorded closely with the recommendations of the Standing Committee. It acknowledged that there are many causes of homelessness including individual challenges and structural inequalities; it noted the norm of non-discrimination; it emphasised the need to provide appropriate support to people experiencing homelessness to enhance their social inclusion; and it highlighted the importance of implementing strategies to reduce homelessness through cooperation and consultation.<sup>39</sup>

Yet, the exposure draft departed from the Standing Committee's recommendations in one very important respect. Clause 13 of the draft Bill states:

31 Australian Government, *The Road Home*, above n 25, viii.

32 Parsell, Jones and Head, above n 29, 189, 191.

33 See, eg, Australian Human Rights Commission, Submission No 90 to House of Representatives Standing Committee on Family, Community, Housing and Youth, *Inquiry into National Homelessness Legislation*, 1 September 2009, 4–5; Australian Council of Social Service, Submission No 60 to House of Representatives Standing Committee on Family, Community, Housing and Youth, *Inquiry into Homelessness Legislation*, August 2009, 2; Hanover Welfare Services, Submission No 34 to House of Representatives Standing Committee on Family, Community, Housing and Youth, *Inquiry into National Homelessness Legislation*, 20 August 2009, 2.

34 Notably, the current Prime Minister Tony Abbott was a member of the Standing Committee at the time.

35 House of Representatives Standing Committee on Family, Community, Housing and Youth, Parliament of Australia, *Housing the Homeless: Report on the Inquiry into Homelessness Legislation* (2009) xiv, recommendations 4, 6.

36 Ibid, recommendation 7.

37 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 November 1976) art 2.1 ('ICESCR').

38 Department of Social Services (Cth), *Exposure Draft – Homelessness Bill 2012* (2012).

39 See especially Homelessness Bill 2013 (Cth) cls 6–11.

- (1) This Act does not, by its terms or operation, create or give rise to any rights (whether substantive or procedural), or obligations, that are legally enforceable in judicial or other proceedings.
- (2) No action, suit or proceeding is to be instituted in reliance on the terms of this Act or the operation of this Act.

Consistent with this, clause 7 states that it is the Commonwealth's 'aspiration' that all persons have access to adequate housing. The draft Bill notes Australia's various international human rights obligations at clause 12, but goes on to say that reducing homelessness is only a 'part' of meeting these obligations. The failure of the government to create a right to adequate housing, or an enforceable duty to house people in need was, of course, the subject of many of the submissions that responded to the draft Bill.<sup>40</sup> The homelessness sector was disappointed. It was felt that this "once in a generation" opportunity' to address an important area of human rights had been lost.<sup>41</sup>

### C Definitions of Homelessness

An additional point of concern for stakeholders regarding the draft Bill was the definition of homelessness that the Bill applies.

The most widely accepted definition of homelessness in Australia in recent times has been that put forward by Chamberlain and Mackenzie in 1992 (the 'Chamberlain and Mackenzie definition').<sup>42</sup> This is a 'cultural' definition of homelessness, that is, it represents the standard of housing that is generally accepted within Australia. The definition describes three types of homelessness:

- Primary homelessness: where a person is without conventional accommodation. This includes people 'sleeping rough' on the streets, those squatting in abandoned buildings and those living in their cars.
- Secondary homelessness: where a person resides in temporary forms of accommodation and relocates frequently. This includes people living in emergency or transitional accommodation (hostels, shelters, refuges) and those living temporarily within other households ('couch surfing').
- Tertiary homelessness: where a person lives in a boarding house, or in accommodation that is not self-contained and lacks the security of tenure of a lease.<sup>43</sup>

For the purposes of the population census, the Australian Bureau of Statistics' ('ABS') definition of homelessness is modelled on the Chamberlain

40 See, eg, Australian Human Rights Commission, above n 33; Australian Council of Social Service, above n 33; Hanover Welfare Services, above n 33.

41 Australian Human Rights Commission, above n 33, 2.

42 Chris Chamberlain and David Mackenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274.

43 Ibid 291.

and Mackenzie definition,<sup>44</sup> although the ABS has begun moving away from this definition in recent years, and some additional categories have been incorporated.<sup>45</sup> The category of persons living in ‘severely crowded’ dwellings was added as another category of homelessness, and persons who are ‘marginally housed’ (but not classified as homeless) are now counted as well, including those who live in ‘other crowded dwellings’ and caravan parks.<sup>46</sup>

The Chamberlain and Mackenzie definition has not been universally endorsed. Some advocacy organisations and commentators have instead expressed support for the definition of homelessness enshrined in the *Supported Accommodation and Assistance Act 1994* (Cth).<sup>47</sup> Section 4(1)–(2) of the Act reads:

- (1) For the purposes of this Act, a person is homeless if, and only if, he or she has inadequate access to safe and secure housing.
- (2) For the purposes of this Act, a person is taken to have inadequate access to safe and secure housing if the only housing to which the person has access:
  - (a) damages, or is likely to damage, the person’s health; or
  - (b) threatens the person’s safety; or
  - (c) marginalises the person through failing to provide access to:
    - (i) adequate personal amenities; or
    - (ii) the economic and social supports that a home normally affords; or
  - (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

The value of this definition is that it acknowledges that ‘rooflessness’ is only one expression of homelessness – other elements include lack of safety and social exclusion.<sup>48</sup> The Chamberlain and Mackenzie definition is based on housing standards, and pays less attention to the homeless experience. Lack of acceptable accommodation may be a symptom of disadvantage and marginalisation, rather than a cause.<sup>49</sup> Aboriginal people may reject conventional accommodation options, permanently or intermittently, because they have a cultural connection to a certain space.<sup>50</sup> In domestic violence situations, a woman may reject a more ‘acceptable’ form of housing and ‘choose’ a state of

44 Chris Chamberlain, ‘Counting the Homeless – Implications for Policy Development: 1996’ (Occasional Paper, ABS, 2 December 1999) 8 ff.

45 ABS, Information Paper: A Statistical Definition of Homelessness (2012) 12–17.

46 ABS, Census of Population and Housing, above n 1, 92–4.

47 Chris Chamberlain and Guy Johnson, ‘The Debate about Homelessness’ (2001) 36 *Australian Journal of Social Issues* 35, 38. See also Australian Council of Social Service, above n 33, 7–8.

48 See Anne Coleman, *Five Star Motels: Spaces, Places and Homelessness in Fortitude Valley, Brisbane* (PhD Thesis, University of Queensland, 2001) 167.

49 See further Chamberlain and Johnson, above n 47; Human Rights and Equal Opportunity Commission, *Homelessness Is a Human Rights Issue* (2008) 2.

50 See especially Paul Memmott et al, ‘Categories of Indigenous “Homeless” People and Good Practice Responses to Their Needs’ (Final Report No 49, Australian Housing and Urban Research Institute, November 2003).



homelessness for reasons of personal safety and safety of children.<sup>51</sup> Similarly, young people may prefer ‘the relative safety and solitude of the streets’ to an abusive family home.<sup>52</sup> The *Supported Accommodation Assistance Act 1994* (Cth) definition acknowledges these situations, whilst the Chamberlain and Mackenzie definition ignores them.

Clause 5 of the 2012 draft Bill, which defines homelessness, originally read as follows:

For the purposes of this Act, a person is experiencing homelessness if:

- (a) the person is sleeping rough or living in an improvised dwelling; or
- (b) either:
  - (i) the person is temporarily living with friends or relatives and has no other usual address; or
  - (ii) the person is living in accommodation provided by a specialist homelessness service; or
- (c) the person is living in a boarding house, caravan park, hostel, refuge, shelter or similar accommodation, whether on a short-term or long-term basis, in respect of which the person has no secure lease and the person is not living in that accommodation *by choice*.<sup>53</sup>

The concept of ‘choice’ is contested in the context of homelessness, and subsection (c) was criticised by key stakeholder groups for this reason.<sup>54</sup> In response, clause 5 was reworked and replaced with the following in the Homelessness Bill 2013 (Cth):

For the purposes of this Act, a person is experiencing homelessness if:

- (a) the person is sleeping rough or living in an improvised dwelling; or
- (b) the person is temporarily living with friends or relatives, has no other usual address and does not have the capacity to obtain other suitable accommodation; or
- (c) the person has no safe place to live (including because the person is, or is at risk of, experiencing domestic violence); or
- (d) the person is living in accommodation provided by a specialist homelessness service; or
- (e) the person is living in a refuge, shelter or similar crisis accommodation; or

51 Cate Nunan, ‘Women, Domestic Violence and Homelessness’ (1995) 11 *Shelter – National Housing Action* 37.

52 Matt Gleeson, ‘Obstacles to Surviving Homelessness’ (2000) 13(10) *Parity* 7.

53 Department of Social Sciences (Cth), *Exposure Draft – Homelessness Bill 2012* (2012) cl 13 (emphasis added).

54 These stakeholders argued that the notion of ‘choice’, particularly in the context of domestic violence, was inherently problematic: see, eg, Australian Human Rights Commission, *Submission on the Exposure Draft, Homelessness Bill 2012* (2012) 2–3; PILCH Homeless Persons’ Legal Clinic and Council to Homeless Persons, *Comment on the Exposure Draft of the Homelessness Bill 2012* (2012) 4; Anglicare Australia, *Submission Brief to the Homelessness Bill 2012 – Exposure Draft* (2012) 1. See further Catherine Robinson, ‘Understanding Iterative Homelessness: The Case of People with Mental Disorders’ (Final Report No 45, Australian Housing and Urban Research Institute, July 2003).

- (f) the person is living in a caravan park, boarding house, hostel or similar accommodation, whether on a short-term or long-term basis, in respect of which the person has no secure lease and the person is not living in that accommodation by choice.

This final definition of homelessness closely resembles the Chamberlain and Mackenzie definition, with sub-section (c) added to address some of the problems with taking a purely instrumental approach.

Some of the organisations that responded to the draft Bill recommended an alternative definitional approach. They suggested that the Bill define 'adequate housing' (perhaps in accordance with the Chamberlain and Mackenzie definition) and then include 'lack of adequate housing' as just one example of homelessness.<sup>55</sup> This way, homelessness could be defined broadly to include lack of adequate housing, but also having access only to unsafe or insecure housing, or having no 'legitimacy or control' over the spaces in which one lives.<sup>56</sup>

### **D The Case for Homelessness Legislation in Australia**

For the homelessness sector, the attractiveness of homelessness legislation is that it provides an opportunity to create entitlements to housing, as opposed to mere gratuities.<sup>57</sup> Legislation also has an important role to play in providing general guidance and direction on responses to homelessness, outlining proper processes and establishing accountability mechanisms to guide policy implementation.<sup>58</sup>

The question to be addressed here is whether the proposed Bills are the most effective means of legislating around the issue of homelessness in Australia, and whether they represent an improvement on, or even an alternative to, the existing Act.

## **IV HOMELESSNESS LEGISLATION: SOME INTERNATIONAL EXAMPLES**

When developing or improving responses to social policy issues, it is usual for governments to examine the approaches of other countries with

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55 Australian Human Rights Commission, *Submission on the Exposure Draft*, above n 54, 3; PILCH Homeless Persons' Legal Clinic and Council to Homeless Persons, above n 54, 4.

56 Anne Coleman proffered an alternative definition of homelessness: 'having no legitimacy or control over the spaces in which you live, and no legitimated role within the community in which you live': Coleman, above n 48.

57 As to the differences between a rights-based and a welfare response to homelessness, see Cassandra Goldie, 'Rights versus Welfare: Fostering Community and Legal Activism in Support of People Facing Homelessness' (2003) 28 *Alternative Law Journal* 132.

58 See James Farrell, 'The Road Home: Australians' Right to Adequate Housing' (2009) 34 *Alternative Law Journal* 227, 229.

similar problems.<sup>59</sup> An effective law or policy framework elsewhere may be transferrable. Alternatively, governments may learn what not to do from the negative experiences of others.

Various models for homelessness legislation exist throughout the world. In some jurisdictions, there exists a legally enforceable right to housing.<sup>60</sup> The examples discussed here are Scotland, England and Wales and France. Ireland is also discussed, despite the absence of a legally enforceable right. When housing legislation was debated in Ireland, the same objections to an individually enforceable right to housing were raised as those in Australia. There were concerns that the creation of individual rights to housing would create an unsustainable financial burden on the state, result in costly court action and reduced flexibility.<sup>61</sup> Ultimately, the *Housing Act 1988* (Ireland) created an expectation that local authorities would assist those experiencing homelessness, rather than imposing a legal obligation to do so.<sup>62</sup> Each of the jurisdictions discussed here provide helpful examples to guide Australia's response to homelessness law.

### A Scotland: A Right to Accommodation

Scotland is widely recognised as having the most progressive homelessness legislation in the world.<sup>63</sup> The *Homelessness etc (Scotland) Act 2003* (Scot) asp 10 creates an enforceable right to accommodation for people who are unintentionally homeless.<sup>64</sup>

A person is considered homeless if they have 'no accommodation'. A person has no accommodation if, for example:

- there is no accommodation available to them which it would be reasonable for them to continue to occupy (when making this

59 Richard Rose, 'What Is Lesson-Drawing?' (1991) 11 *Journal of Public Policy* 3; Fabrizio Gilardi, 'Who Learns from What in Policy Diffusion Processes?' (2010) 54 *American Journal of Political Science* 650.

60 One example not explored here is South Africa. The right to housing is an entrenched right under the South African Constitution and it has been judicially enforced: see *Constitution of the Republic of South Africa Act 1996* (South Africa) s 26(3); *South Africa v Grootboom* [2001] 1 SA 46 (Constitutional Court). The South African approach is not discussed in detail here because having a constitutionally entrenched right to housing is not, at the present time, a realistic possibility in Australia. See further Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011) 222–5.

61 Beth Watts, 'Rights, Needs and Stigma: A Comparison of Homelessness Policy in Scotland and Ireland' (2013) 7(1) *European Journal of Homelessness* 41, 44.

62 *Housing Act 1988* (Ireland) s 10.

63 Isobel Anderson and Regina Serpa, 'The Right to Settled Accommodation for Homeless People in Scotland: A Triumph of Rational Policy-Making?' (2013) 7(1) *European Journal of Homelessness* 13, 14.

64 A person is considered 'intentionally homeless' if they deliberately do, or fail to do, anything in consequence of which they cease to occupy accommodation which is available for their occupation and which would have been reasonable for them to continue to occupy: *Housing (Scotland) Act 1987* (UK) c 26, s 26(1).

determination, regard may be had to the general circumstances prevailing in relation to housing in that local area);

- the person has accommodation but they cannot secure entry to it, for example, because it is probable that occupation of it will lead to violence, or threats of violence, from some other person residing in it, or from someone who previously resided with that person whether in that accommodation or elsewhere;
- the person has accommodation but it is overcrowded.<sup>65</sup>

The Act states that '[i]f the local authority have reason to believe that an applicant may be homeless ... they shall secure that accommodation is made available for his [sic] occupation'.<sup>66</sup> The effect of this section is that if the local authority is satisfied the applicant is homeless,<sup>67</sup> they must provide the person with accommodation.<sup>68</sup> Previously, local authorities were only required to house those who fell within a 'priority need' category,<sup>69</sup> however at the end of 2012, legislation was passed to abolish the priority need test. Now, every person who is unintentionally homeless has a right to accommodation.<sup>70</sup> This is a legally enforceable right, and it is accompanied by rights to receive reasons for local authority decisions, to have decisions reviewed, and to be informed of the right to review.<sup>71</sup> In addition to this, every local authority is required to carry out assessments of homelessness, and prepare strategies for preventing and alleviating homelessness, in their area.<sup>72</sup> The legislation also provides for the personal property of people experiencing homelessness to be protected,<sup>73</sup> and it

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65 *Housing (Scotland) Act 1987* (UK) c 26, s 24.

66 *Housing (Scotland) Act 1987* (UK) c 26, s 29.

67 The obligation to house is subject to the outcome of inquiries made into the person's situation – if the local authority determines that they are not satisfied that the person is homeless or threatened with homelessness, they must notify the person and provide reasons: *Housing (Scotland) Act 1987* (UK) c 26, s 30.

68 *Housing (Scotland) Act 1987* (UK) c 26, s 31.

69 Priority need is defined at s 25(1) of the *Housing (Scotland) Act 1987* (UK) c 26 as persons who are, or might reasonably be expected to reside with persons who are: pregnant; dependent children; vulnerable as a result of old age, mental illness, handicap, physical disability or some other special reason; or homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

70 In respect of those who are intentionally homeless, local authorities are not relieved of all their obligations. If an intentionally homeless person falls within a priority need category, short stay accommodation must be secured for them, provided they have not had a prior tenancy terminated by their own fault: *Homeless etc (Scotland) Act 2003* (Scot) asp 10, s 5(2), inserting *Housing (Scotland) Act 1987* (UK) c 26, s 31(2C). For those who are experiencing difficulty in sustaining a tenancy, such housing support services as are considered appropriate must be provided to the person until they become eligible to reapply: *Homeless etc (Scotland) Act 2003* (Scot) asp 10, s 6, amending *Housing (Scotland) Act 2001* (Scot) asp 10.

71 *Housing (Scotland) Act 1987* (UK) c 26, ss 30–2, 35A.

72 *Housing (Scotland) Act 2001* (Scot) asp 10, s 1.

73 *Housing (Scotland) Act 1987* (UK) c 26, s 36.

creates rights for public housing tenants to buy their property under certain circumstances.<sup>74</sup>

Together, the provisions of the Act create a scheme that enables people to become housed quickly, and supports them to maintain their housing into the long-term. The policies underpinning Scottish homelessness legislation emphasise the importance of local authorities having clearly articulated strategies for addressing homelessness in their area, and of working in partnership across government and non-government agencies.<sup>75</sup> The dialogue that occurs between local authorities and government, and between non-government agencies and local authorities, is crucial to the success of the scheme because it is implemented locally but governed by national legislation.<sup>76</sup>

While the Scottish executive's initial vision of 'permanent accommodation' for all people experiencing homelessness has been replaced in recent years by the more diluted concept of 'settled accommodation',<sup>77</sup> the fact that individuals and families receive immediate housing in times of crisis makes Scotland's system one of the most effective in the world. It has survived changes in government and economic conditions, and has successfully expanded in scope over its 11 years as originally planned.<sup>78</sup>

## B England and Wales: An Enforceable Duty to House

It was the United Kingdom's ('UK') housing laws that formed the foundations for the Scottish system. The UK's legislative response to homelessness dates back to the *Housing (Homeless Persons) Act 1977* (UK) c 48. Since this Act, local authorities have been legally required to take reasonable steps to secure accommodation for those who are 'unintentionally' homeless<sup>79</sup> and have a 'priority need',<sup>80</sup> and to take reasonable steps to prevent people at risk of homelessness from losing their existing accommodation.<sup>81</sup>

These obligations have continued and have been consolidated by the *Housing Act 1996* (UK) c 52 and the *Homelessness Act 2002* (UK) c 7. 'Priority need' categories are defined to include households with: pregnant women; dependent children; adults who are vulnerable because of old age, mental illness or

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74 'Right to buy' provisions are at *Housing (Scotland) Act 1987* (UK) c 26, ss 61–8.

75 Eric S Tars and Caitlin Egleson, 'Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States' (2009) 16 *Georgetown Journal on Poverty Law and Policy* 187, 199.

76 Ibid 203.

77 Anderson and Serpa, above n 63, 21.

78 Ibid 34.

79 A person becomes homeless intentionally if they deliberately do or fail to do anything in consequence of which they cease to occupy accommodation which is available and would have been reasonable for them to occupy: *Housing (Homeless Persons) Act 1977* (UK) c 48, s 17(1) (as originally passed).

80 *Housing (Homeless Persons) Act 1977* (UK) c 48, s 3(4) (as originally passed).

81 *Housing (Homeless Persons) Act 1977* (UK) c 48, s 4(4) (as originally passed).

disability; people who are homeless as a result of an emergency such as fire or flood; and people who belong to a specific group (such as 16 and 17 year olds).<sup>82</sup> Applicants must also demonstrate that they have a 'local connection' to the local authority they are applying to for housing.<sup>83</sup>

The purpose of the *Homelessness Act 2002* (UK) c 7 was to emphasise early intervention approaches, and to encourage local authorities to develop preventative strategies to address homelessness in their areas. Pawson says that since 2003, there has been 'intense' local authority activity directed towards meeting these goals.<sup>84</sup> In particular, projects have included those that assist people to access and maintain private tenancies, and those involving family mediation to prevent youth homelessness.<sup>85</sup>

The local authorities work closely with housing associations and other voluntary sector organisations to provide social housing in each area to provide accommodation.<sup>86</sup> As public housing rental stock has declined, the role of housing associations in providing social housing has increased, and housing associations are now required to make a proportion of their stock available for homeless households that require temporary accommodation.<sup>87</sup> Supported accommodation is also provided to those experiencing difficulty in sustaining tenancies; support services are provided by charitable organisations that are funded by government.<sup>88</sup>

It has been said that the UK system does not provide individuals with a right to accommodation. Rather, the law places an obligation on local authorities to provide housing, which allows a person to sue if the local authority does not abide by its obligations.<sup>89</sup> However, these obligations are clear and specific enough for people experiencing homelessness to rely on them, and to be able to challenge decisions made under the legislation in the courts.<sup>90</sup>

Commentators in the UK are broadly optimistic about and supportive of their homelessness laws. Pawson notes that despite changes in economic conditions, numbers of homeless households continued to decline post-2003.<sup>91</sup> He attributes

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82 *Housing Act 1996* (UK) c 52, s 189.

83 If an applicant does not have a local connection to the district, the local housing authority may refer them to another authority: *Housing Act 1996* (UK) c 52, s 198. A person may have a local connection with a district because he or she has previously resided there, is employed there, has family there or has other special circumstances: *Housing Act 1996* (UK) c 52, s 199.

84 Hal Pawson, 'Local Authority Homelessness Prevention in England: Empowering Consumers or Denying Rights?' (2007) 22 *Housing Studies* 867, 868.

85 However, this is not universally supported: see *ibid* 869, 877.

86 Marie Loison-Leruste and Deborah Quilgars, 'Increasing Access to Housing: Implementing the Right to Housing in England and France' (2009) 3 *European Journal of Homelessness* 75, 79–80.

87 *Ibid* 84–5.

88 *Ibid* 80.

89 Suzanne Fitzpatrick and Mark Stephens, Department for Communities and Local Government, *An International Review of Homelessness and Social Housing Policy* (2007) 58.

90 *Ibid*.

91 Pawson, *above n* 84, 877.

this to the proactive approach encouraged by the *Homelessness Act 2002* (UK).<sup>92</sup> Having said this, Loison-Leruste and Quilgars state that the number of people in temporary accommodation has remained relatively stable over the years.<sup>93</sup> This suggests that households still struggle to find long-term housing options.

### C France: Enforceable and ‘Symbolic’ Rights

France’s legislative response to homelessness was modelled on the Scottish system and there are many similarities between them.<sup>94</sup> The most important legal difference, though, is that prior to the passing of their homelessness legislation, the right to housing was already enshrined in the French Constitution. The French Constitution states that the nation is under an obligation to provide the individual and the family with ‘the conditions necessary to their development’.<sup>95</sup> It guarantees ‘material security’ to all, and states that ‘[a]ll people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society’.<sup>96</sup> In 1971, the French Constitutional Court held that all rights in the French Constitution had equal constitutional value.<sup>97</sup> Civil and political rights, therefore, are not legally paramount, so the legislature can pass legislation that seeks to advance socio-economic rights, even if it infringes ‘individual liberty rights’.<sup>98</sup>

A justiciable right to housing was not introduced in France until 2008 through the *Enforceable Right to Housing Act 2007* (France) (‘*DALO Act*’).<sup>99</sup> The *DALO Act* was passed in recognition of the fact that the previous ‘best efforts’ obligation had failed to ensure that people experiencing homelessness received housing within a reasonable period of time.<sup>100</sup> Despite France’s progressive

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92 Ibid 879.

93 Loison-Leruste and Quilgars, above n 86, 84.

94 Marie Loison, ‘The Implementation of an Enforceable Right to Housing in France’ (2007) 1 *European Journal of Homelessness* 185, 193 ff.

95 This is stated in *La Constitution du 27 octobre 1946* [French Constitution of 27 October 1946] Preamble para 10 [French Constitutional Court’s trans], and affirmed in *La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] Preamble. The Constitutional Court has confirmed that the rights enshrined in the Preamble are enforceable: Conseil constitutionnel [French Constitutional Court], decision no 71-44 DC, 16 July 1971 reported in JO, 18 July 1971, 7114.

96 *La Constitution du 27 octobre 1946* [French Constitution of 27 October 1946] Preamble para 11 [French Constitutional Court’s trans].

97 Conseil constitutionnel [French Constitutional Court], decision no 71-44 DC, 16 July 1971 reported in JO, 18 July 1971, 7114.

98 Eric S Tars, Julia Lum and E Kieran Paul, ‘The Champagne of Housing Rights: France’s Enforceable Right to Housing and Lessons for US Advocates’ (2012) 4 *Northeastern University Law Journal* 429, 444.

99 *Loi no 2007-290 du 5 mars 2007* [Law No 2007-290 of 5 March 2007] (France) JO, 6 March 2007, text 4.

100 The ‘best efforts’ obligation was in the *Loi no 90-449 du 31 mai 1990* [Law No 90-449 of 31 May 1990] (France) JO, 8 July 1989, 8541, commonly known as the *Besson Act*. See further *Loi no 2007-290 du 5 mars 2007* [Law No 2007-290 of 5 March 2007] (France) JO, 6 March 2007, text 4.

constitutional law, homelessness persisted as social housing stock was inadequate to meet demand. The 2008 reforms were introduced in response to the deaths of a number of residents as a result of a fire that broke out in substandard temporary housing in Paris.<sup>101</sup> A grassroots movement rose up in solidarity with people experiencing homelessness, supported by advocacy organisations, celebrities and students.<sup>102</sup> Associated media coverage, and a complaint to the European Committee of Social Rights by a prominent federation of homelessness organisations,<sup>103</sup> prompted a private member's bill establishing an enforceable right to housing.<sup>104</sup>

Like in Scotland, the *DALO Act* realised the right to housing in a progressive manner: it applied to the most disadvantaged groups from 2008 but, since 2012, the right has extended to all persons and households that qualify for social housing.<sup>105</sup>

As in the UK, the French 'right' to housing is justiciable in the sense that a person can take legal action against a public authority for failing to fulfil its obligation to provide housing.<sup>106</sup> If a person qualifies for social housing but has not received an appropriate offer of housing after an 'abnormally long time', they can take their case to the mediation committee,<sup>107</sup> which includes representatives from housing and tenants' organisations, and then to the administrative tribunal if necessary.<sup>108</sup> The tribunal has the power to order the state to house the applicant and may impose a fine if they fail to do so.<sup>109</sup> However, there are no remedies available under the *DALO Act* against the central government if the committee's decision is not acted upon.<sup>110</sup>

The French right to housing is implemented primarily through an extensive rental subsidy scheme; indeed, around 50 per cent of all French tenants receive a rent subsidy.<sup>111</sup> Private property owners are encouraged to participate in affordable housing schemes by leasing their properties to the government, who then lets the house at an affordable rate. In return, the government contributes to the costs of improving the property, thereby increasing its value.<sup>112</sup> Tars, Lum

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101 Loison, above n 94, 187.

102 See Tars, Lum and Paul, above n 98, 445.

103 See *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* (European Committee on Social Rights, Complaint 39/2006, 5 December 2007).

104 Loison, above n 94, 187.

105 Ibid 189–90.

106 Loison-Leruste and Quilgars, above n 86, 77.

107 Tars, Lum and Paul explain that the mediation committee is similar to a common law administrative tribunal: Tars, Lum and Paul, above n 98, 451 fn 118.

108 Ibid 450–1.

109 Loison, above n 94, 190. Fines are paid into a regional urban development fund which funds social housing: Tars, Lum and Paul, above n 98, 452.

110 Loison-Leruste and Quilgars, above n 86, 87.

111 Tars, Lum and Paul, above n 98, 437–8.

112 *Code de la construction et de l'habitation* [Building and Housing Code] (France) art L321-4, cited in Tars, Lum and Paul, above n 98, 453 fn 134.



and Paul report that this subsidised rental scheme has been central to the success of the *DALO Act*.<sup>113</sup> They acknowledge that housing supply continues to be a challenge, but they are generally supportive of the laws because a significant amount of housing has been provided to people in need under the Act.<sup>114</sup>

### D Ireland: A Policy-Based Approach to Homelessness

It has been suggested that the success of the Scottish system, in particular, indicates that a rights-based approach offers the best response to homelessness.<sup>115</sup> However, one Irish commentator has argued that a ‘consensual’ approach can work, and has brought about significant reductions in homelessness in Ireland.<sup>116</sup>

Like Australia, in Ireland there is no right to housing. The *Housing Act 1988* (Ireland) confirms that local housing authorities have responsibility for assisting people who are homeless. However, the Act enables, rather than obliges, local housing authorities to assist.<sup>117</sup> The Act also enables, but does not compel, local housing authorities to provide assistance to voluntary organisations that provide and manage housing.<sup>118</sup>

The Irish response has been shaped under the ‘social partnership’ process.<sup>119</sup> Until recently, every three years, representatives from government, employers, unions and non-government organisations came together to negotiate a consensus on the strategic direction of economic and social policy.<sup>120</sup> Out of this process came the ‘Homelessness Initiative’ in 1996, which was a policy response aimed at ensuring effective coordination in the delivery of services, and the development of programs, to enable people to exit the cycle of homelessness.

One legal obligation was imposed. Under the *Planning and Development Act 2000* (Ireland), local authorities are required to prepare housing strategies.<sup>121</sup> Similarly, under section 9 of the *Housing Act 1988* (Ireland), local authorities are required to carry out assessments every three years of the need for accommodation services in their area. In 2002, the policy-based ‘Homelessness Strategy’ was introduced, requiring Homeless Forums to be established in every local area to prepare these three year action plans. The revised National Homeless Strategy of 2008 set out a number of strategic aims including

113 Tars, Lum and Paul, above n 98, 458.

114 Ibid 458.

115 Watts, above n 61, 42.

116 See Eoin O’Sullivan, ‘Sustainable Solutions to Homelessness: The Irish Case’ (2008) 2 *European Journal of Homelessness* 205.

117 *Housing Act 1988* (Ireland) s 10(1).

118 *Housing Act 1988* (Ireland) s 5(1).

119 As to ‘social partnership’ generally, see William K Roche, ‘Social Partnership in Ireland and New Social Pacts’ (2007) 46 *Industrial Relations: A Journal of Economy and Society* 395.

120 It appears the social partnership process collapsed in 2010: see Michael Doherty, ‘It Must Have Been Love ... but it’s Over Now: The Crisis and Collapse of Social Partnership in Ireland’ (2011) 17 *European Review of Labour and Research* 371.

121 *Planning and Development Act 2000* (Ireland) s 94.

eliminating rough sleeping, eliminating long-term homelessness, preventing homelessness and ensuring effective service delivery.<sup>122</sup>

A report by a coalition of voluntary organisations states that initiatives such as the three-year action plans have had ‘disappointing’ outcomes because they are not legislatively required.<sup>123</sup> However, O’Sullivan states that despite the lack of housing ‘rights’, there is broad consensus amongst statutory and non-government agencies ‘on tackling homelessness’.<sup>124</sup> O’Sullivan also notes that homelessness in Ireland has continued to fall despite economic recession.<sup>125</sup> He says that, while social housing has decreased,<sup>126</sup> access to private rental accommodation has increased due to the expansion of the rent supplement system, assisted by large funding injections.<sup>127</sup> Ultimately, O’Sullivan argues that whilst rights-based approaches to homelessness have an ‘intuitive appeal’, consensus-based solutions may provide more ‘robust’ results in the long-run.<sup>128</sup>

## V Symbolic Legislation

The proposed Homelessness Bill 2013 (Cth) does not establish any rights to housing, or duties to house. The Bill merely sets out a series of principles and aspirations which are not legally enforceable and have no capacity to change how services are delivered or the scale on which they are delivered. Nor does the Bill set out a strategy to tackle homelessness. It seems pertinent to ask, therefore, whether the Bill is necessary at all.<sup>129</sup>

The Department of the Prime Minister and Cabinet’s Legislation Handbook states that when making Acts, departments should give ‘careful consideration to whether legislation is actually needed or whether administrative action would be sufficient’.<sup>130</sup> It further states that legislation should not be proposed ‘simply to give a matter “visibility”’ and that Office of Parliamentary Counsel (‘OPC’) resources should only be used for ‘proposals which cannot proceed

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122 O’Sullivan, above n 116, 218.

123 Focus Ireland et al, *Housing Access for All? An Analysis of Housing Strategies and Homeless Action Plans* (2002) 107. Other organisations co-authoring the report are the Simon Communities of Ireland, Society of St Vincent de Paul, and Threshold.

124 O’Sullivan, above n 116, 217. However, some commentators disagree that consensus has been achieved: see Rosie Meade, ‘We Hate it Here, Please Let Us Stay! Irish Social Partnership and the Community/Voluntary Sector’s Conflicted Experiences of Recognition’ (2005) 25 *Critical Social Policy* 349.

125 O’Sullivan, above n 116, 220, 227.

126 To only 10 per cent of total housing output: *ibid.*

127 *Ibid.*

128 *Ibid* 229.

129 This is a question that was raised by NSW government in its submission to the Commonwealth regarding the exposure draft: see Department of Premier and Cabinet (NSW), Submission No 96 to Standing Committee on Family, Community, Housing and Youth, *Inquiry into Homelessness Legislation*, 14 September 2009, 8.

130 Department of Prime Minister and Cabinet, *Legislation Handbook* (2000) 1 [1.3].

without legislation'.<sup>131</sup> Arguably, in drafting the Homelessness Bill, these guiding principles of the Department of the Prime Minister and Cabinet have, for some reason, been cast aside. In its current form, the Homelessness Act would be only 'symbolic' in nature if the Bill were to pass.

'Symbolic legislation' is law that is designed to remain ineffective.<sup>132</sup> Though symbolic Acts may contain 'ambitious officially declared objectives',<sup>133</sup> they are deceptive in that they do not alter rights, duties or interests. Symbolic legislation either deliberately misleads the public, or amounts to self-deception by politicians who are, perhaps, divided between a desire to support a cause and concerns about its financial cost.<sup>134</sup> Siehr goes so far as to say that symbolic laws do not adhere to 'standards of rationality and objectivity' and are 'unjust' because of their deceptive character.<sup>135</sup> They are technically permissible, of course, by virtue of the notion of parliamentary sovereignty, but the question is whether they are legitimate or not.<sup>136</sup>

Symbolic legislation is not uncommon in the area of environmental law.<sup>137</sup> However, Newig states that it is the 'primarily symbolic quality of many environmental laws' that 'is widely held responsible for the fact that ... many major environmental problems still remain unsolved'.<sup>138</sup> Newig points out another danger of symbolic legislation. That is, once it is passed, there can be a perception that the issue has been dealt with, thus stifling any future efforts to deal legislatively with the problem.<sup>139</sup> In many instances, this will be the intention of the legislature – to remove a controversial issue from the table.<sup>140</sup> As Edelman remarks, symbolic laws and policies are designed to make the public feel as though something is being done to solve a problem when in fact they do not make any real change.<sup>141</sup>

In the case of environmental legislation, particularly that which was passed in the late 2000s when the climate change debate reached its climax, this holds true

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131 Ibid 1 [1.4]. This is consistent with the principle of proportionality in jurisprudence, discussed in Angelika Siehr, 'Symbolic Legislation and the Need for Legislative Jurisprudence: The Example of the Federal Republic of Germany' (2008) 2 *Legisprudence* 271, 302.

132 Jens Newig, 'Symbolic Environmental Legislation and Societal Self-Deception' (2007) 16(2) *Environmental Politics* 276, 277.

133 Ibid.

134 Ibid 277, 282. See also Siehr, above n 131, 282, 296.

135 Siehr, above n 131, 282, 298.

136 Ibid 294. Another question, of course, is how public servants and judicial officers should enforce them: see further John P Dwyer, 'The Pathology of Symbolic Legislation' (1990) 17 *Ecology Law Quarterly* 233, 241; James A Henderson Jr and Richard N Pearson, 'Implementing Federal Environmental Policies: The Limits of Aspirational Commands' (1978) 78 *Columbia Law Review* 1429, 1431.

137 See especially Dwyer, above n 136; Henderson and Pearson, above n 136.

138 Newig, above n 132, 276.

139 Ibid 277.

140 Ibid 279.

141 Murray Edelman, *The Symbolic Uses of Politics* (University of Illinois Press, 1964) 38, 164–5.

because there was strong community consensus that action needed to be taken.<sup>142</sup> However, homelessness legislation is much more marginal than this. There are few powerful stakeholders. Indeed, the legislation's beneficiaries are amongst the most disempowered groups within society.<sup>143</sup> There must, therefore, be other motivations at play.

Marion has acknowledged some legitimate functions of symbolic legislation, for example, symbolic legislation may have a moral educative function.<sup>144</sup> It may help create a 'moral consensus' around an issue and increase understanding.<sup>145</sup> It may affirm, or try to change, certain values.<sup>146</sup> This perspective credits legislators with a measure of beneficence, and in the social policy area of homelessness, it does seem plausible that adherence to social justice-type values prompted this legislative response. The legislators may have personally valued progressive homelessness laws and policies, but feared electoral backlash against the cost of implementing a right to housing.<sup>147</sup>

Marion has also noted that symbolic legislation is more common, and seems more acceptable, when the area of law being legislated on is a matter over which the legislator lacks clear jurisdiction, or which is practically difficult to regulate.<sup>148</sup> It may provide suggestions for law to other jurisdictions that may be more appropriate legislators in respect of the matter.<sup>149</sup> This is true of homelessness, which is an area of shared responsibility between the Commonwealth and the states. A significant proportion of funding has traditionally come from the Commonwealth, but service delivery has always been state-based. Funding arrangements, over the years, have often been fragile with both sides demonstrating a reluctance to fund homelessness programs generously.<sup>150</sup> It is possible that the Labor Government aimed to demonstrate leadership in this social policy area, but felt unable to legislate decisively on key issues. Indeed, the legislative competence of the Commonwealth in respect of housing and homelessness was raised by both the New South Wales and Queensland governments during the consultation process. The Premier of Queensland questioned whether a target-based right to accommodation would be

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142 Dwyer, above n 136; Henderson and Pearson, above n 136; Newig, above n 132.

143 Note, however, that Newig opines that important interest groups are more likely to be satisfied with substantial legislation, whilst less important interest groups are more likely to be satisfied merely symbolically: Newig, above n 132, 284.

144 Nancy E Marion, 'The Council of Europe's Cyber Crime Treaty: An Exercise in Symbolic Legislation' (2010) 4 *International Journal of Cyber Criminology* 699, 706.

145 Ibid.

146 Dwyer, above n 136, 249–50.

147 As Newig says, politicians will 'seek to please a maximum number of voters whilst minimising the number who might be alienated by the projected policy': Newig, above n 132, 283.

148 Marion, above n 144.

149 Ibid 706.

150 See Erebus Consulting Partners, *National Evaluation of the Supported Accommodation Assistance Program (SAAP IV): Final Report* (2004) 172–6.

enforceable in Australia.<sup>151</sup> The New South Wales Department of Premier and Cabinet commented that the federal government should clarify the basis on which it sought to legislate with respect to homelessness in light of its constitutional powers and the NAHA.<sup>152</sup> The constitutional basis for homelessness legislation is discussed further below.<sup>153</sup>

## VI HOMELESSNESS LEGISLATION FOR AUSTRALIA: DISCUSSION

### A Lessons from the International Examples

Housing policy forces us to marry what Glendon calls the ‘two halves of the divided soul of liberalism – our love of individual liberty and our sense of a community for which we accept a common responsibility’.<sup>154</sup> The problem with homelessness policy is that housing is both a market commodity and a public good.<sup>155</sup> In most Western countries, housing policy involves the state providing ‘correctives’ to the housing market.<sup>156</sup>

In Australia, there has been a clear reluctance to recognise, let alone legislate for, social rights.<sup>157</sup> Those few rights that have been legislated for are civil or political in nature – what King calls ‘freedom rights’.<sup>158</sup> King argues that many governments, of which Australia’s is certainly one, underestimate the importance of the right to housing.<sup>159</sup> He argues that housing should be considered a ‘freedom right’, like the right to life and the right to property, rather than a socio-economic right.<sup>160</sup> He argues that people experiencing homelessness have nowhere to go, and as a result, they have no right to do anything – thus, they do not have freedom.<sup>161</sup> This means that a ‘right to place’ is necessary for freedom, and should be considered equal to any other ‘freedom right’.<sup>162</sup>

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151 Queensland Government, Submission No 92 to House of Representatives Standing Committee on Family, Community, Housing and Youth, *Inquiry into Homelessness Legislation*, 2009, 17.

152 Department of Premier and Cabinet (NSW), above n 129, 7.

153 See below Part VI(C).

154 Mary Ann Glendon, ‘Rights in Twentieth-Century Constitutions’ (1992) 59 *University of Chicago Law Review* 519, 536.

155 Bo Bengtsson, ‘Housing as a Social Right: Implications for Welfare State Theory’ (2001) 24 *Scandinavian Political Studies* 255, 257.

156 Ibid. Indeed, Bengtsson says that in Sweden, housing policy is implemented through ‘supporting the household in its position as market actor’, rather than providing social housing: at 264.

157 Hillary Charlesworth, ‘The Australian Reluctance about Rights’ in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, 1994) 21.

158 Peter King, ‘Housing as a Freedom Right’ (2003) 18 *Housing Studies* 661.

159 Ibid 663.

160 Ibid 665.

161 Ibid 668.

162 Ibid 668–9.

It is not unusual in European countries for the ‘right to housing’ to be considered so fundamental that it is included in the national constitution.<sup>163</sup> Housing rights are also protected in the revised European Social Charter.<sup>164</sup> However, constitutional and charter rights such as these are often considered to be only goals which governments agree to aspire to. Governments commit to developing and implementing laws and policies that protect these rights, but it is rare in Europe, and indeed around the world, for individuals’ social rights to be justiciable in the sense that they are in Scotland and France.<sup>165</sup>

Watts has argued that enforceable rights to housing can contribute to the stigma attached to homelessness.<sup>166</sup> She argues that consensual, policy-based approaches are more likely to attract public support while, in a rights-based system, individuals may be seen as ‘demanding’ and may have ‘unrealistic expectations’ of the state.<sup>167</sup> She implies that it may be preferable for service users to express ‘gratitude and relief’ rather than a sense of entitlement and assertive attitudes.<sup>168</sup> She says ‘[l]egal rights seem to promote higher expectations and a sense of legitimate entitlement’, whilst those who rely on ‘charity’ have a greater sense of ‘personal responsibility for moving on from homelessness’ and ‘a tendency to be uncritical’ of services.<sup>169</sup> Legal rights to housing can also encourage ‘perverse’ incentives to ‘go homeless’ to attract support, the classic example in the UK being the allegation that people may decide to enter into a pregnancy in order to come within a ‘priority need’ category.<sup>170</sup>

Yet, King argues in favour of rights-based approaches because they suggest that each individual is important.<sup>171</sup> They ‘locate significance at the level of individuals’ and they ‘prohibit any trade-off between individuals and groups’ where the interests of some may be sacrificed for the benefit of others.<sup>172</sup> They force us to concentrate on morality rather than utility or economy.<sup>173</sup> And it

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163 See, eg, *Kungörelse (1974: 152) om beslutad ny regeringsform* [Constitution of Sweden – Instrument of Government 1974] art 2; *Constitución Española 1978* [Spanish Constitution 1978] art 47; *La Constitution belge / De Belgische grondwet / Die Verfassung Belgiens* [Belgian Constitution] art 23.

164 *European Social Charter (Revised)*, opened for signature 3 May 1996, CETS No 163 (entered into force 1 July 1999) art 31 reads:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

165 The other notable example is South Africa, see above n 60.

166 Watts, above n 61, 48.

167 Ibid 58.

168 Ibid.

169 Ibid 59–60, 62.

170 Ibid 61.

171 King, above n 158, 663.

172 Ibid 662.

173 Ibid 663–4.

cannot be disputed that enforceable rights to housing do effectuate the provision of accommodation to people in need, even if the unintended consequence is generosity towards those considered ‘undeserving’.

### B What Next for Australia?

Regardless of Australia’s position on housing rights, a definition of homelessness must be agreed upon in Australian law. As has been noted, this was a matter of contention in submissions on the Homelessness Bill 2013 (Cth). It is widely acknowledged that any definition of homelessness must extend beyond rooflessness, but Fitzpatrick notes that if the definition of homelessness is extended too far, it becomes ‘entirely useless’.<sup>174</sup> Any definition of homelessness must remain targeted enough to ensure that those who need accommodation get it, rather than being lost in the vast pool of those seeking assistance.<sup>175</sup> This criticism has been levelled at the French system, where an estimated 600 000 households are eligible for housing assistance under the *DALO Act*, 10 times the quota.<sup>176</sup> A broad definition might also encourage the assumption that there are commonalities between the vast array of homeless households when there are not; some people experiencing homelessness encounter other social problems (such as drug misuse or mental illness), but that is not true of all.<sup>177</sup> Watts argues against wide legislative definitions of homelessness. She says that they can unnecessarily catch large numbers of people within their stigmatised web,<sup>178</sup> and that individuals should be able to obtain assistance without being ‘tag[ged]’ as ‘homeless’.<sup>179</sup>

Once a definition is agreed upon, thought needs to be given to whether it should be applied in service delivery and in the homeless censuses. A single definition would enable an accurate assessment of need to be made for the purpose of funding, program planning and policy development. However, if a narrow definition of homelessness is applied, a different definition for service delivery may be required. Otherwise, those who are at risk, or require continuing support, may be excluded from services.

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174 Suzanne Fitzpatrick, ‘Homelessness in the European Union’ in Mark Kleinman, Walter Matznetter and Mark Stephens (eds), *European Integration and Housing Policy* (Routledge, 1998) 197, cited in Pawson, above n 84, 870.

175 See generally Pawson, above n 84.

176 Loison-Leruste and Quilgars, above n 86, 90.

177 See Pawson, above n 84.

178 Watts, above n 61, 55.

179 Ibid 56.

It is close to impossible that the current Australian government could be persuaded to pass a law creating an enforceable right to housing,<sup>180</sup> but perhaps it will support the ‘aspirational legislation’ that has been proposed. What would the homeless sector think of this? Is symbolic legislation better than no legislation from the point of view of people experiencing homelessness? Absent strong leadership and community support for its values, possibly not. As Loison-Leruste and Quilgars point out, a rights-based approach is most necessary in countries with a poorer record of housing provision, and where homelessness has reached socially unacceptable levels.<sup>181</sup> If the Rudd Government’s vision to address homelessness was to have been realised, resolute commitment to achieving the set targets would have been required, demonstrated through funding and monitoring. This will not occur now.

Having said this, whilst the government would not consider itself bound by symbolic legislation in administrative decision-making, such legislation could have persuasive value in court proceedings. Although the Homelessness Bill 2013 (Cth) states that proceedings could not be brought in reliance on the proposed Act, it could influence judicial decision-making in related matters.

For example, the Commonwealth’s definition of homelessness could be applied in a variety of contexts, including:

- criminal cases where homelessness is an incident of the offence (including offences like unlawful camping out and other public order offences),<sup>182</sup>
- child protection cases, particularly where there are legislative requirements to deal with children and families experiencing homelessness in a particular manner;<sup>183</sup>
- eligibility criteria for specialty courts directed at people experiencing homelessness (such as the Infringements Court in Victoria).<sup>184</sup>

Further, references in the Act to the structural causes of homelessness might be applied in other matters. For example, in social housing eviction matters, a court might be persuaded to consider the tenant’s special vulnerability, and the external factors contributing to homelessness (such as family violence, abuse and mental health issues), before enforcing a possession order. Of course, the full

180 As noted below, Prime Minister Abbott has said he will not pursue the policy goals set by the Rudd Government in relation to homelessness: Michael Perusco, ‘Bible Bashing the Homeless, Abbott Style’, *Sydney Morning Herald* (online), 16 February 2010 <<http://www.smh.com.au/federal-politics/bible-bashing-the-homeless-abbott-style-20100215-o2tj.html>>. According to this article, Abbott indicated that he felt there was little the government could do for people who chose to be homeless.

181 Loison-Leruste and Quilgars, above n 86, 94.

182 As to homelessness and public order offences, see especially Walsh, above n 60, ch 3.

183 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 7 pt 2.

184 As to the Infringements Court, see *Infringements Act 2006* (Vic). Note the *Infringement (General) Regulations 2006* (Vic) reg 7 explicitly refers to the *Supported Accommodation Assistance Act 1994* (Cth) definition of homelessness.



range of matters in which the legislation might be cited cannot be reliably predicted.

### C Constitutional Basis for Homelessness Legislation

The most obvious source of legislative power with respect to homelessness is section 51(xxix) of the *Commonwealth Constitution*, the external affairs power. It is now settled law that the Commonwealth can introduce legislation to implement a treaty obligation.<sup>185</sup> The right to an adequate standard of living, including housing, is recognised at article 11 of the *International Covenant on Economic, Social and Cultural Rights*,<sup>186</sup> and the right not to be subjected to arbitrary interference with one's home is recognised at article 17 of the *International Covenant on Civil and Political Rights*.<sup>187</sup> Australia has ratified both these covenants, so there is no doubt the Commonwealth can legislate on the subject of housing and homelessness.

However, the question as to whether the Commonwealth could legislatively require the states to provide housing services to those in need is more controversial. A right to housing would best be implemented by directing the state and territory housing authorities to provide accommodation to individuals and households that come within a statutory definition of homelessness. The potential barrier to this is the implied doctrine of intergovernmental immunities. Since the *Constitution* assumes the continued existence of the states, the Commonwealth must not exercise its powers in such a way that it curtails their continued existence or their capacity to function as independent governments.<sup>188</sup> In *Clarke v Federal Commissioner of Taxation*, French CJ outlined the factors to be considered when deciding whether a Commonwealth law impermissibly encroaches upon the capacities or functions of the states.<sup>189</sup> Such factors include whether the law imposes a particular burden on the states, the effect of the law upon the capacity of the states to exercise their constitutional powers, and the effect upon the exercise of their functions.<sup>190</sup> Whether the effects of the law are significant enough to be constitutionally impermissible is to be judged

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185 See especially *Commonwealth v Tasmania* (1983) 158 CLR 1, 123–4 (Mason J), 218–20 (Brennan J), 259–60 (Deane J) ('*Tasmanian Dam Case*'); *Victoria v Commonwealth* (1996) 187 CLR 416, 485 (Brennan CJ, Toohey, Gleeson, McHugh and Gummow JJ), 570–1 (Dawson J) ('*Industrial Relations Act Case*').

186 ICESCR art 11. See further Annemarie Devereux, 'Australia and the Right to Adequate Housing' (1991) 20 *Federal Law Review* 223.

187 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17 ('*ICCPR*'). See further Cassandra Goldie, *Living in Public Space: A Human Rights Wasteland?* (PhD Thesis, University of New South Wales, 2008).

188 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J).

189 (2009) 240 CLR 272, 299 [34].

190 *Ibid.*

‘qualitatively’ and ‘by reference to its practical effects’.<sup>191</sup> If the Commonwealth were to require states to finance a large-scale housing program, which was particularly burdensome on state budgets, the High Court might consider this to be too intrusive.

However, the constitutional difficulties associated with the Commonwealth legislating with respect to homelessness are not insurmountable. The Commonwealth could always impose duties to house those in need upon specialist homelessness service providers (most of which are non-government organisations), rather than state and territory housing authorities. The Commonwealth could legislate to impose certain requirements on those service providers that receive Commonwealth funding, or the Commonwealth could make conditional grants to the states and territories requiring them to meet certain targets or fulfil certain duties.<sup>192</sup> The *Federal Financial Relations Act 2009* (Cth) implies a general commitment by the Commonwealth to fund ‘housing services’ but it does not contain any specific requirements as to how the funds are to be expended, or any guiding principles or spending priorities. Something more firm, and more detailed, is required for certainty.

## VII CONCLUSION

The fate of the Homelessness Bill 2013 (Cth) in the hands of the Abbott Government remains undecided. However, the current Prime Minister has confirmed that he will not continue to pursue the Rudd Government’s goal to halve homelessness by 2020.<sup>193</sup>

It seems that Kevin Rudd may have missed the one opportunity Australia had for progressive homelessness legislation. The introduction of a right to housing need not have overwhelmed the nation, either ideologically or economically. Both France and Scotland rolled out their housing rights over many years. This is consistent with our international human rights obligations with respect to social and economic rights – the United Nations calls only for ‘progressive realisation’.<sup>194</sup> Alternatively, the Commonwealth could have required housing providers to take ‘reasonable steps’ to secure accommodation for those who met the statutory definition of homelessness, rather than imposing a *duty* to accommodate.<sup>195</sup>

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191 Ibid 298 [33].

192 *Commonwealth Constitution* s 96.

193 Perusco, above n 180. According to this article, Abbott indicated that he felt there was little the government could do for people who chose to be homeless.

194 *ICESCR* art 2.1, cf *ICCPR* art 2.1.

195 See *Housing (Homeless Persons) Act 1977* (UK) c 48, s 17(1) (as originally passed).

If symbolic legislation is considered desirable, then there are ways it can be rendered more robust. Fuller argues that aspiration cannot be compelled,<sup>196</sup> but Henderson and Pearson put forward some suggestions to encourage compliance with symbolic legislation. First, they suggest that rewards, rather than punishment, can be utilised.<sup>197</sup> In the context of homelessness, a promised reward (such as a grant-in-aid) could be withheld if the service provider, or state, failed to meet certain performance targets.<sup>198</sup> Alternatively, Henderson and Pearson argue that objectives can be clearly outlined in symbolic legislation so that performance can, at least, be assessed.<sup>199</sup> A range of performance reasonably to be expected can be spelled out so that agents can work towards achieving the upper reaches of that range.<sup>200</sup>

What is true of any jurisdiction is that social and economic benefits to disadvantaged people can only be achieved with ‘active support of a citizenry’.<sup>201</sup> In a context of general social policy apathy, and a reluctance about rights,<sup>202</sup> at this time it is unlikely that policy alone can deliver significant benefits for people experiencing homelessness in Australia.

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196 Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 9.

197 Henderson and Pearson, above n 136, 1439–40.

198 Interestingly, this is similar to the *Supported Accommodation Assistance Act 1994* (Cth) ss 7, 8.

199 Henderson and Pearson, above n 136, 1441–2.

200 Ibid 1441.

201 Glendon, above n 154, 536.

202 Charlesworth, above n 157.