ADDRESSING HOMELESSNESS AS A VIOLATION OF HUMAN RIGHTS IN THE AUSTRALIAN CONTEXT

Dianne Otto
Associate Professor, Faculty of Law, The University of Melbourne[*]

Paper presented at the
3rd National Homelessness Conference 'Beyond the Divide'
convened by the Australian Federation of Homelessness Organisations
and held at the Sheraton Hotel Brisbane, 6-8 April 2003

[*] The Australian Research Council funded the research for this paper.

Introduction

Australia is now the only common law country that has no constitutional or legislatively enacted bill of rights. Yet Australia is a party to all the international human rights treaties and claims that it has an exemplary human rights record. So how *are* human rights protected in Australia? This is a question that all of the United Nations (UN) treaty committees, set up to monitor the implementation of human rights treaties, have asked, and, each time it has been asked, the Australian Government has had difficulty in satisfactorily answering.[1] Admittedly, the question does not have a simple answer, as human rights, to the extent that they are protected in Australia, are protected by a diverse array of legal, administrative and policy mechanisms that are not easily described or understood. However, the Government's difficulties in explaining this system are also related to the unsystematic and incomplete implementation of its international human rights obligations, which is plainly indefensible.

Much of the Government's recent promotion of the 'rights' of homeless people in Australia has focused on their rights as users or consumers of government-funded services, designed to assist homeless people. This approach has the effect of 'privatizing' the discussion of rights by focusing attention on the relationship between service users and service providers. As important as this discussion is, it has tended to divert attention from the government's own responsibilities in this area, especially the public (human) rights that homeless people have at international law, which the Australian state is legally bound to ensure are enjoyed by everyone, without discrimination.

The subject of my paper is the human rights obligations that attend this primary relationship - between the Australian state and those who come within its jurisdiction. I will begin by outlining the 'Australian approach' to the implementation of its international human rights obligations. While my focus is on economic and social rights, many of my comments apply equally to civil and political rights. Secondly, I use the recent Canadian case of a young homeless woman, Louise Gosselin, to illustrate what strategies for homeless people would be opened up in Australia by a constitutional bill of rights. Thirdly, I consider what remedies are currently available to someone in Louise's position in Australia. Finally, accepting that an Australian bill of rights is outside the present range of political possibilities, I conclude that there is considerable scope for arguing that the Government can and must do much more to implement its international human rights obligations, even within the framework of its preferred approach, before it can legitimately claim an exemplary record. I hope that this discussion will suggest how strategies aimed at addressing homelessness in Australia might utilize the tools offered by human rights discourse, in the absence of a bill of rights.

The 'Australian Approach'

The legal enforceability of economic and social rights, in areas like health, education, social security, food, clothing and housing, is an idea that Australian legal and political cultures have resisted. These rights are included in the International Covenant on Economic, Social and Cultural Rights (the Covenant),[2] which entered into force for Australia in 1976.[3] The Covenant creates an obligation, under international law, for Australia to progressively implement the rights it catalogues, which includes, in article 11, 'the right of everyone to an adequate standard of living … including adequate food, clothing and housing'. This obligation extends to all parts of federated states like Australia.[4] States parties to the Covenant enjoy significant discretion in choosing the measures they

[1] See further, Dianne Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights (2001) 26/5 *Alternative Law Journal* 219.
[2] The *International Covenant on Economic, Social and Cultural Rights* (the Covenant) was adopted by the United Nations General Assembly, Res 2200(XXI), 16 December 1966. It entered into force on 3 January 1976, 3 months after the 35th ratification.
[3] The Covenant was signed for Australia on 18 December 1972 and the instrument of ratification was deposited with the United Nations on 10 December 1975 without reservation. The Covenant subsequently entered into force for Australia on 10 March 1976.
[4] The Covenant, above n. 2, art. 28.

will adopt to implement their obligations under the Covenant. In Australia's case, since international treaties are generally not self-executing, its Covenant obligations must be incorporated into Australian law by legislation before they can be *directly* claimed as rights in the domestic legal system. Australia has limited its direct incorporation of Covenant rights to the adoption of anti-discrimination legislation, which, while important and necessary, falls a long way short of comprehensively prohibiting discrimination on all of the grounds enunciated by the Covenant.[5] Of most significance, for present purposes, is the failure of the Commonwealth to prohibit discrimination on the grounds of 'social origin, property, birth or other status' as required under article 2(2) of the Covenant, which would include the status of being a recipient of social security benefits.[6] Also, it should be recognized that anti-discrimination legislation does not necessarily ensure full realization of Covenant rights because it relies on a comparison with rights enjoyed by others. If no-one enjoys a particular Covenant right, then laws against discrimination will not help.

Rather than directly implementing human rights by making them judicially enforceable, Australia relies largely on the *indirect* effects of legislation and government policies and programs to ensure their enjoyment. Successive governments have taken this approach to most economic and social rights, as well as to many civil and political rights such as freedom of speech, the right to vote and the right to peaceful assembly. As explained in its recent periodic report to the UN Committee on Economic, Social and Cultural Rights, which monitors the implementation of the Covenant, the Government believes that "[i]n many cases, rights are more readily promoted by less formal processes [than traditional legal sanctions], often associated with inquiry, conciliation and report".[7] This indirect approach, it is argued, is consistent with the institution of responsible government in a democracy, which provides a guarantee that individual rights and freedoms will be protected, a guarantee that is superior to that offered by courts.[8] There are various other rationales for the Australian lack of enthusiasm for rights discourse, including deference to 'States' rights', the fear of attributing too much power to an unelected and politicized judiciary, and an enduring commitment to utilitarianism,[9] but the democratic justification is generally primary. However, the Committee on Economic, Social and Cultural Rights has yet to be convinced of the worth of this approach and, in response to Australia's last report on its implementation of the Covenant in the period covering 1990-1997[10], has strongly recommended that the Government 'incorporate the Covenant in its legislation, in order to ensure the applicability of the Covenant in domestic courts'.[11]

Most well-known of the indirect implementation measures adopted by Australia is the Human Rights and Equal Opportunity Commission (HREOC), established in 1986, which is charged with promoting respect for and observance of human rights in Australia.[12] Among its responsibilities is the oversighting of Australia's obligations under seven international human rights instruments which are scheduled to the *HREOC Act 1986* (Cth).[13] While scheduling does not have the effect of incorporating the instruments into Australian law, it does define 'human rights' for the purposes of the Act and grants individuals the right to complain to HREOC about violations of the rights covered by the scheduled instruments. But the Covenant is not scheduled, which means that

[5] The direct implementation of Australia's international obligations to prevent discrimination in the enjoyment of human rights is constituted by the *Race Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). The inadequacies of the federal system mean that a great deal of reliance is placed on State's anti-discrimination legislation, which also lacks comprehensiveness.

[6] See for discussion of these issues in the context of Victorian anti-discrimination legislation, Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

[7] *Third Periodic Report: Australia*, 23/07/98, E/1994/104.Add/22, para. 21.

[8] For a defence of democratic promotion and protection of human rights, see Tom Campbell, 'Democracy, Human Rights and Positive Law' (1994) 16 *Sydney Law Review* 195.

[9] Hilary Charlesworth, 'The Australian Reluctance About Rights' in Philip Alston (ed), *Towards An Australian Bill of Rights* (1994) 21, 22.

[10] Periodic Report: Australia 23/07/98. E/1994/104/Add.22, 23 July 1998.

[11] *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. E/C.12/1/Add.50, 1 September 2000, para 24.

[12] *Human Rights and Equal Opportunity Act 1986* (Cth).

[13] The scheduled instruments are the *International Covenant on Civil and Political Rights*, the *Declaration of the Rights of the Child*, the *Declaration on the Rights of Disabled Persons*, the *Declaration on the Rights of Mentally Retarded Persons*, the *Convention Concerning Discrimination in Respect of Employment and Occupation 1958* (ILO Convention No.111), the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, and the *Convention on the Rights of the Child.*

Covenant rights are effectively excluded from the mandate of HREOC, except to the extent that they are included in the instruments that are scheduled. While the HREOC has been prepared to read its mandate broadly, such as when it undertook its National Inquiry into Homeless Children in 1989,[14] it is highly unlikely that it could be stretched to cover Covenant rights per se, like the right to adequate housing.[15] Therefore, the failure to schedule the Covenant seriously inhibits HREOC's ability to substantially influence government policy in the area of economic and social rights. Further examples of indirect implementation of Australia's human rights obligations are the *Supported Accommodation Assistance Program Act 1994* (Cth) and the *Commonwealth-State Housing Agreement*,[16] both of which are guided by considerations related to Australia's international human rights obligations, but neither of which directly incorporates housing-related rights into Australian law.

While I do not want to suggest that making the Covenant fully applicable in Australian law would be a panacea for all the social and economic problems faced by Australia's most disadvantaged groups, I do want to make the point that legal rights are a powerful tool that can provide some level of protection against the political expediencies and ideological vagaries of responsible government democracy. As the African-American civil rights movement found, 'new life' can be breathed into rights discourse if it is claimed by 'the people' as their own[17], rather than left to the abstract and often privileged world of legal reasoning and precedent. At the same time, many criticisms of this approach are also well-founded. It must be acknowledged that legal rights are malleable and therefore provide uncertain protection, as the Canadian case study will illustrate. Legal rights also legalize more aspects of our social and political lives and may significantly increase the scope of governmental surveillance and regulation. Therefore the Australian approach offers some clear advantages, although they are yet to be fully realized in the practices of Australian governments.

A Canadian Example: The Gosselin Case

In order to illustrate the role that law *could* play in the implementation of economic and social rights, I will use a Canadian example to demonstrate the type of legal strategy that a constitutional bill of rights makes possible. The original Canadian constitution, like Australia's, stayed with the Westminster tradition and did not include a bill of rights. However, in 1982, following many years of debate and much apprehension, the *Canadian Charter of Rights and Freedoms* became law. This meant that Canadian governments were, henceforth, constrained by the fundamental human rights principles entrenched by the *Charter*. That is, Canadian democracy became what you might call a 'rights-based democracy', as distinct from the Australian approach of responsible government democracy.

The case I want to talk about arose because of the restrictive social assistance policies adopted by the Quebec Government in the 1980s, which are similar to the social security policies adopted in Australia over the last decade. The Quebec policy reduced income support entitlements to one third of the minimum adult rate for everyone between 18 and 30 who was 'employable', but not engaged in a government-sponsored work experience or education program.[18] Participation in one of the programs would allow participants to receive an increase in their social assistance up to, and sometimes exceeding, the rate received by recipients over 30. However, the employment programs did not have the anticipated levels of participation for reasons that are somewhat unclear, but included their narrow eligibility criteria. The result was that a majority of 18-30 year olds were in receipt of benefits at the lower rate.

[14] Human Rights and Equal Opportunity Commission, *Our Homeless Children: report of the national inquiry into homeless children* (1989).
[15] Annemarie Devereaux, 'Australia and the Right to Adequate Housing' (1991) 20 *Federal Law Review* 223, 229.
[16] The Commonwealth State Housing Agreement is a series of agreements between the Commonwealth and each of the State and Territory governments under the *Housing Assistance Act 1996* (Cth).
[17] Patricia Williams, *The Alchemy of Race and Rights* (1991) 163.
[18] Regulation Respecting Social Aid, R.R.Q. 1981, c.A-16, r.1, adopted under the *Social Aid Act*, R.S.Q., c.A-16. Section 29(a)

Louise Gosselin, was in her 20s at the time, unemployed, and ineligible for participation in an employment program.[19] Therefore her social assistance was reduced to one third of the minimum adult rate. She was no longer able to pay her rent and therefore became homeless, staying sometimes with friends, sometimes in shelters for homeless people, and sometimes in substandard cheap rental housing. She often relied on hand-outs for food and, at one point, a man from whom she was receiving food drove her home and then attempted to rape her. When she rented a room in a predominantly male boarding house, she suffered sexual harassment from many of the other tenants. Subsequently, she felt compelled to live intimately with a man, in exchange for a roof over her head and basic necessities. She also had no choice but to engage in sex work in order to afford clothes to wear to job interviews. In the meantime, her material poverty was affecting her self-confidence and reducing her ability to apply for jobs or to participate in one of the employment assistance programs if she were to become eligible. At one point, Louise was so overwhelmed that she attempted suicide. There was evidence that her story was not an isolated example, but reflected the experiences of humiliation, stress and extreme poverty that many other young people suffered as a result of the policy.

Unfortunately, Louise's story is similar to the stories of many Australian homeless people. There are echoes of the Canadian policies in the Australian Government's restructuring of unemployment assistance during the 1990s, in keeping with its principle of 'mutual obligation'. As a result, case management and involvement in labour market programs have become mandatory prerequisites for receiving many social security benefits.[20] The question that these experiences raise is whether, in relatively affluent countries like Canada and Australia, it is reasonable or justifiable that a democratically elected legislature has the freedom to adopt such inhumane and life threatening 'incentives' to 'encourage' people into employment assistance programs, or alternatively, whether there is a need to have some enforceable human rights standards that limit the power of governments to adopt policies that threaten basic human dignity and bodily integrity.

Unlike an Australian counterpart, Louise was able to challenge the Quebec social assistance legislation in a class action under the *Canadian Charter of Rights and Freedoms* and the *Quebec Charte des Droits et Libertes de la Parsonne*.[21] In relation to the *Canadian Charter*, she argued that the right to 'security of person' in section 7[22], and the right to equality in section 15[23], impose legal obligations on Canadian governments to ensure an adequate level of income for Canadians who are unable to provide for themselves. This was the first case to argue that the *Charter* created *positive* obligations whereby governments had to ensure adequate financial assistance for food, clothing, housing and other necessities.

---

[19] The facts of the Louise Gosselin case, from her point of view, are set out in the Factum of the Appellant Louise Gosselin, in the Statement of Facts and the Points in Issue. See further, Factum of the National Association of Women and the Law (NAWL), Court File No. 27418, paras 1-16, http://www.povnet.org/gengl.PDF.

[20] Terry Carney and Gaby Ramia, 'From Citizenship to Contractualism: The Transition from Unemployment Benefits to Employment Services in Australia' (1999) 6 *Australian Journal of Administrative Law* 117.

[21] *Louise Gosselin v Le Procureur General Du Quebec*, with the following Intervenors: A-G of Alberta, A-G of Manitoba, A-G of New Brunswick, A-G of Ontario, A-G of British Columbia, Rights and Democracy, Commission des Droits de la Personne et de la Jeunesse, the National Association of Women and the Law, and the Charter Committee on Poverty Issues.

[22] Section 7 of the *Canadian Charter of Rights and Freedoms* states:

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

[23] Section 15 of the *Canadian Charter of Rights and Freedoms* states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of the conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.

The Quebec Court of Appeal had no trouble in finding that the social assistance available to Louise was not enough on which to survive.[24] Justice Roberts commented that the reduced rate also heightened the risk of serious physical and psychological problems for the young recipients, problems that were incompatible with an acceptable standard of living. Yet despite this, the Court of Appeal rejected Louise's claim, either on the grounds that it concerned 'economic rights' that are not protected by the *Charter* or on the grounds that the courts are not institutionally competent or authorized to review government fiscal policy.

The Court of Appeal accepted the argument of the Quebec Government that the right to security of the person under section 7 of the *Charter* was a *negative* right, which obliged the government to refrain from actions that would violate the right, but did not oblige it to take positive measures to realize the right. While a majority of the Court found that the legislation discriminated on its face on the basis of age, and thus that it violated the equality guarantee of section 15 of the *Charter*, they ultimately held that the discrimination was 'justifiable in a free and democratic society', as permitted by section 1.[25] Central to the finding that the measure was justified was the judicial acceptance of the Quebec Government's argument that the case involved questions of 'social policy' and the 'distribution of scarce resources'. As Canadian commentators Day and Brodsky point out, normally the burden of justifying a rights violation under the *Charter* is a heavy one, but once characterized as being about government spending priorities, the courts show a deferential attitude to government policy, and the burden of justification can be significantly reduced.[26] As they say, this 'fits well with an image of rights as not principally concerned with redistributive matters' and 'has the effect of draining equality rights of their social and economic content'.[27]

This decision was appealed to the Supreme Court of Canada, the equivalent of the Australian High Court, which heard the case on 29 October 2001. The Court delivered its decision in December 2002.[28] The nine justices were divided on the evidence presented, with only four of them (just less than half) finding that the dramatically lower rate of social assistance had had serious effects on the basic human dignity of recipients, like Louise. Therefore, the five judges who formed the majority view held that the case did not present circumstances that warranted the 'novel' interpretation that section 7 was the basis for a positive state obligation to guarantee adequate living standards.[29] However, the majority did leave open the possibility that 'a positive obligation to sustain life, liberty or security of person may be made out in special circumstances,' although this was not such a case.[30] However, as Bonnie Morton from the Regina Anti-Poverty Ministry said in response to the judgment,

> *It's not good enough to say we may find protection for poor people under the Charter 'one day'. We are hungry and homeless today and we rely on the courts to give our governments a clear statement about our constitutional rights and governments' constitutional obligations.*[31]

---

[24] Louise Gosselin's benefit under the Regulation was $173 per month. Robert J of the Quebec Court of Appeal noted that a room cost $180-$200 per month and a one-room apartment cost $320 per month; clothes cost $50 per month; personal necessities cost $37 per month; and food cost $120 per month. As he also points out, the Social Aid Act, R.S.Q., c.A-16, itself states that a person's 'ordinary needs' amount to $440 per month. *Gosselin v Quebec (Procureur General)*, Appellant's Record, Vol.18 at 3479 per Robert J.

[25] Section 1 states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law and justifiable in a free and democratic society.

[26] Shelagh Day and Gwen Brodsky, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law* 185.

[27] Ibid.

[28] *Gosselin v Quebec (Attorney General)* (2002) SCC 84.

[29] McLachlin CJ, writing for the majority.

[30] Ibid.

[31] Press Release, 'Gosselin Decision from Supreme Court: Majority leaves ray of hope for Canada's poor', Charter Committee on Poverty Issues, 19 December 2002. See further http://www.equalityrights.org/ccpi

One of the dissenting judges, Justice Louise Arbour, supported by Justice L'Heureux-Dube, found that section 7 does impose positive obligations on the state to offer basic protections for the life, liberty and security of its citizens. She held that economic rights that are fundamental to human survival, like the right to a minimum level of social assistance, can be accommodated under the section 7 rights to 'life, liberty and security of he person'. Thus, while the *Gosselin* case is a good example of the shortcomings of constitutional protection of human rights, it also opens an important window of possibility by way of the dissenting views and because the majority left the question of positive obligations arising under section 7 open for future consideration. There is every reason to expect that Court will move in this direction in the future.

Remedies Available in the Australian Domestic Context

Let us now consider what options someone in Louise's position would have if the Australian Government had adopted the equivalent of the Quebec legislation.

In relation to legally enforceable rights, there are no constitutional guarantees, state or federal, on which she could base a claim and the High Court has previously decided, in a case that was also brought by a young woman, Karen Green, that social security legislation in Australia does not create legally enforceable rights, but rather bestows privileges or gratuities that the government is free to alter as it sees fit.[32] The only cause of action that would be available to an Australian Louise under the social security legislation would be if the implementation of the benefits scheme was inconsistent with the legislative intent, but this is not such a case. A claim under anti-discrimination legislation is also not available, as 'age' and 'social status' are not given protected status under federal anti-discrimination legislation. Although there are many gender-specific effects of the policy, as outlined by the Factum of the National Association of Women and the Law, an intervenor in the *Gosselin* case[33], the gendered effects compound the discriminatory impact of the age/social status discrimination rather than creating a primary claim based on sex discrimination. In any event, social security laws are exempted from the application of the *Sex Discrimination Act 1984* (Cth), although discrimination on the basis of sex in the provision of accommodation is prohibited (as is discrimination on the basis of race or disability under other anti-discrimination legislation)..

In light of Australian governments' preference for indirect methods of implementation, through the political process, it would be reasonable to expect that Louise would have available to her a panoply of responsive political mechanisms to address her rights claim. Foremost among them, so the argument goes, is the institution of responsible government, whereby the democratic process itself safeguards individual rights. Former Prime Minister Sir Robert Menzies outlined this process in 1967 as follows:

> *Should a Minister do something which is thought to violate fundamental human freedom he [sic] can be brought to account in Parliament. If his Government supports him, the Government may be attacked, and, if necessary defeated. And if that … leads to a new General Election, the people will express their judgment at the polling booths. In short, responsible government is regarded by us as the ultimate guarantee of justice and individual rights.*[34]

---

[32] *Green v Daniels* (1977) 51 AJJR 463. Although this was the decision of a single judge, Stephen J, it is not expected that any review by the Full High Court would substantially change this result. In this case the applicant, Karen Green, argued that she had been improperly denied unemployment benefits which the Director-General of Social Security was empowered to provide under the *Social Services Act 1947* (Cth). Stephen J ordered a re-examination of her case on the grounds that, although the Department's decision was based upon the relevant policy manual, there were doubts as to whether the policy manual properly reflected her entitlement under the Act. However, Stephen J refused to order that she was entitled to the benefit because, in his view, the Act provided that that decision was at the discretion of the Director-General. He ruled that she lacked a sufficient cause of action to compel the provision of a benefit and that, in effect, 'unemployment benefit is no more than a gratuity, to payment of which the plaintiff can have no rights enforceable at law'.

[33] Factum NAWL, above n. 19.

[34] Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 54, quoted in Charlesworth, above n. 9.

This reasoning, in the first instance, overlooks the fact that a majority of the legislature will be members of the same party as any offending Minister, and therefore the likelihood of government members breaking with party loyalty and not supporting one of its Ministers is, at best, remote. In the second instance, the reasoning ignores the fact that electoral disapproval relies on the effective exercise of political power by the group whose rights have been denied. In Louise's case, we are talking about poor, young, unemployed people, one of the most disadvantaged groups in Australian society, whose interests are unlikely to be the subject of an election campaign, let alone an electoral victory.

Foremost among the administrative mechanisms to which Louise *should* be able to make a complaint is the HREOC, but, as I have already explained, the Covenant is not among the instruments that define 'human rights' for the purposes of HREOC. Under previous Australian governments, there were a number of other national machineries that would have played a role in the political discussion of social security policy and thus could have provided a channel for Louise's human rights to be considered and addressed. Two of these mechanisms were the national women's policy coordination machinery, which included the Office of the Status of Women and women's policy units in many government departments,[35] and the Aboriginal and Torres Strait Islander Commission, which was established in 1989 'to ensure the maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them'. Aspects of both of these machineries have been dismantled or significantly restructured by the present Australian government, drastically reducing their ability to contribute to policy development. In a similar manner, the community-based infrastructure that had encouraged grass roots advocacy for homeless people from the mid 1970s to the early 1990s was extensively reorganized and reoriented as a result of market-driven government policies aimed at improving the 'efficiency' of the sector. Thus many of the political, bureaucratic and community-based mechanisms capable of providing some measure of accountability for human rights within a system of responsible government have been systematically taken apart, which provides further evidence of the inadequacy of relying solely on indirect (political) implementation of human rights. A notable exception to this trend was the establishment of the NSW Community Services Commission in 1993, which aims to safeguard the rights and interests of consumers of community services and is empowered to deal with individual complaints. However, until recently, when it was incorporated into the NSW Ombuds Office,[36] the Commission was unable to make decisions or recommendations that were inconsistent with government policy or resource allocation, which surely contradicted the democratic rationale of indirect forms of implementation.

In the absence of other domestic options, a (quasi) legal avenue is provided by the individual complaints mechanisms of the UN human rights treaty committees, which the Australian Government has recently been so critical of.[37] As there is no individual complaints mechanism attached to the Covenant, and the Australia Government has refused to ratify the Optional Protocol that would enable the Committee on the Elimination of Discrimination Against Women to hear a complaint, the only option for an Australian Louise would be to complain to the Human Rights Committee which monitors the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee has interpreted article 26 of the ICCPR[38] as a substantive equality

[35] Marian Sawer, 'The Watchers Within: Women and the Australian State' in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 36.

[36] In December 2002, the Community Services Commission amalgamated with the Office of the NSW Ombudsman. Since then it has operated under the amended *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) and the *Ombudsman Act 1974* (NSW), neither of which places any restrictions on the Ombudsman making decisions or recommendations that are inconsistent with government policy or resource allocation.

[37] Otto, above n. 1.

[38] Article 26 of the *International Covenant on Civil and Political Rights* states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

provision that protects equality in the enjoyment of all human rights, including those in the Covenant.[39] The ICCPR also protects the right to life under article 6, which means that an argument could be made, as in the *Gosselin* case, that states parties are required to take positive action to ensure that people are able to live in dignity, which would include, at least in a developed country like Australia, providing adequate income support and access to adequate housing.[40] It would, however, take several years for a communication to be considered by the Human Rights Committee due to its heavy workload. And even then, there is no guarantee that the Government would act on the views of the Committee, given its recent poor record in this regard.[41]

Australia is also obliged to report periodically to the Committee on Economic, Social and Cultural Rights on its progress towards fully implementing the Covenant. Its last report was accompanied by several 'shadow reports' prepared by community organizations in order to alert the Committee to problems and issues that were not mentioned in the government's report.[42] The shadow reports enabled the Committee to more closely scrutinize Australia's compliance and provided the basis for many of the recommendations that it made. For example, the Committee found itself unable to assess progress with respect to alleviating poverty because of the lack of an official poverty line[43] and it strongly urged the Government to develop a national housing strategy that is consistent with Australia's obligations under the Covenant.[44] While these recommendations are a long way short of providing an individual remedy for someone like Louise, they do draw global attention to the problems with Australia's indirect methods of implementation and bring additional pressure to bear on Australian governments.

Conclusion

There is clearly room for substantial improvement in the non-judicial (political) means of implementing the Covenant in a system that considers itself to be an exemplar of indirect implementation. There are many democratic mechanisms that Australian governments could establish that would improve their accountability and make their human rights record more transparent. Options include setting benchmarks against which the government's performance in delivering social and economic goods can be measured, establishing human rights policy units in all government departments, creating mechanisms for improved scrutiny of proposed legislation to ensure its consistency with human rights obligations, expanding the powers of ombuds offices to include complaints about violations of all international human rights, scheduling the Covenant to the HREOC Act 1986 (Cth) and improving governmental responsiveness to HREOC's reports and advice. As an alternative to the direct incorporation of the Covenant into domestic law, such measures are likely to be more palatable to 'the people' of the rights-resistant cultures of contemporary Australia. There is also much to recommend such measures in other ways, not least that they will enhance democratic participation in the implementation of rights and thus improve the capacity of the institutions of responsible government to indeed protect human rights.

---

[39] *Zwaan de Vries v The Netherlands*, Communication no. 182/1984; *Broeks v The Netherlands*, Communication no. 172/1984.

[40] In General Comment 6, which provides an authoritative interpretation of the right to life in the ICCPR, the Human Rights Committee notes in paragraph 5 that 'the protection of this right requires that States adopt positive measures.'

[41] The Government has completely ignored the views of the Human Rights Committee in A's case, which found that detention of A at the Pt Hedland facility for illegal immigrants for a period of over four years and without judicial review was 'arbitrary detention' in violation of article 9(1) of the ICCPR.

[42] See Australian Social and Economic Rights Project, *Community Perspectives: Australia's Compliance with the UN Covenant on Economic, Social and Cultural Rights* (2000); Women's Rights Action Network Australia, *Retreating From the Full Realization of Economic, Social and Cultural Rights in Australia: A Gendered Analysis* (1999).

[43] *Concluding Observations: Australia*, above n 11, para. 20. The Committee on Economic, Social and Cultural Rights regrets that the Government has not set an official poverty line, which has deprived the Committee of the criteria it needs to assess progress towards reducing poverty.

[44] Ibid, para. 34.

On the other hand, political implementation is unlikely to provide individual remedies for people whose rights have been violated and it is likely that the remedies available will not always be adequate or appropriate. Further, even with the best systems of indirect implementation in place, they fall short of actually binding the state to fulfill its human rights obligations, even where there are egregious violations. Consequently there may still be a need for some form of direct implementation, especially when it comes to protecting the rights of the most vulnerable groups in Australian society, although, as illustrated by the Canadian example, legal rights are not a panacea.

While neither system is a cure-all for economic and social disadvantage, my point is that *both* systems have important and complementary roles to play in realizing the full enjoyment of economic and social rights. The political process is crucial to achieving effective and informed public participation in social policy formulation and economic decision-making that is consistent with Australia's international human rights obligations. At the same time, legal mechanisms can provide an essential check on the reasonableness or justifiability of governmental action in light of its effects on human well-being, and ensure that fundamental guarantees of human dignity are safeguarded. Only when both systems are working well in Australia, will it be appropriate for the Government to claim an exemplary human rights record internationally.