HOMELESSNESS and human rights

Engaging human rights discourse in the Australian context

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What does the government mean by the promotion of human rights by 'less formal processes' and how might these processes be improved?

Before I embarked on my metamorphosis into a legal academic in 1990, I worked for more than a decade with young homeless people, domestic violence survivors and people with psychiatric disabilities. As I reflect back on that period — from the optimism about community-based social change that abounded in the mid-1970s, to the mounting frustrations of dealing with government imposition of market-driven efficiency reforms by the end of the 1980s — I realise that the language of human rights was not part of the social justice/social change vocabulary of the time. We spoke of empowerment, self-help, community participation, and holding governments accountable, but without recourse to legal mechanisms of enforcement associated with human rights discourse.

To some extent, this blind spot about the potential benefits of legal strategies was attributable to the view that the law worked for the powerful against the interests of disadvantaged people; operating as an instrument for maintaining structural disadvantage, rather than providing a means of challenging such structures. Indeed, the direct experiences of the homeless people with whom I worked tended to bear out this analysis. Many homeless young people were targeted by the police and had a string of past convictions for petty theft and street offences (which were inexorably paving the way towards a life-time of engagement with the criminal justice system). While in the face of domestic violence, the police were often unhelpful and the system in toto seemed incapable of ensuring safety for many of the women and children who sought legal protection.

The blind spot was also attributable to what Hilary Charlesworth has referred to as the Australian 'reluctance' about rights due to, amongst other things, a history of deference to federal constitutional arrangements, a fear of legalising politics by attributing too much power to an unelected and politicised judiciary, and an enduring commitment to utilitarianism.[1]

The Australian 'reluctance' about rights is, however, starting to shift in the face of changes to the political landscape wrought by the dual effects of the policies of the present federal government and the inequities of economic globalisation. The government's policies in relation to Aboriginal and Torres Strait Islanders, asylum seekers, recipients of social security payments, the privatisation of public services and utilities, and its intention to limit the already limited scope of the *Sex Discrimination Act 1984* (Cth), are just the openers in a relentlessly expanding catalogue of recent erosions of social justice in this country. Such concerns have prompted efforts to find new and more effective tools to counter government policies that are resulting in widening the gap between the rich and poor in Australia, in reducing the precious sense of civic responsibility that was the foundation of community activism, and in fortressing Australia from its international responsibilities to help alleviate the burdens of poverty, armed conflicts and natural disasters.

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It is in this context that the international language of human rights has emerged as one such tool.

The patchy legal framework for the enjoyment of human rights in Australia has become increasingly distinctive, as movements elsewhere in the world tend towards guaranteeing rights through constitutional entrenchment. While Australia has ratified all the key international human rights treaties, successive governments have chosen, in the main, not to directly incorporate these international human rights obligations into domestic law. That is, with some important but limited exceptions, they have not taken the path of adopting legislation, or promoting constitutional change, which would bring international human rights law directly into Australian law and make it amenable to judicial enforcement.[2] This has left us with a coverage that falls a very long way short of being either systematic or comprehensive when measured against Australia's international human rights obligations.

Instead of direct implementation, Australian governments have relied on the *indirect* effects of legislation and government policies and programs to ensure the enjoyment of many human rights, including many civil and political rights, such as freedom of speech, the right to vote and the right to peaceful assembly, and most economic and social rights. As explained in its recent periodic report to the UN Committee on Economic, Social and Cultural Rights (the CESCR), 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'.[3] This indirect approach is justified as being consistent with the institution of responsible government in a democracy, whereby human rights are best articulated and protected through democratic, rather than judicial, processes.[4]

In this article, I will explore the practices of indirect implementation in the Australian context. While, as lawyers, we are familiar with utilising human rights norms that are directly incorporated into domestic law, I want to argue that we must also become familiar with Australia's indirect forms of implementation in order to maximise their potential as a means of promoting and protecting human rights. Indeed, there are some persuasive arguments for preferring political implementation — especially those that arise from concern about the effects of the over-legalisation of social life.

The national Supported Accommodation Assistance Program (SAAP)[5] provides a useful illustration of what the government means by the promotion of human rights by 'less formal processes' and how these processes might be improved. In particular, the example of SAAP shows how the system does not, on its own terms, establish adequate non-judicial accountability mechanisms that would ensure 'effective remedies' for any violations of human rights. It is in this area of accountability by way of remedial mechanisms, in particular, that lawyers could make a significant contribution.

To this end, I will divide the rest of the article into three areas. First, I will briefly outline Australia's implementation obligations under the International Covenant on Economic, Social and Cultural Rights 1966 (the ICESCR), which protects the right to an adequate standard of living, which includes the right to adequate housing. Second, I will measure the government's response to homelessness, by way of SAAP, against the obligations that Australia has under the ICESCR. Third, I will draw some conclusions about the potential to strengthen indirect forms of implementation by improving the methods of accountability, and, in particular, the access to effective remedies that SAAP establishes.

Australia's implementation obligations under the ICESCR

The SAAP implements some incidents of the right to an adequate standard of living which Australia is bound to implement under article 11 of the ICESCR which entered into force for Australia over 26 years ago on 10 March 1976. The CESCR, which was established in 1985, monitors the implementation of the ICESCR by states parties. It is made up of independent experts elected by states parties. The CESCR has a limited mandate to monitor implementation by way of considering periodic reports from states parties and publishing its 'Concluding Observations' in response to these reports. In order to promote normative development of the ICESCR, the CESCR has followed the lead of some of the other treaty monitoring committees and adopted 'General Comments', which are authoritative interpretations of the text of the ICESCR. These instruments have become essential to the work of the CESCR, and provide invaluable assistance to those seeking to understand Australia's implementation obligations.

The specific legal obligation to implement the ICESCR is set out in article 2(1) as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

While many states and commentators have dismissed this obligation as ineffective because of its progressive nature, the CESCR has worked hard to clarify what is required. Thus, it is now clear that Australia's domestic implementation should be assessed against the four main requirements of article 2(1) — leaving aside the additional obligation to provide international assistance:

1. The government must 'take steps' towards realising the rights in the ICESCR. This is an obligation of conduct. The government cannot be inactive, but must adopt positive measures.
2. The steps taken must be 'with a view to achieving progressively the full realisation of the rights recognised'. While implicit in this wording is the acceptance that states parties may need some time to fully realise economic, social and cultural rights, the CESCR has emphasised that the obligation requires movement 'as expeditiously and effectively as possible towards the goal [of full realisation]'.[6] The CESCR has also stressed that there are immediately realisable aspects of every ICESCR right, including the obligation to ensure non-discrimination in the enjoyment of all ICESCR rights, as provided for in articles 2(2) and 3.[7]
3. The steps must be taken 'to the maximum of its [the government's] available resources'. While resource distribution is primarily a political determination, states parties do not have complete discretion. The ICESCR envisages that budget allocations are reviewable as against the country's 'real' resources, which obliges States parties to show that they have given adequate consideration to their obligations in the budget process.[8]

4. Implementation must be effected by 'all appropriate means'. While article 2(1) expresses a preference for legislative measures, other means are clearly acceptable. In taking a 'broad and flexible approach',[9] the ICESCR leaves considerable scope for states parties to determine the measures they adopt; it is the result of full realisation that is of primary importance, rather than the means of its achievement. Therefore means will be 'appropriate' if they produce the result of progressive realisation.[10]

As the CESCR has observed, there are two concomitant obligations involved in taking appropriate implementation measures, which apply to indirect as well as direct measures: first, the obligation to recognise the right in the most appropriate form; and second, the obligation to provide mechanisms for remedying or redressing violations of the right.[11]

Therefore, the ICESCR will not be fully implemented in the absence of 'effective remedies', enabling individuals and groups to enforce the rights guaranteed in the ICESCR.[12] The term 'effective remedy' is not limited to judicial remedies and the CESCR accepts that administrative remedies will often be appropriate.[13] Thus, remedies may be provided by independent statutory bodies established by parliaments, such as ombuds offices and human rights commissions (like HREOC) or by other forms of alternate dispute resolution. In addition, remedies may be policy-based, such as developing a plan for implementation, establishing benchmarks and time frames, or explicitly articulating human rights principles to guide program development.

Article 11(1) of the ICESCR, largely repeating the text of article 25 of the *Universal Declaration of Human Rights 1948*, sets out the right to an adequate standard of living in the following terms:

> The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself [sic] and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.

Under this article, the government commits itself to 'recognise' that *everyone* within its jurisdiction, not just male-headed households as suggested by the text,[14] has the right to adequate food, clothing and housing, and to living standards that are continuously improved. Fully implementing article 11(1) depends on a complex interplay of economic and social conditions and the enjoyment of other rights, including many civil and political rights.[15] The CESCR has adopted three General Comments, which identify specific obligations relating to article 11(1) and help to make the task of implementation more tangible.[16] It is worth noting that the CESCR rejects the view that the right to adequate housing is satisfied by the mere presence of a roof over one's head, insisting instead that it involves 'the right to live somewhere in security, peace and dignity'.[17] The CESCR also observes that homelessness and inadequate housing are significant problems in some of the most economically developed countries.[18]

Case study: The Supported Accommodation Assistance Program

The SAAP provides services and support to some of the most disadvantaged and marginalised people in Australia. The SAAP national data collection for the financial year 2000–2001 indicates that SAAP services supported 91,200 clients during that period. This figure does not include accompanying children. Nor does it include the number of people who requested SAAP services, but were turned away. Unmet requests in 1997/98 Victoria alone numbered over 45,000. While there were many reasons for using SAAP services, the main ones were domestic violence (23%), eviction or end of previous accommodation (11%), relationship breakdown (10%) and financial difficulty (10%).[19] During this period, Aborigines and Torres Strait Islanders comprised 16% of SAAP clients, yet their representation in the population is under 2%.[20] More recently, the population of homeless people in Australia has come to include many asylum seekers on Temporary Protection Visas, awaiting final determination of their immigrant status.

The program is jointly funded by the federal and state governments and administered by the states within a legislated national policy framework. It provides financial assistance to non-government organisations and local government authorities that provide a range of supported accommodation and related support services to people who are temporarily or permanently homeless. It is the first coordinated national approach to addressing the complex and multifaceted problems of homelessness in Australia.[21] It is operationalised through Commonwealth–State Agreements of five years duration. The objective of the program, identified in the first Agreement in 1985 (SAAP I), is to assist those who need housing support 'to move towards independent living, where possible and appropriate'.[22] According to the federal government, SAAP 'is one of the primary government responses to homelessness' and, as such, constitutes an important measure towards implementing article 11(1).[23]

The second Agreement in 1989 (SAAP II) emphasised the importance of providing support that recognises clients' independence, dignity and self-esteem[24] and aimed to 'establish a framework for the protection of the rights of users of services'.[25] Specifically, the Agreement required the development of principles and strategies for the protection of 'user rights', including the establishment of internal grievance procedures within each SAAP-funded service and, most importantly, external review procedures 'by government officials or other independent review'.[26]

The SAAP II also indicated that user rights may include such matters as participation in decision making, information about available assistance, and security and freedom from abuse',[27] making it clear that user rights were internal to SAAP services, as between users and service providers, rather than rights that service users could exercise against the state with respect to their standard of living.

It was not until the third Agreement (SAAP III),[28] in 1994, that an explicit connection with Australia's international human rights obligations was made in the legislation. The preamble to the Act referred to Australia's recognition of 'international standards for the protection of universal human rights and fundamental freedoms' as one of the considerations that had informed the legislation. Six international instruments were listed, with the ICESCR first among them.[29] In addition, the preamble recognised the need to 'redress social inequalities and to achieve a reduction in poverty' and declared the right of homeless people 'to an equitable share of the community's resources'.

These commitments seemed to promise, in addition to user rights, the recognition of a broader range of the rights, involving substantive claims on community resources to ensure an adequate standard of living for homeless people. However, the Minister, in his Second Reading Speech, made it clear that 'the rights of people who are homeless, to housing and to the other essential elements of a decent quality of life' would be realised by paying more attention to linking people to a range of other services, thereby 'maximising people's chances to participate',[30] rather than by guaranteeing substantive rights. Rights limited to the service-delivery arena do nothing to address the problem of the shortage of adequate housing options.[31]

The program clearly aims to empower people, who are among the most vulnerable and disadvantaged in the Australian community, as service users, by promoting the core human rights principles of dignity, autonomy and participation. In theory at least, SAAP provides an illustration of how international human rights instruments are contributing a new language of rights, and a framework for expressions of human dignity, to the Australian political and legal landscapes. But one has to question whether this use of the language of rights is entirely legitimate.

In order to assess the extent to which SAAP implements article 11(1), we need to consider the requirements of article 2(1) in light of the case study.

The first of these, the requirement that the government 'take steps' towards realising the right, has no doubt been satisfied. The government has not been inactive in addressing homelessness, and the development of SAAP is a positive measure towards that end. Nevertheless, it is also clear that other 'steps' need to be taken, like ensuring that there are more long-term housing options available to SAAP clients when they are ready to leave SAAP services. Such steps would include, as strongly recommended by the CESCR, that the federal government develop a national housing strategy (an indirect measure of implementation) that is consistent with Australia's obligations under the ICESCR, and ensure that state and territory governments do likewise.[32] It is scandalous that such an imperative tool of indirect implementation is not in place in a state that prides itself on 'less formal processes' of implementation.

The second requirement, to achieve 'progressively' the full realisation of the recognised right, could, in the context of SAAP, mean achieving a reduction in the number of people needing SAAP services, a decrease in the number of people turned away because SAAP services are full, and/or a decrease in the number of SAAP clients forced to remain in SAAP beyond when their need for support has passed because of the shortage of housing options. Yet, despite the five-yearly reviews of the program that assess its progress towards fulfilling national objectives, and annual national data collection that should enable new problems and trends to be identified and addressed quickly, progress has not been achieved according to any of these measures.[33] The CESCR drew attention to this issue after its initial review of Australia's last periodic report, asking why the government had failed to address the rising number of homeless people and requesting that comparative statistics covering the previous five years be provided on the number of people who are homeless and the number who have access to public housing.[34] These and other requests indicate that the government provided inadequate information for the monitoring purposes of the CESCR, leaving open the possibility that there was in fact a regressive movement.

The third requirement is that the government devote the 'maximum of its available resources' towards progressively realising ICESCR rights. As Australia's economy grew consistently through the 1990s, anything less than full enjoyment of an adequate standard of living raises fundamental questions about resource allocation. While the government has progressively increased its expenditure on SAAP,[35] there is clearly a serious shortage of long-term housing options of the sort that are required by those who use SAAP services. The failure of the government to provide the CESCR with comparative statistics showing expenditure on public housing over the previous five years,[36] also suggests that it had reason to avoid scrutiny of the level of resources it had devoted to low-income housing.[37]

However, it is the fourth requirement that raises the most glaring problems with Australia's implementation: that the government take 'appropriate' measures in the sense that they produce the result of progressive realisation. As I have suggested, there are two concomitant obligations involved in taking appropriate implementation measures: first, the obligation to recognise the right in the most appropriate form; and second, the obligation to provide mechanisms for remedying or redressing violations of the right.

With respect to the first of these obligations, the SAAP legislation provides for the identification and protection of the rights of SAAP clients as service users, which is understood as a way of assisting them towards independent living. User rights are not 'legal' rights, which entail a correlative and enforceable legal duty that they be respected or enjoyed. Nor are they 'human rights' in the sense of being inherent. Although informed, in a general way, by human rights principles, user rights are defined by policy processes at the state level, implemented through SAAP Funding Agreements with individual services, and enjoyed by service users as the result of an unenforceable 'contract' with the service provider that specifies rights in the context of user responsibilities. Conditioning the enjoyment of user rights on the performance of responsibilities is consistent with the federal government's embrace of 'mutual obligation' as the cornerstone of its approach to welfare. The conditionality of user rights in SAAP, like the conditionality of income support and job search assistance in the social security system, is a thinly veiled exercise in coercive social control of those who are dependent on the community to provide basic social and economic goods, and promotes a lack of trust of the language of rights, reminiscent of the view the law works against the interests of disadvantaged people.[38]

The rights available to SAAP clients are more aptly described as 'privileges' in the Hohfeldian sense of being available to the rights holder on a contingent basis rather than as a legal entitlement.[39] Unlike legal rights, which are referred to as 'claim rights' by Hohfeld,[40] there is no express legal obligation on the state to honour 'privileges'.[41] Indeed, the privatisation of many services that were previously provided directly by the government has eroded the limited legal protection of welfare privileges previously provided by administrative review.[42]

The appropriateness of recognising an ICESCR right in the form of a privilege ultimately depends on fulfilling the second obligation associated with implementation by all appropriate means, which is to ensure that there are effective

'remedies' in the event of a violation.[43] In SAAP, the non-judicial remedial apparatus designed to protect user rights (or more accurately, conditional privileges) consists of internal grievances procedures, appeals to regional SAAP advisers and, in theory, except in New South Wales and to some extent in Victoria, independent external review (as required by SAAP III). Given the vulnerability of SAAP clients, and the real possibility of eviction from a SAAP service if a dispute is unresolved, the absence of comprehensive, independent and publicly accountable external review mechanisms is a serious shortcoming of the SAAP scheme. The operation of such mechanisms would seem to be indispensable to ensuring effective remedies for individual service users, in the event that privileges are denied in a way that is inconsistent with the program's policy and/or its legislated aims. Further, external review mechanisms could serve the related functions of raising broader human rights concerns and drawing attention to systemic problems that may require changes in policy or resource allocation, like the shortage of housing options for people on low incomes.

In Victoria, the Supported Accommodation Rights Service (SARS) was established in 1994 under the auspices of the Council to Homeless Persons, a peak body to many of the SAAP funded services in Victoria. The SARS is funded by SAAP and offers an advocacy service for SAAP clients, or potential SAAP clients, when they come into conflict with a service. While SARS has provided an important service to many homeless people, it does not have the resources to effectively provide advocacy across the state, and its independence has the potential to be compromised by its auspicing arrangement with a body that also represents the interests of service providers. However, the biggest restraint on the work of SARS is that imposed by SAAP itself, which limits its advocacy to the user 'rights' recognised by the SAAP Standards that are internal to SAAP services. The role of SARS is also limited to advocacy; its powers do not extend to playing a mediation or adjudicative role, nor to investigative or community visiting functions.

In New South Wales, the *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) established a watershed legislative framework for ensuring that community services safeguard the rights and interests of consumers.[44] One of the bodies created was the Community Services Commission (CSC), which takes a multi-dimensional approach to its work, including dealing with individual complaints.[45] Yet even this initiative is compromised by the CSC's inability to make decisions or recommendations that are inconsistent with government policy or resource allocation.[46] As the 1999 review of the CSC by the New South Wales Law Reform Commission pointed out, this prevents the CSC from observing its primary guiding principle, which is to act in the best interests of the service user concerned.[47] This restriction is an inappropriate means of providing for what the Second Reading Speech described as 'the primacy of the elected representatives of the people for policy determination and resource allocation',[48] because it prevents any criticism of government policies.

This surely contradicts the democratic rationale of indirect forms of implementation, which rely heavily on public political participation for their efficacy. This example highlights the inherent conflict of interest in governments establishing 'independent' mechanisms that are able to review governmental decisions and those of government-funded service providers. It suggests, as the CESCR has urged, that access to judicial remedies (direct implementation) may at some point be necessary to ensure the effectiveness of indirect forms of implementation and the result of progressive realisation because, ultimately, the courts provide the best guarantee of independent monitoring and of effective remedies.[49]

Conclusion

But, before arriving at this conclusion, which is unlikely to be productive in the present political climate, there are many ways in which Australian governments could make the indirect measures of implementation more effective. In fact, Australia is in a unique position to develop, promote, improve upon and extend the use of indirect measures of human rights implementation, given its singular resistance to legislative or constitutional entrenchment. Therefore, it might be expected that the government's record in enhancing democratic participation in the meaning of rights, by promoting informed community debate about human rights in general and the distribution of social and economic goods in particular, would be exemplary. It might also be expected that substantial monitoring roles would be undertaken by a range of watchdog mechanisms, like human rights commissions, ombuds offices, policy coordination networks and the like, which are particularly important for the protection of economic and social rights[50] and also create opportunities for grass roots engagement in 'dialogue' about rights.[51]

Yet, paradoxically, since 1996, government funding of HREOC has been drastically reduced and many of the national machineries that enhanced the ability of disadvantaged groups to participate in national policy development have been dismantled or incapacitated, most notably those that engaged indigenous people[52] and women.[53] Note also the serious erosion of the community-based infrastructure which enabled SAAP service providers to organise as a lobby group. Further, it is hard to understand why the ICESCR has not been scheduled to the *HREOC Act 1986* (Cth),[54] and why there is a dearth of benchmarks against which the government's performance in delivering social and economic goods can be measured.[55] It is difficult to take the government's stated commitment to human rights seriously when there are such fundamental problems with its preferred approach to implementation, many of which have relatively easy solutions that are entirely consistent with the principles of responsible government. In addition, the absence of appropriate remedial and accountability mechanisms places an unjustifiable burden on already over-stretched international monitoring mechanisms.

The example of SAAP illustrates the enormous scope for critical engagement with federal and state governments in relation to their indirect methods of implementing human rights. In particular, lawyers could play an important role in highlighting the failure of governments to provide independent and transparent mechanisms of review and to set benchmarks against which progress can be measured, and in exposing the cynical ways in which rights discourse is being deployed as a mechanism of social control rather than empowerment. Lawyers could also help to creatively shape and develop more effective mechanisms for monitoring human rights implementation in Australia and for ensuring remedies are available to those whose rights have been violated.

References

1. Charlesworth, Hilary, 'The Australian Reluctance About Rights' in Philip Alston (ed.), *Towards An Australian Bill of Rights*, Centre for International and Public Law, Canberra, 1994, pp.21-2.
2. It should be noted, international human rights law can, in certain circumstances, influence statutory interpretation, the development of the common law, administrative decision making and constitutional interpretation.
3. *Third Periodic Report: Australia*, 23/07/98, E/1994/104.Add/22, para 21.
4. See generally, Campbell, Tom, 'Democracy, Human Rights and Positive Law' (1994) 16 *Sydney Law Review* 195.
5. The Supported Accommodation Assistance Program (SAAP) was the first nationally coordinated approach to addressing homelessness in Australia, commencing in 1985.
6. *CESCR General Comment No.3*, para 9.
7. *CESCR General Comment No.3*, para 5.
8. Alston, Philip and Quinn, Gerard, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 180.
9. *CESCR General Comment No. 9*, para 1.
10. *CESCR General Comment No. 9*, para 5. The CESCR has interpreted the use of the term 'appropriate' in article 2(1) to require that 'the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations under the Covenant'.
11. *CESCR General Comment No. 9*, para 2.
12. *CESCR General Comment No. 9*, para 9.
13. In the case of administrative remedies, an effective remedy means one that is 'accessible, affordable, timely and effective: *CESCR General Comment No.9*, para 9.
14. 'The Right to Adequate Housing', *CESCR General Comment No. 4* (6th Sess. 1991), para 6. See further, 'The Right to Adequate Food', *CESCR General Comment No.12* (20th Sess. 1999), para 1.
15. *CESCR General Comment No.4*, para 9. See further, Farha, Leilani, 'Women and Housing' in Kelly D Askin and Dorean M Koenig (eds), *Women and International Human Rights Law*, Transnational Publishers, Vol. 1, 1999, pp.483 and 494.
16. 'The Right to Adequate Housing', *CESCR General Comment No.4* (6th Sess. 1991); 'The Right to Adequate Housing: Forced Evictions', *CESCR General Comment No.7* (16th Sess. 1997) and *CESCR General Comment No.12* (20th Sess. 1999).
17. *CESCR General Comment No.4*, para 7. At para 8, the CESCR identifies various requirements of the concept of 'adequacy', including legal security of tenure, availability of services and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.
18. *CESCR General Comment No.4*, para 4.
19. Australian Institute of Health and Welfare, *SAAP National Data Collection Annual Report 2000-01*, AIHW, Canberra, 2001.
20. Australian Institute of Health and Welfare, above, ref 19.
21. The SAAP was preceded by the *Homeless Persons Assistance Act 1974* (Cth), which was the first legislation to recognise that the provision of assistance to homeless people was a responsibility of the federal Government.
22. *Supported Accommodation Assistance Act 1985* (Cth), Schedule, para 6.
23. *Third Periodic Report: Australia*, 23/07/98, E/1994/104.Add/22, para 219.
24. *Supported Accommodation Assistance Act 1989* (Cth), Schedule 1, Form of Agreement.
25. SAAP II, para 7(1)(f). The SAAP II also emphasised non-discrimination as a program principle, and explicitly noted that services should be designed to provide equitable access for Aboriginal people and people from non-English speaking backgrounds: see para 6(1)(d).
26. SAAP II, para 15.
27. SAAP II, para 15(a).
28. *Supported Accommodation Assistance Act 1994* (Cth) (SAAP III).
29. SAAP III, preamble para.4. The other instruments referred to were the *Convention on the Elimination of All Forms of Racial Discrimination 1965* (CERD), the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW), the *Convention on the Rights of the Child 1989* (CROC), the *Universal Declaration of Human Rights 1948* (UDHR) and the *Declaration on the Elimination of Violence Against Women 1994* (DEVAW).
30. Second Reading Speech, *House Hansard*, 10 November 1994, 3013.
31. *CESCR General Comment No.4*, para 8, defines 'adequate housing' as including security of tenure, availability of services infrastructure, affordability, habitability, accessibility, location and cultural adequacy.
32. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia. 01/09/2000*, E/C.12/1/Add.50, 1 September 2001, para 34.
33. Australian Institute of Health and Welfare, *SAAP National Data Collection 2000-01*, AIHW, Canberra, 2001, p.59. The data collected shows that, in 2000-1, SAAP services supported an estimated 91,200 clients, which was an increase over the previous year's estimate of 90,000, although this was a decrease from the 1997-8 figure of 94,100.
34. *List of Issues: Australia. 23/05/2000*, E/C.12/Q/AUSTRAL/1, 23 May 2000, para 25.
35. Recurrent expenditure for SAAP increased by 22% in the five years from 1996-7 ($219.8 million) to 2000-1 ($268.5 million), which in real terms amounts to an increase of 10%: Australian Institute of Health and Welfare, *SAAP National Data Collection 2000-01*, AIHW, Canberra, 2001, p.59.
36. *List of Issues : Australia. 23/05/2000*, E/C.12/Q/AUSTRAL/1, 23 May 2000, para 25.
37. In fact, Australian governments over the past decade have decreased expenditure on public housing while increasing expenditure on rental subsidies in the private rental market. This move towards greater reliance on the private market has failed to deliver affordable housing to the poorest Australian households who are spending a mean of 66% of their income on housing. See Australian Social and Economic Rights Project (ASERP), *Australia's Compliance with the UN Covenant on Economic, Social and Cultural Rights: Community Perspectives*, Submission to the UN Committee on Economic, Social and Cultural Rights, Melbourne, Victorian Council of Social Service, April 2000, pp.40-1.
38. Kinnear, Pamela L., 'Mutual Obligation: A Reasonable Policy?', Paper presented to the National Social Policy Conference, University of New South Wales, 4-6 July 2001 (copy on file with author).
39. Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press, New Haven, 1919, pp.38-9.
40. Hohfeld, above, ref 39, pp.36-8.
41. This was confirmed by a single judge of the High Court in *Green v Daniels* (1997) 51 ALJR 463. Stephen J found that unemployment benefits provided through the *Social Securities Act 1947* (Cth) were 'no more than a gratuity', which was not enforceable at law. See further, Bailey, Peter, 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 4 *Australian Journal of Human Rights* 25.
42. Carney, Terry and Ramia, Gaby, 'From Citizenship to Contractualism: The Transition from Unemployment Benefits to Employment Services in Australia' (1999) 6 *Australian Journal of Administrative Law* 117.
43. See further, Otto, Dianne and Wiseman, David, 'In Search of 'Effective Remedies': Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7 *Australian Journal of Human Rights* 5.
44. The legislation established four bodies: the Community Services Commission, the Community Visitors Scheme, the Community Services Review Council, and the Community Services Appeals Tribunal, which was reconstituted as the Community Services Division of the Administrative Decisions Tribunal in 1999.
45. The CSC may also conduct reviews and inquiries, monitor standards, make recommendations about systemic issues, support the development of advocacy services for consumers and play an educational role in relation to service providers and consumers.
46. *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW), s.5(c).
47. New South Wales Law Reform Commission, *Report 90 (1999) — Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*, para 2.35.
48. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech, 768.
49. *CESCR General Comment No.9*, para 3.
50. Tigerstrom, Barbara von, 'Implementing Economic, Social and Cultural Rights: The Role of National Human Rights Institutions' in Isfahan Merali and Valerie Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights*, University of Pennsylvania Press, Philadelphia, 2001, p.139; Mario Gomez, 'Social Economic Rights and Human Rights Commissions' (1995) 17 *Human Rights Quarterly* 155, 163.
51. Nedelsky, Jennifer and Scott, Craig, 'Constitutional Dialogue' in Joel Bakan and David Schneiderman (eds), *Social Justice and the*

Constitution: Perspectives on a Social Union for Canada, Carleton University Press, Ottawa, 1992, p.59.

52. See *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia* 24/02/2000, CERD/C/56/Misc.42/rev.3, para 11.
53. See, for example, Sawer, Marian, 'The Watchers Within: Women and the Australian State' in Linda Hancock (ed), *Women, Public Policy and the State*, 1999, p.36.
54. 'The Role of National Human Rights Institutions in the protection of Economic, Social and Cultural Rights', *CESCR General Comment No.10*, para 3: 'It is essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions'.
55. For example, in response to Australia's last periodic report the CESCR recommended that an official poverty line be established 'so that a credible assessment can be made of the extent of poverty in Australia': *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia. 01/09/2000,* E/C.12/1/Add.50, 1 September 2001, para 33.