AUSTRALIA AND THE RIGHT TO ADEQUATE HOUSING

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Although some fifteen years have passed since Australia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and so incurred an obligation to respect, protect, promote and ensure each individual's "right to adequate housing", in Australia the right remains little more than a rhetorical tool used by welfare activists. Despite the increased political and legal profile of human rights in Australia with the establishment of such bodies as the Commonwealth's Human Rights and Equal Opportunity Commission (HREOC), the "right to adequate housing", like many other economic rights, has been largely ignored. In an attempt to highlight the gap between Australia's international commitment and its domestic response, the first part of this paper examines the content and implications of the right to adequate housing and Australia's obligation under Article 11 of the ICESCR. The second part focuses on the Federal Government's response, discussing in particular the absence of any legal provision for the right's protection and the lack of comprehensive administrative policies aimed at the right's progressive realisation. For the purposes of this latter discussion, a case study of federal policies concerning the homeless, a group most apparently lacking in "adequate housing", demonstrates the extent to which administrative policies continue to embrace notions of "worthiness" rather than "universal dignity", making realisation of a "right to adequate housing" impossible.

1 AUSTRALIA'S INTERNATIONAL LAW OBLIGATION

A Article 11 of the ICESCR

In 1975 the Commonwealth ratified the ICESCR[1] which imposes on the Australian State *inter alia* an obligation to recognise, respect and protect a right to "adequate housing". This right is contained within a more general provision, Article 11(1), concerning the right to an "adequate standard of living". Article 11(1) reads:

> 1. The States Parties to the present Covenant recognize the right of everyone to an *adequate standard of living* for himself 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 realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[2] (emphasis added)

Through becoming a party to the Covenant, the Commonwealth bound itself in international law to respect this "human right" and take steps to the maximum of its available resources with a view to progressively achieving the right's full realisation (Article 2). Australia undertook to guarantee that this right would be exercised without discrimination of any kind as to "race, colour, sex, language,

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1 The ICESCR entered into force for Australia on 10 March 1976.

2 A similar clause relating to the family appeared in the Universal Declaration of Human Rights (UDHR) - Article 25(1). For the full text of the ICESCR and the UDHR, see I Brownlie, *Basic Documents in International Law* (3rd ed 1983).

religion, political or other opinion, national or social origin, property, birth or other status" (Article 2(2)). International co-operation and assistance in achieving these ends was foreshadowed in general terms in Article 2 and is mentioned expressly in Article 11.

Whilst articulating the right to housing, the Covenant provided no enforcement mechanisms or remedies for a person/State wishing to complain of an abrogation of the right. Unlike the ICCPR,[3] the ICESCR did not establish a tribunal nor did it allow for recourse to any sort of International Court. States were to send progress reports to a Committee of the Economic and Social Council.[4] Yet, the Committee's role was to assess States' needs for international aid, rather than enforce compliance with the Covenant's provisions and even now that it is composed of expert personnel rather than government representatives,[5] its purpose remains unchanged. Despite there being only political sanctions available for the ICESCR rights' enforcement, an examination of the right to adequate housing's content and implications reveals that Australia's obligation is far from an "empty shell".

B Connotations of a "Right to Adequate Housing"

The inherent vagueness of the term a "right to adequate housing" is undeniable. Whilst housing in its most basic form connotes stable shelter, to satisfactorily define an "adequate" standard of housing is a difficult task. Unfortunately, according to von Hebel, the *travaux preparatoires* of the ICESCR provide little elucidation beyond making it clear that the phrase was intended to signify more than a right to bare shelter.[6] When Article 11 was drafted, some representatives feared that "adequate" might be read down to imply only the "bare necessities". The alternative phrase suggested - "decent housing" - was rejected, however, on the basis of its "moral overtones" and lack of clarity.[7] Furthermore, as von Hebel points out, when Article 11 is read as a whole, its reference to the right to "continuous improvement of lifestyle", the impression that "adequate" was designed to mean something more than "subsistence level" is confirmed. The intended meaning thus seems to approximate what might be termed a "dignified standard" of housing.

This "dignified standard" approach seems in keeping with interpretations afforded to similar phrases in other international documents. The International Labour Organisation has been insistent that the "right to housing" for workers included in its Recommendation 115 concerning Workers Housing of 1961[8] represents more than "the minimum necessary for subsistence".[9] Similarly, in the "Burdekin Report", the HREOC concluded that the right to adequate housing of children contained within the Declaration of the Rights of the Child must be read consistently with the child's other rights. The housing must therefore be

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3 The International Covenant on Civil and Political Rights, ratified by Australia in 1980.

4 Australia has duly submitted these reports. The most recently completed report was completed in 1980, although a new Report was being prepared at the time of finalising this article in 1990.

5 The change was made in 1986: P Bailey, *Human Rights: Australia in an International Context* (1990) 321.

6 H von Hebel "The implementation of the right to housing in article 11 of the United Nations Covenant on Economic, Social and Cultural Rights" (1987) 20 *SIM Newsletter* 26, 27.

7 *Id.*

8 C Leckie, "The Right to Housing" (1987) 20 *SIM Newsletter* 10, 17.

9 1976 Statement of the ILO quoted by K Tomasevski, "Human Rights: the right to food" (1985) 70 Iowa L Rev 1321, 1325.

sufficient to protect a child's security, health, freedom and dignity.[10] It expressly rejected the situation where the accommodation was insecure, temporary, or detrimental to their health and development, or exposed them to abuse and exploitation.[11] It could be argued that since the basis of ICESCR rights is said to be the "dignity of individuals", the right to adequate housing implies similar requirements - that is, that *all*, even the least vulnerable of adults, have a right to housing which is secure, hygienic, affordable and of a standard consistent with human dignity. Admittedly, this latter factor introduces an element of circularity into the definition of "adequate" and is only marginally less imprecise.

As Schachter has pointed out, the term "dignity" (which he equates with "intrinsic worth") connotes notions of independence, individual responsibility and distributive justice.[12] However, whether dignity is perceived to be upheld or infringed in a particular situation varies according to the relative weighting given to each factor. Häusermann and Tomasevski, for instance, argue that in order to maintain human dignity, the right to food means the right to access to food, rather than the right to be fed.[13] Other American lawyers have downplayed the need for "independence" in "adequate housing" and favour a compulsory housing program based on the doctrine of *parens patriae*.[14] Some people's version of "dignity" might even give approval to a return to Elizabethan Poor Law policies of favouring low level of State aid so as to maximise an individual's incentive to create an adequate standard of living for himself or herself. Yet the relativity of Article 11's standard of housing should not necessarily be regarded as a negative feature. The flexibility inherent in the term "adequate" allows for the development of human rights standards parallel to the development of society's values. Even if this level of relativity is accepted, a pertinent question remains the extent to which the standard of "adequate housing" can be accepted as varying as between nations.

Whilst cultural differences would no doubt assume importance in the implementation of the right to adequate housing, it would seem more in keeping with the internationalist element of human rights to maintain universal criteria for "adequate housing". Although in relation to a child's right to adequate housing in the Declaration of the Rights of the Child, the HREOC was prepared to import some notion of cultural relativity[15] - that is that the standard of "adequate housing" could vary according to the values and situation of a particular nation - the *travaux preparatoires* do not seem to support such a variable standard. While it can be conceded that some rights by their nature involve cultural definition (such as the right to privacy), the right to adequate

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10 HREOC, *Our Homeless Children: Report of the National Enquiry into Homeless Children* (1989) 36. (This report is commonly referred to as the "Burdekin Report").

11 *Id.*

12 O Schachter, "Human Dignity as a normative concept" (1983) 77 American Journal of International Law 848, 852.

13 J Häusermann, "Myths and Realities" in P Davies (ed), *Human Rights* (1988) 126 at 142; K Tomasevski, "Human Rights: the right to food" (1985) Iowa L Rev 1321, 1325.

14 Present American law permits in some States the involuntary admission to hospitals and retention in hostels of those individuals considered to be facing a risk of imminent death/serious physical harm and thought to be lacking the capacity to comprehend the probable consequences of remaining in that situation, powers that can be easily abused; see M Malone, "Homelessness in a Modern Urban Setting" (1982) 10 Fordham Urban Law Journal 749, 752, 775-7

15 The HREOC used the analogy of interpretations of "sufficient livelihood" in the *Social Security Act* 1947; *Re Ezekiel and the Director-General of Social Security* (1984) 6 ALN N 235: HREOC, *supra* n 10, 36.

housing seems more conducive to an international minimum standard. In addition, the *progressive* nature of the obligation could be seen as indicating an acknowledgment by the drafters that it would take varying amounts of time for nations to realise a standard of housing acceptable to the international community. For present purposes, the question thus becomes - what standard of "adequate housing" would be regarded as internationally acceptable in present times?

In present times, the recognition in the Covenant that to be without basic subsistence needs represents a deprivation of dignity *per se*[16] is accompanied by an increasing acceptance that State aid is "the right of every member of society, not an act of charity".[17] Likewise, the present international consensus seems to be that guaranteed equality of opportunity with respect to access to housing rather than compulsory housing schemes is the acceptable mode for fulfilment of the right. Furthermore grave doubts have been raised as to the propriety of international and national programmes which breed dependence. It is said that control of enabling programmes must remain in the hands of the poor[18] so they are empowered and not oppressed.[19] Thus it would seem that Article 11's right to adequate housing can be read as conferring a right to ensured access to housing, the standard of which is considered consistent with dignity (thus hygienic, safe and sufficient) and the right to continuous improvement.

Even though this definition may still have its problems, it is clear that even the most conservative would accept that the 40 000 persons in Australia who sleep out or who sleep in refuges (refuges being temporary accommodation)[20] do not have "adequate housing". Many others who are renting premises which are unhygienic and unsafe might also come within the category of persons without adequate housing. The question then relevant is whether the Federal Government is honouring its commitment to recognise, respect and progressively implement access to such dignified housing. Before this enquiry can be pursued, however, the nature of the Government's obligation requires further elucidation.

C State Parties' Obligations With Respect to Article 11.

Article 2 of the ICESCR imposes on State Parties an obligation to respect and recognise the rights and "take steps" to the maximum of their resources to ensure the realisation of the rights mentioned therein including the right to adequate housing. This obligation implies a giving of priority to matters mentioned in the Covenant as against issues which are omitted.[21] Article 11 essentially restates this "obligation" clause. According to von Hebel's study of the *travaux preparatoires*, it would appear that the repetition of this obligation

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16 O Schachter, *supra* n 12, 852.

17 M Ginsberg, L Lesser, "Current Developments in economic and social rights: a United States perspective" (1981) 2 Human Rights Law Journal (No 3-4) 237, 256.

18 P Alston, "International Law and the Human Right to Food" in P Alston, K Tomasevski (eds), *The Right to Food* (1984) 9, 11; in relation to the right to food, note the discussion of the views of Isenman and Singer discussed also by Alston, *ibid* 11.

19 K Tomasevski, *supra* n 13, 1325.

20 This figure was obtained by the 1985 Census, quoted in H Kendig, C Paris, N Anderton, *Towards Fair Shares in Australian Housing* (1987), 36. The exact number is likely to be higher in view of the difficulty of adequately calculating the number who were not within the written census' ambit. There is a controversy whether those living in caravans are similarly homeless, yet as they were not thought to be "temporary" residents in the Burdekin Report, the question of their status is not addressed here.

21 P Alston, *supra* n 18, 39.

lause in Article 11 was not designed to give Article 11 a higher priority than ther articles, but was included merely to emphasise the need for international o-operation at a time before Article 2 had been finalised.[22]

Qualifications of the rights by laws are permitted only in so far as such mitations are compatible with the nature of the right and solely for the purpose f promoting the general welfare in a democratic society.[23] Whilst the latter round for limitation appears fairly wide, it is difficult to envisage a "general velfare" justification for depriving people of access to subsistence needs when uch rights as the right to a fair trial are upheld regardless of, for example, conomic realities.

The Covenant in its use of general terms certainly confers a large discretion pon States in choosing appropriate means and budgetary allocations for nplementing ICESCR rights. That it is for the legislature alone to make such olitical judgements is clear.[24] Courts or in the present case, the international ommunity, are limited to reviewing whether the measures adopted could be seen easonably to represent measures designed to promote the right in a manner onsistent with "universal dignity".[25] This does not mean however that "[o]nly vhen a State does not take any steps at all, can it be said that it is not acting in onformity with the Covenant".[26] When the full implications of Article 2 are nderstood, its requirements seem analogous to the State's obligation to guarantee" the rights within the ICCPR.

The States' obligation goes far beyond desisting from preventing access to ousing in State legislation and policies which impinge upon housing rights. The "progressive" and "relativist" ("to the maximum of available resources") lements of the obligation merely represent a recognition of the reality of the ıanner in which rights are implemented rather than an attempt to make their ealisation a lower priority or a lesser obligation than "guaranteed" civil and olitical rights.[27] The Limburg Symposium on the Covenant affirmed the State's ositive obligation to act. Its principle 25, for instance, stated the obligation to ensure respect" for minimum subsistence rights,[28] leading the rapporteurs to omment that "whatever the resources and level of their economic development, tates parties should assure minimum subsistence rights for all".[29] The obligation n States to respect and "take steps towards the realisation" of the right has been vell elucidated by van Hoof. To use his terminology, the obligation on States is

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2 H von Hebel, *supra* n 6, 28.

3 ICESCR, Article 4. A narrow meaning was intended to be given to this "democratic welfare" qualification: P Alston, G Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 156, 192-204.

4 *Richardson v Forestry Commission* (1988) 164 CLR 261.

5 This approach was adopted by the High Court in considering measures to facilitate the enjoyment of human rights of a particular race: *Gerhardy v Brown* (1985) 159 CLR 70.

6 H von Hebel, *supra* n 6, 29.

7 P Alston, G Quinn, *supra* n 23, 173, 221 discuss the meaning of the obligation with regard to the original documentation.

8 Principles 27 and 28 reaffirm the need for universal access to resources and the primacy of achieving subsistence requirements: "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 122.

9 E V O Dankwa, C Flinterman, "Commentary by the Rapporteurs on the Nature and Scope of States Parties' Obligations" (1987) 9 Human Rights Quarterly 136, 140; see also P Alston, G Quinn, *supra* n 23.

to respect, protect, promote and ensure the right to adequate housing.[30] Von Hebel has detailed this obligation: proposing that the duty to respect entails, for instance, removing people from slums and alleviating any discrimination, the duty to protect - a commitment to tenancy and house ownership legislation, the duty to ensure housing through subsidies and the duty to promote housing through housing programmes.[31] The *travaux preparatoires* foresaw similar measures, specifically mentioning not only the building of housing but the giving of subsidies, tax exemptions, loans interest subsidies and the provision of materials for housing on favourable terms.[32] Whilst in Australia, fulfilment of this obligation needs to be seen in the context of our federal system, this limitation does not lessen the fact that the Australian State has incurred an international obligation to seek to universally realise the right to adequate housing.

2 THE EXTENT TO WHICH AUSTRALIA IS FULFILLING ITS INTERNATIONAL OBLIGATION

A Protection of the Right to Adequate Housing Within Australia's Legal System

The most obvious means by which the Federal Government could have sought to fulfil Australia's international obligation to *protect* the individual's right to adequate housing would have been either to incorporate such a right into our legal system or provide individuals who have suffered infringements of this right with an avenue for complaint and redress. The Australian Government has chosen neither course.

No reference to a right to adequate housing appears implicitly or explicitly in our Federal Constitution or federal legislation. Within the Constitution, the economic rights protected are rather limited and refer more to rights of trade and property ownership than subsistence.[33] Not even a general recognition that all persons are equal appears in our Constitution, making it impossible to draw any indirect inferences that the right of all persons to enjoy conditions befitting their natural dignity is thus protected. Admittedly, international precedents of a constitutional right to adequate shelter are rare. In New York, a "care for the needy" provision has been accepted as conferring a right to shelter on the needy,[34] yet such a provision is regarded as exceptional. In view of the practical difficulties surrounding constitutional change in Australia, it is perhaps not surprising that no attempt to amend the constitution in such a fashion has been attempted. More startling, however, is the failure of either of the proposed Bills of Rights (1973, 1985) to include the right to adequate housing or indeed any of the provisions of ICESCR. In this respect, Australia is hardly alone given that the right to housing does not appear within the European Social Charter, the European Convention on Human Rights or the African Charter on Human and

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30 G J H van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of some Traditional Views" in P Alston, *supra* n 18, 97.

31 H von Hebel, *supra* n 6, 37-38; see too P Alston, *supra* n 18, 39-40.

32 H von Hebel, *supra* n 6, 27.

33 For an examination of the economic rights protected within the Australian Constitution, see P Bailey, *supra* n 5, 99-103.

34 Article XVII s 1 of the New York State Constitution: *Callahan v Carey* (1979) NYLJ 10; discussed in K P Sherburne, "The Judiciary and the Ad Hoc Development of a Legal Right to Shelter" (1989) 12 Harv J Law & Pub Policy 193.

Peoples' Rights.[35] Furthermore, the right was not even considered worthy of the "administrative protection" afforded its civil and political counterparts with the establishment of the HREOC.

Within the package of federal human rights legislation presently in force in Australia, the right to adequate housing enjoys only selective recognition and administrative protection. The HREOC is empowered to investigate complaints concerning rights contained within the ICCPR, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons and those "declared by any other relevant international instrument" (s 3 HREOC Act 1986 (Cth)). It has no direct power concerning abrogations of ICESCR rights. Some indirect jurisdiction over the right to adequate housing is given to the Commission via the right's classification as a fundamental right protected from sex and race discrimination within the Sex Discrimination Act 1986 (Cth) and the Race Discrimination Act 1975 (Cth). Furthermore the Commission has jurisdiction over matters pertaining to the right to adequate housing of the disabled, the mentally ill and children.[36] In itself, these powers seem an important step in fulfilling Article 2(2)'s obligation that the exercise of the right to adequate housing be free from discrimination. However, it does not represent the universal protection of the right. Whilst the Commission's use of its powers to justify the Inquiry into Homeless Youth indicates the Commission possesses a broad approach to interpreting its own powers,[37] not even the most generous interpretation of the Commission's powers could give it power concerning the "right to adequate housing" *per se*. The only possibility of the Commission possessing such a power would be if the "right to life" recognised in Article 6 of the ICCPR were to be read as encompassing the notion of the right to adequate housing, a possibility which seems extremely unlikely.

Despite the logical appeal of the argument that of necessity the right to life involves a guarantee of the elements required to sustain an acceptable quality of life,[38] the traditional approach has been to interpret the right to life as a protection against arbitrary killing rather than as a right to the maintenance of life.[39] Discussion in the *travaux preparatoires*, for instance, revolves around the need to prevent direct killing[40] - rather than indirect causes of death like exposure[41] or dangerous living conditions. Comparable rights to life contained within national constitutions have been interpreted in a similarly restrictive fashion. Examining an analogous provision in s 21 of the Indian constitution, Chancharad J affirmed that the "right to life" did not extend to protect the right of livelihood nor did it operate to prevent the eviction of pavement and slum-dwellers.[42] Thus even though civil and political rights may seem rather empty

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35 S Leckie, *supra* n 8, 19.

36 HREOC, *supra* n 10, 3.

37 It is questionable whether under the Declaration on the Rights of the Child, the Commission's jurisdiction extended to over 18 year old youths, for instance.

38 Rzetacznik, "The Right to Life as a Basic Human Right", discussed by P Alston, "International Law and the Human Right to Food" in P Alston, *supra* n 18, 9, 24-25.

39 Y Dinstein, "The Right to Life, Physical Integrity and Liberty" in L Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), 114, 115-116.

40 See for instance M J Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant of Civil and Political Rights* (1987) 112-121.

41 P Alston, *supra* n 18, 24.

42 *Tellis and Others v Bombay Municipal Corporation and Others* [1987] LRC 351.

without regard to the economic rights which underpin them,[43] the HREOC and Australian courts seem unlikely to consider a wider ambit for the operation of the "right to life" recognised in the ICCPR. Accordingly, persons suffering from an abrogation of their right to adequate housing seem bereft of a remedy or right of complaint in Australian domestic law.

Express provision for the right to adequate housing would be unnecessary, of course, were the right to be "incorporated" into domestic law of its own force. Despite Kirby P's doubts in *Jago v District Court of New South Wales*[44] as to whether the incorporation/transformation debate in international law was settled, from the High Court's decision in *Kioa*, it would appear certain that "treaties do not have the force of law unless they are given that effect by statute".[45] More recently, however, a variation on this incorporation theme has been propounded by commentators such as Bayne.[46] The major thrust of what may be termed this "*de facto* incorporation theory" is that courts are incorporating such rights into our legal system informally such that the near future might come to see human rights being regarded as relevant considerations, or even binding considerations, in determining constitutional and administrative validity of Acts and actions. According to such theorists, courts could require that statutes and legislative power be read as subject to human rights. Similarly decision makers could be compelled to take into consideration human rights factors and perhaps even be prevented from reaching a decision which contravened such rights.

With respect to the interpretation of statutes, Australian courts have certainly displayed a receptiveness to "rights talk". In *Koowarta v Bjelke Petersen*, for instance, Gibbs CJ stated that where possible statutes would be interpreted so as not to be inconsistent with the established rules of international law.[47] In the recent case of *Davis v Commonwealth*, Brennan J in particular used the concept of freedom of speech to justify why the censorship elements of the Bicentennial Authority Act 1980 (Cth) could not be regarded as a proper exercise of the Commonwealth's incidental power under s 51(xxxix) of the Constitution, whilst several other judges referred to this freedom in reaching their conclusions.[48] Yet the limitations upon using this reasoning to establish a right to adequate housing in Australia are evident. Firstly, it would seem that the *Davis*-style of reasoning is restricted to where the courts are examining whether the legislation is a reasonable or appropriate means of pursuing an object within constitutional power - that is, in examining purported exercises of the Commonwealth's incidental power. Yet most Commonwealth legislation concerning housing would be enacted under the loans power (s 96), depriving the courts of an analogous examination opportunity.[49] Furthermore, it is also noticeable that most of the judicial references to freedom of speech in *Davis* were grounded not in the right's international recognition, but in its "general acceptance". It is quite

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43 D Watson, "Welfare Rights and Human Rights" (1977) 6 Journal of Social Policy 31, 45.

44 (1988) 12 NSWLR 558, 569.

45 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, 336 *per* Gibbs CJ.

46 P Bayne, "Administrative Law, Human Rights and International Humanitarian Law" (1990) 64 ALJ 203; see also Hon Justice M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514.

47 (1982) 153 CLR 168, 204.

48 (1988) 82 ALR 633 *per* Mason CJ, Deane and Gaudron JJ at 645; Brennan J at 657.

49 In the central area of a power, the courts are not concerned with whether the Act is reasonable or necessary: *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1.

ubtful whether the more 'novel'[50] right of adequate housing would be regarded ith such respect.

In the administrative law field, the *de facto* incorporation theory relies on the validation of decisions which fail to take into account human rights nsiderations or the classification of decisions as "unreasonable" and therefore valid if they contravene human rights standards.[51] As Bayne[52] points out, some dges - such as Nicholson CJ in *Re Jane*[53] - have openly referred to human ghts in exercising the court's decision-making power. Yet Bayne's prediction at

> [t]he courts might not then be taking a very long step were they to resort to international humanitarian law as a source for determining whether a decision-maker has had regard to the relevant considerations, acted fairly (either procedurally or substantively) or acted unreasonably[54]

ems unduly optimistic. The High Court in *Kioa* was insistent that whilst uman rights may be taken into account, decision-makers were under no bligation to consider human rights' implications.[55] If there was no obligation to nsider rights, there could certainly be no argument that the decision was reasonable because it contravened such rights. Thus the time in which human ghts considerations are considered as necessary or binding considerations seems ill distant and given the controversial nature of economic rights, it is unlikely at sufficient judges or decision-makers will informally come to regard the right adequate housing as deserving of such attention by decision-makers.[56] lthough in *Re Jane*, Nicholson CJ was prepared to consider the "rights of the ild", rights which have not traditionally been recognised in our legal system, it interesting to note that in the most recent sterilisation case, *Re Marion*, icholson CJ reneges from his former position that the court may examine any ndamental human rights (using an incorporation theory). In *Re Marion* he ounds his support for considering these rights in their inclusion, albeit indirect clusion, within municipal law, given that the Declaration of the Rights of the ild has been listed as a source of human rights in the HREOC Act 1986.[57] ore controversial rights such as the right to housing which enjoy only very direct and selective recognition in domestic law are unlikely to be accepted as ch "fundamental human rights".

Furthermore the utility of administrative law in protecting and promoting a iversal right to adequate housing seems limited. Firstly, for the administrative w doctrines to come into play, a decision must have been made which affects e interests or legitimate expectations of an individual or a group of dividuals. Given that most Commonwealth actions in the housing area involve neral policy decisions concerning the giving of loans to the States or the anting of financial assistance to refuges, it may be difficult to isolate an lministrative decision which the courts could validly review. Secondly,

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Novel only in the sense of being new in the Australian legal system.

P Bayne, *supra* n 46, 204.

Ibid 205.

(1988) 94 FLR 1.

P Bayne, *supra* n 46, 205.

Kioa v West (1985) 159 CLR 550, 604 *per* Wilson J and 630 *per* Brennan J.

Bayne notes the discussion of such "fundamental rights" has been confined to ICCPR rights and other traditional rights such as the right to own property: P Bayne, *supra* n 46, 207.

Re Marion (1991) FLC 92-193, 78, 303.

considering administrative law is not designed to impose an obligation on th State to give priority to a particular consideration, unlike the internation scheme of human rights, the holding of a decision invalid which failed to furthc a particular right seems a most improbable outcome. Thus the Government' failure to provide legal protection for the right to adequate housing cannot eve be excused on the basis that it has already been or will naturally be incorporate into our legal system.

The prospects of political pressure remedying this situation, however, shoul not be underestimated given the increasing recognition of the Australia Government's international obligations displayed in HREOC reports an Commonwealth discrimination legislation. In its Burdekin Report, for instanc HREOC found that Australia's ratification of the ICESCR was evidenc substantiating Australia's commitment to a child's right to adequate housing, a well as evidence of "international law", and was the source of binding leg obligations on the State.[58] The present recognition of the right to housing c particular groups in existing discrimination legislation as discussed earlic shows promise as did Australia's participation in the International Year of th Homeless. It is conceivable that community pressure concerning the right t housing might persuade the government to at least widen the HREOC's charte even if pressure was not sufficient to bring about legislative protection of th right. The major barrier which community pressure would have to overcome the fear of ICESCR rights.

The lack of protest when the ICESCR rights were overlooked in establishin a regime of human rights legislation points to a widespread feeling that suc rights are intrinsically different from other human rights despite the Unite Nations' insistence to the contrary.[59] The nature of economic human rights an their status in relation to the State are the subjects of a complex debate. Fc present purposes, it suffices to say that a brief study of objections put forwar by academics reveals little justification for withholding full human rights stat from the right to adequate housing.

Whilst many tests have been proposed for ascertaining human right Cranston's framework has had a pervasive influence on the "human rights debate. According to Cranston, *real* human rights, such as the traditional civ and political ones, fulfil three tests: firstly, they are of paramount importanc secondly, their enjoyment can be ensured in practical terms; and thirdly, they ca be universally enjoyed. However, a comparison of the operation of Cranston tests on traditional rights and the right to adequate housing (as an example c economic rights) fails to reveal significant differences between the two.[60] Whil no one has suggested that the right to adequate housing does not fulfil the fir element of Cranston's test - that of paramount importance, objections have bee raised concerning the ability of economic rights to fulfil the latter requirement Yet, in relation to the "practicability" criteria, if the right to life is taken as a

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58 HREOC, *supra* n 10, 33 (n 2), 34, 37.

59 See for instance the Limburg Principles formulated by experts in international law in which was emphasised that "equal attention and urgent consideration" should be given to a categories of rights: Principle 3: *supra* n 28, 123 See also the East's insistence on remedyi housing and economic problems in the Helsinki talks: J Häusermann, *supra* n 13, 126.

60 M Cranston, *What are Human Rights?* (1973). Whilst other tests for ascertaining human righ have been proposed, due to the pervasive influence of Cranston on the historiography of tl law, his tests have been accepted as a suitable framework within which to argue: see Watson, *supra* n 43.

ample of a right which he claims is a "true" human right, it would appear fficient to fulfil the criteria that the right of protection (of life) rather than the solute right (to life) be guaranteed.[61] No point of distinction then arises tween it and the right to adequate housing in which the protected right of cess to housing should likewise be sufficient. As for the universality quirement, adequate housing would seem a universal and constant need, far ore than the situational related right to a fair trial, for example, which Cranston cepts as a human right. The differing level of assistance required for real access adequate housing relates only to the substantive provision of the right, not to universality. Whilst this comparison might raise doubts as to the accuracy of anston's tests, it certainly does not point to any basis for distinction as tween traditional human rights and the right to adequate housing.

Other critics have objected to classifying economic rights as human rights cause of the perceived difference in levels of State intervention. Real rights it said pre-exist and need only be protected by the State, whereas economic ;hts owe their existence to the State.[62] Yet as van Hoof has demonstrated, such distinction seems unwarranted. Whilst it can be acknowledged that human ;hts have a source of legitimation extrinsic to the State and that the raison tre of some rights is to protect individuals from State intervention, such missions do not exclude the State from being simultaneously the legal mulator, ensurer and subject of human rights. Firstly, economic rights are not tecedent to the existence of a benevolent State. Like civil and political rights ey derive from the inherent dignity of individuals. Secondly, economic rights nnot be distinguished from civil and political rights on the basis that only the mer require State resources to protect them. Even civil and political rights ed expenditure of resources to guarantee that all can enjoy their rights.. In the ;ht to a fair trial, for instance, the State is required both to respect the right and ovide assistance in the form of a court, judges and legal aid so that all may joy the right. In the housing example, therefore, the necessity for State sistance and intervention does not appear a justifiable ground of distinction tween recognised human rights and the right to adequate housing.

Furthermore, the necessity for recognising economic rights alongside political es is poignantly clear when it is realised that the significance and efficacy of vil and political rights in isolation becomes minimal. Such a conclusion is rne out by witnessing the interdependence of rights. For someone suffering om exposure because of a state of homelessness, civil and political rights such the right to a fair trial are not going to afford them much assistance. Likewise, right to freedom of speech will be quite meaningless if the entirety of an lividual's energy is expended in efforts to survive. Within Australia, in fact, deprivation of the right to housing can lead to a restriction of movement and erty under present vagrancy and trespassing laws.[63] At the root of Australia's

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Ibid 34-36

For an exposition of this view by Bossuyt, see G J H van Hoof, *supra* n 30, 97, 103-105.

Only NSW, Victoria and the Northern Territory have abolished the offence of vagrancy and the Burdekin Report confirmed the existence of "considerable evidence" that existing laws were used to penalise people for being poor and homeless: HREOC *supra* n 10, 19. Seeking shelter in vacant properties leads to trespass actions and possible gaol sentencing. For existing vagrancy provisions, see: Vagrants, Gambling and Other Offences Act 1931, (Qld) - s 4(1)(i), Police Act 1892 (WA) - s 65(1), Police Offences Act 1935 (Tas) - s 5, Police Offences Act 1953 (SA) - s 13.

failure to recognise a legally enforceable right to adequate shelter is more likel to be, however, a hesitancy to qualify existing property rights.

Many of the arguments countering legal recognition of economic rights can b better understood in terms of a fear that recognition of this right would threate and perhaps usurp existing property rights.[64] It may be, for instance, feared tha the right to adequate shelter would provide a defence to trespassing and lim landlords' rights to deal with property as they wish. Whilst it is undeniable tha the right to adequate housing might well conflict with the interests of property owners, conflicts are to be expected in many human rights areas, for exampl between freedom of speech and the right to privacy. In the conflict between th right to adequate housing and property rights the courts could engage in 'balancing' exercise to achieve a resolution in keeping with the general scheme c human rights in a similar manner to its balancing of public and private interest in other areas of law.[65] Fears about the pre-eminence that might be afforded to th achievement of basic subsistence levels over private property interests may we be justified since the desire to retain the privileges of a few at the expense c other's subsistence seems a dubious base for refusing to recognise and respect right to housing. On an international level, similar doubts have been raised:

> When half or more of a city's workforce has no chance of obtaining a legal plot o which a house can be built, let alone of affording to buy or rent a house legall the balance between private landownership rights and the public good must b quickly rethought.[66]

Considering the lack of substantial differences between recognised civil an political rights and the right to adequate housing, it seems that the latter rigl should be afforded the same respect, protection and promotion as its mor traditional counterparts.

Admittedly, enacting legislation to protect individuals' right to adequat housing is not the only means by which Australia's international obligation ca be honoured. Indeed, its full obligation to promote and ensure the right can onl be achieved through administrative action. If a sufficiently comprehensiv administrative system were in place, it would be possible for Australia to fulf its obligation concerning the provision of access to adequate housing to a Australians without recourse to the provision of legislative sanctions. Howeve as the following case study of the Government's policies concerning th homeless demonstrates, the administrative policies adopted militate against th realisation of the right to adequate housing.

B The Right to Adequate Housing, the Homeless and the Australian State.

Although the Australian State's response to the homeless cannot b impeached simply because it has not attained the optimum result of eradicatin homelessness, it can be attacked for its inconsistency with the Covenant governing notions of the universality of human rights and dignity and its failur to use available resources to take steps towards realising universal access t

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64 It is noticeable that the right to property does not appear in the ICESCR, but it is firml entrenched within our common law system: *Mabo* v *State of Queensland* (1990) EOC 92-297

65 See the judgment of Mason J in *Commonwealth v John Fairfax and Sons* (1980) 147 CLR 3 discussed in P Bailey, *supra* n 5, 23-25.

66 World Commission on Environment and Development, *Our Common Future* (1987) 250-25 McCloskey also supports rejecting the right to private property as a basic human right, seeir it as conditional, qualified and derivative: H J McCloskey, "The Moralism and Paternalis Inherent in Enforcing Respect for Human Rights", in C F G Sampford, D J Galligan, (ed *Law, Rights and the Welfare State* (1986), 150.

ıgnified housing. Examining the government's response to the homeless in the ght of its three-fold obligation to a) respect, b) protect, and c) promote and ısure the right to adequate housing (to adopt van Hoof's terminology), the ropriety of the Government's actions certainly seems questionable. Not only has ıe State failed to take real steps towards the implementation of a right to dequate housing through the provision of guaranteed financial and non-financial ıpport, but its policies, built as they are upon a premise of the deserving needy, ndermine the whole basis of the right - that is, the inherent universal dignity of l human beings.

') *Respect*

As jurisdiction over the actual provision of housing and the provision of lanning development approval belongs almost exclusively to the States, there is ery little scope for the Commonwealth to directly respect or disrespect the right adequate housing. However, in its indirect facilitating of and failure to prevent tate actions which deprive persons of their right to adequate housing, the ommonwealth could be seen as equally culpable. In this way the ommonwealth's failure to require States to respect the right as a pre-condition their receiving Commonwealth funds under s 96 could be regarded as an orogation of their obligation. More controversial, perhaps, would be to regard ıe Commonwealth government's failure to restrain interest rates as a ontravention of its obligation to maintain affordable housing and rental costs. endig, for instance asserts the Government's primary responsibility for the ystem of housing in terms of macro-economics and interest rates.[67] However, in iew of the fact that the Australian Government in its Report to the Economic nd Social Council quotes its regulation of interest rates as assisting access to ousing,[68] to criticise present regulation policies might represent an unjustified xamination of the merits of government policy. In addition, the Australian overnment could easily raise the issue of wider economic concerns to justify ıeir recent policies about interest rates. More apparent denials of the right's ıniversal" character appear in other aspects of the States' obligation.

?) *Protect*

As earlier discussed, the Commonwealth has failed to provide legal protection or the universal right to housing. In the likely circumstance that a homeless erson is denied access to housing because of their homeless status, they have no ecourse. Furthermore, due to the absence of a recognised right to housing, it may e that the homeless possess no rights in relation to the closing of refuges. In merica, for instance, due process arguments have failed on the grounds that the omeless possess no property interest in the refuge.[69] Although the closing of ıch hostels cannot by definition mean the depriving of "housing" (since hostels e not places of permanent secure accommodation), the fact that the homeless are enied control over even their temporary shelter contributes to a more widespread isregard of the homeless' right to housing.

H Kendig, *supra* n 20, 4.

Report Submitted by Australia in Accordance with Economic and Social Council Resolution 1988 (LX) Concerning Rights Covered by Articles 10-12 of the International Covenant on Economic, Social and Cultural Rights (1980), 59-64.

See K P Sherburne, *supra* n 34, 198. In Australia, admittedly some natural justice requirements have been held in situations where the interest did not constitute a property interest but was a "legitimate expectation": see *Kioa*, *supra* n 45.

(3) Promote/Ensure[70]

In its latest report to the Economic and Social Council, Australia considere that in providing assistance in the form of home loans and refuges and trying t keep interest rates low, Australia was honouring its international commitment.[7 However, the *ex gratia* nature of such assistance and the lack of universall available means of subsistence inherently negates the universality of the right t adequate housing. Considering the persistence of the "deserving/undeserving style of categorisation of persons eligible to receive aid in the form of socia security benefits or allowances, and the refusal of the State to cater on a need basis for the financial and non-financial causes of homelessness, it is to b doubted whether the State's efforts can be interpreted as truly honourin Australia's commitment to a universal right. Instead these policies appear t support a countervailing notion - the notion that the right to adequate housing i an earned privilege.

Due to the fact that the primary responsibility for housing lies with th Australian States, the Commonwealth's programmes are limited to funding primarily under the Commonwealth-State Housing Agreement (CSHA) withi the Housing Assistance Act, 1989 (Cth). Whilst the agreement is said to b premised upon the aim of ensuring "every person...has access to secure adequat and appropriate housing"[72] and the primary consideration in delivering housin assistance is stated to be "the needs of all people",[73] the Government has mad no public declaration of a universal right to adequate housing. Even the forme stated aim is limited to enjoyment of housing "within his or her capacity t pay", making the standard referable to the personal earning capacity of th individual rather than their needs. Although there is provision for financia assistance to those unable to obtain or maintain affordable housing (cl A(a)), th provision is cast in discretionary terms, there being no *right* to assistance. Th majority of funding under the Agreement is given in the form of untied grants (total of $530 million out of $700 million for 1988-89[74]), so the discretion as t the choice of programmes is delegated to the State.[75] Although th Commonwealth states the priorities which are to be taken into account, thes priorities do not relate to alleviating need but providing services to certai groups. In its Annual Report (1989), for instance, the Department of Communit Services and Health called for priority to be given to youth, people wit disabilities, Aborigines and the aged.[76] Yet, the homeless outside such categorie receive no ensured consideration, resulting in a hierarchy of homeless who wi enjoy the right. Furthermore, as the Burdekin Report outlined, the present syster of public housing, organised by States but partially funded by th Commonwealth, discriminates against those unable to live independentl

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70 As the promotion and ensuring obligations both involve programmes and non-legal avenues, is convenient to study the obligations jointly. By the time of publication of this article, ther may well be new relevant figures, however it is to be doubted whether the basic framewor will have changed dramatically.

71 ESC Report, *supra* n 68.

72 Schedule 1, cl D.

73 Schedule 1, cl D(a).

74 Department of Community Services and Health, *Housing Assistance Act 1984: Annual Repor 1989*, 84.

75 Kendig feels within State policies funds tend to reflect the power of those who have alread achieved home dominance: H Kendig, *supra* n 20, 49.

76 *Ibid* 85.

'ithout assistance.[77] In view of the later discussion of the alienation suffered by ıe homeless, such policies could hardly be said to represent a step towards the :alisation of adequate housing for all, including the homeless.

The individual programmes instituted for the homeless, the Crisis .ccommodation Programme (CAP) and the Supported Accommodation .ssistance Programme (SAAP), also seem to entrench a dichotomy between the deserving" poor who will be given assistance and the "undeserving" poor 'hose homelessness is viewed as a personal responsibility. Under the CSHA ıoney is provided for the express purpose of establishing crisis accommodation rogrammes - usually refuges.[78] Refuges, though, do not have to accept all who :e in need of accommodation. By definition they are limited to the sub-stratum f homeless persons who have suffered identifiable crises.[79] There is no rotection against the operation of an informal "deserving/undeserving" mentality ɔntravening the spirit of Article 11. In practice, the institutionalised, dependent ersons can be chosen in priority to more independent individuals, promoting a ependency contrary to the supposed "dignity" of all. Alternatively, in order to ɔpear successful and increase their chances of increased funding, programmes ıay select only those individuals likely to recover in a short period. Such :lection processes operate to discriminate against the opportunity of all to enjoy dequate housing.[80] It is interesting to note that the United Kingdom employs a milar, but more explicit exclusion of assistance to those thought morally ılpable for their homelessness.[81] As money under the CSHA to CAP rogrammes is to be used only for the construction, purchase or renting of remises, CAP is limited to providing simply a "roof over the head" of the ɔmeless. The Supported Accommodation Assistance Programme also operates n simply providing accommodation (on a discretionary basis) to those without ıelter, yet as Kendig points out:

> SAAP and other special purpose programs are valuable in particular circumstances but they cannot substitute for a basic lack of adequate income support and secure housing.[82]

SAAP does not provide long-term accommodation, nor under funding rangements can it afford any sort of non-material assistance.[83] Such policies - ereft as they are of a guaranteed right of access for all or a component of ıpport to live in the community - seem to merely breed dependence on the State ther than assist persons to independent living. Once again such policies ndermine universal enjoyment of the right to adequate housing.

The homeless are further hindered from enjoying access to adequate housing the free market as they possess no guaranteed source of the financial and non-nancial pre-requisites for the obtaining of housing. The essential nature of come support in order that the right to adequate housing be realised is clear, t in Australia, the homeless have no *right* to income support. In this respect,

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HREOC, *supra* n 10, 192-200, particularly 198-200.

There was an allocation of $19.5 million to CAP projects in 88-89: Department of Community Services and Health, *supra* n 74, 84.

For instance domestic violence refuges.

Further study of this point would require a survey of hostel practices.

Under the Housing (Homeless Persons) Act 1977 (UK) those "Intentionally homeless", that is whose homelessness is considered to be a product of a previous culpable act or omission on the part of the applicant, are denied assistance: P Q Watchman, P Robson, *Homelessness and the Law in Britain* (2nd ed 1989) 103-104.

H Kendig, *supra* n 20, 70.

Id.

the homeless do not face greater discrimination than other groups, as no one i Australia can claim such a right.[84] Certain groups corresponding with soci security categories may have an entitlement to benefits, which fortunately are n dependent on a strict "residence" home qualification.[85] Those outside the categories are left without support no matter how great their need. Given t cumulative effects of homelessness - lack of motivation to find employme because of discrimination[86] and demoralisation and the stringent disability test it is quite conceivable that homeless individuals fall outside social securi requirements (for example, the "work test") and thus are caught in a cycle homelessness. Although Carney and Hanks have argued that a system built c entitlements and discretions is better designed to do justice than one built c rights,[87] the gaps between such categories can and do lead to serious suffering - point drawn attention to by Cass in her review of social security.[88] Attempts imply into the social security legislation a power to grant benefits to those need have failed. The Federal Court in *Lambe v Director General of Soci Security*[89] emphasised that the legislature had exclusively defined the categori of "needy" individuals who were to receive benefits. Such categories are real only manifestations of the underlying theme of "deserving and undeservin poor equally apparent in provision of State shelter. HREOC admitted t prevalence of social security categories imposing notions of blame c individuals and affirmed that such practices are contrary to a universal right social security.[90] The Report added that the provision of Social Security w lacking in its failure to provide sufficient information and advocacy resourc bearing in mind the special needs of youth.[91] Furthermore, there is no provisi of extra allowances to enable the homeless individual to establish independe housing. "Rental Assistance" is available only to those who can demonstra proof of their current rental situation. The one exception to this - the You Homeless Allowance - also incorporates notions of "worthiness" in requiring justification for the homelessness. Unless the categories were redesigned permit a practical right to income support for the needy, the present system cou be seen as supporting a framework which denied the right of *all* to achieve basic subsistence quality of life and operated as a barrier to the realisation of t right to adequate housing.

The refusal of the Commonwealth to address the non-financial causes homelessness compounds the homeless' problems by denying them access resources essential to their enjoyment of housing. The need for emotion support and services to counter the alienation of homelessness has be recognised for some time. Bahr, for instance, includes in his definition homelessness "a condition of detachment from society characterized by t absence or attenuation of the affiliative bonds that link settled persons to

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84 *Green v Daniels* (1977) 51 ALJR 463.

85 *Re Kyvelos and Director General Of Social Services* (1981) 3 ALN No 77: where the A affirmed a homeless person's right to benefits in dictum; to be contrasted with the United Sta position: See K P Sherburne, *supra* n 34, 198.

86 J Häusermann, *supra* n 13, 137.

87 T Carney, P Hanks, "Social Security: Resisting Welfare Rights" (1987) 12 Legal Servi Bulletin (6) 266.

88 Discussed by P Bailey, *supra* n 5, 328-332.

89 *Lambe v Director General of Social Services* (1981) 38 ALR 405, 411-412.

90 HREOC, *supra* n 10, 35.

91 *Id.*

:twork of interconnected social services".[92] Similar comments are made by some ustralian social workers.[93] However, as seen explicitly in the CSHA (clause A)), the provision of support to enable persons to live independently is not nsidered a responsibility of the government. The facilitation of access to using is seen in financial terms only. Any access to housing is thus limited to ose with the resources to compete in and cope within the existing system of using. In human rights terms, the right is only promoted and ensured for the apable". As Campbell has pointed out in his study of the mentally ill, this loer-and-chooser" image of human beings is not uncommon in nations' :tions.[94] Yet it does not seem to accord with the international human right's nguage encompassing all humans. In other contexts Australia has been willing compensate for financial and non-financial inequality - for instance in the ovision of Legal Aid to ensure the right to equality before the law. In the esent case, allowance for the effects of individuals' present deprivation of iman rights seems reasonable and necessary if the right to adequate housing is be enjoyed by all.

The significance of the objections raised in this case-study is not in showing ere perceived inadequacies of approach or budgetary allocations in policies ncerning the homeless, but in demonstrating the lack of a "universal rights" proach in the allocation of available resources. The distinction is vital. While e former complaint could be subsumed into the unreviewable discretionary wer of the Australian Government to instigate "appropriate" policies towards e realisation of universal access to adequate housing, the latter represents a ilure even to attempt to implement such access. There is no evidence of any eneral welfare" or higher priority justification proffered for supporting the esent categorical assistance to the homeless. As such, the administrative licies adopted by the Government, far from representing a means by which the iversal right to adequate housing is being achieved, symbolise a flouting of istralia's commitment to Article 11 of the ICESCR.

CONCLUSION

In the face of Australia's abysmal record in recognising, respecting and omoting the right to adequate housing, the need for political pressure to be ought to bear concerning this important human right is clear. Such pressure eds to direct itself to the sweeping away of prejudices which impede the cognition of economic rights as human rights and which link enjoyment of hts to notions of "worthiness". The aim is not necessarily to achieve an equal ndard of living for all. It is simply to accord each individual's right to equate housing due respect so that "the bottom [standard of housing] is at a fficiently high level to be consistent with human dignity".[95]

Quoted in M Ciampi, "Building a House of Legal Rights: A Plea for the Homeless" [1985] 59 St John's L Rev 530, 530, n 2.

See the interviews in L Crisp, "The Underclass: Australia's Social Time Bomb", *The Bulletin* April 3 1990, 48-56.

T Campbell, "The Rights of the Mentally Ill" in T Campbell et al (ed), *Human Rights: From Rhetoric to Reality* (1986), 126.

Brian Lucas, quoted in L Crisp, *supra* n 93, 56.