Homelessness Bill 2013 [and] Homelessness (Consequential Amendments) Bill 2013

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Homelessness Bill 2013 [and] Homelessness (Consequential Amendments) Bill 2013

Date introduced: 5 June 2013

House: House of Representatives

Portfolio: Housing and Homelessness

Commencement: On Royal Assent to the Homelessness Bill 2013.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech for the Homelessness Bill 2013 and the links to the Bill, its Explanatory Memorandum and second reading speech for the Homelessness (Consequential Amendments) Bill 2013 can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bills

The purpose of the Homelessness Bill 2013 (the Bill) is to outline the Commonwealth’s recognition of persons who are homeless or at risk of homelessness and the general means through which it intends to reduce homelessness and support people who are homeless or at risk of homelessness.

The purpose of the Homelessness (Consequential Amendments) Bill 2013 is twofold. Firstly, it repeals the Supported Accommodation Assistance Act 1994 to make way for the proposed Homelessness Act 2013. Secondly, it repeals the definition of homelessness person in the Commonwealth Electoral Act 1918 and substitutes a new definition that is in line with that contained in the Homelessness Bill 2013.

Background

In January 2008, the then Prime Minister, Kevin Rudd and the then Minister for Housing, Tanya Plibersek made a commitment to tackle the issue of homelessness in Australia ‘as a matter of national priority’.1 The problem of homelessness was to be addressed within Labor’s broader housing affordability and social inclusion agendas through a focus on the prevention of homelessness, improved crisis services and the creation of exit points to secure longer term housing and stop the cycle of homelessness.2

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1. K Rudd (Prime Minister) and T Plibersek (Minister for Housing), Government to set agenda on homelessness for the next decade, joint media release, 27 January 2008, accessed on 14 June 2013.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
As a part of its intention to develop a comprehensive, long-term plan to tackle homelessness the Rudd Government commissioned a Green Paper entitled *Which Way Home? A New Approach to Homelessness* to ‘promote public discussion of homelessness, highlight the challenges faced by people who are homeless, and suggest ways forward’.  

A number of submissions to the Green Paper proposed means for strengthening the existing homelessness legislation—the *Supported Accommodation Assistance Act 1994 (SAA Act)*—or bringing it up to date.  

Based on the findings of the Green Paper, the Government developed the White Paper on homelessness, *The Road Home: A National Approach to Reducing Homelessness*. This paper, which was released in December 2008, seeks to provide a national plan of action on homelessness for the years leading up to 2020. One of the commitments made by the Government in the White Paper is to ‘implement new legislation to ensure people who are homeless or at risk of homelessness receive quality services and adequate support to meet their needs’.  

In March 2008, the Council of Australian Government (COAG) announced major reforms to Commonwealth-state financial relations. Among other things, the reforms involved a rationalisation of existing Commonwealth housing and homelessness assistance programs under a new National Affordable Housing Agreement (NAHA). Under the NAHA, the states and territories are to pursue reforms in three areas of National Partnership. These National Partnership areas are homelessness, remote Indigenous housing and social housing. One of the focuses of the reforms was to reduce conditionality and give the states greater flexibility to allocate resources to areas of highest priority.  

With the introduction of the new funding arrangements, the Supported Accommodation Assistance Program (SAAP) was terminated. The SAAP, a joint Commonwealth-state funded program, was introduced in 1985, largely as a means to consolidate under one nationally coordinated program a range of homelessness programs that were funded by individual state and territory governments and the Commonwealth Government. A majority of Commonwealth Government funding for accommodation and assistance services for people who were homeless or at imminent risk of becoming homeless was provided through the SAAP. This program was administered under the SAA Act, which thus helped to guide the response to homelessness in Australia.  

The Bill is intended to replace the SAA Act and to provide an up-to-date framework for Australian governments’ responses to homelessness.  

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5. Ibid  
6. Ibid., p. 69.  
8. Funding to specialist homelessness agencies is now provided under the National Partnership Agreement on Homelessness (NPAH). While the funding arrangements have changed, a majority of the already existing services under SAAP have continued under the NPAH.
On 16 June 2009, then Minister for Housing, Tanya Plibersek announced that the former House of Representatives Standing Committee on Family, Community, Housing and Youth (the Committee) would hold an inquiry into homelessness legislation. The Committee tabled its report *Housing the Homeless: Report on the Inquiry into Homelessness Legislation* in November 2009. The report made a number of recommendations for the development of new homelessness legislation, and most of these recommendations have been taken up, in whole or in part, in the current Bill. The Government’s response to the report was tabled in Parliament on 20 June 2012. In its response, the Government broadly agreed with a majority of the Committee’s recommendations, with perhaps the main departure being its decision not to specify in the Bill the right of all Australians to adequate housing. This issue is discussed in further detail below.

In August 2012, the Government released for comment an Exposure Draft of the Bill.

**Committee consideration**

The Bill has not been referred to Committee for inquiry and report.

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing this Bills Digest the Senate Standing Committee had not published any comments in relation to the Bill.

**Parliamentary Joint Committee on Human Rights**

At the time of writing this Bills Digest the Parliamentary Joint Committee on Human Rights had not published any comments in relation to the Bill.

**Position of major interest groups**

Issues raised by stakeholders in relation to the Exposure Draft of the Bill are discussed in the ‘Key issues and provisions’ section, below.

**Financial implications**

The Explanatory Memorandum states that the Bill has no financial impact. Given that the Bill does not create any legally enforceable rights or obligations, it is to be expected that it should carry no financial implications.

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Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Key issues and provisions

The need for legislation

A threshold question for this bill is whether there is any need for legislation at all. The Bill contains only general provisions, characterised by terms such as ‘recognition’, ‘aspiration’ and ‘committed to’. There are effectively no operative provisions – a fact made clear by proposed section 14, which stipulates that the Act does not create or give rise to legally enforceable rights or obligations. This reflects the limited constitutional authority for the Commonwealth to legislate in the area of homelessness.

As such, it is arguable that the Bill itself is unnecessary, particularly given that the Commonwealth government does not require legislative authority for the spending programs. Formal policy documents or the adoption of a formal motion in the Parliament may offer more appropriate options to record the Government’s or Parliament’s views.

Meaning of homelessness

There are currently two main definitions of homelessness used in Australia. The first of these is the Australian Bureau of Statistics (ABS) definition, which has been developed specifically for enumeration purposes—that is, from a statistical perspective. This definition encompasses not only those people who are literally homeless (those who do not have a roof over their heads) but also those who are living in circumstances that fall beneath the minimum community standard. While this cultural definition is quite broad, it does not have a focus on those people who are at risk of homelessness, as does the other main definition.

The second definition is that contained in the SAA Act. This definition was designed primarily for the purposes of specifying who is and who is not homeless or at risk of homeless in order to determine eligibility for assistance from welfare agencies under the SAAP. The definition is thus sufficiently wide as to allow homelessness service providers to assist people who are at risk of becoming homeless, as well as people who are actually homeless.

As a result of the 2009 changes to funding arrangements for homelessness, as outlined above, the funding framework provided for by the SAA Act is no longer relevant. While the Bill does not deal

with funding arrangements, it nevertheless still provides some guidance as to who is and who is not able to access services. Hence, many submissions to the Committee inquiry stressed that the definition contained in the Bill should be clear, broad and representative so as to capture the scope and complexity of homelessness.

A majority of submissions on the Exposure Draft of the Bill were generally satisfied with the definition included in that document. However, almost without exception, stakeholders expressed dissatisfaction with the words ‘... and the person is not living in that accommodation by choice’ that have been retained in the Bill and conclude subclause 5(f). Some submissions on the Exposure Draft of the Bill acknowledged that some people living in ‘a caravan park, boarding house, hostel or similar accommodation’ might not be in a state of homelessness\(^\text{14}\) and could ‘appreciate why the element of choice might have been included in the draft Bill’.\(^\text{15}\) Nevertheless, a majority were highly critical of the term’s inclusion on the grounds that, in an environment with few affordable housing options, homeless people or people at risk of homelessness rarely if ever choose their accommodation. Rather, they adapt to their situation and the options that are available to them. For most, it is argued, there is no real choice involved.

In any case, it was argued that the term ‘choice’ requires a subjective assessment of a person’s decision making in respect of their housing and one that could potentially lead incorrectly to a person’s exclusion from services.\(^\text{16}\) Some submissions argued that ‘a more useful defining characteristic would be whether or not a person has access to housing which is adequate’.\(^\text{17}\) These submissions proposed that the definition should be expanded to stipulate that a person is homeless where they do not have access to adequate housing, with ‘adequate housing’ to be clearly defined in the Bill.\(^\text{18}\)

Others have pointed out that the introduction of the notion of ‘choice’ is inconsistent with previous definitions of homelessness, including the definition in the SAA Act\(^\text{19}\) and the recommended versions outlined in The Road Home and Housing the Homeless reports.\(^\text{20}\)

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In the Explanatory Memorandum the Government has justified the inclusion of the word ‘choice’ as recognition of the fact that not all people who live in the kinds of accommodation specified are homeless.

**General recognition**

Submissions on the Exposure Draft of the Bill expressed broad support for the ‘General recognition’ section of that version of the Bill (Part 2, clause 6 of the Bill). However, some submissions argued that a separate clause should have been included to refer to ‘the specific needs and experiences of Aboriginal and Torres Strait Islander (ATSI) peoples who are homeless or at risk of homelessness’. This would be to acknowledge the fact that ATSI peoples are overrepresented in the population of homeless people, and that this has been influenced by their particular context of colonisation and dispossession.21

The Government has indicated that the Bill deliberately ‘avoids focusing unduly on any particular group’. It has done so on the grounds that ‘the approach of singling out particular groups can suggest that any group not mentioned is less important, and the Australian Government knows from experience it is never possible to list all of them. The Australian Government is aiming for a bill that is inclusive, so that no-one is left behind by omission’.22 Arguably, this position fails to account for the fact that Indigenous Australians’ experience of homelessness is qualitatively different from that of other Australians, arising as it does out of their unique position as the first Australians who have been dispossessed.

**Factors contributing to homelessness**

Some submissions on the Exposure Draft of the Bill called for the ‘factors contributing to homelessness’ section (subclause 7(2) of the Bill), which ‘recognises that certain persons leaving institutional settings … may be at risk of experiencing homelessness’ to be strengthened. For example, the Mental Health Council of Australia argued that ‘the need for strict requirements around discharge planning should be reflected in the Draft Bill’.23 If such a change had been made, then this would have been in line with The Road Home commitment to ‘no exits into homelessness’ and the recommendations of a number of submissions to the Committee inquiry. These submissions argued that a ‘no exits into homelessness’ commitment should be made explicit in the Bill.

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Access to housing

Subclause 8(2) of the Bill states that it is ‘the Commonwealth’s aspiration that all persons living in Australia have access to appropriate, affordable, safe and sustainable housing’. As some submissions on the Exposure Draft of the Bill noted, the wording of this section is incompatible with Australia’s international human rights obligations under the International Covenant on Economic Social and Cultural Rights (ICESCR).

Under the ICESCR, to which Australia is a signatory, persons in Australia have a right to the provision of housing that is adequate for their health and well-being. The ICESCR requires that signatories take steps to progressively realise this right for all their citizens. Hence, some commentators have argued that it is not sufficient for the Commonwealth to ‘aspire’ for all persons living in Australia to have access to adequate housing. Rather, it is contended that the Commonwealth has an obligation to work towards the provision of adequate housing for all, and that the clause should have been re-worded to reflect this. To this end, in its submission on the Exposure Draft of the Bill the PILCH homeless persons’ legal clinic suggested the following, alternative wording for the clause:

The Commonwealth recognises the right of all persons living in Australia to adequate housing and commits to take appropriate steps, to the maximum of its available resources, to achieve progressively the realisation of this right.24

It should be noted that the wording of subclause 8(2) has been changed in the Bill, in response to comments on the Exposure Draft version. Where formerly the subclause referred to the Commonwealth’s aspiration being that all persons living in Australia should have access to ‘adequate housing’, it now specifies that the housing should be ‘appropriate, affordable, safe and sustainable’. This wording more closely reflects that contained in the National Affordable Housing Agreement.25

Social inclusion

Subclause 9(2) of the Bill commits the Commonwealth to a cooperative approach with relevant stakeholders to ‘address the issue of homelessness in order to help more persons living in Australia achieve social inclusion’. In its submission on the Exposure Draft of the Bill, Legal Aid New South Wales suggested that the Bill should define the term ‘social inclusion’. If it had done so, then this would have been in line with the National Shelter submission to the Committee Inquiry, which argued that social inclusion needed to be defined within the legislation ‘to clarify interpretation and to ensure constancy over time’.26 It would also have been to follow the Committee’s position on the issue.27

24. PILCH Homeless Persons’ Legal Clinic, op. cit., p. 3.
27. House Standing Committee on Family, Community, Housing and Youth, op. cit., p. 56.
Given the ‘degree of uncertainty about the meaning and application of the term social inclusion’ and the fact that it is by no means clear that there is bipartisan support for its use as a framework concept for social policy, this may be seen as an important omission.

Service delivery

Clause 10 of the Bill conforms broadly with the relevant conclusions and recommendations of the Committee. Submissions on the Exposure Draft of the Bill expressed general support for the five service delivery outcomes specified in the Bill.

Strategies to reduce homelessness

Submissions on the Exposure Draft of the Bill appear to have been generally satisfied with the strategies to reduce homelessness that are specified in the Bill. This is to be expected, given these strategies entail a multi-dimensional response to the problem of homelessness, which targets all stages of homelessness and risk. The strategies follow closely those recommended for inclusion in the Bill by the Committee, largely in response to comments from stakeholders.

National Shelter did, however, suggest in its submission on the Exposure Draft of the Bill that the subclause should be strengthened and made more active through re-wording. Currently, subclause 11(1) states that ‘the Commonwealth recognises the importance of having strategies to reduce the number of persons who are, or are at risk of, experiencing homelessness.’ National Shelter recommended that the clause should read ‘the Commonwealth is committed to developing, implementing and improving strategies to reduce the number of persons who are, or are at risk of, experiencing homelessness’.

Many stakeholder comments on the Exposure Draft of the Bill were of this nature, calling for the wording, and the Commonwealth’s commitment, to be strengthened.

Cooperation and consultation

On the whole, stakeholders would appear to be satisfied with the Commonwealth commitment to cooperation and consultation to reduce homelessness and the risk of homelessness, as outlined in the Bill. That said, some submissions on the Exposure Draft of the Bill commented that they would like to see included in the Bill a commitment to ongoing joint funding of the commitment to reducing homelessness.

28. Ibid
31. In March 2013, the Government committed to provide $159 million in federal funding to extend the National Partnership Agreement on Homelessness for a year. This funding was to be matched by the states and territories. See: M Butler (Minister for Housing and Homelessness) and W Lovell (Victorian Minister for Housing, Children and Early Childhood Development), Victoria, Commonwealth to deliver funds for national homelessness agreement, joint
Commonwealth to ‘maintaining a consultative approach to the development of policy to address the issue of homelessness’ should be expanded. In National Shelter’s view, the subclause should include a commitment to consulting with people who are homeless, at risk of homelessness or who have experienced homelessness. Following similar lines, the Australian Human Rights Commission would have liked to have seen the Bill incorporate a commitment to involving people who have had some experience of homelessness in ‘the development, delivery and assessment of policies and services’.

Australia’s international human rights obligations

Subclause 13(1) of the Bill lists the international standards that have been ratified and legislation enacted by the Commonwealth in relation to the protection of the rights and freedoms of Australian citizens. Subclause 13(2) goes on to observe that ‘the Commonwealth recognises that reducing the number of persons who are, at risk of, experiencing homelessness is part of meeting Australia’s human rights obligations’. Subclause 14(1) then specifies that the Bill does not create or give rise to any legally enforceable rights or obligations.

It is in relation to the Bill’s not being substantively based on a rights approach that most dissatisfaction has been expressed by stakeholders. As noted above (in various places), a majority of submissions on the Exposure Draft of the Bill recommended that the Commonwealth commitment to tackling homelessness in the Bill should be strengthened. The most frequently cited means for achieving this was basing the Bill on a human rights framework. In particular, it was recommended that the Bill should create a legally enforceable right to adequate housing—which should be defined in the Bill—in line with the requirement contained in Articles 2 and 11 of the ICESCR. In the absence of such a commitment, the Homelessness Persons’ Legal Service expressed the view that the Bill would be ‘extremely limited in its effect’, amounting to ‘nothing more than aspirational statements of intent’. Similarly, the Law Society of New South Wales observed:

... if the Government does not create an enforceable right to adequate housing, the value of the Bill would be limited to encouraging service providers, government decision makers and policy makers to consider the unique vulnerabilities of persons experiencing, or at risk of experiencing homelessness. While this is an important step, the Committee submits that this Bill represents the opportunity for the Government to achieve real progress in the protection of those who are homeless or are at risk of homelessness.

media release, 24 April 2013, accessed 17 June 2013. A number of homelessness service providers welcomed the new funding, but have expressed concerns that the extension of the Agreement for a single year amounts to ‘a short-term fix’ and does not provide the certainty that they need. ‘Government, states strike deal for homeless’, news.com.au, 28 March 2013, accessed 17 June 2013.

32. National Shelter, op. cit.
The Government has asserted that:

... the Commonwealth does not have express constitutional authority to legislate on housing or homelessness. This is one of the defining factors that determine the scope of the legislation ... in this context, the Bill doesn’t confer rights or impose obligations. 36

The Constitution divides the legislative authority in Australia between the federal and state governments. The federal government is responsible for the matters allocated to it in the Constitution—primarily in sections 51 and 52—although there are other relevant sections. If the matter is not one which has been allocated to the Commonwealth under the Constitution, then it is for the states to legislate. There is no head of power in the Constitution which expressly empowers the Commonwealth to make laws about housing and homelessness. At present the regulation of those matters falls within state and territory responsibilities.

As the states and territories are responsible for housing and homelessness services, administration and delivery, the Government maintains that it could not have adopted a rights based framework for the Bill.

While some stakeholders have accepted the Government’s reading of its Constitutional powers with respect to legislating on housing and homelessness, 37 others have not. A number of submissions on the Exposure Draft of the Bill expressed the view that the Government could have legislated in the Bill the right to adequate housing, under the external affairs power in section 51(xxix) of the Constitution which allows the Commonwealth to legislate to implement a treaty—namely the ICESCR.

However, the use of the external affairs power is restricted in that the Commonwealth law must be reasonably appropriate to give effect to the treaty. There must be a reasonable connection between the terms of the legislation and the terms of the treaty. That would ultimately be a matter for the High Court to determine.

Concluding comments

The Bill needs to be seen in the context of the Government’s overall efforts to reduce homelessness in Australia, which have been substantial. Arguably, it is at least in part on this basis that the Bill has been generally welcomed by the homelessness sector. Most stakeholders are generally supportive of the Bill’s statements about homelessness and commitment to a range of means necessary to tackle it. In short, they are in favour of the intent of the Bill.

However, most argue that in the absence of a rights based framework—one that goes beyond aspiration and obliges Australian governments to ensure that all Australians have access to adequate housing—the Bill represents a missed opportunity to guarantee that inroads will be made into reducing the number of homeless Australians.

36. Department of Families, Housing, Community Services and Indigenous Affairs, Explanation of the Homelessness Bill 2012
37. See for example St Vincent de Paul, op. cit.