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Ms Jane Nielson
Committee Office
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Dear Ms Nielson,

Submission on Appropriate Housing for People Living with Mental Illness – A Response to the Inquiry

The Human Rights Office welcomes the opportunity to contribute to the Inquiry into Appropriate Housing for People Living with Mental Illness, which is relevant to our mandates under the *Discrimination Act 1991* and the *Human Rights Act 2004*. This inquiry is important as it attempts to address problems of a group of people who, although diverse, have a particular set of issues that are often overlooked or poorly understood by policy makers. They are also a group who, as numerous studies show, typically face a high level of discrimination and denial of human rights.

In our response we consider relevant domestic obligations and international standards and comment on their impact on the situation within the ACT, but informed by our discrimination casework for people living with disabilities, such as mental illness, including in the area of housing. The civil and political right to freedom from discrimination, and other rights (such as protection of the family and children, and not to have one's home arbitrarily of unlawfully interfered with) are linked to the economic and social right to adequate housing, incorporating freedom from homelessness. Housing for people living with mental illness are human rights issues that have been addressed at an international level, and can provide a framework for an effective response at the local ACT level.

1. Human Rights Act 2004

The ACT *Human Rights Act 2004* ('HR Act') incorporates provisions in the International Covenant on Civil and Political Rights. The Covenant contains the right to non-discrimination and equality before the law, which is reflected in section 8. This right has been interpreted to impose a substantive obligation on governments to take positive steps to address the special needs of people, so as to enable them to realise all

of their rights and freedoms.[1] The issues of homelessness and discrimination, and indirectly that of inadequate housing, are addressed within the human rights framework of the HR Act. It provides that people have a right to protection of family and children (section 11) and the right not to have one's home arbitrarily or unlawfully interfered with (section 12). These specific rights, coupled with section 8, are directly relevant to the Committee's Inquiry. The relevance of section 11 of the HR Act to housing has already been acknowledged by the ACT Administrative Appeals Tribunal in the case of *Merritt and Commissioner for Housing* [2004] ACTAAT 37 (29 September 2004). In that case the Tribunal seemed to accept that this section might give rise to an obligation on ACT Housing to house a homeless family. The issue of whether a statute that did not specifically prioritise families with children for public housing could be incompatible with the *Human Rights Act* was not raised.

Other rights, which are indirectly relevant to housing, include the right to privacy (section 12) and the right to freedom of expression (section 16), which includes a right to information. In extreme cases it might be argued that the government in failing to address the homelessness problems of people living with mental illness is failing in its duty under section 9 of the HRA to protect the right to life (section 9). This might occur if a person with mental ill health is released from a forensic or psychiatric facility without any provision for his/her housing or care and s/he commits suicide. This is an acknowledged danger for released patients, as reported by the Mental Health Council of Australia.[2]

2. International jurisprudence

Under subsection 31(1) of the HR Act international law and the judgments of foreign and international courts and tribunals relevant to a human rights may be considered in interpreting the human right engaged in particular situations, such as housing for people living with mental illness.

The ACT HR Act does not specifically include rights under the International Covenant on Economic, Social and Cultural Rights, such as Article 11 which recognises the right of all people to adequate housing and commits state parties to take appropriate steps to ensure the realisation of that right. However, relevant jurisprudence on the civil and political rights set out above, such as protection of the family and children and privacy, can be based on treaty obligations, for example the Convention on the Rights of the Child which includes both civil and political and economic, social and cultural rights. The Report of the UN Special Rapporteur on adequate housing (March 2005) identifies mental illness as a factor that makes people particularly vulnerable to homelessness, particularly with the worldwide phenomenon of deinstitutionalisation.[3] The Rapporteur concludes:

> parallel growth in community support and community based care for persons living with mental illness has not taken place to the required extent. In many countries in the absence of community support such as assisted housing and

[1] Human Rights Committee, *General Comment 18:Non discrimination UN HR/GEN/1/Rev.5 (2001) 136*

[2] "Out of Hospital, Out of Mind", April 2003.

[3] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, E/CN.4/2005/48 (March 2005)

drop in centres there have been significant and unintended consequences of deinstitutionalisation policies, notably increased burden on family caregivers, diversion of persons with severe mental illness to the criminal justice system and increased homelessness.

3. Jurisprudence under the UK *Human Rights Act* 1998

In the absence of specific case law under the ACT HR Act it is not yet clear the extent to which positive obligations are imposed on the government, as does the UK *Human Rights Act* 1998. Existing UK jurisprudence on the human right to housing (based not on the ICCPR, but the European Convention on Human Rights 1950) has made clear that there is at least a minimum obligation on authorities to protect a person from homelessness, although not a duty in general circumstances to provide housing. In a case where a residential institution closed that an elderly person had been living for some years the local authority was held to be breaching her human rights in denying the person her home: *R v North and East Devon Health Authority ex p Coughlan* (2001) QB 213. The types of issues that have arisen include: the tenant's right to respect for home, but eviction can be justified where it is reasonable and there is a serious and proven breach of obligations - *Sheffield County Council v Hopkins* [2001] EWCA Civ 1023; the need to protect others' rights from nuisance, eg freedom of fear and right of peace are legitimate aims - *Gallagher v Castel Vale Action Trust* [2001] EWCA Civ 944; whether there are obligations to ensure that conditions not uninhabitable, eg due to design defects - *Lee v Leeds City Council* [2002] EWCA Civ 6; and the need for review rights - *R v Bracknell Forest District Council* [2001] EWCA Civ 1510, holding that. The scope of the any positive obligation to house homeless people is limited to those suffering from a serious disease (*Marzari v Italy* (1999) 28 EHRR CD 175) or a severe disability (*Bernard v London Borough of Enfield* (2002) EWHC 2282 (Admin)). In a recent case of *Anufrijeva v Southwark LBC* (2004) HRLR 1where the claimant was homeless and faced separation from her child it was common ground that if this occurred the right to private and family life would be infringed. This case also made clear that in the administration of public housing schemes administrative failures that were culpable and serious and which also had a significant effect on private and family life could engage the UK Human Rights Act.

However UK human rights law is significantly narrower than the ACT HR Act in two respects. The UK HR Act lacks a direct duty to protect the family and children, and a freestanding obligation to prevent discrimination. These rights clearly extend the duty of the authorities in respect of the housing of people with mental health problems.

Underlying all the specific rights in the Human Rights Act and relevant in particular to section 12 (right to privacy) is the right to personal integrity and by autonomy[4]. This relates directly to the right of people to live independently and to be given the right to make choices for them selves. This is discussed further below.

[4] *R (Bernard) v Enfield LBC* (2002) 5CCLR 577; *Khana (Official Solicitor) v Mayor and Burgesses of Southwark* (2001) 4 CCLR 2001 267; *Sentges v The Netherlands* (2004) 7 CCLR 400

4. ACT Discrimination Act 1991

The *Discrimination Act 1991* ('DA') is also relevant to this inquiry as it prohibits discrimination on grounds of disability in certain areas, including accommodation under section 21. The Human Rights Office has handled many complaints against housing authorities on various grounds, including disability. While the Discrimination Act is a source of protection from discrimination by landlords, the public need to be made aware of their rights and accessible information provided to them. This is an obligation on the government itself arising as a result of the right to freedom of expression in section 16 of the HR Act.

In the UK case of *Manchester City Council v Romano (1) and Samari* (2)[2004] EWCA Civ 834 the Court of Appeal held that, in deciding whether to evict a person with a mental illness from housing on the ground that her behaviour was causing too much disruption, the fact that her behaviour was the direct result of her disability meant that she was protected by the UK *Disability Discrimination Act* 1995 ('DDA') and could not be evicted unless there was an objective justification within the terms of the Act. The case firmly establishes the overlap between housing legislation and anti-discrimination law. The Court stated that landlords must consider the position carefully before they serve a notice seeking possession or embark on possession proceedings against a tenant who is or might be mentally impaired. If, for example, a local housing authority is considering a situation that could lead to eviction, it might consider contacting the local social services authority at an early stage. Otherwise, it could find itself unlawfully discriminating against a disabled tenant. On the other hand, even if a person's mental health problems do bring them within the definition of disability in the DDA, health risks to neighbours may justify their eviction.

5. The relationship between mental illness and housing

Stable, appropriate housing is critical for people to work and take part in community life. A lack of stability or unsatisfactory housing can lead to worsening mental health. People with mental health problems are particularly likely to have vulnerable housing. Compared with the general population, they are more likely to live in rented housing, with higher uncertainty about how long they can remain in their current home. Many experience high levels of debt. They can lack advice on financial and legal issues, and be denied access to financial services. Tenants with mental health problems may have serious rent arrears, and risk eviction as a result. Mental illness also makes it harder to deal with the administrative requirements involved in acquiring or sustaining stable housing. Mental illness can disrupt personal and social life and cause the breakdown of relationships, which contribute to housing instability and potential homelessness.

People with mental illness also suffer from extreme forms of stigma and discrimination from landlords, neighbours and the general public. In addition the low investment in community mental health services, and the closure of hospital psychiatric beds result in overstretched community services which further exacerbates the situation. People simply may not get the treatment and support they need for their illness. The Mental Health Council of Australia in its national survey *Out of Hospital Out of Mind* (2003) reported on the grossly unmet need for basic mental health services and inadequate growth in expenditure in mental health throughout Australia.

A well-documented vicious circle occurs for people with mental ill health.[5] It involves poverty, relationship breakdown, isolation and then worsening mental health, which leads to further social exclusion and more discrimination. In all these circumstances people are very vulnerable to homelessness. A high percentage of homeless people have mental health problems. For example, up to 75 % of those participating in a Sydney survey had at least one diagnosis of mental disorder. Finally homelessness exacerbates and complicates the treatment of many mental health problems. As a Victorian study states[6]:

> Research and experience demonstrate that improving health outcomes for homeless people requires specifically targeted health care services, delivered together with programs to address underlying causes of homelessness, including in the areas of housing, income support, primary health care, training and employment, protection from discrimination, rehabilitation and reintegration.[7] The consequences of failing to provide adequate treatment, support services and supportive housing for people who are homeless and have mental health issues include 'poor physical health, social dysfunction, inappropriate incarceration, higher crime rates, prolonged homelessness and early death'.[8]

The Australian Housing and Urban Research Institute ('AHURI') Report *Understanding itinerant homelessness: the case of people with mental disorders* (July 2003) calls for a national refocus on the issues of trauma and fluctuating mental health in dealing with homelessness. It identified 2 key factors as stability and healing that is, secure housing and appropriate support services as the source of stability in a person's life leading to significant and long lasting change. They indicate that a coordinated response is required between clinical and non-clinical support and housing agencies. The Report concludes that there can be considerable success in keeping clients with mental ill health in stable housing.

People living with mental illness obviously differ in the aetiology of their illness and in their needs. The housing and support needs of people with chronic and enduring

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[5] See for instance " Understanding iterative Homelessness – the case of people with mental disorders" AHURI (July 2003); "Out of Hospital Out of Mind" (2003); "Homelessness, Mental Health and Human Rights" Submission to the Senate Inquiry into Mental Health; "Mental Health and Social Exclusion" Office of Deputy Prime Minister, June 2004; See also other submissions to the Senate Inquiry e.g. Canberra Schizophrenia Fellowship Submission; insane Australia Submission; Mental Health Foundation Submission; Mental Health Legal Centre Submission

[6] "Homelessness, Mental Health and Human Rights", April 2005 PILCH Homeless Person's Clinic, Victoria

7 L Gelberg, L S Linn, R P Usatine and M H Smith, Health, Homelessness and Poverty: A Study of Clinic Users (1996) 2325-30; National Mental Health Working Group, Homelessness and Mental Illness: Bridging the Gap – Discussion Paper (2003) 5; Margaret Eberle et al, Homelessness: Causes and Effects – A Review of the Literature (2001) 16-17. See also Royal District Nursing Service Homeless Persons Program, It Can Be Done: Health Care for People who are Homeless (1992), cited in Department of Human Services (Victoria), Primary and Acute Health Responses to People Who Are Homeless or at Risk of Homelessness: Information Paper (2000) 3; Correspondence with Dr Julian Freidin, Consultant Psychiatrist, Alfred Hospital Homeless Outreach Psychiatric Service, 10 April 2005. 26 Paula Braveman and Sofia Gruskin, 'Poverty, Equity, Human Rights and Health (2003) 81(7) Bulletin of the World Health Organization 539, 540; Correspondence with Dr Julian Freidin, Consultant Psychiatrist, Alfred Hospital Homeless Outreach Psychiatric Service, 10 April 2005

8 National Health Care for the Homeless Council (US), Addiction, Mental Health and Homelessness: Policy Statement (2004) 1.

mental illness are clearly more substantial than for those who have episodes of ill health that may be severe, but relatively short. The fluctuating nature of this mental ill health gives rise to distinct problems in housing. A person may need to be in hospital for long periods and lose his/her housing as a result - either because s/he is unable to keep up the rental payments or because s/he may choose to end the tenancy. People in this situation may then suffer discrimination from prospective landlords because of their previous record. Their recovery to health may also mean that they need a graduated return to fully independent living. Step up step down facilities can be particularly useful, but may not be readily available.

6. The ACT situation

There is evidence, particularly from the ACTCOSS Report *Needs Analysis of Homelessness in the ACT* (2002) that people living with mental illness in ACT encounter the kinds of problems outlined above. While there have been considerable attempts to improve service provision through the ACT Mental Health Strategy and Action Plan 2003-2008, more specific action targeted at housing needs is required to overcome the deficit in appropriate accommodation. The problems have been exacerbated by developments in the housing market, de institutionalisation leading to an inadequate supply of beds,[9] financial constraints on public sector providers, the lack of a fully developed system of community housing, and lack of targeted programs, such as mental health training for staff, to deal with the support needs and employment opportunities for this group.

The ACTCOSS Report for instance makes clear that Supported Accommodation Assistance Program ('SAAP') programs are unable to deal adequately with the particular needs of those people with mental ill health who exhibit challenging behaviour.
"Some people with high support needs can be difficult to accommodate within SAAP services because they may exhibit challenging or aggressive behaviour which can pose a threat to the safety of staff or other residents if not well-managed; they may require more intensive staff time than other service users; or they may require specialist expertise that is not commonly available within the service (eg an understanding of substance abuse, behaviour intervention or alternative communication). A number of people consulted during this project reported that they had been refused access to SAAP services and in some cases they are now banned from services. For example:

"I was refused entry at a SAAP service because I have severe depression."[Adult female participant, mother of three children]

"My history rules out going to any refuges. I have been banned from all the refuges because I self harm. I lit a fire in my room, so I could get back into Quamby. This is where my friends are – the people who understand me."[Young female participant]

Some ACT SAAP providers confirm they do not accept clients with high support needs and challenging behaviours for reasons including: they are not resourced to

[9] ACT Mental Health Strategy and Action Plan 2003-5 estimated a shortfall of approximately 15% in available beds.

provide adequate support; workers are not appropriately skilled; they have a duty of care to the other clients and it will upset the balance in the client population within the service. As a result, finding services that can actively engage with people with multiple issues can be difficult. However, there are a small number of services that have developed specialist expertise and inclusive service models".[10]

The Report details the lack of specialist services, the lack of coordination between services, gaps in service provision that particularly impact on people with mental illhealth and it makes many recommendations to address these problems.

Another problem reported to the Human Rights Office is that housing and support services are not provided by separate organisations. This can lead to conflict of interests and undermine the autonomy of consumers to take control of their situation It can also prejudice the person's chances to receive the service s/he needs.

7. The need for an effective ACT Response

Human rights standards outlined above clearly require the ACT government and statutory authorities to take action to ameliorate the situation in which people with mental illness remain homeless or without access to the housing which they can afford and which is secure and safe. It is our understanding that the main problem in the ACT, despite recent initiatives, is one of inadequate supply of housing stock.

It is clear that there is a need for ongoing support for that group of people with mental illness that is chronic and enduring, as opposed to the current patchy and poorly coordinated support.

There needs to be a clear separation between the management of housing and support services to ensure that consumers' rights to self determination are enhanced by giving them a central role in the allocation of support and housing. It should not be presumed that a person with mental illness consistently lacks the capacity to make choices, although there will be times of ill-health where that may the case. At these times the person will need assistance both to make choices, and to deal with administrative requirements that may arise.

As a body performing a statutory function under the *Housing Assistance Act 1987*, it is incumbent on ACT Housing to interpret their mandate and deliver services using a human rights approach, including ensuring that their programs are accessible and available to any social group that is known to be particularly disadvantaged in suffering discrimination and high levels of homelessness. Any blanket exclusion of people who display challenging behaviour, or who have displayed challenging behaviour may be unlawful under both the HR Act and the Discrimination Act.

ACT Housing also needs to comprehensively review their policies in the light of the HR Act. For instance their policy of chronological allocation after an assessment of need against the criteria may be too inflexible to properly assess relative need for appropriate housing or associated assistance in the light of the HRA. More sophisticated assessment tools may be required. The policies *Eligibility for Public*

[10] P.51

Housing Assistance and the *Debt Management Policy* need to be reviewed as they appear not to accommodate the particular problems of people with fluctuating ill health.

Cross departmental interaction between ACT Housing and ACT Mental Health needs to develop better protocols and relationships within the service provision sector. They need to ensure that there are appropriate and proportionate protocols to deal with both privacy, and the need for an exchange of information to contact support agencies.

Training of staff in mental health awareness and obligations under the HR Act and the Discrimination Act is necessary to ensure compliance and to promote a human rights culture of best practice towards servicing and supporting people with mental illness. We endorse the recommendation of the Mental Health Foundation(ACT) Inc. in calling for training to people working in agencies such as housing, employment, law enforcement and general health services in dealing appropriately with people affected by mental illness.[11]

The new Strategy *Breaking the Cycle – the ACT Homelessness Strategy*, is welcome, but does not specifically deal with homelessness arising from mental ill health as a separate need category and targets other vulnerable groups. None of its strategies for change or its proposals for commissioning research deals specifically with mental health. The specific addition of people affected by mental illness (including children of parents with mental illness) to the list of those needing special attention would address this deficiency.

The ACTCOSS *Needs Analysis of Homelessness in the ACT* (2002) recognises the high level of mental illness among homeless people, but acknowledges that the actual statistics are not available. Given the high incidence of mental illness among homeless people in other jurisdictions and the particular and unique challenges for this group, these are omissions that need to be redressed. Without the benefit of systematic research it is difficult to know what the problems are and where the greatest need arises. People with mental health needs should be added to the areas of research in the ACT Homelessness Strategy.

The criteria for gaining access to public housing are flexible, but not adequate because they do not specifically protect people with mental illness in some of the most vulnerable situations. The need to review their strict chronological criterion is mentioned above. In addition there are specific issues – for instance in relation to interruptions to ACT residency, there is no provision for taking into account those detained under the *Mental Health (Treatment and Care) Act 1994* or who are absent as voluntary patients. The Memorandum of Understanding between Housing ACT and the Mental Health ACT includes an agreement to ensure that ACT Housing tenants admitted to a mental health facility will not lose their tenancy. This goes some way to dealing with this problem, but does not cover all circumstances, in particular waiting lists.

[11] Response to the Inquiry by the Senate Select Committee on Mental Health, 2005

Conclusion

It is to be hoped that submissions to this Inquiry will provide much needed information on the specific problems and issues facing different groups of people with mental illness in their access to appropriate housing. In seeking to resolve these problems it is likely that the legislative framework for housing provision, mental health, community services and welfare rights will need to be examined. New or revised protocols for service provision and interdepartmental working will also arise. The new human rights framework within the ACT should be relevant in all stages of the work on housing for people living with mental illness, and will remain of interest to the Human Rights Office.

The contact officer for this matter is Dr Rowena Daw.

Yours sincerely,

Dr Helen Watchirs
ACT Human Rights and Discrimination Commissioner
15 July 2005