Submission to the Committee on Economic, Social and Cultural Rights
Draft General Comment on the Right to Social Security

1.1 Australian Lawyers for Human Rights ("ALHR") is a network of Australian lawyers active in furthering awareness, understanding and recognition of human rights in Australia.

1.2 ALHR has approximately 1,200 members nationally, a large majority of whom are practising lawyers. Membership also includes judicial officers, academics, policy makers and law students.

1.3 ALHR promotes the practice of human rights law in Australia through training, publications and advocacy. We work with Australian and international human rights organisations to achieve this aim. ALHR is a member of the Australian Forum of Human Rights Organisations and is regularly consulted by government including through the Attorney-General and Minister for Foreign Affairs NGO forums.

1.4 ALHR welcomes the opportunity to provide comment to the Committee on Economic, Social and Cultural Rights (the Committee) in relation to this draft General Comment on the Right to Social Security. Due to resource constraints, ALHR has confined the contents of this submission to the protection of the right to social security in relation to refugees, asylum-seekers and other vulnerable non-citizens. The submission draws on experience within its membership of this issue both in Australia and internationally.

General Observations

2.1 ALHR welcomes the recognition and inclusion in the draft General Comment of the relevance of the right to social security to refugee, asylum-seeker and other vulnerable non-citizen populations such as trafficked persons and certain migrant workers.

2.1 The draft General Comment recognises that discrimination on the grounds of 'other status' is prohibited under the Covenant on Economic, Social and Cultural Rights (the Covenant) by article 2(2). Given that immigration status is often identified as a ground for denial of the right to social security, ALHR recommends that the draft General Comment make explicit that discrimination

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on the grounds of 'other status' includes discrimination on the grounds of immigration status. This, of course, would not preclude differential treatment between citizens and non-citizens, as long as such treatment is applied pursuant to a *legitimate aim* and is *proportionate* to the achievement of that aim.[1]

2.2 ALHR would also welcome clarification or re-wording of the term 'de facto discrimination'. This should make clear that both direct and indirect discrimination are proscribed, and can arise as a consequence of purpose *or* effect. See paragraph 14.

2.3 ALHR notes that although reference has been made to a range of relevant ILO Conventions and regional instruments, explicit reference has not been made to three key international instruments that make provision for the right to social security: 1951 Convention relating to the Status of Refugees (article 24, and Chapter IV generally); 1954 Convention relating to the Status of Stateless Persons (article 24, and Chapter IV generally); and 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (articles 27 and 61). Although not all of these instruments are widely ratified yet, they are nevertheless clear expressions of applicable international standards. ALHR therefore recommends that reference to these instruments be included in the General Comment.

2.4 Paragraph 38 articulates the obligation of states to *fulfil* the right to social security 'when individuals or a group are unable, *for reasons beyond their control*, to realize that right themselves within the existing social security system with the means at their disposal.' Given the special circumstances of refugees, asylum-seekers and other vulnerable non-citizens and the pressure that state practice often brings to bear on them to return to their country of origin or habitual residence, ALHR believes that the phrase 'for reasons beyond their control' requires clarification. Many states argue that non-citizens can always go home and that this remains within their control. Although this may sometimes be true, it is often not the case. This argument should not, therefore, be permitted to absolve states of the obligation to fulfil the right to social security of such persons. It is therefore recommended that the first sentence be amended as follows:

'States parties are also obliged to fulfil (*provide*) the right when individuals or a group are unable, ~~for~~ on grounds reasonably considered to be beyond their control, to realize that right themselves within the existing social security system with the means at their disposal.'

Paragraphs G and H: refugees, asylum seekers, migrant workers and others

3.1 Immigration and refugee policies in developed states are increasingly using denial of key economic, social and cultural rights as an 'immigration control measure' to persuade or coerce return. In the refugee context, this is sometimes known as *constructive refoulement*. Denial of the right to work and the right to social security to refugees, asylum-seekers and other non-citizens is one of the harshest 'immigration control measures' that states in the developed world implement. Jurisprudence from the UK and Australia illustrate the deleterious effect that such measures can have on the lives of individuals and their families, including indefinite detention and destitution amounting to inhuman or degrading

[1] See CERD, *General Recommendation No.30: Discrimination Against Non Citizens,* 1 October 2004 [4].

treatment in breach of a number of other key international human rights standards.

3.2 In Australia, a decision of then Merkel J in the Federal Court of Australia included the following observations in relation to denial of the right to work and the right to social security:

> Under the current scheme of the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) neither the applicant, nor his wife, both of whom are seeking visas to remain in Australia and are following lawful procedures to do so, are allowed any form of social security; nor are they allowed to work. …
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> The requirement that the applicant not work in Australia is a mandatory condition of his bridging visa.[2] This is surprising, as in relation to other classes of bridging visas the Minister has a discretion to waive that condition if satisfied an applicant has a compelling need to work. It is difficult to understand why any person entitled to remain in Australia to await the outcome of an application for a visa permitting residence in Australia should be absolutely prohibited from seeking work when work is available to that person and he or she can satisfy the Minister that there is a compelling reason for permission to work to be given.
>
> The present legislative regime leads to the Kafkaesque situation in which the applicant, evidently under surveillance, was twice apprehended for working in order to provide for his wife and young child. Under the statutory regime that is an offence, and has resulted in the cancellation of the applicant's bridging visa and his indefinite detention away from his wife and child.[3]

3.3 In the UK, the legislative regime denies certain asylum-seekers social security as well as permission to work where the Secretary of State concludes that the claim for asylum was not made 'as soon as reasonably practicable' after the applicant's arrival in the United Kingdom (s 55(5)(a), *Nationality, Immigration and Asylum Act 2002*). In a landmark decision of the House of Lords in November 2005, the Court found that application of these provisions could amount to, and indeed did in the cases at hand, inhuman or degrading treatment in violation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).[4] This was found to be so notwithstanding the high threshold set in relation to that and related provisions under other instruments. In her judgment, Baroness Hale of Richmond observed:

> The only question, therefore, is whether the degree of suffering endured or imminently to be endured by these people reaches the degree of severity prohibited by article 3. It is well known that a high threshold is set but it will vary with the context and the particular facts of the case. There are many factors to be taken into account. Sleeping rough in some circumstances might not qualify. As my noble and learned friend, Lord Scott of Foscote says, no doubt sometimes it can be fun. But this is not a country in which it is generally possible to live off the land, in an indefinite state of rooflessness and cashlessness. It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam's age had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her

[2] A bridging visa is a temporary visa issued pending a decision on an application for a substantive visa.
[3] *De Silva v Minister for Immigration & Multicultural Affairs* [2001] FCA 962 (23 July 2001), per Merkel J, [3]-[5].
[4] *R v. SSHD ex parte Adam, R v. SSHD ex parte Limbuela, R v. SSHD ex parte Tesema* (Conjoined Appeals) [2005] UKHL 66, 3 November 2005.

suffering would very soon reach the minimum degree of severity required under article 3? I think not.[5]

3.4 ALHR believes that these cases are illustrative of the severe impact of denial of basic economic, social and cultural rights, in particular the rights to work and to social security on the lives of individual refugees, asylum-seekers and other vulnerable non-nationals, including where vulnerability is created or exacerbated by state law or policy.

3.5 While the examples cited above are of policies and practices in developed country settings, ALHR considers that it is critically important that the Committee take account of non-citizen vulnerability in developing countries, given the extent to which denial of the right to social security can compromise effective protection. While in many such countries access to social security will not be the norm for the general population, there are special vulnerabilities that non-citizens experience which make them unable to access local community support networks. Many find themselves forced into exploitative labour. Whether refugees recognised pursuant to UNHCR's mandate, asylum-seekers, documented or undocumented migrant workers, or persons trafficked for forced or otherwise exploitative labour, including forced prostitution, non-citizens will often need some form of social security support pending resolution of their status. Often they depend on UNHCR or IOM for support; e.g. refugees in urban areas or trafficked persons. ALHR believes that it is critically important that explicit reference is made to these organisations in the text of the General Comment, to their human rights obligations and those of their membership, and in particular to the obligations of donor states. This would give due recognition of the requirement to ensure that funding and protection policies are shaped accordingly. Specifically, this would require minor amendments to the following paragraphs: 48 and 70.

3.6 In light of these observations, ALHR has a number of recommended textual changes. For ease of reference, we have pasted below the relevant text from the draft General Comment and marked in 'tracked changes' our suggested amendments to the language:

~~Non-nationals and~~ Migrant Workers and other non-nationals

28. Article 2(2) proscribes discrimination on the ground of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. ~~Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution. Where such a worker leaves the country, restrictions on retrieving contributions (or benefits) should not be unreasonable.~~ It is essential that non-nationals ~~should~~ also be able to access non-contributory schemes for income and family support, and access to health care, ~~and any restrictions must be proportionate and reasonable~~ without discrimination of any kind.

29. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution. Where such a worker leaves the country, s/he should be accorded a reasonable opportunity to ~~restrictions on retrieving~~ retrieve contributions (or benefits) ~~should not be unreasonable~~. [***note:*** *this section has been shifted down, as the most common circumstance will be the need to access non-contributory social security*]

Refugees, Asylum Seekers, Stateless persons and other vulnerable individuals

30. Refugees, asylum seekers, ~~and~~ stateless persons and other vulnerable individuals such as trafficked persons should be provided with equal treatment in access to non-contributory social security schemes consistent with applicable international standards, and without

[5] Ibid., [78], per Baroness Hale of Richmond.

discrimination of any kind. ~~and States parties should not place unreasonable restrictions on~~ This necessarily includes reasonable access to health care and family support.

31. The availability of social security, and associated access to health care and family support can be an essential element in ensuring effective protection of basic human rights. In particular, the right to social security should not be conditionally linked to the grant or refusal of permission to work or to the exercise of appeal rights on substantive applications for protection or residency.

Simeon Beckett
President

Eve Lester
Victorian Convenor

30 June 2006