

AUSTRALIAN CAPITAL TERRITORY ECONOMIC, SOCIAL AND CULTURAL RIGHTS RESEARCH PROJECT

AUSTRALIAN RESEARCH COUNCIL LINKAGE PROJECT LP0989167

REPORT

September 2010

21 September 2010

Mr Simon Corbell MLA
Attorney-General
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Corbell

We are pleased to present you with our Report on the findings of the ACT Economic, Social and Cultural Rights Research Project.

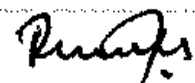
Yours sincerely



Hilary Charlesworth



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Dr Helen Watchirs, ACT Human Rights Commissioner, served on the project's reference group, and she and her office provided valuable feedback on a draft of this report. We also benefited from the visits to Canberra of four distinguished South African visitors during the project: Justice Yvonne Mokgoro of the South African Constitutional Court; Mr Cameron Jacobs of the South African Human Rights Commission; Professor Sandra Liebenberg of Stellenbosch University; and the Hon Albie Sachs, retired justice of the South African Constitutional Court, who visited Canberra in the final stages of our report writing and provided guidance and inspiration.

We were fortunate to have the advice and insights of many ACT public servants and members of community organisations in the various workshops, roundtables and forums that were conducted under the auspices of the project (described in Chapter 1 of this report). Particular thanks go to Diane Joseph (Deputy Chief Executive) and David Miller from the ACT Department of Education and Training; Dr Charles Guest (Chief Health Officer) and Emma Fox from ACT Health; and Maureen Sheehan (Executive Director) from the ACT Department of Disability, Housing and Community Services for their generous assistance with the organisational aspects of the expert workshops.

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Finally, we thank the wonderful research assistants who worked with us on this report: Luke Beck, Lee Wei San, Rachel Lord and Sam Thorpe.

LIST OF ABBREVIATIONS

ACT	Australian Capital Territory
ACT ESCR Project	ACT Economic, Social and Cultural Rights Research Project
ACT HRC	ACT Human Rights Commission
Canadian Charter	Canadian Charter of Rights and Freedoms, 1982
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination 1965
CESCR	UN Committee on Economic, Social and Cultural Rights
CMD	Chief Minister's Department
CRPD	Convention on the Rights of Persons with Disabilities 2006
CPR	Civil and political rights
CRC	Convention on the Rights of the Child 1989
DET	ACT Department of Education and Training
DHCS	ACT Department of Housing and Community Services
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
ESCR	Economic, social and cultural rights
HRA	Human Rights Act 2004 (ACT)
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic Social and Cultural Rights 1966
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990
ILO	International Labour Organization
JACS	ACT Department of Justice and Community Safety
NHRCC	National Human Rights Consultation Committee
NZ BORA	New Zealand Bill of Rights Act 1990 (NZ)
SA BOR	Bill of Rights in the Constitution of the Republic of South Africa, 1996
SAHRC	South African Human Rights Commission
UDHR	Universal Declaration of Human Rights 1948
UK	United Kingdom
UK HRA	Human Rights Act 1998 (UK)
UK JCHR	UK Parliament's Joint Committee on Human Rights
Victorian Charter	Charter of Human Rights and Responsibilities Act 2006 (Vic)

EXECUTIVE SUMMARY

This Report presents the findings and recommendations of a research project established to examine whether the ACT *Human Rights Act 2004* (HRA) should be amended to include explicit guarantees of economic, social and cultural rights (ESCR) and, if so, what impact this was likely to have on governance in the ACT. The project was funded under the Australian Research Council Linkage Project Scheme; the academic project partners were the Regulatory Institutions Network (RegNet) in the College of Asia and the Pacific of The Australian National University and the Australian Human Rights Centre, Faculty of Law, The University of New South Wales, while the Partner Organisation was the ACT Department of Justice and Community Safety.

The overall conclusion of the Report is that the inclusion of ESCR guarantees in the HRA is desirable and feasible, and that the Act should be amended to include most of the ESCR contained in the International Covenant on Economic Social Rights (ICESCR), to which Australia is party. The Report:

- provides an overview of the recent Australian debates over protection of ESCR;
- reviews the nature and content of ESCR and their protection from international, comparative and Australian perspectives;
- examines the arguments made against the inclusion of ESCR in judicially enforceable bills of rights;
- describes the legal protection of ESCR in Australia and in the ACT;
- considers the nature and extent of protection of ESCR in a number of jurisdictions;
- makes a principled and policy case for the inclusion of ESCR in the HRA;
- sets out a number of options for better legal protection of ESCR in the ACT; and
- presents a Model Bill for the inclusion of ESCR in the HRA.

Chapter 1 explains the origins, goal and methodology of the project and its place in the current review of the HRA and provides a brief overview of the HRA. In Chapter 2 the Report sets out the recent history and debates over the inclusion of ESCR in charters or bills of rights in Australia. The issue is not new and has been considered in a number of inquiries into the enactment of bills of rights at Commonwealth, State and Territory levels over the last decade. The ACT Bill of Rights Consultative Committee recommended in 2003 that ESCR be included in any ACT human rights act. A number of subsequent inquiries in Australia have strongly supported their inclusion in legislative charters of rights, as has a recent Parliamentary review in the United Kingdom. On the other hand, the Victorian inquiry in 2005, which led to the adoption of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the National Human Rights Consultation Report of 2009 did not recommend inclusion of ESCR rights on the same basis as civil and political rights (CPR), though the latter report recommended improved protection for ESCR in a number of respects.

Chapter 2 also summarises the reasons why some inquiries have concluded that it was important to include ESCR in any bill of rights or to provide additional protection for ESCR in some other way. These include the importance of ESCR rights to members of the Australian community, the contribution of explicit guarantees of rights to better legislation, policymaking and service delivery, and the need to recognise that ESCR are equally

important and interdependent with CPR. Chapter 2 also outlines the major reasons why other inquiries have been reluctant to include ESCR in the legislative charters they proposed (these are further examined and critiqued in Chapter 3). These include concerns about the nature of ESCR rights, in particular the belief that the realisation of ESCR necessarily involves the allocation of significant resources involving political choices about setting priorities as opposed to the purportedly resource-free abstention from action by the State required for the protection of 'negative' CPR; that ESCR rights are the subject of an obligation of 'progressive realisation' rather than being obligations of 'immediate effect'; and that ESCR are vaguely worded and their content is uncertain compared with the established meaning of most CPR. Many critics of ESCR have been particularly concerned at the prospect of judicial supervision or enforcement of ESCR. They have argued that the formulation of these rights does not provide judicially manageable criteria for application by the courts, and that the nature of ESCR means that adjudication by the courts would involve judges in making resource allocation decisions that they are not competent to make and that properly belong to the executive and legislative branches of government.

In Chapter 3 the Report provides background on the history, nature and importance of ESCR, and identifies the many ESCR that are internationally and nationally recognised. It notes that ESCR have been an important part of the human rights canon for a long time, with many of them originating in the nineteenth century and being firmly anchored as internationally recognised human rights, of similar status to CPR, by the Universal Declaration of Human Rights adopted in 1948. The Chapter also reviews the debates over the nature of ESCR and argues that many of the objections to the recognition of ESCR as 'real' human rights capable of judicial enforcement reflect an analysis that is out of date and that fails to reflect the significant advances that have been made in scholarly analysis, international practice, and domestic litigation in relation to ESCR. The Chapter argues that there are many similarities between ESCR and CPR, and that both categories of rights are both more complex and more similar to each other than these traditional critiques of ESCR suggest.

Chapter 4 builds on this analysis by sketching the content of most of the rights that are guaranteed in the ICESCR. This analysis draws on the extensive international case law and practice that has explicated many of these rights – in particular the work of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) – and refers to examples of national case law in which courts have considered and applied ESCR. It identifies aspects of the rights that are capable of immediate implementation and those that may be realised progressively. The Chapter shows that there is an extensive jurisprudence and practice that has developed the core concepts of the rights set out in the ICESCR. The scope and content of the obligations of states in relation to particular rights is well-settled, though the issues that arise in a given context and the means of fulfilling the obligations will vary according to local institutions and circumstances, including the resources available. It is clear that, while certain aspects of ESCR are subject to obligations of progressive realisation, all ESCR have dimensions that are capable of immediate implementation. These include in particular the obligations of non-discrimination, to ensure the enjoyment of a core minimum level of enjoyment of ESCR, and to take concrete and targeted steps towards full realisation of the rights.

In Chapter 5 we turn to a consideration of the implementation of ESCR in Australia at present. The Chapter provides an overview of the mechanisms and major legislative and institutional protections of ESCR in Australia and the ACT, including indirect protection through the CPR guarantees contained in the HRA. The Chapter notes that implementation of ESCR is reasonably good, but that nonetheless there are areas in which the CESCR and Australian commentators have identified Australia's record as falling short of full implementation of its treaty obligations. In 2009 the CESCR repeated its earlier recommendations that the lack of a legal framework for the protection of ICESCR rights should be remedied by the enactment of legislation that gives effect to ESCR and by the establishment of a mechanism to guarantee effective judicial and other redress for violations of rights guaranteed by the ICESCR.

Chapter 6 describes the findings of a series of expert workshops involving participants from selected sectors of government activity convened as part of the project. The purpose of these workshops was to explore both the current extent of implementation of ESCR and the implications for policymaking, administration and service delivery in those sectors if ESCR were included in the HRA. The workshops brought together government, community and other experts working in the ACT in the areas of education, housing, health, and environment/utilities. The findings of the workshops were consistent, namely that while ESCR standards were not explicitly employed as a basis for policymaking or service delivery in those areas (CPR standards under the HRA were to varying degrees), current policies and practices were largely consistent with the values and requirements of ESCR. Workshop participants also found that, while the existing legislative and policy frameworks in these sectors provided some protection for ESCR, the coverage was unsystematic, incomplete and discretionary, and that this piecemeal and limited protection was susceptible to erosion by changes in government policy, the amendment of laws, or modification or withdrawal of services or facilities. Most participants considered that the inclusion of ESCR in the HRA would provide a more coherent framework for policy analysis, a means of identifying legislative and policy issues that might otherwise be overlooked, and could contribute to better coordination of cross-sectoral obligations, provide stimulus for social reform and enhance democratic participation. At the same time some participants expressed concerns about the possible role of the courts in relation to decisions to allocate finite resources, and the need to manage the expectations of the community so far as the content of specific rights was concerned. Generally, participants across these sectors did not see the potential inclusion of ESCR in the HRA as involving major changes to existing laws, policies or practices.

Chapter 7 sets out in broad terms the international situation relating to the constitutional and legal protection of ESCR. It underlines that, far from being unusual, legal protection of ESCR – including judicial enforcement -- is common in countries on all continents, with differing legal systems, and at different stages of development. The Chapter sketches a number of different ways in which constitutional or legal protection has been given to ESCR, including the non-judicially enforceable guarantees contained in some constitutions, the incorporation of the ICESCR in others, and judicially enforceable constitutional or legislative guarantees of ESCR in yet other countries. The Chapter explores in particular the experience in South Africa, which is frequently seen as showing the way in which justiciable guarantees of ESCR can provide meaningful protection without undermining the appropriate division of

powers between the different branches of government. It analyses the way in which the South African Constitution provides for guarantees of ESCR that have elements that are immediately enforceable by the courts, while retaining a considerable margin of discretion for the government to decide what are reasonable measures to take in pursuing the full realisation of ESCR.

In Chapter 8 we set out the case for inclusion of ESCR in the HRA. We argue that including ESCR in the HRA would serve a number of functions: it would respond to the views of the community that enhanced protection of ESCR is desirable; it would assist the vulnerable in our community; it would enhance the level of compliance of the ACT with our international human rights obligations; it would ensure better ESCR protection at the level of Territory government where significant activity affecting ESCR occurs; it would improve the legislative, policymaking and administrative processes; and it would enhance the judicial process and the development of administrative law and the common law in a rights-consistent manner.

Chapter 9 considers options for the inclusion of ESCR in the HRA. It draws on examples of the legal protection of ESCR in other jurisdictions, as well as the experience of the protection of human rights under the HRA since 2004 and recent developments elsewhere in Australia. The Chapter considers whether ESCR could be included in the HRA on similar terms to CPR, with a lesser level of protection, or as non-justiciable principles. We conclude that ESCR should be included in the HRA on essentially the same basis as CPR. Adopting this approach would underline the equal status of both sets of rights and highlight their interdependence, so that ESCR claims might then be raised directly rather than by indirect and sometimes forced reliance on CPR. As with CPR, the major impact of the inclusion of ESCR in the HRA would be on the deliberations and processes of the executive and legislature, and the courts would play a subsidiary role, with the legislature retaining the final say on issues of interpretation of both ESCR and CPR.

Chapter 9 also examines which ESCR should be included in the HRA. It considers whether the HRA should include: all the ESCR rights contained in the ICESCR; all the ESCR included in relevant treaties to which Australia is party and other international instruments; or a selection of ESCR, which are considered to be of particular practical importance or whose content is considered to be clear and stable. It discusses whether those ESCR to be included should be included in the form in which they are expressed in the relevant international instruments; or should be adapted to the ACT context. We conclude that it would be appropriate to include most of the rights contained in the ICESCR and that the formulation of the rights contained in the ICESCR should be used as the basis for the ESCR guarantees to be included in formulation of the ESCR to be protected, adapting the formulation to reflect justiciable elements of the rights and local drafting practice. We set out in a Model Bill suggestions as to how this might be done.

The Model Bill gives effect to our conclusions and recommendations. It provides for inclusion of the rights in the ICESCR in the HRA. The Model Bill includes guarantees of the rights to housing, health, food and water, and social security; the rights to education, to work, to form and join work-related organisations, and to take part in cultural life. The formulation of individual rights is adapted from the ICESCR, and the Model Bill identifies

aspects of the rights that are immediately enforceable (and that may be subject to reasonable limits under section 28 of the HRA) and others that are subject to an obligation of progressive realisation (ie the Territory must take reasonable measures to ensure the realisation of these aspects of the rights in question).

The Model Bill would put the protected ESCR on a very similar footing to CPR under the HRA:

- The provisions of the HRA relating to pre-legislative scrutiny of Bills for consistency with human rights would now be expanded to include scrutiny for consistency with ESCR, and the function of the Legislative Assembly's scrutiny committee would also explicitly include the protected ESCR.
- Section 30 of the HRA would apply to ESCR so that laws would be required to be interpreted consistently with ESCR if that is possible; if that is not possible, then the Supreme Court could exercise its existing power to make a declaration of incompatibility in relation to a law on the ground of its inconsistency with ESCR.
- Public authorities would be bound by the duty in section 40B of the HRA to act in accordance with ESCR, as they are currently bound to do in relation to CPR. The Model Bill also provides that public authorities must give proper consideration to a relevant ESCR when making decisions. A failure by a public authority will give rise to a direct right of action, in respect of which the Supreme Court may order any appropriate remedy other than damages.
- If the question of whether the Territory has taken reasonable measures to realise an ESCR arises during a proceeding, the courts will be required to have regard to a number of considerations, including the availability of resources (although the court is not permitted to inquire into whether public money could be better spent); and the latitude inherent in a duty of progressive realisation (ie a wide range of measures is possible to meet these obligations). No individual remedy attaches to a finding that the Territory has not taken reasonable measures to progressively achieve the ESCR, but the Supreme Court may issue a 'declaration of incompatibility by omission', which the responsible Minister must then table, along with a written response, in the Assembly within six months. The Model Bill therefore ensures that the judiciary's role in implementing ESCR is appropriate in a parliamentary democracy; and that the Government and the Legislative Assembly remain the primary decision-makers for setting economic and social policy priorities.

Conclusion

The Report concludes that it is an appropriate time to include explicit protection of ESCR in the HRA. The first six years of operation of the HRA have shown that it has not led to a flood of litigation, vexatious or otherwise, and that the major impact of the HRA has been in ensuring that executive government, the legislature and the courts give regular and more focused attention to the human rights issues raised by specific laws, policies and proposals. There is every reason to expect that inclusion of ESCR in the HRA would have a similar

impact, and would represent a further stage of evolution of human rights protection in the ACT.

There are multiple benefits that would flow from the inclusion of ESCR in the HRA. It would improve accountability and process in the executive, legislative and judicial spheres. In terms of substance, legislative protection of ESCR has the potential to assist the most marginalised and vulnerable in our community.

In view of the limited developments at the Commonwealth level in relation to enhanced legislative protection of human rights, the ACT once again is in a position to demonstrate national leadership in the field of human rights and social justice, as it did six years ago when it enacted the HRA. By including ESCR in the HRA, the ACT may stimulate similar reform in other jurisdictions and contribute to the growing international jurisprudence on these important rights.

RECOMMENDATIONS

The ACT Economic, Social and Cultural Rights Research Project makes the following recommendations:

1. The *Human Rights Act 2004* (HRA) should be amended to include economic, social and cultural rights (ESCR). A Model Bill, along with a draft Explanatory Statement and Question and Answer memorandum to give effect to these recommendations, can be found at the end of the Report.
2. The ESCR to be included in the HRA should be based on those rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). These include the following rights:
 - the right to housing;
 - the right to health, including food, water, social security and a healthy environment;
 - the right to education;
 - the right to work, including the right to enjoy just and favourable work conditions and the right to form and join work-related organisations; and
 - the right to take part in cultural life.
3. The following ICESCR rights should not be included in the HRA:
 - the right of peoples to self-determination because, as recommended by the ACT Bill of Rights Consultative Committee in 2003, this should await further consultation and discussion, preferably in the context of the five-year review of the HRA;
 - the right to intellectual property because of a lack of consensus internationally on its precise scope and content; and
 - the right to protection of the family and children because a similar right derived from the International Covenant on Civil and Political Rights (ICCPR) is already recognised in section 11 of the HRA.
4. The HRA should be amended so that its provisions operate with respect to ESCR in a similar way to its current operation in relation to the civil and political rights (CPR) protected by the HRA. Hence, ESCR should be observed by the legislature and executive, and should be interpreted and enforced by courts. Appropriate drafting of ESCR can ensure that the judiciary's role in implementing ESCR is appropriate in a parliamentary democracy; and that the Government and the Legislative Assembly remain the primary decision-makers for setting economic and social policy priorities.
5. The HRA should recognise two types of obligations in relation to the ESCR. The first are obligations that must be immediately realised. The second are obligations that are subject to progressive realisation. The former broadly comprises obligations not to deprive individuals of their existing access to a relevant ESCR and to ensure that

individuals enjoy ESCR without discrimination, while the latter involves obligations to adopt measures that are capable of facilitating the full realisation of the ESCR over time. Both obligations are relevant to the ACT legislature, executive and courts.

6. The ESCR should apply, like the CPR of the HRA, to legislative procedures; in particular, the provisions of the HRA relating to pre-legislative scrutiny of Bills for consistency with human rights - including the requirement for compatibility statements for Government bills and for the Assembly's Scrutiny Committee to report on the consistency of all bills with human rights – should be expanded to include scrutiny for consistency with ESCR.
7. ESCR should apply, like the CPR of the HRA, to public authorities under the Act; in particular, existing obligations on public authorities to act in a way that is compatible with human rights (section 40B(1)(a)), and to give proper consideration to a relevant human right when making decisions (section 40B(1)(b)) should be extended to include ESCR. There should also be a direct right of action against public authorities for failure to comply with ESCR. In keeping with this procedure, that the Supreme Court should be empowered to grant any relief it considers appropriate, except damages, for unlawful public authority conduct vis-à-vis ESCR.
8. ESCR should be included as a standard for statutory interpretation in the HRA, in section 30 of the HRA. Hence, the Supreme Court must interpret a provision in a manner that is compatible with ESCR so far as it is possible to do so consistently with the legislation's purpose.
9. If it is not possible to interpret a legislative provision in a manner that is compatible with ESCR, then the Supreme Court should be empowered to make a declaration of incompatibility (section 32 HRA), which in turn triggers review by the Executive and Legislative Assembly.
10. Those aspects of ESCR that are capable of immediate realisation should be subject to the same structures of protection as the CPR currently protected in the HRA. Hence, any limitation of such rights must be justified in terms of the requirements of section 28 of the HRA.
11. Any failure to meet the obligation to realise ESCR progressively must be justified by reference to (a) the Territory's duty 'to take reasonable measures' (b) 'within its available resources' (c) 'to progressively achieve the full realisation' of the right. This assessment should be assisted by judicial consideration of the following factors:
 - the availability of resources;
 - the latitude inherent in a duty to achieve the realisation of the ESCR progressively;
 - whether the measures are capable of facilitating the realisation of the ESCR;
 - whether the measures include emergency relief for those whose needs are urgent; and
 - whether the measures have been effectively made known to the public, including whether affected groups were consulted in their formulation.

12. The ACT Supreme Court should be empowered to make a 'declaration of incompatibility by omission' if satisfied that the Territory has failed to take reasonable measures to progressively achieve the full realisation of an ESCR.
13. The current requirement for agencies to report on measures taken to respect, protect and promote human rights under the *Annual Reports (Government Agencies) Act 2004* should be extended to ESCR. In addition, the Act should be amended to require agencies to report on measures taken to achieve the progressive realisation of ESCR.
14. The Attorney-General should conduct a review of the operation of the proposed amendments and present a report of the review to the Legislative Assembly not later than five years after their commencement. The review should also consider whether other human rights should be included in the HRA.
15. Further consideration should be given to enabling the ACT Human Rights Commission to investigate and conciliate individual complaints regarding breaches of ESCR, as well as CPR, by a public authority.

1. Chapter 1: Introduction

About the ACT Economic, Social and Cultural Rights Research Project

- 1.1 The ACT Economic, Social and Cultural Rights Research Project is an Australian Research Council Linkage Project (LP0989167) between the Australian National University (ANU), together with the Australian Human Rights Centre at the University of New South Wales (UNSW), and the Partner Organisation, the ACT Department of Justice and Community Safety (JACS). The Project was established to assess whether the ACT *Human Rights Act 2004* (HRA) should be amended to cover economic, social and cultural rights (ESCR) and, if so, what impact this is likely to have on governance in the ACT.
- 1.2 The Project built on a successful collaboration with JACS on a previous ARC Linkage Project, the ACT Human Rights Act Research Project (LP0455490), which monitored the impact of the HRA over the first five years of its operation. That project produced a report on the impact of the HRA,¹ which was tabled in the ACT Legislative Assembly by the Attorney-General in August 2009.²
- 1.3 The Project was conducted between April 2009 and September 2010. It was led by two Chief Investigators: Professor Hilary Charlesworth, ARC Federation Fellow and Director of the Centre for International Governance and Justice in the Regulatory Institutions Network (RegNet) at the ANU, and Professor Andrew Byrnes, Professor of International Law in the UNSW Faculty of Law. Ms Renuka Thilagaratnam was appointed as a Research Fellow and Director of the Project in April 2009. The Project was also assisted by Dr Katharine Young, a Research Fellow at RegNet.
- 1.4 The Project established a Reference Group to facilitate and oversee the research. The Reference Group formally met four times and members also kept in contact informally throughout the course of the Project. The membership of the Reference Group at the end of September 2010 was:
 - Professor Andrew Byrnes, Chief Investigator of the Project, UNSW;
 - Professor Hilary Charlesworth, Chief Investigator of the Project, ANU;
 - Mr Stephen Goggs, Deputy Chief Executive, JACS;
 - Ms Renuka Thilagaratnam, Project Director, ANU;
 - Dr Helen Watchirs, ACT Human Rights Commissioner; and
 - Dr Katharine Young, Research Fellow, ANU.
- 1.5 The Project's framework objectives included:
 - assessing the adequacy of the protection of ESCR in the ACT;

¹ See *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety prepared by the ACT Human Rights Act Research Project, The Australian National University* (May 2009), available at <http://acthra.anu.edu.au/ACTHRA%20project_final%20report.pdf>.

² See ACT, Parliamentary Debates, 18 August 2009, 3230-3234 (Simon Corbell).

- examining the possible mechanisms for the protection of ESCR and the appropriateness of those mechanisms in the ACT; and
- analysing the potential impact of the enforcement of ESCR and the effect on policy-making, service delivery and decision-making processes in the ACT.

1.6 The Project combined a comprehensive literature review, comparative legal analysis, and consultations with international and national legal experts and key ACT stakeholders through a series of workshops and roundtables to consider whether the ACT should include ESCR in the HRA.

Expert workshops

1.7 Between October 2009 and March 2010, the Project held a series of expert workshops which brought together leading ESCR specialists with senior ACT Government officials and community sector members to identify and discuss the major issues for government policy and processes in the local translation of specific ESCR.

1.8 The Project invited international and Australian experts to be keynote speakers at the workshops. A workshop on the right to housing was held on 21 October 2009 with Mr Cameron Jacobs, a senior ESCR researcher at the South African Human Rights Commission. The Project conducted a workshop on the right to education with Professor Sandra Liebenberg, a renowned ESCR legal specialist from Stellenbosch University, on 24 March 2010. The Project concluded its series of specialist workshops with a session on the right to health on 31 March 2010, which was facilitated by Dr John Tobin, an expert on the right to health from Melbourne Law School.

1.9 In addition, JACS and the ACT Human Rights Commission (ACT HRC) jointly convened a workshop on 18 June 2010 to explore the links between ESCR, the environment, and energy and water supply.

Roundtable discussions and other forums

1.10 In conjunction with Professor Sandra Liebenberg's visit, the Project and the ACT Attorney-General co-hosted a roundtable discussion on ESCR for Members of the ACT Legislative Assembly. Mr Cameron Jacobs took part in a community forum on ESCR, which was jointly organised by the ACT HRC, ACT Shelter, and ACT Council of Social Service.

1.11 The Project also hosted a visit by Justice Yvonne Mokgoro from the South African Constitutional Court in July 2009.³ Justice Mokgoro participated in a roundtable discussion on ESCR with members of the ACT Government, judiciary and community sector, and met separately with the ACT Attorney-General to discuss the South African experience of protecting ESCR. Former justice of the South African Constitutional Court, the Hon Albie Sachs, took part in a roundtable discussion with members of the

³ Justice Mokgoro visited Australia as a guest of the Human Rights Law Resource Centre (HRLRC) in Victoria.

ACT HRC, JACS and the Government Solicitor's Office, and also met with members of the ACT Supreme Court during his visit in September 2010.

Project website

- 1.12 The Project established a website containing resource materials, working papers and other publications of the project: <http://acthra.anu.edu.au/PESCR/>. A website established by the earlier Linkage Project to monitor the HRA has also continued to be updated, including summaries of all reported human rights cases in the ACT courts and tribunals.

Objectives and structure of the report

- 1.13 The aim of this report is to convey the findings of the Project, including new thinking on the protection of ESCR, to the ACT Government, in light of the Government's commitment to further consideration of these rights as part of its five-year review of the HRA in 2009-2010. It draws on all aspects of the consultations undertaken over the course of the Project and its recommendations have taken into account the views and concerns expressed by key stakeholders.⁴

- 1.14 The report begins with an overview of the HRA and the key mechanisms it employs to protect human rights (**section 1.15, below**). **Chapter 2** sets out the background and context to this current inquiry on ESCR in the ACT. It also surveys the ESCR debate to date elsewhere in Australia and in comparable overseas jurisdictions such as the United Kingdom. **Chapter 3** reviews controversies over the nature of ESCR, including placing those debates in the context of developments in human rights law over the last few decades. **Chapter 4** outlines the content of ESCR as recognised in international human rights law to allow an understanding of what their inclusion in the HRA might entail.

Chapter 5 describes some of the major ways that ESCR are already substantively covered in Australian Commonwealth, State and Territory law. **Chapter 6** describes the key findings of the expert workshops convened by the Project. **Chapter 7** reviews the protection of ESCR in a number of comparable legal systems. **Chapter 8** outlines the main arguments for expressly recognising ESCR in the HRA. **Chapter 9** considers the specific options for protecting ESCR in the HRA. It draws on examples of the legal protection of ESCR in other jurisdictions, on the experience of the protection of human rights under the HRA and recent developments in Australia. Finally, a **Model Bill** (including a draft Explanatory Statement and Question & Answer memorandum) setting out our recommended approach for amending the HRA to cover ESCR is provided at the end of the Report.

⁴ Parts of this report draw in particular on an article by Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33 *University of New South Wales Law Journal* 193-238, with the kind permission of the Editors of that journal.

Overview of the ACT Human Right Act 2004

1.15 The HRA is a non-entrenched law that aims to create ‘dialogue’ about human rights between the ACT legislature, executive and judiciary. The idea of a human rights dialogue within government has been developed in distinction to constitutional models of guarantees of rights, which involve the invalidation by the courts of laws that are found to be inconsistent with the protected rights. The dialogue metaphor emphasises that the judiciary is not the final or even the major arbiter of whether laws are consistent with human rights guarantees, but rather one participant in a public discussion about rights protection.⁵ The HRA employs various mechanisms to facilitate this dialogue:⁶

Pre-legislative human rights scrutiny

- the requirement for the Attorney-General to present a written statement on the human-rights compatibility of each government bill presented to the Legislative Assembly (section 37);
- the pre-enactment scrutiny role of the Scrutiny of Bills Committee which reports to the Legislative Assembly on the human rights issues raised by all bills (section 38);

Interpreting laws

- the obligation on courts and other decision-makers to interpret Territory laws (including regulations and other statutory instruments, but not the common law) to be consistent with human rights, so far as it is possible to do so consistently with the purpose of the law (section 30);
- the express invitation to benchmark the interpretation of rights, including any limits on rights (section 28), against international human rights standards (section 31);

Declaration of incompatibility

- the power for the Supreme Court to issue a declaration of incompatibility in cases where a Territory law cannot be interpreted to be consistent with human rights (section 32); the declaration does not affect the validity of the law in question (section 39), but the Attorney-General is required to report the government’s

⁵ See Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 51-54.

⁶ For assessments of the operation of the dialogue model of human rights protection in the ACT see *ibid*, chapter 4; *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety prepared by the ACT Human Rights Act Research Project, The Australian National University* (May 2009), available at <http://acthra.anu.edu.au/ACTHRA%20project_final%20report.pdf>; and Helen Watchirs and Gabrielle McKinnon, ‘Five Years Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia’ (2010) 33 *University of New South Wales Law Journal* 136.

response to the declaration to the Legislative Assembly within six months (section 33);

Duty on public authorities

- the positive obligation on public authorities (from 1 January 2009)⁷ to act consistently with human rights and to take human rights into account when making decisions (section 40B); the duty is enforceable through a direct right of action in the Supreme Court, which may grant any remedy except damages (section 40C);

Human Rights Commissioner

- the office of Human Rights Commissioner, which has among other functions that of reviewing the effect of laws to ensure compliance with the HRA (section 41); advising the Attorney-General on the operation of the HRA; and providing education about the HRA (*Human Rights Commission Act 2005*, section 27);

Annual reports and reviews

- the obligation for government departments and other public authorities to report on their implementation of the HRA in their annual reports (*Annual Reports (Government Agencies) Act 2004*, sections 5, 9(3));
- the requirement for the Attorney-General to review and report to the Legislative Assembly on the operation of the HRA one year (now completed), and five years after the HRA came into force (section 43).

⁷ The 12-month review of the HRA recommended a number of amendments to the HRA to ensure that it operated more effectively, including creating a duty on public authorities to comply with the rights under the Act; and creating a direct right of action before the Supreme Court for a breach of those rights, without any entitlement to claim damages; see: ACT Department of Justice and Community Safety (JACS), 'Human Rights Act 2004 Twelve Month Review Report' (2006) ('JACS Twelve Month Review Report') <http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf> The Human Rights Amendment Act 2008 (ACT) made these changes to the HRA and the duty on public authorities commenced on 1 January 2009.

2. Chapter 2: Background and context

- 2.1 The question of whether economic, social and cultural rights (ESCR) should be included in the ACT *Human Rights Act 2004* (HRA) is not new. This chapter reviews the ESCR debate in the ACT to date. It also looks at key discussions that have occurred at both the State and Commonwealth level since the inception of the HRA, in which the issue of protecting ESCR in a human rights charter was considered.¹ Finally, as the HRA is based on a similar dialogue model to the United Kingdom *Human Rights Act 1998* (UK HRA), this chapter describes developments in the United Kingdom where a similar debate on ESCR has taken place.

ACT

- 2.2 **ACT Consultative Committee's Model Bill:** The HRA has its genesis in a draft *Human Rights Act* developed by the ACT Bill of Rights Consultative Committee in its 2003 report *Towards an ACT Bill of Rights Act*.² The Committee was appointed in April 2002 by the ACT Chief Minister (and then Attorney-General), Jon Stanhope, to inquire into whether the ACT should adopt a bill of rights.³ The Committee proposed the adoption of a legislative bill of rights based on the 'dialogue' model of human rights protection contained in the UK HRA.
- 2.3 **Indivisibility:** Based on the principle that all human rights are 'universal, inter-dependent, interrelated and indivisible',⁴ the Committee recommended that an ACT human rights act should protect civil and political rights (CPR) as well as ESCR derived from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) respectively.⁵
- 2.4 To underline the indivisibility of the two categories of rights, the model bill proposed by the Committee grouped related CPR and ESCR together, rather than listing them separately. So, for example, the right to life was grouped with the right to an adequate standard of living (including freedom from hunger); and the right not to be subjected to torture or medical experimentation was grouped with the right to health. The Committee hoped that:

... by identifying the deep connections between the two Covenants in the [model bill], the simplistic distinctions often drawn between economic, social and cultural

¹ For an overview of prior discussions at the State and Commonwealth level, see Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 23-43.

² ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003), Appendix 4 ('ACT Bill of Rights Consultative Committee Report').

³ This was not the first time that the ACT had debated this question. For a summary of previous attempts to introduce a bill of rights in the ACT and for an overview of the 2003 process, see Hilary Charlesworth, 'Australia's First Bill of Rights: The Australian Capital Territory's *Human Rights Act*' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing Ltd, 2006) 289, 290-291.

⁴ *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (12 July 1993), [5], [8].

⁵ *ACT Bill of Rights Consultative Committee Report*, above n 2, [5.32].

rights on the one hand and civil and political rights on the other will be seen to have no substance.⁶

2.5 **Catalogue of ESCR:** The Committee recommended that the following ICESCR rights should be included, to the extent that they were within the jurisdiction of the ACT:

- the right to adequate food, clothing and housing;⁷
- the right to health;⁸
- the right to education;⁹
- the right to work and just conditions of work;¹⁰ and
- the right to take part in cultural life.¹¹

2.6 The Committee considered that the following ICESCR rights were not within the legislative power of the ACT to protect (as they were believed to fall within the exclusive jurisdiction of the Commonwealth) and therefore should not be included:¹²

- the right to form and join trade unions;¹³
- the right to social security;¹⁴ and
- rights in relation to marriage and children.¹⁵

2.7 **Implementation and judicial enforcement:** The Committee proposed two alternative options for implementing ESCR in an ACT human rights act.¹⁶ The first option acknowledged the different obligations attaching to the rights in the ICESCR compared to those in the ICCPR, recognising that ICESCR rights are subject to ‘progressive realisation’, with courts or tribunals required to balance the nature of the benefit from observing such human rights with the financial costs involved:

In other words, the obligation on the ACT government to protect economic, social and cultural rights is one to take reasonable measures within its available resources to realise the rights progressively.¹⁷

2.8 The second approach did not distinguish between CPR and ESCR, but incorporated issues about the nature of ESCR into a general ‘reasonable limitations’ clause, in which

⁶ Ibid.

⁷ ICESCR, art 11(1).

⁸ Ibid art 12(1).

⁹ Ibid art 13(1).

¹⁰ Ibid arts 6, 7, 10(2) and 10(3).

¹¹ Ibid art 15(1)(a).

¹² The Committee also recommended the exclusion of particular CPR for similar reasons, for example the right of an alien not to be expelled from a country without due legal process (art 13, ICCPR).

¹³ ICESCR, art 8.

¹⁴ Ibid art 9.

¹⁵ Ibid art 10(1).

¹⁶ *ACT Bill of Rights Consultative Committee Report*, above n 2, Appendix 4, clause 14(3) and alternative clause 14(1).

¹⁷ Ibid.

the nature of the right was a factor to consider in determining whether a limitation on the enjoyment of a right was permissible:

[L]imitations may be placed on rights if the limitations are reasonable and justifiable taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitations, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the limitation's purpose [that is, rights should be subject to a 'reasonable limits' clause].¹⁸

2.9 The Committee expressed a 'strong preference' for the second alternative, which it considered 'more consistent with the idea of the indivisibility of human rights'.¹⁹

2.10 Drawing on the South African experience, the Committee considered that the courts could legitimately make decisions in relation to the consistency of government policies and measures with ESCR without breaching the principle of separation of powers.²⁰

2.11 The Committee also considered that implementing ESCR in an ACT human rights act would not incur significant costs for government for the following reasons:

First, the [model bill] makes clear that the obligation to implement economic, social and cultural rights is not absolute, and may be limited in reasonable ways to take account of budgetary realities. ... Second, the [model bill] allows the Supreme Court to consider a range of remedies for the breach of a human right, some of which have no financial implications. Finally, the [dialogue model] allows the Legislative Assembly, rather than the courts, to take the final decision on the reasonableness of laws and policies. Even were a particular practice or policy found to breach an economic, social or cultural right, the legislature has the power to enact legislation authorising such a policy or practice.²¹

2.12 **Government response:** The ACT Government accepted the Committee's proposal that the ACT should enact a legislative bill of rights and the HRA was passed in March 2004, its final form largely reflecting the Committee's model bill. However, in a significant departure from the model bill, the ACT Government decided against including ESCR in the HRA.

2.13 While the Government accepted 'in principle the Committee's recommendation that [ESCR] should be given the same status as [CPR]', it considered that implementation of ESCR presented more of a challenge than CPR for the following reasons:²²

- ESCR express ideals about social and economic circumstances;

¹⁸ Ibid [5.46].

¹⁹ Ibid.

²⁰ Ibid [5.33]-[5.41].

²¹ Ibid [5.47].

²² Australian Capital Territory, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT* (tabled by Jon Stanhope in the ACT Legislative Assembly 23 Oct 2003) ('*Government Response to the ACT Bill of Rights Consultative Committee*').

- ESCR are subject to progressive realisation so there is no objective indicator of when they are achieved;
- ESCR require a high level of government resource commitment to achieve so that questions about whether or not they have been violated are likely to involve judgments about whether or not resources have been appropriately allocated;
- ESCR are less amenable to implementation through court action; and
- in a situation of limited resources, a successful claim by one person that an ESCR has been violated is likely to result in resources being drawn away from other people.

2.14 A key factor in the Government's decision to exclude ESCR from the HRA involved concerns over the potential financial cost of protecting ESCR:

While the Government supports the proposed human rights in principle, there is concern that application of policies to individual situations where there is a difficult question of allocation of scarce resources may expose the Government to liability. As there are few countries where the ICESCR rights are enshrined in law, there is little guidance available in the form of decided cases about the extent of that liability. Acknowledging that exposure to a possible large liability for costs in relation to those rights would result in resources being diverted from service provision, the Government will reserve the economic, social and cultural rights from inclusion in the Human Rights Act at this time.²³

We need to do some additional work on the potential resource implications for the territory of incorporating [ESCR] into the legislation.²⁴

2.15 A related concern was the perceived lack of analogous judicial experience in protecting ESCR in other jurisdictions:

It is not appropriate that we look at the extent of the judicial interpretation by the South African courts of the economic, social and cultural rights in that nation.... They give us some guidance but, because of the significant differences, essentially economic, that exist and the differences that are so stark between life in South Africa and life in the ACT, we have to look with some caution at that precedent and at some of those judgments that are being established in South Africa.²⁵

2.16 The Government further considered that the ACT's 'unique position' required:

... a more cautious approach because of the constitutional and service delivery arrangements in our jurisdiction. There are features of territory government which are unique and which limit our capacity to have full and total control over such matters.

The ACT is also committed to a number of inter-governmental agreements. These agreements require the ACT Government to act in a particular way or to use a certain

²³ Ibid.

²⁴ Australian Capital Territory, *Parliamentary Debates*, 2 March 2004, 536 (Jon Stanhope) <<http://www.hansard.act.gov.au/hansard/2004/week02/536.htm>>.

²⁵ Ibid.

set of guidelines in determining how services are to be provided. Agreements in the areas of health, education and housing most specifically fall into this category. In addition, some services are provided by Commonwealth agencies. The Commonwealth Ombudsman and the Commonwealth Privacy Commissioner provide services to the ACT that are complementary to their Commonwealth functions.²⁶

2.17 For these reasons, the Government concluded that it would be better for ESCR to be initially recognised and protected through inclusion in a foundation planning document such as the *Canberra Social Plan*.²⁷ ESCR interests such as housing, health and education were accordingly reflected in the priorities and goals of the Canberra Social Plan when it was released in 2004. However, the Plan does not specifically require the Government to ensure that its policies are consistent with these rights, and thus cannot be regarded as providing real protection for ESCR at a policy level.

2.18 Nevertheless, the Government was keen to keep the issue of ESCR on the table, stating that it remained 'very much alive to the desirability at a later date of incorporating ESCR' in the HRA.²⁸ To that end, it agreed to revisit the issue as part of the twelve month review of legislation.

2.19 **Twelve-month review:** As part of the twelve-month review of the HRA, the Government released a discussion paper in April 2006 which canvassed (among other things) different models for protecting ESCR, such as direct enforceability (as in South Africa and the United Kingdom), through their inclusion in Part 3 of the HRA; indirect enforceability, through their inclusion as directive principles of policy (as in India); and indirect protection, through the interpretation and application of existing rights mechanisms (as in Canada and Europe).²⁹ Submissions were sought on the following questions, which were identified as threshold issues:³⁰

- Should decisions by courts on ESCR be able to:
 - directly impact on budgets?
 - directly impact on policies?
- Is there a set of ESCR that has a stronger case for protection:
 - right to education?
 - right to housing?
 - right to health?
- Should ESCR be subject to the existing dialogue model?
- Should ESCR be subject to a progressive realisation requirement in legislation?
- Is there a stronger argument for incorporation of minimum standards which do not require action, but prevent action that impinges on ESCR?

²⁶ Australian Capital Territory, *Parliamentary Debates*, 23 October 2003, 4030 (Jon Stanhope) <<http://www.hansard.act.gov.au/hansard/2003/week11/4030.htm>>.

²⁷ *Government Response to the Report of the ACT Bill of Rights Consultative Committee*, above n 22.

²⁸ Australian Capital Territory, *Parliamentary Debates*, 2 March 2004, 536 (Jon Stanhope) <<http://www.hansard.act.gov.au/hansard/2004/week02/536.htm>>.

²⁹ 'Human Rights Act 2004 Twelve Month Review – Discussion Paper' (2006), available at:

<<http://acthra.anu.edu.au/Primary%20documents/12%20Month%20Review%20Discussion%20Paper%20.pdf>>

³⁰ Ibid 36-37.

- Should these rights be expressed as directive principles of public policy?
- Should they be subject to other public reporting and accountability mechanisms?
- Is the process of reasonableness review in South Africa consistent with existing principles of judicial review and the institutional competence of the courts?
- How would the protection of ESCR be integrated into the existing HRA, given it does not apply directly to public authorities or create special remedies?
- How far can ESCR be protected through the existing rights in the HRA?
- Would protection of ESCR require changes in existing legal mechanisms, such as provision for public interest litigation?

2.20 Around 70 per cent of the submissions on the discussion paper addressed the protection of ESCR, and over 80 per cent of those supported their express inclusion in the HRA over their indirect protection through alternative mechanisms such as a set of 'directive principles'. The ACT Council of Social Service, for example, wrote:

On the question of the development of directive principles or any other forms of recognition of ESC rights, such as those articulated in the Canberra Social Plan, these are welcome as an additional response to including them in the HRA. However, directive or other policy principles are not a substitute for recognising ESC rights in the HRA and should not be presented as such.³¹

Over 50 per cent of the submissions in favour of including ESCR in the HRA prioritised the rights to housing, education and health as having particular significance to the ACT. However, few submissions addressed the threshold issues associated with protecting ESCR in the HRA.³²

2.21 Ultimately, the twelve-month review may have proved too soon to properly address the ESCR question. The Attorney-General told the Legislative Assembly:

Whilst we have a clear appreciation of the sorts of rights that would be encouraged, we still do not have a clear direction about the way in which they would be enforced. Undoubtedly, the arguments for protecting economic, social and cultural rights are strong. However, despite the passage of 12 months or two years since the legislation was passed, there is limited experience in what effect those rights may have in the ACT.³³

2.22 The review recognised that there had been many important developments in relation to ESCR, but was concerned that these rights had not been extensively incorporated in bills of rights in New Zealand, Canada, the United Kingdom, or in Victoria; South Africa was 'largely an exception'.³⁴

³¹ ACT Department of Justice and Community Safety (JACS), 'Human Rights Act 2004 Twelve Month Review Report' (2006) ('JACS Twelve Month Review Report'), 47

<http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf>.

³² ACT Parliamentary Debates, 22 August 2006, 2462 (Simon Corbell)

<<http://www.hansard.act.gov.au/hansard/2006/week08/2462.htm>>.

³³ Ibid.

³⁴ JACS Twelve Month Review Report, above n 31, 37 - 49.

It is still the case that the inclusion of economic, social and cultural rights at this stage would make us exceptional amongst comparable human rights jurisdictions. And it is still the case that the inclusion of these rights would have an unclear effect. The original objections relating to the political and financial impact of human rights litigation still find support, despite some arguments to the contrary.³⁵

2.23 It therefore recommended deferring the ESCR issue to the five-year review of the HRA:³⁶

- the Government should explore support for the direct enforceability of specific rights, such as the rights to health, education and housing, but should not amend the HRA to include ESCR (Recommendation 10); and
- the Government should revisit the question of ESCR as part of the five-year review of the HRA (Recommendation 11).

2.24 **Five-year review:** In August 2009, as part of the five-year review of the HRA, the ACT Government again called for submissions on (among other things) protecting ESCR, including comments on the nature of the protection, the scope of the rights protected and possible economic impacts.³⁷ Among the submissions received, there was overwhelming support for ESCR to be included in the HRA, and the majority of these submissions concluded that fears about these rights were overstated. Various submissions noted that there are multiple models for protecting ESCR, though the general preference was for appropriate judicial enforcement.

Other Australian jurisdictions

2.25 Since the introduction of the HRA in 2004, there have been four major consultations on bills of rights at both the State and Commonwealth level in which the question of including ESCR was considered: Victoria (2005), Tasmania (2007), Western Australia (2007), and the Commonwealth (2009).

2.26 **Victoria:** The Victorian Government appointed a Consultation Committee in 2005 to inquire whether Victoria should adopt a legislative human rights charter. The Committee was asked to focus on rights in the ICCPR as:

[t]he Government's primary purpose in this initiative is to adequately recognise, protect and promote those rights that have a strong measure of acceptance in the community.... Legislating for the protection of the ICESCR rights, such as the right to adequate food, clothing and housing, is complicated by the fact that such rights can

³⁵ Ibid 49.

³⁶ Ibid.

³⁷ See the ACT Government's call for submissions: ACT Government, *Review of the Human Rights Act 2004* (2009) North Canberra Community Council Inc Community Noticeboard <<http://www.scribd.com/doc/18958280/20090822-Community-Notice-Board>>. A number of the submissions made to the review appear at ACT ESCR Research Project website (2009) <<http://acthra.anu.edu.au/PESCR/Publications>>; the ACT Government does not have a website on which submissions are available.

raise difficult issues of resource allocation and that many deal with responsibilities that are shared between the State and Commonwealth Governments. The Government also believes that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated.³⁸

2.27 The Victorian Human Rights Consultation Committee noted that there were ‘strong concerns and arguments regarding ESCR’ but nevertheless recommended that ESCR not be included at the outset because:

- ESCR ‘may involve significant resources in order to be fully enjoyed’ and that ‘[a]s such, nations are given greater latitude in their implementation of the rights contained in ICESCR’ than those contained in the ICCPR;
- ESCR were not included in the legislative charters adopted in the United Kingdom, New Zealand or the ACT (with the exception of the right to education in the United Kingdom);
- there was ‘limited experience on what effect ESC rights may have within a legal system like Victoria’s’; and
- the inclusion of ESCR rights ‘would make Victoria exceptional amongst the models of human rights protection enacted in similar jurisdictions’.³⁹

2.28 The Committee recommended a comprehensive review of the Act after four years and that such a review should include the question of whether ESCR should be included.⁴⁰

2.29 **Government response:** On the basis of the Committee’s report, the Victorian Government enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in July 2006. The Government accepted the Committee’s recommendation that the Charter should not initially include ESCR but provision was made for the issue to be revisited as part of the four-year review of the legislation, which is required to be tabled in the Victorian Parliament by 1 October 2011.⁴¹

2.30 **Tasmania:** In 2006, the Tasmanian Government asked the Tasmanian Law Reform Institute to investigate whether Tasmania should adopt a bill of rights.

2.31 **Indivisibility:** After reviewing the arguments for and against the inclusion of ESCR in a Tasmanian bill of rights, the Institute recommended that ESCR be included alongside CPR, concluding:

³⁸ Victorian Government, Statement of Intent, May 2005, Appendix B in Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005) 161,163.

³⁹ Ibid 29.

⁴⁰ Ibid 137.

⁴¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44.

The arguments for limiting rights protection to civil and political rights are not compelling. They speak of timidity rather than rationality. Suggestions that courts are ill-equipped to engage with economic, social and cultural rights show little knowledge of the courts' current decision making responsibilities. Fears that the inclusion of economic, social and cultural rights in a Tasmanian Charter would deprive governments of their control of fiscal policy and resource allocation are unfounded. Under the dialogue model recommended here for the Tasmanian Charter, this cannot occur. The Tasmanian Law Reform Institute recognises that human rights are indivisible and that the separation of rights into civil and political rights on the one hand and economic, social and cultural rights on the other is artificial.⁴²

2.32 The Institute recommended that if its recommendation for inclusion of ESCR at the outset was not accepted, then the issue should be considered in the prescribed reviews of the Act.⁴³

2.33 ***Catalogue of ESCR:*** The Institute recommended the inclusion of the following ICESCR rights in a Tasmanian human rights act:

- the right to adequate food, clothing and housing;
- the right to health;
- the right to education; and
- the right to work and just conditions of work (including the right of children not to be exploited economically or socially).

2.34 It did not recommend including the following ICESCR rights, based on the view that protecting these rights constitutionally fell outside the Tasmanian Government's jurisdiction:

- the right to social security; and
- the right to marry.

2.35 ***Implementation and judicial enforcement:*** The Institute did not expressly canvass the specificities of implementing ESCR in a Tasmanian human rights act but it would appear, based on its endorsement of the principle that all rights are indivisible, that the Institute intended for ESCR and CPR to be recognised equally, with issues about the nature of ESCR to be addressed through the mechanism of a general reasonable limitations clause:

[A]ll rights included in a Tasmanian Charter would be subject to reasonable limitations. This means that Government obligations with respect to ESCR would only be to take such measures as are reasonable and within its available resources to protect and observe such rights.⁴⁴

⁴² Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, October 2007) 122.

⁴³ Ibid 122, 123.

⁴⁴ Ibid 118-119.

2.36 **Government response:** For various reasons, including a number of changes of Attorney-General, the Tasmanian Government did not follow up on the Institute's report. However, the issue is the subject of renewed debate, with the latest Tasmanian Attorney-General recently announcing her intention to progress a Tasmanian human rights act by 'developing a discussion paper ... before a proposal is taken to Cabinet'.⁴⁵

2.37 **Western Australia:** The Western Australian Government appointed a Consultation Committee in 2007 to consider the issue of a human rights act for Western Australia. The Western Australia Government indicated in its Statement of Intent⁴⁶ that its preferred approach was not to include ESCR, at least initially, and it did not include ESCR in the draft human rights act it published as part of the initial consultation materials.⁴⁷

2.38 **Indivisibility:** However, the Consultation Committee took a different view. Noting the importance of the interests protected by ESCR to the community and notwithstanding the Western Australia Government's clear indication on the issue, the Committee reviewed the arguments for and against the inclusion of ESCR,⁴⁸ and recommended that they be included alongside CPR.⁴⁹

2.39 **Catalogue of ESCR:** Citing constitutional or other difficulties with including some of the rights in the ICESCR, the Committee recommended including only these ICESCR rights:

- the right to housing;
- the right to health;
- the right to an education; and
- the right to take part in cultural life.⁵⁰

2.40 **Implementation and judicial enforcement:** The Committee proposed two options for implementing ESCR:

(a) Economic, social and cultural rights should be treated in the same way as civil and political rights in a WA Human Rights Act.

(b) In the alternative:

⁴⁵Lara Giddings MP, 'Attorney-General outlines law reform agenda' (Media Release, 22 June 2010) <<http://www.media.tas.gov.au/print.php?id=29810>>.

⁴⁶A WA Human Rights Act: Statement of Intent by the Western Australian Government (May 2007) 4, reproduced as Appendix A in Consultation Committee for a Proposed WA Human Rights Act, A WA Human Rights Act: Report of the Consultation Committee for a proposed WA Human Rights Act (2007) ('WA Consultation Committee Report').

⁴⁷Draft Human Rights Bill 2007, reproduced as Appendix B in WA Consultation Committee Report, above n 46.

⁴⁸Ibid Chapter 4.

⁴⁹Ibid 76.

⁵⁰Ibid 82.

(i) economic, social and cultural rights should be treated in the same way as civil and political rights, except in relation to the remedies available for a breach of those rights (set out in Part 6 of the draft Bill). A breach of an economic, social or cultural right should not be able to be the subject of a remedy in the courts. However, complaints about a breach of these rights should be addressed through the internal complaint process of a government agency or contractor, or by conciliation; and

(ii) a WA Human Rights Act should expressly include a statement to the effect that economic, social and cultural rights are to be progressively implemented. This should be assessed by reference to all relevant circumstances of the particular case, including the nature of the benefit or detriment likely to accrue or be suffered by any person concerned, and the financial circumstances and the estimated amount of expenditure required to be made by a government agency to act in a manner compatible with the economic, social or cultural right in question.⁵¹

2.41 **Government response:** The Western Australian Government decided not to follow up on the Committee's recommendations, stating that it was preferable to pursue these reforms at the national level;⁵² the Government's subsequent loss of a parliamentary majority and then the 2008 election took the matter off the agenda.

2.42 **Commonwealth:** The Commonwealth Government appointed a National Human Rights Consultation Committee (NHRCC) in 2008 to consider how human rights could be better protected in Australia.⁵³ The Committee undertook extensive consultations and ultimately recommended the adoption of a legislative bill of rights based on the dialogue model of the HRA, Victorian Charter and the UK HRA.⁵⁴

2.43 **Indivisibility:** The NHRCC accepted that both CPR and ESCR were of equal status under international law and that both categories of rights are frequently interdependent and interrelated. The Committee also acknowledged that the 'most basic economic and social rights – the rights to the highest attainable standard of health, to housing and to education – matter most to Australians and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community'.⁵⁵

2.44 **Catalogue of ESCR:** While the Committee noted the particular relevance of a subset of ESCR, namely, housing, education and health, its recommendations in relation to ESCR in general did not prioritise specific ESCR or distinguish between the guarantees

⁵¹ Ibid 116.

⁵² Jim McGinty MP, 'Human Rights report completed' (Media Release, 20 December 2008) <http://acthra.anu.edu.au/articles/McGinty%20media_release_report.pdf>.

⁵³ For a detailed discussion of the NHRCC's treatment of ESCR, see Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33 *University of New South Wales Law Journal* 193.

⁵⁴ While the NHRCC viewed most of its proposals as ideally accompanying a HRA, it also suggested that many could be implemented as independent reforms.

⁵⁵ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 344 ('NHRCC Report') available at <www.humanrightsconsultation.gov.au>.

contained in the ICESCR and those ESCR contained in other human rights treaties to which Australia is party.

2.45 **Implementation and judicial enforcement:** The NHRCC recommended against ESCR being included in any national human rights act. It considered that ‘it would be very difficult, if not impossible, to make such rights matters for determination in the courts’,⁵⁶ and that some of the measures proposed for the protection of CPR were not appropriate for the protection and implementation of ESCR. However, the Committee proposed that, if ESCR were to be included, they should not be judicially enforceable; instead the following measures should apply to them:

- pre-enactment scrutiny of all bills via a requirement for compatibility statements and parliamentary scrutiny committee reports which would assess whether the proposed legislation was compatible with ESCR;
- obligations on public authorities to give proper consideration to ESCR when making decisions. However, unlike CPR, public authorities would also not be required to act in a manner compatible with ESCR. Furthermore, the interpretative obligation (for statutes to be interpreted in accordance with human rights) would not apply in relation to ESCR;⁵⁷ and
- a complaints-handling jurisdiction for the Australian Human Rights Commission (AHRC) to hear individual complaints of human rights violations, including those relating to ESCR. Unlike CPR complaints, however, if the Commission were unable to resolve an ESCR complaint, there would ‘be no scope to bring court proceedings’.⁵⁸

2.46 **Government response:** The Commonwealth Government released its formal policy response to the Committee’s report – Australia’s Human Rights Framework – in April 2010.⁵⁹ The Framework did not take up the NHRCC’s central recommendation for the adoption of a national human rights act. The Government instead opted to put in place a normative and policy framework based on the standards contained in the seven core UN human rights treaties to which Australia is already a party to enhance legislative processes. To that end, the Government introduced the Human Rights (Parliamentary Scrutiny) Bill 2010. The Bill would have established a requirement for all bills and disallowable instruments to be accompanied by a compatibility statement. It would also have created a new Joint Parliamentary Committee on Human Rights to examine and report to Parliament on the compatibility of legislation with Australia’s

⁵⁶ Ibid 365.

⁵⁷ Rather oddly, however, the Committee suggested that if a human rights act were not to be enacted, the *Acts Interpretation Act 1901* (Cth) should be amended ‘to require that, as far as it is possible to do so consistently with the legislation’s purpose, all federal legislation is to be interpreted consistently with [human rights, including ESCR]’, *ibid* 373.

⁵⁸ Ibid 360.

⁵⁹ Robert McClelland, ‘Launch of Australia’s Human Rights Framework’ (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010, available at http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_21April2010-AddresstotheNationalPressClubofAustralia-LaunchofAustraliasHumanRightsFramework).

international human rights obligations, including those under the ICESCR as well as ESCR in other human rights treaties to which Australia is party. The Bill lapsed when Parliament was prorogued in July 2010 but is likely to be reintroduced in the new Parliament.

United Kingdom

2.47 The United Kingdom Parliament's Joint Committee on Human Rights (JCHR) adopted reports on ESCR in 2004⁶⁰ and 2008,⁶¹ in which it considered the possible inclusion of ESCR in a British Bill of Rights.

2.48 **Indivisibility:** Pointing to the consistent evidence of opinion polls that supported the inclusion of ESCR in a bill of rights, the JCHR acknowledged that ESCR are now viewed 'as being just as fundamental as what are perceived to be the ancient rights in Magna Carta [ie CPR]'.⁶²

2.49 **Catalogue of ESCR:** The JCHR recommended that a United Kingdom Bill of Rights should initially include the following ESCR (with a view to reviewing the experience after a period and considering whether to add other ESCR):⁶³

- the right to health;
- the right to education;
- the right to housing;
- the right to an adequate standard of living (including adequate food, water and clothing); and
- the right to social security.

2.50 **Implementation and judicial enforcement:** While recognising that it was inappropriate for courts to become involved in policy decisions about 'large-scale redistribution of resources',⁶⁴ the JCHR rejected the traditional arguments⁶⁵ about the nature of ESCR and the possibility of their judicial enforcement.⁶⁶ The JCHR also noted that the right to education under the UK HRA was 'without difficulty guaranteed and

⁶⁰ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, House of Lords Paper 183, House of Commons Paper 1188, Session 2003–04 (2004).

⁶¹ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, House of Lords Paper 165, House of Commons Paper 150, Session 2007–08 (2008) ch 5.

⁶² Ibid Chapter 5, [152].

⁶³ Ibid Chapter 5, [197].

⁶⁴ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, House of Lords Paper 183, House of Commons Paper No 1188, Session 2003–04 (2004), [71]. However, the JCHR also noted that some court decisions on civil and political rights may have 'substantial resource implications', [72].

⁶⁵ These views are discussed in Chapter 3 below.

⁶⁶ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, House of Lords Paper 183, House of Commons Paper No 1188, Session 2003–04 (2004), [21], [26], [48]; Joint Committee on Human Rights, *A Bill of Rights for the UK?*, House of Lords Paper 165, House of Commons Paper 150, Session 2007–08 (2008) ch 5, [155], [183]–[191].

applied by the UK courts, if in relatively circumscribed and qualified form, alongside the civil and political guarantees'.⁶⁷

- 2.51 The JCHR considered that a model involving a duty of progressive realisation with a closely circumscribed judicial role (based on the South African constitutional experience) was the best way of providing judicial oversight, while still maintaining the proper separation of powers between the courts and the legislature and executive.⁶⁸ The JCHR therefore proposed a model based on the South African experience, but including 'additional wording designed to ensure that the role of the courts in relation to social and economic rights is appropriately limited'.⁶⁹
- 2.52 The broad scheme of these provisions is to impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources; to report to Parliament on the progress made; and to provide that the rights are not enforceable before the courts by individuals. Instead, the courts have a very closely circumscribed role in reviewing the measures taken by the Government.
- 2.53 The JCHR proposal is in fact more restrictive than the South African model and the proposals of the ACT, Tasmanian and Western Australian consultative bodies, as it would not allow any of the listed ESCR to be directly enforced by the courts. Nonetheless, the JCHR's endorsement of the inclusion of ESCR is important and makes clear that the South African experience cannot be dismissed as appropriate only to a developing country with relative new democratic institutions but not to Australia. As the NSW Bar Association commented in relation to this proposal:

[W]hile the option preferred by the Joint Committee may be too limited in the rights which it proposes for inclusion and the extent of judicial oversight permitted, it nevertheless demonstrates that in a comparable jurisdiction to Australia, a leading Parliamentary body with a decade-long engagement with a statutory charter of rights considers that there are strong arguments for the inclusion of [ESCR] in a statutory bill of rights, and that there is a role for judicial oversight. It is also important to recall the point made by the Joint Committee in its 2004 report that, as with the inclusion of [CPR] in a statutory charter, the most important effect of the inclusion of economic and social rights is likely to be its effect on the policymaking process and the legislative process, by promoting a culture of rights and ensuring that a human rights framework is used throughout all arms of government.⁷⁰

- 2.54 **Government response:** In its response to the JCHR's 2008 report, the United Kingdom Government expressed its concerns about the possibility of increased judicial intervention in areas involving resource allocation in the socio-economic sphere, but

⁶⁷ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, House of Lords Paper 183, House of Commons Paper No 1188, Session 2003–04 (2004), [22].

⁶⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, House of Lords Paper 165, House of Commons Paper 150, Session 2007–08 (2008) ch 5, [172].

⁶⁹ *Ibid* [192].

⁷⁰ NSW Bar Association, Submission to National Human Rights Consultation, *National Human Rights Consultation*, 9 June 2009, [35].

acknowledged that there may be ways of recognising ESCR that already exist as enforceable entitlements but are not expressly enunciated as legal rights in United Kingdom law.⁷¹

- 2.55 The Government subsequently released a Green Paper in March 2009 as part of its consultations on a British Bill of Rights.⁷² The Green Paper affirmed the Government's commitment to social welfare priorities that fall within the sphere of ESCR, such as healthcare, education, housing and employment, and suggested that 'a new Bill of Rights ... could present the opportunity to bring together in one place a range of [ESCR] entitlements currently scattered across the UK's legal and political landscape'.⁷³
- 2.56 The Government, however, signalled its reluctance to guarantee ESCR as individually enforceable rights, stating that 'a general model of directly legally enforceable rights ... may not be the best mechanism for ensuring fair provision for society as a whole in relation to social and economic rights'.⁷⁴ Instead, the Green Paper canvassed a range of possible options for protecting ESCR without making them individually enforceable: these included incorporating ESCR as a set of non-justiciable 'directive principles of social policy', whereby Ministers might be required to report to Parliament on the Government's compliance with the principles;⁷⁵ as a set of interpretive principles that would provide the courts and public authorities with a relevant standard when exercising discretions and interpreting laws;⁷⁶ and/or creating an express duty for public authorities to have regard to ESCR when exercising their functions and making decisions.⁷⁷
- 2.57 Following the 2010 elections, the new United Kingdom coalition Government indicated that it will set up a commission to 'investigate the creation of a British Bill of Rights';⁷⁸ beyond this commitment, the Government's position on the issue remains unclear for the time being.

Conclusion

- 2.58 The various Australian and United Kingdom studies of the introduction of ESCR into the legal system have shown that, first, the interests protected by ESCR, particularly those relating to housing, health and education, are highly valued in the community. Second, the various options for protecting ESCR have been extensively explored during the course of these enquiries and many of the traditional arguments about ESCR can no longer be maintained as persuasive objections to the recognition of ESCR in some

⁷¹ Joint Committee on Human Rights, *A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08*, House of Lords Paper 15, House of Commons Paper No 145, Session 2008-09 (2009), [19]-[21].

⁷² Ministry of Justice (UK), *Rights and Responsibilities: developing our constitutional framework*, March 2009.

⁷³ Ibid 32, 41.

⁷⁴ Ibid 57.

⁷⁵ Ibid 52-54.

⁷⁶ Ibid 55.

⁷⁷ Ibid 56.

⁷⁸ Ministry of Justice (UK), *Draft Structural Reform Plan*, July 2010, 7
<<http://www.justice.gov.uk/publications/docs/moj-structural-reform-plana.pdf>>.

form. Third, there is significant support for the inclusion of ESCR in a human rights act: a majority of the committees that have considered the issue (ACT, Tasmania, Western Australia and the UK JCHR),⁷⁹ as well as an overwhelming majority of submissions to the twelve-month and five-year reviews of the HRA, recommended their inclusion in combination with some form of judicial oversight.

- 2.59 Nonetheless, none of these inquiries has yet resulted in a human rights statute that guarantees explicit protection for ESCR. The governments involved in these inquiries have remained cautious about the desirability of treating ESCR as equivalent to CPR, particularly for fear of judicial interference in areas involving resource allocation.
- 2.60 In short, the ESCR debate to date in the ACT, the rest of Australia and in comparable jurisdictions such as the United Kingdom has shown that that the relevant question is no longer whether ESCR are legitimate human rights, but whether the courts have an appropriate role to play in their implementation and, more generally, whether and how governments should be held accountable for fulfilling ESCR.

⁷⁹ The NHRCC proposed that if ESCR were to be included then the sole mechanism for their accountability should be the legislature and not the courts, while the Victorian Human Rights Consultation Committee recommended deferring consideration of the issue based on the express preference of the Victorian Government.

3. Chapter 3: What are economic, social and cultural rights?

Introduction

3.1 This chapter provides an introduction to economic, social and cultural rights (ESCR) and reviews controversies about the nature of these rights. ESCR have long been part of the human rights canon, as illustrated by their inclusion in the 1948 Universal Declaration of Human Rights (UDHR). Today, substantial bodies of international and national jurisprudence exist on the meaning and application of ESCR, and there is extensive experience of their domestic implementation. These developments show the similarities between ESCR and civil and political rights (CPR) and that differences between them have been overstated. It is important to emphasise that legal measures for the implementation of ESCR are only one component of ensuring their enjoyment and that, as with CPR, a range of other economic, policy or other measures will also be necessary. At the same time, evidence suggests that governmental performance in securing ESCR is enhanced by their legal protection.¹

What are ESCR?

- 3.2 Many ESCR are the product of struggles in the nineteenth century by workers and other disadvantaged groups for social justice, including just, fair and safe conditions of employment, the right of workers to organise and the right to education for all. Recognition of these rights led to the policies of the social welfare states that emerged in various parts of Europe during the late nineteenth and early twentieth centuries.²
- 3.3 International concern with ESCR is almost as longstanding as interest in CPR. The establishment of the International Labour Organization (ILO) in 1919 endorsed the importance of ESCR in the field of employment and occupation. The ILO has adopted a large number of binding international standards that are subject to international and national supervision and enforcement, including by courts or quasi-judicial bodies. The cultural, linguistic and educational rights of minorities have been recognised since at least the end of the First World War.
- 3.4 The UDHR, adopted unanimously by the United Nations General Assembly, was designed as a catalogue of basic human rights and includes both ESCR and CPR. The translation of the UDHR into binding treaty obligations in the 1950s and 60s was affected by the politics of the Cold War, and this was one cause of a division of the UDHR rights into two separate treaties: the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).³

¹ Lanse Minkler, 'Economic Rights and Political Decision Making' (2009) 31 *Human Rights Quarterly* 368.

² Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009) 10.

³ Daniel Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29 *Human Rights Quarterly* 908; Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462.

3.5 Despite this division of human rights, the close relationship between the two categories of rights has been emphasised in subsequent human rights instruments. For example, the 1993 Vienna Declaration on Human Rights referred to the indivisibility, interdependence and interrelationship between ESCR and CPR.⁴

3.6 In this Report, we use the term ESCR to refer to the rights recognised in the major relevant international instruments, particularly the ICESCR. These rights include:

- the right to work, including ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’ (ICESCR, article 6);
- the right to ‘the enjoyment of just and favourable conditions of work’, including ‘fair wages and equal remuneration for work of equal value without distinction of any kind’ and in particular women’s right to equality in work; safe and healthy working conditions, the equal opportunity to be promoted in one’s employment, and the right to ‘rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’ (ICESCR, article 7);
- the right to form trade unions and to join the trade union of one’s choice (subject to reasonable restrictions) and the right to strike (if exercised lawfully) (ICESCR, article 8);
- the right to social security, including social insurance (ICESCR, article 9);
- the right of families to protection and assistance, including special protection for mothers and children, and the requirement of free consent by both spouses to marriage (ICESCR, article 10);
- the right to an adequate standard of living for oneself and one’s family, ‘including adequate food, clothing and housing, and to the continuous improvement of living conditions’ (ICESCR, article 11);
- the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (ICESCR, article 12);
- the right to education, including the right to free primary education, to secondary education, and to non-discriminatory access to higher education (ICESCR, article 13);
- the right of parents and legal guardians to choose schools for their children other than public schools and to ensure the religious and moral education of their children in conformity with their own convictions; and the right of individuals and bodies to establish and direct educational institutions that satisfy minimum prescribed standards (ICESCR, article 13);
- the right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which an individual is the author (ICESCR, article 15); and
- the right to the enjoyment of the rights guaranteed ‘without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national

⁴ *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (12 July, 1993) [5].

or social origin, property, birth or other status’ (ICESCR, article 2(2)),⁵ as well as ‘the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth’ in the ICESCR (ICESCR, article 3).

- 3.7 The UDHR also includes the right to own property alone as well as in association with others, and the right not to be arbitrarily deprived of one’s property (article 17). The right to property is generally considered to be both a civil right as well as an economic right, but it is not expressly included in either the ICCPR or the ICESCR.⁶
- 3.8 ESCR are drawn from many sources, national and international, and their formulations differ. While the UDHR and the ICESCR are the major reference-points in the debate over ESCR, it is important to remember that they are neither the exclusive source of those rights nor the only possible articulation of them. An understanding of the content of the ICESCR, in particular the nature of the obligations assumed by States parties to that treaty under article 2(1) (the obligation often referred to as one of ‘progressive realisation’),⁷ as well as specific obligations that are spelled out in individual articles,⁸ is fundamental to the debate over the implementation of ESCR. The rights guaranteed by the ICESCR may be subject to limitations, whether under the general limitations clause (article 4)⁹ or the specific limitations provided for in individual articles.¹⁰

The nature of ESCR

- 3.9 During his visit to Canberra, the Hon Albie Sachs reminded us that the protection of ESCR contributes to the creation of a coherent and principled normative system that is concerned with the whole human being; a system that is integrated into the political system, but not dependent on its vagaries and one that is capable of filling in gaps that are unacceptable in our open and democratic society. There has been much debate over the nature and status of ESCR as compared with CPR, although both are integral to human freedom and dignity. The reality that CPR and ESCR are ‘two sides of the same coin’ is well illustrated by the example that a right to vote or to free expression is

⁵ Art 2 of the UDHR guarantees the enjoyment of all rights set out in the Declaration ‘without distinction of any kind’, including distinctions on the grounds listed in the ICESCR.

⁶ The right is included in Art 1 of Protocol I to the *European Convention on Human Rights*. It appears in the *Charter of Human Rights and Responsibilities 2006* (Vic), but not in the *Human Rights Act 2004* (ACT) (HRA).

⁷ Art 2(1) provides:

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

⁸ See, eg, arts 11(2) and 12(2).

⁹ Art 4 provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

¹⁰ Eg art 8(2) and (3).

meaningless if a person is too hungry or too ill to exercise the right.¹¹ However, protection from disease, from malnutrition and from the degradation of poverty are themselves serious matters of concern, even without their importance for realising CPR.

- 3.10 Some have resisted the characterisation of ESCR as human rights at all, arguing that they embody aspirational and resource-dependent goals that require positive state action for their realisation. Such critics maintain that authentic human rights are those that can be realised immediately, by State abstention from action, with little or no demand for additional resources.¹² Others regard the two categories of rights as fundamentally different and susceptible to quite different forms of implementation and enforcement. They point to the apparent vagueness and generality of ESCR as compared with CPR and argue that the former are thus non-justiciable.
- 3.11 While today most scholars and commentators accept ESCR as legitimate human rights, some nevertheless claim that they are qualitatively different from CPR. The asserted difference is that ESCR involve positive obligations (ie the State must allocate resources to the achievement of the rights) while CPR contain negative obligations (ie the State must respect those rights by refraining from taking actions that infringe them). These perceived differences are reflected in the requirement of the ICCPR that States Parties 'respect and ... ensure'¹³ CPR – an obligation assumed to be capable of immediate implementation – contrasted with the complex general obligation in the ICESCR requiring States Parties to take steps to achieve the progressive realisation of those rights.¹⁴ The Report of the National Human Rights Consultation Committee followed this approach in recommending that, if ESCR were to be listed in an Australian Human Rights Act, they be made non-justiciable.¹⁵
- 3.12 Objections to the judicial enforcement of ESCR draw on the perception that judicial resolution of alleged violations of ESCR will almost always require a court to decide between competing priorities for limited resources. It is said that this is a task requiring expertise courts do not have, for which the curial process is poorly designed, and one which is pre-eminently a question for the democratically elected legislature to

¹¹ Eg Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press, 1993); Henry Shue, *Basic Rights* (Princeton University Press, 2d ed, 1996).

¹² See, eg, Maurice Cranston, *What Are Human Rights?* (Bodley Head, 1973) 65–71; E. W. Vierdag, 'The Legal Nature of the Rights Granted by the *International Covenant on Economic, Social and Cultural Rights*' (1978) 9 *Netherlands Yearbook of International Law* 69.

¹³ ICCPR, art 2(1).

¹⁴ ICESCR, art 2. See G. J. H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (Martinus Nijhoff, 1984) 97; Mashood A Baderin and Robert McCorquodale, 'The *International Covenant on Economic, Social and Cultural Rights*: Forty Years of Development' in Mashood A. Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007), 8–14; Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees?' (1992) 141 *University of Pennsylvania Law Review* 1; Malcolm Langford, 'Closing the Gap? An Introduction to the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*' (2009) 27 *Nordic Journal of Human Rights* 1, 9–18.

¹⁵ See discussion in Chapter 2.

carry out. Conferring the power on courts to do this would, it is argued, violate the separation of powers and have a number of other undesirable consequences.

3.13 Over the last thirty years, scholarly analysis, international practice and domestic litigation have challenged the traditional dichotomy between the two categories of rights, and brought a more sophisticated understanding of both.¹⁶ Chapter 7 of this Report details examples of national systems of protection of ESCR. These have challenged the notion that CPR involve purely negative obligations (and thus can be respected without the allocation of financial resources) and that ESCR only involve positive actions and the spending of money. Take, for example, the right to a fair trial, considered a classic CPR. This right depends for its enjoyment on the allocation by the State of extensive financial resources to run a court system, with independent judges, the availability of legal aid, interpreters and other forms of support. There is little difference between this and the expenditure involved in the maintenance of a health system that gives effect to the right to the highest attainable standard of health care. The main difference is one of perception: at least in developed countries, court systems are funded as a matter of course and the costs become invisible when analysing the costs of rights.

3.14 Jurisprudential developments have also made it clear that States may be under obligations to take positive measures to carry out their obligations in relation to many CPR.¹⁷ Conversely, obligations in relation to ESCR may often involve negative obligations, for example, not unlawfully evicting a tenant from state housing or discriminating against an employee for union membership or related activities.

3.15 States' obligations to fulfil ESCR and CPR are similar. They both rest on the need to respect, to protect, and to fulfil/promote rights; in other words, they both entail negative and positive obligations.¹⁸ The UN Committee on Economic, Social and Cultural Rights has elaborated the three different types or levels of obligation.¹⁹ A useful summary of the multilayered approach is:

The obligation to respect rights requires states to refrain from any action that would

¹⁶ See generally the sources and references in Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3rd ed, 2007) 263–374.

¹⁷ See, eg, Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004); Jean-François Akandji-Kombé, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights: Human Rights Handbooks, No 7* (Council of Europe, 2007).

¹⁸ See, eg, Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press, 1995) 109–14; M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia, 2003) 157–248; Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff, 2004) 28–34.

¹⁹ Eg, *General Comment No. 19: The Right to Social Security (art 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008), [43]; *General Comment No. 18: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art 6)*, 36th sess, UN Doc E/C.12/GC/18 (24 November 2005), [22]; *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author (Art 14, para 1(c))*, 35th sess, UN Doc E/C.12/GC/17 (2005), [28].

interfere with citizens' enjoyment of their rights; including actions people take in efforts to realize their rights.

The obligation to protect rights requires states to take action to prevent violations of human rights by others. This obligation involves encouraging individuals and organizations to respect the rights of others, as well as imposing sanctions for violations that are committed by private individuals or organizations.

The obligation to fulfil rights requires states to take action to achieve the full realization of rights. These actions can include enacting laws, implementing budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies....²⁰

The judicial enforceability of ESCR

3.16 International and national adjudication indicates that ESCR can be the subject of meaningful and legitimate judicial enforcement.²¹ At the international level, complaints of non-fulfilment of obligations to ensure the enjoyment of ESCR have been brought against States in the context of the European Social Charter (revised),²² before the African Commission on Human and Peoples' Rights,²³ and under the American Convention on Human Rights (including its Additional Protocol in the area of Economic, Social and Cultural Rights),²⁴ as well as before ILO supervisory bodies and other bodies. The adoption of the Optional Protocol to the ICESCR is an important step in affirming the justiciability of ICESCR provisions at the international level.²⁵

3.17 In the national context courts and tribunals regularly directly enforce ESCR in many ways, for example, protecting tenants against unlawful eviction, determining entitlements to social security or health benefits, or deciding claims of discrimination in education or employment. However, in these cases, courts are usually applying detailed rules laid down in primary and secondary legislation and relevant case law, rather than broadly worded guarantees. In such cases the State has partly

²⁰ Human Rights Internet, 'State Obligations to Implement International Human Rights' in *For the Record: A Focus on Canada – Bringing Economic, Social and Cultural Rights Home – Guide*, vol 1, Part 6, available at <http://www.hri.ca/fortherecordcanada/vol1/guide-part_6.htm>.

²¹ For an overview, see Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009); Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (2003); International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability: Human Rights and Rule of Law Series: No 2* (2008).

²² Robin R Churchill and Urfan Khaliq, 'Violations of Economic, Social, and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter' in Mashood A Baderin and Robert McCorquodale (eds), above n 14, 195.

²³ Mashood A Baderin, 'The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social and Cultural Rights in Africa' in Mashood A Baderin and Robert McCorquodale (eds), above n 14, 139.

²⁴ Verónica Gómez, 'Economic, Social, and Cultural Rights in the Inter-American System' in Mashood A Baderin and Robert McCorquodale (eds), above n 14, 167.

²⁵ See generally Special Issue, 'Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27(1) *Nordic Journal of Human Rights* 1. Compare Dennis and Stewart, above n 3.

implemented its obligations under the ICESCR to ensure the relevant rights by specifying the applicable domestic rules that will be applied and identifying and empowering the domestic institutions for their implementation and enforcement.

- 3.18 ESCR have come into domestic legal systems in a variety of ways, including through direct incorporation of the terms of a treaty, in the form of constitutional guarantees of ESCR (such as India, South Africa and Hong Kong),²⁶ and in the form of specific statutes guaranteeing ESCR in general or specific terms. The courts of many countries have given effect to a variety of treaty provisions relating to ESCR, both in direct reliance on a treaty such as the ICESCR or an ILO convention as the primary norm,²⁷ as well as in reliance on the treaty as a parallel source to a national source of law or as an interpretive guide to national constitutional or legislative provisions.²⁸ The experience in a number of countries, described in Chapter 7, shows that there are ways to ensure that courts play a constructive role in supervising the implementation of ESCR and do not usurp the power of legislatures to decide contentious issues relating to the allocation of limited resources.

Conclusion

- 3.19 ESCR are integral to international human rights law. Although there have been debates about the status of these rights, it is now widely accepted that it is artificial to treat them as distinct from CPR. The better view is that both sets of rights are critical to maintaining lives of dignity and value, the overarching goal of human rights law.

²⁶ Though there is still some question as to whether the inclusion of the ICESCR in Hong Kong's *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* has thereby incorporated it as part of Hong Kong law directly enforceable before the courts: see *Catholic Diocese of Hong Kong v Secretary for Justice*, Civ App No 18 of 2007 [2010] HKCA 31, [98].

²⁷ See Constance Thomas, Martin Oelz, and Xavier Beaudonnet, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications' in Jean-Claude Javillier and Bernard Gernigon (eds), *Les Normes Internationales du Travail: Un Patrimoine pour l'avenir: Mélanges en l'honneur de Nicolas Valticos* (International Labour Organisation, 2004) 249.

²⁸ See generally Langford, above n 14, and International Labour Organization, *Use of International Law by Domestic Courts: Compendium of Court Decisions* (2007) <http://training.itsilo.org/ils/CD_Use_Int_Law_web/Additional/English>.

4. Chapter 4: The content of economic, social and cultural rights in international law

Introduction

- 4.1 This chapter outlines the content of the economic, social and cultural rights (ESCR) recognised in the International Covenant on Civil and Political Rights (ICESCR). The UN Committee on Economic, Social and Cultural Rights (CESCR) has elaborated the meaning of the rights in a series of General Comments. The rights have also been considered by many national and international courts and tribunals. International interpretations of these ESCR have generally been formulated so as to apply to a wide range of countries at different stages of development.
- 4.2 The purpose of this chapter is to provide an overview of the main features of the current international understanding of these rights in order to elucidate what their inclusion in the ACT *Human Rights Act 2004* (HRA) might entail. The chapter explains the extent to which these rights have been given specific content nationally and internationally, and identifies aspects of the rights that are capable of immediate implementation and judicial enforcement and those that are subject to the obligation of progressive implementation.
- 4.3 After describing the general features of ESCR, this chapter outlines current developments in relation to the rights to housing, health care and education. An extensive elaboration of these rights can be found in the workshop discussion papers in Appendix 1. Next, the chapter describes the international interpretations of the rights to work, social security, water and cultural life, which are also central to the operation of the ICESCR.
- 4.4 This chapter does not address all the rights contained in the ICESCR. Article 1 sets out the right of peoples to self-determination and is identical to Article 1 of the International Covenant on Civil and Political Rights (ICCPR). The ACT Bill of Rights Consultative Committee recommended that the five-year review of the HRA give special attention to the effectiveness of the legislation in protecting the rights of Indigenous Australians, including the right to self-determination,¹ and in our view any inclusion of the right should await such a review. Article 10 of the ICESCR provides protection for families and children. We do not address it here as the right is effectively already covered in section 11 of the HRA. We also do not deal with the right to intellectual property contained in article 15(1)(c) of the ICESCR because there is a lack of consensus both within Australia and internationally on its scope and content.

¹ ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003), [5.48]-[5.64].

General features of ESCR

- 4.5 **Obligations to respect, protect and fulfil ESCR:** As noted in Chapter 3, the obligation to observe ESCR is multilayered: it requires that States respect (ie not interfere with), protect (ie take measures to prevent others from interfering with), and fulfil (ie take positive measures to fully realise) these rights.
- 4.6 **Obligations of immediate effect and obligations of progressive realisation:** The formulation of ESCR in the ICESCR comprises two different types of obligations.² First, there are obligations with *immediate effect*: the State must satisfy ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’,³ ensure the enjoyment of rights without discrimination,⁴ and take ‘deliberate, concrete and targeted’ steps towards the ensuring the full enjoyment of ICESCR rights.⁵ Discrimination is generally understood to mean both direct⁶ and indirect⁷ discrimination.
- 4.7 Second, there are obligations that may be *progressively realised* ‘with the full use of maximum available resources’.⁸ Progressive realisation is a ‘necessary flexibility device, reflecting the realities of the real world’.⁹ Elements of the right that may be progressively realised are subject to greater governmental discretion. If an obligation must be progressively realised, action must still be taken ‘as expeditiously and effectively as possible’, and measures that are retrogressive to the achievement of an outcome must be properly justified.¹⁰ That an obligation must be progressively realised, then, does not let a government ‘off the hook’: it merely acknowledges that some obligations need more time to be implemented than others.
- 4.8 **Limitations on ESCR:** As with civil and political rights (CPR), the enjoyment of ESCR may be subject to reasonable limitations.¹¹ Article 4 of the ICESCR provides:

² See generally Philip Alston and Gerard 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.

³ Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties Obligations* (art 2(1)), 5th sess, UN Doc E/1991/23 (14 December 1990), [10] (‘General Comment 3’).

⁴ *Ibid* [1].

⁵ *Ibid* [2]. For an examination of the analytical steps required to interpret this standard, see Katharine G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’, 33 (2008) *Yale Journal of International Law* 113.

⁶ Direct discrimination occurs where a person is subject to less favourable treatment than others in a similar situation because of a particular characteristic: for example, if a housing provider allocates a better-quality house to a white applicant than to an indigenous applicant on the basis of race.

⁷ Indirect discrimination occurs where apparently neutral criteria are applied to make decisions but which have a disproportionate impact on persons who share a particular characteristic: for example, eligibility criteria for public housing that requires an applicant to have resided in the local area for a particular number of years would have a disproportionate impact on new migrants.

⁸ ICESCR, art 2; *General Comment No. 3*, above n 3, [9].

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ See generally Philip Alston and Gerard Quinn, above n 2, 192-205; Amrei Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9 *Human Rights Law Review* 557.

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

- 4.9 **Remedies:** The CESCR has recognised the importance of domestic remedies for a failure to ensure the enjoyment of ESCR. This includes judicial or other appropriate remedies.¹² A violation of many ESCR should be addressed by adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. Moreover, access to legal assistance for obtaining remedies (within available resources) should be provided.¹³ In addition to judicial remedies, violations may also be addressed by national ombudspersons, human rights commissioners, and similar human rights institutions.¹⁴ Support for trade unions and other organisations of civil society also contributes to the defence of ESCR.

The right to adequate housing

- 4.10 Article 11 of the ICESCR sets out three components of an adequate standard of living: food, clothing and housing. We focus here on the right to adequate housing. In broad terms, the right to adequate housing is viewed as a 'right to live somewhere in security, peace and dignity'.¹⁵ This right has been interpreted to include several key elements: adequacy, protection against forced evictions, prohibition against discrimination, and the provision of emergency housing for vulnerable groups.
- 4.11 For housing to be considered adequate for the purposes of the right to adequate housing, the following factors should be taken into account:¹⁶
- *Legal security of tenure:* Adequacy requires a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats;
 - *Availability of services and infrastructure:* Adequacy requires the availability of certain essential facilities, including safe drinking water, heating and lighting, and sanitation;

¹² Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998) ('General Comment No. 9'); Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (art 9)*, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [77] ('General Comment No. 19').

¹³ *Ibid* General Comment No. 19, [77].

¹⁴ *Ibid*; see also Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (arts 11 and 12)*, 29th sess, UN Doc E/C.12/2002/11 (20 January 2003), [55] ('General Comment No. 15'); and Sub-Commission on the Promotion and Protection of Human Rights, *Realization of the right to drinking water and sanitation: Report of the Special Rapporteur, El Hadji Guissé*, 11 July 2005, UN Doc E/CN.4/Sub.2/2005/25, [9] ('Report of Special Rapporteur on Water').

¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (art 11)*, 6th sess, UN Doc E/1992/23 (13 December 1991), [7] ('General Comment No. 4').

¹⁶ *Ibid* [8].

- *Affordability*: Adequacy requires that housing costs do not threaten or compromise the satisfaction of other basic needs;
- *Habitability*: Adequacy requires sufficient space and protection from environmental, health and structural hazards;
- *Accessibility*: Adequacy requires that housing policies and laws must give priority to the ability of disadvantaged groups to access housing;
- *Location*: Adequacy requires that housing must be in a location which allows access to employment, healthcare, education and social facilities; and
- *Cultural adequacy*: Adequacy requires that housing construction, building materials and supporting policies must appropriately enable the expression of cultural identity and diversity of housing.

- 4.12 The right to adequate housing requires public authorities to refrain from forced evictions. The government must also take reasonable measures to ensure that third parties, such as private landlords, do not carry out forced evictions. Forced eviction means ‘the permanent or temporary removal of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’.¹⁷
- 4.13 The right to adequate housing must be implemented in accordance with the principles of equality and non-discrimination.¹⁸ As a minimum, housing policies and laws must refrain from directly or indirectly discriminating without reasonable justification, but positive measures may also be required to ensure equality in the effective enjoyment of housing rights.
- 4.14 The right to adequate housing has not been interpreted to be a right to housing on demand but it does require that reasonable provision be made for vulnerable individuals to access emergency accommodation as temporary relief.¹⁹
- 4.15 The obligation to ensure the enjoyment of the right to adequate housing has immediate obligation elements, but also progressive obligation elements, insofar as its implementation must in many aspects take account of the reality of resource constraints. In other words, the obligation on government is to take reasonable measures within its available resources to secure the right to adequate housing progressively.
- 4.16 There is an *immediate obligation* on governments to take ‘deliberate, concrete and targeted’ steps towards progressively realising the right to adequate housing, including:

¹⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions*, 16th sess, UN Doc E/1988/22 (20 May 1997) [3] (*General Comment No. 7*).

¹⁸ *General Comment No. 4*, above n 15, [6].

¹⁹ See, for example, *Government of South Africa v Grootboom* [2000] ZACC 19, where the government was held to have breached the right to housing because its policies had made no provision to facilitate access to emergency accommodation for people whose homes had been demolished. See also *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, where the Court refused to order the eviction of people from undeveloped public lands because reasonable provision had not been made for alternative accommodation.

- developing a coordinated and comprehensive housing strategy, which addresses structural problems and prioritises the needs of the most vulnerable groups in the community;²⁰
- putting in place mechanisms to ensure that progress towards securing the right to adequate housing can be monitored effectively;²¹ and
- ensuring that vulnerable groups are able to effectively participate in decision-making processes and the development of policies which affect them.²²

4.17 The following elements of the right to adequate housing have also been interpreted to give rise to obligations of *immediate effect*:

- protection against forced eviction;²³
- prohibition against discrimination;²⁴ and
- access to emergency accommodation for vulnerable groups.²⁵

4.18 The right to adequate housing does not mean that the government will be required to:

- build housing for the entire population;
- provide housing free of charge to all who request it;
- fulfil all aspects of this right immediately;
- either assume full responsibility itself or leave completely to the unregulated market to secure this right for all; or
- implement this right in exactly the same way in all circumstances or locations.²⁶

4.19 The CESCR regards many component elements of the right to adequate housing as being ensured by the availability of the following types of domestic legal remedies:

- court proceedings in which orders can be obtained to prevent planned evictions or demolitions;
- legal procedures for seeking compensation following an illegal eviction;
- complaints procedures that permit consideration of illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination;
- procedures to resolve allegations of any form of discrimination in the allocation and availability of access to housing; and
- procedures for dealing with complaints against landlords concerning unhealthy or inadequate housing conditions.²⁷

²⁰ General Comment No. 7, above n 17, [12]. See also Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, UN Doc E/CN.4/2002/59(1 March 2002) [127] ('*Report of Special Rapporteur on Housing*').

²¹ General Comment No. 7, above n 17, [13].

²² *Report of Special Rapporteur on Housing*, above n 20, [127].

²³ General Comment No. 7, above n 17, [8].

²⁴ General Comment No. 3, above n 3, [2].

²⁵ See, eg, *Government of South Africa v Grootboom* [2000] ZACC 19.

²⁶ See, eg, *Report of Special Rapporteur on Housing*, above n 20, [26].

The right to the highest attainable standard of health

4.20 The right to health is set out in article 12 of the ICESCR. The CESCR has noted that the right to health ‘contains both freedoms and entitlements’.²⁸ The freedoms include:

- the right to control one’s health and body, including sexual and reproductive freedom; and
- the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.

4.21 The entitlements include the right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health. This encompasses the right to have access to timely and appropriate health care and extends to what are described as the ‘underlying determinants of health’. These are the basic requirements on which good health depend, and include: safe and potable water and adequate sanitation; adequate supply of safe food, nutrition and housing; and healthy occupational and environmental conditions.²⁹

4.22 The Committee has noted that the provision of health resources must meet certain requirements to be meaningful:³⁰

- *Availability*: There must be functioning public health and health care facilities, goods and services, as well as programmes in sufficient quantity;
- *Accessibility*: Access to health care facilities, goods and services must be universal and provided on an equitable basis. Accessibility has four overlapping dimensions, namely non-discrimination; physical accessibility; economic accessibility (affordability); and information accessibility;
- *Acceptability*: All health facilities, goods and services must be respectful of medical ethics and culturally appropriate as well as sensitive to gender and life-cycle requirements; and
- *Adequacy/Quality*: Health facilities, goods and services must be scientifically and medically appropriate and of good quality.

4.23 The right to health is not the same as a right to be healthy. States are not responsible for every aspect of good health of the people within their territory. This is especially so given the many biological, environmental and socio-economic factors that can limit an individual’s health. It is also the case because personal choices, including choices to engage in risky behaviour, can limit an individual’s capacity for full health.³¹

²⁷ *General Comment No. 4*, above n 15, [17].

²⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [8] (*‘General Comment No. 14’*).

²⁹ *Ibid* [11].

³⁰ *Ibid* [12].

³¹ *Ibid* [8].

- 4.24 Respecting the right to health means governments must not interfere directly or indirectly with the enjoyment of the right, including in relation to preventative, curative or palliative health services. This includes, for example, not preventing access to sexual and reproductive health measures such as contraceptives, or to appropriate traditional medicines, and not taking unreasonable coercive measures in the area of mental health.³²
- 4.25 Protecting the right to health requires the government to take positive measures -- for example, through legislation -- to ensure equal access to health care and health services, including those provided by private or community organisations. Further, the government must ensure that unsafe drugs are not on the market, and must regulate professional standards through measures such as health professions boards.³³
- 4.26 Fulfilling the right to health requires governments to give health appropriate recognition in political and legal systems. Formulating and reviewing health policies and plans are key aspects of this obligation – for example, through immunisation plans, delivery of reproductive health infrastructure, or in relation to occupational health and safety plans in the workplace.³⁴
- 4.27 The following elements of the right represent *immediate obligations*:
- developing a coordinated and comprehensive health strategy, which addresses structural problems and prioritises the needs of the most vulnerable groups in the community;³⁵
 - putting in place mechanisms to ensure that progress towards securing the right to health can be monitored effectively;
 - ensuring that vulnerable groups are able to effectively participate in decision-making processes and the development of policies which affect them; and
 - implementing the right to health in a non-discriminatory way. This includes providing access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups,³⁶ and ensuring the equitable distribution of all health facilities, goods and services. Health legislation should also not unjustifiably discriminate in its terms or its impact.
- 4.28 *Limitations*: Limits may be placed on the enjoyment of the right to health, where they can be demonstrably justified as reasonable and proportionate to a legitimate

³² Ibid [34].

³³ Ibid [35]. For the ways in which a legal right to health may promote this type of regulation, see Katharine G. Young, 'Securing Health through Rights', in *Incentives for Global Public Health* (Thomas Pogge, Matthew Rimmer and Kim Rubenstein, eds., forthcoming Cambridge University Press, 2010).

³⁴ General Comment No 14, above n 28, [36].

³⁵ Areas of comparable priority relate to reproductive and child health; immunisation, prevention, treatment and control of endemic disease; and education and access to information and training.

³⁶ As an example, States must provide 'reasonable accommodation of persons with sensory impairments in accessing health care facilities': See Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art 2, para 2)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [3], [7] ('General Comment No. 20').

objective.³⁷ It may be reasonable for a government, for example, to ration access to a particular life-saving vaccine in cases of an urgent public health emergency, provided that a longer term public health strategy is developed concurrently. Similarly, it may be necessary to limit an individual's freedom of movement if an individual has a serious communicable disease and should be quarantined.³⁸

The right to a healthy environment

4.29 The right to a healthy environment is derived from the right to health in article 12 of the ICESCR, which provides for the 'improvement of all aspects of environmental and industrial hygiene' (article 12(2)(b)).³⁹ As noted above, the right to health has a broad meaning and 'embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, [including] safe and healthy working conditions, and a healthy environment'.⁴⁰

4.30 The CESCR has interpreted the requirement in article 12(2)(b) to include:⁴¹

- preventive measures in respect of occupational accidents and diseases;
- the requirement to ensure an adequate supply of safe and potable water and basic sanitation;
- the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health;
- the minimisation, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment;
- adequate housing and safe and hygienic working conditions;
- an adequate supply of food and proper nutrition; and
- discouraging the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

4.31 *Progressive realisation*: States have a wide margin of discretion to achieve the right to a healthy environment progressively. But they are required to adopt a detailed plan for the realisation of the right, including measures to address environmental and occupational health hazards and policies to reduce and eliminate environmental pollution.⁴²

³⁷ HRA, s 28. Art 4, ICESCR, notes that in certain circumstances it may be necessary to limit an individual's right to health, although this must be 'compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. However, this might also be seen as an aspect of the 'progressive realisation' of the right if it is justified by reference to limited resources.

³⁸ Gunilla Backman et al, 'Health systems and the right to health: an assessment of 194 countries' (2008) 372 *The Lancet* 2047, 2049.

³⁹ See also General Assembly Resolution 45/94 (14 December 1990), which states that '[a]ll individuals are entitled to live in an environment adequate for their health and well-being.'

⁴⁰ *General Comment No. 14*, above n 28, [4], [36].

⁴¹ *Ibid* [15].

⁴² *Ibid* [36].

4.32 The CESCR has identified various *obligations of immediate effect*, or minimum core standards, in relation to the right to a healthy environment. These include:

- implementing the right on a non-discriminatory basis;⁴³
- refraining from unlawfully polluting air, water and soil, for example, through industrial waste from State-owned facilities;⁴⁴
- taking legislative measures to prevent the pollution of water, air and soil by extractive and manufacturing industries; and⁴⁵
- ensuring access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water.⁴⁶

The right to adequate food

4.33 The right to food is an essential component of the right to an adequate standard of living contained in article 11 of the ICESCR. The CESCR has observed that the right to food is no less relevant in the developed world, noting that ‘the roots of the problem of hunger and malnutrition are not lack of food but lack of *access to* available food’.⁴⁷ For the right to be guaranteed means that there must be physical and economic access to adequate food or means for its procurement.⁴⁸ Adequacy implies that food must be acceptable, available, accessible, meet dietary needs, and be free of adverse substances.⁴⁹

4.34 *Respect, protect and fulfil*: The obligation to respect the right to adequate food requires the State to refrain from interfering with people’s existing access to food. Violations include denying access to food to particular individuals or groups; or preventing access to food aid in emergency situations.⁵⁰ Violations would also occur, for example, if people were arbitrarily evicted from their land, especially if the land was their primary means of feeding themselves, or if social security provisions were removed without making sure that vulnerable people had alternative ways to feed themselves.⁵¹ The obligation to protect requires the State to prevent third parties from interfering with the enjoyment of the right to food;⁵² this includes taking legislative and other measures to ensure that private sector and civil society activities are in conformity with the right to food.⁵³ For example, laws may be required to

⁴³ *General Comment No. 3*, above n 3, [2].

⁴⁴ *Ibid* [34].

⁴⁵ *General Comment No. 14*, above n 28, [51].

⁴⁶ *Ibid* [45].

⁴⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (art 11)*, 29th sess, UN Doc E/C.12/1999/5 (12 May 1999) [5] (*‘General Comment No. 12’*).

⁴⁸ *Ibid* [5].

⁴⁹ *Ibid* [9]-[13].

⁵⁰ *Ibid* [19].

⁵¹ Commission on Human Rights, *The right to food: Report of the Special Rapporteur on the right to food, Jean Ziegler*, UN Doc E/CN.4/2006/44 (16 March 2006) (*‘Report of Special Rapporteur on Food’*), [22].

⁵² *General Comment No. 12*, above n 47, [5].

⁵³ *Ibid* [27].

protect consumers against harmful food products, including labelling on foods, or regulating the use of pesticides or genetically engineered food.⁵⁴

- 4.35 The obligation to fulfil the right to adequate food requires the State to facilitate people's access to resources and means to ensure their livelihood, including food security.⁵⁵ Positive action must be taken to identify vulnerable groups and to implement policies to ensure their access to adequate food.⁵⁶ Also where individuals are unable to access food for reasons beyond their control, including victims of natural or other disasters, States must fulfil that right directly,⁵⁷ including, for example, by means of safety nets such as food voucher schemes or social security provisions.⁵⁸
- 4.36 *Progressive realisation*: While the State has a wide margin of discretion in adopting measures to progressively guarantee the right to food,⁵⁹ it must nevertheless move expeditiously to put in place a strategy to address critical issues in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security.⁶⁰
- 4.37 Obligations of *immediate effect* in relation to the right to food include ensuring non-discriminatory access to food or resources for food.⁶¹ In particular, special attention must be given to vulnerable and disadvantaged individuals or groups, including those who do not have sufficient means to access food.⁶²

The right to water

- 4.38 The right to water is recognised in international law as a human right.⁶³ It is fundamental to the right to life and human dignity, as well as for the realisation of the rights to an adequate standard of living, to health, to adequate housing and to adequate food.⁶⁴ This right is incorporated in a range of international treaties,⁶⁵

⁵⁴ *Report of Special Rapporteur on Food*, above n 51, [23].

⁵⁵ *General Comment No. 12*, above n 47, [5].

⁵⁶ *Report of Special Rapporteur on Food*, above n 51, [24].

⁵⁷ *General Comment No. 12*, above n 47, [5].

⁵⁸ *Report of Special Rapporteur on Food*, above n 51, [24].

⁵⁹ *General Comment No. 12*, above n 47, [21].

⁶⁰ *Ibid* [25].

⁶¹ *Ibid* [18]. See also Human Rights Council, *Preliminary study of the Human Rights Council Advisory Committee on discrimination in the context of the right to food*, UN Doc A/HRC/13/32 (22 February 2010).

⁶² *General Comment No. 12*, above n 47, [28].

⁶³ *General Comment No. 15*, above n 14, [1]. See also a 2010 General Assembly resolution declaring that access to clean water and sanitation is a human right, *The Human Right to Water and Sanitation*, UN Doc A/64/L.63/Rev.1 (26 July 2010). Press release available at <http://www.un.org/apps/news/story.asp?NewsID=35456&Cr=sanitation&Cr1=>.

⁶⁴ *General Comment No. 15*, above n 14, [3].

⁶⁵ For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art 14(2)(h); Convention on the Rights of the Child (CRC) arts 24(1) and (2)(c); Convention on the Rights of Persons with Disabilities (CRPD), art 28(2)(a); Geneva Convention relative to the Treatment of Prisoners of War of 1949, arts 20, 26, 29 and 46; Geneva Convention relative to the Treatment of Civilian Persons in Time of War of 1949, arts 85, 89 and 127; Additional Protocol I to the Geneva Conventions, of 1977, arts 54 and 55;

regional instruments⁶⁶ and national legislation.⁶⁷ It is also recognised in various declarations and resolutions.⁶⁸

- 4.39 A guarantee of the right to water means that there must be access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use,⁶⁹ as well as for the prevention of starvation, dehydration and disease, and to meet the core obligations of each of the rights under ICESCR.⁷⁰ While the use of water for a range of different purposes is needed for the full realisation of the rights in the ICESCR,⁷¹ priority must be given to the above purposes.⁷² The right to water does not mean access to an unlimited amount of water.⁷³
- 4.40 The right to water includes the right to maintain access to the existing water supply without interference, as well as the right (progressively realised) to a system of water supply and management for the enjoyment of water.⁷⁴ The realisation of this right must be sustainable to ensure that the present and future generations can enjoy this right.⁷⁵ The CESCR's General Comment No. 15 refers to the need for water to be adequate, available, of appropriate quality and accessible. In particular, special attention must be given to vulnerable and marginalised individuals and groups, including those who do not have sufficient means to access water. This implies that in

Additional Protocol II to the Geneva Conventions, of 1977, arts 5 and 14. Australia is a party to all the above conventions.

⁶⁶ For example, African Charter on the Rights and Welfare of the Child, 1990, art 14(1) and (2)(c); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art 15(a); European Charter on Water Resources (Rec. (2001)14), in particular see art 5.

⁶⁷ See Appendix 3 of this Report.

⁶⁸ Preamble of the Mar Del Plata Action Plan of the United Nations Water Conference 1977; Para 18.47 of Agenda 21, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, UN Doc A/CONF.151/26/Rev.1 (28 September 1992); Principle 2 of the Programme of Action of the International Conference on Population and Development, Cairo, 1994, UN Doc A/CONF.171/13 (18 October 1994); Subcommission on the Promotion and Protection of Human Rights, *Promotion of the Realization of the Right to Drinking Water and Sanitation*, Res 2004/6, UN Doc E/CN.4/Sub.2/2004 (9 August 2004); *The Right to Development*, GA Res 54/175, 54th sess, UN Doc A/RES/54/175 (15 February 2000), [12(a)].

⁶⁹ *General Comment No. 15*, above n 14, [2]; and Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments [*OHCHR Report 2007*], 16 August 2007, UN Doc A/HRC/6/3, [13].

⁷⁰ *General Comment No. 15*, above n 14, [2], [6].

⁷¹ Such as agriculture and the production of food (right to food), securing livelihoods (right to work), production of medicines and environmental hygiene (right to health), as well as for the enjoyment of certain cultural practices (right to take part in cultural life). See *General Comment No. 15*, above n 14, [6], [7] and [8].

⁷² See for example the case of *Delhi Water Supply & Sewage Disposal Undertaking and Another v. State of Haryana and Others* (1996) SCC (2) 572, where the Supreme Court of India held that priority must be given to the provision of water for domestic use above the use of water for other purposes. This case concerned inter-state control of water supply, in which case the state in the upper region that controlled the water was not releasing sufficient water for residents downstream. The Court ordered that the upper state supply a sufficient quantity of water for domestic purposes to residents downstream in New Delhi. Source: COHRE, Source No. 8: Legal Resources for the Right to Water - International and National Standards (draft 2nd edition, January 2008), p 286. Available at: <http://www.cohre.org/store/attachments/RWP-Legal_Res_1st_Draft_web.pdf>.

⁷³ *OHCHR Report*, above n 69, [15]. See also *Report of Special Rapporteur on Water*, above n 14.

⁷⁴ *General Comment No. 15*, above n 14, [10].

⁷⁵ *Ibid* [11] and [28].

some circumstances safe drinking water should be provided for free, as no one should be deprived of water because of an inability to pay.⁷⁶

- 4.41 *Respect, protect and fulfil*: The right to water also embodies the obligations to respect, protect and fulfil. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to water, which includes activities that deny or limit access to adequate water, interfering with traditional arrangements for water allocation, polluting water, and limiting access to or destroying water services and infrastructure as a punitive measure for example during armed conflicts.⁷⁷ Violations include unjustified disconnection of water services, discriminatory or unaffordable increases in prices and diminution of water resources affecting health.⁷⁸ The obligation to protect requires States to take measures (legislation, regulatory and other measures) to prevent third parties from interfering with the enjoyment of the right to water. This includes situations where a third party controls or operates the water services, as the State retains responsibility to comply with its obligations under the ICESCR.⁷⁹ Violations include failure to enact or enforce laws to prevent contamination of water and inequitable extraction of water and failure to effectively regulate water services providers.⁸⁰
- 4.42 *Progressive realisation*: There is a wide margin of discretion in determining the most appropriate steps towards the progressive realisation of the right to water.⁸¹ However, the State must move expeditiously and effectively towards the full realisation of the right to water, which is seen as feasible and practical as States have control over a range of resources including water, technology, financial resources and international assistance.⁸² If retrogressive measures are adopted, the State must prove that the measure was introduced after alternatives have been considered and that it is justified taking into account the maximum available resources.⁸³ In addition, any action that interferes with an individual's right to water may only be taken after genuine consultation with those affected, full and timely disclosure of information on the proposed measures, reasonable notice of proposed actions, and the availability of legal assistance for obtaining remedies.⁸⁴ Where interference is due to an individual's failure to pay for water, their capacity to pay must be taken into account.⁸⁵
- 4.43 *Immediate obligations*: The ICESCR also imposes obligations on States that must be carried out immediately:⁸⁶

⁷⁶ OHCHR Report, above n 69, [28]; see also *Report of Special Rapporteur on Water*, above n 14.

⁷⁷ General Comment No. 15, above n 14, [21], [22].

⁷⁸ Ibid [44(a)].

⁷⁹ Ibid [23], [24].

⁸⁰ Ibid [44(b)].

⁸¹ Ibid [45].

⁸² Ibid [18].

⁸³ Ibid [19].

⁸⁴ Ibid [56].

⁸⁵ Ibid.

⁸⁶ Ibid [37].

- *non-discrimination* in access to water and distribution of water, especially for disadvantaged and marginalised groups;
- *provision of minimum amount of water* that is sufficient and safe for personal and domestic use, and to prevent disease. Under no circumstances, including failure to pay for water, shall a person be deprived of the minimum amount of water;⁸⁷
- *physical access to water*;
- *participation in formulation, adoption and implementation of a national water strategy and plan of action*
- *monitoring the realisation of the right to water*
- *protection of vulnerable and marginalised groups* through the adoption low cost water programmes targeted towards the protection of vulnerable and marginalised groups;⁸⁸ and
- taking measures to prevent, treat and control diseases linked to water, in particular ensuring *access to adequate sanitation*.⁸⁹

The right to social security

4.44 Article 9 of the ICESCR recognises the right to adequate benefits in order to protect a person against poverty that results from a lack of work-related income and leaves them unable to get access to health care and with insufficient means to support their children and dependants.

4.45 The CESCR has elaborated the nature, scope and content of the right to social security.⁹⁰ It has stated that the term ‘social security’ covers ‘all the risks involved in the loss of means of subsistence for reasons beyond a person's control’⁹¹ and that it encompasses ‘the right to access and maintain benefits, whether in cash or in kind . . . in order to secure protection . . . from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.’⁹² The right to social security includes ‘the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage . . . as well as the right to equal enjoyment of

⁸⁷ Ibid [56]; *OHCHR Report*, above n 69, [28]. See, for example, *Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A. Amparo*, Cordoba City, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial First Instance Court), April 8, 2002. Text of the judgement in Spanish available at: <<http://www.cedha.org.ar/docs/doc220-spa.doc>>. Source: ESCR-Net Caselaw Database <<http://www.eschr-net.org/caselaw/>>. Compare the South African Constitutional Court case *Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09 [2009] ZACC 28, which rejected the concept of a minimum core content of a right to water.

⁸⁸ *General Comment No. 15*, above n 14, [37(h)]; and *Report of Special Rapporteur on Water*, above n 14, [3].

⁸⁹ *General Comment No. 15*, above n 14, [37(i)].

⁹⁰ See *General Comment No. 19*, above n 12, as well as Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities*, 11th sess, UN Doc E/1995/22 (9 December 1994) (*‘General Comment No. 5’*); *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 13th sess, UN Doc E/1996/22 (8 December 1995) (*‘General Comment No. 6’*), and *General Comment No. 14*, above n 28.

⁹¹ *General Comment No. 6*, above n 90, [26].

⁹² *General Comment No. 19*, above n 12, [2].

adequate protection from social risks and contingencies.⁹³ Like the measures underlying other rights, the CESC has held that social security should be available, adequate and accessible, with provision for universal coverage and participation.

4.46 Nine principal areas covering all social security risks have been identified by the CESC for coverage under a social security system:⁹⁴ (1) health care,⁹⁵ (2) cash benefits to cover periods of loss of earning due to ill-health/sickness, (3) old age benefits,⁹⁶ (4) unemployment benefits;⁹⁷ (5) compensation for employment injuries;⁹⁸ (6) family and child support;⁹⁹ (7) paid maternity leave;¹⁰⁰ (8) disability support benefits;¹⁰¹ and (9) family dependent benefits on the death of a breadwinner who was covered by social security or had a pension.¹⁰² Most of these aspects are covered by Commonwealth legislation, but some measures, such as parental leave, or the links to housing and health services provision, are also addressed at the State and Territory level, as Chapter 5 makes clear.

4.47 The obligations of *immediate effect* in relation to the right to social security, or the set of minimum core standards developed by the CESC, include the requirement that States:¹⁰³

- ensure access to a social security scheme that provides a minimum essential level health care (access to health facilities, essential drugs, reproductive, maternal and child health care, immunisation against major infectious diseases in the community), basic shelter and housing, water and sanitation, food, and basic education;
- guarantee that the right can be enjoyed without discrimination of any kind;¹⁰⁴

⁹³ Ibid [9].

⁹⁴ Ibid [12] – [21]. These nine areas were first identified in ILO Convention No. 102 (1952) on Minimum Standards of Social Security, Parts II to X. For a summary of the type of benefits set out under ILO Convention No. 102, see http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Subjects/Socialsecurity/lang-en/index.htm.

⁹⁵ See also *General Comment No. 14*, above n 28.

⁹⁶ See also *General Comment No. 6*, above n 90.

⁹⁷ See *General Comment No. 19*, above n 12, [16], [33] – [39].

⁹⁸ Ibid, [17]. See also ILO Convention No 121 (1964) on Employment Injury Benefits.

⁹⁹ See *General Comment No. 19*, above n 12, [18].

¹⁰⁰ Ibid [19]. See also art 10 (2) of the ICESCR; art 11 (2) of the Convention on the Elimination of All Forms of Discrimination against Women; and the ILO Convention No. 183 (2000) on Maternity Protection.

¹⁰¹ See *General Comment No. 19*, above n 12, [20]. See also *General Comment No. 15*, above n 14; and ILO Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits.

¹⁰² See art 26 of the Convention on the Rights of the Child and ILO Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits.

¹⁰³ *General Comment No. 19*, above n 12, [59].

¹⁰⁴ ICESCR art 3. See also *General Comment No. 19*, above n 12, [32]; and Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Woman to the Enjoyment of All Economic, Social and Cultural Rights (art 3)*, 34th sess, UN Doc E/C.12/2005/4 (11 August 2005) ('*General Comment No 16*'). The Human Rights Committee has held that legislation on social security that did not allow women to claim for benefits on the assumption that their husbands would provide for them is discrimination under the ICCPR. In *Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, CCPR/C/29/D/182/1984 (1987), the complainant, Mrs Zwaan de Vries was denied long-term unemployment benefits because she was a

- respect existing social security schemes and protect them from unreasonable interference;¹⁰⁵ and
- monitor the extent of the realisation of the right to social security.

The right to education

4.48 The right to education is contained in article 13 of the ICESCR. It encompasses all levels of education, from primary to higher education. Its most rigorous elements relate to primary education, which must be provided to everyone, and be compulsory and free.¹⁰⁶ The CESCR has introduced a helpful framework for guidance on when a right to education is realised, and when it is being denied. The framework involves availability accessibility, acceptability and adaptability.¹⁰⁷

4.49 *Availability* refers to the notion that educational institutions and programmes must be physically available to students, and are affordable. Physical availability may relate to the zoning and design of schools, which must be located within the reach of student populations, subject to the provision of government support for transport, or appropriate alternative facilities, such as ‘distance learning’ programmes for remote communities.¹⁰⁸ When adjudicating this right, courts have emphasised the pragmatic nature of questions of availability, and allowed governments a margin of appreciation to determine local demands.¹⁰⁹ Secondary education must be ‘generally available and accessible’, with the expectation that steps are taken towards the progressive introduction of free secondary education. Tertiary education must be equally accessible, relative to a state’s capacity.¹¹⁰

4.50 *Accessibility* refers to the need for education to be provided in a non-discriminatory way. Access to education must be provided to all, especially the most vulnerable groups. An example comes from the House of Lords, applying the UK *Human Rights Act 1998* (UK HRA) in conjunction with the right to education guaranteed by article 2 of the European Convention on Human Rights. The House of Lords emphasised that the right to education requires ‘fair and non-discriminatory access’,¹¹¹ and held that,

married woman and was not the family breadwinner. Married men could, however, receive unemployment benefits even if their wife was the breadwinner. The Human Rights Committee applied art 26 of the ICCPR in holding that (i) the right to equal protection under the law without discrimination applied to all areas, including the socio-economic domain (ie was not limited only to the rights set out in the ICCPR); and that (ii) the legislation was discriminatory because it required married women to meet a condition that married men did not have to fulfil. The Committee recommended the repeal of the legislation and an appropriate remedy for the complainant. Source: COHRE, *Leading Cases on Economic, Social and Cultural Rights: Summaries. Working Paper No. 3, ESC Rights Litigation Programme* (January 2006), page 6.

¹⁰⁵ See also *General Comment No. 19*, above n 12, [78].

¹⁰⁶ See also Committee on Economic, Social and Cultural Rights, *General Comment No. 11: Plans of Action for Primary Education (art 14)*, 20th sess, UN Doc E/1992/23 (10 May 1999) (*‘General Comment No. 11’*).

¹⁰⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (art 13)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999), [6] (*‘General Comment No. 13’*).

¹⁰⁸ Andrew Clapham and Susan Marks, *International Human Rights Lexicon* (Oxford University Press, 2005) 139.

¹⁰⁹ See *Ali v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, [24] (*‘Lord Grey School’*).

¹¹⁰ *General Comment No. 13*, above n 107, [6].

¹¹¹ *Lord Grey School*, above n 109.

where a person is suspended or expelled from school, there should be alternative educational mechanisms available.

- 4.51 *Acceptability* refers to the acceptability of educational facilities for both students, and, in appropriate cases, parents. Acceptability therefore consists of a commitment to a minimum standard of educational quality, and to giving some weight to parents' own views on what is acceptable education. The CESCR has emphasised the need for teaching methods and the school curriculum to be 'relevant, culturally appropriate, and of good quality'.¹¹² A specific corollary of this is that it must be possible to receive education in one of the national languages.¹¹³ Where more than one language of instruction is financed in public schools, there may be contestation about the selection of languages and about whether the exclusion of particular minority and indigenous languages constitutes discrimination. Similarly, religious and moral instruction is a matter of debate. Putting aside these issues, which also affect other rights,¹¹⁴ United Kingdom authority on the right to education suggests that acceptability includes 'access to a minimum level', which is not obstructed by a 'systemic failure' of the educational system.¹¹⁵ United States authority on the right to education guaranteed in State Constitutions supplies two examples of systemic failure: serious under-staffing or egregious failures to provide necessary equipment.¹¹⁶
- 4.52 The requirement that parental views be respected is a protection against indoctrination by the state.¹¹⁷ The European Convention on Human Rights makes clear that parents' 'philosophical or religious convictions' must be respected, subject to reasonable limits (see below). This requires that parents also have the liberty to set up their own educational institutions, which must nevertheless comply with the same basic standards as the rest of the educational system.
- 4.53 *Adaptability* addresses the requirement that educational institutions are flexible, open to review, and tailored to the needs of individual students. The CESCR has emphasised that 'education has to be flexible so it can adapt to the needs of changing societies and community and respond to the needs of students within their diverse social and cultural settings'.¹¹⁸ This points to the way that educational arrangements must be able to adapt to particular students who are often left out of the core focus of education policy, such as children with disabilities, refugee children, working children, children in prison, students who are parents, and students who require fundamental

¹¹² *General Comment No. 13*, above n 107, [6(e)].

¹¹³ *Belgian Linguistic Case (No 2)* [1968] 1 EHRR 252 (applying ECHR, art 2, Protocol 1).

¹¹⁴ Eg, the right to freedom of religion and belief, the right to freedom of expression, and minority rights, indigenous rights and children's rights.

¹¹⁵ *Lord Grey School*, above n 109, [61] (applying UK HRA, s 6; ECHR, art 2, Protocol 1).

¹¹⁶ Eg, *Campaign for Fiscal Equity v. State of New York*. 719 N.Y.S.2d 475 (2006) (applying Art XI(1) of the New York Constitution, which states that 'The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated').

¹¹⁷ David Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press, 2nd ed, 2009) 709.

¹¹⁸ *General Comment No. 13*, above n 107, [6(d)].

education.¹¹⁹ A failure to diagnose students with special needs might amount to a breach of the element of adaptability.¹²⁰

4.54 The following elements of the right to education represent *immediate duties* on States:

- primary education must be free and compulsory for all;
- access to public educational institutions and facilities must be provided on a non-discriminatory basis;
- parents must be free to educate their children in private schools, provided that such schools comply with minimal educational standards; and
- the government must establish minimal educational standards.

4.55 Other elements of the right are subject to *progressive realisation*:

- the government must show progress in the provision of free secondary education and equally accessible tertiary education; and
- the government must strive for adaptable, suitable and well-tailored education.

4.56 The right to education is, like other rights, subject to reasonable limitations. Cases decided in other jurisdictions offer some guidance on which kinds of government infringements on education are reasonable limitations, and which are not. In *Patel v United Kingdom*, the European Commission on Human Rights held that restrictions on access to tertiary education are legitimate, in instances where individuals repeatedly fail entrance requirements (such as a first-year examination and re-sit).¹²¹ In *Lord Grey School*, the House of Lords noted that expulsion and suspension may still be defensible tools to be used by schools where students misbehave.¹²² In the *Denbigh High School* case, involving a British school's ban on the wearing of the Muslim *hijab*, the House of Lords emphasised that uniforms may still be required by a school and that access to a school can be conditional on compliance with a reasonable uniform policy.¹²³ In all of these cases it is clear that considerable latitude is accorded to decision-makers in view of their authority and expertise, and that it is unlikely that a right to education can be used to override long-accepted practices, such as a uniform policy or the use of suspensions or expulsions.

4.57 There is invariably concern over how the incorporation of the right to education in human rights legislation might tie the hands of government or require radical budgetary changes. However, case law on the right to education suggests that such fears are misguided. The United Kingdom House of Lords, for example, has held that a premise of the right to education (at least in the developed world context) is that a

¹¹⁹ Andrew Clapham and Susan Marks, above n 108, 141.

¹²⁰ Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) 1373.

¹²¹ Application No 8844/80 (1982) 4 EHRR 256 (applying ECHR, art 2, Protocol 1).

¹²² *Lord Grey School*, above n 109, [24].

¹²³ *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 [97] (applying UK HRA, s 6; ECHR, art 2, Protocol 1).

state system of education already exists.¹²⁴ The purpose of the right is not to restructure priorities across social services, but rather to ensure that education is satisfactorily provided, particularly for individuals who are at the margins of public service provision.

The right to work

4.58 Article 6 of the ICESCR enshrines the right to work, including the right of everyone to the opportunity to gain their living by work they freely choose. The CESCR has described the right to work as ‘essential for realising other human rights and . . . an inseparable and inherent part of human dignity’.¹²⁵ It requires States to undertake particular actions to facilitate employment.¹²⁶ The definition of work includes all forms of work, whether independent work or salaried work,¹²⁷ and encompasses work in both the public and private sectors.¹²⁸ Work must be *decent* work, which includes safe working conditions,¹²⁹ fair remuneration or income, and respect for the physical and mental integrity of the worker in the exercise of his/her employment.¹³⁰ Of particular importance is the protection of children from work that is likely to interfere with their physical or mental health and development, from economic exploitation and forced labour.¹³¹

4.59 Article 6 is not an unconditional right to employment; instead it has been understood as freedom to choose an occupation and to engage in work.¹³² Broadly stated, the right contains three core guarantees. First, it means the right to freely choose or accept work.¹³³ This implies the right not to be forced to engage in or exercise employment or to be subjected to forced labour.¹³⁴ Employment must be voluntary

¹²⁴ *Lord Grey School*, above n 109, [24].

¹²⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (art 6), 36th sess, UN Doc E/C.12/GC/18 (24 November 2005), [1] (*General Comment No. 18*).

¹²⁶ ICESCR, art 6.2.

¹²⁷ *General Comment No. 18*, above n 125, [6].

¹²⁸ *Ibid* [43].

¹²⁹ For example, the decision of the Constitutional Court of Peru with regard to working hours for miners, taking into account the dangerous nature of the work in the mines, in *Constitutional Court, 17 April 2006, Case No. 4635-2004-AA/TC*. In declaring the system of hours unconstitutional, the Court stated that there must be respect for the constitutional provisions concerning health and the principle of ‘decent work’ promoted by the ILO. Source: International Labour Organization, *Use of International Law by Domestic Courts: Compendium of Court Decisions* (December 2007) <http://training.ilo.org/ils/CD_use_int_law_web/additional/english/>.

¹³⁰ *General Comment No. 18*, above n 125, [7].

¹³¹ *Ibid* [15] and ICESCR art 10(3). See the case of *The International Commission of Jurists v Portugal* Complaint No. 1/1998 European Committee of Social Rights, where the Committee found that Portugal contravened art 7(1) of the European Social Charter as it did not adequately monitor or supervise child labour, which adversely affected children’s health.

¹³² *General Comment No. 18*, above n 125; art 15, EU Charter of Fundamental Rights.

¹³³ ICESCR art 6 and *General Comment No. 18*, above n 125, [6].

¹³⁴ *General Comment No. 18*, above n 125, [6], [9]. See also the International Labour Organisation (ILO) Convention No. 29 concerning Forced or Compulsory Labour (1930), art 2 (1) (*‘ILO Convention 29’*); and ILO Convention No. 105 concerning the Abolition of Forced Labour (1957). See also the African Commission on Human and Peoples’ Rights communication, *Malawi African Association and Others v Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000), 11 May, 2000, where the

and not entered into under a threat of penalty.¹³⁵ Second, there must be a system that guarantees access to employment.¹³⁶ It does not, however, mean an unconditional or an absolute right to have employment or to be employed.¹³⁷ Third, the right includes a guarantee not to be unfairly deprived of work¹³⁸ and to have minimum due process guarantees in relation to termination of employment.¹³⁹ This means a prohibition on termination unless there is a valid reason connected either to the capacity or conduct of the worker or based on the operational requirements of the employer.¹⁴⁰

4.60 In its General Comment No. 18 the CESCR applied the criteria it has employed in analysing most rights in the ICESCR to explicate the content of the right to work. Work should therefore be available, accessible, and acceptable.

4.61 *Progressive realisation*: The ICESCR provides for progressive realisation of the right to work, which acknowledges constraints faced by States parties due to available resources¹⁴¹ and that the realisation of the right may take place over a period of time.¹⁴² However, the State is expected to move expeditiously as well as effectively towards the full realisation of the right to work;¹⁴³ retrogressive measures may only be taken if all alternatives have been considered and are justified, taking into account the maximum available resources of the State.¹⁴⁴ The State is also accorded a margin of discretion in applying the most appropriate measures to meet its obligation.¹⁴⁵

4.62 *Immediate effect*: While the ICESCR provides for progressive realisation of the right to work, it also imposes on States certain core obligations which are of immediate effect, and which are not subject to progressive realisation. In order to satisfy a satisfactory level of minimum essential levels, the following requirements must be met:

Commission found that there was a obligation on the state to abolish slavery, and this was a positive obligation regardless of the wealth of the country. (Source: International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (ICJ, 2008) 27).

¹³⁵ General Comment No. 18, above n 125, [4]; *ILO Convention 29*, art 2.1.

¹³⁶ General Comment No. 18, above n 125, [6].

¹³⁷ Ibid.

¹³⁸ ICESCR art 6; General Comment No. 18, above n 125, [4], [11]. See also ILO Convention No. 158 concerning Termination of Employment (1982), art 4 (*ILO Convention 158*). See also the Australian Federal Court decision of *Konrad v Victoria Police & Ors* [1999] FCA 988, which referred to standards set out in the ILO as a guide for interpreting domestic law with regard to unfair dismissal. Source: International Labour Organization, Use of International Law by Domestic Courts: Compendium of Court Decisions (December 2007) <http://training.itsilo.org/ils/CD_use_int_law_web/additional/english/>

¹³⁹ In *Baena, Ricardo et al. (270 workers v. Panama)*, Series C No. 72 [2001] IACHR 2 (2 February 2001), the Inter-American Court of Human Rights held that the arbitrary dismissal by the State of Panama of 270 public officials and union workers for participating in union activities violated the rights of freedom of association, judicial guarantees and judicial protection, and decided that the State had to reassign the workers to their previous positions and pay them missed salaries <<http://www.worldlii.org/int/cases/IACHR/2001/2.html>>.

¹⁴⁰ ILO Convention 158 art 4.

¹⁴¹ General Comment No. 18, above n 125, [19].

¹⁴² Ibid [20].

¹⁴³ Ibid.

¹⁴⁴ Ibid [21].

¹⁴⁵ Ibid [37].

- *Access*: there must be a system that ensures that individuals have access to employment;¹⁴⁶
- *Non-discrimination*: the right to work must be exercised without discrimination of any kind and measures taken by the State must not result in discrimination and unequal treatment in both the private and public sectors;¹⁴⁷
- *Obligation to take steps*: the State has to take steps that are 'deliberate, concrete and targeted', towards full realisations of the right to work.¹⁴⁸ In particular, the State must have a national policy and plan of action,¹⁴⁹ which:
 - addresses the concerns of all workers;
 - includes the participation of and consultation with relevant stakeholders such as employers and workers' organisations, as well as civil society;¹⁵⁰
 - has been formulated and implemented in a way that is accountable, transparent and participatory;¹⁵¹ and
 - includes indicators and benchmarks with a mechanism to monitor implementation and progress within set time frames.¹⁵² It should also identify the most cost-effective way to use available resources.¹⁵³

4.63 As Chapter 5 points out, most of these aspects of the right to work are addressed by Commonwealth legislation. Nonetheless, some obligations, such as non-discrimination, are also directly relevant to the States and Territories.

The right to the enjoyment of just and favourable conditions of work

4.64 This right, contained in article 7 of the ICESCR, guarantees protection for workers; it covers fair remuneration, safe and healthy working conditions, equal opportunity for advancement, rest and leisure, the reasonable limitation of working hours, and periodic holidays with pay.

4.65 *Fair remuneration* means that equal wages must be paid without distinction for work of equal value; this is of particular importance in guaranteeing women equal working conditions to those enjoyed by men. Fair remuneration is that which is sufficient for a decent living for the worker and their family.

4.66 *Safe and healthy working conditions* must be ensured by the adoption of policies designed to minimise, as far as is reasonably possible, hazards to health in the working

¹⁴⁶ Ibid [31(a)].

¹⁴⁷ Ibid [19], [31(b)] and [44].

¹⁴⁸ Ibid [19].

¹⁴⁹ Ibid [31(c)].

¹⁵⁰ Ibid [38(d)].

¹⁵¹ Ibid [31(c)], [42].

¹⁵² Ibid [31(c)], [46].

¹⁵³ Ibid [41].

environment.¹⁵⁴ It also includes the creation of appropriate mechanisms to ensure the investigation of workplace accidents.¹⁵⁵

The right to form and join trade unions

4.67 Trade union membership is protected in article 8 of the ICESCR. In addition to freedom of association, this right allows trade unions to function freely and enshrines the right to strike. The right provides equally for the freedom *not* to join a trade union. However, these rights are subject to those limitations provided by law that are necessary in a democratic society. This right is a means for guaranteeing the rights to work and to safe working conditions.¹⁵⁶

4.68 The right not to join a trade union precludes requiring membership of a particular trade union in order to be employed. While the right allows for the creation of a single regulatory body covering an entire profession (such as requiring membership of a Bar Association), this cannot prevent the creation of other associations.¹⁵⁷

The right to take part in the cultural life of the community

4.69 Participating in cultural life is protected under article 15(1)(a) of ICESCR as a freedom that requires both non-interference with the exercise of cultural practices and positive obligations to ensure that preconditions for cultural participation are met.¹⁵⁸ ‘Culture’ has been defined broadly in international law. It encompasses ‘an interactive process whereby individuals and communities ... give expression to the culture of humanity’.¹⁵⁹ It thus extends to ways of life, oral and written literature, music, religion, rites and ceremonies, sport, food, clothing and the arts. It does not include actions that are primarily of an industrial and commercial nature.¹⁶⁰

4.70 The right to take part in cultural life may be exercised individually, in association with others or within a community or group.¹⁶¹ There must be the ability to participate, access and contribute to cultural life.¹⁶² The full realisation of the right to take part in cultural life requires that the following elements be met:¹⁶³

¹⁵⁴ ILO Convention No.155 Concerning Occupational Safety And Health and the Working Environment (1981) art 4.1.

¹⁵⁵ Ibid art 11.

¹⁵⁶ *General Comment No. 18*, above n 125, [3].

¹⁵⁷ *Le Compte, Van Leuven and de Meyere v. Belgium* (1982) 4 E.H.R.R 1.

¹⁵⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 21: The Right of Everyone to Take Part in Cultural Life (art 15(1)(a))*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009), [3] (*‘General Comment 21’*).

¹⁵⁹ Ibid.

¹⁶⁰ *European Parliament v Council of the European Union*, 23 February 1999, Case C-42/97 available at <<http://www.ena.lu/judgment-court-justice-ep-council-case-c-42-97-23-february-1999-020006910.html>>.

¹⁶¹ *General Comment No. 21*, above n 158, [9].

¹⁶² Ibid [14]. See, eg, the case of *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) c. Arco Oriente s/ Amparo*, Tribunal Constitucional de Ecuador, Sala Primera, April 1, 2000. In this case, the Court referred to the International Labour Organization Convention No. 169 and the Constitution of Ecuador, both of which protect the right of Indigenous peoples to be consulted and to participate in the design, implementation and evaluation of development plans and programs potentially affecting them, and their rights to preserve their

- *Availability*: the presence of cultural goods and services that can be enjoyed (such as museums, libraries, theatres etc), literature, shared spaces (such as parks, streets etc), nature, and intangible cultural goods (such as languages, history, etc);
- *Accessibility*: opportunities for individuals and communities to enjoy culture. This includes physical and financial reach, in urban and rural areas, non-discrimination, as well as the access to information in a chosen language¹⁶⁴ and the right to express and disseminate culture; and
- *Acceptability*: laws, policies, programmes and measures adopted by the State must be acceptable to affected individuals and communities, through prior consultations. They must also be flexible, so as to be able to adapt to be respectful and relevant to individuals and communities. Moreover, they must be appropriate, taking into account a particular cultural modality or context, for example cultural values attached to food, use of water, the way health and education services are provided and the way housing is designed and constructed.¹⁶⁵

4.71 In its General Comment No. 21 the CESCR identified groups of vulnerable persons and communities requiring special protection: these include women, children, older persons, persons with disabilities, minorities, migrants, and indigenous peoples, and persons living in poverty.

4.72 *Immediate obligations*: While there are provisions for the progressive realisation of the full realisation of the right to take part in the cultural life of the community, the ICESCR also imposes on the State party the obligation to meet the minimum core obligations, developed by the CESCR, which are of immediate effect.¹⁶⁶ These are to:

- guarantee non-discrimination and gender equality¹⁶⁷ in the enjoyment of the right, including through legislation;
- adopt measures to ensure the freedom of choice to identify or not to identify with one or more communities and the right to change their choice;
- ensure that there is balance in the respect and protection of cultural rights, and the other human rights;
- eliminate barriers and obstacles to access culture; and

individual customs and institutions, their cultural identity, and rights to property and possession of ancestral land. Source: ESCR-Net Caselaw Database <<http://www.escr-net.org/caselaw/>>.

¹⁶³ *General Comment No. 21*, above n 158, [16].

¹⁶⁴ This includes the provision of education in the language of choice – see the Supreme Court of Canada case of *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3, [2003] SCC 62 on the right to access education in a minority language.

¹⁶⁵ See, eg, a case concerning housing for an indigenous man which was not appropriate and interfered with his ability to engage in cultural practices essential to his race as an indigenous person in *Balaiya v Northern Territory Government*, Northern Territory Anti-Discrimination Commission, ADC File No. C2002 1202-01.

¹⁶⁶ *General Comment No. 21*, above n 158, [55].

¹⁶⁷ See for example the communication to the UN Human Rights Committee under the ICCPR, Human Rights Committee, *Communication No. 24/1977*, UN Doc CCPR/C/13/D/24/1977 (30 July 1981) ('*Sandra Lovelace v. Canada*'). Full text of the case can be accessed at the website of the Human Rights Committee at: <<http://www2.ohchr.org/english/bodies/hrc/index.htm>>.

- allow and encourage the participation of persons belonging to minority groups and indigenous peoples, in the design and implementation of laws and policies affecting them.¹⁶⁸

4.73 *Limitations*: Like other ESCRs, this right is expressly open to reasonable limitations. Limitations on the right to take part in cultural life are permissible where its exercise threatens to destroy, infringe upon or limit the scope of human rights protected by international law.¹⁶⁹ Limitations must have a legitimate aim, be strictly necessary for the promotion of the general welfare of society and be proportionate (ie utilise the least restrictive measure).¹⁷⁰

The right to enjoy the benefits of scientific progress and its applications

4.74 Article 15 (1) (b) of ICESCR recognises the right to enjoy the benefits of scientific progress and its applications. The State must balance the right of individuals or companies to profit from the monopoly over scientific and technological products and services (and protection under intellectual property regimes) with the right of communities and individuals to enjoy and share in those benefits.¹⁷¹ The right to access and enjoy the benefits of scientific progress and its applications is crucial as it allows for the improvement of one's socio-economic situation and the opportunity to take part meaningful in the life of communities.¹⁷² In contrast, the restriction of access to scientific progress may lead to stagnation, regression and exclusion.¹⁷³

4.75 The following elements have been developed in determining the conditions necessary in the fulfilment of this right:¹⁷⁴

- *Accessibility*: access to the benefits of scientific progress must be financially feasible (ie be affordable) so that everyone can fully enjoy the benefits of scientific progress.¹⁷⁵ There must be non-discrimination in access and particular attention must be given to access by disadvantaged or marginalised groups;¹⁷⁶
- *Availability*: there must be an enabling environment for the conservation, development and diffusion of science and technology. This means the freedom indispensable for scientific research and in relation to this, the freedom of expression and opinion, information, association and movement;¹⁷⁷

¹⁶⁸ *General Comment No. 21*, above n 158, [55].

¹⁶⁹ *Ibid* [17], [18] and [19]. See for example CEDAW, art 5, which provides that States must take steps to modify social and cultural patterns of conduct which are harmful to women.

¹⁷⁰ *General Comment No. 21*, above n 158, [19].

¹⁷¹ 'Venice Statement on The Right to Enjoy the Benefits of Scientific Progress and its Applications' ('*Venice Statement*'), [5] – [10], in UNESCO, *The Right to Enjoy the Benefits of Scientific Progress and its Applications* (Paris, 2009), 14 ('*UNESCO Report*'). Full text of the report can be accessed at <<http://unesdoc.unesco.org/images/0018/001855/185558e.pdf>>.

¹⁷² *UNESCO Report*, above n 171, 4.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* 5.

¹⁷⁶ *Venice Statement*, above n 171, [12(b)], [13(a)] 15 - 16.

¹⁷⁷ *Ibid* [13(a)].

- *Acceptability*: there must be the right to access and participate in science and technology;¹⁷⁸
- *Protection from harmful effects of science*: there must be protection from the negative effects of science which may cause harm to the public or the environment, through education, information, assessment monitoring of the development of science and technology;¹⁷⁹ and
- *International cooperation*: there must be international cooperation necessary for the effective implementation of the right to benefit from the benefits of scientific progress and its applications. This includes the provision of assistance by States that have the capacity and resources to assist States that require such assistance to fulfill this right.¹⁸⁰

4.76 The right to enjoy the benefits of scientific progress and its applications can be enjoyed individually as well as collectively.¹⁸¹

4.77 *Respect, protect and fulfil*: The obligation to *respect* the right to enjoy the benefits of scientific progress and its applications encompasses: respect of and non-interference with the freedoms indispensable for scientific development, including freedom of thought, opinion and to seek, receive, and impart information; taking appropriate measures to prevent the use of science and technology in a manner that interferes with the enjoyment of the human rights and fundamental freedoms enshrined in the UDHR, the International Covenants on Human Rights, and other relevant international instruments.¹⁸²

4.78 The obligation to *protect* the right to enjoy the benefits of scientific progress and its applications encompasses: taking appropriate and effective measures, including legislative measures, to prevent the utilisation of science and technologies to the detriment of human rights and fundamental freedoms and the dignity of the human person by third parties. This includes the protection of persons exposed to research activities and their right to information and informed consent.¹⁸³

4.79 The obligation to *fulfil* the right to enjoy the benefits of scientific progress and its applications encompasses: taking measures, including through policies and establishment of institutions, to promote the development and diffusion of science and technology, and reviewing those measures periodically; to promote access to the benefits of science and of scientific progress on a non-discriminatory basis with particular focus on access by vulnerable and marginalised groups; to monitor potential harmful effects of science and technology, in order to be able to effectively react to the findings and inform the public in a transparent way; to take measures to encourage and strengthen international cooperation in science to the benefit of all countries; to provide opportunities for meaningful public engagement in decision-

¹⁷⁸ UNESCO Report, above n 171, 9.

¹⁷⁹ Ibid 5 and 16.

¹⁸⁰ Ibid 10.

¹⁸¹ Venice Statement, above n 171, [13(e)].

¹⁸² Ibid [14].

¹⁸³ Ibid [15].

making about science and technology; and to institute a strong science program at all levels of the educational system, leading to development of the skills necessary to engage in scientific research.¹⁸⁴

Conclusion

4.80 The discussion in this chapter has shown that there is an extensive amount of jurisprudence, policy and practice that has helped to develop the scope and content of the rights set out in the ICESCR. The obligations of States in relation to particular rights have become well-settled, although the issues that arise in a given context and the means of fulfilling the obligations will vary according to local institutions and circumstances, including the resources available. It is clear that, while certain aspects of ESCR are subject to obligations of progressively realisation, all rights have dimensions that are capable of immediate implementation. These include in particular the obligations of non-discrimination, to ensure the enjoyment of a minimum level of enjoyment of ESCR, and to take concrete and targeted steps towards full realisation of the rights. A number of these immediate obligations have also been shown to be capable of judicial enforcement. We now turn to a consideration of the current protection of ESCR in Australia.

¹⁸⁴ Ibid [16].

5. Chapter 5: Economic, social and cultural rights in Australian and ACT law

5.1 Economic, social and cultural rights (ESCR) are already protected to some extent in the Australian legal system. This chapter describes the major ways in which ESCR are substantively covered in Australian Commonwealth, State and Territory law, although it does not attempt a comprehensive survey of the field. Australia's most recent report on its implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), submitted in July 2007, contains a detailed catalogue of references to ESCR in our legal system.¹ A comprehensive review, issued by a coordinated group of local NGOs, has also detailed the state of ESCR protection in Australia and measures to improve performance.²

Overview of international obligations in relation to ESCR

5.2 Australia signed the ICESCR in 1973 and ratified it without reservations in 1975. As a party to the treaty, Australia has made a series of commitments to implement its provisions according to the relevant provisions of Part II:

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ...

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as

¹ See <<http://www.dfat.gov.au/hr/reports/icescr-iccpr/index.html>>.

² *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Committee on Economic, Social and Cultural Rights* (April 2008); *Freedom, Respect, Equality, Dignity: Action – Addendum to NGO Submission to the Committee on Economic, Social and Cultural Rights* (April 2009); available at <<http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/#ICESCR>> (endorsed by over 100 Australian NGOs).

this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

5.4 Australia is required to report to the Committee on Economic, Social and Cultural Rights (CESCR) every five years.³ As of 2010, Australia has submitted four reports to the Committee.

Australia's record of implementation of the ICESCR

5.5 The Committee's Concluding Observations on Australia's most recent report noted that there had been some positive developments in Australian law, but stated:

The Committee regrets that the Covenant has not yet been incorporated into domestic law by [Australia], despite the Committee's recommendations adopted in 2000 (E/C.12/1/Add.50). It notes with concern the lack of a legal framework for the protection of economic, social and cultural rights at the Federal level, as well as of an effective mechanism to ensure coherence and compliance of all jurisdictions in the Federation with [Australia's] obligations under the Covenant.

Bearing in mind the provisions of article 28 of the Covenant,⁴ the Committee reiterates that the principal responsibility for its implementation lies with [Australia's] Federal government and recommends that it: (a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation; (b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; (c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights.⁵

5.6 Some of the major gaps in the Australian protection of ESCR identified by the CESCR in 2009 include:

³ An initial report is required within two years of ratification.

⁴ Art 28 of the ICESCR extends the provisions of the treaty 'to all parts of federal States without limitations or exceptions'.

⁵ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009), [11].

- inequality between women and men in the workplace;
- the barriers to the enjoyment of the right to work encountered by many indigenous people, asylum-seekers, migrants and people with disabilities;
- the gap between Indigenous and non-Indigenous health indicators and educational opportunities;
- the inadequacy of health services in prisons;
- the insufficiency of support for those with mental illness; and
- the increasing rate of homelessness.

5.7 Commentators within Australia have recommended a number of practical steps to implement the Committee's Concluding Observations. These include proposals that the Australian Government:

- work towards enacting a National Human Rights Act that legally recognises and protects ESCR;
- provide the Australian Human Rights Commission with the mandate to monitor ESCR and to conciliate complaints about breaches of ESCR;
- ensure that a Parliamentary Joint Committee consider the human rights implications of proposed legislation, and establish a Statement of Compatibility process;
- address issues relating to Indigenous enjoyment of human rights, including health, education, language and land rights, and addressing obstacles to the enjoyment of human rights presented by the Northern Territory Intervention;
- promote an Equality Act and advance gender equality in the workplace, and paid parental leave;
- adopt homelessness legislation, which would provide protection against forced or arbitrary evictions, a requirement for meaningful participation by persons experiencing homelessness in the development of policy and delivery of services, and an immediately enforceable right of access to emergency accommodation;
- end the policy of mandatory immigration detention; and
- incorporate ESCR and other human rights in the National Curriculum.⁶

5.8 Australia has not yet signed the Optional Protocol to the ICESCR, which allows complaints about a State's compliance with the treaty to be made by individuals to the Committee, after all domestic remedies have been exhausted.

5.9 Australia operates in a 'dualist' legal system, which means that treaties such as the ICESCR do not in general enjoy legal force in domestic law unless they have been expressly incorporated in domestic legislation. Australian courts, however, may take account of the terms of an unincorporated treaty such as the ICESCR, on the basis of a number of principles. These include:

⁶ These submissions, made by the Human Rights Law Resource Centre (HRLRC) to the Department of Foreign Affairs and Trade are available at <www.hrlrc.org.au/content/topics/esc-rights/esc-rights-implementation-of-the-concluding-observations-of-the-un-committee-on-economic-social-and-cultural-rights/> (28 May 2010).

- the presumption that the legislature has enacted law in compliance with its international obligations.⁷ If express statutory words are inconsistent with these obligations, the presumption may be overridden. The presumption applies particularly where a statute was enacted to fulfil an international obligation, where the courts will assume that it must be effective for that purpose;
- the principle of legality (or ‘fundamental rights principle’), which requires the Parliament to use clear and unambiguous language to interfere with fundamental rights of the common law;⁸
- the ‘legitimate influence’ principle, which allows international law to guide common law development;⁹ and
- the ‘legitimate expectation’ principle, which gives weight to the expectation of people dealing with public authorities that the government will act in a manner consistent with Australia’s international obligations.¹⁰

5.10 There are examples of the ICESCR guiding Australian courts in their interpretation of domestic law. The ICESCR has been treated as relevant to the interpretation of the Australian Constitution,¹¹ legislation,¹² and the common law.¹³

5.11 A number of other international human rights treaties, to which Australia is party, also protect ESCR. These include the Convention on the Rights of the Child 1989 (CRC), and the Convention on the Rights of Persons with Disabilities 2006 (CRPD).

5.12 As noted in Chapter 2, the Commonwealth introduced the Human Rights (Parliamentary Scrutiny) Bill 2010 before the 2010 election. The Committee’s mandate was to establish a new Joint Parliamentary Committee on Human Rights which would examine and report to Parliament on the compatibility of legislation with Australia’s international human rights obligations, which would include those under the ICESCR.¹⁴ The Bill lapsed with the proroguing of Parliament in July 2010 but is likely to be reintroduced in the new Parliament.

⁷ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38; *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529, 534–5; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

⁸ *Coco v R* (1994) 179 CLR 427, 437.

⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42. For an analysis of the present operation of these principles, see Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008); Katharine G Young, ‘The World, through the Judge’s Eye’ (2009) 28 *Australian Year Book of International Law* 27.

¹⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; but see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

¹¹ *Eg Dowal v Murray* (1978) 143 CLR 410 (relevance of UDHR and ICESCR to s 51(xxix)); *Wong v Commonwealth of Australia* [2009] HCA 3 (2 February 2009) [100] (relevance of UDHR and ICESCR to s 51(xxiiiA)); but see *AMS v AIF* (1999) 199 CLR 160, 180 (the Constitution’s provisions ‘are not to be construed as subject to an implication said to be derived from international law’).

¹² *Eg Western Australia v Ward* [2002] HCA 28; 213 CLR 1 (cultural rights and Native Title Act 1993 (Cth)); *Wickham v Canberra District Rugby League Football Club Limited* [1998] ACTSC 95 (10 September 1998) (right to work); *Joshua Quinton v Commissioner for Fair Trading* ACAT (10 July 2010) (right to work).

¹³ *Eg Cattnach v Melchior* [2003] HCA 38; 215 CLR 1 [35] (parental obligations and medical negligence).

¹⁴ See further <www.ag.gov.au/humanrightsframework>; Hon Robert McClelland MP, ‘Enhancing Parliamentary Scrutiny of Human Rights’ (Media Release, 2 June 2010).

Overview of legislative protection of ESCR

- 5.13 ESCR are implicated, sometimes supported and sometimes limited, by a great range of laws and policies in Australia adopted by the Commonwealth, State and Territory governments. The coverage of material interests in food, health, housing, education, work and social security, as legal ‘rights’, is inconsistent and limited, as the following brief survey indicates. Often, due to the constitutional allocation of legislative powers, State (and sometimes Territory) legislation is of particular importance to the interests that underlie ESCR.
- 5.14 ESCR are also regularly implicated in a range of judicial decisions even when there is no formal constitutional or legislative protection of human rights. For example, Australian courts routinely make decisions on entitlements to social security, on economic loss following an accident, on damages for loss of health or disability, and on the rights of tenants.¹⁵
- 5.15 The *Australian Human Rights Commission Act 1986* (Cth) gives the Commission a range of functions with respect to a number of human rights treaties that contain ESCR, for example the CRC (eg, articles 25-28) and the Convention Concerning Discrimination in Respect of Employment and Occupation 1958 (ILO 111). However, the Commission has been given no mandate with respect to the ICESCR.
- 5.16 **Protection against discrimination** in the enjoyment of ESCR is required by ICESCR, article 2(2), but also by article 26 of the ICCPR,¹⁶ which has been interpreted by the UN Human Rights Committee as extending to ESCR when the State regulates such areas. The equality and non-discrimination required by the ICESCR and ICCPR is not merely equality *before* the law – that is, the even-handed administration and application of the law to individual cases – but also equal protection *of* the law – the distinctions drawn in the law itself must not be discriminatory.¹⁷
- 5.17 Protection against various forms of discriminatory treatment and laws is provided by a number of Commonwealth and Territory laws. The Commonwealth statutes that

¹⁵ Common law cases involving the development of contracts, torts or property implicate social and economic issues. For example, *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1 [35] provides an example of the development of common law damages in medical negligence cases, in which the court had recourse to overarching principles, such as those espoused by international human rights, that should guide and constrain the judicial determination. Administrative tribunals, deciding residential tenancy determinations, are also regularly forced to determine social and economic issues. An example, *Director of Housing v Sudi* [2010] VCAT 328, is discussed below. The implication of inevitable judicial involvement is discussed in Chapter 8.

¹⁶ Art 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁷ The same meaning should be given to the similar wording in s 8(3) of the ACT HRA, which is derived from art 26 ICCPR and provides:

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

prohibit discrimination, such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, and the *Age Discrimination Act 2004* (Cth), all operate to protect the interests that underlie ESCR.

5.18 In the ACT, the *Discrimination Act 1991* (ACT) provides protection against discrimination.¹⁸ These provisions work to indirectly protect ESCR, such as rights to access health, education and housing. For example, the *Discrimination Act 1991* (ACT) makes it unlawful for an educational authority to discriminate against a person in relation to admission to educational institutions and the enjoyment of educational opportunities once admitted (s 18).¹⁹ In the context of the *Disability Discrimination Act 1992* (Cth), a successful application of non-discrimination principles in education involved a claim of discrimination when a school refused to accept two parents' offer of financial support to fund a sign language interpreter at Mackillop Catholic College. The claim succeeded and the Federal Court of Australia awarded damages of \$26,000.²⁰ The **right to equality and non-discrimination** is also recognised in section 8 of the *Human Rights Act 2004* (ACT) (HRA), and its implications for ESCR in the ACT are discussed below.

5.19 The **right to work and just and favourable conditions of work** (ICESCR, articles 6, 7) is not specifically enshrined in Australian law. Industrial and labour rights are created, and limited, through a complex system of laws and regulations.²¹ In the past, some Commonwealth and State laws have attached parts of the ICESCR as schedules.²² The ACT sets out certain protections at the Territory level, such as through the *Work Safety Act 2008* (ACT). The lack of a human rights perspective in this area of law is illustrated

¹⁸ The *Discrimination Act 1991* (ACT) only prohibits discrimination on certain enumerated grounds and arguably does not create a positive obligation on duty-bearers to promote equality. See, Gabrielle Szabo, 'Mainstreaming Equality in the ACT - An equality duty for the ACT Discrimination Act' (Report prepared for the ACT Human Rights and Discrimination Commissioner Dr Helen Watchirs, October 2008) <<http://www.hrc.act.gov.au/res/mainstreaming%20equality.pdf>>. In contrast, the Human Rights Committee has noted that the right to non-discrimination under the ICCPR requires states to take positive measures to ensure equality. See, eg, Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th sess, (11 October 1989), [5].

¹⁹ *Discrimination Act 1991* (ACT) s 18:

- (1) It is unlawful for an educational authority to discriminate against a person—
 - (a) by failing to accept the person's application for admission as a student; or
 - (b) in the terms or conditions on which it is prepared to admit the person as a student.

Note The Legislation Act, dict, pt 1 defines fail to include refuse.

- (2) It is unlawful for an educational authority to discriminate against a student—
 - (a) by denying the student access, or limiting the student's access, to any benefit provided by the authority; or
 - (b) by expelling the student; or
 - (c) by subjecting the student to any other detriment.

²⁰ *Clarke v Catholic Education Office* [2003] FCA 1085. The recent United Kingdom case of *R (McDougal) v Liverpool City Council* [2009] EWHC 1821 confirmed the applicability of the principle of non-discrimination in an educational context, although the case, involving a school closure, did not succeed.

²¹ See generally Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007).

²² The right to work was considered, for example, by the ACT Supreme Court in *Wickham and Others v Canberra District Rugby League Football Club Limited & Others* [1998] ACTSC 95 [69] with Miles CJ noting its relevance, despite its repeal from the *Industrial Relations Reform Act 1993* (Cth) by the *Workplace Relations and other Legislation Amendment Act 1996* (Cth).

by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which significantly reduced the rights of employees and increased the power of employers.²³ One example of this process was precluding employees in businesses that employed less than 100 workers from having access to unfair dismissal laws. Although this legislation is now effectively repealed by the *Fair Work Act 2009* (Cth), it demonstrates the ease with which the right to work can be eroded.

5.20 The **right to form and join trade unions** (ICESCR, article 8) is covered in part by the *Fair Work Act 2009* (Cth). This legislation also takes into account Australia's international labour obligations (section 3). The *Fair Work (Registered Organisations) Act 2009* (Cth) sets out the entitlement to become and to remain a member of an employee organisation.

5.21 The **right to social security** (ICESCR, article 9) is protected in part by Commonwealth legislation. Under the *Australian Constitution*, social security is the primary responsibility of the Commonwealth government. Sometimes, Commonwealth laws and policies have appeared inconsistent with the right to social security. For example, the CESCR requested further information on the Work for Dole program in 2000.²⁴ Similarly, the recent Welfare Reforms, which seek to create a system of involuntary income management, may raise questions about the Australian government's compliance with this right.²⁵ Given the dimensions of the right to security relating to parental leave and other elements, ACT laws continue to affect the enjoyment of this right. For example, the *Public Sector Management Act 1994* (ACT) sets out an entitlement to paid maternity leave, which also affects on the protection of the family.²⁶

5.22 The **protection of the family** (ICESCR, article 10) is effected chiefly by Commonwealth laws, for example the definition of marriage in the *Marriage Act 1961* (Cth), *Family Law Act 1975* (Cth), and parental leave schemes. Section 11 of the HRA also protects the rights of families and children.

5.23 The **right to an adequate standard of living, including rights to food, clothing and housing** (ICESCR, article 11) is touched on indirectly in Australian law by a large range of legislative measures and schemes, including food and clothing standards and safety legislation, taxation and residential tenancies laws.

5.24 The **right to housing** is partially protected in the policy and legislation of the ACT. The *Residential Tenancies Act 1997* (ACT) establishes protections for security of tenure and

²³ See Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 678-681.

²⁴ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Doc E/C.12/1/Add.50 (11 Sept 2000), [31].

²⁵ See Senate Standing Committee on Community Affairs' *Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination) Act 2009 (Cth) and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Cth)*, along with the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of the Racial Discrimination Act) Bill 2009 (Cth)*.

²⁶ *Public Sector Management Act 1994* (ACT) s 170.

minimum living standards, and the *Housing Assistance Act 1997* (ACT) also provides for housing assistance for those most in need. The *Canberra Social Plan*, which sets out a number of goals related to housing, includes the goals of increasing the supply of public and community housing, improving access to quality, affordable and safe housing, and reducing homelessness. *Breaking the Cycle – the ACT Homeless Strategy* was launched in 2004 and sets out a strategy to meet this latter commitment. The *Youth Homelessness Action Plan* also provides such a framework. The *ACT Homelessness Charter* (2008) is a non-enforceable statement of the rights of homeless people. The working paper on the right to housing in Appendix 1 of this Report sets out some of these initiatives and their relationship to the key obligations of the right to adequate housing.

- 5.25 The **right to water** has been interpreted by the CESCR as an implicit part of the guarantee of an adequate standard of living (ICESCR, article 11) and to the realisation of other ESCR.²⁷ In Australia, the Constitution guarantees the right to reasonable use of ‘the waters of rivers’.²⁸ Measures relating to the sustainable management and use of water are set out in the *Water Resources Act 2007* (ACT), which establishes a framework in order to ‘sustain the physical, economic and social wellbeing of the people of the ACT which protecting the ecosystems that depend on those resources’, including for future generations. This object is complementary to the right to water.
- 5.26 The **right to the highest attainable standard of health care** (ICESCR, article 12) is affected by a panoply of legislation and policies, at both Commonwealth and State and Territory level. The Medicare system, for example, provides a form of national health insurance, and the Pharmaceutical Benefits Scheme subsidises the cost of prescriptions in order to ensure access to affordable medicines. The Commonwealth is now the dominant funder for public hospitals in most of Australia.²⁹
- 5.27 Australian jurisdictions, including the ACT, have long given effect to aspects of the right to health through legislation, policies and programmes, and through the design of health systems. Generally, most citizens and residents have access to a reasonable level of enjoyment of the right to health, although particular groups such as Indigenous children in remote areas may have limited access. The mental health of asylum seekers and the health of detainees in Australia are other areas of concern.³⁰ In June 2010, the UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover, released a report that was prepared after a 12-day mission to

²⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water*, 29th sess, UN Doc E/C.12/2002/11 (20 January 2003).

²⁸ *Australian Constitution* s 100. For a narrow reading of this term, see *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.

²⁹ Council of Australian Governments, *National Health and Hospitals Network Agreement* (2010), available at <http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/NHHN_Agreement.pdf>.

³⁰ Committee on Economic, Social and Cultural Rights Concluding Observations: Australia; United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Official Mission to Australia: Preliminary observations and recommendations* (4 December 2009).

Australia, which drew attention to the effect of poverty and discrimination, including inequalities, on the enjoyment of health in Australia.³¹

- 5.28 Many aspects of the right to health are already incorporated in the ACT legal framework, such as the *Health Act 1993* (ACT), which recognises many aspects of the right to access medical treatment for a range of illnesses and conditions, and the *Health Practitioner Regulation National Law 2010* (ACT), which recognises the right to medical services of appropriate quality. Under the *Human Rights Commission Act 2005* (ACT), a person has the right to make a complaint about a health service if a service is not being provided, is not provided appropriately or the provider has acted inconsistently with relevant health standards.
- 5.29 The *Work Safety Act 2008* (ACT) and *Workers Compensation Act 1951* (ACT) both recognise the right to a healthy work environment. Given the expansive modern interpretation of the right to health, the *Water Resources Act 2007* (ACT) and *Environmental Protection Act 1997* (ACT) are also relevant, in that they assist the implementation of the right to clean, potable water and the right to a healthy environment. The *Health Records (Privacy and Access) Act 1997* (ACT) recognises the right to privacy for health data, and the right to seek and impart health-related personal information.
- 5.30 The **right to education** (ICESCR, articles 13, 14) is partially protected in State, Territory and Commonwealth legislation. However, there are many gaps in the implementation of the right; for example the CESCR has questioned the differences in the quality of schooling in government-funded and private schools in Australia.³²
- 5.31 In the ACT, the *Education Act 2004* (ACT) provides a framework for schooling that is generally consistent with the right to education. This legislation establishes the compulsory schooling age, as well as a framework for government schools (including a system of complaints and review), and the requirements of registration, attendance and governance of non-governmental schools. Significant policy implementation, such as through the Council of Australian Government (COAG) National Education Reform, the Early Childhood Schools Framework, the Literacy and Numeracy Strategy 2009-2013, and the Professional Learning Strategy all aim to make learning a lifelong activity.³³ The working paper on the right to education in Appendix 1 of this Report lists the features of these laws and policies which help to ensure the availability, accessibility, adaptability and acceptability of education in the ACT.
- 5.32 The *Human Rights Commission Act 2005* (ACT) empowers the ACT Children and Young People Commissioner to take complaints in relation to any service for children and young people, including education services.

³¹ Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Mission to Australia*, UN Doc A/HRC/14?20/Add.4 (3 June 2010) <www2.ohchr.org/English/bodies/hrcouncil/docs/14session/A.HRC.14.20.Add4.pdf>.

³² Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Doc E/C.12/1/Add.50 (11 Sept 2000), [23].

³³ See ACT Department of Education and Training website <<http://www.det.act.gov.au>>.

5.33 The **right to cultural life** (ICESCR, article 15) is affected by many laws and policies, including national cultural strategies, arts and research funding and copyright laws. The HRA already protects some aspects of this right in section 27, which states:

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

Indirect protection of ESCR under the current HRA

5.34 The two Australian jurisdictions with a legislative bill of rights, the ACT and Victoria, offer some indirect protection to ESCR through those statutes. Because CPR and ESCR are indivisible, interdependent and interrelated, no categorical line can be drawn between them. Therefore, some measure of protection for ESCR exists by virtue of the CPR framework of the HRA. For the purposes of this study, we refer to this as ‘indirect protection’ of ESCR, since it protects the material interests underlying ESCR without an explicit textual guarantee.

5.35 The following examples are drawn from the ACT and other comparable human rights jurisdictions. Consideration of foreign case law is of course directly relevant to the ACT, by virtue of section 31(1) of the HRA, which provides:

International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.³⁴

5.36 The **rights to equality before the law and protection against discrimination** in the HRA may indirectly protect ESCR. For example, sections 8 (2) and (3) of the HRA, which derives from article 26 ICCPR, provide that:

(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

5.37 This section draws no distinction between categories of rights and thus it could be used to challenge discrimination in protecting ESCR. Also, similar to the meaning given to article 26 ICCPR, section 8(3) of the HRA requires laws to be non-discriminatory both in terms of their substantive content, and to be enforced or implemented without discrimination.

³⁴ *Hakimi v Legal Aid Commission (ACT); The Australian Capital Territory (Intervener)* [2009] ACTSC 48 (12 May 2009).

- 5.38 The grounds on which discrimination is prohibited in the HRA include race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status. In human rights law, such grounds have been interpreted to include ‘health status’.³⁵
- 5.39 In the ACT, section 8 of the HRA has been used to argue that public tenants, paying a rebated rent, and private tenants, paying a market rent, should be compensated on the same scale for a landlord’s failure to ensure that the properties were habitable.³⁶
- 5.40 Comparative experience suggests that there is further scope for the rights to equality and non-discrimination to provide indirect protection for the rights to health, education and housing.³⁷
- 5.41 The **right to life** in section 9 of the HRA may indirectly protect ESCR. For example, the right to life is sometimes invoked in end-of-life health care decisions. In the recent ACT Supreme Court decision of *Australian Capital Territory v JT*,³⁸ the Court had to decide whether it was lawful for health authorities to discontinue force-feeding a patient with a psychiatric illness. This raised both the right to life (section 9 HRA), and the **right to be free from cruel, inhuman and degrading treatment** (section 10). ACT Health argued that long-term feeding against the patient’s will was contrary to the latter. Chief Justice Higgins found that, in this instance, the Court could not sanction removal of force-feeding because the patient lacked the capacity to consent. It is possible that this decision would have been assisted by a more direct assessment of the right to health care. Other foreign examples indicate the links between the right to life and ESCR, such as the rights to health or education.³⁹
- 5.42 The **protection of the family and children** in section 11 of the HRA has been regularly raised in the context of housing matters in the ACT. In *Commissioner for Housing for the ACT v Allan* the Commissioner sought the eviction of a public housing tenant on the basis of her ex-partner’s violent behaviour. Under the tenancy agreement the tenant was deemed personally responsible for the conduct of visitors who were on the

³⁵ An example of ‘health status’ is being HIV-positive. The UN Committee recently noted that ‘denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation’: Committee on Economic, Social and Cultural Rights, *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2)*, UN Doc E/C.12/GC/20 (10 June 2009), [33].

³⁶ *Peters v ACT Housing* [2006] ACTRRT 6; *Kiternas v Watts* [2006] ACTRTT 4.

³⁷ Eg *Eldridge v British Columbia* [1997] 3 SCR 624 (Canadian Supreme Court holding that provincial government’s failure to fund sign-language interpreters within the public health system amounted to discrimination, and was not proportionate).

³⁸ [2009] ACTSC 105.

³⁹ In *Shortland v Northland Health Ltd* [1998] 1 NZLR 433, the New Zealand Court of Appeal was confronted with the conceptual connection between health care and life. It ultimately held that a clinical decision to withdraw dialysis treatment did not amount to deprivation of life, given the clinical team’s knowledge of the patient’s condition and their assessment of whether he would benefit from dialysis. In *Paschim Banga Khet Samity v State of West Bengal* (1996) 4 SCC 37, the Supreme Court of India held that the right to life encompassed the right to timely access to emergency medical treatment at state expense, where the medical emergency is life-threatening. *Mohini Jain v State of Karnataka* (1992) SCR (3) 658 (education and right to livelihood).

premises with her permission, and she was therefore found to have breached her tenancy agreement.⁴⁰ However, the Tribunal urged the Commissioner to consent to her transfer to another property on the condition that the tenant kept her location secret from her ex-partner. ACT Care and Protection (part of the Department of Disability Housing and Community Services) also advocated for a transfer, to avoid the children being taken into care. The Tribunal did not have the power to order the Commissioner to make a transfer but noted that ‘all government tenants are people with human rights, which the Commissioner is obliged to respect. In relation to the potential threat to the tenant’s children and to her role as their mother, section 11 is to the point’.⁴¹

5.43 The **right of children to protection** in section 11(2) of the HRA indirectly protects the right to education. For example, the ACT Scrutiny Committee explored the content of the right to education in the ICESCR in considering the Education Amendment Bill 2006.⁴² The Bill provided for financial contributions by parents to government schools (where education was otherwise free) to pay for particular activities. The Scrutiny Committee reviewed the jurisprudence on article 13 of the ICESCR and decided that the right to education could be seen as a component of section 11(2).

5.44 **The right to privacy** in section 12 of the HRA may indirectly protect ESCR, and is especially relevant to the right to housing. The right encompasses protection against unjustifiable interference with access, occupation and peaceful enjoyment of the home, and has been invoked both here in the ACT and in overseas jurisdictions in relation to such matters.⁴³ In *Nolan v MBF Investments Pty Ltd*,⁴⁴ the Supreme Court of Victoria confirmed that human rights, and in particular the right to privacy, are a relevant interest that must be considered when a mortgagee sells a property to satisfy a debt. This is especially relevant where a debt is secured over a family home. In another Victorian Charter case, the Victorian Civil and Administrative Tribunal (VCAT) held that the Director of Housing had breached the human rights of the applicants to family and home by seeking to evict them from public housing without justification.⁴⁵ Justice Kevin Bell, President of VCAT, noted the relevance of enforceable ESCRs to obligatory CPRs, suggesting that ‘both of these different systems of rights protection share something deeply in common: recognition of the fundamental importance of housing to human dignity, to personal and family wellbeing and to democratic society’.⁴⁶ He also noted the **obligations on public authorities** to make decisions consistently with human rights, which are discussed below.

⁴⁰ *Commissioner for Housing for the ACT v Allan* [2007] ACTRTT 21.

⁴¹ *Ibid* [71]-[72].

⁴² Scrutiny Report no 26, 5 June 2006. See also Scrutiny Report no 30, 21 August 2006; Scrutiny Report no 13, 12 October 2009; Scrutiny of Acts and Regulations Committee, Victoria, Alert Digest 11, 14 September 2009.

⁴³ *McCann v UK* [2008] ECHR 385. The European Court of Human Rights found that the right to privacy had been breached because the housing authority had failed to put in place adequate procedural safeguards for evictions.

⁴⁴ [2009] VSC 244.

⁴⁵ *Director of Housing v Sudi* [2010] VCAT 328.

⁴⁶ *Ibid* [81]. Compare with *Michelle Dawson v Transport Accident Commission* [2010] VCAT 796, where the Deputy President of VCAT refused to consider that a refusal of a monetary entitlement could amount to a challenge to one’s right to privacy.

5.45 Similarly, in *Metro West v Sudi (Residential Tenancies)*⁴⁷ the VCAT considered a claim by recently arrived refugees whom the private housing provider administering a government transitional housing program had served with eviction notices. The tenants claimed this violated their rights under the Victorian Charter. The Tribunal confirmed that the housing provider in question was a ‘public authority’ for the purposes of the Charter, leaving open the way to consideration of the claim on the merits. The Tribunal noted that:

[d]isadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperilled by their circumstances. That such people get the housing they need is a vital function of government.⁴⁸

5.46 **Freedom of expression** in section 16 of the HRA includes a right to seek and impart information in section 16(2). This is important to ESCR, such as the right to health because access to appropriate and relevant health-related information is essential in enabling individuals to make informed decisions relating to their health. This includes, for example, access to information on sexual and reproductive health.⁴⁹

5.47 The **right to liberty and security of the person** in section 18 of the HRA sets out a protection against imprisonment for inability to carry out a contractual obligation. This relates to norms against debtors’ prisons which reflects protection of a person’s economic rights and right to be free from poverty, which underlie ESCR.

5.48 The **right to humane treatment when deprived of liberty** in section 19 of the HRA requires treatment with respect to the inherent dignity of the human person. This standard relates to the conditions in places of detention in the ACT. It is pertinent to the obstacles to the enjoyment of health of detainees in Australia, identified by the UN Special Rapporteur on the Right to the Highest Attainable Standard of Health.⁵⁰

5.49 **The right to a fair trial** in section 21(1) of the HRA may offer indirect protection of ESCR. In the recent case of *Thompson v ACTPLA*, the ACT Civil and Administrative Tribunal held that the right to a fair hearing should be interpreted broadly, and it is likely that it would apply to government decisions that affect an individual’s substantive health services or benefits.⁵¹ This right has also been invoked in the context of housing issues and can provide some measure of support against arbitrary evictions. In *Commissioner for Housing in the ACT v Y*⁵² the Supreme Court held that the Commissioner for Housing was required to provide the applicant, a single mother with two young children, with certain protections before removing her from a priority

⁴⁷ [2009] VCAT 2025.

⁴⁸ Ibid [1]-[2].

⁴⁹ Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health (art 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000), [11].

⁵⁰ Anand Grover, above n 31.

⁵¹ *Thompson v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 38, [63]-[71].

⁵² [2007] ACTSC 84.

housing list. In the United Kingdom, for example, the **right to a fair hearing** has protected aspects of the right to health in the areas of social security and disability benefits.⁵³ In Victoria, the right to a fair hearing in section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) served to protect a mental health patient, after the Mental Health Review Board failed to conduct the reviews of the patient's involuntary and community treatment orders within a reasonable time.⁵⁴

5.50 The **right to be free from forced work** in section 26 of the HRA establishes a quintessential labour right.

5.51 The indirect protection offered by CPR to ESCR can be relevant to litigation, to bureaucratic practices, or to legislative scrutiny. In this way, the rights to equality, to life, to the protection of family and children, to privacy and to humane treatment when deprived of liberty, all indirectly protect ESCR. As for CPR, these **human rights may subject to reasonable limits**, by Territory laws that are justifiable in a free and democratic society.⁵⁵

5.52 New enforcement provisions under the HRA have been in operation since 1 January 2009.⁵⁶ These include an explicit **obligation on public authorities to comply with the HRA**, combined with a direct right of action in the ACT Supreme Court for breach of this duty, without entitlement to claim damages. The HRA definition of 'public authorities' includes core government agencies as well as private agencies when there are carrying out government functions. This definition points to the current responsibilities to protect human rights on the part of schools, hospitals, and housing commissions.

Conclusion

5.53 This survey of the ways in which the Australian Commonwealth and ACT legal systems acknowledge ESCR shows first, that these rights are already familiar to Australian legislatures and judiciaries; and second, that their coverage is incomplete, indeed haphazard. The possible protections of ESCR – in framework legislation, in anti-discrimination law, policy, the common law or administrative law, and in the current human rights framework – offer at best an inchoate structure of protection. The disadvantages of this structure, and advantages of direct legislative inclusion, are discussed in Chapter 8.

⁵³ Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart Publishing, 2007) 333.

⁵⁴ *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009).

⁵⁵ HRA s 28.

⁵⁶ *Ibid* Part 5A.

6. Chapter 6: Key findings from workshops on economic, social and cultural rights

6.1 The Project convened a series of expert workshops to bring together leading economic, social and cultural rights (ESCR) specialists with key stakeholders in the ACT Government and community sectors between October 2009 and March 2010. Workshops were held on the right to housing, the right to education and the right to health to discuss the implications of protecting these specific ESCR in the ACT.¹ Our Partner Organisation, the ACT Department of Justice and Community Safety (JACS), together with the ACT Human Rights Commission (ACT HRC), also hosted a supplementary forum in June 2010 to explore the links between ESCR, the environment and energy and water supply. This chapter describes the key findings from these discussions.² It was anticipated that these discussions would inform the recommendations made in this report.

Background

ANU workshops

6.2 The purpose of the workshops was to consider the theoretical and practical issues involved in implementing the rights to housing, education and health in the ACT context as well as to identify whether there were any gaps in the present legislative and policy framework that could be addressed by expressly incorporating these rights in the ACT *Human Rights Act 2004* (HRA).

6.3 The Project circulated working papers on the rights to housing, education and health to the workshop participants prior to each session, and these formed the basis for discussion at the respective workshops. These papers are attached in full in Appendix 1 of this report. Broadly, the working papers sought to:

- provide an overview of the content of the rights to housing, education and health, in particular as recognised in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia is a party;
- survey the means by which these rights are currently implemented in the law and practice of the ACT, and the extent to which that law and practice gives effect to the right;
- identify the ways in which existing provisions of the HRA already guarantee aspects of these rights;
- describe how these rights might be incorporated in the HRA and the legal implications of such inclusion; and

¹ Due to the limited timeframe of the project, specialist workshops were not able to be convened for the complete catalogue of ESCR. The rights to housing, education and health were chosen in part because they had been identified as having particular significance for the ACT by the twelve-month review of the HRA: see ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) at <http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf> 45.

² We do not attribute views expressed during the course of the workshops to any particular person or agency.

- assess the advantages and possible drawbacks of including these rights in the HRA.

JACS forum

- 6.4 The purpose of the forum was to consider the implications of ESCR for environmental protection and the supply of energy and water in the ACT. JACS circulated a discussion paper prepared by the ACT HRC, which formed the basis for discussion at the forum. The discussion paper (attached in full in Appendix 1 of this report) canvassed, among other things, the possible implications of protecting the rights to a healthy environment, water and energy supply (in the context of the right to adequate housing) in the ACT.

Discussion

- 6.5 Participants focused on two main issues in the course of discussions in all four workshops:
- the appropriateness and utility of recognising a *human rights* guarantee of ESCR in the HRA; and
 - whether implementation of ESCR should be subject to judicial scrutiny and enforcement.

Why an explicit human rights guarantee?

- 6.6 *Incomplete coverage:* Participants generally agreed that, while the existing legislative and policy framework for housing, education and health in the ACT provided varying degrees of protection of the relevant ESCR, the coverage was unsystematic, incomplete and largely discretionary. Further, this piecemeal and limited protection was susceptible to being eroded by the amendment or repeal of laws, or the modification or withdrawal of facilities and services.
- 6.7 *Limitations of indirect protection:* Participants recognised that many of the core elements of ESCR such as the rights to housing, education and health, in particular those giving rise to ‘immediate obligations’,³ were to some extent already applicable and (indirectly) enforceable in the ACT as civil and political rights (CPR) claims under the HRA, particularly since the commencement of the duty to comply with human rights on public authorities in January 2009. However, there are inherent limits to this approach and participants acknowledged that, without specific recognition, the protection of these ESCR was likely to remain relative to, and dependent on, the treatment given to the CPR in the HRA.

³ For example, ‘immediate obligations’ in the context of the right to housing include non-discrimination; prohibition of forced eviction, and access to emergency housing.

- 6.8 *More coherent framework:* Most participants saw that express incorporation of ESCR in the HRA would provide clearer direction to government agencies and other public authorities about their obligations and would focus the attention of policy-makers on the conditions needed to secure their effective realisation in practice. They agreed that the real success of the HRA to date has been the extent to which it has improved the policy-making and legislative process in the ACT by bringing human rights questions explicitly to the forefront; it followed that similar gains were likely to be achieved by including ESCR in the HRA. For example, one participant at the housing workshop stated:

I do agree with the discussion paper that a legislative right to adequate housing would provide clearer guidance to policy makers and government agencies than the existence of unenforceable rights.

Another participant at the JACS forum considered that:

The HRA might be a useful framework for addressing complex land management issues [that involve competing interests]. Rights can inform and indicate the questions to be asked and can be a way of assisting to answer these issues.

- 6.9 *Means to identify legislative and policy 'blind spots':* Some participants were initially doubtful whether the inclusion of the ESCR in the HRA would result in any tangible benefits to the lives of people in the ACT. It was suggested that the positive examples of protecting these rights in jurisdictions such as South Africa were of limited relevance to the ACT because of the vastly different social and economic circumstances. The ACT undoubtedly has a good track record overall in providing access to high quality public housing, healthcare services and education for ACT residents. However, participants conceded that there was the potential for legislative and policy 'blind spots' which could result in the ESCR interests of certain vulnerable individuals or groups being neglected. The inclusion of ESCR in the HRA would therefore serve as an aid to the formulation and implementation of laws and policy, and as a standard that would enable a denial of the rights or regression in its enjoyment to be better identified and rectified. A participant at the housing workshop observed:

I think the existence of an enforceable right to housing in the HRA will be an enabler for progressive legislation to provide more definitely for the goods and services in the real world which will give effect to that right.

- 6.10 *Better coordination of cross-sectoral obligations:* Some participants noted that effective implementation of ESCR interests would often involve cross-sectoral obligations. Because of its broad links with other human rights, the right to health, for example, is not just a portfolio-specific issue that can be dealt with by the Department of Health. Express inclusion of the ESCR in the HRA could provide a framework for addressing the range of issues relevant to underlying determinants of health and more clearly delineate corresponding obligations of other actors.

6.11 *Better outcomes for Commonwealth funding*: National cooperative schemes and intergovernmental funding agreements are a common feature of governance in the ACT, particularly in the areas of health, education and housing. Some participants argued that the incorporation of the relevant ESCR in the HRA could act as leverage in negotiating better outcomes for the ACT vis-à-vis Commonwealth funding agreements, as well as informing discussions with the Commonwealth and other States and Territories.

6.12 *Aid to social reforms*: Participants acknowledged that inclusion of the ESCR in the HRA could provide a more definite stimulus for policy makers to clarify the content and scope the guarantee as well as assisting government to enact social reforms in areas such as housing, health care, education and the environment. One participant at the JACS forum observed that:

Looking at utilities through a HRA framework would be a way to promote equity in pricing and avoid the pitfalls of monopoly pricing. It would strengthen our ability to convey the message to service providers.

6.13 *Enhance democracy*: Despite some concerns, discussed below, that the inclusion of ESCR in the HRA would undermine the democratic process by transferring power from the elected legislature to the courts on social and economic policy determinations, participants generally agreed that recognition of ESCR would enhance democracy by promoting the participatory capabilities of marginalised individuals and groups in political, economic, social and cultural spheres.

A role for the courts?

6.14 There was a significant degree of overlap in the concerns raised by participants in all three workshops. These concerns broadly related to the legal implications of including the ESCR in the HRA and involved three inter-connected issues: the appropriate role for the courts in enforcing the ESCR; the question of scarce resources and who determines their allocation; and the management of community expectations in light of the perceived vagueness of the content of ESCR when compared with CPR.

6.15 *Changed setting*: Participants recognised that the current debate on ESCR was taking place in a very different context to that which occurred before the ACT introduced the HRA in 2004.⁴ As noted above, claims that essentially involve ESCR interests can now be brought as enforceable CPR claims under the HRA. Participants conceded that the relevant question was no longer *if* the ACT should protect ESCR, but *how* it should do so. Most participants agreed that it would be preferable to provide an explicit and targeted framework for protecting the ESCR, rather than leaving it to the courts to indirectly enforce ESCR through expanded interpretations of CPR. One participant at the housing workshop commented:

⁴ See discussion in Chapter 2.

We do not want the development of these rights to be solely dependent on judicial interpretation as it always occurs *ex post facto*, once there is an allegation that a right has been breached because adequate housing has been denied.

- 6.16 *Judicial scrutiny*: Nevertheless, some participants remained concerned about the consequences of ‘justiciability’ and whether it was appropriate or desirable for the courts to be empowered to play a significant role in the supervision of ESCR implementation. A participant at the health workshop commented:

While the HRA framework might help us to go forward, I am concerned that it may also result in the judicialisation of health policy and delivery of health services. Legal interventions and lawyers make me nervous.

Another participant asked:

Who will be the arbiter of evidence in a rights-based framework? If it is the courts, then the danger is that it takes away from deference to practitioners.

- 6.17 Other participants thought that enforceable rights would create the necessary accountability to improve government compliance with the ESCR. A participant at the housing workshop commented:

I think we should ask the question how much certainty and comfort can the most vulnerable members of community take from the continued improvement of housing accessibility and services based on Intergovernmental agreements and ACT budget papers rather than legal rights.

- 6.18 *Allocation of scarce resources*: Some participants were concerned that judicial resolution of ESCR claims would involve the courts in determinations about whether the government had committed sufficient resources to achieving ESCR outcomes and risk disrupting government priorities for the allocation of scarce resources. However, others considered that these concerns were overstated. For example, at the housing workshop, one participant said:

I think we have gone past the point where we say that we don’t want the right to housing in the HRA to be enforceable because resources are limited. There are already specific legal rights to housing which are enforceable and which have resource implications.

If the right to housing was enforceable, the courts could look at the Homelessness NP implementation plan and see if it has any reasonable prospect of being followed, if it is resourced adequately and then if it has made enough progress. Would that be so bad in the ACT? While I’m understandably nervous about a court testing this, I am not at all nervous about all the information being brought into the public arena so it can be tested and the plans having input from those they are designed to assist. Why not take the next step and have the courts test the progress as well?

- 6.19 *Managing expectations*: A related concern for some participants was that the recognition of the ESCR as a legal right would create the expectation of ‘rights on demand’. A participant at the housing workshop said:

From the community’s perspective, a right to housing implies one person, one house.
The question is how to manage expectations within a limited budget.

Similarly, a participant at the health workshop cautioned that a right to health could create the expectation that individuals are entitled to treatment on demand and exaggerate the importance of ‘choice’ over medical expertise.

- 6.20 *A question of formulation*: Discussions at the workshops clarified that there were many different forms that ESCR protection can take: a dialogue model like the HRA, for example, does not enable courts to strike down legislation or to compel government to allocate resources in any particular way. Further, the particular formulation of the ESCR guarantee adopted can be adapted to avoid many of the concerns identified by participants. For example, some elements of the ESCR may be enforceable in the same way as CPR, while other components may be subject to judicial scrutiny of the ‘reasonableness’ of the measures adopted to achieve their progressive realisation; and it is possible that the implementation of some obligations will be left entirely to the discretion of the executive and legislature.

- 6.21 Some participants suggested that for courts to play an appropriate role in ESCR adjudication, it would be necessary to provide them with specific legislative guidance on the factors to be considered when assessing the question of ‘reasonable measures’. Others noted that it would be important to construct a sufficiently broad definition of the ESCR guarantee to take account of the cross-sectoral nature and obligations of particular ESCR.

Conclusion

- 6.22 The four ACT expert workshops provided a valuable opportunity for public servants and non-government organisations to raise concerns and questions about legislative protection of ESCR. The discussions confirmed first, that there are sound reasons for including ESCR in the HRA; and second, that many of the concerns relating to the ‘justiciability’ of ESCR can be ameliorated by adopting the appropriate formulation of the ESCR guarantee.

7. Chapter 7: Comparative models of economic, social and cultural rights protection

7.1 This chapter reviews the protection of economic, social and cultural rights (ESCR) in a number of comparable legal systems. The chapter focuses on ways in which general guarantees of ESCR are incorporated into domestic legal systems, and the machinery that may be established or drawn upon to enhance the enjoyment of those rights. The chapter mainly examines the forms of protection of ESCR from the perspective of justiciability, but where relevant, it also describes examples of complementary mechanisms for their protection (eg, through institutions such as human rights commissions, or procedures for legislative scrutiny or oversight).

7.2 **Legal protection of ESCR:** Despite some references in earlier Australian debates to the novelty of the legal protection of ESCR through general rights guarantees, the protection of ESCR in domestic legal systems, including at the constitutional level, is common throughout the world. For example, a study on the national protection of the right to food prepared for the United Nations Food and Agricultural Organisation (FAO) in 2005 noted that the International Covenant on Economic, Social and Cultural Rights (ICESCR) was part of the domestic law and directly applicable in some 77 jurisdictions (of 203 reviewed), a significant number of them developed countries.¹ The study also found that:²

- 114 constitutions recognised a right to social security;
- 22 constitutions explicitly recognised the right to food and 17 referred to the right to food of a specific group; and
- 46 constitutions contained recognition of rights which included the right to food, the right to an adequate standard of living and to a dignified life.³

7.3 It is important to examine both constitutional and statutory bills of rights containing ESCR, despite the fact that the ACT review considers only the possibility of statutory protection of ESCR. The institutional relationships between courts, the executive and the legislature and government involved in interpreting and enforcing constitutional ESCR are in many respects analogous to those that are at issue when the protection of ESCR takes the form of an ordinary statute under a 'dialogue' bill of rights. Of course the fact that a court's decision under a statutory bill of rights is not the final word on the protection of rights is a fundamental difference between the models.

¹ Margret Vidar, *State Recognition of the Right to Food at the National Level* (FAO, 2005), 7 and Annex II. The developed countries included: Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Norway, Portugal, Republic of Korea, Slovakia, Slovenia, Spain, and Switzerland.

² Ibid 7-8.

³ Vidar also found that 37 constitutions contained provisions on minimum wages; 66 constitutionally protected the rights of the child, and 12 contained broad constitutional provisions on the right to health, *ibid* 8. See also Eleanor D. Kinney and Brian Alexander Clark, 'Provisions for Health and Health Care in the Constitutions of the Countries of the World', (2004) 37 *Cornell International Law Journal* 285 (presenting data that suggests that two thirds of all constitutions contain provisions protective of health or health care, and noting that more recent constitutions are more likely to reflect statements of duty and entitlement).

7.4 **Justiciability of ESCR:** The protection of ESCR in domestic legal systems, including the role assigned to the courts, can take a variety of forms. These include:

- non-justiciable ESCR as Directive Principles of State Policy, which provide standards that the various organs of government should follow but which are not intended to be subject to judicial review or other enforcement;
- partially justiciable incorporation of ESCR as part of domestic law by general rules on the reception of international treaties or specific ratifying statutes; and
- fully justiciable ESCR through protection of specific guarantees of ESCR in relation to which the courts may play a supervisory or enforcement role.

Non-justiciable ESCR guarantees: The Directive Principles approach

7.5 The impact of Directive Principles has varied and reflects political and social contexts and legal and judicial culture. The divergent experience can be illustrated by two leading examples in the common law world, Ireland and India, the latter having derived its approach from the former.

7.6 **Ireland:** The Irish Constitution of 1937, which has been influential in the development of constitutions in the Commonwealth of Nations, including India, includes ESCR as Directive Principles of State Policy. Article 45 provides in part:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas [Parliament]. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

7.7 During the debates on the adoption of the Directive Principles in Ireland, one speaker defended their presence as offering ‘a constant headline, something by which the people as a whole can judge of their progress in a certain direction; something by which the representatives of the people can be judged as well as the people judge themselves as a whole’.⁴ Directive Principles may influence the legislature’s deliberations. They have been analogised to the content of a party’s platform or to the status of a speech made by a respected national leader.⁵ The Irish courts have done little with the Directive Principles so far as turning them into enforceable guarantees of rights goes. However, it should also be noted that the Constitution of Ireland contains entrenched guarantees of rights (including some ESCR); there are also further rights guarantees under European Union law that apply in Ireland and have primacy over Irish statutes. Ireland also has a statutory bill of rights, the *European Convention on Human Rights Act 2003* (based closely on the United Kingdom’s *Human Rights Act 1998*), which also provides protection for the right to property (right to peaceful enjoyment of one’s possessions) and the right to education.

⁴ <<http://www.oireachtas-debates.gov.ie/D/0067/D.0067.193705110029.html>>.

⁵ Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (Foundation Press, 2nd ed, 2006), 1663.

- 7.8 **India:** The Indian Constitution of 1949 lists the rights to housing, education,⁶ food, health, livelihood and a clean environment as Directive Principles of State Policy in Part IV of the Constitution (listed after the fundamental rights outlined in Part III of the Constitution).⁷ The Constitution states that Directive Principles are non-justiciable, and ‘shall not be enforceable by any court, but the principles ... are nevertheless fundamental to the governance of the country and it shall be the duty of the State to apply these principles in making laws’ (article 37).
- 7.9 The Indian courts have interpreted the justiciable rights in the Constitution to incorporate many aspects of the non-justiciable ESCR contained in the Directive Principles, in effect undermining the attempt to distinguish between the two categories of rights. For example, the interpretation of the right to life has often included the interests linked to ESCR, such as the rights to a livelihood, a decent life, a clean environment, food, or emergency medical treatment.⁸
- 7.10 *Purposive interpretation of rights:* The Indian Supreme Court and other courts have stressed the indivisibility of ESCR with the fundamental right to life (article 21), and rights to equality and religion. All such rights supplement each other in aiming to bring about the establishment of a welfare state, which is envisaged in the Preamble to the Constitution.⁹ Where laws made with respect to Directive Principles appear to conflict with selected fundamental rights, those laws nevertheless prevail (article 31C).
- 7.11 *Limited but de facto judicial review:* Since the late 1970s, the Indian Supreme Court has laid the foundation for the principle that ESCR are complementary, indivisible and interdependent with CPR. Despite the formally non-justiciable status of the Directive Principles, the broad interpretation of some CPR, for example the right to life, has made ESCR *de facto* justiciable and enforceable by the Supreme Court of India, as well as in the High Courts. They influence the courts in interpreting statutes, in developing the common law and in implementing the nation’s obligations under international agreements. They may also be relevant to claims that social and economic legislation may involve an unconstitutional redistribution of private property.
- 7.12 *Remedies:* The Indian Supreme Court has developed new remedies in order to initiate positive action on the part of the State. Court orders may be declaratory (stating that laws or policies are in breach of ESCR, but leaving the government to devise a remedy) or supervisory (requiring the relevant agency to report back to the court within a set time-frame, direct the state to appoint a Committee, or a municipal corporation to

⁶ In the case of education, the Indian Supreme Court spearheaded the adoption of an amendment to the Constitution, which converted the non-justiciable aspiration of free primary education into a justiciable right in 2002.

⁷ Similar provisions appear in a number of other South Asian Constitutions, eg Bangladesh, Pakistan, and Sri Lanka.

⁸ *AP Pollution Control Board v MV Nayudu* (1999) 2 SCC 718 (environment); *Peoples Union for Civil Liberties (PUCL) v Union of India*, Writ Petition No 196/2001, 23 July 2001, unreported (food); *Parmanand Katara v Union of India* (1989) 4 SCC 248 (medical treatment).

⁹ *Umni Krishnan v State of AP* AIR 1993 SC 2178.

devise an appropriate scheme). These have had significant effects in some cases. The key to successful enforcement by the court appears to be the combined use of all levers of democracy – legal action, media advocacy, academic research and street demonstrations.¹⁰

Partially justiciable ESCR guarantees: Incorporation of the ICESCR

- 7.13 In many jurisdictions, the ICESCR has been incorporated into domestic law, sometimes with constitutional status, in other cases with the status of ordinary legislation or with an enhanced status that means the ICESCR will prevail over inconsistent domestic laws (but not the Constitution).¹¹ Such incorporation frequently accompanies constitutional guarantees of ESCR. Examples of jurisdictions in which the ICESCR forms part of domestic law include Germany, Switzerland, the Netherlands, Cyprus, Nepal, Hong Kong, Belgium, and most Latin American countries.
- 7.14 Such an approach leaves open the question of the extent to which the guarantees are justiciable, the extent to which they need to be read in the light of the obligation of progressive realisation in article 2(1) of the ICESCR, which steps need to be taken immediately, which aspects of the rights are capable of judicial enforcement, and the role of the limitations clause in the ICESCR in giving effect to the rights.
- 7.15 The approach taken by the courts of jurisdictions in which the ICESCR has been incorporated to the question whether ICESCR rights generally, or specific rights in the Covenant, are directly enforceable by the courts, has varied. In some countries courts have taken the view that in general the provisions of the ICESCR are not directly enforceable, though in most such cases courts have left open the possibility that specific rights might be. These courts have tended to refer to the obligation of ‘progressive implementation’ in article 2 of the ICESCR,¹² as well as to the nature of some of the rights.
- 7.16 For example, in 1994 the Swiss Federal Supreme Court considered a challenge to an increase in university fees on the ground that it was inconsistent with article 13(2) of the ICESCR.¹³ The Court held that, in general, the rights guaranteed by the ICESCR

¹⁰ Jayna Kothari, ‘Social Rights Litigation in India: Developments of the Last Decade’ in Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory And Practice* (Hart Publishing, 2007) 171, 181.

¹¹ In jurisdictions where ratified treaties have constitutional status or prevail over ordinary laws, other sources of ESCR rights will include ILO conventions to which the State has become a party.

¹² See the discussion in Yuji Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Oxford University Press, 1998) 56–61. The Dutch courts have held that in nearly all cases raising the issue that the rights in the ICESCR are not directly applicable, even including rights which they have held to be directly applicable in the context of the European Convention on Human Rights (eg the right to form trade unions). See ‘Survey of case law relating to the Covenant’ in *Combined fourth and fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant: The Netherlands*, UN Doc E/C.12/NLD/4-5, 12 July 2009, Appendix 1.

¹³ Art 13(2) provides:

‘The States Parties to the present Covenant recognize that, with a view to achieving the full realization of [the right to education] ... (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education’.

were not directly applicable. Rather than creating a justiciable right that could be invoked before the national courts by an individual, the treaty addressed the legislature, which was obliged to observe the stipulations of the treaty, and did not provide a precise standard that could be applied by a national court in an individual suit.¹⁴

7.17 A 1986 decision of the Dutch Central Appeals Court noted that, while not all the rights in the ICESCR might have direct effect, some might – in that case the right to equal remuneration for work of equal value.¹⁵

7.18 Other courts (in particular Latin American courts)¹⁶ have found that the ‘progressive implementation’ obligation under the ICESCR is no bar to finding that many provisions of the ICESCR (or aspects of them) are directly applicable.¹⁷

7.19 For example, *Mariela Viceconte v Argentinian Ministry of Health and Social Welfare – Poder Judicial de la Nación*¹⁸ was a case involving a claim based on article 12(2)(c) of the ICESCR¹⁹ in relation to the Argentine Government’s failure to arrange the production of a vaccine against Argentine hemorrhagic fever. The Federal Administrative Court of Appeals of Argentina found a violation of the ICESCR and ordered the State to arrange for production of the vaccine. Another example is a decision of the Supreme Court of Argentina in which a challenge was brought against a Government decision to stop providing medication to a child who suffered from a severe immunological condition and who was dependent on the drug. The Court held

¹⁴ *Verband Studierender an der Universität Zürich et al v Regierungsrat des Kantons Zürich*, BGE 120 Ia 1 E, §5c. See generally Giorgio Malinverni, ‘Les Pactes dans l’ordre Juridique Interne’ in Walter Kälin, Giorgio Malinverni, and Manfred Nowak (eds), *Die Schweiz und die UNO-Menschenrechtspakte: La Suisse et les Pactes des Nations Unies Relatifs aux Droits de l’homme* (Helbing und Lichtenhahn, 2nd revised ed, 1997) 71–82, and Jörg Künzli and Walter Kälin, ‘Die Bedeutung des UNO-Paktes über Wirtschaftliche, Soziale und Kulturelle Rechte für das Schweizerische Recht’ in Walter Kälin, Giorgio Malinverni, and Manfred Nowak (eds), *Die Schweiz und die UNO-Menschenrechtspakte: La Suisse et les Pactes des Nations Unies Relatifs aux Droits de l’homme* (Helbing und Lichtenhahn, 2nd ed, 1997) 105–54. This approach seems to be based in part on an understanding of the obligations under the ICESCR that does not reflect more recent analysis or jurisprudence. The CESCR in particular has pointed out the directly applicable aspects of many of the rights in the ICESCR. See, eg, Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, 19th session, E/C.12/1998/24 (3 December 1998), [3], [9].

¹⁵ *Board of the Teaching Hospital at the University of Amsterdam v FW, The Netherlands, Central Appeals Court for the Public Service and for Social Security Matters*, 3 July 1986, commented upon in L.A.N.M. Barnhoorn, ‘Netherlands Judicial Decisions Involving Questions of Public International Law’ (1988) 19 *Netherlands Yearbook of International Law* 427, discussed by Iwasawa, above n 13, 60. See also *Catholic Diocese of Hong Kong v Secretary for Justice* [2010] HKCA 31, [98] (claim of violation of right to education rejected).

¹⁶ Christian Courtis, ‘Judicial Enforcement of Social Rights: Perspectives from Latin America’ in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 169.

¹⁷ See Christian Courtis, ‘Argentina: Some Promising Signs’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 163.

¹⁸ Argentine Federal Administrative Court of Appeals, 2 June 1998, No 31 777/96.

¹⁹ Art 12(2)(c) provides that the steps States parties should take in achieving the full enjoyment of the right to health include those ‘necessary for ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases’.

that the right to health in the ICESCR and the Constitution required the Government to continue to provide the drug to the child.²⁰

Fully justiciable ESCR guarantees: Express recognition as individual legal rights

In national constitutions

7.20 There are many countries whose constitutions include guarantees of ESCR. Sometimes the protection extends to a broad range of rights listed in the constitution; in other cases the coverage is limited to a smaller number of rights. In most cases the protection is based on explicit guarantees of rights, but in some cases the guarantees have been implied.

7.21 The formulation of ESCR varies from constitution to constitution, but a common feature is that courts have been able to enforce constitutional ESCR or aspects of them. Even in jurisdictions such as Germany or Switzerland where the courts have not been prepared to directly enforce ICESCR guarantees, the constitutional ESCR have nevertheless been enforced.

7.22 For example, in 1996 the Swiss Federal Supreme Court held that there was an implied constitutional right to subsistence support, in a case involving three non-Swiss citizens. They had lost their refugee status in Switzerland, been deported to Czechoslovakia, returned to Switzerland, and who were considered as having lost their Czech citizenship. They were thus stranded in Switzerland without a right to remain or to work, and their requests for social assistance were refused by cantonal authorities.²¹ The Court considered whether such a right to subsistence support was justiciable, or a matter entirely for the political organs of government. It held:

Whereas fundamental-rights defensive entitlements raise no problems in this connection, entitlements to benefits presuppose that they are adequately defined normatively and can be concretized and implemented by the judge with the procedures and means at his disposal... Here, the judge has to comply with the functional bounds on his competence. He has not, in view of the scarcity of State resources, the competence to set priorities in allocating resources. Accordingly, only a minimum of State benefit can be directly required as a fundamental right and be implementable by the judge

The fundamental right to a subsistence guarantee meets these conditions of justiciability. It is as such oriented to the minimum required as a fundamental right (assistance in situations of need). The associated State expenditure is recognized on the basis of social assistance legislation in the cantons; it requires no further basic financial policy decisions. What constitutes an infeasible prerequisite for a humanly dignified life is adequately clearly recognizable and accessible to determination in judicial proceedings. What is at issue here is not, however, a

²⁰ *Campodónico de Beviacqua, Ana Carina c/ Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas*, Supreme Court of Argentina, 24 October 2000, No 823 XXXV.

²¹ *V v Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, judgment of the Second Public Law Division, Federal Supreme Court, 27 October 1995, BGE 121 I 367 (English translation by ESCR-Net) (citations omitted).

guaranteed minimum income. All that is constitutionally required is that which is essential for a humanly dignified existence and able to guard against an undignified existence as a beggar. It is in the first place a matter for the competent polity on the basis of its legislation to determine the nature and extent of the benefits required in the specific case. Here both money benefits and benefits in kind come into consideration It is only where the ordinary statutory law is not in the upshot able to meet the constitutional minimum entitlement that this has to be focused on directly. It is admittedly not appropriate here to expatiate on the details, since it is not the nature and extent of the benefits that are in dispute but only the question whether the complainants could at all be refused the support.²²

- 7.23 In this case, the issue was thus only whether the applicants were entitled to the benefits that had been set by law, not the adequacy of that benefit. There is now a specific guarantee in the Swiss Constitution which embodies this right:

Article 12 Right to assistance when in need

Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living.

- 7.24 Germany provides another example of constitutionally guaranteed and judicially enforceable ESCR. The German constitutional 'social state' principle and the guaranteed existential minimum in the Basic Law operates to guarantee a form of ESCR.²³ These rights have operated primarily as 'optimisation principles' rather than 'subjective entitlements', meaning that their main role is to guide legal decision makers, rather than be the focus of individual complaints and judicial enforcement.²⁴ Yet there are examples of courts stepping in where majorities have passed legislation infringing ESCR.
- 7.25 A recent decision of the German Federal Constitutional Court held that provisions in the federal social assistance legislation did not comply with the Basic Law, because they were insufficient to guarantee a subsistence minimum that is consistent with human dignity.²⁵ The Court examined the bases and the assessment method for benefits, which it found must be justifiable on the basis of reliable figures and plausible methods of calculation. The legislature was required to disclose these methods. The impugned legislation, which ruled out a supplementary benefit for special needs, and made other restrictions, was held to be unconstitutional.
- 7.26 Another example is Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong is a common law jurisdiction), which provides:

²² Ibid.

²³ Grundgesetz für die Bundesrepublik Deutschland (German Basic Law), arts 1(1), 20(1).

²⁴ For an influential theory behind this useful distinction see Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (Oxford University Press, 2002).

²⁵ BVerfG, 1 BvL 1/09, judgment of the First Senate of the Federal Constitutional Court, 9 February 2010, available at <http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html> (English summary available at <<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-005en.html>>).

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

7.27 This provision has been generally accepted as entrenching the ICESCR (and relevant ILO conventions) as applied to Hong Kong as part of Hong Kong law.²⁶ The Basic Law also contains other examples of ESCR.²⁷

7.28 The Hong Kong courts have considered a number of challenges based on ESCR, and have adopted a flexible approach. In some cases, the courts have drawn a line between what they see as the policy role of the executive and legislative organs, and that of the courts. For example, in 2007 the Hong Kong Court of First Instance considered a challenge based on the right to health in the ICESCR (among other rights) to the Government's policy on air pollution.²⁸ The Court rejected the challenge, stating that the applicants sought:

in fact to review the merits of policy in an area in which Government must make difficult decisions in respect of competing social and economic priorities and, in law, is permitted a wide discretion to do so. While issues of importance to the community may have been raised, it is not for this court to determine those issues. They are issues for the political process.²⁹

7.29 However, in other cases, the Hong Kong courts have assessed government actions and legislation on the basis of consistency with ICESCR provisions. For example, in *Catholic Diocese of Hong Kong v Secretary for Justice*³⁰ the Hong Kong Court of Appeal considered a challenge to legislation that changed the nature of management in government-aided schools, by enforcing a policy of school-based management in all such schools. The applicant unsuccessfully argued that this was a violation of the provisions of the Basic Law relating to preservation of the pre-1997 school system, but also claimed that the change was a violation of article 13(4) of the ICESCR,³¹ in particular as read in light of the CESCR's General Comment No. 13.³²

²⁶ Although it has not been finally determined that the inclusion of the ICESCR in Hong Kong's Basic Law has thereby incorporated it as part of Hong Kong law and made it directly enforceable before the courts (see *Catholic Diocese of Hong Kong v Secretary for Justice* [2010] HKCA 31, [98]), the Hong Kong courts have considered cases brought under art 39 on the basis that it has.

²⁷ For example, the right to freedom of choice of occupation (art 33), the freedom to engage in academic research, literary and artistic creation, and other cultural activities (art 34) and the right to social welfare (art 36).

²⁸ *Clean Air Foundation Ltd v Government of the Hong Kong SAR* [2007] HKCFI 757, [43].

²⁹ Ibid.

³⁰ [2010] HKCA 31.

³¹ Art 13(4) reads: 'No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set

- 7.30 Another example of constitutional protection of ESCR in a common law jurisdiction is the Constitution of Cyprus, which includes, among other rights, the right to a decent existence, social security and social insurance (article 9), the right to education (article 20) and the right to practice any profession or to carry on any occupation, trade or business (article 25). The courts have considered claims of violation of these rights. For example, in *Stella Theodoulidou via her father and guardian Andreas Theodoulides and others v Cyprus Republic via Ministry of Education*³³ the Supreme Court of Cyprus considered a claim that the right to education entitled students to register at the public school of their choice rather than being restricted to the public school in their educational region. The Court rejected the claim, holding that the right included the right of parents to choose between public and private schools for their children but did not permit them to select any public school for their children's education.
- 7.31 **South Africa:** The 1996 South African Constitution is perhaps the best-known example of constitutional protection of ESCR.
- 7.32 *Catalogue of ESCR guaranteed:* The South African Constitution of 1996 protects the rights of everyone to have access to ESCR, including housing, health care, food, water and social security (sections 26, 27), education (section 29) and a clean environment (section 24).
- 7.33 The South African Constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (section 7(2)). The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state (section 8(1)). It also applies to natural or juristic persons, and suggests that a court must develop the common law accordingly (section 8(2), 8(3)). This provision indicates the 'horizontal' effect of ESCR, as binding on individuals acting without government intervention.
- 7.34 *Purposive and informed interpretation of ESCR:* ESCR must be interpreted in order to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' (section 39(1)(a)). Interpreters of the Bill of Rights, including courts, must consider international law, and may consider foreign law (section 39(1)(b)(c)). Furthermore, courts and tribunals, when interpreting legislation

forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

³² General Comment No. 13 provides in part:

40. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

³³ Case no. 689/89, 6 November 1989, summarised in *Replies by the Government of Cyprus to the list of issues (E/C.12/CYP/Q/5) to be taken up in connection with the consideration of the fourth and fifth periodic reports of Cyprus (E/C.12/CYP/5, E/C.12/CYP/Q/5/Add.1 (2009), 7, [2(a)]*.

or developing the common law, must promote the spirit, purport and objects of the Bill of Rights (section 39(2)).

7.35 *Permissible limitations on ESCR*: ESCR are subject to limitations (section 36), which must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. None of the ESCR are non-derogable. Moreover, since the obligation to respect ESCR is subject to 'progressive realisation', an immediate entitlement to enjoy all aspects of a guaranteed ESCR is not categorical.

7.36 The ESCR in the South African Constitution are formulated to reflect the complexity of obligations that arise in relation to ESCR, and the differing nature of the judicial role that corresponds to those. The right to housing in section 26 provides an illustration:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.³⁴

Following the general statement of the right, the two subsequent paragraphs vary in their effect. While section 26(3) clearly permits judicial enforcement at the suit of an individual, the role of the court under section 26(2) is different. As discussed below, this embodies a form of 'reasonableness' review of government action, rather than a focusing on an individual's right directly to enforce positive duties by demanding the direct provision of essential goods and services. The courts' inquiry is whether the steps taken by the state in the progressive realisation of these rights can be considered reasonable, which will include an assessment of available resources.³⁵

7.37 The South African Constitution adopts the terminology of the international human rights instruments, requiring that the state 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of ESCR (sections 26(2), 27(2)). The rights listed in the Bill of Rights extend to 'everyone', and the Constitutional Court has interpreted this provision to refer to non-citizens, such as permanent residents.³⁶

7.38 *Justiciability and broad access to courts*: ESCR are justiciable, as was confirmed by the Constitutional Court when it certified the South African Constitution.³⁷ Moreover, everyone has the right to have any legal dispute resolved in court (section 34). Many people have standing. For example, anyone acting in their own interest, or in the

³⁴ *Constitution of the Republic of South Africa Act 1996* (South Africa) s 26.

³⁵ See generally Sandra Liebenberg, 'Adjudicating Social Rights under a Transformative Constitution' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 75–101; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co, 2010).

³⁶ *Khosa v Minister of Social Development* [2004] ZACC 11.

³⁷ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26.

public interest, has the right to approach a competent court alleging an actual or threatened rights infringement (section 38).

7.39 *Reasonableness review*: The Constitutional Court has developed a mode of 'reasonableness review' in assessing whether the government and Parliament has complied with its constitutional duties, especially the rights to access housing, health care, water and social security. This model requires the Court to ask whether the government has acted 'reasonably' in accordance with this right; that is, whether the means chosen are reasonably capable of facilitating the realisation of the ESCR in question.

7.40 The Constitutional Court has been reluctant to advance any substantive content for each ESCR, preferring to issue a contextual assessment of government action rather than a categorical statement of what each right requires. This approach allows the elected branches a margin of discretion relating to the specific policy choices adopted to give effect to ESCR. As the Constitutional Court has stated, 'A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent'.³⁸

7.41 Reasonableness has been developed to include such non-exhaustive criteria as whether the policy or programme is:

- comprehensive, coherent and coordinated;
- supported by appropriate financial and human resources;
- balanced and flexible, and providing appropriately for short, medium and long-term needs;
- reasonably conceived and implemented; and
- transparent, with its contents made known effectively to the public.³⁹

7.42 These criteria are familiar in the judicial context. These may be seen as 'connected to a set of administrative law principles, involving judicial review of inaction by government agencies'.⁴⁰ More substantively, to be reasonable governmental action must also be:

- attuned to those whose material needs are most urgent;
- responsive to the inherent dignity of human beings;
- oriented towards progressive realisation;
- aimed to avoid, where possible, deliberately retrogressive measures; and
- tailored to the availability of resources.

7.43 *Remedies*: If law or conduct is found to be inconsistent with ESCR, the court must declare that it is invalid to the extent of its inconsistency. It may also make any order that is 'just and equitable', including an order which limits the retrospective effect of

³⁸ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, [41].

³⁹ Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, above n 35.

⁴⁰ Cass R. Sunstein, 'Social and Economic Rights? Lessons from South Africa', *U of Chicago, Public Law Working Paper No. 12*; *U Chicago Law & Economics, Olin Working Paper No. 124* (2001) 13.

the declaration of invalidity, and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect (section 172).

7.44 In its jurisprudence, the Constitutional Court has used a wide range of remedies. It has made declarations of invalidity with respect to housing policy infringing the right to housing;⁴¹ declared that the government's lack of provision of HIV/AIDS testing and counselling meant that health policy did not comply with the right to access health care;⁴² read in 'curing words' to make social security legislation compatible with equality and social security rights;⁴³ and ordered a 'meaningful engagement' between parties to resolve tenancy disputes.⁴⁴

7.45 *The role of other bodies:* The South African Human Rights Commission (SAHRC) has responsibilities to promote and monitor the observance of human rights, including ESCR. Each year, the Commission requires relevant organs to provide it with information on the measures they have taken towards the realisation of ESCR.⁴⁵ The SAHRC has adopted policy papers, conducted investigations, and published findings around ESCR. These have been completed with the involvement of many non-governmental organisations active in the area of addressing poverty, inequality and respect for specific ESCR.

7.46 The SAHRC also has the power to receive and investigate individual or group complaints of ESCR (and CPR) breaches.⁴⁶ The Commission can resolve a complaint by mediation, conciliation, or negotiation but has no power to make binding decisions. It can however initiate court proceedings either in its own name, or on behalf of an aggrieved person(s).⁴⁷ In general, the Commission does not accept complaints concerning matters that are before a court or any other statutory body, and complaints must be made within three years of the alleged violation, unless good cause can be shown.

In sub-national constitutions

7.47 Although the United States Constitution contains no explicit guarantees of ESCR, and has generally been interpreted narrowly to maintain a distinction between ESCR and CPR,⁴⁸ there are some cases in which the United States Supreme Court has in effect enforced ESCR, in particular in relation to equality and non-discrimination in the

⁴¹ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19.

⁴² *Minister of Health and Others v Treatment Action Campaign (No 2)* [2002] ZACC 15.

⁴³ *Khosa v Minister of Social Development* [2004] ZACC 11.

⁴⁴ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7. See also Brian Ray, 'Extending the Shadow of the Law; Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases', 3 (2009) *Utah Law Review* 797.

⁴⁵ SA Constitution, s 184(3).

⁴⁶ *Human Rights Commission Act, No. 54 of 1994* (SA), ss 8, 9, 10.

⁴⁷ *Ibid* s 7(e).

⁴⁸ For a counter-interpretation of the due process and equal protection provisions which sustains ESCR, see Cass Sunstein, above n 41. Cf *Goldberg v Kelly*, 397 U.S. 254 (1970) (due process requires hearing before social security entitlements restricted).

enjoyment of such rights. For example, in *United States Department of Agriculture v Moreno*,⁴⁹ the United States Supreme Court considered a challenge to eligibility conditions for a federal food stamp program. The statute provided assistance to 'households', which were defined to include only those groups where all the members of the group were related to each other, thus excluding any group of persons who met the income requirement but of whom one member was not related to the others. The Court held the limitation to be a violation of the due process clause of the Fifth Amendment, essentially applying an equal protection analysis and finding that the criterion excluding non-related groups from the program did not rationally pursue any legitimate state interest.

- 7.48 Equally significantly, there are many instances of sub-national constitutions in the US which recognise ESCR. Often, these constitutions resemble legislation, rather than traditional constitutions, first because they are more easily amended and secondly because they appear to lack the same stringent deliberative foundations.⁵⁰ For the first reason in particular, they are usefully compared with the operation of the HRA.
- 7.49 Indeed many US State Constitutions guarantee some form of ESCR.⁵¹ The New York Constitution, for example, provides that '[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.'⁵² Many State Constitutions provide for minimum education rights.⁵³ The State Constitution of Montana guarantees respect for individual 'dignity' which may be subject to a substantive interpretation in line with ESCR guarantees.⁵⁴ The State Constitution of Florida recognises workers' right to form a union; the constitution of Arkansas recognises a right to work.⁵⁵ More than a third of all state constitutions contain environmental policy provisions, and some, like Montana, guarantee a clean environment.⁵⁶ While some of these provisions have been treated as aspirational statements that cannot be judicially enforced, others have grounded justiciable claims against the government.⁵⁷

In statutory bills of rights

- 7.50 The United Kingdom *Human Rights Act 1998* (UK HRA) – on which the ACT *Human Rights Act 2004* (HRA) is modelled – provides a statutory model of ESCR protection,

⁴⁹ 413 U.S. 528 (1973).

⁵⁰ Eg, James A. Gardner, 'What Is A State Constitution?' (1993) 24 *Rutgers L.J.* 1025

⁵¹ Helen Herschkoff, 'Positive Rights and State Constitutions: The Limits of Federal Rationality Review' (1999) 112 *Harvard Law Review* 1131.

⁵² New York Constitution, art 17, [12].

⁵³ See William E. Thro, 'Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation' (1989) 75 *Virginia Law Review* 1639, n 103.

⁵⁴ Mathew O. Clifford and Thomas P. Huff, 'Some Thoughts on the Meaning and Scope of the Montana 'Dignity' Clause with Possible Applications' (2000) 61 *Montana Law Review* 301.

⁵⁵ Florida Constitution, art 1, para 6; Arkansas Constitution, amend 24.

⁵⁶ Barton H. Thompson, Jr, 'Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions, (2003) 64 *Montana Law Review* 157.

⁵⁷ See Helen Herschkoff, above n 51.

although it is currently restricted to protecting the right to education.⁵⁸ The UK HRA protects the rights contained in the European Convention on Human Rights of 1950 as well as the rights contained in the First and Sixth Protocols to the Convention, all of which are set out in a schedule to the legislation. Article 2 of the First Protocol provides:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

7.51 The right to education affects United Kingdom law in the following ways:

- it must be taken into account in the development of laws (the Joint Committee on Human Rights of the United Kingdom Parliament must report on the human rights compatibility of legislative proposals; and bills introduced into Parliament must include a compatibility statement by the responsible Minister);⁵⁹
- it must be taken into account in the interpretation of laws (all laws must be read and given effect to so that they are compatible with the designated rights as far as possible);⁶⁰
- a court can make a formal declaration if it considers that a law is incompatible with the right;⁶¹ and
- it can be the basis of an action taken against public authorities if they have breached the right.⁶²

7.52 *The role of other bodies:* The Equality and Human Rights Commission (established by the *Equality Act 2006* (UK)) has responsibility for enforcing equality and non-discrimination laws, including in the areas of employment, education, housing and health. Its duties include encouraging public authorities to comply with their human rights obligations under the UK HRA. However, unless there is an equality dimension to the case, the Commission does not have the jurisdiction to initiate or intervene in legal proceedings involving issues that fall purely under the UK HRA. As a national human rights institution it also protects and promotes human rights generally. The Commission is required to publish a report every three years on the progress made in Britain on protecting human rights, including ESCR.

Conclusion

7.53 The experience in a range of different jurisdictions around the world has been that ESCR may, in certain circumstances, be capable of judicial enforcement. The question is not whether this is possible, but rather which aspects of those rights are

⁵⁸ The Irish *European Convention on Human Rights Act 2003*, modelled closely on the UK HRA, is similar in content and operation.

⁵⁹ UK HRA, s 19.

⁶⁰ Ibid s 3.

⁶¹ Ibid s 4.

⁶² Ibid s 6.

enforceable as a matter of practicality, and as a matter of ensuring that the courts are not confronted with, or assume, a task that is beyond their competence, or constitutionally inappropriate for other reasons.

7.54 The experience in South Africa has been frequently cited as demonstrating that courts can responsibly and appropriately enforce or scrutinise the implementation of ESCR without encroaching on the proper role of the executive and the legislature.⁶³ Some national courts have been more expansive in their approach than others, and judicial culture, tradition and role may vary from country to country. Experience in comparable common law jurisdictions to Australia and the decisions of Australian courts on existing bills of rights or on ESCR issues involving treaty interpretation (discussed in Chapter 5) suggest that Australian courts would take a cautious approach to interpreting justiciable ESCR guarantees.

7.55 In assessing the appropriateness of any combination of measures to enhance the protection of ESCR, it is important to recall that all branches of government have a role to play in their implementation. The effective realisation of ESCR, like CPR, requires that there should be:

- clear standards to guide all branches of government;
- procedures for ensuring that those standards are followed by all organs of government in policy development, program implementation, service delivery and decision-making; and
- procedures for ensuring that a failure to adhere to those standards is remedied.

The executive, legislature and the judiciary, as well as institutions such as human rights commissions, have distinctive roles to play, but the responsibility for implementation of ESCR is one that is shared throughout government.

⁶³ See, eg, Danie Brand, 'Introduction to Socio-Economic Rights in the South African Constitution' in Danie Brand and Christof Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria University Law Press, 2005) 1; Sandra Liebenberg, 'Beyond Civil and Political Rights: Protecting Social, Economic and Cultural Rights under Bills of Rights – The South African Experience' (Paper presented at the Centre for Comparative Constitutional Studies Conference, Protecting Human Rights, Melbourne, 25 September 2007) <<http://acthra.anu.edu.au/PESCR/Resources>>; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2008); Katharine G. Young, 'A Typology of Economic and Social Rights Adjudication', 8 *International Journal of Constitutional Law* (forthcoming 2010); Brian Ray, above n 45.

8. Chapter 8: The case for including economic, social and cultural rights in the HRA

- 8.1 This chapter outlines the main arguments for including economic, social and cultural rights (ESCR) in the ACT *Human Rights Act 2004* (HRA). The conclusion of Chapter 5 was that there are significant gaps in the protection of ESCR in ACT and Australian law. This chapter explains how express inclusion of ESCR would address those gaps. These arguments complement the initial arguments for the review of the HRA presented in Chapter 1 and the key findings of the expert workshops set out in Chapter 6.
- 8.2 **Assisting the vulnerable:** ESCR can assist vulnerable and marginalised groups in the ACT by orienting the legal system to respond to gaps in human rights protection. These groups include children, Indigenous Australians, the homeless, people in detention, people with disabilities, the elderly and asylum seekers.¹ In Chapter 3, we invoked a point made by the Hon Albie Sachs that, together with CPR, ESCR provide a coherent normative system to support the needs of the whole human being.
- 8.3 **Expressing local norms:** The inclusion of ESCR brings the HRA into line with Australian norms, values and principles about the importance of human rights. In the 2009 National Human Rights Consultation, Australians listed the right to education, health care and housing as among the most important human rights.² This priority echoed the findings of the Western Australian and Tasmanian inquiries, and is reflected in community surveys conducted in the ACT as well.³ The rights to housing, education and health were also identified as having particular significance for the ACT by the twelve-month review of the HRA.⁴ Protection of ESCR is an important aspect of the often-identified Australian values of equality and a 'fair go' too.
- 8.4 **Implementing international human rights:** Just as the inclusion of ESCR is expressive of local norms, it also brings the ACT into line with the international human rights treaties to which Australia is party, such as the ICESCR. Implementation of international law can proceed through several domestic routes; State and Territory legislatures are often able to take the lead in designing implementation strategies, and in doing so in participatory ways.⁵ Moreover, the inclusion of ESCR in the HRA would

¹ See, eg, ACT Department of Education and Training 'Annual Report 2007-08' 231, where it is noted: '[t]he gap in school performance between Indigenous and non-Indigenous students is evident from year 1 onwards.'

² See, eg, National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) ('NHRCC Report'), Recommendation 22. Available at <www.humanrightsconsultation.gov.au>.

³ See, eg, the ACT Human Rights Commission's *Community Survey 2009*, discussed in the ACT Human Rights Commission's Submission to the Five-Year Review of the HRA (November 2009) 24.

⁴ See ACT Department of Justice and Community Safety (JACS), 'Human Rights Act 2004 Twelve Month Review Report' (2006) 45 at <http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf> ('JACS Report').

⁵ Eg Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, And Federalism's Multiple Ports Of Entry' (2006) 115 *Yale Law Journal* 1564 (documenting the adoption of 'transnational rights' by city councils, state legislatures, and state judges in the United States).

bring the ACT into line with the changing understanding of the nature of ESCR that has occurred in other parts of the world over the last three decades.⁶

- 8.5 **Ensuring protection of ESCR where it counts:** ESCR fall squarely within the responsibilities of Territory and State governments. As the National Human Rights Consultation Report noted, implementation of a Commonwealth Human Rights Act would have direct influence only on Commonwealth public authorities, and would exclude a large number of services for which the States and Territories are primarily responsible, such as in health and education.⁷ Including ESCR in a sub-federal bill of rights means that these rights will directly affect service-delivery. This is also consistent with the constitutional division of powers in Australia's federal system.
- 8.6 **Enhancing legislative process:** The inclusion of ESCR in the HRA guards against legislative 'blind spots', which result in the inadvertent neglect of the material interests of certain vulnerable individuals or groups. Such blind spots may arise because of time pressures on legislative deliberations, because legislatures may be unable to appreciate the perspective of rights claimants with very different life experiences, or because they are ill-equipped to accommodate rights-based claims.⁸ ESCR are therefore less about constraining legislative power than ensuring legislative power identifies and covers particular areas.⁹
- 8.7 **Enhancing administrative process:** Explicit inclusion of ESCR can provide for a more coherent bureaucratic framework and better quality public decisions. The pressure to provide accountability for ESCR can provide the scaffolding for change in the institutional culture of particular services and arrangements. Such a process can also result in the participatory design of important benchmarks for interests in health, housing or education contexts.¹⁰
- 8.8 **Improving policy-development:** Well-developed policy forms part of any attempt to protect ESCR. However, policy is changeable, and fluctuates across electoral cycles as a function of governmental priorities. The inclusion of ESCR in the HRA would provide a stable baseline to ground the government's commitment to provide goods and services in areas of health care, housing or education or environment. As well as providing stability, this baseline would ensure that the fundamental interests of individuals or minority groups are protected, which might be overlooked in majority-based political processes.¹¹

⁶ Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation Committee' (2010) 33 *University of New South Wales Law Journal* 193.

⁷ *NHRCC Report*, above note 2, 274.

⁸ Rosalind Dixon, 'Creating Dialogue about Socio-Economic Rights: Strong v Weak Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391, 402.

⁹ Helen Hershkoff, 'Just Words': Common Law and the Enforcement of State Constitutional Social and Economic Rights' (2010) 62 *Stanford Law Review* 1521.

¹⁰ Eg Kathleen G. Noonan, Charles Sabel and William H. Simon, 'The Rule of Law in the Experimentalist Welfare State: Lessons from Child Welfare Reform' (2009) 34 *Law & Social Inquiry* 523.

¹¹ For a discussion of the pitfalls associated with enforcing educational rights politically, see: E.J. Ryan 'Failing the System? Enforcing the Right to Education in New Zealand' [2004] *VUWLR* 29.

- 8.9 Uniting and educating advocates:** The explicit inclusion of ESCR also has the capacity to unite groups that may be struggling with a systemic problem from different perspectives.¹² Such rights help to frame particular problems, and provide the rhetorical means to demonstrate, for example, that hunger, poverty, homelessness, medical neglect or barriers to schooling are public injustices in Australia, rather than private misfortunes. Human rights advocates must also confront the reasonable claims of others – to civil and political rights (CPR), or to other material interests – when making claims based on ESCR.
- 8.10 Analysing equality claims:** Equality and non-discrimination are rights currently protected in the HRA. Nonetheless, equality claims are always susceptible to the question: equality of what?¹³ ESCR help to delineate reasonable from unreasonable claims to equality by articulating a baseline of protection in educational, health and housing contexts. For example, a legislated right to education helps to inform the theory of education that must guide decision-makers in accommodating the special needs of particular individuals, as well as what would constitute a reasonable limitation on such accommodation.¹⁴
- 8.11 Improving the judicial process:** ESCR can improve the judicial process, first by providing a statement of community values to guide judicial decision-making, and second by introducing judges to the range of comparable decisions in international and comparative jurisdictions. In each task, ESCR can be important to the development of the common law, to statutory interpretation, and to the enforcement of administrative law.
- 8.12 Developing the common law:** The values and sometimes difficult allocative implications of ESCR are constantly present in the common law, particularly in tort, property and contract law. Human rights can interact ‘horizontally’ to guide the behaviour of private individuals (and law’s response to that behaviour), as well as the relations between government and individual.¹⁵ ESCR can therefore reorient common law doctrine to bring it into line with societal values. In developing doctrine, a court inevitably signals approval or disapproval of particular forms of private behaviour (such as an employer firing an employee without reasons).¹⁶ Explicit ESCR can help give shape to that decision.¹⁷ Moreover, judicial determination of the open-ended and contextual principles that remain in the common law, such as standards of

¹² Katharine G. Young, ‘Freedom, Want and Economic and Social Rights’ (2009) 24 *Maryland Journal of International Law* 182, 192.

¹³ See generally Amartya Sen, *Inequality Reexamined* (Harvard University Press, 1992).

¹⁴ Compare *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92, [148] (Callinan J suggesting that the right to education ‘could be adversely affected by an insistence that the education to which a disabled person is equally entitled should be provided in circumstances which cause disruption to the education of others’).

¹⁵ See, eg, South African Constitution 1996, s 8(2), 38(2). Thus, both private and public torts are relevant to ESCR. See, eg, *Phelps v Mayor of the London Borough of Hillingdon* [2001] 2 AC 619., the House of Lords established that a duty of care could exist between a local educational authority and disabled children in the provision of education. A breach was found, and the plaintiffs were granted substantial redress.

¹⁶ Herschkoff, above n 9, 1526-1527.

¹⁷ Eg *Cattanach v Melchior* [2003] HCA 38; 215 CLR 1 [35] (parental obligations and medical negligence).

‘reasonableness’ or ‘good faith’, is assisted by recourse to the baselines supplied by ESCR jurisprudence.¹⁸

8.13 Enforcing administrative law: The values of ESCR are also implicated in administrative law decisions, particular in the disputes that may reach administrative tribunals. For example, in tenancy decisions, or in medical review procedures, judges are often asked to decide questions of allocation and entitlement.¹⁹ Legislative protection of ESCR, and access to the jurisprudence on ESCR, would enhance this process.

8.14 Interpreting CPR: In Chapter 5, we detailed the way in which ESCR are already indirectly protected by the CPR framework of the HRA. This is due to the indivisibility and interdependence of human rights, which makes the line between CPR and ESCR an arbitrary one. Nonetheless, there are disadvantages in judges interpreting CPR expansively, in order to protect ESCR. The four main problems are:

- Some of the interpretations of CPR are grounded on reasons that are too distant from the key elements of the rights to education, health and housing. For example, the Indian Supreme Court’s expansive interpretation of the right to life and livelihood (described in Chapter 7) may lead to a conception of education in merely vocational or productivity terms; health in merely life-prolonging terms; or housing in merely survival terms.
- Judges providing individuals with a measure of redress through a broad conceptualisation of current rights might be perceived to be overly activist and adventurous in redrawing the boundaries of, say, the right to life or the right to privacy. Including ESCR in the HRA’s coverage might constrain judges by provided a more explicit and targeted framework.
- Indirect protection of ESCR may undermine the power of the CPR by refashioning them to guarantee entitlements. Attention could be diverted away from the protection of CPR for otherwise vulnerable groups, giving the rights less force in argument and popular discourse.
- Conversely, where CPR are not interpreted in light of ESCR, they are subject to a ‘structural imbalance’ which may lead to retrogressive effects for ESCR.²⁰ ESCR are more socially oriented than CPR and can add emphasis to the participatory, duty-based elements of human rights that are arguably more able to reflect a concern for the welfare of the community.²¹ In certain areas, ESCR can provide a legal

¹⁸ Compare Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009), esp ch 6-7 with Lucy Maxwell, ‘Judging the Allocation of Resources: The Adjudication of ESC Rights and the Limits of the Judicial Role’ (unpublished paper, 2010) (portraying ESCR adjudication in the narrow realm of assessing allocative decision-making).

¹⁹ See eg *Director of Housing v Sudi* [2010] VCAT 328.

²⁰ Ellen Wiles, ‘Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law’ (2006) 22 *American University International Law Review* 35.

²¹ *Ibid* 49.

counter-balance to CPR arguments which may result in hardship to vulnerable groups in the community.²²

Conclusion

8.15 Many benefits would flow from explicit inclusion of ESCR in the HRA. These include bringing ACT law into line with community expectations and international commitments as well as updating and correcting the imbalance towards CPR in the current model of human rights in the HRA. They also include improvements in accountability and process in executive, legislative and judicial spheres and providing a coherent target for the campaigns of advocates for the marginalised. ESCR can thus help to assist the most vulnerable people in our community.

²² Ibid 60-62. Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University Pennsylvania Law Review* 1, 15. See *Wilson v Medical Services Commission* (1988) 53 DLR. (4th) 171, in which a restriction on the authorisation of new doctors from practising in areas without medical or community need was challenged as infringing the right to liberty. The regulations were ruled unconstitutional, and yet, the outcome may have been different had a right to health existed, since their impact on the unequal distribution of doctors in certain areas would have been explicitly weighed against the CPR.

9. Chapter 9: Options for protecting economic, social and cultural rights under the HRA

- 9.1 This chapter considers how economic, social and cultural rights (ESCR) could be included in the ACT *Human Rights Act 2004* (HRA) and what ESCR might be included. It draws on examples of the legal protection of ESCR in other jurisdictions, as well as the experience of the protection of human rights under the HRA since 2004 and recent developments elsewhere in Australia, including the deliberations of the National Human Rights Consultation, the adoption by the Commonwealth Government of the Australian Human Rights Framework in May 2010 and recent discussion of the protection of ESCR in comparable overseas jurisdictions.
- 9.2 In approaching these questions, we emphasise the particular characteristics of the HRA as a non-entrenched *legislative* bill of rights which gives primacy to the policy choices of the Legislative Assembly, and the experience of the ACT in the six years since its adoption. Our previous research – confirmed also by the perceptions of many public servants and legislators – has shown that the major impact of the HRA has been within government, as part of the policy-making process, and within the legislature where explicit consideration of human rights issues has significantly increased.¹ While there have been around 130 judgments or rulings in the ACT courts citing the HRA, the HRA has been decisive for the outcome only in very few of those cases.² As of the end of August 2010, there had been no declaration of incompatibility made by the ACT Supreme Court,³ and there appear to have been few (if any) cases in which the courts have adopted an interpretation of a statute under section 30 of the HRA that has been significantly at odds with the intention or expectations of the Legislative Assembly when it enacted a law (certainly as regards post-2004 laws).
- 9.3 Accordingly, our assessment of the options available for the inclusion of greater protection of ESCR in the HRA assumes that the experience to date will continue: a modest impact in the courts and an increased level of explicit consideration of such rights in the policy-making and legislative processes leading to improved policy, programs and legislation.

Options

- 9.4 In the following discussion, we proceed on the assumption that the options for increased protection of ESCR would involve amendment of the HRA in some form, that is, a legislative embodiment of ESCR rather than a constitutional level set of

¹ See ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety* (2009), available at: <http://acthra.anu.edu.au/ACTHRA%20project_final%20report.pdf>. See also Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009), chapter 4.

² See, eg, *R v YL* [2004] ACTSC 115, *Perovic v CW No CH 05/1046*, and *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84.

³ As of the end of August 2010 there had been only one declaration of inconsistency made under the Victorian Charter of Human Rights and Responsibilities: *R v Momcilovic* [2010] VSCA 50.

guarantees. Nevertheless, in considering the form and content of possible ESCR guarantees we draw on examples from other jurisdictions where the guarantees have constitutional status, in particular South Africa. In assessing these models, therefore, it is important to keep in mind that they exist in a system where the courts have the power to strike down legislation where it conflicts with the relevant human rights guarantee and where the legislature may not have the option (or may have only a very limited option) to override the court's decision. In the ACT, by contrast, the courts do not have the power under the HRA to strike down laws and the Legislative Assembly generally has the final say on issues of Territory law.

9.5 We have argued in earlier chapters that experience at the international level and in other jurisdictions, as well as in Australia, indicates that the core meaning of internationally recognised ESCR is well-established, that in principle ESCR can be the proper subject of judicial consideration and, in appropriate cases, enforcement by courts. The formulation of ESCR can be an important element in ensuring the protection of those rights by courts in ways that respect the constitutional division of powers and institutional competence. ESCR are thus not fundamentally different in character from civil and political rights (CPR).

9.6 The following paragraphs set out the range of options that are available to enhance the legal protection of ESCR in the ACT.

Legal status of ESCR guarantees

9.7 ESCR could be incorporated into ACT law:

- in similar terms to CPR;
- with some variation from the protection of CPR; or
- as non-justiciable legislative principles or standards.

9.8 **Incorporation of ESCR in similar terms to CPR** would essentially involve extending the following HRA mechanisms to ESCR:

- inclusion as a standard for statutory interpretation in the HRA, along with a power for the Supreme Court to issue a declaration of incompatibility if a Territory law cannot be interpreted consistently with ESCR;
- inclusion in HRA scrutiny processes, including the requirement for compatibility statements and in the mandate of the Legislative Assembly's scrutiny committee, the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee); and
- imposition of explicit duties on public authorities to (i) comply with ESCR in their activities; and (ii) to give ESCR proper consideration in administrative decision-making; and creation of a direct right of action against public authorities for failure to comply with these obligations.

9.9 **Incorporation of ESCR in ways that differ from CPR** could involve some but not all of the methods outlined in the preceding paragraph or it could involve the creation of additional mechanisms, for example:

- inclusion of a duty on the Territory to take reasonable measures to achieve the full realisation of ESCR progressively, along with a power for the Supreme Court to make a ‘declaration of incompatibility by omission’ following a finding that the Territory has failed to take reasonable measures; and/or
- provision for the ACT Human Rights Commission (ACT HRC) to receive individual complaints of violations of ESCR.

9.10 It could also involve legislative protection through other ACT laws, for example:

- inclusion of ESCR as a relevant standard for statutory interpretation in the *Legislation Act 2001* (ACT); the courts would be obliged to interpret laws in accordance with ESCR but, if that were not possible, then that would be the end of the matter; and/or
- inclusion, as an explicit ground for judicial review of administrative decisions, of a failure to take ESCR into account properly in administrative decision-making in the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (ADJR Act).

9.11 **Incorporation of ESCR as non-justiciable legislative principles or standards** could take the form of inclusion in the HRA of a statement of fundamental principles to guide the development of policy and law, such as are set out in the *Legislative Standards Act 1992* (Qld), or as Directive Principles of State Policy included in the Constitutions of Ireland and India (discussed in Chapter 7).

9.12 **Our recommendation:** We support the first option – incorporation of ESCR in the HRA on similar terms to CPR. Adopting this approach would underline the equal status of both sets of rights and highlight their interdependence, so that ESCR claims might then be raised directly rather than by indirect and sometimes strained reliance on CPR. We suggest that this option is compatible with our findings that the concerns about justiciability are exaggerated. Questions about the judicial enforcement of ESCR – in particular, the potential redistributive consequences of judicial findings of an infringement of ESCR – are capable of being properly addressed by the appropriate drafting and interpretation of ESCR. This could be achieved by making clear that implementation of ESCR involves both obligations of immediate entitlement and obligations of progressive realisation, and by ensuring that judicial adjudication of ESCR is carefully calibrated to correspond to these different obligations. Consideration could also be given to empowering the ACT HRC to receive individual complaints of ESCR violations.

9.13 Our view is that the courts of the ACT are very unlikely to give a declaratory, expressly non-justiciable statement of rights any significant effect. So far as the legislature and executive government are concerned, such a declaratory statement is likely to add

little to the current commitment of government and the applicability of international human rights treaties to the ACT Government, and would be less effective than the inclusion of an ESCR mandate as part of the legislative process, as is currently provided for under the HRA in relation to CPR.

9.14 We describe these aspects of our recommendation in more detail below. In each of them, the ESCR are to be accorded similar treatment to CPR in the HRA.

9.15 **ESCR as part of the interpretive mandate under section 30 of the HRA, along with a power for the Supreme Court to issue a declaration of incompatibility if Territory laws cannot be interpreted consistently with ESCR:** The formal position under existing rules of statutory interpretation is that Parliament is taken not to have intended to legislate in a manner inconsistent with Australia's international obligations.⁴ In practice examination of this consistency is relatively infrequent unless there is specific reference to a treaty in a statute or the statute incorporates some or all of the terms of a treaty;⁵ and the rule may only otherwise apply in cases of ambiguity. A direct instruction to the courts is likely to focus the mind of judges on that issue and lead to more detailed examination of the relevant international standards.

9.16 The National Human Rights Consultation Committee (NHRCC) appears to have supported such an interpretive provision in relation to ESCR, though its proposals in this regard are not entirely clear.⁶ In any event, the Commonwealth Government did not take up this suggestion in the Australian Human Rights Framework in relation to any category of rights or international treaties.

9.17 If section 30 of the HRA were extended to cover ESCR, an attempt would be required to be made to interpret a provision in a manner that is compatible with human rights. If that were not possible, then the interpretation stands, but the Supreme Court may make a declaration of incompatibility, a step which triggers a process ending in review by the Legislative Assembly. If one accepts that courts should be asked to interpret statutes consistently with ESCR where that is reasonably possible, then there seems to be no logical reason why the declaration of incompatibility procedure should not apply. Such a declaration does not affect the validity of the law, and ensures that the question is subject to a focused review by the Executive (with a fixed deadline) and then the Legislative Assembly.

9.18 **Inclusion of ESCR in HRA scrutiny processes, including the requirement for compatibility statements and in the mandate of the Legislative Assembly's scrutiny committee.** The Terms of Reference of the Standing Committee on Justice and

⁴ See, eg, *Jumbunna Coalmine No Liability v Victorian Coalminers Association* (1908) 6 CLR 309; *Polites v The Commonwealth* (1945) 70 CLR 60; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Coleman v Power* (2004) 220 CLR 1. For a review of the authorities, see *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100, 112 (Perry J); *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 (18 June 2009).

⁵ See also s 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth).

⁶ See Chapter 2.

Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee) currently require it (among other duties) to:

- (c) consider whether the clauses of bills introduced into the Assembly:
 - i. unduly trespass on personal rights and liberties;
 - ii. make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - iii. make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - iv. inappropriately delegate legislative powers; or
 - v. insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*....

9.19 Paragraph (c) represents what has been called a ‘traditional common law scrutiny mandate’. While in theory ‘personal rights and liberties’ could include ESCR rights as well as classical CPR, the experience in the ACT and in other Australian jurisdictions has been that CPR have been the major focus of scrutiny.⁷

9.20 Under paragraph (d), the focus is the ‘human rights’ protected under the HRA, which is largely CPR. This provision has led to the extensive and detailed consideration of CPR issues in the preparation of bills and their scrutiny by the Scrutiny Committee, other Assembly Committees, and in Assembly debates. There is sometimes also consideration of relevant ESCR, including international treaties, but this is sporadic. There is no doubt that the effect of the HRA and its inclusion of CPR in the mandate of the Scrutiny Committee has been to promote a sustained, systematic and focused examination of CPR issues.

9.21 Inclusion of ESCR in the mandate of existing Parliamentary committees or proposed new Parliamentary Committees has been supported by all the Australian inquiries that have endorsed enhanced protection for ESCR (ACT, Tasmania, Western Australia, and the National Human Rights Consultation). It was also adopted in the Commonwealth Government’s 2010 Australian Human Rights Framework, in the form of the proposed establishment of a Parliamentary Joint Committee on Human Rights, part of whose mandate will be to consider compatibility of bills and delegated legislation with Australia’s obligations under the principal UN human rights treaties to which Australia

⁷ See the discussion in Andrew Byrnes, ‘The protection of human rights in NSW through the Parliamentary process – a review of the recent performance of the NSW Parliament’s Legislation Review Committee’, paper presented at *Protecting Human Rights Conference 2009*, Sydney, 2 October 2009, [2009] UNSWLRS 43, available at < <http://law.bepress.com/unswwps/flrps09/art44/>>.

is party (including the International Covenant on Economic, Social and Cultural Rights (ICECSR) and other treaties that guarantee ESCR).⁸

- 9.22 The Joint Committee on Human Rights of the United Kingdom Parliament also has a mandate to consider ESCR-compatibility of bills and a range of other government actions, not under the UK HRA (other than in relation to the right to property and the right to education) but under its general mandate to inquire into human rights in the United Kingdom.⁹ However, the Committee has noted that there is no impediment to the inclusion of ESCR in the procedure provided for under the HRA and that:

an obligation on government to address compliance with these rights at an early stage, before the introduction of a Bill to Parliament, would significantly enhance protection of the Covenant rights. It would also assist Parliament, and the JCHR, in its scrutiny of legislation, and enrich parliamentary debate on matters affecting economic, social and cultural rights.¹⁰

- 9.23 In our view the explicit inclusion of ESCR in the Parliamentary scrutiny process – by applying the procedure laid down by the HRA for statements of compatibility and legislative scrutiny – would have real benefits. The exact content of the compatibility and scrutiny standard will depend on the rights selected and their formulation, discussed below.

- 9.24 **An explicit duty on public authorities to comply with ESCR and a direct right of action for failure to do so:** Currently, under section 40B(1)(a) of the HRA, it is unlawful for a public authority ‘to act in a way that is incompatible with a human right’. A failure to do so may give rise to a direct right of action under section 40C of the HRA. In our view the fact that ESCR are binding on the ACT Government as a matter of international law, and that the Government is politically committed to their implementation, should support the extension of this obligation to cover ESCR. The inclusion in the HRA in 2008 of an explicit duty on public authorities and of a direct action for failure to comply with this duty have had an important effect in raising awareness of the obligations of government in relation to the rights guaranteed under the HRA. There is every reason to assume the same in relation to ESCR.

- 9.25 **An explicit duty for public authorities to take account of ESCR in administrative decision-making:** At present, section 40B(1)(b) of the HRA provides that it is unlawful for a public authority ‘in making a decision, to fail to give proper consideration to a relevant human right’. In effect this makes explicit that the failure to take into account a relevant CPR is a ground for judicial review of an administrative decision (failure to take into account a relevant consideration). A similar provision might be made in relation to ESCR rights. It would have the advantage of ensuring that ESCR were

⁸ See Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), cl 7, in combination with the definition of ‘human rights’ in cl 3(1).

⁹ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, House of Lords Paper 183, House of Commons Paper 1188, Session 2003–04 (2004), [84].

¹⁰ Ibid [86].

appropriately taken into account in administrative decision-making and would mean that ESCR and CPR were treated as being on a par in this regard.

- 9.26 The NHRCC made such a recommendation in relation to ESCR, in the context of its recommendation that Commonwealth public authorities be obliged to act compatibly with CPR and that all human rights should be properly considered in the process of making administrative decisions.¹¹
- 9.27 Such a change would provide (or affirm) a basis on which judicial review of an administrative decision could be sought. In a sense, it provide a significant level of protection, since a decision made by a decision-maker who fails to take into account a relevant ESCR or to give it 'proper consideration' is reviewable, even if the decision reached does not in fact violate an ESCR or Australia's obligations under the ICESCR.¹² Nonetheless, in such a case it may be open to a court to deny relief on a discretionary basis, if there is in fact no violation of the right.
- 9.28 In our view, instead of inclusion as a ground for review in the ADJR Act, it would be preferable to extend the existing public authority obligations in the HRA to cover ESCR to ensure that ESCR are properly taken into account in administrative decision-making. We, however, agree with the ACT HRC's proposal that the ADJR Act should be amended to include a note referring to the human rights obligations of public authorities under section 40B of the HRA, as this would serve a useful reminder for legal practitioners.¹³
- 9.29 **Inclusion of a duty on the Territory to take reasonable measures to achieve ESCR progressively, along with a power for the Supreme Court to make a 'declaration of incompatibility by omission' following a finding that the Territory has failed to take reasonable measures:** In our view, the HRA should recognise two types of obligations in relation to the ESCR. The first are obligations that must be immediately realised, and the second are obligations that are subject to progressive realisation. The former involves obligations not to deprive individuals of their existing access to ESCR and to ensure non-discrimination in the implementation of ESCR. The latter involves obligations to adopt measures that are capable of facilitating the full realisation of ESCR over time.

¹¹ 'The Committee recommends that any federal Human Rights Act require Commonwealth public authorities to act in a manner compatible with human rights (*other than economic and social rights*) and to give proper consideration to relevant human rights (*including economic and social rights*) when making decisions', National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) ('NHRCC Report') 376 (emphasis added), Available at <www.humanrightsconsultation.gov.au>.

¹² In this respect it is different to the UK situation where 'the House of Lords has repeatedly asserted that under the UKHRA 'the question is ... whether there has actually been a violation of ... rights and not whether the decision-maker properly considered the question of whether ... rights would be violated or not': *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1426. See also *R (on the application of Begum) v Governors of Denbigh High School* [2007] 1 AC 100, 114–17. ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety prepared by the ACT Human Rights Act Research Project* (2009) 20 n 22. See also *Secretary of State for the Home Department v Nasser* [2010] 1 AC 1, 19 (Lord Hoffmann).

¹³ See ACT Human Rights Commission's Submission to the Five-Year Review of the HRA (Nov 2009) 28.

9.30 A duty of progressive realisation would require the Territory (a) to take reasonable measures (b) within its available resources (c) to progressively achieve the full realisation of ESCR. Those aspects of ESCR that are qualified on the ground of progressive realisation should be subject only to a reasonableness review by the courts. Specifically, judicial supervision of these aspects of ESCR should be informed by the following factors:

- the availability of resources;
- the latitude inherent in a duty to achieve the realisation of the ESCR progressively;
- whether the measures are capable of facilitating the realisation of the ESCR;
- whether the measures include emergency relief for those whose needs are urgent; and
- whether the measures have been effectively made known to the public, including whether affected groups were consulted in their formulation.

9.31 We suggest that the ACT Supreme Court should be empowered to make a ‘declaration of incompatibility by omission’ if satisfied that the Territory has failed to take reasonable measures to progressively achieve the full realisation of an ESCR. The purpose of the declaration is to draw to the attention of the Government and the Assembly a finding of failure or omission by the Court.

9.32 **Empowering the ACT Human Rights Commission to receive individual complaints of violations of ESCR (and CPR):** The ACT HRC is not presently empowered to receive and consider individual complaints against public authorities for violation of the rights in the HRA. As discussed in Chapter 7, institutions such as Human Rights Commissions can provide accessible and cost-effective avenues of redress for victims of human rights violations.

9.33 The Human Rights Commissioner has an audit power to review the effect of Territory laws, including the common law, on human rights.¹⁴ The Commission also has the function of handling complaints of discrimination on the grounds of protected attributes in specified areas of public life. It also handles complaints in relation to provision of disability services, health services, services for children or young people, and services for older persons. Complaints in relation to these matters would on many occasions involve human rights issues in substance, and each Commissioner is informed by human rights considerations in handling complaints. Nevertheless, cumulatively the complaint handling jurisdiction does not cover all the rights in the HRA, and the scope of complaints might go well beyond human rights issues.

9.34 In its submission to the five-year review of the HRA, the ACT HRC expressed the view that:

¹⁴ The Commissioner has used this power to investigate systemic human rights concerns relating to the youth detention centre and adult correctional facilities.

In principle, we support the recommendation that the Commission be given a complaint handling role under the HR Act to investigate and conciliate complaints regarding breaches of the HR Act by a public authority. This function would provide a more accessible forum for redress for victims of unlawful acts by public authorities compared to Supreme Court litigation. The details of this role, and the delineation of these complaints and other categories of complaints handled by the Children and Young People Commissioner and the Health Services/Disability and Community Services Commissioner, (and other complaints handling bodies such as the ACT Ombudsman, Victims of Crime Coordinator, Privacy Commissioner) would need to be considered in more detail. In the event that this recommendation were to be adopted, it would be appropriate to limit this jurisdiction to civil matters, and not to criminal proceedings that are sub-judice. If the HR Act were to be amended (as we recommend) to include economic social and cultural rights, further thought would need to be given to whether any complaints handling mechanism should extend to these rights, such as the right to housing.

- 9.35 We share the Commission's view that further consideration should be given to the option of enabling the Commission to handle individual complaints for HRA breaches. We consider that such a function could be a useful complement to the current mechanisms for protecting human rights in the ACT.

The selection of ESCR for inclusion

- 9.36 An important issue is what ESCR should be included in the HRA. Options include:

- all the ESCR contained in the ICESCR, other treaties to which Australia is party, and other international instruments that Australia has supported, for example, the UN Declaration on the Rights of Indigenous Peoples 2007;
- all the ESCR rights contained in the ICESCR; or
- a number of ESCR, selected on the basis of those considered to be of particular practical importance or whose content is considered to be clear and stable.

- 9.37 There are also a number of options for the formulation of ESCR. They could:

- be included in the form in which they are expressed in the relevant international instruments ; or
- be adapted to the ACT context.

- 9.38 **Inclusion of a broad list of ESCR:** We have noted earlier that Australia – including the ACT in its areas of constitutional responsibility – is bound to ensure the implementation of the obligations contained in all the international treaties to which Australia is party, including those which contain ESCR: the ICESCR, the International Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention of the Rights of Persons with Disabilities. We have also noted the interdependence and indivisibility of human rights, arguing that

this is more than a slogan and that the implementation and enjoyment of most CPR and ESCR is closely related in practice. We also consider that, given that both categories of rights are of equal status, that the starting-point should be to treat ESCR rights in a similar manner to CPR and to include all ESCR by which Australia is bound as a matter of treaty law. The importance of ESCR rights in the lives of most Australians also provides support for the inclusion of a broad rather than a narrow list of ESCR.

- 9.39 **Selection of a subset of ESCR:** On the other hand, it would be possible to select a number of ESCR for inclusion in the HRA, leaving open the possibility of expansion of the list of rights protected in subsequent reviews of the HRA. A number of jurisdictions and inquiries have preferred this route, with the rights to education, to an adequate standard of living (or more specifically housing), and the right to the health being the rights commonly chosen.¹⁵
- 9.40 **Difficulties in prioritising particular ESCR:** It is not entirely clear how one distinguishes between these and other rights contained in the ICECSR, and the case for limiting the choice of ESCR to be included to these three rights is not compelling. The National Human Rights Consultation, for example, argued that the rights to health, housing and education were of primary concern to members of the community, in particular those who are marginalised.¹⁶ Yet it is not clear that the right to social security, the right to employment (including access to fair conditions of employment) and the right to support for the family are any less important: the point is that, taken together, they provide holistic support for a dignified life that does not involve material or other deprivation.
- 9.41 The right of peoples to self-determination recognised in common article 1 of the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) raises distinct issues. The right is of particular relevance to Indigenous Australians. As noted in Chapter 4, the ACT Bill of Rights Consultative Committee recommended against inclusion of the right to self-determination and other specific Indigenous rights on the basis that this should be revisited in the five-year review of the HRA. This issue was not included in the terms of reference of the five year review and we would urge the ACT Government to consider this matter as soon as practicable. In any event, we note that current indicators suggest that the realisation of ESCR with respect to the ACT Indigenous community is comparatively more distant than for other groups and that ESCR will be of substantial benefit to the community.
- 9.42 **Justiciability as basis for selection of ESCR:** A further basis for selecting a sub-set of ESCR might be the claim that these are rights whose detailed content is well-known and which have in many contexts been found to be justiciable, at least in some of their aspects. That is certainly so with the rights to education, housing and health.
- 9.43 However, it is equally true of most of the other rights contained in the ICESCR. For example, the work-related rights guaranteed by articles 6, 7 and 8 of the ICESCR are

¹⁵ See the discussion in Chapter 7.

¹⁶ *NHRCC Report*, above n 11, 344, 365.

not only relatively detailed themselves, but draw on a considerable body of practice and jurisprudence in the context of the ILO conventions on which they are based or to which they refer. This practice includes adjudication by ILO quasi-judicial bodies, the European Committee of Social Rights of the European Social Charter and other regional bodies, as well as the case law of national courts which have applied these conventions as part of national law. The same is true of the right to social security, while the right to protection of the family is contained already in the ICCPR and the HRA.

- 9.44 The right to participate in cultural life is a right that has been given detailed content more recently, but even here the elaboration of the content of the right provided by the CESCR demonstrates that this broadly worded right has a detailed substantive content.
- 9.45 **Federalism as basis for selection of ESCR:** A further consideration that may be relevant in the choice of ESCR to include is the extent to which the ACT has the power or responsibility to ensure the protection of specific rights. As a matter of constitutional law and legislative preemption by the Commonwealth, or as a result of the way in which responsibilities are in fact exercised, the ACT may have little power to implement a right, or a relatively small or non-existent area in which to exercise that power. For example, the implementation of the right to social security is largely a matter governed by Commonwealth legislation and programs, and the rights of workers to organise and bargain collectively are also largely covered by Commonwealth law, much of which ‘covers the field’ and displaces State or Territory law. Indeed, the reason for the ACT Consultative Committee’s original exclusion of these rights from its 2003 proposals to include ESCR in the HRA was that these were essentially a matter for the Commonwealth.¹⁷
- 9.46 However, we do not consider this argument compelling. While the Commonwealth has primary legislative power in the area of employment relations and social security, there are still aspects of these rights that fall within the competence of the State and Territory governments. Given that future Commonwealth legislation will require to be scrutinised for its compliance with ESCR as set out in the human rights treaties to which Australia is party, there is much to be said for aligning ACT’s own legislative scrutiny with that framework.
- 9.47 A related issue is the impact of two other aspects of federalism on the operation of the HRA were it to include ESCR: the fact that many of the ACT’s programs in the field of ESCR may involve in essence the implementation of programs financed by the Commonwealth Government where the terms of the program have effectively been set by the Commonwealth without HRA considerations necessarily having been taken into account. The second type of scenario is where there is a cooperative scheme agreed to by Commonwealth, State and Territory governments (in particular through

¹⁷ The NHRCC argued that ‘it is the states and territories that are primarily responsible for delivery of services in these areas of greatest relevance to ESC rights’ as one justification for not including ESCR in a Commonwealth legislative bill of rights. *NHRCC Report*, above n 11, 365.

the Council of Australian Governments or the Standing Committee of Attorneys-General), where human rights considerations that the ACT and Victoria are required to take into account under their legislation may not have been fully considered and complied with in the formulation of the cooperative or harmonised scheme or legislation.

- 9.48 Both of these possibilities already exist under the current HRA and under the Victorian Charter, with the issue of the impact of cooperative schemes and their impact on human rights scrutiny in particular having given rise to some comment by Scrutiny Committees.¹⁸ To the extent that an arrangement with the Commonwealth requires the ACT Government to act in a manner that is not consistent with human rights, implementation of such an agreement would presumably not be subject to an order under the HRA against the government for failure to comply with its duty. In the case of ACT legislation giving effect to a cooperative scheme or model legislation, it is sometimes possible to adapt the model or uniform legislation to reflect ACT human rights requirements;¹⁹ if such adaptation is not possible, and the legislation remains inconsistent with the HRA, all that can be done is to seek a declaration of incompatibility.
- 9.49 **Our recommendation:** In our view there is much to be said for the inclusion of most of the rights contained in the ICESCR, rather than simply confining protection to a limited number of those rights.
- 9.50 In a number of jurisdictions the ICESCR itself has been directly incorporated into national law. However, these jurisdictions tend to be civil law jurisdictions in which it is more common to incorporate ratified treaties into national law, and this does not mean that every provision of a treaty so incorporated is directly applicable or enforceable by the courts.²⁰ Such incorporation is relatively rare in common law jurisdictions, especially for human rights treaties, although there are exceptions. Nepal, Cyprus and Hong Kong, for example, are all common law jurisdictions with incorporated human rights obligations.
- 9.51 A more common approach to incorporation is the inclusion in a statute of specific rights guarantees, sometimes replicating the words of relevant provisions of the treaty, at other times reformulating that language. Given that the HRA sets out CPR

¹⁸ See, eg, the discussion by the Victorian Parliament's Scrutiny of Acts and Regulations Committee of two cooperative schemes in the context of the National Gas (Victoria) Bill 2008 (*Alert Digest No. 8 of 2008*, 7-12) and the Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 (*Alert Digest No. 5 of 2009*, 5-7).

¹⁹ For an example of model national legislation that was adapted to reflect human rights requirements under ACT law, see ACT Legislative Assembly, *Explanatory Statement for the Australian Capital Territory Dangerous Goods (Road Transport) Bill 2009*, 2-3. Changes were made to proposed uniform terrorism laws in 2005 to render the legislation consistent with the HRA: Andrew Byrnes and Gabrielle McKinnon, 'The ACT Human Rights Act 2004 and the Commonwealth Anti-Terrorism Act (No 2) 2005: a triumph for federalism or a federal triumph?' in Miriam Gani and Pene Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E-press, 2008) 361, available at <http://epress.anu.edu.au/war_terror/pdf/ch16.pdf>.

²⁰ See Andrew Byrnes and Catherine Renshaw, 'Within the State' in Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), *International Human Rights Law* (Oxford University Press, 2010) 498, 501-505.

derived from the ICCPR (with some modifications), rather than enacting the ICCPR as such, it would be appropriate to do the same with the ESCR contained in the ICESCR.

- 9.52 We suggest that the formulation of rights contained in the ICESCR provides a useful starting-point for the manner in which ESCR could be expressed in the HRA. However, it may be appropriate to update some of the language in those formulations to reflect more modern formulations in more recent human rights treaties.
- 9.53 We also consider that some modification of the language may be appropriate in order to underline that certain aspects of those rights are justiciable. In other words, the HRA formulation could make it clear that certain aspects of the guaranteed rights are subject to judicial enforcement immediately, while other aspects are subject to the progressive realisation obligation. Those immediately enforceable elements of the right would also be subject to the usual reasonable limitations clause. This approach has been taken, for example by the South African Constitution, which provides in relation to certain rights that there is an immediately enforceable aspect of the right (eg access to emergency health treatment) while subjecting other aspects of the right only to a reasonableness review.
- 9.54 **Our recommendation:** It would not be appropriate simply to enact the ICESCR as part of ACT law. However, the formulation of the rights contained in the ICESCR should be used as the basis for the formulation of the ESCR to be protected, adapting the formulation to reflect immediately enforceable elements of the rights and local drafting practice. We set out in the Model Bill a suggested manner in which this might be done.

Constitutional issues

- 9.55 The issue of the constitutionality of certain aspects of the 'dialogue' model bills of rights has been much discussed, and was canvassed extensively before and during the National Human Rights Consultation in academic literature and other fora, in relation to a possible Commonwealth charter of rights.²¹ While the constitutional

²¹ Among the major discussions before and after the National Human Rights Consultation are: Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188; Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Human Rights' (2007) 12 *Deakin Law Review* 1; Stephanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 *Federal Law Review* 431; Pamela Tate SC, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 220, 231-238; Jim South, 'Campaign for a National Bill of Rights: Would "Declarations of Incompatibility" be Compatible with the Constitution' (2007) 9 *Constitutional Law and Policy Review* 2; See, Michael McHugh, 'A Human Rights Act, The Courts and the Constitution', presentation given at the Australian Human Rights Commission, 5 March 2009; Anne Twomey, Submission to the National Human Rights Consultation Committee, *National Human Rights Consultation*, 5 May 2009, 13-14; Australian Human Rights Commission, *Expert Roundtable on the Constitutional Validity of an Australian Human Rights Act* (2009), [6]; Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 *UNSWLJ* 60; H P Lee, 'A Federal Human Rights Act and the Reshaping of Australian Constitutional Law' (2010) 33 *University of New South Wales Law Journal* 88, 104-107; and Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33 *University of New South Wales Law Journal* 193, 217-221.

considerations may be somewhat different so far as Territory courts are concerned, it is important to consider those issues.

- 9.56 The principal issue was whether the conferral on a federal court of the power to make a declaration of incompatibility or inconsistency would involve the exercise of the judicial power of the Commonwealth or the adjudication of a ‘matter’ – something necessary to the constitutionality of the exercise of the power. This issue arises in particular from the specific provision in the ACT and Victorian statutes that such a declaration does not affect the validity of any law, or the rights and obligations of any person. The discussion was largely conducted with reference to a statute that protected CPR, but issues relating to ESCR were also given some attention.
- 9.57 The issue was addressed by the NHRCC, which relied on opinions requested from the Commonwealth Solicitor-General, Stephen Gageler SC, and then Senior Legal Adviser, Henry Burmester QC.²² Their view was that a declaration of incompatibility in relation to CPR contained in a legislative bill of rights along the lines of the Victorian Charter would be constitutional. Their Initial Opinion raised the issue of whether different issues might arise if ‘economic or social rights (such as a right to adequate housing)’ were to be included, as these rights might not be ‘susceptible to the application of “legal standards”’.²³ In response to this comment, the NHRCC sought further advice on the issue, asking that if ‘human rights’ were defined to include not only CPR rights but also the right to the enjoyment of just and favourable conditions of work, the right to adequate housing, the right to health and the right to education, it would constitute a valid exercise of judicial power for a court to ‘interpret a provision of Commonwealth legislation consistently with those rights or make a declaration of incompatibility’ or ‘determine that a public authority had acted incompatibly with those rights’. Messrs Gageler and Burmester expressed doubts as to whether conferral of a power on a federal court to adjudicate on the general rights contained in articles 7, 11, 12 and 13 of the ICESCR would be valid, given that these rights did not appear generally to provide ‘what would traditionally be regarded as judicially manageable standards’, though some provisions did provide such standards.²⁴
- 9.58 The Gageler/Burmester opinion on this issue has been criticised, on the basis that it failed to take into account the extensive international and comparative jurisprudence on these rights and the hundreds of cases in which such provision have been applied by national and international courts and adjudicative bodies.²⁵ We have

²² Stephen Gageler SC and Henry Burmester QC, *In the matter of constitutional issues concerning a charter of rights – Opinion*, SG No. 40 of 2009, 15 June 2009 [Initial Opinion]; and Stephen Gageler SC and Henry Burmester QC, *In the matter of constitutional issues concerning a charter of rights – Supplementary Opinion* [Supplementary Opinion], SG No. 68 of 2009, 7 September 2009. Both opinions are reproduced in Appendix E in *NHRCC Report*, above n 11.

²³ *Initial Opinion*, [30].

²⁴ *Supplementary Opinion*, [49].

²⁵ See Peter Hanks QC, D S Mortimer SC, K L Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic, Social and Cultural Rights: Memorandum of Advice*, 9 December 2009, available at <http://www.hrlrc.org.au/content/topics/esc-rights/esc-rights-legal-opinion-on-justiciability-of-esc-rights-in-an-australian-human-rights-act-dec-2009/>; and Byrnes, above n 21, 217-221.

described in Chapter 4 the detailed content of the rights in the ICESCR and have given references to some of the extensive case law in which these rights have been applied. In our view, the conclusion that in general the ESCR contained in the ICECSR do not provide judicially manageable standards fails to reflect current jurisprudence and practice at international and national levels. This is certainly the case in relation to those aspects of the rights that are immediately enforceable by the courts, and which are so identified in the Model Bill included in this report.

- 9.59 So far as the judicial supervision of the obligation to implement progressively certain aspects of ESCR is concerned – expressed in the Model Bill as the obligation to take ‘reasonable measures’ to achieve full realisation of the right -- we consider that the content of this obligation, while general in formulation, is also capable of scrutiny by the courts using judicially manageable standards. This conclusion is based, among other experience, on the practice of the South African Constitutional Court. The specific matters to be considered by the court are set out in the Model Bill, and they make it clear that the inquiry is not an open-ended one, but one which can be scrutinised by reference to criteria that are similar to those applied by courts in other contexts.
- 9.60 In sum, we consider that the HRA, if amended by the proposed Model Bill, would be constitutional in its operation with respect to ESCR.
- 9.61 The attached Model Bill, Explanatory Statement and Question & Answer memorandum provide detail on how our recommendations that the HRA be amended to include ESCR can be translated into legislation. The three hypothetical examples included at the end of the Q & A illustrate the effect that ESCR might have in daily life in the ACT.

A MODEL BILL

Model amendments of *Human Rights Act 2004*

1 Section 5

substitute

5 What are *human rights*?

In this Act:

human rights means—

- (a) the civil and political rights in part 3; and
- (b) the economic, social and cultural rights in part 3A.

2 Rights apart from this Act Section 7, new example 2A

insert

2A rights under the ICESCR not listed in this Act

3 New part 3A

insert

Part 3A Economic, social and cultural rights

Note 1 The primary source of these rights is the International Covenant on Economic, Social and Cultural Rights.

Note 2 Some economic, social and cultural rights may be subject to qualification on the ground of progressive realisation (see s 28A).

27A Right to adequate housing

- (1) Everyone has the right to have access to adequate housing.
- (2) Aspects of this right that are not subject to progressive realisation include the following:
 - (a) everyone is entitled to enjoy this right without discrimination;
 - (b) no-one may be unlawfully or arbitrarily evicted from his or her home;
 - (c) no-one may have an essential utility service to his or her home unlawfully or arbitrarily withdrawn.
- (3) In this section:

essential utility service means a utility service under the *Utilities Act 2000*.

27B Right to health, food, water and social security

- (1) Everyone has the right to have access to—
 - (a) appropriate health care services; and
 - (b) adequate food and water; and
 - (c) social security, including appropriate social assistance if necessary.

- (2) Everyone has the right to an environment that is not harmful to his or her health.
- (3) Aspects of these rights that are not subject to progressive realisation include the following:
 - (a) everyone is entitled to enjoy these rights without discrimination;
 - (b) no-one may be refused emergency medical treatment that is immediately necessary to save his or her life or prevent serious impairment.

27C Right to education

- (1) Every child has the right to have access to free, full-time education appropriate to his or her needs.
- (2) Everyone has the right to have access to further education and to vocational and continuing training.
- (3) Aspects of these rights that are not subject to progressive realisation include the following:
 - (a) everyone is entitled to enjoy these rights without discrimination;
 - (b) education must be free for every child of compulsory education age;
 - (c) to ensure the religious and moral education of a child in conformity with the convictions of the child's parents or guardian, the parents or guardian may choose schooling for the child which conforms to the minimum educational standards required under law.
- (3) In this section:
compulsory education age—see the *Education Act 2004*, section 9.

27D Right to work

- (1) Everyone has the right to work, including the right to choose his or her trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
- (2) Everyone has the right to the enjoyment of just and favourable conditions of work.
- (3) Aspects of these rights that are not subject to progressive realisation include the following:
 - (a) everyone is entitled to enjoy these rights without discrimination;
 - (b) everyone has the right to form or join a work-related organisation with the objective of protecting his or her economic or social interests.

27E Right to take part in cultural life

- (1) Everyone has the right to take part in cultural life.
- (2) Everyone has the right to enjoy the benefits of scientific progress and its applications.
- (3) Aspects of these rights that are not subject to progressive realisation include that everyone is entitled to enjoy these rights without discrimination.

Part 3B

Reasonable limits on human rights

4 New part 3C

insert

Part 3C

Reasonable measures to realise economic, social and cultural rights

28A Territory to progressively realise economic, social and cultural rights

- (1) The Territory must take reasonable measures, within its available resources, to progressively achieve the full realisation of economic, social and cultural rights.
- (2) In deciding whether reasonable measures have been taken, all relevant factors must be considered, including the following:
 - (a) the availability of the Territory's resources;
 - (b) whether the measures are likely to assist in progressively achieving the full realisation of the economic, social or cultural right;
 - (c) whether the measures include emergency relief for people whose needs are urgent;
 - (d) whether the public was appropriately consulted and effectively informed about the measures;
 - (e) that a wide range of measures may be taken to progressively achieve the full realisation of the economic, social or cultural right.
- (3) To the extent that aspects of economic, social and cultural rights are not subject to progressive realisation, those aspects may be subject only to the limits under section 28.

5 New sections 33A and 33B

insert

33A Declaration of incompatibility by omission

- (1) This section applies if—
 - (a) a proceeding is being heard by the Supreme Court; and
 - (b) an issue arises in the proceeding about whether the Territory has taken reasonable measures to progressively achieve the full realisation of an economic, social or cultural right.
- (2) In addition to the matters mentioned in section 28A, the Supreme Court must have regard to the principle that the executive and legislature have primary responsibility for decisions relating to the expenditure of public money of the Territory.

Note **Public money**, of the Territory, means revenues, loans and other money received by the Territory (see the Legislation Act, dictionary).
- (3) If the Supreme Court is satisfied that the Territory has failed to take reasonable measures to progressively achieve the full realisation of an economic, social or

cultural right, the court may declare that the Territory has failed to take reasonable measures (the ***declaration of incompatibility by omission***).

- (4) The declaration of incompatibility by omission does not affect—
 - (a) the validity, operation or enforcement of a law to which the declaration relates; or
 - (b) the validity, operation or enforcement of any measures taken by the Territory to which the declaration relates; or
 - (c) the rights or obligations of anyone.
- (5) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility by omission to the Attorney-General.

33B Attorney-General's action on receiving declaration of incompatibility by omission

- (1) This section applies if the Attorney-General receives a copy of a declaration of incompatibility by omission.
- (2) The Attorney-General must provide a copy the declaration of incompatibility by omission to the Minister responsible for the administration of the law or measures to which the declaration relates within 14 days after the day the Attorney-General receives the copy.
- (3) The responsible Minister must prepare a written response to the declaration of incompatibility by omission and present the response and a copy of the declaration to the Legislative Assembly not later than 6 months after the day the Minister receives the copy of the declaration.

6 Notice to Attorney-General and commission Section 34 (1) (a) (ii)

after

declaration of incompatibility

insert

or declaration of incompatibility by omission

7 New section 40B (2A)

insert

- (2A) A public authority will not have acted unlawfully or made an unlawful decision under subsection (1) only because the Territory has failed to take reasonable measures to progressively achieve the full realisation of an economic, social or cultural right.

8 New section 44

insert

44 Review of Act

- (1) The Attorney-General must review the operation of this Act and present a report of the review to the Legislative Assembly not later than 1 July 2016.

- (2) The review must consider whether other human rights should be included in this Act.
- (3) This section expires on 1 January 2017.

9 Schedule 1 heading

substitute

Schedule 1 ICCPR source of civil and political rights

10 New schedule 2

insert

Schedule 2 ICESCR source of economic, social and cultural rights

(see pt 3A)

column 1 item	column 2 section	column 3 description	column 4 ICESCR article
1	27A	right to housing	11 (1)
2	27B	right to health	12 (1)
3	27B	right to food and water	11 (1)
4	27B	right to social security	9
5	27C	right to education	13
6	27D	right to work	6 (1)
7	27D	right to join work-related organisations	8 (1) (a)
8	27E	right to take part in cultural life	15 (1)

11 Dictionary, note 2

insert

- public money

12 Dictionary, new definitions

insert

declaration of incompatibility by omission—see section 33A.

ICESCR means the International Covenant on Economic, Social and Cultural Rights.

Model amendments of *Annual Reports (Government Agencies) Act 2004*

[1.1] Section 5 (2) (a)

substitute

- (a) include a statement describing the measures taken by the administrative unit during the financial year to—
 - (i) respect, protect and promote human rights; and
 - (ii) progressively achieve the full realisation of economic, social and cultural rights; and

[1.2] Section 9 (3) (e), except note

substitute

- (e) for a public authority annual report—require the report to include a statement describing the measures taken by the public authority during the financial year to—
 - (i) respect, protect and promote human rights; and
 - (ii) progressively achieve the full realisation of economic, social and cultural rights; or

[1.3] Dictionary, new definitions

insert

economic, social and cultural rights means the economic, social and cultural rights mentioned in the *Human Rights Act 2004*, part 3A.

human rights—see the *Human Rights Act 2004*, section 5.

MODEL AMENDMENTS OF THE HRA

DRAFT EXPLANATORY STATEMENT

Overview

The Model Bill amends the *Human Rights Act 2004* to provide a framework for the protection and promotion of fundamental economic, social and cultural rights in the Territory. These amendments are based on the recognition that all human rights are universal, indivisible, interdependent and interrelated; and that civil and political rights as well as economic, social and cultural rights are integral to human freedom and dignity. It is intended for both categories of rights in the Act to be interpreted and given effect to in a manner that is mutually reinforcing.

The key elements of the framework include:

- Extending the ‘dialogue’ mechanisms in the *Human Rights Act 2004* for the protection of civil and political rights to apply also to economic, social and cultural rights, including:
 - The requirement for bills to be subject to pre-legislative scrutiny for consistency with human rights, including the requirement for compatibility statements for Government bills and the requirement for the Assembly’s Scrutiny Committee to report on the consistency of all bills with human rights;
 - The duty on public authorities to comply with human rights, and the right to bring proceedings in the Supreme Court for a failure to comply with this duty, for which any remedy except damages may be granted; and
 - The requirement for Territory laws to be interpreted consistently with human rights so far as it is possible to do so consistently with the law’s purpose, and conferral of the power on the Supreme Court to make a declaration of incompatibility if a Territory law cannot be interpreted consistently with human rights.
- Establishing a new duty on the Territory to take reasonable measures to progressively achieve the full realisation of economic, social and cultural rights, and conferral of a new power for the Supreme Court to make a ‘declaration of incompatibility by omission’ following a finding that the Territory has failed to take reasonable measures.
- The Bill also amends the *Annual Reports (Government Agencies) Act 2004* to require government departments and other public authorities to report on their implementation of economic, social and cultural rights in their annual reports.

The commencement date for these amendments should allow sufficient time for public authorities to prepare for the changes.

Detail

Clause 1 Section 5

Clause 1 replaces the existing definition of human rights in the *Human Rights Act 2004*. New section 5 extends the definition of human rights for the purposes of the Act to include the economic, social and cultural rights set out in new part 3A.

Clause 2 Rights apart from this Act Section 7, new example 2A

Clause 2 inserts a new example in 2A to section 7 to clarify that these amendments do not operate to limit an economic, social and cultural right not expressly recognised in this Bill.

Clause 3 New part 3A

Clause 3 inserts new Part 3A, which sets out the economic, social and cultural rights to be included in the *Human Rights Act 2004*.

Note 1 explains that the primary source of these rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Australia ratified without reservation in 1975. Schedule 2 provides a cross reference of Part 3A rights to the relevant article of the ICESCR.

Note 2 alerts readers that some of the rights in Part 3A may be subject to qualification on the ground of progressive realisation and refers readers to section 28A, which establishes the duty of progressive realisation.

The rights appear in a different order to that of the ICESCR but are broadly expressed in the same terms as the Covenant, except where adjustments to language were necessary to improve the drafting or to clarify the specific application of a right in the context of the Territory. In particular, the rights are formulated to identify aspects that are immediate entitlements (and which may be subject to reasonable limits under section 28 of the *Human Rights Act 2004*) and others that are subject to an obligation of progressive realisation (that is, the Territory must take reasonable measures, within available resources, to ensure the realisation of these aspects of the rights in question). The first are obligations that must be immediately realised and can be directly enforced, similar to the way in which obligations for the civil and political rights in Part 3 of the Act are enforced. The second are obligations which are subject to progressive realisation.

The first category broadly comprises obligations not to deprive individuals of their existing access to a relevant economic, social or cultural right and to ensure that individuals enjoy these rights without discrimination (consistent with section 8 of the *Human Rights Act 2004*, this includes not only non-discrimination in the application of laws, but non-discrimination in their content as well; see also UN Committee on Economic, Social and Cultural Rights, General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 2009). The second category of obligations involves obligations to adopt measures that are capable of facilitating the full realisation of the economic, social or cultural right over time. Both obligations are relevant to the legislature, executive and courts.

Some rights contained in the ICESCR have been omitted, either because their precise content lacks consensus (for example, rights in relation to intellectual property); or because the right is already recognised in the *Human Rights Act 2004* (for example, the right to protection of the family and children).

The *Human Rights Act 2004* recognises that international and comparative human rights law sources are important for the interpretation of human rights contained in the Act (section 31). These sources are equally relevant for interpreting the scope and application of a Part 3A right. Of particular importance is the jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights, and of other human rights treaty bodies. For the purposes of section 31, it is intended for the ICESCR to be included on the ACT Legislation Register. The *Convention on the Rights of Persons with Disabilities* is also relevant to economic, social and cultural rights, and should be included on the ACT Legislation Register under section 31.

New section 27A provides for the right to adequate housing.

Section 27A derives from article 11(1) of the ICESCR and is modelled on section 26 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*.

Sub-section (1) establishes a right to have access adequate housing. For housing to be adequate for the purposes of this right, relevant factors include security of tenure; availability of services and infrastructure; affordability; and habitability: see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment No. 4: The right to adequate housing, 1991. The right is expressed in terms of an ‘access’ right and is subject to the duty of progressive realisation.

Sub-section (2) specifies that certain aspects of the right are nevertheless capable of immediate realisation and may not be qualified on the ground of progressive realisation. These aspects are intended to operate as rights of direct entitlement and include the following:

- Paragraph 2(a) provides for the right of every person to have access to adequate housing without discrimination. While the guarantee of non-discrimination is already established in section 8 of the *Human Rights Act 2004*, its inclusion here serves to clarify that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation.
- Paragraph 2(b) establishes the right not to be unlawfully or arbitrarily evicted from one’s home. The right reflects the interpretation given to article 11(1) of the ICESCR relating to the prohibition against forced evictions (see, generally, the UN Committee on Economic, Social and Cultural Rights, General Comment 7: The right to adequate housing: forced evictions (art.11 (1)), 1997) and is modelled on s 26(3) of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*.
- Paragraph 2(c) establishes the right not to have an essential utility service to one’s home unlawfully or arbitrarily withdrawn. Sub-section (4) provides that the definition of an ‘essential utility service’ means a utility service defined in the *Utilities Act*

2000, covering electricity, gas, water and sewerage. This provision broadens article 11(1) of the ICESCR and reflects current ACT practice in relation to the provision of essential utilities.

New section 27B provides for the right to health, food, water and social security.

Section 27B derives from articles 9 (social security); 11(1) (food and water); and 12 (health and healthy environment) of the ICESCR and is modelled on sections 24 and 27 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*. These rights are grouped together in recognition of the inter-relatedness of the obligations involved in protecting these interests. For example, the right to health is not a right that can be effectively protected in isolation because of its broad links with other human rights.

Paragraph (1)(a) establishes a right to have access to appropriate health care services. This essentially means the right to access timely and appropriate health care, including basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities; the provision of essential drugs; and appropriate mental health treatment and care: see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (art.12), 2000.

Paragraph (1)(b) establishes a right to have access to adequate food and water. The right to adequate food has been interpreted to include physical and economic access to adequate food or means for its procurement and extends to obligations for ensuring food safety and food security; see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment 12: The right to adequate food (art. 11), 1999. The right to water has been interpreted to include access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use; and extends to the sustainable management of water supply; see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment 15: The right to water (arts. 11 and 12), 2002.

The right to have access to adequate food and water is also closely related to the ‘underlying determinants of health’, which are a part of the right to health as recognised in article 12 of the ICESCR. These are the basic requirements on which good health depends and include safe and potable water and adequate sanitation; and adequate supply of safe food, nutrition; see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (art. 12), 2000.

Paragraph (1)(c) establishes a right of access to social security, including appropriate social assistance if necessary. The purpose of this provision is to ensure that individuals who are unable to support themselves and their dependants have access to the basic necessities of life. The right to social security has been interpreted to cover a broad range of social security risks, including health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and family dependents; see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment 19: The right to social security, 2008. While the Commonwealth has primary legislative power for most of these aspects of social security, there are still areas of these rights that fall within the Territory’s competence, including, for example, those linked to housing and health services provision.

Sub-section (2) establishes a right to an environment that is not harmful to a person's health. It is intended for this right to be read in the context of the right to health in article 12 of the ICESCR, which 'embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, [including] safe and healthy working conditions, and a healthy environment'; see UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (art. 12), 2000, paras 4; see also para 36.

Sub-sections (1) and (2) are framed in terms of 'access' rights and are subject to the duty of progressive realisation.

Sub-section (3) specifies that certain aspects of these rights are nevertheless capable of immediate realisation and may not be qualified on the ground of progressive realisation. These aspects are intended to operate as rights of direct entitlement and include the following:

- Paragraph 3(a) provides for non-discrimination in the enjoyment of these rights. While the guarantee of non-discrimination is already established in section 8 of the *Human Rights Act 2004*, its inclusion here serves to clarify that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation.
- Paragraph 3(b) establishes the right to emergency medical treatment that is immediately necessary to save a person's life or to prevent serious impairment. This provision is modelled on section 27(3) of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*. The right is intended to apply only to medical emergencies and does not extend to the ongoing treatment of chronic illnesses; see, for example, *Soobramoney v. Minister of Health, Kwazulu-Natal*, 1998 (1) SA 765 (CC).

New section 27C provides for the right to education.

Section 27C is derived from article 13 of the ICESCR.

Sub-section (1) provides that every child has the right to have access to free and full-time education appropriate to his or her needs. The right applies to all children (ie individuals under the age of 18, see *Legislation Act 2001*, Dictionary definition) and is not restricted to children of compulsory school age (see note on para (b) below).

Sub-section (2) establishes the right to have access to further education and to vocational and continuing training. This right applies to everyone.

Sub-sections (1) and (2) are framed as 'access' rights and are subject to the duty of progressive realisation.

Sub-section (3) specifies that certain aspects of these rights are nevertheless capable of immediate realisation and may not be qualified on the ground of progressive realisation. These are intended to operate as rights of direct entitlement and include the following:

- Paragraph 3(a) provides for these rights to be enjoyed without discrimination. While the guarantee of non-discrimination is already established in section 8 of the *Human Rights Act 2004*, its inclusion here clarifies that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation.
- Paragraph 3(b) establishes the right to free education for every child who is of compulsory education age. Sub-section (4) refers the definition of ‘compulsory education age’ to section 9 of the *Education Act 2004* (ie children between the ages of 6 – 17, unless they complete Year 12 prior to turning 17).
- Paragraph 3(c) establishes the right of parents and guardians to ensure the religious and moral education of their children in conformity with their convictions. The right is subject to the minimum educational standards required under law and extends to the right of parents and guardians to set up their own educational institutions, which must nevertheless comply with the same standards as the rest of the educational system. This provision is derived from article 13 of the ICESCR and also reflects article 18(4) of the International Covenant on Civil and Political Rights.

New section 27D provides for the right to work.

Sub-section (1) establishes a right to work, including a person’s right to choose his or her trade, occupation or profession freely. This provision derives from article 6 of the ICESCR. The right to work is not an unconditional right to employment and the practice of a trade, occupation or profession may be regulated by law. Broadly stated, the right includes access to a system of employment; protection against forced employment; and protection against unfair deprivation of work: see, generally, UN Committee on Economic, Social and Cultural Rights, General Comment 18: The Right to work (art. 6), 2005.

Sub-section (2) establishes the right to enjoy just and favourable conditions of work. This provision derives from article 7 of the ICESCR and protects fair remuneration, safe and healthy working conditions, equal opportunity for advancement and rest, leisure, the reasonable limitation of working hours and periodic holidays with pay.

Sub-sections (1) and (2) are subject to the duty of progressive realisation.

Sub-section (3) specifies that certain aspects of these rights are nevertheless capable of immediate realisation and may not be qualified on the ground of progressive realisation. These are intended to operate as rights of direct entitlement and include the following:

- Paragraph 3(a) provides for the right of every person to enjoy these rights without discrimination. While the guarantee of non-discrimination is already established in section 8 of the *Human Rights Act 2004*, its inclusion here serves to clarify that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation.
- Paragraph 3(b) establishes the right to form or join a work-related organisation with the objective of protecting a person’s economic or social interests. This right extends to all professional, employer and employee associations and is not restricted to trade

unions. This provision derives from article 8 of the ICESCR and complements the right to freedom of association protected in section 15 of the *Human Rights Act 2004*.

New section 27E provides for the right to take part in cultural life.

Sub-section (1) establishes the right to take part in cultural life. This provision derives from article 15(1)(a) of the ICESCR and extends to participation in, and access to, cultural goods, institutions and activities. ‘Culture’ has been defined broadly in international law and extends to ways of life, oral and written literature, music, religion, rites and ceremonies, sport, food, clothing and the arts but it is not intended to include actions that are primarily of an industrial and commercial nature. The right to participate in cultural life is not absolute and reasonable restrictions can be placed upon culture, especially where cultural practices infringe upon other human rights.

Sub-section (2) establishes the right to enjoy the benefits of scientific progress and its applications. This provision derives from article 15(1)(b) of the ICESCR and involves obligations to conserve, develop and disseminate science, to respect scientific freedom and to encourage scientific cooperation. It includes obligations to ensure affordable access to the benefits of scientific progress and its applications for everyone.

Sub-sections (1) and (2) are subject to the duty of progressive realisation.

Sub-section (3) specifies that certain aspects of these rights are nevertheless capable of immediate realisation and may not be qualified on the ground of progressive realisation. This includes the right to enjoy these rights without discrimination (paragraph 3(a)). While the guarantee of non-discrimination is already established in section 8 of the *Human Rights Act 2004*, its inclusion here serves to clarify that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation.

New heading: Part 3B Reasonable limits on human rights

A new heading is created for section 28 of the Act, entitled ‘Part 3B Reasonable limits on human rights’. This amendment is consequential upon the changed order of the provisions following the creation of new part 3A.

Clause 4 New part 3C

Clause 4 inserts new Part 3C with the heading ‘Reasonable measures to realise economic, social and cultural rights’.

New section 28A introduces a duty of progressive realisation on the Territory in relation to the rights in Part 3A.

Sub-section 28(1) requires the Territory (a) ‘to take reasonable steps’ (b) ‘within its available resources’ (c) ‘to progressively achieve the full realisation’ of the designated economic, social and cultural rights. The duty is intended to take account of the reality of resource constraints in securing all aspects of Part 3A rights immediately and allows for their full realisation to be achieved progressively over time. The requirement to take *reasonable* measures also implicitly recognises that the rights in new Part 3A are to be given effect only

to the extent that the Territory has the legislative power or jurisdictional responsibility to ensure their protection.

Sub-section 28A(2) provides specific guidance on the considerations that must be taken into account when assessing whether the adopted measures are reasonable. These factors include:

- the availability of the Territory's resources;
- whether there is a rational connection between the measure and the objective of progressively realising the right;
- whether provision is made for emergency relief for those most in need;
- recognising that participatory processes are an important indicator of progress towards realising economic, social and cultural rights, whether provision is made for appropriate public consultation and information about the measure; and
- recognising the latitude inherently involved in implementing a duty of progressive realisation, the fact that a wide range of measures is possible to meet the Territory's obligations (ie, the availability of an alternative means of realising the right is not, of itself, an indication of unreasonableness).

This list of considerations draws on the principles that have emerged from the 'reasonableness review' case law of the South African Constitutional Court, in particular the decisions of *Soobramoney v. Minister of Health, Kwazulu-Natal*, 1998 (1) SA 765 (CC); *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC); and *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC). They also reflect but go beyond the model recommended by the UK Parliament's Joint Committee on Human Rights (JCHR) for the inclusion of economic, social and cultural rights in a British Bill of Rights: Joint Committee on Human Rights, *A Bill of Rights for the UK?*, House of Lords Paper 165, House of Commons Paper 150, Session 2007–08 (2008), Annex 1: Outline of a UK Bill of Rights and Freedoms.

Sub-section 28A(3) clarifies that any limitation of a Part 3A right that is not subject to qualification on the basis of the progressive realisation must be justified under section 28 of the *Human Rights Act 2004*. As set out in the clause notes above, aspects of Part 3A rights that are immediate entitlements include those comprising obligations not to deprive individuals of their existing access to economic, social and cultural rights and to ensure non-discrimination in their enjoyment.

Clause 5 New sections 33A and 33B

New section 33A

New section 33A provides the Supreme Court with the power to issue a declaration of incompatibility by omission if the Court determines that the Territory has not taken reasonable measures to progressively achieve the full realisation of an economic, social or cultural right.

Sub-section 33A(1) specifies that the power is only exercisable if the issue of whether the Territory has taken reasonable measures is raised for consideration during a proceeding being heard by the Court.

Sub-section 33A(2) is to be read together with new section 28A. It requires the Court to take into account all relevant factors when assessing whether reasonable measures have been taken, including those specifically set out in section 28A, but makes it clear that the Court's task is subject to the principle that the primary responsibility for decisions relating to the expenditure of the Territory's public money lies with the executive and legislative branches. This provision recognises, consistent with the separation of powers, that the judiciary is not institutionally equipped to decide how public money should be most effectively spent and reflects the intention to confine the court's role to an evaluation of the reasonableness of the measures adopted. Taken together, sub-section 33A(2) and section 28A aim to ensure that the judiciary's role in relation to rights that are progressively realised is limited to that which is appropriate in a parliamentary democracy, and that the Government and the Assembly remain the primary decision-makers for setting economic and social policy priorities. A similar approach has been endorsed by the South African Constitutional Court, see, for example, *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), at [41]; and *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC), at [37]-[38].

The note explains that 'public money of the Territory' is defined in the Dictionary to the *Legislation Act 2001* and means revenues, loans and other money received by the Territory.

Sub-section 33(3) provides that a declaration of incompatibility by omission does not affect the validity, operation or enforcement of any law or administrative measure to which the declaration relates; or the rights or obligations of anyone.

The purpose of the declaration is to draw to the attention of the Government and the Assembly a finding of incompatibility by omission by the Court. To achieve this purpose, sub-section 33(4) requires that if the Court makes a declaration of incompatibility by omission the registrar of the Court must promptly give a copy of the declaration to the Attorney-General.

New section 33B

New section 33B provides for the steps to be taken by the Attorney-General upon receiving a copy of the declaration of incompatibility by omission.

Sub-section 33B (2) requires the Attorney-General to provide the declaration to the Minister responsible for administering the law or measures to which the declaration relates within 14 days of receiving the declaration.

Sub-section 33B (3) requires the responsible Minister to then prepare a written response to the declaration and table it in the Assembly within six months of receiving the declaration.

These requirements are intended to ensure that appropriate action may be taken with respect to any declaration of incompatibility by omission that may be issued by the Supreme Court. However, there is no obligation on the Government or the Assembly to remedy the failure or omission in question. These provisions are designed to preserve the separation of powers by

enabling the courts to make a declaration without indicating how the failure or omission is to be resolved; that role is reserved for the elected branches in responding to the declaration.

Clause 6 Notice to Attorney-General and commission
Section 34 (1) (a) (ii)

Paragraph 34(1)(a)(ii) extends the existing notification requirements in section 34 to proceedings where the Supreme Court is considering issuing a declaration of incompatibility by omission.

This amendment extends the existing precondition to the exercise of a declaration power, namely that the Supreme Court is satisfied that notice of the issue has been given to the Attorney-General and the Human Rights Commission; and that they have been given a reasonable amount of time to decide whether or not to intervene (in accordance with their right to intervene under section 35 and section 36 respectively).

This amendment also ensures that the Supreme Court may continue to hear any part of the proceeding that is severable from those matters involving the application of the rights in new Part 3A. The Supreme Court may also without delay hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where it thinks it necessary in the interests of justice to do so.

Clause 7 New section 40B (2A)

New section 40B(2A) establishes an additional exception to the duty on public authorities to comply with human rights in sub-section 40B(1). It provides that a public authority will not have acted unlawfully or made an unlawful decision only because the Territory has failed to take reasonable measures to progressively realise an economic, social or cultural right. In such circumstances, it will be open to the Supreme Court to issue a declaration of incompatibility by omission.

The purpose of this amendment is to make clear that no individual remedy can attach to a finding that the Territory has failed to take reasonable steps to achieve the progressive realisation of an economic, social or cultural right. Instead, consistent with parliamentary democracy, the Supreme Court may use its declaration power to alert the Government of its failure or omission, and leave to the elected branches what is essentially a policy question of how best to achieve the right in question.

Clause 8 New section 44

New section 44 establishes an obligation upon the Attorney-General to review the operation of the *Human Rights Act 2004*, including whether it should be extended to include additional human rights. The Attorney-General is required to present a report to the Assembly by 1 July 2016. However, this does not preclude any review or proposals for amendment that might be made before that date.

The intention of this provision is to ensure that the *Human Rights Act 2004* remains effective and continues to reflect community values and aspirations in the Territory.

Clause 9 Schedule 1 heading

Clause 11 replaces the existing heading in Schedule 1 to clarify that the civil and political rights protected in Part 3 of the Act are derived from the International Covenant on Civil and Political Rights.

Clause 10 New schedule 2

New Schedule 2 provides a cross reference of the economic, social and cultural rights protected in new Part 3A to the relevant article of the ICESCR.

Clause 11 Dictionary, note 2

Clause 11 inserts a reference in note 2 to the definition of ‘public money’ which is contained in part 1 of the dictionary in the *Legislation Act 2001*.

Clause 12 Dictionary, new definitions

Clause 13 inserts a reference to the definition of a ‘declaration of incompatibility by omission’ in section 33A. It also clarifies that ‘ICESCR’ means the International Covenant on Economic, Social and Cultural Rights.

Schedule 1 Legislation amended

Part 1.1 Annual Reports (Government Agencies) Act 2004

Part 1.1 amends the *Annual Reports (Government Agencies) Act 2004* in the following way:

[1.1] includes in section 5(2)(a) an additional requirement that chief executive annual reports include a statement describing the measures taken by the administrative unit during the financial year to progressively achieve the full realisation of economic, social and cultural rights.

[1.2] extends section 9(3)(e) to also permit the making of an annual report direction to require that annual reports of public authorities include a statement describing the measures taken during the financial year to progressively achieve the full realisation of economic, social and cultural rights.

[1.3] includes the definition of a number of terms in the dictionary of the Act. It cross-references the definition of economic, social and cultural rights to the rights contained in new part 3A of the *Human Rights Act 2004*. It also inserts a reference to the definition of human rights in section 5 of the *Human Rights Act 2004*.

The intention of these amendments is to establish a process for monitoring and benchmarking the Territory’s progress towards achieving the realisation of economic, social and cultural rights.

MODEL AMENDMENTS OF THE HRA

QUESTIONS AND ANSWERS

1. Which ESCR will be included in the HRA and have any been omitted?
2. Why were these ESCR selected?
3. How can the Territory be responsible for implementing ESCR when many of them deal with responsibilities that are shared with the Commonwealth, or are the subject of national cooperative schemes?
4. How will ESCR be implemented?
5. Will the courts have a role in protecting ESCR?
6. Who can bring a claim for breach of an ESCR and can a court award damages?
7. What is a declaration of incompatibility by omission?
8. Will a right of action for ESCR lead to a flood of litigation against public authorities?
9. How can a court enforce ESCR when these are essentially questions of socio-economic policy that are for the elected branches?
10. Will including ESCR in the HRA place an increased burden on budgetary decision-making processes?
11. What are the benefits of including ESCR in the HRA?
12. The formal protection ESCR may be useful in countries that have experienced widespread inequality and poverty, like South Africa. By comparison, the ACT is a wealthy community with functioning democratic institutions that can address these issues. Why do we need to protect ESCR here in the ACT?

1. Which ESCR will be included in the HRA and have any been omitted?

- The Model Bill will amend the *Human Rights Act 2004* (HRA) to include the following economic, social and cultural rights (ESCR):
 - Right to adequate housing;
 - Right health, food, water and social security;
 - Right to education;
 - Right to work; and
 - Right to take part in cultural life.
- These rights are derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Australia ratified without reservation in 1975.
- The Model Bill does not include the following ICESCR rights:
 - The right of peoples to self-determination because this requires further consultation and discussion;
 - The right to intellectual property because of a lack of consensus internationally on its precise meaning; and
 - The right to protection of the family and children because a similar right derived from the International Covenant on Civil and Political Rights (ICCPR) is already recognised in section 11 of the HRA.

2. Why were these ESCR selected?

- Findings from the ANU workshops on the rights to housing, education and health, and the JACS ESCR forum (on the environment and utilities) supported their inclusion.
- The ACT is bound to ensure the implementation of obligations contained in the ICESCR, as well as other human rights treaties that contain ESCR to which Australia is party.
- The Commonwealth Government's 2010 Australian Human Rights Framework includes the establishment of a Parliamentary Joint Committee on Human Rights, which will require Commonwealth legislation to be scrutinised for compliance with ESCR. It is therefore prudent to align the ACT's own human rights framework with that standard.
- The overall case for limiting the choice of ESCR is not compelling. There is no reason why social security or employment rights are any less important than the rights to housing, education or health. Taken together, they provide holistic support for a dignified life that does not involve material or other deprivation.
- The importance of ESCR values to the community supports the inclusion of a broad rather than a narrow list of ESCR.

3. How can the Territory be responsible for implementing ESCR when many of them deal with responsibilities that are shared with the Commonwealth, or are the subject of national cooperative schemes?

- The Territory would be responsible for ESCR only in so far as it has the legislative power or jurisdictional responsibility to ensure their protection.
- The requirement to take *reasonable* measures implicitly recognises that the ESCR included in the HRA can be given effect only to the extent that the Territory is able to take action.
- While the Commonwealth may have primary legislative power in some areas relating to ESCR, there are still aspects of these rights that fall within the competence of the Territory to implement.
- To the extent that an arrangement with the Commonwealth requires a public authority to act in a manner that is not consistent with ESCR, implementation of such an agreement would not be subject to an order under the HRA against the authority for failure to comply with its duty.
- In the case of ACT legislation giving effect to a cooperative scheme or model legislation, it is sometimes possible to adapt the model or uniform legislation to reflect ACT human rights requirements. These circumstances already exist under the current HRA.

4. How will ESCR be implemented?

- ESCR will be implemented in essentially the same way as civil and political rights (CPR) in the HRA. In particular, the following mechanisms will apply equally to ESCR:
 - the requirement for *compatibility statements* by the Attorney-General to inform the Assembly that Government bills have been assessed for HRA consistency;
 - the requirement for the *Scrutiny of Bills Committee* to report to the Assembly on HRA issues raised by Government and Private bills;
 - the *reasonable limits provision*, which permits justifiable and proportionate limits on HRA rights;
 - benchmarking the interpretation of rights, including any limits on rights, against *international human rights standards*;
 - *public authority obligations* to act in a way that is compatible with human rights; and to give proper consideration to human rights when making decisions;
 - the *Human Rights Commissioner's mandate* to review the impact of laws on human rights, monitor the operation of the HRA and provide human rights education; and
 - the *annual reports obligation* for government departments and public authorities to report on the steps taken to implement the HRA.

5. Will the courts have a role in protecting ESCR?

- Yes. Similar to CPR, a person who complains that a public authority has acted in a way that is incompatible with ESCR can bring an action before the Supreme Court.
- A person who is a victim of an unlawful act by a public authority may also rely on ESCR as part of any other proceeding in a court or tribunal.
- The Court will look to see if the interference with the ESCR in question was reasonable and justified. If the answer is no, the Court will find that the public authority has acted unlawfully.
- However, the Court may not find that a public authority has acted unlawfully if it has acted to give effect to a Territory law which requires it to act incompatibly with ESCR or where a Territory law cannot be interpreted in a way which is compatible with ESCR. In these circumstances, it will be open for the Supreme Court to issue a declaration of incompatibility with regard to the law in question.
- The Court may also not find that a public authority has acted unlawfully only because of a failure to take reasonable measures to progressively realise the ESCR in question. In these circumstances, it will be open for the Supreme Court to issue a declaration of incompatibility by omission.
- In addition, public authorities will not be liable where they are obliged to act in accordance with a Commonwealth law that is incompatible with ESCR.

6. Who can bring a claim for breach of an ESCR and can a court award damages?

- A person who claims that a public authority has acted or proposes to act in a way that is incompatible with ESCR may bring proceedings but only if the person is or would be a victim of the unlawful act.
 - A 'victim' is a person who is directly affected or is at risk of being directly affected by the act of the public authority. A victim must be a natural person. Corporations cannot be victims.
 - Relatives may bring proceedings on behalf of a victim where a complaint is made about that person's death, or if the victim (a child, for example) lacks the capacity to bring them in their own name.
- The Model Bill does not give a court any new remedial powers.
- A court may grant any remedy which is already within its power. For example, it may quash the unlawful decision; or order a public authority not to take a proposed action which, if taken, would be unlawful. But it may not award damages for a breach of an ESCR.

7. What is a declaration of incompatibility by omission?

- The Supreme Court will have the power to issue a declaration of incompatibility by omission if it determines that the Territory has not taken reasonable measures to progressively realise a relevant ESCR.
- Any declaration that the Court might make is consequent upon determining a legal question arising during a proceeding between parties in dispute.
- Before making a declaration, the Court must first seek to interpret the law, policy or programme in question compatibly with ESCR.
- The declaration does not affect the validity, operation or enforcement of the relevant law, policy or programme; or the rights or obligations of anyone. Its purpose is to draw to the attention of the Government and the Assembly an issue of incompatibility.

8. Will a right of action for ESCR lead to a flood of litigation against public authorities?

- There have been only two reported instances of the direct right of action being used since it commenced in 2009. There is no reason to think that it will be employed more frequently in relation to ESCR.
- The experience of the HRA so far is that applicants will generally attach a human rights ground to other actions.

9. How can a court enforce ESCR when these are essentially questions of socio-economic policy that are for the elected branches?

- Decisions about resource allocation and the setting of socio-economic priorities must rightly remain a question for the Government and the Assembly. However, this does not mean that ESCR cannot be the proper subject of judicial consideration and in certain cases, enforcement by courts.
- The Model Bill sets out an appropriate role for the courts that fully respects the constitutional separation of powers and institutional competence.
- The ESCR are carefully defined to ensure that there will not be a risk of judicial interference with judgements made by the elected branches about priority setting and resource allocation.
- The precise formulation of the ESCR identifies aspects that are immediate entitlements which would be enforceable in the same way as CPR and others that are subject to an obligation of progressive realisation. The former includes obligations of non-discrimination and not depriving individuals of their access to ESCR. The latter involves obligations to adopt measures that are capable of facilitating the realisation of the ESCR.
- Any omission or failure in relation to the progressive realisation aspects of the ESCR will only be subject to a reasonableness review, that is, it must be justified with reference to the Territory's duty (a) 'to take reasonable steps' (b) 'within its available resources' (c) 'to progressively achieve the full realisation' of the right.
- Judicial scrutiny is limited to evaluating the *reasonableness* of the measures adopted and the Court is provided with specific guidance on the factors that must be considered. The Court's task does not extend to second-guessing the priorities set by the democratically elected branches of government.
- The federal division of powers was not considered to represent an objection to the inclusion of ESCR in the HRA.
- The judicial management of ESCR was not considered to represent an objection to the inclusion of these rights in the HRA.

10. Will including ESCR in the HRA place an increased burden on budgetary decision-making processes?

- No. Under the HRA, public authorities must give proper consideration to human rights when making decisions (s 40B). The Executive and government departments are therefore already required to take account of human rights when making decisions about the allocation of resources.
- The virtue of including ESCR in the HRA is to foster a human rights culture in government decision-making processes.
- Express consideration of ESCR in budgetary decision-making processes will simply provide a clearer framework to ground the government's commitment to provide services in areas such as health care, housing, education or the environment.
- The ACT community is entitled to expect that public authorities respect their human rights, including ESCR, in the way in which public money is spent and resources are allocated.

11. What are the benefits of including ESCR in the HRA?

- Bringing ACT law into line with community expectations.
- Providing a coherent and normative system that is capable of identifying and addressing gaps that are unacceptable in an open and democratic society.
- Ensuring integration into the political system in a way that is not dependent on all its temporary vagaries.
- Improving accountability and process for human rights protection in executive, legislative and judicial spheres.
- Providing a legitimate voice for disadvantaged groups in the community.
- Allowing the ACT to once again take the lead in human rights reform and stimulate similar change in other jurisdictions.

12. The formal protection ESCR may be useful in countries that have experienced widespread inequality and poverty, like South Africa. By comparison, the ACT is a wealthy community with functioning democratic institutions that can address these issues. Why do we need to protect ESCR here in the ACT?

- There is no doubt that ESCR may be very useful for countries such as South Africa, which is a developing country that has widespread poverty and material deprivation emerging from decades of repression, injustice and maldistribution of wealth.
- But there are a number of reasons for introducing ESCR guarantees in the ACT:
 - ESCR are as important as CPR, which have been included in the HRA.
 - Despite the relative average wealth of ACT residents, there is deprivation in the ACT community in a number of areas covered by ESCR guarantees.
 - The inclusion of ESCR will assist in ensuring that in the development of laws, policies and programs, attention is given to the position of those who are marginalised, and is likely to lead to better, more effectively designed policies and programs.
 - In fact there is a greater possibility of protecting ESCR in the ACT than in poorer jurisdictions, such as South Africa.
 - Guaranteeing ESCR in legislative form also provides protection against going backwards in the protection of ESCR, by ensuring that the Government focuses on the potentially adverse consequences of proposed new laws and policies.
- The South African example is relevant to the ACT because it shows that ESCR are capable of judicial review and that, with appropriate safeguards, they can be enforced without judicial overreaching.
- South Africa may be the most well-known example, but it is not the only country where there are legal guarantees of ESCR in constitutional or legislative bills of rights. In fact, many developed countries comparable to Australia – for example, many members of the European Union – have constitutional or other forms of legal protection of ESCR, and in many of these, ESCR are directly enforceable before the courts.

HYPOTHETICAL EXAMPLES OF THE OPERATION OF ESCR IN THE HRA

Example 1 – The right to housing

Several government agencies, including ACT Health, ACT Planning and Land Authority and ACT Policing, are concerned about overcrowding in a two-bedroom house in central Canberra. After investigating, they find that 22 people, including men, women and children, are all living in the house, with access to one toilet between them. They determine that the house must be closed as a matter of urgency.

The Government wishes to close the house as soon as possible. However, it finds that some tenants refuse to leave. It has asked for advice to ensure that its next steps are compatible with the HRA.

The habitability and safety of this house would certainly be a matter for concern under a legislated right to housing in the HRA, and the Government would be justified in taking immediate action to resolve the situation. As international and comparative jurisprudence makes clear, the right to housing includes a requirement that housing be accessible, affordable, available, and of sufficient quality. It will probably be clear that conditions of severe overcrowding do not provide adequate essential facilities, and for adequate protection from environmental and health hazards.

That the Government must act does not, however, settle the issue. The right to housing (as well as other rights in the HRA) would also require that any evictions take place in a fair and non-arbitrary manner. It may be that, in accordance with the way in which the right to housing is understood in international human rights law, the Government is required to undertake a meaningful engagement with the present tenants, in order to arrive at a resolution that befits the gravity of their situation. It may, for instance, organise to provide them with reasonable alternative accommodation before the closure of the housing and their departure from it. The right to housing jurisprudence and commentary suggests that the alternative accommodation should probably be located, if possible, in areas which allow continued access to employment, healthcare, education, and social facilities. It may become relevant to attempt to provide these tenants with some continuity with the communities in which they were residing. Alternatively, the Government may arrange to intervene on the behalf of such tenants in relations with the landlord.

Outside of the immediate situation, this incident may suggest that longer-term housing and planning strategies should also be reviewed in the ACT. It may suggest a market failure or a lack of sufficient support for vulnerable people within the ACT housing market.

There are of course many other relevant laws in relation to housing which will come into play, such as the *Residential Tenancies Act 1997* (ACT) and the *Housing Assistance Act 1997* (ACT). The Canberra Social Plan and the ACT Affordable Housing Action Plan will also be relevant, as will health and planning laws.

Example 2 – The right to education

The *Education Act 2004* (ACT) requires public education in the ACT to be free; however, it does not extend this entitlement to people holding temporary visas (section 26(2)).

A 2005 policy of the ACT Department of Education and Training also requires fees to be charged for temporary residents studying in ACT schools (ACT Department of Education, School Policy: Enrolment of Temporary Visa Holders - Charging Policy (2005)).

The policy allows exemptions to be granted to particular categories of temporary residents, such as dependants of diplomats, exchange students, or refugees. Other temporary visa holders have to seek an exemption on a case-by-case basis.

A 10 year old asylum seeker, B, is refused an exemption on fees at a government school in the ACT. He brings a claim in the ACT Supreme Court. What impact does a legislated right to education have on his claim?

A legislated right to education in the HRA would protect everyone's entitlement to enjoy the right without discrimination, and, like the Education Act, would require all children of compulsory school-age (6-17) to be provided with free education. It would also establish an obligation on the Territory to progressively realise the right to education, such as providing access for all children to free and full-time education appropriate to his or her needs. There would be a duty on public authorities to comply, as far as possible, with this requirement, under section 40B HRA.

B would have standing to make a claim under section 40C HRA. A court would in turn look at the compatibility of the Department's decision and its policy with the right to education. It may find that the Department's conduct is not unlawful because it is either expressly required by section 26(2) of the Education Act or because section 26(2) cannot be interpreted consistently with the right to education under section 30 HRA. If so, it may issue a declaration of incompatibility under section 32 HRA.

In making these determinations, the court would first be required to examine the compatibility of section 26(2) of the Education Act with the right to education in the HRA. It would be required to test the reasonableness of the Department's exemption policy. It might conclude that the exclusion of asylum seeker children is or is not a justifiable limitation on the right to education in accordance with section 28 HRA. Section 28 stipulates that a limitation will only be reasonable if it is proportionate to a legitimate objective. In making this determination, the court would probably examine the justification provided in the Commonwealth policy that international students should pay the full cost of their education and that the Australian community should not be called upon to make a direct financial contribution. It might assess the advice of the ACT Treasury about the financial impact of educating temporary visa holders in ACT government schools. It might examine whether the ACT policy is dependent upon a funding arrangement between the Commonwealth and the ACT. It might take into consideration that the policy does not operate on the basis of blanket exclusion and that it includes a process for internal review. It might also examine the Department's rationale for differentiating between asylum seekers and refugees for the purpose of this policy, and assess whether this is consistent with the right to non-discrimination in section 8 HRA. It will be assisted in these considerations by international and comparative jurisprudence, which stresses the importance of education for children and the burden placed on them if they are excluded from it.

Example 3 – The right to health

Public hospitals in the ACT provide renal dialysis to a range of patients in need of ongoing treatment. However, the provision of dialysis is hugely expensive, and the hospitals are unable to provide dialysis immediately to all who ask for it. The hospitals have a process of rationing this treatment according to a formula, which includes the patient's eligibility for a kidney transplant, and the likelihood that renal dialysis will provide a cure, rather than simply treatment.

One person, M, suffering from a range of chronic health problems, applies for renal dialysis. Due to the extent of his other health problems, the hospital determines that he is not eligible for a kidney transplant, or ongoing renal treatment. M argues that this policy contravenes his right to health. How will this argument be assessed?

A legislated right to health in the HRA would prohibit the refusal of medical treatment that is immediately necessary to save a person's life or prevent serious impairment. M would probably argue that renal dialysis is a life-saving intervention and cannot be refused under any circumstances. However, in assessing this argument, the distinction should be drawn between life-saving and life-prolonging treatment. International and comparative commentary suggests that decision-makers are very careful to preserve the category of 'emergency, life-saving care' for the situations of immediate and urgent accidents or incidents. As M's need for renal dialysis represents an ongoing state of affairs, and treatment will not cure the underlying health problem, his situation would be unlikely to be understood in emergency terms.

M may then argue that the refusal of treatment is contrary to the progressive realisation of his right to have access to health care. It would be necessary to examine the reasonableness of the hospital's stance. It is clear that the difficult decisions of rationing renal dialysis may be justified by a hospital process which is guided by serious ethical considerations. It may be necessary to examine these justifications, but given that every individual health allocation must be weighed against the provision of health collectively, M's argument would be unlikely to be successful.

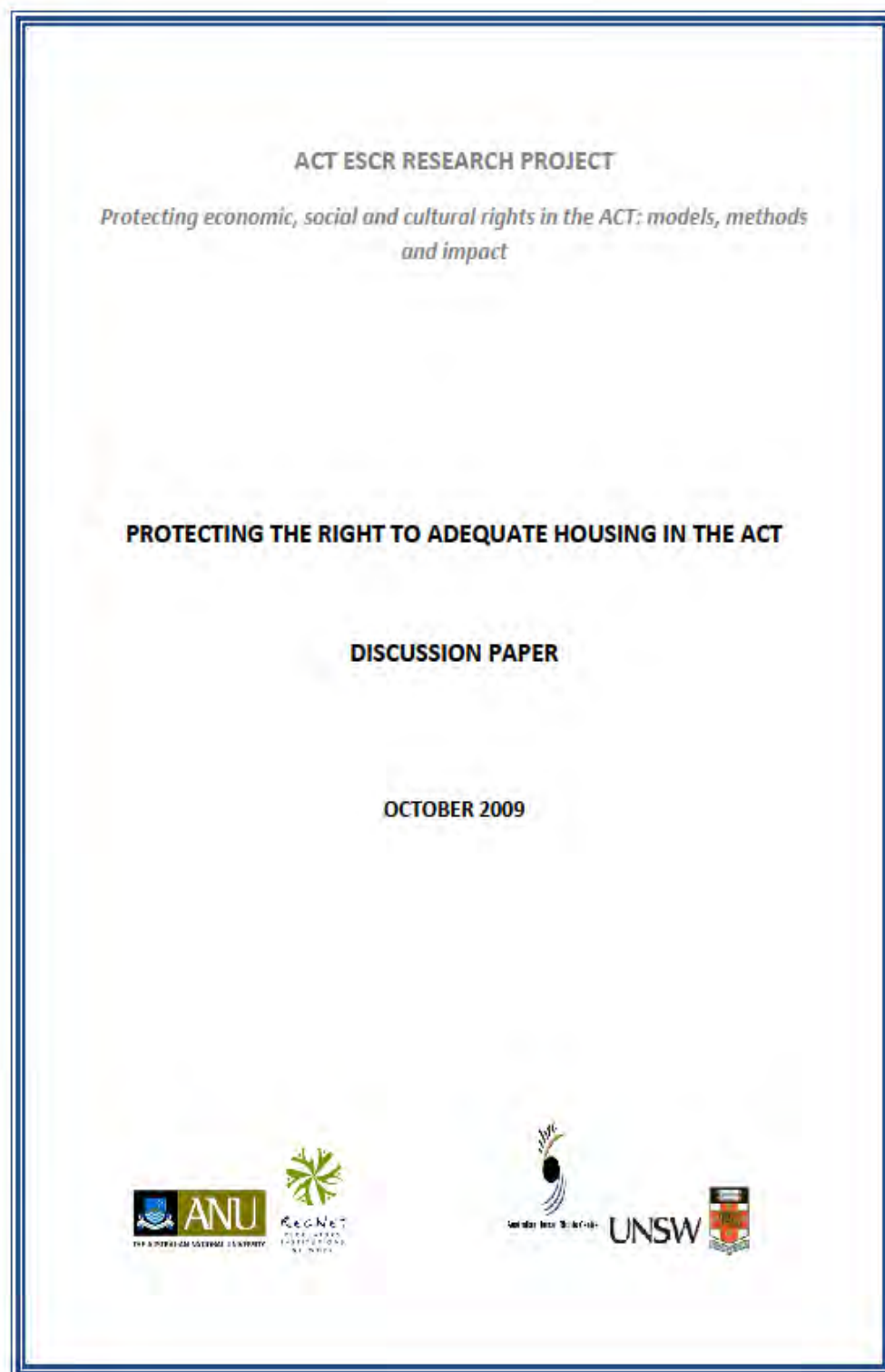
If the decision-making process described here was undertaken at the legislative stage (ie on passing appropriation legislation for hospital budgets) or at a policy stage (ie in determining a policy for health care rationing) similar questions of reasonableness and resources would be raised, and the considerable international and comparative jurisprudence on the right to health care would assist. This jurisprudence would probably be more helpful to such a decision-maker than, for instance, the prohibition on cruel and degrading treatment, or the right to life, which M would also likely raise if no ESCR is available under the HRA.

It should be noted that, should a situation such as M's reach the courts, the HRA would not enable a court to substitute its own moral considerations with that of health care professionals, once it had established that a procedure for ethical rationing is in effect. In other words, the court's role would be limited to testing the reasonableness of the rationing criteria – ie whether the allocation system was rational, non-discriminatory, etc; the court's role would not involve making determinations about whether a particular individual should receive treatment over another. As courts have invariably acknowledged, hospitals must

constantly deal with the challenges of securing the maximum health advantages to the maximum number of patients. With new developments in expensive biotechnology, such challenges will only increase. While M's individual dilemma is not removed by the HRA, a rights-based process ensures that such considerations are articulated, aired and assessed.

APPENDIX 1: Workshop discussion papers

Working paper 1: Right to housing



ACT ESCR RESEARCH PROJECT

*Protecting economic, social and cultural rights in the ACT: models, methods
and impact*

PROTECTING THE RIGHT TO ADEQUATE HOUSING IN THE ACT

DISCUSSION PAPER

OCTOBER 2009



UNSW



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The ACT Economic, Social and Cultural Rights Research Project

Protecting Economic, Social and Cultural Rights in the ACT: models, methods and impact (the 'ACT ESCR Project') is a joint project between the ANU (together with the Australian Human Rights Centre at UNSW) and the ACT Department of Justice and Community Safety, supported by a Linkage grant from the Australian Research Council. The project is assessing whether the ACT *Human Rights Act 2004* (HRA) should be amended to include economic, social and cultural rights.

The project is being undertaken at the request of the ACT government, following the government's 12-month review of the HRA, which recommended that the issue of ESCR be revisited as part of the five-year review of the legislation.

The project will culminate in a report to the ACT government next year. It is anticipated that the project will generate the first comprehensive Australian study of the potential impact of the protection of ESCR in a legislative bill of rights. Its framework objectives include:

- Assessing the adequacy of the protection of ESCR in the ACT;
- Examining the possible mechanisms for the protection of ESCR and the appropriateness of those mechanisms in the ACT; and
- Analysing the potential impact of the enforcement of ESCR and the effect on policy-making, service delivery and decision-making processes in the ACT.

INTRODUCTION

The aim of this paper is to explain the concept of the right to adequate housing and to assess whether it is being adequately protected in the ACT. It is designed both to provide information and to prompt discussion at the expert workshop.

The paper begins with a brief description of the constituent elements of the right to adequate housing as developed in international human rights law and in other jurisdictions. It then examines the extent to which housing rights are presently protected in the ACT through the current framework of the HRA and in other ACT laws and administrative measures. Finally, the paper outlines some of the potential benefits of recognising an explicit right to adequate housing in the ACT.

THE RIGHT TO ADEQUATE HOUSING

The right to adequate housing is recognised as a distinct human right in international law. It is enshrined in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights as an aspect of the 'right to an adequate living',¹ as well as in various other international² and regional³ human rights instruments. It is also expressly protected in various domestic jurisdictions,⁴ perhaps most notably in the South African Bill of Rights, which provides that:⁵

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹ See Article 11(1) of the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR). Australia has been a party to the ICESCR since 1975 and is required to submit periodic reports to the UN Committee on Economic, Social and Cultural Rights on the measures taken to give effect to its obligations under the Covenant. Its latest report, as part of '[Australia's Common Core Document, incorporating Australia's Fifth Report under the ICCPR and Fourth Report under the ICESCR](#)', was submitted in July 2007 (see p 136-140 for measures relating to the right to adequate housing).

² See, for example, the [Convention on the Rights of the Child](#), article 27(3); the [International Convention on the Elimination of All Forms of Racial Discrimination](#), article 5(e)(iii); the [Convention on the Elimination of All Forms of Discrimination against Women](#), article 14(2)(h); and the [Convention on the Rights of Persons with Disabilities](#), article 28. Australia is a party to all these conventions.

³ See, for example, the [Revised European Social Charter](#), article 31; and the [Charter of the Organization of American States](#), article 31(k).

⁴ For example, Belgium, Portugal, Spain, the Netherlands, Finland, Switzerland, India, Argentina, and Russia.

⁵ [Constitution of South Africa](#), section 26.

Key elements

In broad terms, the right to adequate housing is viewed as a 'right to live somewhere in security, peace and dignity'.⁶ This wide aspiration has been interpreted to comprise several key elements:

- (a) Adequacy of housing: For housing to be considered adequate for the purposes of the right to adequate housing, the following factors should be taken into account:⁷

Factor	Meaning
Legal security of tenure	Adequacy requires a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.
Availability of services and infrastructure	Adequacy requires the availability of certain essential facilities, including safe drinking water, heating and lighting, and sanitation.
Affordability	Adequacy requires that housing costs do not threaten or compromise the satisfaction of other basic needs.
Habitability	Adequacy requires sufficient space and protection from environmental, health and structural hazards.
Accessibility	Adequacy requires that housing policies and laws must give priority to the ability of disadvantaged groups to access housing.
Location	Adequacy requires that housing must be in a location which allows access to employment, healthcare, education and social facilities.
Cultural adequacy	Adequacy requires that housing construction, building materials and supporting policies must appropriately enable the expression of cultural identity and diversity of housing.

- (b) Protection against forced eviction: The right to adequate housing requires public authorities to refrain from forced evictions. The government must also take reasonable measures to ensure that third parties, such as private landlords, do not carry out forced evictions. Forced eviction means 'the permanent or temporary removal of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.⁸

⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: [The right to adequate housing](#), at [7]. The Committee publishes General Comments that clarify the content of rights and obligations in the ICESCR.

⁷ UN CESCR, General Comment No. 4: [The right to adequate housing](#), at [8].

⁸ UN CESCR, General Comment 7: [The right to adequate housing: forced evictions](#), at [3].

- (c) Prohibition against discrimination: The right to adequate housing must be implemented in accordance with the principles of equality and non-discrimination.⁹ Discrimination is generally understood to mean both direct¹⁰ and indirect¹¹ discrimination. As a minimum, housing policies and laws must refrain from directly or indirectly discriminating without reasonable justification, but positive measures may also be required to ensure equality in the effective enjoyment of housing rights.
- (d) Emergency housing for vulnerable groups: The right to adequate housing has not been interpreted to be a right to housing on demand but it does require that reasonable provision is made for vulnerable individuals to access emergency accommodation as temporary relief.¹²

Key obligations

What it does not require

The right to adequate housing does not mean that the government will be required to:¹³

- Build housing for the entire population;
- Provide housing free of charge to all who request it;
- Fulfil all aspects of this right immediately;
- Exclusively entrust itself or the unregulated market to secure this right for all; or
- Implement this right in exactly the same way in all circumstances or locations.

What it does require

'Progressive realisation within available resources'

The right to adequate housing does mean that the government will be subject to the obligation of 'progressive realisation', which takes account of the reality of resource

⁹ UN CESCR, General Comment No. 4: [The right to adequate housing](#), at [6].

¹⁰ Direct discrimination occurs where a person is subject to less favourable treatment than others in a similar situation because of a particular characteristic – for example, if a housing provider allocates a better-quality house to a white applicant than to an indigenous applicant on the basis of race.

¹¹ Indirect discrimination occurs where apparently neutral criteria are applied to make decisions but which have a disproportionate impact on persons who share a particular characteristic – for example, eligibility criteria for public housing that requires an applicant to have resided in the local area for a particular number of years would have a disproportionate impact on new migrants.

¹² See, for example, [Government of South Africa v Grootboom](#) [2000] ZACC 19, where the government was held to have breached the right to housing because its policies had made no provision to facilitate access to emergency accommodation for people whose homes had been demolished. See also [Port Elizabeth Municipality v. Various Occupiers](#) [2004] ZACC 7, where the Court refused to order the eviction of people from undeveloped public lands because reasonable provision had not been made for alternative accommodation.

¹³ See, for example, [Report of the Special Rapporteur on adequate housing](#), (Mission to Australia, 2002) at [26].

constraints.¹⁴ In other words, the obligation on government is to take reasonable measures within its available resources to secure the right to adequate housing progressively.

'Immediate obligations'

The obligation to progressively realise the right to adequate housing within available resources, however, does not mean that the government can defer indefinitely efforts towards securing the right. The government is under an immediate obligation to take 'deliberate, concrete and targeted' steps towards progressively realising this right,¹⁵ including by:

- Developing a coordinated and comprehensive housing strategy, which addresses structural problems and prioritises the needs of the most vulnerable groups in the community;¹⁶
- Putting in place mechanisms to ensure that progress towards securing the right to adequate housing can be monitored effectively;¹⁷ and
- Ensuring that vulnerable groups are able to effectively participate in decision-making processes and the development of policies which affect them.¹⁸

In addition to the immediate obligation to 'take steps', the following elements of the right to adequate housing have also been interpreted to give rise to obligations of immediate effect:¹⁹

- Protection against forced eviction;²⁰
- Prohibition against discrimination;²¹ and
- Access to emergency accommodation for vulnerable groups.²²

¹⁴ UN CESCR, General Comment 3: [The nature of States parties' obligations](#), at [9].

¹⁵ UN CESCR, General Comment 3: [The nature of States parties' obligations](#), at [2].

¹⁶ UN CESCR, General Comment 7: [The right to adequate housing: forced evictions](#), at [12]. See also [Report of the Special Rapporteur on adequate housing](#), (Mission to Australia, 2002) at [127].

¹⁷ UN CESCR, General Comment 7: [The right to adequate housing: forced evictions](#), at [13].

¹⁸ See [Report of the Special Rapporteur on adequate housing](#), (Mission to Australia, 2002) at [127].

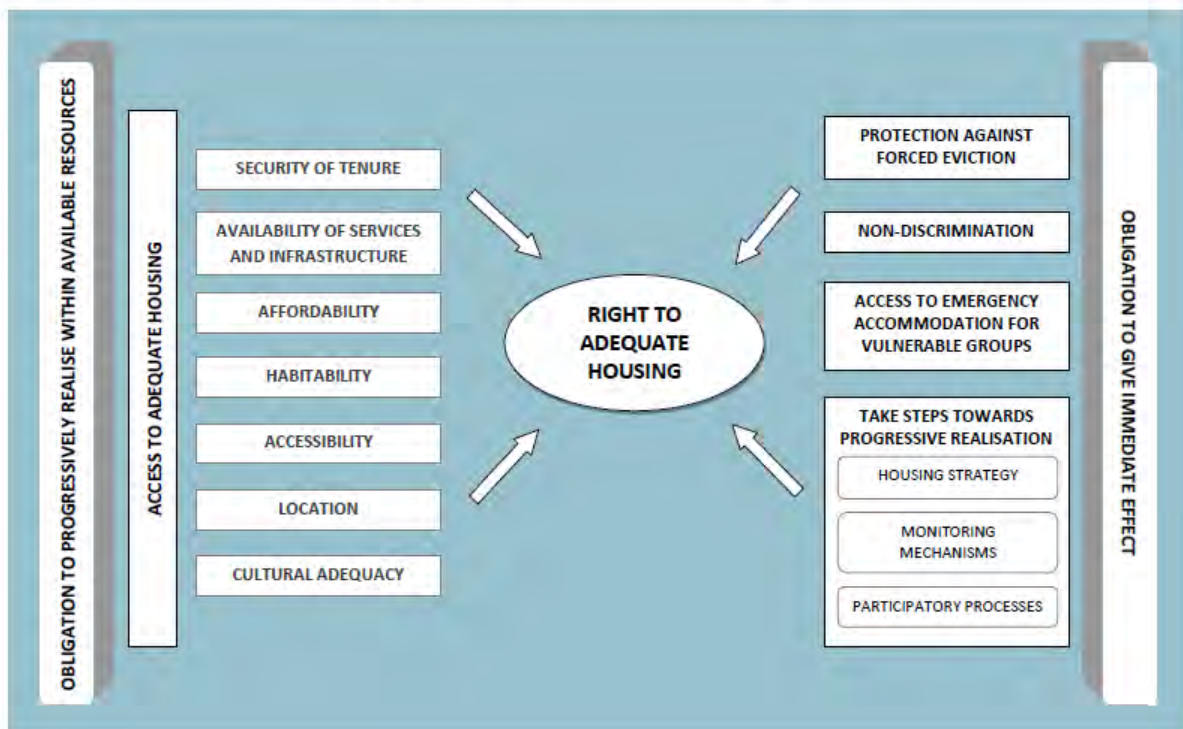
¹⁹ Discussed above at [5-6].

²⁰ UN CESCR, General Comment 7: [The right to adequate housing: forced evictions](#), at [8].

²¹ UN CESCR, General Comment 3: [The nature of States parties' obligations](#), at [2].

²² See, for example, [Government of South Africa v Grootboom](#) [2000] ZACC 19.

THE RIGHT TO ADEQUATE HOUSING: KEY ELEMENTS AND OBLIGATIONS



Reasonable limitations

In line with the general understanding that few rights – whether civil and political or economic, social and cultural – are absolute, human rights law recognises that limits may be placed on the right to adequate housing, where they can be demonstrably justified as reasonable and proportionate to a legitimate objective.²³

Remedies

The UN Committee on Economic, Social and Cultural Rights views many component elements of the right to adequate housing as being consistent with the provision of domestic legal remedies in the following areas:²⁴

- legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
- legal procedures seeking compensation following an illegal eviction;

²³ For example, Article 4 of the ICESCR provides that the rights guaranteed may be subjected 'only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

²⁴ UN CESCR, General Comment No. 4: [The right to adequate housing](#), at [17].

- complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination;
- allegations of any form of discrimination in the allocation and availability of access to housing; and
- complaints against landlords concerning unhealthy or inadequate housing conditions.

INDIRECT PROTECTION UNDER THE HRA

Several of the civil and political rights protected in the ACT under the HRA can be – and have been with varying degrees of success – interpreted to give indirect effect to some of the key elements of the right to adequate housing.

The following examples are drawn from the ACT and other comparable human rights jurisdictions.²⁵ The way in which equivalent rights are interpreted in comparable jurisdictions is relevant because s 31 of the HRA invites decision-makers to benchmark the HRA against established human rights standards. The ACT Supreme Court recently confirmed the importance of comparative jurisprudence for interpreting the rights in the HRA:

[T]he process of identification of the content of rights enshrined in the Human Rights Act is properly to be assisted by the jurisprudence of international courts and tribunals, which consider the same or relevantly similar rights expressed in instruments similar to the Human Rights Act.²⁶

(i) Right to equality and non-discrimination:²⁷

The right to equality and non-discrimination has particular significance for the protection of housing rights as it protects both formal and substantive equality, and prohibits discrimination in law or in practice in any area regulated by public authorities.

The grounds of prohibited discrimination include race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status. Decisions by the UN Human Rights Committee suggest that a

²⁵ The text of the cases referred to in this section can be accessed through [AUSTLIJ](#) and [WORLDII](#).

²⁶ *Imran Hakimi v Legal Aid Commission (ACT); The ACT (Intervener)* [2009] ACTSC 48 (12 May 2009), at [71].

²⁷ HRA, s 8.

clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. The UK House of Lords has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of homelessness.²⁸

ACT examples

In litigation

In the cases of *Peters v ACT Housing* [2006] ACTRRT 6 and *Kiternas v Watts* [2006] ACTRTT 4 tenancy advocates used s 8 HRA to argue that public tenants (on rebated rent) should be compensated to the same extent as private tenants (on market rent) for the failure of the respective landlords to carry out essential repairs and maintenance to ensure that the properties were habitable. The tribunal noted that:

People pay rent at different levels. A low income tenant may pay only one tenth of the rent that a high income tenant pays. If the respective landlords were to commit identical breaches, harassing and threatening each tenant in the same way, resulting in comparable levels of distress to the tenants, then on a percentage rent reduction basis one tenant would obtain 10 times the compensation of the other! Welfare Rights and Legal Centre urged upon the Tribunal that this result would constitute a breach of section 8 of the Human Rights Act... which was in itself a basis for avoiding such a construction (Kiternas, at [90(c)])

[Source: Welfare Rights and Legal Centre]

Examples from other jurisdictions

In *Morris v Westminster City Council* [2005] EWCA Civ 1184 the Court of Appeal for England and Wales confirmed that provisions of the UK *Housing Act 1996*, which differentiated between dependent children who were British citizens and those who were subject to immigration control when determining whether an applicant had a priority need for housing violated the (equivalent) right to non-discrimination in article 14 of the European Convention on Human Rights (ECHR), in conjunction with the right to respect for one's private and family life and home in article 8 of the Convention.

In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 the House of Lords held that tenancy succession laws which differentiated between the surviving partner of a same-sex partnership and the surviving partner of a heterosexual partnership breached the right to non-discrimination in the ECHR in conjunction with article 8.

²⁸ *R (on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63.

(ii) Right to life:²⁹

The right to life includes the obligation for authorities to take appropriate steps to protect the life of those within its jurisdiction. Given its fundamental nature, the Human Rights Committee has stated that the right to life ‘cannot be properly understood in a restrictive manner’.³⁰ Thus the Committee has viewed issues such as homelessness, for example, as falling within its scope.³¹

Examples from other jurisdictions

The Indian Supreme Court has adopted a similarly broad interpretation of the right to life, finding that it extends to, among other things, the right to adequate housing and shelter.³²

Other national courts have however displayed a more cautious approach, particularly where there are social policy and budgetary implications. For example, in *Lawson v. Housing New Zealand* (1997) 4 LRC 369 a decision to charge public housing tenants market rental rates was challenged on the grounds that it breached the right to life (among other things). The NZ High Court acknowledged that it ‘should have regard to international human rights norms in interpreting and applying the [NZ Bill of Rights Act 1990], and ... a liberal interpretative approach is warranted’, but considered that it was ‘ultimately constrained by the wording of s 8 itself’.³³

Similarly, in *Gosselin v Quebec (Attorney General)* [2002] SCC 84 the Supreme Court of Canada concluded that the right to life under s 7 of the Canadian Charter did not extend to a positive obligation on the State to guarantee adequate living standards, citing ‘insufficient evidence’ to support adopting such a ‘novel’ interpretation. The Court was, however, careful to leave the door open to future challenges, saying that ‘it would be a mistake to regard [the right to life] as frozen or its content as having been exhaustively defined in previous cases’.³⁴

Habitability

The right to life has been relevant in cases concerning the requirements of health and safety in terms of the ‘habitability’ of adequate housing. For example, in *Oneryildiz v Turkey* [2004] ECHR 657 (judgment of 30 November 2004) the European Court of Human Rights held that the Turkish authorities were in breach of the right to life when several people living next to a State-authorised rubbish tip were killed in a methane explosion after the authorities had failed to take adequate steps to address the known risks.

The UN Human Rights Committee has also suggested that the location of disposal sites for radioactive waste near residential areas could give rise to a legitimate claim under the right to life: *EHP v Canada* (Communication No 67/1980, 27 October 1982).

²⁹ HRA, s 9.

³⁰ Human Rights Committee, [General Comment No 6](#) (1982), para 5.

³¹ Concluding Observations of the Human Rights Committee: [Canada](#) (1999), para 12.

³² See, for example, *Olga Tellis & other v Bombay Municipal Corporation and others* [1985] INSC 155, (1985) 3 SCC 545; *Shanti Star Builders v Narayan K Totame* (1990) 1 SCC 520; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & others* [1996] INSC 1300, (1997) 11 SCC 121.

(iii) Prohibition against inhuman and degrading treatment:³⁵

The positive obligation for authorities to prevent inhuman and degrading treatment may in certain circumstances also be relevant to housing and living conditions.

Examples from other jurisdictions

In *R v Secretary for the Home Department, ex parte Adam, Limbuela and Tesema* [2005] UKHL 66 the House of Lords found that the withdrawal of public housing and support to the applicants who were asylum seekers with no alternative sources of support was so severe a deprivation that it amounted to inhuman and degrading treatment.

In *Moldovan and Others v. Romania* (judgment No. 2 of 12 July 2005) the European Court of Human Rights found that the applicants' very poor and cramped living conditions, following the destruction of their homes by state agents, constituted inhuman and degrading treatment.

(iv) Protection of family and children:³⁶

The right of families and children to be afforded protection under the HRA has been regularly raised in the context of housing matters in the ACT.

ACT examples

In litigation

In *Commissioner for Housing for the ACT v Allan* [2007] ACTRTT 21 the Commissioner sought the eviction of a public housing tenant on the basis of her ex-partner's violent behaviour. Under the tenancy agreement the tenant was deemed personally responsible for the conduct of visitors who were on the premises with her permission, and she was therefore found to have breached her tenancy agreement. The Tribunal however urged the Commissioner to consent to her transfer to another property on the condition that the tenant kept her location secret from her ex-partner. ACT Care and Protection (part of the Department of Disability Housing and Community Services) also advocated for a transfer, to avoid the children being taken into care. The Tribunal did not have the power to order the Commissioner to make a transfer but noted that '*... government tenants are people with human rights, which the Commissioner is obliged to respect. In relation to the potential threat to the tenant's children and to her role as their mother, section 11 [HRA] is to the point...*'

³³ But note that s 8 NZBORA is worded negatively in that it confers a right *not* to be deprived of life 'except on such grounds as are established by law and are consistent with the principles of fundamental justice', rather than a right *to* life.

³⁴ per McLachlin CJ, at [82].

³⁵ HRA, s 10(1).

³⁶ HRA, s 11.

In general advocacy [Source: Welfare Rights and Legal Centre]

'Following the death of her mother, a client found that she and her children were not entitled to remain in her mother's public housing property, as the lease had been in her mother's name. The children had always lived in the house and had close contacts with the local community, especially their school and nearby friends. The mother was in contact with care and protection and there was a risk the children would be taken from her care if she did not have a home for them. In submissions to Housing ACT, we raised the right to protection of family life and asked that the client be granted a lease over the property. The lease was granted'

'A client was homeless and temporarily living with one of her children in a caravan without electricity in NSW. The other child was living with her grandmother in the ACT in order to attend school. Our client was not eligible for priority housing as she had outstanding debts to Housing ACT from a previous tenancy. We used the right to protection of family life to advocate for flexibility in applying the allocation rules. The client was housed as a priority candidate prior to arranging repayments on the debts.'

(v) Right to respect for one's private and family life, and one's home:³⁷

The right to privacy, which encompasses protection against unjustifiable interference with access, occupation and peaceful enjoyment of the home, has been invoked both here in the ACT and in overseas jurisdictions in relation to housing matters.

ACT examples

In litigation

'This case concerned a dispute between our client and her lessor, a community housing provider (CHP), about the required standard of cleanliness in a rented property. The CHP had conducted the maximum number of property inspections permitted by law in a 12 month period. Our client refused permission for a further inspection arguing that such requirements constituted an unacceptable level of interference in her daily life. The CHP then applied to the ACAT seeking access to the property for a further inspection. We wrote to the CHP and asked them to reconsider their request for access based on the right to privacy (s 8 HRA). The CHP refused to reconsider its decision and expressed the view that the HRA did not apply as it was only intended for use in the event of 'serious breaches' of human rights. We argued before the Tribunal that the CHP had failed to consider the effect of its request for access on our client's right to privacy. We also argued that the Tribunal was a public authority for the purposes of the HRA and was consequently bound to consider the right to privacy when considering whether to permit a further inspection. The Tribunal refused the CHP's request for access.'

In general advocacy:

'A vulnerable female client who was being harassed by a neighbour sought Housing ACT's permission

³⁷ HRA, s 12.

to modify her rented property. The submission to Housing ACT relied on, amongst other things, the client's right to privacy as the modification was intended to prevent the neighbour from observing and photographing the tenant in her yard. Permission to make the modifications was granted.'

[Source: Welfare Rights and Legal Centre]

Examples from other jurisdictions

Security of tenure/Prohibition against forced eviction

In an significant ruling, the European Court of Human Rights held that the eviction of a public housing tenant in circumstances where the public authority had not ensured that the tenant had adequate alternative housing constituted a disproportionate limitation of the tenant's right to privacy: *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007)

The right to privacy has also been interpreted to give a degree of security of tenure to people living in informal settlements, including those occupying land or property, depending on the existence of sufficient and continuous links with the place that could point to the existence of a home. See, for example, the judgments of the European Court of Human Rights in *Buckley v UK* [1996] ECHR 39 (judgment of 25 September 1996); *Chapman v UK* [2001] ECHR 43 (judgment of 18 January 2001) and *Beard v UK* [2001] ECHR 42 (judgment of 18 January 2001).

Nolan v MBF Investments Pty Ltd [2009] VSC 244 : The Supreme Court of Victoria recently confirmed that human rights, and in particular the right to privacy, are relevant interest that must be considered when a mortgagee sells a property to satisfy a debt. This is especially relevant where a debt is secured over a family home.

Habitability

The right to privacy has been relevant in cases concerning the requirements of health and safety in terms of the 'habitability' of adequate housing.

- For example, in *López Ostra v Spain* [1994] ECHR 46 (judgment of 9 December 1994) the European Court of Human Rights held that the failure of authorities to regulate a privately-owned tannery plant that caused environmental pollution breached the residents' right to privacy as it affected their well-being and prevented them from enjoying their homes, even if it did not seriously endanger their health.
- Similarly, in *Fadeyeva v Russia* [2005] ECHR 376 (judgment of 9 June 2005) the European Court of Human Rights held that the authorities had violated the residents' right to privacy because it had failed to design or apply effective measures to protect residents from excessive toxic emissions generated by a steel plant.

Accessibility for disadvantaged groups

Significantly, the right to privacy has also been interpreted to give indirect effect to the requirement to provide priority access to adequate housing to disadvantaged groups that takes account of their special needs. For example, in *Bernard v London Borough of Enfield* [2002] EWHC 2282 the High Court of England and Wales held that the local authority had breached the right to privacy of a

severely disabled woman and her family for failing to provide them with suitable accommodation within a reasonable period of time.

Cultural adequacy

The right to privacy has also been interpreted to indirectly protect the requirement for housing to be culturally adequate. In *O'Donnell v South Dublin County Council* [2007] IEHC 2004 the Irish High Court noted that there was an obligation on public authorities to respect the Traveller way of life and that where they qualified for the provision of public accommodation, it should be provided in a form acceptable to them (ie a mobile home).

(vi) Right to a fair hearing:³⁸

The right to a fair hearing has also been invoked in the context of housing issues and can provide some measure of support against arbitrary evictions.

ACT examples

In *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84 the applicant, a single mother with two young children, had been removed from a priority housing list because of a strict application of the income barrier test. The Supreme Court relied on the right to a fair trial to find that the Commissioner should have interpreted an exemption provision more broadly, in accordance with human rights, and should have given the applicant the benefit of this exemption in assessing her income, overturning the restrictive approach taken by the Administrative Appeals Tribunal in an earlier case.³⁹

Examples from other jurisdictions

In *McCann v UK* [2008] ECHR 385 (judgment of 13 May 2008) the European Court of Human Rights emphasised the requirement for appropriate procedural safeguards where a person is at risk of being evicted from their home, as it impacted upon their right to privacy. The Court found that the eviction process in this instance did not meet the requisite standard of protection because it did not provide for an independent assessment of whether the decision to evict was a proportionate interference with the applicant's right to privacy.

In *Pullen & Ors -v- Dublin City Council* [2008] IEHC 379 the Irish High Court held that the eviction of tenants for anti-social behaviour following a procedure which did not afford the tenants any opportunity to dispute the lawfulness or the proportionality of the Council's decision to evict them was both a violation of the tenants' right to a fair hearing under article 6 of the European Convention on Human Rights and an unjustified limitation on their right to enjoyment of their home, private and family life under article 8.

³⁸ HRA, s 12.

³⁹ *Z and Commissioner for Housing* [2007] ACTAAT 12.

(vii) Enforcement provisions under the HRA:⁴⁰

New enforcement provisions under the HRA have been in operation since 1 January 2009. These include an explicit obligation on public authorities to comply with the HRA, combined with a direct right of action in the ACT Supreme Court for breach of this duty, without entitlement to claim damages. Similarly to the definition of ‘public authority’ in the *Victorian Charter of Human Rights and Responsibilities Act 2006*, the HRA definition of public authorities includes core government agencies as well as private agencies when there are carrying out government functions.

The duty of public authorities to comply with the HRA has the potential to circumscribe the circumstances in which evictions may be lawfully carried out, particularly where it would result in the person being rendered homeless. At the very least, public authorities and their agents are obliged under the HRA to carry out all evictions in strict compliance with the requirements of reasonableness and proportionality. The new enforcement provisions also have the potential to indirectly secure remedies for breaches of housing rights.

Examples from other jurisdictions

In *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1131 the Victorian Civil and Administrative Tribunal refused an application for an order of possession, holding that a private housing provider administering a government transitional housing program had acted unlawfully in seeking to evict a tenant in circumstances where it was likely that he would be rendered homeless. The Tribunal found that the housing provider was a ‘public authority’ for the purposes of the *Victorian Charter* and that it had acted incompatibly with the right to privacy under s 13(a) of the *Charter* (equivalent to s 12 of the HRA). The housing provider was also found to have acted unlawfully because it had failed to give proper consideration to human rights when making the decision to evict (equivalent s 40B(1)(b) of the HRA).

Similarly, in *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025 the Tribunal considered a claim by recently arrived refugees whom the private housing provider administering a government transitional housing program had served with eviction notices. The tenants claimed this violated their rights under the *Victorian Charter*. The Tribunal confirmed that the housing provider in question was a ‘public authority’ for the purposes of the *Charter*, leaving open the way to consideration of the claim on the merits. The Tribunal noted that:

‘[d]isadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperilled by their circumstances. That such people get the housing they need is a vital function of government.’ [at 1-2]

⁴⁰ HRA, new Part 5A.

PROTECTION IN OTHER ACT LAWS

In addition to the HRA, there are various other legislative and administrative measures in the ACT which give indirect effect to some of the constituent elements of the right to adequate housing to a greater or lesser degree.

The table below sets out some of these initiatives and their relationship to the key obligations of the right to adequate housing.

Key obligation
Comprehensive housing strategy, which addresses structural problems and prioritises the needs the most vulnerable groups in the community
• The <i>Canberra Social Plan</i> sets a number of goals related to housing, including increasing the supply of public and community housing; improving access to quality, affordable and safe housing; and reducing homelessness. - Under the <i>Plan</i>, the government has set a target of reducing primary homelessness to as close as possible to zero by 2013. Primary homelessness relates to ‘people who have no shelter, sleep rough, live on the streets, in cars, under bridges or in impoverished dwellings’.⁴¹ - Among other things, the <i>Plan</i> also commits to providing housing assistance to eligible Temporary Protection Visa holders if they are homeless, at risk of homelessness, or in extreme hardship. • <i>Breaking the Cycle - the ACT Homelessness Strategy</i> was launched in 2004 and set the strategic direction for the government’s policy commitment to improving responses to homelessness. Its vision statement was framed in terms consistent with the right to adequate housing: All Canberrans have the right to safe, secure, affordable and appropriate accommodation with the necessary supports to live as independently as possible within our community.⁴² • The <i>Youth Homelessness Action Plan</i> provides a policy framework for the government’s response to youth homelessness. • The ACT Affordable Housing Action Plan acknowledges that ‘access to affordable and appropriate housing is a basic right’. The strategy includes initiatives to improve access to affordable housing at all levels, including Home Ownership; Private Rental; Community Housing; Public Housing; and Supported Accommodation, including Emergency Housing.

⁴¹ *Breaking the Cycle - the ACT Homelessness Strategy* (2004), at [16].

⁴² *Ibid*, at [8].

Key obligation Protection against forced eviction/Security of tenure
There is no legislation in the ACT that directly regulates homelessness. However, it is indirectly regulated to some extent by the following acts relating to tenancies and public housing: • <i>Residential Tenancies Act 1997</i> (ACT) • <i>Housing Assistance Act 1997</i> (ACT) <i>Residential Tenancies Act 1997</i> (RTA) The RTA essentially regulates the rights and obligations of landlords and tenants, including the termination of tenancies, rent increases and the settlement of disputes. The RTA was amended in 2005 to extend the minimum living standards guaranteed to tenants to a range of other people who were previously outside its scope, including boarders and lodgers, and caravan park residents. The entitlements include: - a minimum standard of repair and cleanliness of the premises; - a measure of security of tenure, such that termination and eviction by the owner may only take place in accordance with agreed periods of notice and procedures so that arbitrary eviction is not possible; - clearly defined rights of privacy subject to access for inspections and other appropriate purposes; - clear information concerning the rules of the premises and the rights of residents; and - access to appropriate in-house and external dispute resolution processes. The Welfare Rights and Legal Centre has noted that prior to these changes, ‘very few [of such] individuals were able to negotiate protections against eviction, rent increase or basic living conditions when entering into non-tenancies and none in our experience pursued the few rights they had through the Courts.’⁴³
Key obligation Access to emergency housing
<i>Housing Assistance Act 1997</i> (HAA) A key object of the HAA is to ‘facilitate the provision of housing assistance for those most in need’. Housing assistance is defined as ‘services, programs, assets, rebates and amounts, provided under an approved housing assistance program to help [persons] who are eligible for assistance under the

⁴³ Submission of the Welfare Rights and Legal Centre (ACT) and the Tenants Union ACT to the House of Representatives Standing Committee on Family, Community, Housing and Youth in response to the parliamentary inquiry into the principles and service standards for new homelessness legislation, Aug 2009, [1].

program to meet their emergency, short-term, medium-term and long-term housing needs.’ Categories for priority housing include people experiencing primary or secondary homelessness; families with children; those formally diagnosed with mental health issues or suffering other serious health issues; people with a disability including frail-aged, where natural supports have broken down, or are at serious risk of breaking down; indigenous persons, families having difficulty accessing private rental accommodation; women with or without children escaping domestic violence; and children at risk of abuse or neglect.⁴⁴
Key obligation Non- discrimination
The <i>Discrimination Act 1991</i> (ACT) prohibits unlawful discrimination in certain areas, including accommodation. It is unlawful to discriminate on the prescribed grounds (including race, religion, sexuality, or disability, but not homelessness or social status) with respect to, for example, refusing a rental application; changing rental terms; refusing or limiting accommodation benefits; refusing to continue to provide accommodation; changing the terms of a lease; or any other unfair treatment when providing accommodation. In 2008-09, discrimination complaints in the area of accommodation comprised 13% of the total number of complaints received by the ACT Human Rights Commission, which represented an increase from the number of cases in previous years (10% in 2007-08; and just 2% in 2006-07).⁴⁵ The <i>Residential Tenancies Act 1997</i> applies equally to both public and private tenancies, ensuring a consistent application of standards.
Key obligation Monitoring mechanisms
We are not aware of any ACT specific mechanisms to ensure that progress in realising the right to adequate housing is monitored effectively. An example of the type of indicators relevant to monitoring the progressive realisation of the right to adequate housing is at Annex 1.
Key obligation Participatory processes
A relevant objective of the <i>Housing Assistance Act 1997</i> is to ‘promote the establishment of appropriate mechanisms and forums to allow input into housing policy by consumers, and potential

⁴⁴ [Housing Assistance Public Rental Housing Assistance Program \(Housing Needs Categories\) Determination 2007 \(No 1\)](#).

⁴⁵ ACT Human Rights Commission Annual Report 2008-2009, at [48].

consumers, of housing assistance and by representative non-government agencies involved in housing policy and provision.⁴⁶

Service standards

The *ACT Homelessness Charter* (2008) is a non-enforceable statement of the rights of homeless people, with the view to promoting a rights-based approach to homelessness service delivery. The catalogue of rights draws on the HRA and other international standards, and includes the right to dignity, respect, non-discrimination, safety and freedom.

The *Supported Accommodation Assistance Program Service Guarantee* (2008) defines the services and support available to people in need of housing assistance.

BENEFITS OF EXPRESSLY PROTECTING A RIGHT TO ADEQUATE HOUSING

While the existing legislative framework in the ACT clearly provides a degree of indirect protection to some of the constituent elements of the right to adequate housing, there are inherent limits to its comprehensive realisation through substitute mechanisms. The first five years of the HRA have shown the value of setting out a coherent statement of fundamental civil and political rights and the benefits of introducing a systematic and comprehensive regime for their protection. They have resulted in human rights considerations being brought explicitly into the formulation of policy and legislation and, as a consequence, improved their quality. Similarly, specific legislative protection of the right to adequate housing would provide clearer direction to government agencies and other public authorities about their obligations and would focus the attention of policy-makers on the conditions needed to secure its effective realisation in practice.

Without specific recognition, the protection of housing rights is likely to remain relative to, and dependent on, the treatment given to the civil and political rights in the HRA. While it is premature to say what particular form of legislative protection the right to adequate housing should be given, express provision would appear preferable to waiting for the courts to construct expansive interpretations of the current rights in the HRA to ensure their protection.

⁴⁶ s 6(i).

Further reading

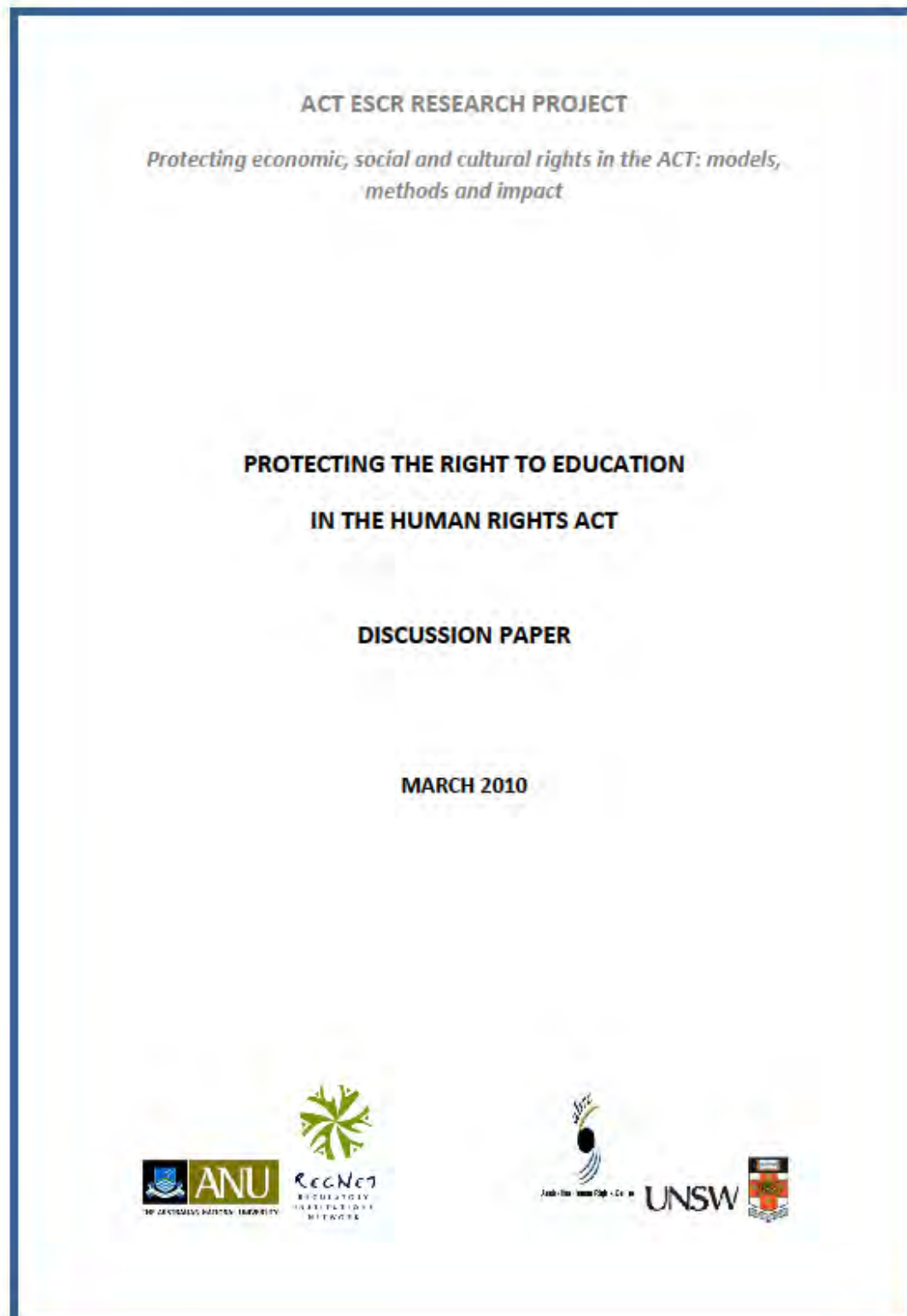
- Office of the High Commissioner for Human Rights, Fact Sheet No. 33: [Frequently asked questions and answers on ESCR](#)
 - Office of the High Commissioner for Human Rights, Fact Sheet No. 21: [The Right to Adequate Housing](#)
 - Centre on Housing Rights and Evictions, [The Human Right to Housing in Australia](#) (2004)
-

Annex 1

[Source: Office of the High Commissioner for Human Rights, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights', 2008, Annex, p 29]

List of illustrative indicators on the right to adequate housing (UDHR, Art. 25) (* MDG related indicators)

	Habitability	Accessibility to Services	Housing Affordability	Security of Tenure
Structural	• International human rights treaties, relevant to the right to adequate housing, ratified by the State • Date of entry into force and coverage of the right to adequate housing in the Constitution or other forms of superior law • Date of entry into force and coverage of domestic laws for implementing the right to adequate housing • Type of accreditation of National Human Rights Institutions by the rules of procedure of the International Coordinating Committee of National Institutions. • Number of registered and/or active non-governmental organizations (per 100,000 persons) involved in the promotion and protection of the right to adequate housing			
	• Time frame and coverage of national housing policy or strategy for the progressive implementation of measures, including special measures for target groups, for the right to adequate housing at different levels of government • Time frame and coverage of national policy on rehabilitation, resettlement and management of natural disaster			• Date of entry into force and coverage of legislation on security of tenure, equal inheritance and protection against forced eviction
Process	• Proportion of received complaints on the right to adequate housing investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded effectively by the government • Number of and total public expenditures on housing reconstruction and rehabilitation by evicted/displaced persons during the reporting period • Net official development assistance (ODA) for housing (including land and basic services) received or provided as proportion of public expenditure on housing or GNI*			
	• Proportion of habitations (cities, towns and villages) brought under the provisions of building codes and by laws in the reporting period • Share of public expenditure on social or community housing • Habitable area (sq. m) added through reclamation, including of hazardous sites and change in land use pattern in the reporting period • Habitable area (sq. m per capita) earmarked for social or community housing during the reporting period	• Share of public expenditure on provision and maintenance of sanitation, water supply, electricity and physical connectivity of habitations • Proportion of targeted population that was extended sustainable access to an improved water source*, access to improved sanitation*, electricity and garbage disposal in the reporting period	• Proportion of households that receive public housing assistance, including those living in subsidised rented housing and households subsidised for ownership • Proportion of targeted households living in squatter settlements rehabilitated in the reporting period • Proportion of homeless population that was extended the use of public and community based shelters in the reporting period	• Average time taken to settle disputes related to housing and land rights in courts and tribunals • Number/proportion of legal appeals aimed at preventing planned evictions or demolitions ordered by court in the reporting period • Number/proportion of legal procedures seeking compensation following evictions in the reporting period, by result after adjudication • Number and proportion of displaced or evicted persons rehabilitated or resettled in the reporting period
Outcome	• Proportion of population with sufficient living space (persons per rooms or rooms per household) or average number of persons per room among target households • Proportion of households living in permanent structure in compliance with building codes and by-laws • Proportion of households living in or near hazardous conditions	• Proportion of urban population living in slums* • Proportion of population using an improved drinking water (public / private) source, sanitation facility, electricity and garbage disposal • Proportion of household budget of target population groups spent on water supply, sanitation, electricity and garbage disposal	• Proportion of households spending more than 'X' percent of their monthly income or expenditure on housing or average rent of bottom three income deciles as a proportion of the top three • Annual average of homeless persons per 100,000 population ('X' being defined normatively for the country context)	• Reported cases of "forced evictions" (e.g. as reported to UN special procedures), in the reporting period • Proportion of households with legally enforceable, contractual, statutory or other protection providing security of tenure or proportion of households with access to secure tenure • Proportion of women with titles to land or property
24.4.08	All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in metasheets			



ACT ESCR RESEARCH PROJECT

*Protecting economic, social and cultural rights in the ACT: models,
methods and impact*

PROTECTING THE RIGHT TO EDUCATION IN THE HUMAN RIGHTS ACT

DISCUSSION PAPER

MARCH 2010



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The ACT Economic, Social and Cultural Rights Research Project

Protecting Economic, Social and Cultural Rights in the ACT: Models, Methods and Impact (the “ACT ESCR Project”) is a joint project between the ANU (together with the Australian Human Rights Centre at UNSW) and the ACT Department of Justice and Community Safety, supported by a Linkage grant from the Australian Research Council. The project is assessing whether the ACT *Human Rights Act 2004* (“HRA”) should be amended to include economic, social and cultural rights.

The project is being undertaken at the request of the ACT government, following the government’s 12-month review of the HRA, which recommended that the issue of ESCR be revisited as part of the five-year review of the legislation.

The project will submit a report to the ACT government in 2010. It is anticipated that the project will generate the first detailed Australian study of the potential impact of the protection of ESCR in a legislative bill of rights. Its framework objectives include:

- Assessing the adequacy of the protection of ESCR in the ACT;
- Examining the possible mechanisms for the protection of ESCR and the appropriateness of those mechanisms in the ACT; and
- Analysing the potential impact of the enforcement of ESCR and the effect on policy-making, service delivery and decision-making processes in the ACT.

INTRODUCTION

Education is both a human right in itself and an indispensable means of realizing other human rights. ... the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.¹

Education is regarded by our community as fundamental to the development of the individual in our society, facilitating not just a person's growth as an individual, but as a member of the community and as a citizen; a well-educated citizenry has many other advantages, including economic ones. Government plays a critical role in ensuring that individuals and groups in the community have access to a high-quality education. The importance of access to education by all in our societies is reflected in its incorporation in major international statements of human rights (including the Universal Declaration of Human Rights) and in the constitutions and laws of many countries.

Australian jurisdictions, including the ACT, have long given effect to aspects of the right to education through legislation, policies and programmes. Generally, most citizens and residents have access to a reasonable level of enjoyment of the right, though particular groups such as Indigenous children in remote areas do not have such access; other issues have also been identified by international bodies and others about improvements that need to be made in order to ensure the full enjoyment of the right to education by all.

The ACT has had a very good track record overall in ensuring access to high quality education for residents of the ACT, in the fields which fall within the responsibility and competence of the ACT. The right to education is already accepted as a political and social goal, and legally protected in part. -Yet nowhere is the situation perfect, and significant changes to educational policy initiated both within and outside the system can affect the enjoyment by individual and members of groups of the right to education.

Accordingly, this paper explores whether the explicit inclusion of the right to education as a *legal* right in the HRA could contribute to better protection of the right in the future, both as an aid to the formulation and implementation of education policy, and as a standard that would enable a denial of the right or regression in its enjoyment to be better identified (and rectified).²

The purposes of this paper are:

¹ United Nations Committee on Economic, Social and Cultural Rights, General Comment No 13, *The Right to Education* (1999) para 1.

² Grateful thanks to Max Harris for his assistance in researching and preparing early drafts of this paper.

- (a) To provide an overview of the internationally guaranteed right to education and associated rights, in particular as accepted by Australia under international treaties to which it is a party;
- (b) To describe briefly the manner means by which the right to education is currently implemented in the law and practice of the ACT, and the extent to which that law and practice gives effect to the right;
- (c) To identify the ways in which existing provisions of the HRA already guarantee aspects of the right to education
- (d) To describe how the right to education might be incorporated in the Human Rights and the legal implications of such inclusion; and
- (e) To assess the advantages and possible drawbacks of including the right to education in the HRA.

I. THE NATURE AND SCOPE OF THE RIGHT TO EDUCATION

The right to education can be categorized as an economic, social, cultural, and as a civil and political right.³ Education is regarded as an important contributor to the values of participation and tolerance necessary for democracy. It provides the skills that enable individuals to boost productivity, to innovate, and also to share in the benefits of economic growth.⁴ In a “knowledge-driven” global economy, education is therefore associated with poverty reduction. It is also strongly correlated to better health outcomes, partly due to its function in enhancing individuals’ ability to access to information, and partly because it creates greater confidence and assertiveness in those seeking services. The United Nations Special Rapporteur on the Right to Education, Katarina Tomaševksi, has suggested that it is a “multiplier” human right: “It enhances all other human rights when guaranteed and forecloses the enjoyment of most, if not all, when denied”.⁵

The right to education is embodied in a number of human rights instruments. It appears for instance, in Article 26 of the Universal Declaration on Human Rights; in Article 13 of the International Covenant on Economic, Social and Cultural Rights; and in Articles 28 and 29 of the Convention on the Rights of the Child. Non-discrimination on the grounds of race, sex and disability in the enjoyment of the right to education is also guaranteed explicitly by the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities. Australia is bound by all of these treaties. It also appears in Article 2 of the First Protocol to the European Convention on Human Rights, and it is in this form that the United Kingdom incorporated the right into UK law by including it a protected right in the UK Human Rights Act 1998.

³ Douglas Hodgson, *The Human Right to Education* (Ashgate: Dartmouth, 1998) 72–73.

⁴ Andrew Clapham and Susan Marks, *International Human Rights Lexicon* (2005) 133-34.

⁵ Katarina Tomaševksi, *Education Denied* (2003) 1.

The model of the right to education that has arguably received the most attention is the articulation of the right in the International Covenant on Economic, Social and Cultural Rights, which expresses the right as follows:

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

In addition to the detailed provisions in Article 13 of the ICESCR, Article 2(2) of the Covenant provides that States parties to the Covenant “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Key elements

The right to education encompasses all levels of education, from primary to higher education. Its most rigorous elements relate to primary education, which must be provided to everyone, and be compulsory and free.⁶ The United Nations Committee on Economic, Social and Cultural Rights, which is the independent expert body that monitors implementation of the ICESCR, has introduced a helpful framework for guidance on when a right to education is realized, and when it is being denied:⁷

- a) Availability refers to the notion that educational institutions and programmes must be physically available to students, and are affordable. Physical availability may relate to the zoning and design of schools, which must be located within the reach of student populations, subject to the provision of government support for transport, or appropriate alternative facilities, such as “distance learning” programmes for remote communities.⁸ When adjudicating this right, courts have emphasized the pragmatic nature of questions of availability, and allowing governments a margin of appreciation to determine local demands.⁹ Secondary education must be “generally available and accessible”, with the expectation that steps are taken towards the progressive introduction of free secondary education. Tertiary education must be equally accessible, relative to a state’s capacity.¹⁰
- b) Accessibility is addressed to the need for education to be provided in a non-discriminatory way. Access to education must be provided to all, especially the most vulnerable groups. In one leading decision, the UK House of Lords emphasized that the right to education requires “fair and non-discriminatory access”.¹¹ The House of Lords held that, where a person is suspended or expelled from school, there should be alternative educational mechanisms available. A New Zealand High Court decision, *Daniels v Attorney-General* reinforced this interpretation: in *Daniels* the High Court noted that alternatives must be available when institutions are disestablished.¹²

⁶ See also UN Committee on Economic, Social and Cultural Rights, General Comment No. 11 (1999), *Plans of Action for Primary Education*.

⁷ *General Comment No. 13*, above n 1, para 6.

⁸ Clapham & Marks, above n 3, 139.

⁹ See *Ali v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, [24] (“*Lord Grey School*”).

¹⁰ *General Comment No. 13*, above n 1, para 6.

¹¹ *Lord Grey School* [2006] 2 AC 363.

¹² (Unreported, High Court, Auckland, M1615-SW99, 3 April 2002, Baragwanath J), at para 140. It should be noted that this case was appealed successfully in the NZ Court of Appeal. The earlier case

“Accessibility” affirms a set of procedural rights, alongside core principles of non-discrimination, for those accessing the educational system.

- c) Acceptability refers to the acceptability of educational facilities for both students, and, in appropriate cases, parents. Accessibility therefore consists of a commitment to a minimum standard of educational quality, and to giving some weight to parents’ own views on what is acceptable education. The Committee on Economic, Social and Cultural Rights has emphasized the need for teaching methods and the school curriculum to be “relevant, culturally appropriate, and of good quality”.¹³ A specific corollary of this is that it must be possible to receive education in one of the national languages.¹⁴ Where more than one language of instruction is financed in public schools, there may be contestation about the selection of languages and about whether the exclusion of particular minority and indigenous languages constitutes discrimination. Similarly, religious and moral instruction is a matter of debate. Putting aside these issues, which also affect other rights,¹⁵ UK authority suggests that acceptability includes, “access to a minimum level”, which is not obstructed by a “systemic failure” of the educational system.¹⁶ US authority supplies two examples of systemic failure: serious under-staffing or egregious failures to provide necessary equipment.¹⁷ European authority suggests that official recognition of educational studies must be provided: without such recognition, there can be no quality control of educational provision.¹⁸

The requirement that parental views be respected is a protection against indoctrination by the state.¹⁹ The European Convention on Human Rights makes clear that parents’ “philosophical or religious convictions” must be respected, subject to reasonable limits (see below). This demands that parents also have the liberty to set up their own educational institutions, which must nevertheless comply with the same basic standards as the rest of the educational system.

- d) Adaptability addresses the requirement that educational institutions are flexible, open to review, and tailored to the needs of individual students. The Committee has emphasized that “education has to be flexible so it can adapt to the needs of changing societies and community and respond to the needs

nevertheless suggests some useful principles that might govern a substantive ‘right to education’ in another jurisdiction.

¹³ *General Comment No. 13*, above n 1, para 6 (e).

¹⁴ *Belgian Linguistic Case (No 2)* [1968] 1 EHRR 252 (applying ECHR, Art 2, Protocol 1).

¹⁵ E.G., the right to freedom of religion and belief, the right to freedom of expression, and minority rights, indigenous rights and children’s rights.

¹⁶ *Lord Grey School* [2006] 2 AC 363 at [61] (applying UK HRA 1998, s 6; ECHR, Art 2, Protocol 1).

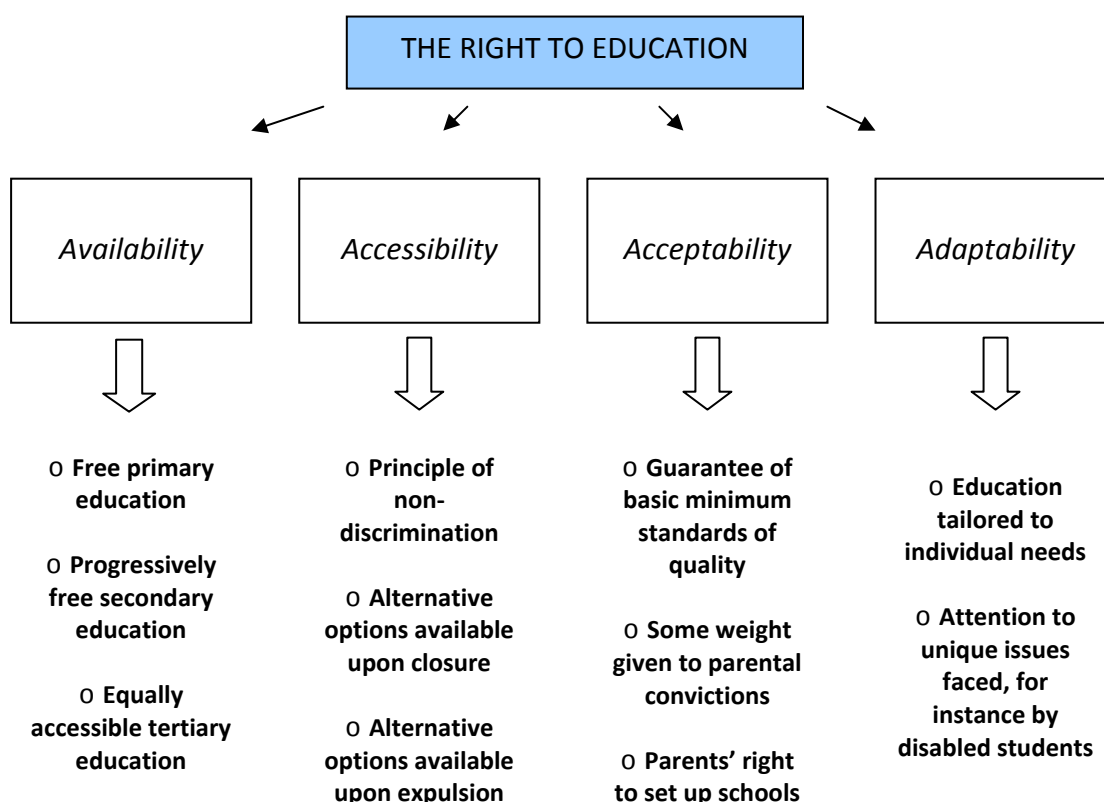
¹⁷ *Campaign for Fiscal Equity v. State of New York*. 719 N.Y.S.2d 475 (2006) (applying Art XI(1) of the New York Constitution, which states that “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated”).

¹⁸ *Belgian Linguistic Case (No 2)* [1968] 1 EHRR 252, para 4 (applying ECHR, Art 2, Protocol 1).

¹⁹ Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights* (2009, 2nd ed) 709.

of students within their diverse social and cultural settings.”²⁰ This points to the way that educational arrangements must be able to adapt to particular students who are often left out of the core focus of education policy, such as children with disabilities, refugee children, working children, children in prison, students who are parents, and students who require fundamental education.²¹ One leading British textbook has suggested that a failure to diagnose students with special needs might amount to a breach of the element of adaptability.²²

The framework is usefully summarized in the following diagram:



Key obligations

The right to education creates obligations of two kinds, which reflect the fact that there are resource and other constraints which may indirectly affect education. First, there are obligations with *immediate effect*: core minimum requirements of the right to education that governments must take “deliberate, concrete and targeted” steps to satisfy.²³ Second, there are obligations that must be *progressively realized* “with

²⁰ *General Comment No. 13*, above n 1, para 6(d).

²¹ Clapham and Marks, above n 3, 141.

²² Richard Clayton & Hugh Tomlinson *The Law of Human Rights* (2000) 1373.

²³ Committee on Economic, Social and Cultural Rights, *General Comment No. 3* (1990), para 2.

the full use of maximum available resources”.²⁴ Progressive realization is a “necessary flexibility device, reflecting the realities of the real world”.²⁵ Elements of the right that must be progressively realized are subject to more government discretion. If an obligation must be progressively realized, action must still be taken “as expeditiously and effectively as possible”, and measures that are retrogressive to the achievement of an outcome must be properly justified.²⁶ That an obligation must be progressively realized, then, does not let a government “off the hook”: it merely acknowledges that some obligations are more aspirational than others, and need more time to be implemented.

We suggest that the following elements of the right represent *immediate duties*:

- Primary education must be free and compulsory for all;
- Access to public educational institutions and facilities must be provided on a non-discriminatory basis;
- Parents must be free to educate their children in private schools, provided that such schools comply with minimal educational standards; and
- The government must establish minimal educational standards.

The other elements of the right are subject to *progressive realization*:

- The government must show progress in the provision of free secondary education and equally accessible tertiary education;
- The government must strive for adaptable, suitable and well-tailored education.

Reasonable limits

The enjoyment of the right to education may be subject to reasonable limitations. Article 4 of the ICESCR provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The ACT HRA contains a general limitation provision (s 28) that would presumably also apply to a right to education included in the Act:

- (1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

²⁴ ICESCR, art 2; *General Comment No. 3*, above n 26, para 9.

²⁵ *General Comment No. 3*, above n 26, para 9.

²⁶ *Ibid.*

- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
- (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Cases decided in other jurisdictions offer some guidance on which kinds of government infringements on education are reasonable limits, and which are not. In *Patel v United Kingdom*, the European Commission on Human Rights held that restrictions on access to tertiary education are legitimate, in instances where individuals repeatedly fail entrance requirements (such as a first year examination and re-sit).²⁷ In *Lord Grey School*, the House of Lords noted that expulsion and suspension may still be defensible tools used by schools where students misbehave.²⁸ In the *Denbigh High School* case, involving a British school's ban on the wearing of the Muslim hijab, the House of Lords underlined that uniforms may still be required by a school: access to a school can be conditional on a uniform policy.²⁹ In all of these cases it is clear that considerable latitude is given to decision-makers' authority and expertise, and that it is unlikely that a right to education can be used to override long-accepted practices, such as the use of a uniform policy and suspensions or expulsions.

What the obligation to ensure the enjoyment of the right to education does not require

There is invariably much anxiety over how the incorporation of the right to education in human rights legislation might tie the hands of government or require radical budgetary changes. However, case law on the right to education suggests that such fears are misguided. The UK House of Lords, for example, has held that a premise of the right to education (at least in the developed world context) is that a state system of education already exists.³⁰ The purpose of the right is not to restructure priorities across social services, but rather to ensure that education is satisfactorily provided, particularly for individuals who are at the margins of public service provision.

²⁷ (Application No 8844/80) (1982) 4 EHRR 256 (applying ECHR, Art 2, Protocol 1).

²⁸ *Lord Grey School* [2006] 2 AC 363, [24].

²⁹ *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 [97] (applying UK HRA 1998, s 6; ECHR, Art 2, Protocol 1).

³⁰ *Lord Grey School* [2006] 2 AC 363 [24].

II. CURRENT IMPLEMENTATION OF THE RIGHT TO EDUCATION

Under the ICESCR States parties are obliged to take a range of measures – including legislative and policy measures – to ensure the enjoyment of the right. This means that full enjoyment of the right will result from a detailed legislative supporting framework, the establishment of appropriate institutions and monitoring mechanisms, and the allocation of sufficient resources, among other factors. The inclusion of an explicit right to education in the HRA is an important supplement to the existing array of measures that have gone a long way to implementing the right to education in the ACT. While the measures that exist in the ACT ensure the enjoyment of the right in large part, the inclusion of the right in the HRA would ensure that assessing the current levels of enjoyment of the right and the consistency of future laws and policies with the right, would be undertaken in a manner consistent with Australia’s human rights obligations and thereby more fully secure the enjoyment of the right.

The Education Act 2004

The Education Act 2004 integrates the principles and rules governing education in the ACT. It replaced four existing statutes that related to education and aims to lay out educational obligations and rights clearly in one document. The Act is comprehensive in coverage: after some general definitions and principles of education are noted (chapter 1), the compulsory schooling age is stated (chapter 2), the framework for government schools is explained (including a system of complaints and review: chapter 3), the requirements of registration, attendance, and governance of non-governmental schools are specified (chapter 4), home education regulation is laid out (chapter 5), and a further miscellaneous chapter deals with reviewable decisions and additional obligations. The Education (Participation) Amendment Act 2009, which came into force on 1 January 2010, amends the Education Act to raise the school leaving age to 17.

It could be argued that a “right to education” is unnecessary because of the presence of this statute: educational outcomes are protected by the Act, and s 7 explicitly confirms, as a guiding principle for decision makers, “the principle that every child has a right to receive a high-quality education”. Certainly, the Act enshrines many of the principles underpinning the right to education, as Table 1 illustrates:

Element of Right	Equivalent in Education Act 2004
Availability	Section 7(1): “everyone involved in the administration of this Act, or in the school or home education of children in the ACT, is to apply the principle that every child has a right to receive a high-quality education” Section 26: “[e]ducation in government schools is to be free”
Accessibility	Section 7(3): requires stakeholders in education to (a) “recognize the

	individual needs of children with disabilities” and (b) “make appropriate provision for those needs, unless it would impose unjustifiable hardship on the provider of school education” Section 18(d)(ii): government to provide “reasonable access to public education for all”
Adaptability	Section 7(2) (c)-(g): recognizes “innovation, diversity and opportunity within and among schools should be encouraged” “effective quality assurance mechanisms should be applied to school education”; “government funding should be directed to students through their schools or school system; “the partnership between the home, community and educational providers should be recognised; and “school communities should be given information about the operation of their schools” Section 18(d)(iv): “responsiveness to community needs” required
Acceptability	Section 7(2) (b): the criteria for “high-quality education” includes the principle that education should: (i) aim to develop every child's potential and maximise educational achievements; and (ii) promote children's enthusiasm for lifelong learning and optimism for the future; and (iii) encourage parents to take part in the education of their children, and recognise their right to choose a suitable educational environment; and (iv) promote respect for and tolerance of others; and (v) recognise the social, religious, physical, intellectual and emotional needs of all students; and (vi) aim over time to improve the learning outcomes of students so that the outcomes are free from disadvantage because of economic, social, cultural or other causes; and (vii) encourage all students to complete their senior secondary education; and (viii) provide access to a broad education; and (ix) recognise the needs of Indigenous students. Sections 20–31: discussion of religious education, monitoring and review procedures to ensure minimum quality

Table 1: Compatibility of Education Act 2004 with the right to education

Table 1 demonstrates how compatible the ACT’s current legislative framework is with the right to education. However the Education Act remains an inadequate mechanism to protect this right, for the following reasons.

- a) The principled support for the “right to education” is assisted by its explicit connection with human rights legislation, which helps to fill gaps and ambiguities. The United Kingdom, for instance has both a right to education in its human rights legislation (the UK Human Rights Act 1998) and a separate comprehensive legislative scheme relating to education, the Education Act 2002 (UK). The UK Joint Committee on Human Rights had expressed concern about the “limited opportunity to challenge gaps and inadequacies in this [education] legislation, unless the matter can be brought within one of the rights protected under the [UK] HRA”.³¹
- b) Ambiguities as to what is meant by a “right to education” may be clarified by an express inclusion in the HRA. Despite a successful amendment during the Education Bill’s passage hoping to make the protection of the right to education more “unambiguous”, there remains much uncertainty over how many *legal* protections the Act offers.³² Most of the review procedures found in the Act allow complaints to the Minister and the chief executive of the Department. Section 145A allows judicial review of decisions by the ACT Civil and Administrative Tribunal. A potential role for the parliamentary scrutiny committee, and for courts, is discussed below.

The Discrimination Act 1991 and federal anti-discrimination law

The Discrimination Act 1991 also protects interests in education. Section 7 of the Act lists prohibited grounds of discrimination. Section 18 of the Act makes it unlawful for an educational authority to discriminate against a person in relation to admission to educational institutions and the enjoyment of educational opportunities once admitted. Section 20 of the Act prevents individuals from denying a service to others on any of the prohibited grounds, and the Dictionary of the Act contains a definition of services that includes in (e) “services provided by a government, government authority, local government body or corporation in which a government has a controlling interest”. This definition has been used to lodge a claim of discrimination in education to the Discrimination Tribunal.

The Discrimination Act 1991 has been invoked in three cases concerning education. In *ACT Department of Education Training v Prendergast* it was claimed that a child had been discriminated against on the grounds of disability at school.³³ In *Best Practice Education Group Ltd T/as Blue Gum School v Department of Education*

³¹ House of Lords/House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, Twenty-First Report of Session 2003-04, HL Paper 183, 12, [24].

³² See comments of Ms Dundas, *Legislative Assembly for the ACT: 2004 Week 4 Hansard (30 March)* at page 1308. Ms Dundas said: “While the words ‘as far as practicable’ remain in the bill, a spectre remains over the head of every child who is slightly different, a child with a disability or who is otherwise difficult to teach. There is no guarantee that “as far as practicable” will not mean something different under a different education minister or a different government. That is why I think it is important that these words are removed.”

³³ [2000] ACTDT 6.

Community Services the Blue Gum School took a complaint to the Discrimination Tribunal, claiming that it had received unfair funding amounts due to its religious character.³⁴ Lastly, in *Nicolette Neveu-Abramczuk v ACT Department of Education Community Services* a parent argued that his daughter had been discriminated against, on account of her age, by not being given correct medical advice after she had been spat at in the school playground.³⁵ All of these claims were struck out by the Discrimination Tribunal, and because the Tribunal concluded that the claims had no merit, there was little discussion of the scope of anti-discrimination principles in the educational sphere.

Federal anti-discrimination legislation provides another avenue for protection. One ACT example is *Clarke v Catholic Education Office*. Here, discrimination under the Disability Discrimination Act 1992 was alleged in an educational context when a school refused to accept two parents' offer of financial support to fund a sign language interpreter at Mackillop Catholic College.³⁶ The claim succeeded and the Federal Court of Australia awarded damages of \$26,000.

While we can accept that the Discrimination Act 1991 alongside federal anti-discrimination law would have some reach in protecting educational rights, the presence of these Acts does not rebut the need for a "right to education" in the HRA. The above cases show that a high threshold must be reached for discrimination principles to apply in instances involving education. There are also difficulties in fully assessing the harm caused by discrimination without an acceptance of the underlying principles of education and why it is so important – informed principles which the right to education jurisprudence openly discusses. Moreover, the Discrimination Act 1991 covers only a small sphere of subject-matter in relation to education. The limitations of the individual-complaint based focus of discrimination legislation for proper policy scrutiny and development are also well-known.

Policy

The ACT Government has enacted a suite of policy reforms through the Department of Education and Training that are effective in advancing educational outcomes. To take just a few examples, the Council of Australian Government (COAG) National Education Reform has been implemented; the Early Childhood Schools Framework aims to structure early education in a way that ensures children have their needs acknowledged within the schooling system; the Literacy and Numeracy Strategy 2009-2013 targets those who struggle with basic education; and the Professional Learning Strategy aims to make learning a lifelong activity.³⁷ All of these policies are steps in the direction of giving effect to the right to education: literacy and numeracy, for instance, helps to guarantee the minimum standards implicit in the third prong of the right to education, acceptability.

³⁴ [2002] ACTDT 1.

³⁵ [2002] ACTDT 4.

³⁶ [2003] FCA 1085.

³⁷ See ACT Department of Education and Training website: <http://www.det.act.gov.au>.

However, there is evidence that there are significant systemic gaps in the education system and injustices that must be redressed: for instance, outcomes for Aboriginal and Torres Strait Islander Australians are markedly worse than for other Australians.³⁸

Well-developed policy must form part of any attempt to protect individuals' educational rights. However, policy is changeable, and fluctuates across electoral cycles as a function of governmental priorities. A "right to education" in the HRA would provide a stable baseline that grounds a government's commitment to education. As well as providing stability, this baseline would ensure that the fundamental interests of individuals or minority groups are protected, which might be overlooked in majority-based political processes.³⁹

Policy and political advantages of a right to education

One of the possible advantages of having a right to education included as a legal right in the HRA may be the additional status that it could give to claims for resources for the support of education, from an always inadequate budget. Rather than simply having educational needs compete with other needs for a place in government budgetary priorities, its status as a right may mean that, with the prospect of increased legislative and possibly judicial scrutiny, claims to budgetary resources to support the implementation of the right to education may gain additional weight. The existence of the right may also be of relevance in the context of Commonwealth-ACT negotiations or in relation to nation-wide joint or coordinated schemes in the field of education.

Common law and administrative law redress

Courts may play a role in protecting interests in education through their enforcement and development of the common law. For example, civil liability in negligence might be used as a tool to protect educational rights. In other jurisdictions, notably the UK and NZ, this is an emerging field. In *Phelps v Mayor of the London Borough of Hillingdon*, the House of Lords established that a duty of care could exist between a local educational authority and disabled children in the provision of education. A breach was found, and the plaintiffs were granted substantial redress.⁴⁰

An alternative route to protect educational rights is through the application of the principle of "irrationality" or "unreasonableness" under administrative law. This is

³⁸ See, eg, ACT Department of Education and Training 'Annual Report 2007-08' at 231, where it is noted: "[t]he gap in school performance between Indigenous and non-Indigenous students is evident from year 1 onwards."

³⁹ For a discussion of the pitfalls associated with enforcing educational rights politically, see: E.J. Ryan 'Failing the System? Enforcing the Right to Education in New Zealand' [2004] VUWLR 29.

⁴⁰ [2001] 2 AC 619.

distinct from the judicial review claim through the Education Act 2004 described above, which would entail a claim of “illegality”. Unreasonableness or irrationality can justify the quashing of a decision where a decision is “so outrageous in its defiance of logic or ordinary moral standards” that no sensible decision-maker could have made that decision.⁴¹ Educational interests were protected in this manner by the UK House of Lords decision in *R v East Sussex County Council, ex p Tandy*.⁴² In *Tandy*, the hours of home tuition for a sick child had been drastically reduced due to financial considerations. Although the decision partly turned on the unique statutory context in the UK, the House of Lords held that the recourse to financial considerations in this case was unlawful on unreasonableness grounds. It should be noted that the threshold for finding a decision to be unreasonable is high.⁴³

In sum, the possible protections of the right to education – in the Education Act 2004, the Discrimination Act 1991, policy, the common law or administrative law – appear inadequate in protecting the right to education. While in some of these areas, the courts are moving towards protecting education, a more proactive and comprehensive protection would result from inclusion in the HRA.

III. THE CURRENT HUMAN RIGHTS ACT AND THE RIGHT TO EDUCATION

Five of the rights already in the ACT HRA may indirectly protect the right to education. These include the right to equality (s 8), the right to life (s 9), the right to protection of the family and children (s 11), freedom of thought, conscience, religion and belief (s 14), and the right to humane treatment when deprived of liberty (s 19).

Equality and non-discrimination

The right to equality and non-discrimination is protected in s 8 of the HRA. Just as the Discrimination Act 1991 may indirectly protect the right to education, particularly in terms of accessibility, availability and adaptability, so too do the rights to equality and non-discrimination. The recent UK case of *R (McDougal) v Liverpool City Council* demonstrates how a claim under non-discrimination principles might be mounted in an educational context.⁴⁴ In that case a parent claimed that a school closure, of the only mixed non-faith school in her region, amounted to discrimination against non-Catholic families, undermining educational entitlements. The claimant invoked article 14 of the European Convention of Human Rights, which differs slightly from s 8 of the HRA, but which secures the same principle of non-

⁴¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 first outlined the concept. The quotation is taken from Lord Diplock’s speech in *Council of Civil Service Unions v Minister for the Civil Service Respondent* [1985] AC 374.

⁴² [1998] 2 All ER 769.

⁴³ See, eg, *Aorangi School Board of Trustees v Minister of Education* (unreported, High Court, Christchurch CIV-2009-409-002812, 21 December 2009, Simon France J) (unreasonableness claim marshalled to challenge school closures).

⁴⁴ [2009] EWHC 1821.

discrimination. The claim did not succeed, because there was said to be adequate justification for the closure. This was because the school which was closed had a large number of surplus places, which the Court decided was proportionate.

Right to life

The right to life is protected in s 9 of the HRA. In India, the right to life has been interpreted to include the right to education, by virtue of its connection with livelihood. In *Mohini Jain v State of Karnataka*, a higher fee charged by a private medical college to those students who had not been guaranteed reserved government positions was held to make education inaccessible.⁴⁵ The Supreme Court of India held that “[t]he right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.”⁴⁶ Thus, the Court determined that the right to life created a standard of educational entitlement. Such an interpretation was assisted by the presence, in the Indian Constitution, of the right to education as a “directive principle”. Directive Principles, although not expressly justiciable, guide the interpretation of legislation. It should be said that it is unlikely an Australian court would adopt as broad an interpretation of the right to life. However, the evolution of this interpretation in India is interesting: in 2002, India amended its Constitution to make education a fundamental right.⁴⁷

Protection of family and children

The rights of the child, and in particular the protection of children against discrimination, are protected in s 11 of the HRA. This section also provides an alternative avenue for educational claims. There are no parallel protections for children in either the Human Rights Act 1998 (UK) or the Bill of Rights Act 1990 (NZ). While the Victorian Charter of Rights and Responsibilities Act 2006 shares a similar provision, there has been little jurisprudence on the connection of this with education. Yet from international commentary, it is clear that non-discrimination against children might become quite powerful as an instrument to prevent educational discrimination. Much depends on how the provision’s language (which refers to “the protection needed by the child because of being a child”) is construed.

Freedom of thought, conscience, religion and belief

The rights to freedom of thought, conscience, religion and belief are protected in s 14 of the HRA. This was applied in the UK case of *R (SB) v Governors of Denbigh High School* in the context of the alleged denial of the right to education.⁴⁸ In that case,

⁴⁵ (1992) SCR (3) 658.

⁴⁶ See 669. See also *Unni Krishnan v State of Andhra Pradesh* (1993) SCR (1) 594.

⁴⁷ Vijayashri Sripathi and Arun K Thiruvengadam “India: Constitutional Amendment Making the Right to Education a Fundamental Right”, (2004) 2(1) *International Journal of Constitutional Law* 148.

⁴⁸ [2007] 1 AC 100.

Denbigh High School established a policy that allowed female Muslim students to wear the shalwar kameeze, but not the jilbab, to school. As a result, the plaintiff, who generally wore the jilbab, was excluded from the school and asserted a violation of her right to education as well as freedom of religion. Two judges reasoned that the student's right to manifest her religion had been infringed, but accepted there was valid justification. They decided the school had aimed legitimately to smooth over social divisions through its uniform policy, and that the student was aware of the policy when enrolling in the school.⁴⁹ Where suppression of thought, conscience, religion, and belief has an impact on a person's education, that person's educational rights might be indirectly defended through reference to, for instance, freedom of religion.

Right to humane treatment when deprived of liberty

The right of a person to humane treatment when deprived of liberty is enshrined in s 19 of the HRA. Arguably, the denial of education to those of school age in prison undermines the "humanity" and "respect for the inherent dignity of the human person" that is afforded to prisoners under s 19. Given that most international formulations of the right to education observe that "all" are entitled to primary education, and that secondary and tertiary education should be equally accessible to "all", it is reasonably arguable that those individuals in prison of school age are entitled to educational opportunities as part of the right to education. Indeed, the ACT Human Rights Commission's human rights audit of ACT corrective facilities makes this connection. The report, after noting an absence of literacy and numeracy programs for those of school age in detention centres like Quamby, writes that: "It is possible that denial of education opportunities in detention in combination with other problems identified in this Report may contribute to inhumane treatment in violation of s.19 of the HR Act."⁵⁰

The benefits of a targeted approach to the right to education

While the five existing rights discussed above may indirectly secure the right to education, there are three main problems with this approach to protection:

1. Some of the interpretations suggested here may be grounded on reasons that are too distant from the key elements of the right to education. For example, India's expansive interpretation of the right to life and livelihood may lead to a conception of education in merely vocational or productivity terms.
2. Judges, in providing individuals a measure of redress through a broad conceptualization of current rights, might be perceived to be overly activist and adventurous in redrawing the boundaries of, say, the right to life.

⁴⁹ See para 41 (per Lord Nicholls) and paras 97–98 (per Baroness Hale).

⁵⁰ Human Rights Commission, *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation* (July 2007) 50.

Somewhat counter-intuitively, then, inserting the right to education into the HRA might constrain judges by providing a more explicit and targeted framework to protecting education.

3. Indirect protection may undermine the power of the rights listed above. These other rights might be diluted if attempts are made to refashion them to guarantee educational entitlements. Attention could be diverted away from these rights' core content, giving the rights less force in argument and popular discourse.

Express inclusion of the right to education in the HRA would address these difficulties. The next section explores the models of implementation that are available.

IV. FORMS OF IMPLEMENTATION OF THE RIGHT TO EDUCATION IN THE HRA

The inclusion of a right to education in the HRA would trigger the application of the various procedures set out in the HRA to legislation, policies or programmes which affect the enjoyment of the right. Inclusion would therefore:

- impose a duty on public authorities to act in accordance with the right to education;
- require a statement of human rights compatibility to be provided when any draft legislation is introduced into the Legislative Assembly;
- similarly, make bills subject to review by the Legislative Assembly's scrutiny committee which identifies human rights issues;
- give rise to rights that may be enforced by the courts in proceedings based on the HRA and under the general administrative law;
- require public officials and the courts to interpret existing legislation in accordance with the right to education where reasonably possible.

Of course, to some extent these requirements and procedures already formally apply in relation to education laws and policies. This is because a number of rights already included in the HRA have application in the field of education; these have been outlined above. Thus, public authorities are obliged by the HRA to comply with those rights in relation to education, and are subject to the existing legislative review process and to the jurisdiction of the courts in cases where those included rights affect the enjoyment of the right to education.

Nonetheless, the inclusion of the right to education in the HRA may expand the extent to which rights-analysis will be undertaken. Within government the development of policy proposals will need to be explicitly measured against the right to education (to the extent that this does not already occur), and the right will become an explicit ground for parliamentary review of legislation, as well as providing an additional basis for proceedings under the HRA or under general administrative law. The nature of the rights analysis involved, and the extent of any

additional litigation will depend on the particular formulation of the right that is chosen for inclusion in the HRA.⁵¹

Given the relatively low levels of litigation under the HRA in the ACT since 2004 (and on issues relating to education generally in the ACT), it is hard to see that the inclusion of the right in the HRA would give rise to significant amounts of new litigation based solely on that right.

Nor is the nature and extent of review by the Legislative Assembly and its committees likely to change radically or create major new burdens. For example, even though the right to education has not yet been explicitly included in the HRA, the Legislative Assembly's Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee) [the Scrutiny Committee] has already on a number of occasions made extensive reference to the right to education and relevant international jurisprudence, both as an element of existing HRA rights but also as a freestanding right.

One example is the discussion by the Scrutiny Committee in June 2006 of the Education Amendment Bill 2006. This Bill proposed to amend the guarantee of free education in s 1 of the Education Act 2004 ("Education in government schools is to be free and no fees are chargeable for it") by providing the Minister with power to "determine guidelines about charges for activities, services and facilities provided in relation to a government school." The *Explanatory Statement* to the Bill set out the intended effect of the amendment:

"This will allow schools to charge parents only for some specific activities, services and facilities (such as overseas excursions and canteen facilities) that they want their child to use at, or in relation to, a government school. Students will continue to be entitled to free access to government school facilities to meet curriculum requirements and will have access to the school curriculum regardless of their capacity to pay."

The Scrutiny Committee report, under its scrutiny category of "trespassing on personal rights and liberties", considered whether the "derogation" from the right to education (in fact strictly a limitation) was justified. It examined that issue against the background of the right to education in the Universal Declaration of Human Rights and the ICESCR. The Scrutiny Report draws on the jurisprudence of the UN

⁵¹ For example, the Western Australian committee that examined the possibility of including economic, social and cultural rights into a Western Australian Bill of Rights identified six possible ways of doing so: (a) treating the selected ESCR in the same way as civil and political rights (CPR); (b) inclusion of ESCR with the recognition that they were to be implemented progressively; (c) modifying the application of provisions of the Act relating to remedies, by not providing judicial remedies for ESCR violations but instead providing for administrative remedies; (d) inclusion of ESCR as non-binding principles or objectives; (e) the pursuit of ESCR through different means, such as human rights audits or regular reviews; and (f) reliance on the indirect protection of ESCR through the implementation and enforcement of CPR. Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a proposed WA Human Rights Act* (2007), 82-86.

Committee on Economic, Social and Cultural Rights, whose General Comments No 11 and 13 have been cited extensively above. The Scrutiny Committee notes from General Comment No 11 that “the nature of a right to free education is unequivocal, and there is no provision in the ICESCR which permits of its derogation.”⁵² The Scrutiny Report also draws on international jurisprudence that linked certain aspects of the right to education to the rights of children under the ICCPR, and under the similar provision in the ACT HRA.⁵³

A second example of such scrutiny took place in August 2006, in relation to amendments to section 20 of the Education Act 2004 by the Education Amendment Bill 2006 (No 3). These amendments were to “to make new provision concerning the nature of the consultation that must take place before the Minister decides to close or amalgamate a government school, and to preclude the Minister from deciding to close or amalgamate before 1 January 2008 a government school that has been identified for closure or amalgamation.”⁵⁴ The Scrutiny Committee referred once again to article 13 of the ICESCR and to the General Comment No 11, and once again linked the right to education to rights in the ICCPR (article 24(1)), and the right of a child to protection contained in section 11(2) of the HRA.⁵⁵ Nonetheless, it engages in little substantive analysis of these issues in the context of the Bill.

If a right to education were included in the HRA, one would expect that the examination of these issues would be very similar to what has taken place in these cases, though a more substantive analysis of some of the aspects of the right might be expected if it were included in the HRA.

United Kingdom model

The UK Human Rights Act provides one model of implementation of the right to education. The UK Human Rights Act protects the rights contained in the European Convention on Human Rights of 1950 as well as the rights contained in the First and Sixth Protocols to the Convention, all of which are set out in a schedule to the legislation. The First Protocol includes (Article 2):

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

⁵² Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee), Report No 26, 5 June 2006, 4. In fact the question here is not one of “derogation” (a technical term in human rights law relating to the suspension of particular right in certain emergency situations) but of “limitation”. The ICESCR does in fact contain a provision which permits the right to education to be subject to limitations (article 4).

⁵³ *Ibid* 4-5.

⁵⁴ Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee), Report No 30, 21 August 2006, 1.

⁵⁵ *Ibid* 2-4.

This right affects UK law in the following ways:

- (a) it must be taken into account in the interpretation of laws (all laws must be read and given effect to so that they are compatible with the designated rights as far as possible); (s 3)
- (b) a court can make a formal declaration if it considers that a law is incompatible with the right; (s 4)
- (c) it can be the basis of an action taken against public authorities if they have breached the right. (s 6).

Judicial remedies

If the right to education were to be included in the HRA, public authorities would be under an obligation to respect the right, subject to reasonable limits. Several remedies would be available to complainants. Should the right be made justiciable by the courts, they would be empowered to adjudicate claims.⁵⁶ There would be little difficulty in a court adjudicating the nature and scope of the right to education.⁵⁷ However, no compensation for a breach of the right would be available, as damages cannot be awarded for a rights infringement under the HRA (with the exception of a breach of s 18, the right to liberty and security).⁵⁸

Under s 30 of the HRA, courts would strive to seek an interpretation of legislation consistent with the right to education if a violation of the right were established. If a rights-consistent interpretation of legislation were not possible (because such an interpretation would undermine the purpose of the legislation), a court could issue a declaration of incompatibility under s 32 of the Act, which would trigger a response from the Attorney-General in the Legislative Assembly (s 33). This declaration would act as a vindication of the complainant's rights.

Case study on the role of the right to education in the ACT

It is appropriate to conclude this Discussion Paper with a local case study. This case study helps to offer some useful background on the issue of whether a right to education ought to be included in the HRA. It seems clear that a right to education would not radically alter the policy landscape. However, it would certainly provide an important set of standards against which the actions of government can be judged.

⁵⁶ Human Rights Act 2004 (ACT), ss 28, 40B.

⁵⁷ For example, in his recent advice on the constitutionality of a national human rights charter, Solicitor-General Stephen Gageler QC (despite raising doubt about other rights) said that the right to education is one of the “more specific rights that may represent judicially manageable standards”.

⁵⁸ On the question of damages under s 18(7), see *Morro v Australian Capital Territory* [2009] ACTSC 118.

The *Towards 2020* school closures and the right to education

In May 2006 the ACT government announced plans to renew schools in the Territory: the reforms were given the name *Towards 2020: Renewing our Schools*. Part of this project involved the reconfiguring of the structure of schooling, creating a new system whereby education was to be analysed in regional terms, and closing several schools as well as upgrading others. \$90 million was set aside over four years for the upgrades. A six month period of consultation was organised with around 700 meetings, and in December 2006 the government announced a revised plan. One of the major changes related to the number of schools being closed: 9 out of the 20 originally named preschools would face closure, and 12 out of the 17 named high schools would be closed. As the government began to roll out this policy, it became clear that there was some community disenchantment. In February 2009 the government commissioned an inquiry into the consultation process. A Committee was set up to conduct the inquiry. This Committee made three school visits, held four public hearings, and received 76 submissions. The Committee drew on this evidence to write its report, *School Closures and Reform of the ACT Education System 2006*.

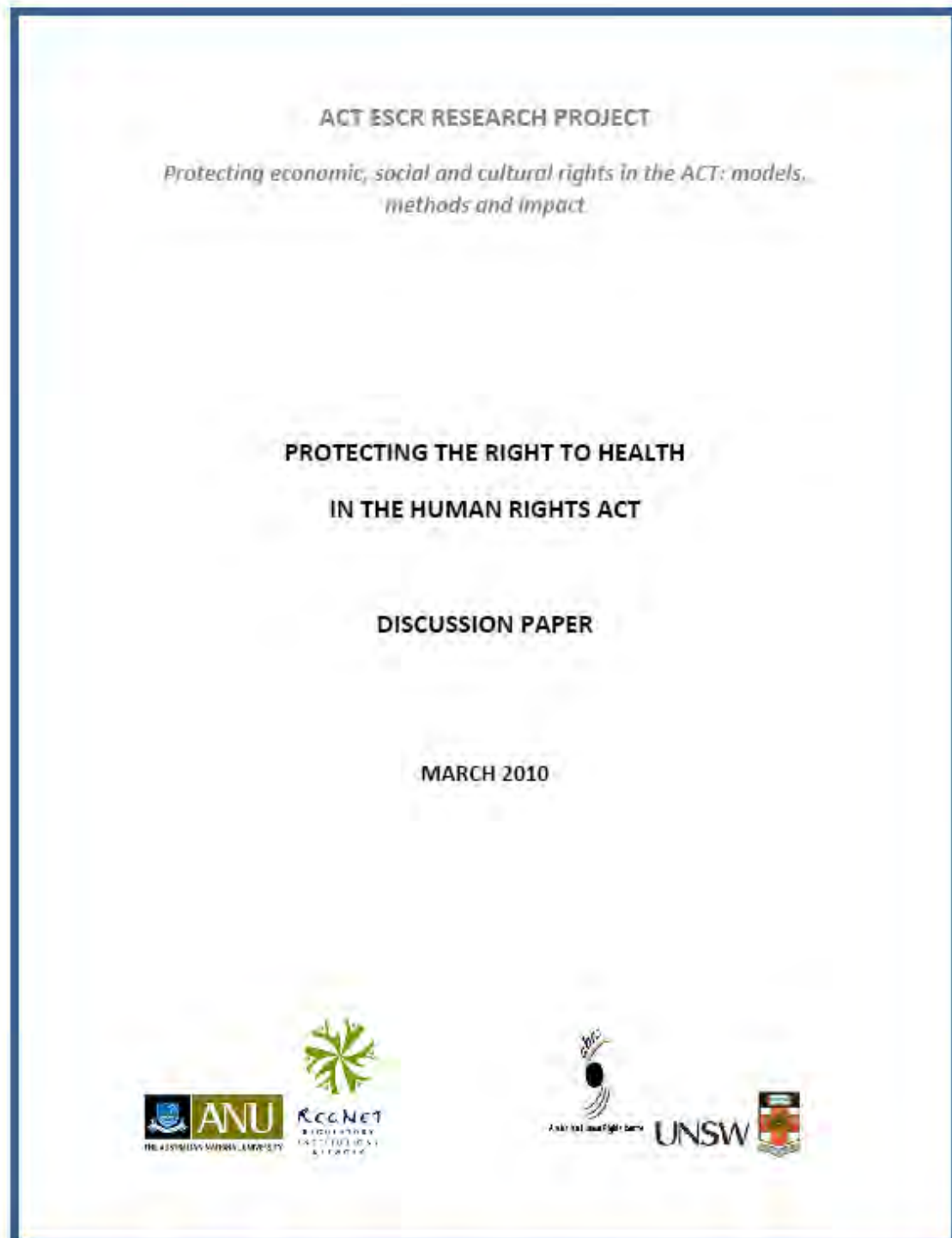
The report was critical of the process undertaken by the ACT government. It concluded that the timing of the consultation was inadequate, given how substantial the reforms were. It suggested that the changes to the school system should have been foreshadowed in the election, or more time should have been set aside to consult schools, parents, and community leaders. It also raised questions about the quality of the evidence base that formed the basis of the reforms, the impartiality of the decisions, and the weight given to the consultation in the government's decisions. The Committee recommended that the statutory provisions for consultation in the Education Act were "inadequate". It recommended that more careful consultation take place in the future, and specifically that two schools (Hall and Tharwa) be reopened. Representatives of Cook and Flynn schools pursued legal proceedings, but withdrew these in early 2009.

It is useful to assess the ways in which the right to education in the HRA would have influenced the *Toward 2020* vision. Consider the compatibility of the decisions on:

- the availability of school facilities, physically and financially;
- the accessibility of school facilities, and whether alternatives provided where institutions disestablished;
- the acceptability of school facilities, to minimum quality standards, and to parents;
- the adaptability of school facilities.

Further reading

- UN Committee on Economic, Social and Cultural Rights, General Comment No. 11 (1999), *Plans of Action for Primary Education*.
- United Nations Committee on Economic, Social and Cultural Rights, General Comment No 13, *The Right to Education* (1999).
- Katarina Tomaševski, *Education Denied* (2003).
- ESCR-Net: The Right to Education, online at: http://www.escr-net.org/resources/resources_show.htm?doc_id=401317.



ACT ESCR RESEARCH PROJECT

*Protecting economic, social and cultural rights in the ACT: models,
methods and impact*

PROTECTING THE RIGHT TO HEALTH IN THE HUMAN RIGHTS ACT

DISCUSSION PAPER

MARCH 2010



UNSW



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The ACT Economic, Social and Cultural Rights Research Project

Protecting Economic, Social and Cultural Rights in the ACT: Models, Methods and Impact (the “ACT ESCR Project”) is a joint project between the ANU (together with the Australian Human Rights Centre at UNSW) and the ACT Department of Justice and Community Safety, supported by a Linkage grant from the Australian Research Council. The project is assessing whether the ACT *Human Rights Act 2004* (“HRA”) should be amended to include economic, social and cultural rights.

The project is being undertaken at the request of the ACT government, following the government’s 12-month review of the HRA, which recommended that the issue of ESCR be revisited as part of the five-year review of the legislation.

The project will submit a report to the ACT government in later this year. It is anticipated that the project will generate the first comprehensive Australian study of the potential impact of the protection of ESCR in a legislative bill of rights. Its objectives include:

- Assessing the adequacy of the protection of ESCR in the ACT;
- Examining the possible mechanisms for the enhancement of the protection of ESCR and the appropriateness of those mechanisms to the ACT; and
- Analysing the potential impact of the inclusion of ESCR in the ACT HRA and the effect on policy-making, service delivery and decision-making processes in the ACT.

INTRODUCTION

Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.¹

The right to health has long been regarded as fundamental to the dignity and flourishing of the human being. The World Health Organisation declared in 1946 that the highest attainable standard of health is a fundamental right of every human being, without distinction of race, religion, political belief, economic or social condition.² In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, which laid the foundations for the international legal framework for the right to health by proclaiming the right of everyone to a standard of living adequate for the health and wellbeing of all persons and their families, including the right to medical care.³

This paper explores whether the explicit inclusion of the right to health as a *legal* right in the ACT *Human Rights Act 2004* (HRA) could contribute to better protection of the right in the ACT, both as an aid to the formulation and implementation of health policy, as a design feature of health systems, and as a standard that would enable a denial of the right or regression in its enjoyment to be better identified (and rectified).⁴

The purposes of this paper are to:

- (a) provide an overview of the internationally guaranteed right to health, in particular as accepted by Australia under international treaties to which it is a party;
- (b) describe briefly the manner means by which the right to health is currently implemented in the law and practice of the ACT, and the extent to which that law and practice gives effect to the right;
- (c) identify the ways in which existing provisions of the HRA already guarantee aspects of the right to health;
- (d) describe how the right to health might be incorporated in the HRA and the legal implications of such inclusion; and

¹ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para 1.

² WHO Constitution, signed on 22 July 1946 by the representatives of 61 States, including Australia, and entered into force on 7 April 1948.

³ Universal Declaration of Human Rights, Article 25(1).

⁴ Grateful thanks to Rebecca Minty for her invaluable and generous assistance in researching and preparing early drafts of this paper.

- (e) assess the advantages and possible drawbacks of including the right to health in the HRA.

I. THE NATURE AND SCOPE OF THE RIGHT TO HEALTH

The 'right to health' is shorthand for the more accurate statement of the right under international law, namely "the right to the highest attainable standard of health". The right to health is recognised in numerous international human rights instruments. It is enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ as well as in other international human rights treaties to which Australia is party.⁶

Article 12 of the ICESCR provides that:

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Many countries recognise the right to health in their national constitutions. This commitment is expressed in various ways. There are over 60 countries which expressly recognise the right to health or the right to health care, while more than 40 countries recognise health-related rights, expressed variously in terms such as the right to reproductive health care, the right of disabled persons to material

⁵ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force generally 3 January 1976 and for Australia 10 March 1976).

⁶ See, for example, Article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination; Articles 11(1) (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 24 of the Convention on the Rights of the Child; and Article 25 of the Convention on the Rights of Persons with Disabilities. Several regional human rights instruments also recognise the right to health, such as the European Social Charter of 1961 as revised (art 11); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (art 10); the African Charter on Human and Peoples' Rights (art. 16); and the African Charter on the Rights and Welfare of the Child (art. 14).

assistance, and the right to a healthy environment.⁷ One example of such protection is offered in the 1996 South African Bill of Rights, which provides that:⁸

Section 27

1. Everyone has the right to have access to [health care services, including reproductive health care].
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

Key elements

The UN Committee on Economic, Social and Cultural Rights has clarified the meaning of the right to health in Article 12 of the ICESCR in *General Comment 14: The Right to the Highest Attainable Standard of Health* (“GC 14”).

According to the Committee, the right to health ‘contains both freedoms and entitlements’.⁹ The freedoms include:

- The right to control one’s health and body, including sexual and reproductive freedom; and
- The right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.

The entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. This includes the right to have access to timely and appropriate health care and extends to what are described as the “underlying determinants of health”. These are the basic requirements on which good health depend, and include: safe and potable water and adequate sanitation; adequate supply of safe food, nutrition and housing; and healthy occupational and environmental conditions.¹⁰ The Committee has noted

⁷ Paul Hunt, [Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health](#), E/CN.4/2003/58, para 20.

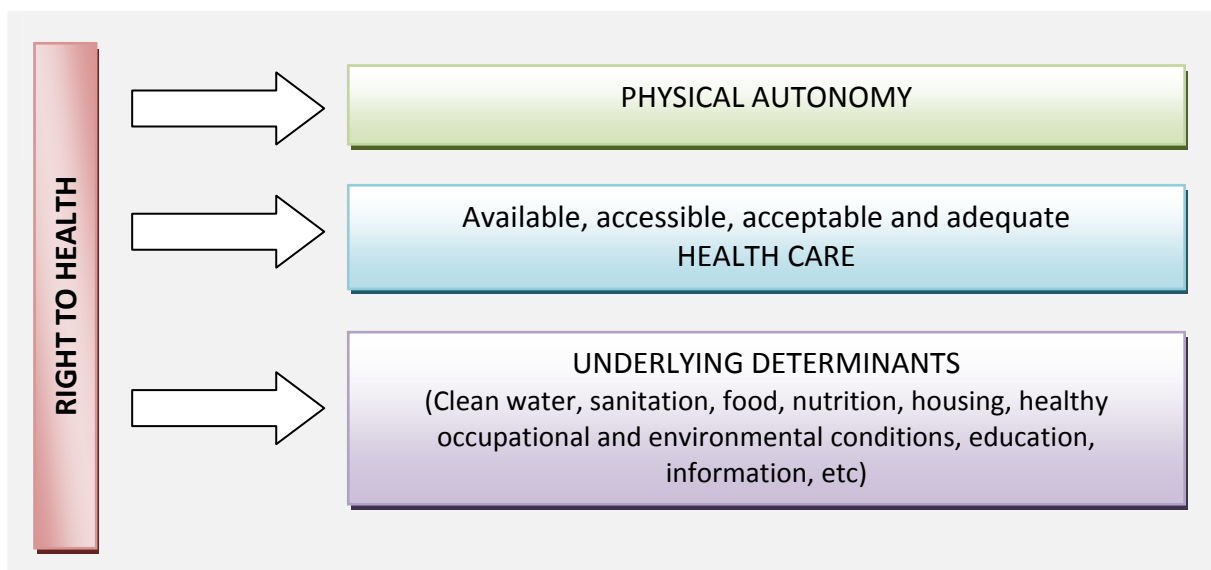
⁸ A related provision, section 24, in the South African Constitution also protects the right of everyone “to an environment that is not harmful to their health”, which includes measures to prevent pollution, and to secure ecologically sustainable development.

⁹ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 8.

¹⁰ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 11.

that the provision of health resources must meet certain requirements to be meaningful:¹¹

Factor	Meaning
Availability	There must be functioning public health and health care facilities, goods and services, as well as programmes in sufficient quantity.
Accessibility	Access to health care facilities, goods and services must be universal and provided on an equitable basis. Accessibility has four overlapping dimensions: • non-discrimination • physical accessibility • economical accessibility (affordability) • information accessibility
Acceptability	All health facilities, goods and services must be respectful of medical ethics and culturally appropriate as well as sensitive to gender and life-cycle requirements.
Adequacy/Quality	Health facilities, goods and services must be scientifically and medically appropriate and of good quality.



¹¹ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 12.

Key obligations

What it does not require

The right to health is not the same as a right to be healthy. States are not responsible for every aspect of good health of people within their territory. This is especially so given the many biological, environmental and socio-economic factors that can limit an individual's health. It is also the case because personal choices, including choices to engage in risky behavior, can limit an individual's capacity for full health.¹²

What it does require

Duties to protect, respect and fulfill the right to health

Australia, including its States and Territories,¹³ are bound in international law to "respect, protect, and fulfill" the rights contained in the ICESCR, including the right to health.¹⁴

- *Respecting* the right to health means governments must not interfere directly or indirectly with the enjoyment of the right, including in relation to preventative, curative or palliative health services. This includes, for example, not preventing access to sexual and reproductive health measures such as contraceptives, or to appropriate traditional medicines, and not taking unreasonable coercive measures in the area of mental health.¹⁵
- *Protecting* the right to health requires the government to take positive measures for example, through legislation to ensure equal access to health care and health services, including those provided by private or community organisations. Further, the government must ensure that unsafe drugs are not on the market, and must regulate professional standards through measures such as health professions boards.¹⁶
- *Fulfilling* the right to health requires governments to give health appropriate recognition in political and legal systems. Formulating and reviewing health

¹² General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 8.

¹³ Article 28, ICESCR. Committee on Economic, Social and Cultural Rights, Concluding Observations for Australia (12 June 2009) E/C.12/AUS/CO/4, para. 11 ("CESCR Concluding Observations: Australia"), reflecting the principle in Article 28 of ICESCR that the obligations of States parties in relation to rights guaranteed by the Covenant extend to all parts of federal States, irrespective of the distribution of power and responsibilities within a particular federal system.

¹⁴ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 33.

¹⁵ Ibid, para. 34.

¹⁶ Ibid, para. 35.

policies and plans are key aspects of this obligation – for example, through immunisation plans, delivery of reproductive health infrastructure, or in relation to occupational health and safety plans in the workplace.¹⁷

Immediate obligations

The right to health creates obligations of two kinds, which reflect the fact that there are resource and other constraints that may indirectly affect healthcare provision. First, there are obligations with *immediate effect*: core minimum requirements of the right to health that governments must take “deliberate, concrete and targeted” steps to satisfy.¹⁸

Second, there are obligations that must be *progressively realised* “with the full use of maximum available resources”.¹⁹ Progressive realisation is a ‘necessary flexibility device, reflecting the realities of the real world’.²⁰ Elements of the right that must be progressively realised are subject to more government discretion. If an obligation must be progressively realised, action must still be taken “as expeditiously and effectively as possible”, and measures that are retrogressive to the achievement of an outcome must be properly justified.²¹ That an obligation must be progressively realised, then, does not let a government “off the hook”: it merely acknowledges that some obligations are more aspirational than others, and need more time to be implemented.

We suggest that the following elements of the right represent *immediate obligations*:

- Developing a coordinated and comprehensive health strategy, which addresses structural problems and prioritises the needs of the most vulnerable groups in the community;²²
- Putting in place mechanisms to ensure that progress towards securing the right to health can be monitored effectively;²³
- Ensuring that vulnerable groups are able to effectively participate in decision-making processes and the development of policies which affect them; and

¹⁷ Ibid, para. 36.

¹⁸ General Comment 3: [The nature of States parties' obligations \(art. 2 \(1\)\)](#), 1990, para 2.

¹⁹ General Comment 3: [The nature of States parties' obligations \(art. 2 \(1\)\)](#), 1990, para 9.

²⁰ Ibid.

²¹ Ibid.

²² Areas of comparable priority relate to reproductive and child health; immunisation, prevention, treatment and control of endemic disease; and education and access to information and training.

²³ An example of the type of indicators relevant to monitoring the progressive realisation of the right to health is at **ANNEX 1: Monitoring the effective realisation of the right to health**.

- Implementing the right to health in a non-discriminatory way. This includes providing access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups,²⁴ and ensuring the equitable distribution of all health facilities, goods and services. Health legislation should also not unjustifiably discriminate in its terms or its impact.

Reasonable limitations

In line with the general understanding that few rights – whether civil and political or economic, social and cultural – are absolute, human rights law recognises that limits may be placed on the right to health, where they can be demonstrably justified as reasonable and proportionate to a legitimate objective.²⁵ It may be reasonable for a government, for example, to ration access to a particular life-saving vaccine in cases of an urgent public health emergency, providing that a longer term public health strategy was developed concurrently. Similarly, it may be necessary, for example, to limit an individual’s freedom of movement, or right to refuse medical treatment if an individual has a serious communicable disease that should be quarantined.²⁶

Remedies

The UN Committee on Economic, Social and Cultural Rights has recognised the importance of domestic remedies for a failure to ensure the enjoyment of the right to health; these may be judicial or other appropriate remedies.²⁷ If a violation of the right to health is found, remedies may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. In Part III of this paper, we present a potential form of implementation, and the prospects of judicial remedies, in the ACT. Of course, a range of bodies other than courts can ensure accountability for the right to health. These include internal grievance mechanisms, ombudsmen, human rights commissions, consumer forums, patients’ rights associations or similar institutions.

²⁴ As an example, States must provide “reasonable accommodation of persons with sensory impairments in accessing health care facilities”: See General Comment 20: [Non-Discrimination in Economic, Social and Cultural Rights \(art. 2, para. 2\)](#), 2009, paras 3, 7.

²⁵ HRA. s 28. Article 4, ICESCR, notes that in certain circumstances it may be necessary to limit an individual’s right to health, although this must be ‘compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’.

²⁶ Gunilla Backman et al, ‘Health systems and the right to health: an assessment of 194 countries’ (2008) 372 *The Lancet* 2047, 2049.

²⁷ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 59.

II. CURRENT PROTECTION OF THE RIGHT TO HEALTH UNDER THE HRA AND OTHER LAWS

Indirect protection under the HRA

The HRA currently protects the right to health indirectly, because of the linkages that exist between health and other human rights.²⁸ The following examples are drawn from the ACT and other comparable human rights jurisdictions.²⁹

i. Right to equality and non-discrimination³⁰

The right to be free from discrimination is of paramount importance with respect to realising the right to health, because it prohibits health services from being provided in a way that advantages one particular group, or individuals with a particular attribute, over another.

This prohibition of discrimination is also entrenched in the *Discrimination Act 1991* (ACT).³¹ Section 20 of that Act prohibits discrimination in the provision of “services”, which includes “services provided by a government, government authority, local government body or corporation in which a government has a controlling interest”.

More generally, the grounds on which discrimination is prohibited in human rights law include gender, race, age, nationality and sexual orientation as well as “health status”. An example of “health status” is being HIV positive.³²

²⁸ See **ANNEX 2: Linkages between health and human rights**

²⁹ Consideration of foreign case law is directly relevant to the ACT, by virtue of s 31(1) of the HRA, which provides that “International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.”

³⁰ HRA, s 8.

³¹ The *Discrimination Act 1991* (ACT) only prohibits discrimination on certain enumerated grounds and arguably does not create a positive obligation on duty-bearers to promote equality. See, Gabrielle Szabo, ‘Mainstreaming Equality in the ACT - An equality duty for the ACT Discrimination Act’ (2008). Available online at www.hrc.act.gov.au (accessed 14 February 2010). In contrast, the Human Rights Committee has noted that the right to non-discrimination under the ICCPR requires states to take positive measures to ensure equality. See, eg, Human Rights Committee General Comment No. 18: Non-discrimination (10 November 1989), para 5.

³² The Committee recently noted that ‘denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation’: General Comment 20: [Non-Discrimination in Economic, Social and Cultural Rights \(art. 2, para. 2\)](#), 2009, para. 33.

Example from overseas jurisdictions

In *Eldridge v British Columbia*³³ the Canadian Supreme Court held that provincial government's failure to fund sign-language interpreters within the public health system amounted to indirect discrimination. The British Columbia Medical Services Commission and relevant hospital authority had exercised a discretion under legislation not to include provision of sign language interpreters as a "medically required service" eligible for public funding. The Court held that the limitation on the right to equality for people with a hearing impairment was not proportionate, given the cost of providing sign language interpreters was "relatively insignificant" at 0.0025 per cent of the provincial health care budget. This confirmed the Court's well-established position that once the state had chosen to fund a particular service, it was obliged to do so in a non-discriminatory way.

ii. Right to life³⁴

The right to life is intrinsically related to the right to health. The positive obligation on States to take steps to preserve life has been recognised by the Human Rights Committee, as the body that monitors the International Covenant on Civil and Political Rights in comments on the right to life. The right to life extends to the public health sphere and imposes positive obligations on hospitals and health authorities to adopt appropriate measures for the protection of patients' lives.³⁵

It is arguable that the obligation to protect life may in certain limited circumstances require the State to fund a minimum level of health services or essential medication.³⁶ At the least, health authorities may have to account for resource-allocation and where life saving treatment is denied "...they must explain the priorities that have led them to decline to fund the treatment."³⁷

Withdrawing or withholding life-saving treatment

ACT example

In the recent ACT Supreme Court decision of *Australian Capital Territory v JT*³⁸ the Court had to decide whether it was lawful for health authorities to discontinue force-feeding a patient with a psychiatric illness. This raised both the right to life under section 9 of the HRA, and the right to be free from cruel, inhuman and degrading treatment under section 10 of the HRA (see discussion of this section below). ACT Health argued that long term feeding against the patient's will was contrary to the latter. Chief Justice Higgins found that in this instance,

³³ (1997) 3 SCR 624.

³⁴ Section 9, *Human Rights Act 2004* (ACT) ("HRA").

³⁵ *Eriksson v Italy* (Application No 37900/97, 26 Oct 1999); *Calvelli and Ciglio v. Italy* (Application No 32967/96), ECHR 2002-I.

³⁶ See, for example, *Netecki v Poland* (Application No 65653/01), 21 March 2002; *Scialacqua v Italy* (1998) 26 EHRR 164.

³⁷ *R v Cambridge Health District Health Authority, ex parte B* [1995] 1 W.L.R. 898.

³⁸ [2009] ACTSC 105.

the Court could not sanction removal of force-feeding because the patient lacked the capacity to consent.

Examples from other jurisdictions

In *Shortland v Northland Health Ltd*³⁹ the NZ Court of Appeal was confronted with the conceptual connection between health care and life. It ultimately held that a clinical decision to withdraw dialysis treatment did not amount to deprivation of life, given the clinical team's knowledge of the patient's condition and their assessment of whether he would benefit from dialysis.

Decisions concerning children

The right of parents to make decisions on appropriate medical treatment for their child does not extend to decisions that endanger the life or health of the child.⁴⁰ It also follows that competing rights, for example, the right to manifest religious or cultural beliefs, may not be used to deny a child the right to life-saving or other essential treatment.⁴¹

Emergency treatment

Example from other jurisdictions

In *Paschim Banga Khet Samity v State of West Bengal* [1996] 4 SCC 37, the Supreme Court of India held that the right to life encompassed the right to timely access to emergency medical treatment at state expense, where the medical emergency is life-threatening. In that case the applicant required emergency medical treatment but was refused treatment at eight separate state facilities, either because of lack of beds, or lack of medical capacity. He was eventually taken to a private hospital where he was required to pay for treatment. The Court noted that the right to life imposed a positive obligation on the state to run hospitals and health centers in a manner that enables preservation of human life.

Provision of adequate healthcare in custodial settings

The UN Human Rights Committee has signaled that the right to life extends to provision of healthcare at least within the context of custodial settings. It has asserted that the State is "responsible for the life and well-being of its detainees",⁴² and has a positive duty to maintain an adequate standard of health for detainees:⁴³

'[I]t is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection ... the essential fact remains that the State party by arresting and detaining

³⁹ [1998] 1 NZLR 433

⁴⁰ See, for example, *Re J (An Infant): Director-General of Social Welfare v B and B* [1995] 3 NZLR 73; *In Auckland Healthcare Services Ltd v Liu* (NZ High Court; 11-7-96, M 812/96); *MJB v Director-General of Social Welfare* (3-4-96; NZCA 154/95); *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 (Canada).

⁴¹ *Re J (An Infant): Director-General of Social Welfare v B and B* [1995] 3 NZLR 73 (HC).

⁴² [Fabrikant v Canada](#), Communication No 970/2001 (11 November 2003), para 9.3.

⁴³ [Lantsova v Russian Federation](#), Communication No 763/1997, UN (26 March 2002), para 9.2

individuals takes responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility.'

In *Lantsova v The Russian Federation*⁴⁴ the Committee found a violation of the right to life where a man died in a detention centre in Moscow. The prisoner's mother, who took the case on behalf of her deceased son, alleged that he was in good health when he entered the prison, but soon fell ill due to poor conditions. It was claimed that the prisoner "received medical care only during the last few minutes of his life" and "that the prison authorities had refused such care during the preceding days and that this situation caused his death".⁴⁵ The Committee found that the failure of the authorities to provide a "properly functioning medical service" to diagnose and treat the prisoner's medical condition violated his right to life.⁴⁶ Based on *Lantsova*, it can be presumed that providing a "properly functioning medical service" in prisons is a legal requirement of countries parties under the right to life. [Case summary excerpted from Rick Lines, 'The right to health of prisoners in international human rights law', *International Journal of Prisoner Health*, March 2008; 4(1): 3-53, at 17]

Prevention of diseases

The Committee has also said that the conditions of detention must comply with the standards required by the right to life, which includes "the prevention of the spread of disease and the provision of appropriate medical treatment to persons who have contracted diseases, either in prison or prior to their detention."⁴⁷

Provision of mental healthcare

The failure to provide adequate mental healthcare in custodial settings may also violate the right to life. In *Edwards v UK* the European Court of Human Rights found that the right to life had been violated when the failure by the authorities involved (medical profession, police, prosecution and court) to pass on information to prison authorities about a potentially mentally ill prisoner, and the inadequacy of the screening process on the prisoner's arrival at the prison, resulted in the death of the prisoner's cellmate.⁴⁸ The Court said that:

'[I]t is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision. The defects in the information provided to the prison admissions staff were combined in this case with the brief and cursory nature of the examination carried out by a screening health worker who was . . . inadequately trained and acting in the absence of a doctor to whom recourse could be made in the case of difficulty or doubt.'⁴⁹

⁴⁴ [Lantsova v Russian Federation](#), Communication No 763/1997, UN (26 March 2002).

⁴⁵ Ibid, para 9.2.

⁴⁶ Ibid.

⁴⁷ Concluding Observations of the Human Rights Committee: [Republic of Moldova](#) (2002), para 9.

⁴⁸ *Edwards v United Kingdom* (2002) 35 EHRR 487, para 64. See also *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, where the House of Lords held that the negligent failure of a psychiatric hospital to take adequate steps to prevent the suicide of a patient was a violation of the right to life.

⁴⁹ *Edwards v United Kingdom* (2002) 35 EHRR 487, para 62.

iii. Prohibition against inhuman and degrading treatment⁵⁰

The positive obligation for authorities to prevent inhuman and degrading treatment may in certain circumstances also be relevant to the right to health. Whether treatment is found to be contrary to this right depends on the duration of treatment, its physical and mental effects, and in some circumstances, the sex, age and state of health of the victim.

Example from other jurisdictions

In the UK case of *Secretary of State for the Home Department v Limbuela & Ors*⁵¹ the House of Lords found that the right not to be subject to cruel, inhuman and degrading treatment under the European Convention of Human Rights imposed a positive obligation on the state to ensure asylum seekers did not become completely destitute. The Court noted it was not satisfactory for the state to allow a situation where asylum seekers lacked access to basic services and were unable to earn any income, as they would be denied many of the underlying determinants of health such as adequate shelter and food. However, the treatment must “to a seriously detrimental extent ... den[y] the most basic needs of any human being”.⁵²

iv. Right to refuse medical treatment⁵³

The right to refuse medical treatment is an essential component of the right to health and upholds a person’s right to autonomy and personal, mental and bodily integrity in the specific context of medical treatment.

A “mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death”.⁵⁴ The right to refuse life-sustaining measures could operate even if the refusal was given in advance of the medical situation arising.⁵⁵ A similar position is also reflected in Australia’s common law.⁵⁶

⁵⁰ HRA, s 10(1).

⁵¹ [2005] UKHL 66.

⁵² This high threshold of treatment is one of the factors informing Byrne’s conclusion that the current UK civil and political rights framework is too narrow to protect the right to health of desperately ill asylum seekers in the UK: Iain Byrne, ‘Enforcing the Right to Health: Innovative Lessons from Domestic Courts’ in Andrew Clapham and Mary Robinson, *Realizing the Right to Health* (2009), 533.

⁵³ HRA, s 10(2).

⁵⁴ *Re MB (Medical Treatment)* [1997] 2 FLR 426, 432 (Butler-Sloss LJ). See also *Re B (adult: refusal of medical treatment)* [2002] 2 All ER 449; *Re T (adult: refusal of medical treatment)* [1992] 4 All ER 649; *Airedale NHS Trust v Bland* [1993] AC 789; *Nancy B v Hotel-Dieu de Quebec* (1992) 86 DLR (4th) 385.

⁵⁵ *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819; *Airedale NHS Trust v Bland* [1993] AC 789, 864 (Lord Goff); *Re T (adult: refusal of medical treatment)* [1992] 4 All ER 649; *Malette v Shulman* (1990) 67 DLR (4th) 321.

⁵⁶ *Hunter & New England Area Health Service v. A* [2009] NSW SC 761; *Brightwater Care Group (Inc) v. Rossiter* [2009] WASC229.

Medical treatment without consent may meet the general definition of cruel, inhuman and degrading treatment when it causes suffering or degradation.⁵⁷

v. Right to protection of family and children⁵⁸

The right to protection of the family and children may be relevant to the right to health, for example, in relation to government decisions about allowing visiting access for people in closed health facilities such as mental health treatment centers or geriatric care homes.

vi. Right to privacy⁵⁹

The right to privacy is clearly important to the protection of medical records and health data. The right to privacy encompasses the right to respect for one's private and family life, and one's home. The importance of protecting these interests may also implicate the provision of a healthy environment.

Examples from other jurisdictions

Protection of personal medical data

In *I. v. Finland*⁶⁰ the European Court of Human Rights found that a hospital's failure to adequately protect a HIV-positive patient's medical data violated her right to privacy. The Court noted that the "protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life... It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the [right to privacy]".⁶¹

Healthy environment

In the case of *Guerra & Ors v Italy*⁶² the European Court of Human Rights held that a council's failure to provide local residents with information about the potential environmental impact of a nearby fertiliser factory, which had been classified as "high risk", violated the residents' right to private and family life. In doing so, the Court linked environmental health with human health and private life. The Court also noted that the right

⁵⁷ The UN Human Rights Committee has found that the sterilization of disabled women without consent is a breach of the prohibition against cruel, inhuman and degrading treatment in article 7 ICCPR. See Concluding Comments on Japan (1998) UN doc. CCPR/C/79/Add. 102, para.31.

⁵⁸ HRA, s 11.

⁵⁹ HRA, s 12.

⁶⁰ (Application No. 20511/03), judgment of 17 July 2008.

⁶¹ Ibid, at para 38.

⁶² (1998) 26 EHRR 357.

to information meant that the residents must be allowed access to information about the factory given it related to their health.⁶³

Duty to inform vs patient confidentiality

The duty to inform could also extend to situations where health authorities know that an individual patient is putting another identifiable person at risk, for example, if a doctor is aware that a patient is knowingly exposing his/her partner to HIV infection. However, human rights jurisprudence has provided little guidance to date on how to reconcile the conflict of interests which arise in such circumstances, with respect to the duty of confidentiality. In *Colak and Tsakiridis v. Germany*,⁶⁴ the applicant complained that her rights to life, respect for private life and a fair hearing had been breached because she had not received damages for the failure of a family doctor to inform her that her partner had AIDS. The European Court of Human Rights found no violation, on the basis that the national courts' assessment of the facts had not been arbitrary and that the national legal system provided adequate legal remedies for parties injured through medical negligence. In *Mr. X v Hospital Z* (1998) 8 SCC 296, the Indian Supreme Court held that a doctor may disclose the HIV-positive status of a patient to his/her (future) spouse without incurring liability; but there was no obligation to do so.

vii. Freedom of expression⁶⁵

The right to seek and impart information⁶⁶ is important to the right to health since access to appropriate and relevant health related information is essential in enabling individuals to make informed decisions relating to their health. This includes, for example, access to information on sexual and reproductive health.⁶⁷

viii. Right to humane treatment when deprived of liberty⁶⁸

It is well-established in human rights jurisprudence that prisoners and persons held in custody are a category of vulnerable persons, whose lives and health the State has a particular obligation to protect. The right applies in relation to "all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions".⁶⁹

⁶³ "Casenote: Case of Guerra and Others v Italy" (1998) 2 *International Journal of Human Rights* 93, 97.

⁶⁴ (Applications nos. 77144/01 and 35493/05), judgment of 5 March 2009.

⁶⁵ HRA, s 16.

⁶⁶ This is part of the right to freedom of expression, protected in section 16(2), HRA.

⁶⁷ General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000, para. 11.

⁶⁸ HRA, s 19.

⁶⁹ UN Human Rights Committee, General Comment 9: [Human treatment of persons deprived of liberty \(art 10\)](#), 1982, para 1.

Example from overseas jurisdictions

In *Van Biljon v Minister of Correctional Services*⁷⁰ the South African Constitutional Court assessed whether a lack of access to ARV medication for HIV+ prisoners violated their right to “conditions of detention that are consistent with human dignity, including ... the provision, at state expense, of adequate ... medical treatment”.⁷¹ In finding that the State was obligated to provide ARV treatment, the Court noted that “adequate” medical treatment for prisoners could not be determined by what was generally available in the public system, given that prisoners were more exposed to opportunistic infections than those with HIV not deprived of their liberty. It was also that the state was unable to show that it could not afford to provide the treatment. The Court applied the principle of “equivalence”: that is, prisoners are entitled to health care of a standard equivalent to those not detained. This case reflects the importance of equivalent health *outcomes* rather than simply provision of equivalent treatment.

ix. Right to a fair hearing⁷²

The right to a fair hearing may indirectly protect the right to health. In the recent case of *Thompson v ACTPLA*,⁷³ the ACT Civil and Administrative Tribunal held that the right to a fair hearing should be interpreted broadly, and it may apply to government decisions that affect an individual’s substantive health services or benefits.⁷⁴ In the United Kingdom, for example, right to a fair hearing arguments have been used to protect aspects of the right to health in the areas of social security and disability benefits.⁷⁵

ACT example

In *Kracke v Mental Health Review Board*⁷⁶ the Applicant was subject to compulsory mental health treatment orders without his consent, which were required to be regularly reviewed by the Mental Health Review Board. Due to administrative oversight, the Board failed to conduct a number of the mandated reviews, and the Victorian Civil and Administrative Tribunal found the failure to conduct the required reviews infringed Mr Kracke’s right to due process. The Tribunal noted that due process required that mental health hearings be conducted within a reasonable time, particularly as the outcome of the hearing significantly impacted on Mr Kracke’s right to be free from medical treatment without consent.

⁷⁰ 1997 (4) SA 441 SA 613 (T).

⁷¹ Section 35(2)(e), *Constitution of South Africa* (2006).

⁷² HRA, s 21.

⁷³ [2009] ACAT 38.

⁷⁴ *Thompson v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 38, 63-71.

⁷⁵ Ellie Palmer, *Judicial review, socio-economic rights, and the Human Rights Act* (Oxford, Portland, Or, Hart, 2007) 333.

⁷⁶ *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009).

Problems with using existing rights to protect the right to health

Notwithstanding the potential to protect indirectly many aspects of the right to health through existing rights under the HRA, this approach has limitations. In many cases it requires robust and progressive advocacy on the part of lawyers, and a judicial willingness to consider “creative but legitimate approaches which do not exceed the scope of judicial power”.⁷⁷ Judicial interpretations of protected rights naturally influence the views of policymakers and legislators when they are considering how to give effect to the rights in question.

Given the restraint of advocates and judges in their interpretation of the HRA to date,⁷⁸ the potential for indirect protection of the right to health in the ACT currently appears limited. Thus in cases where a civil and political rights argument cannot be made out, individuals will be left without a remedy for actions that nevertheless may significantly affect their health.

More importantly, if rights are not interpreted broadly to include the right to health, there may be a “structural imbalance” in the ACT human rights framework. This occurs when civil and political rights are interpreted without contemplating the broader welfare effects of the protection of the right.⁷⁹ If the limitations clause were also not interpreted as responsive to rights to health, such interests would be removed from the attention of the court.⁸⁰

Example from other jurisdictions

In *Wilson v Medical Services Commission of British Columbia*,⁸¹ provincial legislation restricted doctors from practising in a geographic location unless there was a demonstrated

⁷⁷ Iain Byrne, Paper presented to the Inter-Regional Conference on Human Rights and Judiciary Systems: Brasilia 18-20 September 2006 Working Group VI, 14, available online at: www.ggp.up.ac.za/human_rights_access_to_medicines/additional/2009/academic%20papers/TheRighttoHealth-IainByrne.pdf (accessed 13 February 2010). See also Centre on Housing Rights and Evictions, “Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies” (2003) 11.

⁷⁸ See generally, ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety prepared by the ACT Human Rights Act Research Project*, May 2009, available at http://acthra.anu.edu.au/ACTHRA_project_final_report.pdf.

⁷⁹ See, eg, the extensive discussion by the ACT Legislative Assembly’s Scrutiny of Bills Committee of the civil rights dimensions of the Health Practitioner Regulation National Law (ACT) Bill 2009. While the Committee canvassed many of the rights guaranteed in the ACT HRA, it did not consider the Bill from the perspective of a measure to ensure the right to health, which may have been relevant to some of the limitations on civil rights proposed. ACT Legislative Assembly Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee), Report No 18, 1 February 2010, 3-10.

⁸⁰ Ellen Wiles, “Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law” (2007) 22 *American University International Law Review* 37, 61.

⁸¹ [1998] 53 D.L.R. (4th) 171.

need for medical service in that area. The law was a response to high number of doctors per capita, an unequal distribution of doctors, and an increase in the cost of physician services in some areas.

The law was successfully challenged by doctors on the basis that limiting practice locations violated their right to liberty under the Canadian Charter.⁸² Section 1 of the Charter permits limitations on rights where the limitation is reasonable and can be “demonstrably justified in a free and democratic society”, similar to section 28 of the HRA. Applying Section 1, the Court did not consider the limitation on doctor’s rights to be proportionate to the end the legislation sought to achieve. Had the Charter included a right to health, the outcome may have been different. A right to health in the Charter would have enabled the Court to *directly* consider the right to health of those with limited access to a doctor, rather than considering community health needs indirectly through the limitations analysis under section 1 of the Charter.

Other ACT laws

Many aspects of the right to health are already incorporated in the ACT legal framework, for example:

- The *Health Act 1993* (ACT) recognises many aspects of the right to access medical treatment for a range of illnesses and conditions;
- The *Health Professionals Act 2004* (ACT) recognises the right to medical services of appropriate quality. The *Health Practitioner Regulation National Law (ACT) Act 2010* (ACT), passed on 16 March 2010 by the Legislative Assembly, seeks to establish a national framework for regulating and accrediting health professionals;
- The *Work Safety Act 2008* (ACT) and *Workers Compensation Act 1951* (ACT) recognise the right to a healthy work environment;
- The *Water Resources Act 2007* (ACT) and *Environmental Protection Act 1997* (ACT) recognise the right to clean, potable water and the right to a healthy environment;
- The *Health Records (Privacy and Access) Act 1997* (ACT) recognises the right to privacy for health data, and the right to seek and impart health-related personal information;

⁸² Equivalent to section 18 of the HRA.

- The *Corrections Management Act 2007* (ACT) recognises the entitlement of detainees to health care and health care prevention to a degree equal to that provided for the Territory community; and
- The *Human Rights Commission Act 2005* (ACT) gives the Health Services Commissioner the mandate to consider complaints about health services, including infringements of privacy principles or of a consumer's right of access to his/her access to health records. The Commissioner also works with Health Professions Boards to maintain minimum standards in service provision and to ensure that health service providers meet suitability to practice requirements.

Although these and other legislative measures cover many substantive aspects of the right to health, they may not necessarily fully align with internationally accepted standards. One argument for including the right to health in the HRA is that it would provide a benchmark for ACT legislators and policy makers to measure the performance of ACT laws, policies and practices in the area of health.

III. EFFECT OF INCLUDING THE RIGHT TO HEALTH IN THE HRA

The inclusion of a right to health in the HRA would trigger the application of the various procedures set out in the Act to legislation, policies or programmes that affected the enjoyment of the right. Inclusion would therefore:

- impose a duty on public authorities to act in accordance with the right to health;
- require a statement of human rights compatibility to be provided when any draft legislation is introduced into the Legislative Assembly;
- make bills subject to review by the Legislative Assembly's scrutiny committee by specific reference to the right to health;
- give rise to rights that may be enforced by the courts in proceedings based on the HRA and under the general administrative law;
- require public officials and the courts to interpret existing legislation in accordance with human rights where reasonably possible.

To some extent these requirements and procedures already formally apply in relation to health laws and policies. As part II of this paper indicates, a number of rights already included in the HRA have application in the field of health.

Nonetheless, the inclusion of the right to health in the HRA may expand the extent to which rights-analysis will be undertaken. Within government the development of

policy proposals will need to be explicitly measured against the right to health (to the extent that this does not already occur), and the right will become an explicit ground for parliamentary review of legislation, as well as providing an additional basis for proceedings under the HRA or under general administrative law. The nature of the rights analysis involved, and the extent of any additional litigation will depend on the particular formulation of the right that is chosen for inclusion in the HRA.⁸³

Given the relatively low levels of litigation under the HRA in the ACT since 2004 (and on issues relating to health generally in the ACT), it is hard to see that the inclusion of the right in the HRA would give rise to significant amounts of new litigation based solely on that right. Nor is the nature and extent of review by the Legislative Assembly and its committees likely to change radically or create major new burdens.

In light of the division of responsibility for health between the Commonwealth and State and Territory governments, the ACT government would continue to be obliged to work cooperatively with the Commonwealth government in areas where legislative responsibility is shared. The form of “co-operative federalism ... maintained by complex bureaucratic and political mechanisms”⁸⁴ is a constant feature of health care in Australia and likely to become even greater in the future.⁸⁵ Commonwealth interventions in the hospital networks of the ACT would also need to be compatible with ACT legislation.

Judicial remedies

If the right to health were to be included in the HRA, public authorities would be under an obligation to respect the right, subject to reasonable limits. Several remedies would be available to complainants. Should the right be made justiciable

⁸³ For example, the Western Australian committee that examined the possibility of including economic, social and cultural rights into a Western Australian Bill of Rights identified six possible ways of doing so: (a) treating the selected ESCR in the same way as civil and political rights (CPR); (b) inclusion of ESCR with the recognition that they were to be implemented progressively; (c) modifying the application of provisions of the Act relating to remedies, by not providing judicial remedies for ESCR violations but instead providing for administrative remedies; (d) inclusion of ESCR as non-binding principles or objectives; (e) the pursuit of ESCR through different means, such as human rights audits or regular reviews; and (f) reliance on the indirect protection of ESCR through the implementation and enforcement of CPR. Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a proposed WA Human Rights Act* (2007), 82-86.

⁸⁴ Gavan Griffith, “Commonwealth-State Responsibilities for Health – “Big Bang” or Incremental Reform?”, *Briefing Paper No. 17/2006* Parliament of NSW, available online at: www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Commonwealth-StateResponsibilitiesforHealth-“BigBang”orIncrementalReform, at p 11.

⁸⁵ See Kevin Rudd, Better health, better hospitals: The national health and hospitals network, Speech to the National Press Club, 3 March 2010 (proposing a nationally funded, locally operated, health system.) This package will be put to the States and Territories at COAG on 11 April 2010.

by the courts, they would be empowered to adjudicate claims.⁸⁶ They would be assisted by comparative interpretations of the right to health and health care. For example, the influential cases on the right to health in South Africa has indicated the way in which courts can assess the 'reasonableness' of the government's actions with respect to health policy and legislation.

Examples from other jurisdictions

In *Soobramoney v Minister for Health*⁸⁷ the Constitutional Court of South Africa was asked to evaluate the denial of the claimant to renal dialysis in the public health system. A hospital had rationed this resource and it made it unavailable to chronically ill patients in the position of the claimant. The Constitutional Court deferred to the knowledge and expertise of hospitals, in making rationing decisions, and in provincial health authorities, in setting health budgets. It found such rationing to be reasonable. The described its role as "slow to interfere with rational decisions taken in good faith by the political organs ... whose responsibility it is to deal with such matters".

In *Minister of Health v Treatment Action Campaign*⁸⁸ the Constitutional Court again assessed the "reasonableness" of health policy. It found that the government, in obstructing the roll-out of antiretroviral (ARV) drugs in public hospitals in South Africa, acted unreasonably. The Court found that the government's actions violated the right to health of pregnant women and their newborns by restricting access to ARV in circumstances where lives could have been saved at low cost to the government.

Right to health and environmental policies

In 2005, the Hong Kong Court of First Instance considered a challenge based on the right to health in the ICESCR (among other rights) to the government's policy on air pollution. The Court rejected the challenge, stating that the case sought: 'in fact to review the merits of policy in an area in which Government must make difficult decisions in respect of competing social and economic priorities and, in law, is permitted a wide discretion to do so. While issues of importance to the community may have been raised, it is not for this court to determine those issues. They are issues for the political process.'⁸⁹

No compensation for a breach of the right would be available, as damages cannot be awarded for a rights infringement under the HRA (with the exception of a breach of s 18, the right to liberty and security, and s 23, the right to compensation for wrongful conviction).⁹⁰ Under s 30 of the Act, courts would strive to seek an interpretation of

⁸⁶ HRA, ss 28, 40B.

⁸⁷ *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC), 27 November 1997.

⁸⁸ *Minister of Health v Treatment Action Campaign (No 2)*, 2002 (5) SA 721 (CC) – 27 November 1997.

⁸⁹ *Clean Air Foundation v Government of the Hong Kong SAR* [2007] HKCFI 757, at para 43 (26 July 2007)

⁹⁰ On the question of damages under s 18(7), see *Morro v Australian Capital Territory* [2009] ACTSC 118.

legislation consistent with the right to health if a violation of the right were established. If a rights-consistent interpretation of legislation were not possible (because such an interpretation would undermine the purpose of the legislation), a court could issue a declaration of incompatibility under s 32 of the Act, which would trigger a response from the Attorney-General in the Legislative Assembly (s 33). This declaration would act as at least a partial vindication of the complainant's rights.⁹¹

It should be recognised that the inclusion of a right to health does not necessarily involve the conferral on the courts of the power to fundamentally challenge the executive and legislative setting of priorities and policies. This is in part because of the limited remedies provided for in the HRA, but is more importantly due to the recognition by many courts that it is for the legislature and the executive to address major policy issues of this sort.

Further reading

- ◆ WHO/OHCHR, "The Right to Health: Fact Sheet 31". Available online at: www.ohchr.org/Documents/Publications/Factsheet31.pdf
- ◆ British Institute of Human Rights and the Department of Health, 'Rights in Healthcare – A Framework for Local Action' (2nd edition, October 2008). Available online at: http://www.dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_088972.pdf
- ◆ Health and Human Rights: An International Journal. Available online at: <http://www.hhrjournal.org/index.php/hhr/index>

⁹¹ It may be noted that in the six years of operation of the ACT HRA, there have been no declarations of incompatibility issued; there has been only one issued in Victoria since the Charter of Human Rights and Responsibilities Act entered into force in 2006 (*R v Momcilovic* [2010] VSCA 50).

ANNEX 1: Monitoring the effective realisation of the right to health

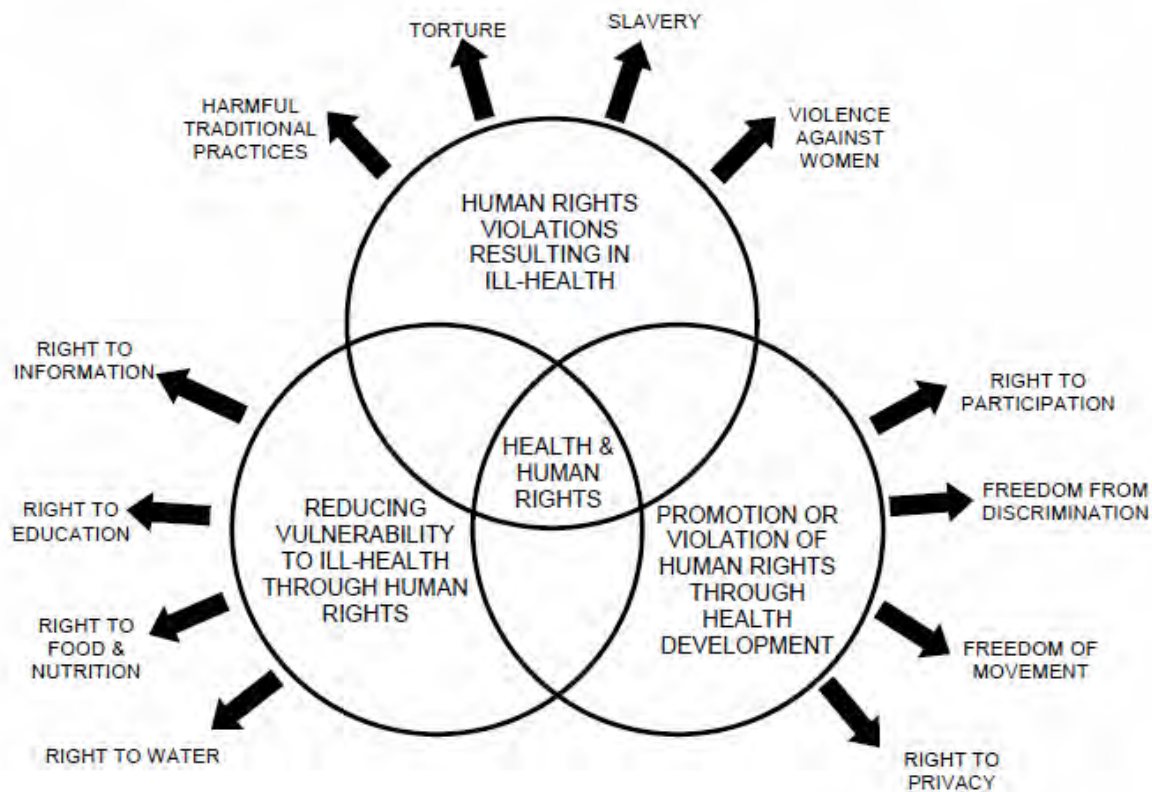
[Source: Office of the High Commissioner for Human Rights, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights', 2008, p 25]

List of illustrative indicators on the right to enjoyment of the highest attainable standard of physical and mental health (UDHR, Art. 25) (* MDG related indicators)					
	Sexual and reproductive health	Child mortality and health care	Natural and occupational environment	Prevention, treatment and control of diseases	Accessibility to health facilities and essential medicines
Structural	- International human rights treaties, relevant to the right to enjoyment of the highest attainable standard of physical and mental health (right to health), ratified by the State - Date of entry into force and coverage of the right to health in the Constitution or other forms of superior law - Date of entry into force and coverage of domestic laws for implementing the right to health, including a law prohibiting female genital mutilation - Number of registered and/or active non-governmental organizations (per 100,000 persons) involved in the promotion and protection of the right to health - Estimated proportions of births, deaths and marriages recorded through vital registration system				
	- Time frame and coverage of national policy on sexual and reproductive health - Time frame and coverage of national policy on abortion and foetal sex-determination	Time frame and coverage of national policy on child health and nutrition	- Time frame and coverage of national policy on physical and mental health, - Time frame and coverage of national policy for persons with disabilities - Time frame and coverage of national policy on medicines, including list of essential medicines, measures for generic substitution		
Process	- Proportion of received complaints on the right to health investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded to effectively by the government - Net official development assistance (ODA) for the promotion of health sector received or provided as a proportion of public expenditure on health or Gross National Income*				
	- Proportion of births attended by skilled health personnel* - Antenatal care coverage (at least one visit and at least four visits)* - Increase in proportion of women of reproductive age using, or whose partner is using, contraception (CPR)* - Unmet need for family planning* - Medical terminations of pregnancy as a proportion of live births - Proportion of reported cases of genital mutilation, rape and other violence restricting women's sexual and reproductive freedom responded to effectively by the government	- Proportion of school-going children educated on health and nutrition issues - Proportion of children covered under programme for regular medical check-ups in the reporting period - Proportion of infants exclusively breastfed during the first 6 months - Proportion of children covered under public nutrition supplement programmes - Proportion of children immunised against vaccine-preventable diseases (e.g. measles*)	- Proportion of targeted population that was extended access to an improved drinking water source* - Proportion of targeted population that was extended access to improved sanitation* - CO2 emissions per capita * - Number of cases of deterioration of water sources brought to justice - Proportion of population or households living or working in or near hazardous conditions rehabilitated - Number of prosecutions under domestic law on natural or workplace environment - Proportion of driving licences withdrawn for breaches of road rules	- Proportion of population covered under awareness raising programmes on transmission of diseases (e.g. HIV/AIDS*) - Proportion of population (above age 1) immunised against vaccine-preventable diseases - Proportion of population applying effective preventive measures against diseases (e.g. HIV/AIDS, malaria*) - Proportion of disease cases detected and cured (e.g. tuberculosis*) - Proportion of population abusing substances, such as drug, chemical and psychoactive substance, brought under specialised treatment - Proportion of mental health facilities inspected in the reporting period	- Per capita government expenditure on primary health care and medicines (Improvement in) Density of medical and para-medical personnel, hospital beds and other primary health care facilities - Proportion of population that was extended access to affordable health care, including essential drugs*, on a sustainable basis - Proportion of people covered by health insurance in reporting period - Proportion of persons with disabilities accessing assistive device - Share of public expenditure on essential medicines met through international aid
Outcome	- Proportion of live births with low birth-weight - Perinatal mortality rate - Maternal mortality ratio*	- Infant and under-five mortality rates* - Proportion of underweight children under-five years of age*	Prevalence of deaths, injuries, diseases and disabilities caused by unsafe natural and occupational environment	- Death rate associated with and prevalence of communicable and non-communicable diseases (e.g. HIV/AIDS*, malaria*, tuberculosis*) - Proportion of persons abusing harmful substances - Life expectancy at birth or age 1 and health-adjusted life expectancy - Suicide rates	
24.04.08	All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in metasheets				

ANNEX 2: Linkages between health and human rights

[Source: World Health Organisation at <http://www.who.int/hhr/HHR%20linkages.pdf>]

Examples of the linkages between health and human rights:



Working paper 4: Implications for the Environment, Energy and Water



Economic, Social and Cultural Rights: Implications for the Environment, Energy and Water

Gabrielle McKinnon, ACT Human Rights Commission

A Background Paper for a Forum on Economic, Social and Cultural Rights, and Energy and Water Supply to be held 12.30pm, Friday, 18 June 2010, Level 9 Conference Room,
12 Moore Street, Canberra City



**HUMAN RIGHTS
COMMISSION**

Economic, Social and Cultural Rights: Implications for the Environment, Energy and Water

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Economic Social and Cultural Rights and the ACT *Human Rights Act*

1. The Universal Declaration of Human Rights developed by the United Nations in 1948 recognises fundamental human rights that are held to be universal to all human beings. These rights are civil and political ones and economic, social and cultural ones. The inclusion of them all in the one Declaration affirmed that they are interrelated and indivisible rights. That is, a person's enjoyment of their civil and political rights is dependent on whether they enjoy their economic, social and cultural right (ESC rights) and vice versa.
2. However, when human rights were given binding force in international treaties they were divided into two separate categories due to political sensitivities during the Cold War. Civil and political rights are protected in the International Covenant on Civil and Political Rights 1966 (ICCPR) and ESC rights protected in the Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). Australia has ratified both treaties, and has thus accepted obligations to respect, promote and fulfil these rights.
3. Article 2(1) of the ICESCR obliges States parties to:
(T)ake steps, individually and through international assistance and co-operation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
4. Note that this wording refers to the concept of progressive realisation, and that whatever action is taken will be done so by appropriate means and within available resources. Thus, the Covenant recognises that the rights will not necessarily be achieved immediately or within a short period of time. These stipulations have also been adopted with regards to key economic and social rights in the South African Constitution.'
5. In its 2003 Report, the ACT Bill of Rights Consultative Committee, chaired by Professor Hilary Charlesworth, recommended that an ACT bill of rights include both categories of rights to respect the indivisible nature of human rights. However, in introducing the *Human Rights Act 2004* (HR Act), the first legislative bill of rights in Australia, the ACT Government opted to initially include only civil and political rights, and to progressively consider the inclusion of additional ESC rights.
6. In 2008, following the first year review of the HR Act, the Act was amended to impose a direct obligation on public authorities to comply with human rights and to take human rights into account in decision making. However, no new rights were added. The Act broadly defines 'public authority' and includes statutory corporations and authorities such as ACTEW AGL and the ACT Planning and Land Authority.
7. The first review recommended that the inclusion of ESC rights be considered further in the second review of the HR Act, once the Act had been in force for five years.
8. The Department of Justice and Community Safety is the Department is currently undertaking a project exploring the inclusion of ESCR in the HR ACT, with the Australian National University. As one of its contributions to this joint project, the Department is convening this forum to canvas of the possible implications of ESC rights for environmental protection, and the supply of water and energy in the ACT.

Indirect Protection of the Environment and Energy and Water Supply

9. The ICESCR does not contain specific rights protecting the environment, natural resources or energy and water supply. Nevertheless, a number of ESC rights have an impact on these areas. The right to the highest attainable standard of health (Article 12) and the right to an adequate standard of living (Article 11), which includes a right to adequate housing, and has been interpreted to include a right to water, are of particular relevance.
10. The General Comments of the UN Committee on Economic, Social and Cultural Rights, which monitors the implementation of the treaty, provide important guidance as to the content of these rights and the obligations of governments to respect, protect and fulfil these rights.
11. Case law on ESC rights may be drawn from South Africa, where ESC rights have constitutional protection, and from regional bodies such as the European Committee on Social Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. The Asia-Pacific is the only area without a regional human rights regime.
12. There have also been many cases in other international and comparative jurisdictions where civil and political rights have been invoked to provide indirect protection of environmental rights and ESC rights. These cases suggest that there are a number of civil and political rights currently protected in the HR Act that already provide indirect protection for environmental interests and for access to water, energy and utilities.
13. These rights include the right to life (section 9), the rights of children (section 11), the rights of minority groups (section 27), the right to privacy and family life (section 12), the right to a fair trial (section 21) and the right to freedom of expression (section 16),

Right to a Healthy Environment - Prevention of Pollution and Contamination

14. The right to the highest attainable standard of health in Article 12 of the ICESCR is not limited to the provision of healthcare, but has been interpreted to protect the underlying determinants of good health, including a "healthy environment."¹ Article 12(2) provides that realisation of the right to health requires governments to take steps necessary to achieve this right, including "the improvement of all aspects of environmental and industrial hygiene" (Article 12(2)(b)).
15. The Committee on Economic Social and Cultural Rights stated in General Comment 14 on this aspect of the right to health that:
*The improvement of all aspects of environmental and industrial hygiene comprises inter alia preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation, the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.*²
16. The Committee further notes that the obligation on States Parties (countries that have ratified the treaty) to protect the right to health extends to safeguarding people from the infringements of this right by third parties, and notes that "the failure to enact or enforce laws to prevent the pollution of

¹ Committee on Economic Social and Cultural Rights, General Comment 14, E/C.12/2000/4, para 4.

² Ibid at para 15.

water, air and soil by extractive and manufacturing industries” would be a violation of this obligation.

17. The Committee also stated that environmental hygiene encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions:

*For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. Likewise, States parties should monitor and combat situations where aquatic eco-systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.*³

18. In the case of *Social and Economic Rights Action Centre v Nigeria*⁴ the African Commission on Human and Peoples’ Rights found that the Nigerian government had breached the right of the Indigenous Ogoni People to a healthy environment (specifically protected under the African Charter of Human and People’s Rights) through its collusion with oil production companies and its failure to regulate and prevent serious oil spills which caused contamination of water, soil and air in Ogoni villages. The Commission found that the obligation to protect this right in this case included an obligation to ensure that the oil companies consulted properly with affected communities and warned them of dangers of the oil production process.
19. In the case of *Mapuche Paynemil and Kaxipayin Communities*⁵ the Inter-American Commission on Human Rights found that the Argentinian Government had failed to protect the right to health of children and young people in the Indigenous Paynemil Mapuche community where drinking water was contaminated with lead and mercury. The Argentinian Government agreed to supply potable water to the community and free medical care to affected children.
20. In severe cases, such as the Nigerian and Argentinian examples above, environmental pollution or contamination may pose a threat to human life, and would thus engage the right to life already protected as a civil and political right under the HR Act.
21. In its Report on Ecuador⁶ the Inter-American Commission noted that “the realisation of the right to life and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”⁷
22. The European Court of Human Rights has also found that the right to privacy and family life (also protected in section 12 of the ACT HR Act) may be infringed by environmental pollution, and that this right may provide protection from environmental conditions that are severe, but not life threatening. In *Lopez Ostra v Spain*⁸ the Court held that a tannery waste treatment plant near the applicant’s home affected her and her family’s health and prevented her from enjoying her home, in breach of her right to privacy.

³ Ibid at para 9.

⁴ Case regarding Communication 155/96, 27 May 2002.

⁵ Case No 12.010(2001).

⁶ OEA/Ser.L.V/II.96, doc.10 (1997).

⁷ Ibid at v.

⁸ App No 16798/90, 20 Eur.Ct.H.R.277 (1994).

Right to a Healthy Environment: Possible Implications for the ACT

The ESCR right to health requires effective regulation (through legislation and enforcement) to prevent environmental pollution of air, soil or water in the ACT at levels harmful to human health. These areas are already the subject of legislation in the ACT and issues of pollution and contamination are monitored by the Environment Protection Agency and the Commissioner for the Environment and Sustainability. Where pollution or contamination is potentially life threatening, there is also already some protection in the HR Act under the right to life (section 9).

23. International case law suggests that environmental contamination and pollution considerations should be taken into account in planning and development decisions to avoid breaching the right to privacy already protected in the HR Act (section 12).

Environmental Rights of Cultural Minorities

24. The ICESCR includes a right to of everyone to take part in cultural life (Article 15(1)(a)). This right has been interpreted by the Committee on Economic Social and Cultural Rights to include a right of Indigenous and other minority cultural groups to enjoy their culture.⁹
25. The Committee considered that ‘culture’ encompasses “natural and man-made environments” as well as “customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives”.¹⁰
26. It should be noted that there is already specific protection for the right to minority culture in section 27 of the HR Act. This right is drawn from Article 27 of the ICCPR. Section 27 of the HR Act provides that:
- Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.*
27. In General Comments on Article 27 of the ICCPR, the UN Human Rights Committee stated that:
- [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.*¹¹
28. In *Ilmari Lansman et al. v. Finland*¹² the UN Human Rights Committee considered the effect of this right in assessing whether stone quarrying permitted by Finland in traditional lands of the Indigenous Sami people amounted to a denial of their right to culture affecting their livelihood of

⁹ E/C 12/GC/21 General Comment 21, 2009.

¹⁰ Ibid, para 13.

¹¹ UN Human Rights Committee General Comment No. 23: The rights of minorities (Art. 27) : . 08/04/1994, at para 7.

¹² Communication No. 511/1992, *Ilmari Lansman et al. v. Finland*, Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996) . See also Communication No. 547/1992, *Apirana Mahuika et al v. New Zealand*, CCPR/C/70/D/547/1993, views issued November 16, 2000.

reindeer husbandry. In this instance the Committee found that the extent of the quarrying did not amount to a denial of the applicants' right to culture.

29. It noted that the Sami were consulted and their views taken into account in the Government's decision and that measures were taken to minimize the impact on reindeer herding activity and on the environment. However, the Committee noted that if future mining activities were to be significantly expanded then it might constitute a violation of the right to culture.
30. In this case, the UN Human Rights Committee found that a State's freedom to pursue economic development is limited by its obligations under Article 27 of the ICCPR. The Committee also emphasised the importance of consultation before undertaking the activity.

Cultural Rights: Possible Implications for the ACT

There is already protection in the HR Act for the cultural rights of minorities, which includes the right to participate in activities of cultural significance which may affect the environment or natural resources. This right implies that Aboriginal people and other minority communities in the ACT should be consulted on environmental and planning decisions that would affect their ability to enjoy their culture.

Right to Water

31. Although the ICESCR does not contain an explicit right to water, this right is protected as part of the right to an adequate standard of living in Article 11, and the right to health in Article 12. This right encompasses obligations regarding non discriminatory access to an affordable water supply that is of adequate quality. The Committee on Economic Social and Cultural Rights has issued a detailed General Comment (No.15) on the right to water.
32. The Committee states that this right:
- [E]ntitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.*¹³
33. The Committee notes that the water required for personal or domestic use must be safe "*therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a persons's health. Furthermore water should be of an acceptable colour, odour and taste for each personal or domestic use.*"¹⁴
34. The Committee further confirms that water and water facilities and services must be affordable to all, and must be accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination.¹⁵
35. The Committee on Economic Social and Cultural Rights recognises that States Parties have a core obligation to ensure access to a minimum essential amount of water. However, the South African decision of *Lindiwe Mazibuko & Others v City of Johannesburg*¹⁶ rejected a minimum core argument

¹³ E/C 12/2002/11 General Comment 15 at para 2.

¹⁴ Ibid at para12.

¹⁵ Ibid.

¹⁶ Case CCT 39/09, [2009] ZACC 28.

in the context of the South African Constitution, overturning a lower court decision which sought to stipulate a minimum free water supply for indigent residents.

36. In that case the City of Johannesburg had introduced a pre-paid meter scheme for Soweto residents, with a small free allocation per household per month, after which supply would cease until payment was made. The fixed water allocation did not take account of the number of residents or dwellings on the property. The Court found that the City's water supply policy was reasonable in all the circumstances.
37. The Court rejected the applicants' argument that the Court should adopt a quantified standard determining the 'content' of the right. In doing so, the Court stated that:
- a. "ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right" ; and
 - b. the positive obligations imposed upon government by the constitutional social and economic rights will be enforced by courts in at least the following ways: (a) where government takes no steps to realise the rights; (b) where the government's adopted measures are unreasonable; and (c) where the government fails to give effect to its duty under the obligation of progressive realization to continually review its policies to ensure that the achievement of the right is progressively realised.
38. It is also important to note that the Constitutional Court's decision was subject to considerable criticism by socio-economic rights experts both in terms of the Court's conclusions on the constitutional right to have access to sufficient water, as well as its 'recharacterisation' of the Court's previous economic and social rights jurisprudence, particularly *Minister of Health v Treatment Action Campaign* ¹⁷.
39. Nevertheless, this case may be considered an example of progressive realisation of an ESC right in an economically developing country. A higher standard is likely to be expected in a comparatively wealthy western country.
40. In Spain, by contrast, the Civil and Commercial Court of the city of Cordoba held that a water services company could reduce, but not completely cut, the water supply to a group of low-income and indigent families due to non-payment.¹⁸

Right to Water: Possible implications for the ACT

The right to water may be relevant in assessing the affordability of domestic water supply for ACT residents, particularly those who are socially and economically disadvantaged. The right to water would also need to be considered in policies and decision making regarding termination of water supply for non-payment.

41. While the quality of ACT tap water is generally unlikely to pose human rights concerns, the requirement of water safety and quality may be relevant to any proposal to significantly change the water supply or treatment processes, for example a move to recycled sewerage.
42. The issue of the fluoridation of ACT tap water was also raised with the then Human Rights Office, in 2005, by opponents of fluoridation who claimed that it was a limitation on the right to be free

¹⁷ (TAC) (2002) 5 SA 721 (CC).

¹⁸ *Quevedo Miguel Angel and Ors. Aguas Cordobesas S. A. Amparo* (8/04/2002).

from medical treatment without consent (section 10(2) of the HR Act). These opponents might use the right to water as a further basis to challenge this practice. Any consideration of this issue would require an assessment of evidence of the safety and the health benefits of fluoridation.

Right to Energy

43. The right to an adequate standard of living under Article 11(1) of the ICESCR provides that States Parties “*recognise 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.*”
44. The Committee on Economic Social and Cultural Rights, in General Comment 4 on the right to adequate housing notes that this right includes a right to energy and utilities:
45. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, **energy for cooking, heating and lighting**, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services¹⁹ (emphasis added).
46. In the South African case of *Leon Joseph and Others v City of Johannesburg*²⁰ the Constitutional Court found that City Power, a government owned electricity company had breached the rights of tenants in an apartment block by terminating electricity supply without notice to the residents, due to non-payment by the building owner.
47. The Court found that although the residents did not have a contractual relationship with the power supplier, in depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right. In this case the lack of notice to residents meant that the termination was unlawful.
48. In the case of *European Roma Rights Centre v Bulgaria*²¹ the European Committee of Social Rights considered a complaint regarding discrimination in housing provision for the Roma people in Bulgaria. One of the issues considered in assessing the adequacy of the Roma housing was the lack of services and infrastructure for the Roma housing, where electricity and heating was non-existent or insufficient to meet the needs of the population.
49. The applicant raised concerns about collective punishment through disconnection of whole neighbourhoods from the electricity grid and failure to conduct repairs due to non-payment by some Roma families. The Committee found that the situation concerning the inadequate housing of the Roma families and lack of proper amenities constituted a breach of the right of these families to appropriate protection.²²

¹⁹ Committee on Economic, Social and Cultural Rights, General Comment 4, 13/12/1991, para 8.

²⁰ Case CCT 43/09.

²¹ European Committee of Social Rights Complaint No 31/2005.

²² Ibid at para 43.

Right to Energy: Possible implications for the ACT

The right to energy supply, as part of the right to adequate housing, will be relevant to an assessment of the affordability of energy in the ACT for those who are most disadvantaged. Policies and decision making regarding the disconnection of energy supply are also likely to raise the issue of the right to energy.

The South African *Joseph* case suggests that the rights of people who are not in a contractual relationship with the energy supplier but who are directly affected by the termination of supply need to be carefully considered, and that they must be afforded procedural fairness. The European *Roma Rights Centre* case also suggests that the right of the family to protection, which is already included in the HR Act, may provide a basis for assessing the adequacy of housing and amenities, including electricity supply.

The provision of utilities including electricity, gas and water is regulated in the ACT under the *Utilities Act 2000*. This Act provides for standard terms of consumer contracts with utility providers and gives the ACT Civil and Administrative Tribunal (ACAT) power to determine cases about the supply of water and energy by utilities, including hardship complaints where supply is to be disconnected. ACAT can stop or delay a disconnection or order reconnection (within 24 hours). ACAT also determines complaints about misconduct or poor services by utilities.

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INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

THE STATES PARTIES TO THE PRESENT COVENANT,

CONSIDERING that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

RECOGNIZING that these rights derive from the inherent dignity of the human person,

RECOGNIZING that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

CONSIDERING the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

REALIZING that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

AGREE upon the following articles:

PART I
Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II
Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

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. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant.

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of

their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or as appropriate for information the reports concerning human rights submitted by States in accordance with Articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with Article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under Article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.[\[1\]](#)
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.[\[2\]](#)
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this Article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.[\[3\]](#)
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.[\[4\]](#)

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority

of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under Article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under Article 26;

(b) The date of the entry into force of the present Covenant under Article 27 and the date of the entry into force of any amendments under Article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in Article 26.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Covenant, opened for signature at New York, on the nineteenth day of December, one thousand nine hundred and sixty-six.

[Signatures not reproduced here.]

[\[1\]](#) Signed for Australia 18 December 1972.

[\[2\]](#) Instrument of ratification deposited for Australia 10 December 1975.

[\[3\]](#) The Covenant entered into force generally 3 January 1976.

[\[4\]](#) The Covenant entered into force for Australia 10 March 1976.

Following are the General Comments by the Committee on Economic, Social and Cultural Rights on various articles of the ICESCR:

- General Comment 1: [Reporting by States parties](#), 1989
See also [Reporting Guidelines](#), March 2009
- General Comment 2: [International technical assistance measures \(art. 22\)](#), 1990
- General Comment 3: [The nature of States parties' obligations \(art. 2 \(1\)\)](#), 1990
- General Comment 4: [The right to adequate housing](#), 1991
- General Comment 5: [Persons with disabilities](#), 1994
- General Comment 6: [The economic, social and cultural rights of older persons](#), 1995
- General Comment 7: [The right to adequate housing: forced evictions \(art.11 \(1\)\)](#), 1997
- General Comment 8: [The relationship between economic sanctions and respect for economic, social and cultural rights](#), 1997
- General Comment 9: [The domestic application of the Covenant](#), 1998
- General Comment 10: [The role of national human rights institutions in the protection of economic, social and cultural rights](#), 1998
- General Comment 11: [Plans of action for primary education \(art. 14\)](#), 1999
- General Comment 12: [The right to adequate food \(art. 11\)](#), 1999
- General Comment 13: [The right to education \(art. 13\)](#), 1999
- General Comment 14: [The right to the highest attainable standard of health \(art. 12\)](#), 2000
- General Comment 15: [The right to water \(arts. 11 and 12\)](#), 2002
- General Comment 16: [The equal right of men and women to the enjoyment of all economic, social and cultural rights \(art.3\)](#), 2005
- General Comment 17: [The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author \(art. 15 \(1\) \(c\)\)](#), 2005
- General Comment 18: [The right to work \(art. 6\)](#), 2005
- General Comment 19: [The right to social security \(art.9\)](#), 2008
- General Comment 20: [Non-Discrimination in economic, social and cultural rights \(art. 2\(2\)\)](#), 2009

APPENDIX 3: ESCR provisions in selected international, regional and domestic instruments

- RIGHT TO HOUSING
- RIGHT TO HEALTH, including a healthy environment
- RIGHT TO FOOD
- RIGHT TO WATER
- RIGHT TO SOCIAL SECURITY
- RIGHT TO EDUCATION
- RIGHT TO WORK, including the right to just and favourable conditions of work and the right of workers to organize and bargain collectively (trade union rights)
- RIGHT TO TAKE PART IN CULTURAL LIFE, including right to benefit from scientific progress

RIGHT TO HOUSING	
International human rights instruments	
Universal Declaration of Human Rights	<u>Article 25:</u> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including ... housing....
International Covenant on Economic, Social and Cultural Rights	<u>Article 11:</u> 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 ... housing, and to the continuous improvement of living conditions. <u>UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 4 (1991): The right to adequate housing:</u> ‘All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, potable drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services.’
International Covenant on Civil and Political Rights	-
Convention on the Elimination of All Forms of Racial Discrimination	<u>Article 5</u> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (iii) The right to housing; ...
Convention on the Elimination of All Forms of Discrimination against Women	<u>Article 14</u> ... 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
Convention on the Rights of the Child	<u>Article 27</u> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. ... 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in

	case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<u>Article 43:</u> 1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents; <i>NB: Australia is not a signatory but the Convention may be considered to be part of international law for the purposes of interpreting the right to housing (HRA Dictionary definition of 'international law' is not exhaustive).</i>
Convention on the Rights of Persons with Disabilities	<u>Article 28 Adequate standard of living and social protection:</u> 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate ... housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. 2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: ... (d) To ensure access by persons with disabilities to public housing programmes; ...
UN Declaration on the Rights of Indigenous Peoples	<u>Article 21</u> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of ... housing.... <u>Article 23</u> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining ... housing ... and, as far as possible, to administer such programmes through their own institutions.
Regional human rights instruments	
European Social Charter (revised)	<u>Article 31 – The right to housing:</u> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources.
European Convention for the Protection on Human Rights and Fundamental Freedoms, Protocol 1	-
Charter of Fundamental Rights of the European Union	-
American Declaration of the Rights and Duties of Man 1948	-
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	-
African (Banjul) Charter on Human and Peoples' Rights	-
African Charter on the Rights and Welfare of the Child	<u>Article 20</u> 2. States Parties to the present Charter shall in accordance with their means and national conditions

	the all appropriate measures; (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to ... housing; ...
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	<u>Article 16</u> Right to Adequate Housing Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.
Domestic models	
ACT BOR Consultative Committee Model Bill	<u>Clause 2 - Right to life and an adequate standard of living:</u> ... 2.2 Everyone has the right to an adequate standard of living for himself or herself and his or her family, including ... housing. ... <i>Note:</i> Article 11(1) ICESCR
UK Joint Committee on Human Rights Model Bill	<u>Housing:</u> Everyone has the right to adequate accommodation appropriate to their needs. Everyone is entitled to be secure in the occupancy of their home. No one may be evicted from their home without an order of a court.
South African Bill of Rights	<u>26. Housing:</u> 1. Everyone has the right to have access to adequate housing. 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. <u>28. Children:</u> 1. Every child has the right ... (c) to... shelter....
Constitution of the Federal Republic of Germany Germany: Constitution of Brandenburg (1992) Germany: Constitution of Mecklenburg-Vorpommern (1993)	- <u>Article 47- Housing:</u> (1) The State is obliged, within the framework of its powers, to provide for the realization of the right to adequate housing, in particular through the advancement of housing property, through measures of social housing construction, rental protection and housing subsidies. (2) The eviction from a dwelling shall only be carried out if alternative accommodation is provided. <u>Article 17 - Employment, Economy and Social Matters:</u> (3) State, local and municipal governments strive to ensure that everyone will have access to adequate housing space at their disposal. They will support, in particular, the construction of housing and the maintenance of existing housing space. They ensure everyone in the event of an emergency situation, basic shelter.
Constitution of the Portuguese Republic (Seventh Revision [2005])	<u>Article 65</u> (Housing and urban planning) 1. Everyone shall possess the right for themselves and their family to have an adequately sized dwelling that provides them with hygienic and comfortable conditions and preserves personal and family privacy. 2. In order to ensure enjoyment of the right to housing, the state shall be charged with: a) Planning and implementing a housing policy that is embodied in general town and country planning documents and supported by urban planning documents that guarantee the existence of an adequate network of transport and social facilities; b) In cooperation with the autonomous regions and local authorities, promoting the construction of

	low-cost and social housing; c) Stimulating private construction, subject to the general interest, and access to owned or rented housing; d) Encouraging and supporting local community initiatives that work towards the resolution of their housing problems and foster the formation of housing and selfbuilding cooperatives. 3. The state shall undertake a policy that works towards the establishment of a rental system which is compatible with family incomes and access to individual housing. 4. The state, the autonomous regions and local authorities shall lay down the rules governing the occupancy, use and transformation of urban land, particularly by means of planning instruments and within the overall framework of the laws concerning town and country planning and urban planning, and shall expropriate such land as may be necessary to the fulfilment of the purposes of public-use urban planning. 5. Interested parties shall be entitled to participate in the drawing up of urban planning instruments and any other physical town and country planning instruments.
The Constitution of the Kingdom of the Netherlands 2002	-
Constitution of the Italian Republic	-
The Constitution of the Republic of Hungary	-
Spanish Constitution	<u>Section 47</u> All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town-planning policies of public bodies.
The Constitution of Japan	-

RIGHT TO HEALTH, including the right to a healthy environment	
International human rights instruments	
Universal Declaration of Human Rights	Article 25: (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including ... medical care....
International Covenant on Economic, Social and Cultural Rights	Article 12: 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
International Covenant on Civil and Political Rights	-
Convention on the Elimination of All Forms of Racial Discrimination	Article 12 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.
Convention on the Elimination of All Forms of Discrimination against Women	Article 5 In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (iv) The right to public health, medical care, social security and social services; ...
Convention on the Rights of the Child	Article 24: 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services. 3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional

	practices prejudicial to the health of children. ... <u>Article 24 (2) (c)</u> (2) States Parties ... shall take appropriate measures: (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<u>Article 28:</u> Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment. <u>Article 43:</u> 1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (e) Access to ... health services, provided that the requirements for participation in the respective schemes are met; ... <u>Article 45:</u> 1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: (c) Access to ... health services, provided that requirements for participation in the respective schemes are met; ... <i>NB: Australia is not a signatory but the Convention may be considered to be part of international law for the purposes of interpreting the right to health (HRA Dictionary definition of 'international law' is not exhaustive).</i>
Convention on the Rights of Persons with Disabilities	<u>Article 25:</u> States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes; b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons; c) Provide these health services as close as possible to people's own communities, including in rural areas; d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care; e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner; f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.
UN Declaration on the Rights of Indigenous Peoples	<u>Article 24:</u> 1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. 2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.
Regional human rights instruments	
European Social Charter	<u>Part 1:</u>

(revised)	The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised: ...[including] (11) Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable. <u>Article 11: The right to protection of health</u> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed <i>inter alia</i>: 1. to remove as far as possible the causes of ill-health; 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.
European Convention for the Protection on Human Rights and Fundamental Freedoms, Protocol 1	-
Charter of Fundamental Rights of the European Union	<u>Article 35:</u> Health care Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.
American Declaration of the Rights and Duties of Man 1948	<u>Article XI</u> Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	<u>Article 10: Right to Health</u> 1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: a. Primary health care, that is, essential health care made available to all individuals and families in the community; b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction; c. Universal immunization against the principal infectious diseases; d. Prevention and treatment of endemic, occupational and other diseases; e. Education of the population on the prevention and treatment of health problems, and f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable. <u>Article 11: Right to a Healthy Environment</u> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. ...
African (Banjul) Charter on Human and Peoples' Rights	<u>Article 16:</u> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
African Charter on the Rights and Welfare of the Child	<u>Article 14: Health and Health Services</u> 1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. 2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: (a) to reduce infant and child mortality rate;

	(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) to ensure the provision of adequate nutrition and safe drinking water; (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology; (e) to ensure appropriate health care for expectant and nursing mothers; (f) to develop preventive health care and family life education and provision of service; (g) to integrate basic health service programmes in national development plans; (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents; (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children; (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	<u>Article 14</u> Health and Reproductive Rights 1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: • the right to control their fertility; • the right to decide whether to have children, the number of children and the spacing of children; c) the right to choose any method of contraception; d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS; e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; • the right to have family planning education. 2. States Parties shall take all appropriate measures to: a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas; b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding; c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. <u>Article 18</u> Right to a Healthy and Sustainable Environment 1. Women shall have the right to live in a healthy and sustainable environment. ...
Domestic models	
ACT BOR Consultative Committee Model Bill	<u>Clause 3 - Physical well-being and health:</u> 3.3 Everyone has the right to the highest attainable standard of health. <i>Note:</i> Article 12(1) ICESCR
UK Joint Committee on Human Rights Model Bill	<u>Health care:</u> Everyone has the right to have access to appropriate health care services, free at the point of use and within a reasonable time. No one may be refused appropriate emergency medical treatment. <u>A healthy and sustainable environment</u> Everyone has the right to an environment that is not harmful to their health.

	Everyone has the right to information enabling them to assess the risk to their health from their environment. ...
South African Bill of Rights	<u>27. Health care...</u> - Everyone has the right to have access to - health care services, including reproductive health care; - sufficient food and water; and - social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. - The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. - No one may be refused emergency medical treatment. <u>24. Environment:</u> Everyone has the right (a) to an environment that is not harmful to their health or well-being; ... <u>35. Arrested, detained and accused persons:</u> ... - Everyone who is detained, including every sentenced prisoner, has the right ... (e) to conditions of detention that are consistent with human dignity, including ... the provision, at state expense, of adequate ... medical treatment; and (f) to communicate with, and be visited by, that person's ... (iv) chosen medical practitioner.
Constitution of the Federal Republic of Germany	-
Constitution of the Portuguese Republic (Seventh Revision [2005])	Article 64 (Health) - Everyone shall possess the right to health protection and the duty to defend and promote health. - The right to health protection shall be fulfilled: - By means of a national health service that shall be universal and general and, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge; - By creating economic, social, cultural and environmental conditions that particularly guarantee the protection of childhood, youth and old age; by systematically improving living and working conditions and also promoting physical fitness and sport at school and among the people; and by developing both the people's health and hygiene education and healthy living practises. - In order to ensure enjoyment of the right to the protection of health, the state shall be under a primary duty: - To guarantee access by every citizen, regardless of his economic situation, to preventive, curative and rehabilitative medical care; - To guarantee a rational and efficient nationwide coverage in terms of healthcare units and human resources; - To work towards the public funding of the costs of medical care and medicines; - To regulate and inspect corporate and private forms of medicine and articulate them with the national health service, in such a way as to ensure adequate standards of efficiency and quality in both public and private healthcare institutions; - To regulate and control the production, distribution, marketing, sale and use of chemical, biological and pharmaceutical products and other means of treatment and diagnosis; - To establish policies for the prevention and treatment of drug abuse. - The national health service shall possess a decentralised and participatory management system. <u>Article 66</u> (Environment and quality of life) - Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it. ...
The Constitution of the Kingdom of the Netherlands 2002	<u>Article 22</u> The authorities shall take steps to promote the health of the population. ...

Constitution of the Italian Republic	<u>Art. 32</u> The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.
The Constitution of the Republic of Hungary	<u>Article 18.</u> The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment. <u>Article 70/D.</u> (1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. (2) The Republic of Hungary shall implement this right through institutions of labor safety and health care, through the organization of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment.
Spanish Constitution	<u>Section 43</u> (1) The right to health protection is recognized. (2) It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect. (3) The public authorities shall foster health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time.
The Constitution of Japan	<u>Article 25</u> ... In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

RIGHT TO FOOD	
International human rights instruments	
Universal Declaration of Human Rights	<u>Article 25</u> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...
International Covenant on Economic, Social and Cultural Rights	<u>Article 11</u> 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, ... 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need. See also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 12 (1999): The right to adequate food (art. 11), 1999
International Covenant on Civil and Political Rights	-
Convention on the Elimination of All Forms of Racial Discrimination	-
Convention on the Elimination of All Forms of Discrimination against Women	-
Convention on the Rights of the Child	<u>Article 24 (2) (c)</u> (2) States Parties ... shall take appropriate measures: (c) To combat ... malnutrition, ... through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods ...
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
Convention on the Rights of Persons with Disabilities	<u>Article 28</u> 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food ... and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
UN Declaration on the Rights of Indigenous Peoples	-
Regional human rights instruments	
European Social Charter (revised)	-
European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1	-
Charter of Fundamental Rights of the European Union	-

Union	
American Declaration of the Rights and Duties of Man 1948	<u>Article XI</u> Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	<u>Article 12</u> Right to Food 1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development. 2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.
African (Banjul) Charter on Human and Peoples' Rights	-
African Charter on the Rights and Welfare of the Child	<u>Article 14</u> 2. States Parties to the present Charter in particular shall take measures: ... (c) to ensure the provision of adequate nutrition ...
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	<u>Article 15 - Right to Food Security</u> [State parties shall] a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; b) establish adequate systems of supply and storage to ensure food security.
Domestic models (reference made to ACT Bill of Rights, UK Human Rights Model Bill, as well as the Constitutions of South Africa, Germany, Portugal, Netherlands, Italy, Hungary, Spain and Japan)	
ACT BOR Consultative Committee Model Bill	2.2 Everyone has the right to an adequate standard of living for himself or herself and his or her family, including adequate food, clothing and housing. <i>Note: Article 11(1) ICESCR</i>
UK Joint Committee on Human Rights Model Bill	<u>An adequate standard of living</u> Everyone is entitled to an adequate standard of living sufficient for that person and their dependents, including adequate food, water and clothing. ...
South African Bill of Rights	<u>Article 27 - Health care, food, water and social security</u> 1. Everyone has the right to have access to b. sufficient food and water; 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
Constitution of the Federal Republic of Germany	-
Constitution of the Portuguese Republic (Seventh Revision [2005])	-
The Constitution of the Kingdom of the Netherlands 2002	-
Constitution of the Italian Republic	-
The Constitution of the Republic of Hungary	-
Spanish Constitution	-
The Constitution of Japan	-

RIGHT TO WATER	
International human rights instruments	
Universal Declaration of Human Rights	-
International Covenant on Economic, Social and Cultural Rights	See General Comment No. 15 (2002) on the right to water (arts. 11 and 12)* Para. 3, "Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. ... The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). ..." Article 11 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 cooperation based on free consent.
International Covenant on Civil and Political Rights	-
Convention on the Elimination of All Forms of Racial Discrimination	-
Convention on the Elimination of All Forms of Discrimination against Women	Article 14 (2) (h) (2) States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
Convention on the Rights of the Child	Article 24 (2) (c) (2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	-
Convention on the Rights of Persons with Disabilities	Article 28 (2)(a) 2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
UN Declaration on the Rights of Indigenous Peoples	Article 32 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in

	connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
Regional human rights instruments	
European Social Charter (revised) _	-
European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1	-
Charter of Fundamental Rights of the European Union	-
American Declaration of the Rights and Duties of Man 1948	-
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	-
African (Banjul) Charter on Human and Peoples' Rights	-
African Charter on the Rights and Welfare of the Child	Article 14 2. States Parties to the present Charter ... in particular shall take measures: ... (c) to ensure the provision of adequate nutrition and safe drinking water; ...
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	Article 15 [State parties shall] a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food ...
Domestic models <i>(reference made to ACT Bill of Rights, UK Human Rights Model Bill, as well as the Constitutions of South Africa, Germany, Portugal, Netherlands, Italy, Hungary, Spain and Japan)</i>	
ACT BOR Consultative Committee Model Bill	-
UK Joint Committee on Human Rights Model Bill	<u>An adequate standard of living</u> Everyone is entitled to an adequate standard of living sufficient for that person and their dependents, including adequate food, water and clothing. ...
South African Bill of Rights	<u>Article 27 - Health care, food, water and social security</u> 3. Everyone has the right to have access to b. sufficient food and water; 4. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
Constitution of the Federal Republic of Germany	-
Constitution of the Portuguese Republic (Seventh Revision [2005])	-
The Constitution of the	-

Kingdom of the Netherlands 2002	
Constitution of the Italian Republic	-
The Constitution of the Republic of Hungary	-
Spanish Constitution	-
The Constitution of Japan	-

RIGHT TO SOCIAL SECURITY	
International human rights instruments	
Universal Declaration of Human Rights	<u>Article 22</u> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. <u>Article 25</u> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
International Covenant on Economic, Social and Cultural Rights	<u>Article 9</u> The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance. <u>Article 10(2)</u> Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. See also General Comment No. 19 (2008) on the right to social security
International Covenant on Civil and Political Rights	-
Convention on the Elimination of All Forms of Racial Discrimination	<u>Article 5(e)(iv)</u> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) Economic, social and cultural rights, in particular: (iv) The right to public health, medical care, social security and social services;
Convention on the Elimination of All Forms of Discrimination against Women	<u>Article 11(1)(e)</u> (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; <u>Article 13(a)</u> States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits; <u>Article 14(2)(c)</u> (2) States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (c) To benefit directly from social security programmes;
Convention on the Rights of the Child	<u>Article 26</u> (1) States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

	(2) The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<u>Article 27</u> (1) With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm. (2) Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances. <u>Article 43(1)(e)</u> Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met; <u>Article 45(1)(c)</u> Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: (c) Access to social and health services, provided that requirements for participation in the respective schemes are met; <i>NB: Australia is not a signatory, but the Convention may be considered to be part of international law for the purposes of interpreting the right to social security (HRA Dictionary definition of 'international law' is not exhaustive).</i>
Convention on the Rights of Persons with Disabilities	<u>Article 28(2)(b-c), (e)</u> (2) States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes; (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care; (e) To ensure equal access by persons with disabilities to retirement benefits and programmes.
UN Declaration on the Rights of Indigenous Peoples	<u>Article</u> <u>21</u> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of ... social security.
Regional human rights instruments	
European Social Charter (revised) _	<u>Part I</u> The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised:... 12. All workers and their dependents have the right to social security. 13. Anyone without adequate resources has the right to social and medical assistance. 14. Everyone has the right to benefit from social welfare services. ... 23. Every elderly person has the right to social protection. ... <u>Article 12 – The right to social security</u> With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

	1. to establish or maintain a system of social security; 2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; 3. to endeavour to raise progressively the system of social security to a higher level; 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties. <u>Article 13 – The right to social and medical assistance</u> With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: 1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; 2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; 3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; 4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953. <u>Article 14 – The right to benefit from social welfare services</u> With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake: 1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment; 2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services. <u>Article 23 – The right of elderly persons to social protection</u> With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular: • to enable elderly persons to remain full members of society for as long as possible, by means of: a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them; • to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; b. the health care and the services necessitated by their state; • to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.
European Convention for the Protection of Human Rights and Fundamental	-

Freedoms, Protocol 1	
Charter of Fundamental Rights of the European Union	<u>Article 34</u> 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices. 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices. 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.
American Declaration of the Rights and Duties of Man 1948	<u>Article XVI</u> Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	<u>Article 9 - Right to Social Security</u> 1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents. 2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.
African (Banjul) Charter on Human and Peoples' Rights	<u>Article 18</u> ... 4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.
African Charter on the Rights and Welfare of the Child	-
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	<u>Article 13 – Economic and Social Welfare Rights</u> States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall: ... (f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it; ... (i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors; ... (l) recognise and enforce the right of salaried women to the same allowance and entitlements as those granted to salaried men for their spouses and children. <u>Article 22(a) - Special Protection of Elderly Women</u> The State Parties undertake to:- provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training.
Domestic models <i>(reference made to ACT Bill of Rights, UK Human Rights Model Bill, as well as the Constitutions of South Africa, Germany, Portugal, Netherlands, Italy, Hungary, Spain and Japan)</i>	
ACT BOR Consultative Committee Model Bill	-
UK Joint Committee on Human Rights Model Bill	<u>An adequate standard of living</u> Everyone has the right to social assistance, including care and support, in accordance with their needs. No one shall be allowed to fall into destitution.

South African Bill of Rights	<u>Article 27 (1)(c) and (2) - Health care, food, water and social security</u> - Everyone has the right to have access to - social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. - The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
Constitution of the Federal Republic of Germany	-
Constitution of the Portuguese Republic (Seventh Revision [2005])	<u>Article 63 - Social security and solidarity</u> - Everyone shall have the right to social security. - The state shall be charged with organising, coordinating and subsidising a unified and decentralised social security system, with the participation of the trade unions, other organisations that represent workers and associations that represent any other beneficiaries. - The social security system shall protect citizens in illness and old age and when they are disabled, widowed or orphaned, as well as when they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or ability to work. - All periods of work shall, as laid down by law, contribute to the calculation of old age and disability pensions, regardless of the sector of activity in which they were performed. - With a view to the pursuit of the social solidarity objectives that are particularly enshrined in this Article and in Articles 67(2)b, 69, 70(1)e, 71 and 72, the state shall, as laid down by law, support and inspect the activities and operation of private charitable institutions and other non-profit institutions that are recognised to be in the public interest.
The Constitution of the Kingdom of the Netherlands 2002	<u>Article 20</u> - It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth. - Rules concerning entitlement to social security shall be laid down by Act of Parliament. - Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to aid from the authorities.
Constitution of the Italian Republic	<u>Article 38</u> Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons are entitled to receive education and vocational training. Responsibilities under this article are entrusted to entities and institutions established by or supported by the State. Private-sector assistance may be freely provided.
The Constitution of the Republic of Hungary	<u>Article 70/E</u> (1) Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own. (2) The Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions.
Spanish Constitution	<u>Section 41</u> The public authorities shall maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of hardship, especially in case of unemployment. Supplementary assistance and benefits shall be optional. <u>Section 50</u> The public authorities shall guarantee, through adequate and periodically updated pensions, a sufficient income for citizens in old age. Likewise, and without prejudice to the obligations of the families, they shall promote their welfare through a system of social services that provides for their specific problems of health, housing, culture and leisure.

The Constitution of Japan	<u>Article 25</u> All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.
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RIGHT TO EDUCATION	
International human rights instruments	
Universal Declaration of Human Rights	Article 26: 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. ... 3. Parents have a prior right to choose the kind of education that shall be given to their children.
International Covenant on Economic, Social and Cultural Rights	Article 13: 1. The States Parties to the present Covenant recognize the right of everyone to education. ... 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.
International Covenant on Civil and Political Rights	Article 18: 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
Convention on the Elimination of All Forms of Racial Discrimination	Article 5 In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (v) The right to education and training; ...
Convention on the Elimination of All Forms of Discrimination against Women	Article 10 States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training; (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

	(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods; (d) The same opportunities to benefit from scholarships and other study grants; (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women; (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely; (g) The same Opportunities to participate actively in sports and physical education; (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.
Convention on the Rights of the Child	<u>Article 28:</u> 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. ... <u>Article 29:</u> ... 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<u>Article 12:</u> 4. States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. <u>Article 30:</u> Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment. <u>Article 43:</u> 1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and placement services; (c) Access to vocational training and retraining facilities and institutions; ... <u>Article 45:</u> 1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: (a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;

	(b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met; ... 4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin. <i>NB: Australia is not a signatory but the Convention may be considered to be part of international law for the purposes of interpreting the right to education (HRA Dictionary definition of 'international law' is not exhaustive).</i>
Convention on the Rights of Persons with Disabilities	<u>Article 24:</u> 1. States Parties recognize the right of persons with disabilities to education. ... 2. In realizing this right, States Parties shall ensure that: (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; (c) Reasonable accommodation of the individual's requirements is provided; (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education; (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion. 3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including: (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development. 4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities. 5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.
UN Declaration on the Rights of Indigenous Peoples	<u>Article 14:</u> 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.
Regional human rights instruments	
European Social Charter (revised)	<u>Article 17</u> With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private

	organisations, to take all appropriate and necessary measures designed: 1.a.to ensure that children and young persons, taking account of the rights and duties of their parents, have ... the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; ... 2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.
European Convention for the Protection on Human Rights and Fundamental Freedoms, Protocol 1	<u>Article 2 – Right to education</u> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.
Charter of Fundamental Rights of the European Union	<u>Article 14</u> Right to education 1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.
American Declaration of the Rights and Duties of Man 1948	<u>Article XII</u> Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity. Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education.
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	<u>Article 13: Right to Education</u> 1. Everyone has the right to education. ... 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.
African (Banjul) Charter on Human and Peoples' Rights	<u>Article 17:</u> 1. Every individual shall have the right to education. ...
African Charter on the Rights and Welfare of the Child	<u>Article 11:</u> 1. Every child shall have the right to an education. ... 3. States Parties to the present Charter shall take all appropriate measures with a view to achieving

	the full realization of this right and shall in particular: (a) provide free and compulsory basic education; (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all; (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means; (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates; (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community. 4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child. 5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter. 6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability. 7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	Article 12 Right to Education and Training 1. States Parties shall take all appropriate measures to: a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training; b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination; • protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices; • provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment; • integrate gender sensitisation and human rights education at all levels of education curricula including teacher training. 2. States Parties shall take specific positive action to: a) promote literacy among women; b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology; c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.
Domestic models <i>(reference made to ACT Bill of Rights, UK Human Rights Model Bill, as well as the Constitutions of South Africa, Germany, Portugal, Netherlands, Italy, Hungary, Spain and Japan)</i>	
ACT BOR Consultative Committee Model Bill	Clause 10 Education: 10.1 Everyone has the right to education. <i>Note:</i> Article 13(1) ICESCR 10.2 To ensure the religious and moral education of their children in conformity with their own convictions, parents and legal guardians may choose schooling for their children, which conform to such minimum educational standards required by law and subject to the human rights set out in this

	Schedule. <i>Note:</i> Article 13(3) ICESCR and Article 18(4) ICCPR
UK Joint Committee on Human Rights Model Bill	Education: Everyone of compulsory school age has the right to receive free, full-time education suitable to their needs. Everyone has the right to have access to further education and to vocational and continuing training.
South African Bill of Rights	29. Education: 1. Everyone has the right a. to a basic education, including adult basic education; and b. to further education, which the state, through reasonable measures, must make progressively available and accessible. 2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices. 3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that a. do not discriminate on the basis of race; b. are registered with the state; and c. maintain standards that are not inferior to standards at comparable public educational institutions. 4. Subsection (3) does not preclude state subsidies for independent educational institutions.
Constitution of the Federal Republic of Germany	Article 7 [School system] (1) The entire school system shall be under the supervision of the state. (2) Parents and guardians shall have the right to decide whether children shall receive religious instruction. (3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction. (4) The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the <i>Länder</i>. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured. (5) A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality. (6) Preparatory schools shall remain abolished.
Constitution of the Portuguese Republic (Seventh Revision [2005])	Article 43 (Freedom to learn and to teach) 1. The freedom to learn and to teach shall be guaranteed. 2. The state shall not lay down educational and cultural programmes in accordance with any philosophical, aesthetic, political, ideological or religious directives. 3. Public education shall not be denominational.

	4. The right to create private and cooperative schools shall be guaranteed. <u>Article 74</u> (Education) 1. Everyone shall possess the right to education, and the right to equal opportunities and to access to and success in schooling shall be guaranteed. 2. In implementing the education policy, the state shall be charged with: a) Ensuring universal, compulsory and free basic education; b) Creating a public, and developing the general, preschool system; c) Guaranteeing permanent education and eliminating illiteracy; d) In accordance with his capabilities, guaranteeing every citizen access to the highest levels of education, scientific research and artistic creation; e) Progressively making all levels of education free of charge; f) Inserting schools into the communities they serve and establishing links between education and economic, social and cultural activities; g) Promoting and supporting disabled citizens' access to education and supporting special education when necessary; h) Protecting and developing Portuguese sign language, as an expression of culture and an instrument for access to education and equal opportunities; i) Ensuring that emigrants' children are taught the Portuguese language and enjoy access to Portuguese culture; j) Ensuring that immigrants' children receive adequate support in order to enable them to effectively enjoy the right to education. <u>Article 75</u> (Public, private and cooperative education) 1. The state shall create a network of public education establishments that covers the needs of the whole population. 2. The state shall recognise and inspect private and cooperative education, as laid down by law. <u>Article 76</u> (University and access to higher education) 1. The rules governing access to university and other higher education institutions shall guarantee equal opportunities in and the democratisation of the education system, and shall have due regard for the country's needs for qualified staff and to raising its educational, cultural and scientific level. 2. As laid down by law and without prejudice to an adequate assessment of the quality of education, universities shall autonomously draw up their own by-laws and shall enjoy scientific, pedagogical, administrative and financial autonomy. <u>Article 77</u> (Democratic participation in education) 1. Teachers and students shall possess the right to take part in the democratic management of schools, as laid down by law. 2. The law shall regulate the forms in which teachers', students' and parents' associations, communities and scientific institutions participate in drawing up the education policy.
The Constitution of the Kingdom of the Netherlands 2002	<u>Article 23</u> 1. Education shall be the constant concern of the Government. 2. All persons shall be free to provide education, without prejudice to the authorities' right of supervision and, with regard to forms of education designated by law, their right to examine the competence and moral integrity of teachers, to be regulated by Act of Parliament. 3. Education provided by public authorities shall be regulated by Act of Parliament, paying due respect to everyone's religion or belief. 4. The authorities shall ensure that primary education is provided in a sufficient number of public-authority schools in every municipality. Deviations from this provision may be permitted under rules to be established by Act of Parliament on condition that there is opportunity to receive the said form of education. 5. The standards required of schools financed either in part or in full from public funds shall be

	regulated by Act of Parliament, with due regard, in the case of private schools, to the freedom to provide education according to religious or other belief. 6. The requirements for primary education shall be such that the standards both of private schools fully financed from public funds and of public-authority schools are fully guaranteed. The relevant provisions shall respect in particular the freedom of private schools to choose their teaching aids and to appoint teachers as they see fit . 7. Private primary schools that satisfy the conditions laid down by Act of Parliament shall be financed from public funds according to the same standards as public-authority schools. The conditions under which private secondary education and pre-university education shall receive contributions from public funds shall be laid down by Act of Parliament. 8. The Government shall submit annual reports on the state of education to the States General.
Constitution of the Italian Republic	<u>Art. 33</u> The Republic guarantees the freedom of the arts and sciences, which may be freely taught. The Republic lays down general rules for education and establishes state schools of all branches and grades. Entities and private persons have the right to establish schools and institutions of education, at no cost to the State. The law, when setting out the rights and obligations for the non-state schools which request parity, shall ensure that these schools enjoy full liberty and offer their pupils an education and qualifications of the same standards as those afforded to pupils in state schools. State examinations are prescribed for admission to and graduation from the various branches and grades of schools and for qualification to exercise a profession. Higher education institutions, universities and academies, have the right to establish their own regulations within the limits laid down by the law. <u>Art. 34</u> Schools are open to everyone. Primary education, given for at least eight years, is compulsory and free of tuition. Capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education. The Republic renders this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations. <u>Art. 38</u> ... Disabled and handicapped persons are entitled to receive education and vocational training. ...
The Constitution of the Republic of Hungary	<u>Article 67</u> ... (2) Parents have the right to choose the form of education given to their children. <u>Article 70/F</u> (1) The Republic of Hungary guarantees the right of education to its citizens. (2) The Republic of Hungary shall implement this right through the dissemination and general access to culture, free compulsory primary schooling, through secondary and higher education available to all persons on the basis of their ability, and furthermore through financial support for students. <u>Article 70/G</u> (1) The Republic of Hungary shall respect and support ... the freedom to learn and to teach. ...
Spanish Constitution	<u>Section 27</u> (1) Everyone has the right to education. Freedom of teaching is recognized. (2) Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms. (3) The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions. (4) Elementary education is compulsory and free. (5) The public authorities guarantee the right of all to education, through general education

	programming, with the effective participation of all sectors concerned and the setting-up of educational centres. (6) The right of individuals and legal entities to set up educational centres is recognized, provided they respect constitutional principles. (7) Teachers, parents and, when appropriate, pupils shall participate in the control and management of all centres supported by the Administration out of public funds, under the terms established by the law. (8) The public authorities shall inspect and standardize the educational system in order to ensure compliance with the laws. (9) The public authorities shall help the educational centres which meet the requirements established by the law. (10) The autonomy of Universities is recognized, under the terms established by the law.
The Constitution of Japan	<u>Article 26</u> All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

RIGHT TO WORK (including the right of workers to organize and bargain collectively (trade union rights) and the right to just and favourable conditions of work)	
International human rights instruments	
Universal Declaration of Human Rights	Article 23 (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests. Article 24 Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
International Covenant on Economic, Social and Cultural Rights	Article 6 (1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. (2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual. Article 7 The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. Article 8 (1) The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. (2) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

	(3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention. See also <u>General Comment No. 18 (2006) on Article 6</u>
International Covenant on Civil and Political Rights	<u>Article 8 (1), (2) and (3) (a)</u> 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3 (a) No one shall be required to perform forced or compulsory labour; <u>Article 22</u> (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.
Convention on the Elimination of All Forms of Racial Discrimination	<u>Article 5(e)(i) and (ii)</u> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions;
Convention on the Elimination of All Forms of Discrimination against Women	<u>Article 11(1)(a-d) and (f)</u> (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. <u>Article 11(2)</u> In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to

	combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them. <u>Article 11(3)</u> Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary. See also General recommendation No. 13 (1989) on equal remuneration for work of equal value, General recommendation No. 16 (1991) unpaid women workers in rural and urban family enterprises, General recommendation No. 17 (1991) measurement and quantification of the unremunerated domestic activities of women and their recognition in the GNP, and General Recommendation No. 26 (2008) Women Migrant Workers
Convention on the Rights of the Child	<u>Article 32</u> 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<u>Article 11 (1-2)</u> 1. No migrant worker or member of his or her family shall be held in slavery or servitude. 2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour. <u>Article 25</u> (1) Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment. (2) It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article. (3) States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity. <u>Article 26</u> (1) States Parties recognize the right of migrant workers and members of their families: (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned; (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned; (c) To seek the aid and assistance of any trade union and of any such association as aforesaid. (2) No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

	<u>Article 40</u> (1) Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests. (2) No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others. <u>Article 52</u> 1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions. 2. For any migrant worker a State of employment may: (a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation; (b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications. 3. For migrant workers whose permission to work is limited in time, a State of employment may also: (a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years; (b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years. 4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment. <u>Article 54</u> 1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of: (a) Protection against dismissal; (b) Unemployment benefits; (c) Access to public work schemes intended to combat unemployment; (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention. 2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention. <u>Article 70</u> States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity. <i>NB: Australia is not a signatory, but the Convention may be considered to be part of international law for the purposes of interpreting this right (HRA Dictionary definition of 'international law' is not exhaustive).</i>
Convention on the Rights of Persons with Disabilities	<u>Article 27(1)</u> (1) States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who

	acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances; (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others; (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business; (g) Employ persons with disabilities in the public sector; (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace; (j) Promote the acquisition by persons with disabilities of work experience in the open labour market; (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
UN Declaration on the Rights of Indigenous Peoples	<u>Article 17</u> 1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. 2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment. 3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.
Regional human rights instruments	
European Social Charter (revised) _	<u>Part I</u> The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised: 1. Everyone shall have the opportunity to earn his living in an occupation freely entered upon. 2. All workers have the right to just conditions of work. 3. All workers have the right to safe and healthy working conditions. 4. All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families. 5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests. 6. All workers and employers have the right to bargain collectively. ... 20. All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. 21. Workers have the right to be informed and to be consulted within the undertaking. 22. Workers have the right to take part in the determination and improvement of the working conditions and working environment in the undertaking. ...

	24. All workers have the right to protection in cases of termination of employment. 25. All workers have the right to protection of their claims in the event of the insolvency of their employer. 26. All workers have the right to dignity at work. 27. All persons with family responsibilities and who are engaged or wish to engage in employment have a right to do so without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities. 28. Workers' representatives in undertakings have the right to protection against acts prejudicial to them and should be afforded appropriate facilities to carry out their functions. 29. All workers have the right to be informed and consulted in collective redundancy procedures <u>Part II</u> The Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs. <u>Article 1 – The right to work</u> With a view to ensuring the effective exercise of the right to work, the Parties undertake: 1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon; 3. to establish or maintain free employment services for all workers; 4. to provide or promote appropriate vocational guidance, training and rehabilitation. <u>Article 2 – The right to just conditions of work</u> With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: 1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit; 2. to provide for public holidays with pay; 3. to provide for a minimum of four weeks' annual holiday with pay; 4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations; 5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest; 6. to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship; 7. to ensure that workers performing night work benefit from measures which take account of the special nature of the work. <u>Article 3 – The right to safe and healthy working conditions</u> With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations: 1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment; 2. to issue safety and health regulations; 3. to provide for the enforcement of such regulations by measures of supervision; 4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions. <u>Article 4 – The right to a fair remuneration</u> With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:
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	1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; 2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; 3. to recognise the right of men and women workers to equal pay for work of equal value; 4. to recognise the right of all workers to a reasonable period of notice for termination of employment; 5. to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards. The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions. <u>Article 5 – The right to organise</u> With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations. <u>Article 6 – The right to bargain collectively</u> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: 1. to promote joint consultation between workers and employers; 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into. <u>Article 20 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex</u> With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: a. access to employment, protection against dismissal and occupational reintegration; b. vocational guidance, training, retraining and rehabilitation; c. terms of employment and working conditions, including remuneration; d. career development, including promotion. <u>Article 21 – The right to information and consultation</u> With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice: a. to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and b. to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking. <u>Article 22 – The right to take part in the determination and improvement of the working conditions and working environment</u> With a view to ensuring the effective exercise of the right of workers to take part in the determination
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	and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute: - to the determination and the improvement of the working conditions, work organisation and working environment; - to the protection of health and safety within the undertaking; - to the organisation of social and socio-cultural services and facilities within the undertaking; - to the supervision of the observance of regulations on these matters. <u>Article 24 – The right to protection in cases of termination of employment</u> With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: - the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; - the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief. To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body. <u>Article 25 – The right of workers to the protection of their claims in the event of the insolvency of their employer</u> With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection. <u>Article 26 – The right to dignity at work</u> With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: - to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; - to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct. <u>Article 27 – The right of workers with family responsibilities to equal opportunities and equal treatment</u> With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake: - to take appropriate measures: - to enable workers with family responsibilities to enter and remain in employment, as well as to reenter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training; - to take account of their needs in terms of conditions of employment and social security; - to develop or promote services, public or private, in particular child daycare services and other childcare arrangements; - to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice; - to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment. <u>Article 28 – The right of workers' representatives to protection in the undertaking and facilities to be accorded to them</u> With a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking: - they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking;
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	b. they are afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned. <u>Article 29 – The right to information and consultation in collective redundancy procedures</u> With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.
European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1	-
Charter of Fundamental Rights of the European Union	<u>Article 15 - Freedom to choose an occupation and right to engage in work</u> 1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. 2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. 3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. <u>Article 12 - Freedom of assembly and of association</u> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.
American Declaration of the Rights and Duties of Man 1948	<u>Article XIV</u> Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family. <u>Article XXII</u> Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	<u>Article 6 - Right to Work</u> 1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity. 2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work. <u>Article 7 - Just, Equitable, and Satisfactory Conditions of Work</u> The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to: a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction; b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations; c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority; d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or

	to reinstatement on the job or any other benefits provided by domestic legislation; e. Safety and hygiene at work; f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received; g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work; h. Rest, leisure and paid vacations as well as remuneration for national holidays. <u>Article 8 - Trade Union Rights</u> 1. The States Parties shall ensure: a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely; b. The right to strike. 2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law. 3. No one may be compelled to belong to a trade union.
African (Banjul) Charter on Human and Peoples' Rights	<u>Article 15</u> Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.
African Charter on the Rights and Welfare of the Child	<u>Article 15: Child Labour</u> 1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. 2. States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children, States Parties shall in particular: (a) provide through legislation, minimum wages for admission to every employment; (b) provide for appropriate regulation of hours and conditions of employment; (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article; (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	<u>Article 13 - Economic and Social Welfare Rights</u> States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall: a) promote equality of access to employment; b) promote the right to equal remuneration for jobs of equal value for women and men; c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace; d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;

	e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector; ... g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child; h) take the necessary measures to recognise the economic value of the work of women in the home; i) guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors; ... k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children; ...
Domestic models <i>(reference made to ACT Bill of Rights, UK Human Rights Model Bill, as well as the Constitutions of South Africa, Germany, Portugal, Netherlands, Italy, Hungary, Spain and Japan)</i>	
ACT BOR Consultative Committee Model Bill	<u>Clause 11 – Work</u> 11.1 No one shall be held in slavery or servitude. <i>Note: Article 8(1) and (2) ICCPR</i> 11.2 Subject to clause 11.3, no one shall be required to perform forced or compulsory labour. <i>Note: Article 8(3)(a) ICCPR</i> 11.3 For the purpose of clause 11.2, forced or compulsory labour does not include - (a) any work or service, normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; or (b) any work or service exacted in cases of emergency or calamity threatening the life or well-being of the community; or (c) any work or service which forms part of normal civil obligations. <i>Note: Article 8(3)(c) ICCPR</i> 11.4 Everyone has the right to work, which includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. <i>Note: Article 6(1) ICESCR</i> 11.5 Everyone has the right to the enjoyment of just and favourable conditions of work. <i>Note: Article 7 and Article 10(2) and (3) ICESCR</i>
UK Joint Committee on Human Rights Model Bill	-
South African Bill of Rights	<u>Article 22 - Freedom of trade, occupation and profession</u> Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. <u>Article 23 - Labour relations</u> 1. Everyone has the right to fair labour practices. 2. Every worker has the right a. to form and join a trade union; b. to participate in the activities and programmes of a trade union; and c. to strike. 3. Every employer has the right a. to form and join an employers' organisation; and b. to participate in the activities and programmes of an employers' organisation. 4. Every trade union and every employers' organisation has the right a. to determine its own administration, programmes and activities; b. to organise; and c. to form and join a federation. 5. Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section

	36(1). 6. National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
Constitution of the Federal Republic of Germany	<u>Article 9 (1) and (3) - Freedom of association</u> (1) All Germans shall have the right to form corporations and other associations. (3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions. <u>Article 12 - Occupational freedom</u> (1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law. (2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all. (3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court.
Constitution of the Portuguese Republic (Seventh Revision [2005])	<u>Article 53 - Job security</u> Workers shall be guaranteed job security, and dismissal without fair cause or for political or ideological reasons shall be prohibited. <u>Article 54 - Workers' committees</u> 1. Workers shall possess the right to form workers' committees to defend their interests and democratically intervene in company life. 2. Decisions to form workers' committees shall be taken by the workers in question, who shall approve the committees' by-laws and shall elect their members by direct, secret ballot. 3. Coordinating committees may be created with a view to improving intervention in economic restructuring and to guaranteeing workers' interests. 4. Committee members shall enjoy the legal protection accorded to trade union delegates. 5. Workers' committees shall possess the right: a) To receive all the information needed to perform their tasks; b) To monitor the management of businesses; c) To participate in corporate restructuring processes, especially in relation to training actions or when working conditions are altered; d) To take part in drawing up labour legislation and economic and social plans that address their sector; e) To manage, or participate in the management of, businesses' social activities; f) To promote the election of workers' representatives to the management bodies of businesses that belong to the state or other public bodies, as laid down by law. <u>Article 55 - Freedoms concerning trade unions</u> 1. Workers shall be free to form and operate trade unions as a condition and guarantee of the building of their unity in defence of their rights and interests. 2. In exercising their freedom to form and operate trade unions, workers shall particularly be guaranteed the following, without any discrimination: a) Freedom to form trade unions at every level; b) Freedom of membership. No worker shall be obliged to pay dues to a union to which he does not belong; c) Freedom to determine the organisation and internal regulations of trade unions; d) The right to engage in trade union activities in businesses; e) The right to political views, in the forms laid down in the respective by-laws.

	3. Trade unions shall be governed by the principles of democratic organisation and management, to be based on periodic elections of their managing bodies by secret ballot, without the need for any authorisation or homologation, and shall be founded on active worker participation in every aspect of trade union activity. 4. Trade unions shall be independent of employers, the state, religious denominations, and parties and other political associations, and the law shall lay down such guarantees as may be appropriate to that independence, which is fundamental to the unity of the working classes. 5. Trade unions shall possess the right to establish relations with or join international trade union organisations. 6. Workers' elected representatives shall enjoy the right to be informed and consulted, as well as to adequate legal protection against any form of subjection to conditions, constraints or limitations in the legitimate exercise of their functions. <u>Article 56 - Trade union rights and collective agreements</u> 1. Trade unions shall be responsible for defending and promoting the defence of the rights and interests of the workers they represent. 2. Trade unions shall possess the right: a) To take part in drawing up labour legislation; b) To take part in the management of social security institutions and other organizations that seek to fulfil workers' interests; c) To give their opinion on economic and social plans and supervise their implementation; d) To be represented on social conciliation bodies, as laid down by law; e) To take part in corporate restructuring processes, especially in relation to training actions or when working conditions are altered. 3. Trade unions shall be responsible for the exercise of the right to enter into collective agreements, which shall be guaranteed as laid down by law. 4. The law shall lay down the rules governing the legitimacy to enter into collective labour agreements and the validity of their provisions. <u>Article 57 - Right to strike and prohibition of lock-outs</u> 1. The right to strike shall be guaranteed. 2. Workers shall be responsible for defining the scope of the interests that are to be defended by a strike and the law shall not limit that scope. 3. The law shall define the conditions under which such services as are needed to ensure the safety and maintenance of equipment and facilities and such minimum services as are indispensable to the fulfilment of essential social needs are provided during strikes. 4. Lock-outs shall be prohibited. <u>Article 58 - Right to work</u> 1. Everyone shall possess the right to work. 2. In order to ensure the right to work, the state shall be charged with promoting: a) The implementation of full-employment policies; b) Equal opportunities in the choice of profession or type of work, and the conditions needed to avoid the gender-based preclusion or limitation of access to any position, work or professional category; c) Cultural and technical training and vocational development for workers. <u>Article 59 - Workers' rights</u> 1. Regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions, every worker shall possess the right: a) To the remuneration of his work in accordance with its volume, nature and quality, with respect for the principle of equal pay for equal work and in such a way as to guarantee a proper living; b) That work be organised in keeping with social dignity and in such a way as to provide personal fulfilment and to make it possible to reconcile professional and family life; c) To work in conditions that are hygienic, safe and healthy; d) To rest and leisure time, a maximum limit on the working day, a weekly rest period and periodic paid holidays;
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	e) To material assistance when he involuntarily finds himself unemployed; f) To assistance and fair reparation when he is the victim of a work-related accident or occupational illness. 2. The state shall be charged with ensuring the working, remuneratory and rest-related conditions to which workers are entitled, particularly by: a) Setting and updating a national minimum wage which, among other factors, shall have particular regard to workers' needs, increases in the cost of living, the level to which the sectors of production have developed, the requirements imposed by economic and financial stability, and the accumulation of capital for development purposes; b) Setting national limits on working hours; c) Ensuring special work-related protection for women during pregnancy and following childbirth, as well as for minors, the disabled and those whose occupations are particularly strenuous or take place in unhealthy, toxic or dangerous conditions; d) In cooperation with social organisations, ensuring the systematic development of a network of rest and holiday centres; e) Protecting emigrant workers' working conditions and guaranteeing their social benefits; f) Protecting student workers' working conditions. 3. Salaries shall enjoy special guarantees, as laid down by law.
The Constitution of the Kingdom of the Netherlands 2002	<u>Article 19</u> 1. It shall be the concern of the authorities to promote the provision of sufficient employment. 2. Rules concerning the legal status and protection of working persons and concerning codetermination shall be laid down by Act of Parliament. 3. The right of every Dutch national to a free choice of work shall be recognised, without prejudice to the restrictions laid down by or pursuant to Act of Parliament.
Constitution of the Italian Republic	<u>Article 4</u> The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society. <u>Article 35</u> The Republic protects work in all its forms and practices. It provides for the training and professional advancement of workers. It promotes and encourages international agreements and organizations which have the aim of establishing and regulating labour rights. It recognises the freedom to emigrate, subject to the obligations set out by law in the general interest, and protects Italian workers abroad. <u>Article 36</u> Workers have the right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence. Maximum daily working hours are established by law. Workers have the right to a weekly rest day and paid annual holidays. They cannot waive this right. <u>Article 37</u> Working women are entitled to equal rights and, for comparable jobs, equal pay as men. Working conditions must allow women to fulfil their essential role in the family and ensure appropriate protection for the mother and child. The law establishes the minimum age for paid labour. The Republic protects the work of minors by means of special provisions and guarantees them the right to equal pay for equal work. <u>Article 38</u> Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment.

	Disabled and handicapped persons are entitled to receive education and vocational training. Responsibilities under this article are entrusted to entities and institutions established by or supported by the State. Private-sector assistance may be freely provided. <u>Article 39</u> Trade unions may be freely established. No obligations may be imposed on trade unions other than registration at local or central offices, according to the provisions of the law. A condition for registration is that the statutes of the trade unions establish their internal organisation on a democratic basis. Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement. <u>Article 40</u> The right to strike shall be exercised in compliance with the law.
The Constitution of the Republic of Hungary	<u>Article 70/B.</u> (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession. (2) Everyone has the right to equal compensation for equal work, without any discrimination whatsoever. (3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out. (4) Everyone has the right to leisure time, to free time and to regular paid vacation. <u>Article 70/C.</u> (1) Everyone has the right to establish or join organizations together with others with the objective of protecting his economic or social interests. (2) The right to strike may be exercised within the framework of the law regulating such right. (3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to strike.
Spanish Constitution	<u>Section 28</u> (1) All have the right to freely join a trade union. The law may restrict or except the exercise of this right in the Armed Forces or Institutes or other bodies subject to military discipline, and shall lay down the special conditions of its exercise by civil servants. Trade union freedom includes the right to set up trade unions and to join the union of one's choice, as well as the right of trade unions to form confederations and to found international trade union organizations, or to become members thereof. No one may be compelled to join a trade union. (2) The right of workers to strike in defence of their interests is recognized. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services. <u>Section 35</u> (1) All Spaniards have the duty to work and the right to work, to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of their needs and those of their families. Under no circumstances may they be discriminated on account of their sex. (2) The law shall regulate a Workers' Statute. <u>Section 37</u> (1) The law shall guarantee the right to collective labour bargaining between workers and employers' representatives, as well as the binding force of the agreements. (2) The right of workers and employers to adopt collective labour dispute measures is hereby recognized. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may impose, include the guarantees necessary to ensure the functioning of essential public services.
The Constitution of Japan	<u>Article 27</u> All people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law.

	Children shall not be exploited. <u>Article 28</u> The right of workers to organize and to bargain and act collectively is guaranteed.
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RIGHT TO TAKE PART IN CULTURAL LIFE (including right to benefit from scientific progress and creative activity)	
International human rights instruments	
Universal Declaration of Human Rights	<u>Article 27</u> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
International Covenant on Economic, Social and Cultural Rights	<u>Article 15</u> (1) The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. (4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields. See also General Comment No. 17 (2005) on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15 (1) (c)) and General Comment No. 21 on the right of everyone to take part in cultural life
International Covenant on Civil and Political Rights	<u>Article 27</u> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
Convention on the Elimination of All Forms of Racial Discrimination	<u>Article 5(e)(vi)</u> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) Economic, social and cultural rights, in particular:...(vi) The right to equal participation in cultural activities;
Convention on the Elimination of All Forms of Discrimination against Women	<u>Article 13(c)</u> States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: ... (c) The right to participate in recreational activities, sports and all aspects of cultural life.
Convention on the Rights of the Child	<u>Article 30</u> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language. <u>Article 31</u> (1) States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. (2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural,

	artistic, recreational and leisure activity.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<u>Article 31</u> (1) States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. (2) States Parties may take appropriate measures to assist and encourage efforts in this respect. <u>Article 43(1)(g)</u> Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: ... (g) Access to and participation in cultural life. <u>Article 45(1)(d)</u> Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: ... (d) Access to and participation in cultural life. <i>NB: Australia is not a signatory, but the Convention may be considered to be part of international law for the purposes of interpreting the right to cultural life (HRA Dictionary definition of 'international law' is not exhaustive).</i>
Convention on the Rights of Persons with Disabilities	<u>Article 30(1-4)</u> 1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats; (b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats; (c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance. 2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society. 3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. 4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.
UN Declaration on the Rights of Indigenous Peoples	<u>Article 5</u> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. <u>Article 31</u> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.
Regional human rights instruments	
European Social Charter (revised)	<u>Article 15 (3) – The right of persons with disabilities to independence, social integration and participation in the life of the community</u> With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular: (3) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and

	mobility and enabling access to transport, housing, cultural activities and leisure. <u>Article 22 (c) – The right to take part in the determination and improvement of the working conditions and working environment</u> With a view to ensuring the effective exercise of the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute: c. to the organisation of social and socio-cultural services and facilities within the undertaking; <u>Article 23 (a) – The right of elderly persons to social protection</u> With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular: • to enable elderly persons to remain full members of society for as long as possible, by means of: a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; <u>Appendix to the European Social Charter (Revised)</u> <i>Scope of the Revised European Social Charter in terms of persons protected</i> Article 22: The terms "social and socio-cultural services and facilities" are understood as referring to the social and/or cultural facilities for workers provided by some undertakings such as welfare assistance, sports fields, rooms for nursing mothers, libraries, children's holiday camps, etc.
European Convention for the Protection of Human Rights and Fundamental Freedoms 1952, Protocol 1	<u>Article 1 – Protection of property*</u> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. <i>*implicit according to the Committee on Economic Social Cultural Rights in its General Comment No. 17 (2005), para 3.</i>
Charter of Fundamental Rights of the European Union	<u>Article 22 - Cultural, religious and linguistic diversity</u> The Union shall respect cultural, religious and linguistic diversity. <u>Article 25 - The rights of the elderly</u> The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.
American Declaration of the Rights and Duties of Man 1948	<u>Article XIII</u> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.
Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)	<u>Article 14 - Right to the Benefits of Culture</u> 1. The States Parties to this Protocol recognize the right of everyone: a. To take part in the cultural and artistic life of the community; b. To enjoy the benefits of scientific and technological progress; c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art. 3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture,

	and accordingly agree to foster greater international cooperation in these fields.
African (Banjul) Charter on Human and Peoples' Rights	<u>Article 17(2)</u> Every individual may freely, take part in the cultural life of his community.
African Charter on the Rights and Welfare of the Child	<u>Article 12 - Leisure, Recreation and Cultural Activities</u> 1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. 2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	<u>Article 17 - Right to Positive Cultural Context</u> 1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. 2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.
Domestic models <i>(reference made to ACT Bill of Rights, UK Human Rights Model Bill, as well as the Constitutions of South Africa, Germany, Portugal, Netherlands, Italy, Hungary, Spain and Japan)</i>	
ACT BOR Consultative Committee Model Bill	<u>Clause 7.2</u> Everyone has the right to take part in the cultural life of the Australian Capital Territory.
UK Joint Committee on Human Rights Model Bill	-
South African Bill of Rights	<u>Article 30 - Language and culture</u> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. <u>Article 31 - Cultural, religious and linguistic communities</u> 1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community a. to enjoy their culture, practise their religion and use their language; and b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. 2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.
Constitution of the Federal Republic of Germany	-
Constitution of the Portuguese Republic (Seventh Revision [2005])	<u>Article 42 - Freedom of cultural creation</u> 1. Intellectual, artistic and scientific creation shall not be restricted. 2. This freedom shall comprise the right to invent, produce and publicise scientific, literary and artistic works and shall include the protection of copyright by law. <u>Article 73 - Education, culture and science</u> 1. Everyone shall possess the right to education and culture. 2. The state shall promote the democratisation of education and the other conditions needed for an education conducted at school and via other means of training to contribute to equal opportunities, the overcoming of economic, social and cultural inequalities, the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in public life. 3. Acting in cooperation with the media, cultural associations and foundations, cultural and recreational groups, cultural heritage associations, residents' associations and other cultural agents, the state shall promote the democratisation of culture by encouraging and ensuring access by all citizens to cultural enjoyment and creation. 4. The state shall stimulate and support scientific research and creation and technological innovation, in such a way as to ensure their freedom and autonomy, reinforce competitiveness and ensure

	cooperation between scientific institutions and businesses. <u>Article 78 - Cultural enjoyment and creation</u> 1. Everyone shall possess the right to cultural enjoyment and creation, together with the duty to preserve, defend and enhance the cultural heritage. 2. Acting in cooperation with all cultural agents, the state shall be charged with: a) Encouraging and ensuring access by all citizens to the means and instruments required for cultural activities, and correcting the country's existing asymmetries in this respect; b) Supporting initiatives that stimulate individual and joint creation in all its many forms and expressions, and that stimulate more travel by high quality cultural works and items; c) Promoting the safeguarding and enhancement of the cultural heritage and making it an element that inspires a common cultural identity; d) Developing cultural relations with all peoples, especially those that speak Portuguese, and ensuring the defence and promotion of Portuguese culture abroad; e) Coordinating the cultural policy with the other sectoral policies.
The Constitution of the Kingdom of the Netherlands 2002	<u>Article 22(3)</u> The authorities shall promote social and cultural development and leisure activities.
Constitution of the Italian Republic	<u>Article 9</u> The Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation.
The Constitution of the Republic of Hungary	<u>Article 68(2)</u> The Republic of Hungary shall provide for the protection of national and ethnic minorities and ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the use of names in their native languages. <u>Article 70/G</u> (1) The Republic of Hungary shall respect and support the freedom of scientific and artistic expression, the freedom to learn and to teach. (2) Only scientists are entitled to decide in questions of scientific truth and to determine the scientific value of research.
Spanish Constitution	<u>Section 44</u> (1) The public authorities shall promote and watch over access to culture, to which all are entitled. (2) The public authorities shall promote science and scientific and technical research for the benefit of the general interest.
The Constitution of Japan	-

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