

## **Time to expand the ACT Human Rights Act 2004? Report of the Australian Capital Territory Economic, Social and Cultural Rights Research Project**

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The recent focus on economic, social and cultural rights suggests a new maturity in the debate about rights in Australia. In 2010, the report of the Australian Capital Territory Economic, Social and Cultural Rights Research Project proposed that justiciable economic, social and cultural rights be given the same importance in the ACT's *Human Rights Act 2004* as civil and political rights. This article discusses the ACT report's contribution to the development of a normative framework for protecting economic, social and cultural rights in Australia. The article concludes that while the report achieves some important goals, it misses other opportunities to move the rights debate forward. Overall, the report raises more questions than it answers.

### **Introduction**

Economic, social and cultural rights are the new frontier in rights talk. This shift in focus from civil and political rights to their more controversial cousins suggests a new maturity in the debate about rights in Australia. In 2010, a report for the Australian Capital Territory — the *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (ACT ESCR 2010, the report) — entered this debate with a proposal to include justiciable economic, social and cultural (ESC) rights in the ACT's *Human Rights Act 2004* (HRA) on an 'equal footing' with civil and political rights.

This article discusses the ACT report's contribution to developing a normative framework for protecting ESC rights in Australia. First, the article offers some background to the report and outlines its recommendations. It then charts the ESC rights debate in Australia and overseas and sketches a spectrum of views. Finally, the article assesses the strengths and weaknesses of the report and asks whether it moves the debate forward.

The article concludes that the report achieves some important goals but misses other opportunities. The report's most interesting contribution to the debate is in

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providing new ideas, and a local perspective, on how justiciable ESC rights could work in a legislative Bill of Rights. The flaws in the report lie in its silences. The report leaves under-explored the 'minimum core' issue, remedies, and the role of courts in supervising implementation. Another concern is that the report's ambition to see ESC rights enforced in law limits its capacity to imagine other, non-judicial futures for protecting rights. The report raises expectations that law can be a panacea for social issues and a 'quick fix' (Gearty in Gearty and Mantouvolou 2011, 35) solution to the political processes required to realise justice and equality goals in the long term.

## The ACT report

### *Background*

Published in September 2010, the report sets out the findings of a research project conducted between 2009 and 2010 by the Centre for International Governance and Justice at the Australian National University, the Australian Human Rights Centre at the University of New South Wales, and the ACT Department of Justice and Community Safety. The project was established to assess whether the HRA should be amended to include ESC rights, and what impact this would have on governance in the ACT. To answer this, the project explored the adequacy of existing ESC rights protection in the ACT, what mechanisms could protect ESC rights, and how they could be enforced.

The report was timed to correspond with the ACT government's commitment to consider ESC rights in its five-year review of the HRA. It reflects insights gathered by the project team through consultation with government, community and individuals working in the ACT in education, housing, health and environment/utilities, and roundtable sessions with national and international experts.<sup>1</sup>

### *Recommendations and key features of the model Bill*

Significantly, the report recommends that ESC rights should be protected in the HRA (report, 17–19). It argues that this would consolidate and build on the impact that the HRA has had in its first six years of operation. In concrete terms, this includes

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1 Among other initiatives, the project hosted a visit by Justice Yvonne Mokgoro from the South African Constitutional Court and held roundtables with Albie Sachs, former justice of the South African Constitutional Court, and Professor Sandra Liedenber, an expert on ESC rights from Stellenbosch University in South Africa.

ensuring that the executive, the legislature and the courts give more regular, focused attention to human rights issues, as well as improving accountability and process in the executive, legislative and judicial spheres (report, 113–17).

The report also argues that explicit inclusion of ESC rights has the potential to assist the most marginalised and vulnerable in the community (report, 113). This is, in part, because including ESC rights in the HRA would protect material interests that are not covered by existing civil and political rights and by other guarantees enshrined in the HRA, federal and territory legislation, and the common law. It could also be said that this is because ESC rights enable and empower, as much as they meet needs and remedy disadvantage, and in this way they offer a paradigm beyond welfarism.

Among the report's most interesting recommendations are those relating to how justiciable ESC rights could work in practice (report, 97–113, 119–35). The report presents a model legislative Bill of Rights (report, 135–71). The Bill protects justiciable ESC rights and includes mechanisms designed to assist adjudicating and implementing these rights. Complemented by case studies, the Bill offers practical and empirical insights that Australia's national debate on human rights has so far lacked. Also, by showing how rights can operate in context, the Bill brings rights closer to our everyday experience.

There are three key features of the Bill. First, it protects a selection of rights drawn from the International Covenant on Economic, Social and Cultural Rights (ICESCR): the right to housing; the right to health, food, water and social security; the right to education; the right to work; and the right to take part in cultural life. These rights are expressed in a form that reflects local conditions — that is, slightly modified from their expression in international human rights covenants. The report argues that including a broad list of ESC rights reflecting Australia's treaty obligations, rather than a narrow list, was desirable. The importance of ESC rights in the lives of most Australians supported this. The report also cites the difficulty of prioritising particular rights if a more limited selection were to be protected. It acknowledges, however, that the list could be expanded in future.

The second key feature of the Bill is its emphasis on the equal importance of ESC and civil and political rights. The Bill aims to place rights on an equal footing by extending to ESC rights all mechanisms currently applying to civil and political rights, including making ESC rights a standard for statutory interpretation in the HRA; empowering the ACT Supreme Court to issue declarations of incompatibility for inconsistent interpretation; requiring compatibility statements for legislation and parliamentary scrutiny of Bills for compliance with ESC rights; and imposing explicit duties on public authorities to comply with ESC rights and to give ESC rights proper

consideration in decision making, with a right of action against public authorities for failure to comply. The Bill also creates mechanisms applying exclusively to ESC rights. This includes empowering the Supreme Court to issue a 'declaration of incompatibility by omission' where the territory fails to take reasonable measures to implement ESC rights.

The third key feature of the Bill is its distinction between immediate and progressive obligations attaching to rights in the HRA. Under the Bill, the ACT must take reasonable measures to achieve the full realisation of ESC rights progressively. The progressive obligation attaches to ESC rights alone. Civil and political rights, by contrast, impose only immediate obligations. Some aspects of ESC rights, however, also attract immediate obligations, such as non-discrimination. The distinction between immediate and progressive obligations reflects the difference in time, resources and complexity involved in implementing rights. It is also a practical and realistic strategy for achieving the full realisation of rights because it gives governments scope to respond appropriately and to set long-term goals — and, in the case of ESC rights, it enables continuous improvement in the enjoyment of the rights.<sup>2</sup>

The report concludes that enshrining ESC rights in the HRA would represent a 'further stage of evolution of human rights protection in the ACT' (report, 16) and an opportunity for the ACT to demonstrate national leadership. It could also stimulate similar reform in other jurisdictions and enhance existing ESC rights jurisprudence in Australia and elsewhere (report, 16).

The report's confidence, however, contrasts with the history of controversy and doubt surrounding ESC rights — and the divergence of views in current national and international debate.

## Debating economic, social and cultural rights

### *A history of recognition and division*

ESC rights have attracted as much attention as civil and political rights over time. Their origins lie in the struggles of workers in the 18th century for social justice and fairness in conditions of employment, organisation and education (report, 43). The welfare states of Europe in the late 19th and early 20th century were a response to these struggles. Concern for ESC rights grew at the international level through the establishment of

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2 See further Fredman 2004, 80–84.

the International Labour Organisation (ILO) in 1919.<sup>3</sup> The ILO endorsed ESC rights in employment and occupation and developed a number of binding international standards relating to these rights which are subject to national and international adjudication before judicial and quasi-judicial bodies. Since the end of World War I, the cultural, linguistic and educational rights of minorities have been recognised.

Perhaps the strongest endorsement of ESC rights came with the 1948 Universal Declaration of Human Rights (UDHR). The UDHR was unanimously adopted by the UN General Assembly as a basic catalogue of human rights, enshrining civil and political rights and ESC rights, such as the right to housing (Art 25(1)), the right to health (Art 25(1)), the right to food (Art 25(1)) and the right to social security (Arts 22, 25(1)), among others. This optimistic consensus rallied around a belief in the dignity and value of all human lives and the urgency of acting on this belief after the horrors of World War II. However, the translation of the UDHR into binding treaty obligations in the 1950s and 1960s was affected by Cold War politics. Simmering East–West tension was one reason why the UDHR rights were divided between the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. This demarcation of these two sets of rights in separate texts cemented the historical, geographical and cultural division between ESC rights and civil and political rights.

### *Are economic, social and cultural rights human rights at all?*

The division also manifested in the idea that ESC rights and civil and political rights are qualitatively different — and even that ESC rights may not be human rights at all. On this view, ESC rights embody aspirational and resource-dependent goals imposing positive obligations on states. By comparison, ‘real’ human rights are those that can be realised immediately through state abstention from action, or negative obligations, with little demand on resources (Cranston 1973, 65–71). This perceived qualitative difference between the two sets of rights is embedded in the language of the international covenants. The ICCPR requires states parties to ‘respect and ensure’ rights immediately (Art 2(1)), while the ICESCR requires states to ‘progressively realise’ rights over time under more general conditions (Art 2).

However, later human rights instruments have repeatedly stressed the indivisibility and equal importance of rights. The 1986 Limburg Principles affirmed that (at [3]):

As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

3 The ILO was established in 1919 and became the first specialised agency of the United Nations in 1946.

They encouraged states to (at [17]):

... use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

In 1993, the Vienna Declaration famously described rights as 'interdependent, interrelated and indivisible' (at [5]). The Bangalore Declaration in 1995 're-affirmed the fact that economic, social and cultural rights are an essential part of the global mosaic of human rights' (at [12]). In 1997, the Maastricht Guidelines stated (at [4]):

It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

The Maastricht Guidelines also advised that (at [26]):

The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

Activists, judges and scholars have also affirmed this commitment to ESC rights. Former South African Constitutional Court justice Albie Sachs described ESC rights as essential to 'the creation of a coherent and principled normative system that is concerned with the whole human being' (report, 45). Shue (1986) wrote that civil and political rights and ESC rights are two sides of the same coin. The right to vote, for example, is meaningless if a person is too hungry to exercise that right. Fredman (2008) relies on the interdependence of ESC rights and civil and political rights to make the case for justiciable ESC rights.

Yet, despite attempts to reconcile the two sets of rights, they remain distinct. The moniker 'second-generation rights' signals where ESC rights stand in the pantheon of rights. In the Australian context, the inclusion of civil and political rights in human rights legislation — such as in the ACT and in Victoria<sup>4</sup> — though not uncontroversial, reflects the privileged political status of these so-called first-generation rights. ESC rights remain unsettled in politics, practice and philosophy. The debate about ESC rights, nationally and internationally, has generated a spectrum of views from sceptical to supporting, with many shades in between.

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4 See the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

### *A spectrum of views on economic, social and cultural rights*

At one end of the spectrum are the supporters of ESC rights. These include activists employing the language of rights to fight for justice, as well as scholars such as Nussbaum who believe that ESC rights are key to human capability. Fredman emphasises the role of ESC rights in enhancing deliberative democracy and facilitating equal participation (Fredman 2008). Others argue that ESC rights are 'claims of the highest priority' and that protecting them in law is a 'constitutional essential' (Mantouvolou in Gearty and Mantouvolou 2011, 88). For Mantouvolou, political struggles against poverty and organisations promoting social justice are valuable, but protecting ESC rights in law is the best way to express our commitment to these claims. This 'shows that we care for the well-being of all people, including the weakest and most vulnerable' (Gearty and Mantouvolou 2011, 88).

At the other end of the spectrum are those who deny that ESC rights are human rights at all. Cranston notoriously claimed that ESC rights threaten 'real' human rights by pushing 'all talk of human rights out of the clear realm of the morally compelling into the twilight world of utopian aspiration' (Cranston 1967). In the eyes of some critics, ESC rights are conceptually flawed because there can be no entitlement to resources such as food and housing, and infeasible because they require considerable government action for their realisation (Cranston 1973). Others disagree with the language of rights, and ESC rights in particular, because they depoliticise issues and detract from the political protests which combat injustice and cause social transformation (Gearty in Gearty and Mantouvolou 2011).

The drafters of the Bangalore Declaration expressed similar concern when they 'warned against a tendency of the law ... to "legalise" issues which are more properly decided in a context, and according to considerations, larger than typically found in courts of law' (Bangalore Declaration, at [5]).

Between these two ends of the spectrum are many shades of views on ESC rights. For example, there are those who see ESC rights as important concerns but ones which are best left to philanthropy (Gearty in Gearty and Mantouvolou 2011). This view rests on the argument that the distribution of social goods should be based on desert and that we can choose to, but not be compelled to, give away our wealth or property to assist the needy. Other scholars have been concerned to discover a normative basis for ESC rights. Onora O'Neill, for example, sees obligations and claimable rights as reciprocal. For O'Neill, then, the lack of specific obligations accompanying ESC rights is problematic (O'Neill 2005). She argues that these 'abstract rights' to goods and services, such as rights to health and food, are 'often muddled or vague, or both, about the allocation of the obligations without which these rights not merely cannot be met, but remain undefined' (O'Neill 2005, 427). Without obligations, rights are empty.

However, the concern to determine a normative basis is a perennial problem for all human rights, not just ESC rights. Sunstein's idea that rights stem from incompletely theorised agreement on general principles goes some way to explain, but not satisfy, the problem (Sunstein 1995).

Others accept that ESC rights present significant political and moral considerations but disagree that they are suitable for enforcement in law. Jeremy Waldron, for example, argues that distributive decisions are for parliaments, not courts (Waldron 1999, 213). On this view, participation is seen as a right in itself, so having courts decide is an insult to the electorate. Similarly, Conor Gearty (in Gearty and Mantouvolou 2011) argues that it is in politics, not law, that we should be campaigning for ESC rights. Indeed, Gearty warns against letting lawyers get anywhere near human rights (Gearty and Mantouvolou 2011, 33–52). He reserves special caution for involving courts in adjudicating ESC rights because this can undermine the transformative process necessary to achieve ESC rights goals (Gearty and Mantouvolou 2011, 33–52).

Other objections to justiciability are that courts are ill-equipped to answer ESC rights questions because ESC rights themselves are vague, general and without precise content. Courts suffer an information deficit in the sense that parliament is better placed to address the sort of policy issues that ESC rights raise. Courts are also institutionally unsuitable to manage the implementation of ESC rights. Finally, adjudicating ESC rights threatens the democratic balance between executive and judicial roles because of the distributive consequences of these rights and their budgetary implications. Put simply, many believe that making ESC rights justiciable places too much power in the hands of judges — ignoring the fact that judges make decisions every day that are distributive in nature and socially significant.

Opposition to justiciability in the Australian context has most recently been heard in two contexts: at a national level, in the 2009 National Human Rights Consultation Committee report (NHRCC 2009) and, at a state level, in the Victorian Scrutiny of Acts and Regulations Committee (SARC) *Review of the Charter of Human Rights and Responsibilities Act 2006* (SARC 2011). Both reports considered that it was 'not prudent to impose' (SARC 2011, 37) jurisdiction over ESC rights on Australian courts because ESC rights are contested, 'vague and uncertain' (SARC 2011, 44). Indeed, the SARC report said that 'giving the courts a role in commenting upon the appropriateness of resource allocation by government would produce no positive results, and possible negative results' (SARC 2011, 44). Unfortunately, the SARC report did not elaborate on exactly what 'results' it envisaged. The comment is more surprising considering that the SARC committee was reluctant to even consider ESC rights in the first place, due to a perceived lack of empirical evidence about the operation of these rights in a comparable context — dismissing almost entirely the relevance of the South African

experience (SARC 2011, 41).<sup>5</sup> This is unfortunate and inaccurate. The use of comparative law materials in judicial decision making in Australia is not novel. The High Court in *Momcilovic v R*, 2011, recently reaffirmed the value of using comparative material provided it is consulted with ‘discrimination and care’ (at [19]) and due recognition is paid to the distinct legal and constitutional systems in which comparative material is set (at [14]). As such, the SARC report’s dismissal of South Africa as a source of learning on justiciable ESC rights represents a missed opportunity to advance the Australian debate on ESC rights, and is possibly symptomatic of a more general unwillingness to genuinely engage with ESC rights in Australia.

Besides these objections based on democratic legitimacy and competence are others based on the ethics of adjudicating social distribution. Because access to courts is limited to a minority elite, it could be argued that a system of justiciable ESC rights fails to capture those whom it is designed to assist — that is, the poor, marginalised and disadvantaged. Another argument is that there is a disconnect between the individualised adversarial court system and the wider social ramifications that ESC rights issues raise (Gearty in Gearty and Mantouvolou 2011). There is also the fear that judges could reverse progress on social justice by interpreting ESC rights to preserve existing power structures — such as by protecting a right to property at the expense of landless people.

Gearty has a further objection to justiciable ESC rights. He accuses advocates of selling law as a ‘quick fix’ for intractable social problems (Gearty and Mantouvolou 2011, 35). There is a tension, he argues, in the mind of advocates between the certainty of outcome offered by law and the uncertainty of the political process — explaining the ‘lure of the legal’ (Gearty and Mantouvolou 2011, 33). The focus of human rights on the individual, together with the historical involvement of lawyers in human rights, has pushed social rights protection firmly along the road of ever greater judicial involvement (Gearty and Mantouvolou 2011, 34–36). Still, Gearty is careful to acknowledge the difference between *legalising* ESC rights and making them *justiciable*. He argues that legalising rights isn’t a bad idea. This keeps governments accountable for their promises. So, for example, Gearty supports directive principles in Ireland and India which enshrine in law reviewable but non-justiciable ESC rights standards.<sup>6</sup> What judges should not do is ‘flesh out and enforce broadly based social rights which

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5 The SARC report considered that South Africa was a ‘notable exception in what some might consider a jurisdiction comparable to Victoria’ (2011, 42). In particular, it observed that the South African Constitutional Court has ‘departed from international law in significant respects’ (2011, 41), and this decreased the utility of comparisons to it.

6 See the discussion of directive principles in Fredman 2008, 93.

are presented to the courts in a constitutional but deliberately vague form' (Gearty and Mantouvolou 2011, 36). For Gearty, then, justiciability is not the test for 'real' human rights. The effectiveness of other non-judicial methods for implementing ESC rights, such as directive principles, proves that these rights can be more than mere aspiration even while they are not justiciable.

### *Where does the ACT report sit on the spectrum?*

The ACT report is firmly placed at the pro-justiciability end of the spectrum. It recommends protecting justiciable ESC rights in the HRA and extending to ESC rights all mechanisms currently operating in respect of civil and political rights. It rejects non-justiciable alternatives.<sup>7</sup> Judicial enforcement is seen as the most appropriate way to implement ESC rights in the ACT. The report reflects the view that justiciability, if not the true test for 'real' human rights, is the best way of achieving full respect for and realisation of ESC rights.

However, we can see the report in another light. Its preference to protect ESC rights through the HRA's 'dialogue model' of human rights legislation acknowledges that human rights goals are best realised through both law and politics, and that politics is integral to catalysing the long-term social transformation that ESC rights envisage.<sup>8</sup> The idea is that the HRA creates a 'dialogue' between the ACT legislature, executive and judiciary. In contrast to constitutional models of rights protection, which allow courts to invalidate laws, the dialogue model emphasises that courts are 'one participant in a public discussion about rights protection' (report, 24). On this view, law is not an end in itself, but plays an important role in stimulating democratic process.

In this sense, the report skilfully navigates across the spectrum of views on ESC rights. It promotes an approach to protecting ESC rights that engages law and politics. But in promoting this view, does the report offer enough that is new and compelling to move the ESC rights debate forward?

### **Assessing the report**

The report makes a number of innovative and valuable contributions to developing a normative and structural framework for enforcing ESC rights in Australia. The model Bill is its signal achievement. However, there are a number of grey areas the report leaves under-explored. In particular, it skirts the 'minimum core' question and offers

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7 See the report's consideration of non-justiciable ESC rights guarantees (report, 98–100).

8 See further Byrnes, Charlesworth and McKinnon 2009, ch 4.

only a limited account of remedies. To answer whether the report moves the ESC rights debate forward, we need to assess the strengths and weaknesses of the report's arguments for protecting ESC rights in the HRA.

### *Why protect economic, social and cultural rights in the HRA?*

The equal importance of ESC rights and civil and political rights is a theme sustained throughout the report. It also grounds the report's arguments for why ESC rights should be protected in the HRA.

The first argument the report puts is that existing protection of ESC rights in Australian law is inconsistent, inadequate and haphazard. It recommends express inclusion of ESC rights in the HRA to address these protection gaps. The report's survey of existing domestic protection is compelling in its depth and breadth and offers new empirical understanding of the status of ESC rights in the Australian context.

Another argument the report makes is that including ESC rights in the HRA could assist vulnerable groups. This is an incontrovertibly good aspiration. It assumes, however, that our legal system is capable of delivering. In reality, protecting ESC rights in the HRA does not address underlying systemic problems which inhibit vulnerable groups in accessing the legal system in the first place. Until the hurdles of cost, time, availability of skilled and appropriate representation, and discrimination (economic, linguistic and cultural, among other forms) in accessing the legal system are overcome, including justiciable ESC rights in the HRA will only make a dent in improving human rights protection for vulnerable groups. India and South Africa have attempted to address these issues with innovations such as the 'direct access' mechanism and public interest litigation.<sup>9</sup> The report could draw from these innovations and present a strategy for overcoming access issues and thereby enabling vulnerable groups to access and benefit from justiciable ESCRs in the ACT. Without addressing this, the report risks holding up justiciable rights as a panacea to long-term social issues and raising the community's expectations.

The report also argues that including ESC rights in the HRA would bring the ACT into line with Australian norms and values about the importance of human rights. This is based in part on the overwhelming public support shown for rights to health, housing

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9 See Fredman 2008, ch 5; compare Dugard 2006; Desai and Muralidhar 2000. See also *Gupta v President of India*, 1981, where the Indian Supreme Court committed itself 'to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning'.

and education in the 2009 national consultation, echoed in consultations in Victoria, Western Australia and Tasmania, and reflected in community surveys conducted in the ACT. In particular, the report argued that the protection of ESC rights is an important aspect of the Australian value of the 'fair go' (report, 113).

It is easy to understand why the report appeals to the fair go. The fair go is a treasured part of Australian folklore and self-identity. It is shorthand for a uniquely Australian version of egalitarianism which combines (sometimes contradictory) ideas about sameness and equality.<sup>10</sup> Invoking the fair go, then, conveniently lends legitimacy to ESC rights. However, in some ways the fair go and ESC rights seem mismatched. ESC rights are individualistic, anti-collectivist and anti-utilitarian. By contrast, the fair go's emphasis on sameness stares down individualism and instead demands loyalty to the group (valorised in the concept of 'mateship'). On first appearance, the fair go's emphasis on equality — channelling the myth of a classless Australian society and the great Australian dream that anyone, regardless of status, can enjoy a comfortable life — seems to complement ESC rights goals. However, it is doubtful that the fair go would endorse the version of equality found in ESC rights, which includes redistribution of social goods based on factors other than merit. Indeed, in recent years, the Australian culture of the fair go has been exposed for its lack of sympathy for those in need. We have seen the fair go used as a rhetorical weapon in the corrosive discourse of 'queue jumpers' and 'dole bludgers'. The report's appeal, then, to the fair go is mistaken to the extent that the values underlying it do not necessarily support ESC rights.

### *Which economic, social and cultural rights? Gap filling and cherry picking*

The question of which rights to include is critical to the design of a human rights instrument. It is puzzling, then, that the report excludes from the Bill the rights to self-determination, intellectual property, and protection of family and children, while offering little justification for these exclusions.

The right to self-determination is excluded because the issue 'requires further consultation and discussion' (report, 154). This exclusion is surprising in light of the report's emphasis on self-determination as a right of special significance for the ACT's Indigenous people (even though the report doesn't explain what exactly it means by that). The report's call for consultation would be stronger if it explored that issue further.

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10 For a fascinating study, see Thompson 1994.

The report's exclusion of a right to intellectual property is also curious, considering that the right is protected in a range of international human rights instruments. The report argues that there is 'a lack of consensus internationally' on the meaning of the right (report, 154). Two criticisms come to mind here. First, there has been concern and activity surrounding the human right to intellectual property.<sup>11</sup> Significantly, the UDHR and the ICESCR recognise intellectual property rights as human rights.<sup>12</sup> More recently, the United Nations Declaration on the Rights of Indigenous Peoples enshrined intellectual property rights.<sup>13</sup> As such, the right has generated considerable material from which its meaning can be derived. Second, human rights are by definition general standards. Their formulation leaves a margin for context-specific interpretation and for the continuous development of their meaning and content to reflect social change. Most rights have grey areas. Many aspects of rights are unsettled. Moreover, few human rights claim consensus on their meaning, let alone their normative basis. In light of this, the report's rejection of the human right to intellectual property due to lack of precise meaning is unconvincing.

Instead of rejecting the right to intellectual property, the report might have explored the interests the right protects and considered the possibility of protecting these in ways other than explicit inclusion in the HRA. For example, intellectual property owners could engage rights to free expression, association and privacy to defend their moral rights. After all, the report is concerned to fill gaps in protection. On the other hand, explicit protection of a human right to intellectual property might conflict with respect for other human rights. For example, it could limit access to generic drugs by disabled pensioners and low income earners in the ACT. Excluding the right from the HRA would remove this risk. It is unfortunate that the report didn't engage in this analysis.

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11 For example, in 1998 the World Intellectual Property Organisation and the Office of the High Commissioner on Human Rights held a panel discussion on intellectual property and human rights (WIPO 1998).

12 Article 27 of the UDHR protects 'the moral and material interests resulting from any scientific, literary or artistic production of which [a person] is the author'. Article 15.1(c) of the ICESCR recognises the right of an author to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production' produced by the author.

13 For example, see s 11.

The report excludes the right to protection of family and children because a similar right derived from the ICCPR is already recognised in s 11 of the HRA.<sup>14</sup> While the report does not explain this exclusion further, it appears motivated by a concern that the HRA should not be cumbersome and should avoid overlap. However, it is difficult to justify exclusion on this basis alone. The report doesn't consider whether s 11 offers the same or a comparable level of protection that could be provided by including an express right to protection of family and children. Surely achieving the strongest protection of a right is desirable, even if this results in some overlap (which can, no doubt, be overcome — law is full of overlap). The report also fails to consider whether explicit protection could better or differently protect the interests underlying the right.

Excluding from the HRA rights to self-determination, intellectual property, and protection of family and children dilutes the report's emphasis on the indivisibility of rights and that all rights, taken together, provide 'holistic support for a dignified life' (report, 128). The lack of justification for excluding these rights is a weakness of the report. The report could have avoided this criticism by leaving open the possibility of extending the range of rights protected in the HRA in future.

### *Designing economic, social and cultural rights in the HRA*

One of the first things we notice about the Bill is that it distinguishes between two types of obligations attaching to ESC rights: immediate and progressive obligations. While the notion that different obligations can attach to rights is not new, it is novel in the context of the HRA, which currently only recognises immediate obligations in respect of civil and political rights. The Bill's choice of drafting, then, is significant. Distinguishing between immediate and progressive obligations is integral to a realistic approach for protecting ESC rights. In particular, the distinction accommodates the polycentric nature of ESC rights. As Shue illustrates, there are no one-to-one pairings of rights to duties: fulfilment of one right involves the performance of multiple duties (Shue 1986). The progressive obligation takes account of the fact that this can take time. On the other hand, there are some aspects of ESC rights that can be implemented immediately.

14 Section 11 of the HRA provides:

**Protection of the family and children**

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The report is careful to ensure that the distinction between immediate and progressive obligations does not map onto a perceived qualitative distinction between ESC rights and civil and political rights. Justiciable ESC rights are often objected to on the basis that their programmatic nature means that they cannot be immediately realised. Closely following this is the view that implementing ESC rights is expensive and time-consuming. Civil and political rights, by contrast, are said to be cost-free and capable of immediate implementation.

The report debunks this qualitative distinction as myth. Fulfilling civil and political rights often requires budgetary reallocation and can also take time to implement. The right to a fair trial involves funding and maintaining an entire system of law and justice. As such, while the distinction between immediate and progressive obligations is essential to the design of justiciable ESC rights in the HRA, the report makes it clear that all rights — ESC as well as civil and political — attract a range of different duties. It is a strong point that educates the debate about ESC rights. Nonetheless, the distinction between obligations attaching to rights does not resolve the question of how exactly to measure this progressive obligation. The report's model Bill addresses this through 'reasonableness review'.

### *Reasonableness review: a cautious and comfortable approach*

The report adopts reasonableness review as a method for testing the progressive obligation. The concept of 'reasonableness' was pioneered by the South African Constitutional Court exercising its ESC rights jurisdiction under the South African Bill of Rights. The concept reflects states' duty under the ICESCR to take 'reasonable measures' to achieve the full realisation of ESC rights. The court has developed reasonableness from earlier cases such as *Soobramoney v Minister of Health (Kwazulu-Natal)*, 1997, where it applied an arguably lower standard of rationality, to *Republic of South Africa v Grootboom*, 2000, where it applied a fuller concept of reasonableness. In *Grootboom* — perhaps the seminal ESC rights case — the court moved beyond accountability to focus on equality and participation as integral aspects of the court's transformative agenda, and in particular its ESC rights jurisdiction (see Fredman 2008; Albertyn 2007). Moreover, in *Grootboom*, the court emphasised the distributive nature of positive duties, which meant that each person's entitlement (in this case, to shelter) had to be weighed against others. Through reasonableness, the court fashioned a role for justiciable ESC rights that is democracy-reinforcing, rather than democracy-reducing. Reasonableness review opens a space for deliberation at the same time as respecting the autonomy of policy makers. This balance was articulated perfectly in *Grootboom* when the court held that a housing program must be capable of facilitating the realisation of human rights, but that (at [42]):

... the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive ... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.

Reasonableness also appears to offer the South African court a cautious and comfortable middle road between deference and activism in respect of justiciable ESC rights. Indeed, in both *Soobramoney* and *Grootboom*, the court bypassed emergency provisions of the Constitution which carry immediate duties, instead preferring to hear the cases under the programmatic rights provisions which engage reasonableness review. The attraction of reasonableness as an approach to adjudicating ESC rights may be the balanced decision-making it demands of adjudicators. The very process of 'reasoning' that lies at the heart of reasonableness review may ease some of the uncertainty surrounding ESC rights.

It is not surprising, then, that the report recommends reasonableness review in its model Bill for the HRA. There are other reasons as well for supporting reasonableness in the Australian context. Reasonableness review is already familiar in federal and state anti-discrimination law. This point was made by Hanks, Hill, Mortimer and Walker in their review of the constitutionality of ESC rights under a national human rights Act (2009, 16), when they recalled Justices Gummow and Crennan's description of reasonableness in *Thomas v Mowbray*, 2007, as the 'great workhorse of the common law' (at [100]). The report's adoption of reasonableness review as an appropriate standard for judicial review of ESC rights in Australian courts, then, is a strength.

Section 28A(1) of the Bill sets out 'reasonable measures' that guide reasonableness review. 'Reasonable measures' require the ACT to (a) take reasonable steps, (b) within its available resources, (c) to progressively achieve the full realisation of the relevant ESC rights. This formulation of reasonable measures takes account of the reality of resource constraints and allows for the progressive realisation of rights over time. It recognises that ESC rights can only be given effect to the extent that the territory has the legislative power or jurisdictional responsibility to ensure this protection. This also assuages concerns about the constitutionality of justiciable ESC rights in the HRA (report, 131–33).<sup>15</sup>

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15 Compare Gageler and Burmester 2009a; 2009b.

However, the reasonableness review standard can still be criticised as vague, open ended and overly deferent.<sup>16</sup> One way the report responds to this concern is by including in the Bill criteria to be taken into account when assessing reasonableness. Section 28A(2) sets out the criteria: the availability of the ACT'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; whether provision is made for public consultation and information about the measure; and the latitude inherent in implementing a duty of progressive realisation, which recognises that a wide range of measures could be taken to meet the obligation. In other words, the court's role in reasonableness review is carefully circumscribed. These criteria curtail discretion and assuage fears about giving too much power to judges.

### ***Reasonableness and declarations of incompatibility by omission***

The reasonableness review criteria in s 28A(2) also guide courts in deciding whether to issue a 'declaration of incompatibility by omission'. The declaration, which is an innovation of the report, exclusively attaches to ESC rights in the HRA. It can be issued where the ACT has omitted to take reasonable measures to progressively achieve the full realisation of an ESC right. It does not apply to public authorities. The declaration is an important remedy because it explicitly holds the government accountable: s 33B(3) requires that the Minister responsible for administering the law or measures to which the declaration relates 'must prepare a written response to the declaration of incompatibility by omission and present the response ... not later than 6 months after the day the Minister receives the copy of the declaration' (report, 138).

One concern remains. The reasonableness review criteria are not closed. The worry is that judges — unelected and unaccountable — could use the expansiveness and generality of progressive obligations to reflect their own world view in an assessment of reasonableness. There are two ways of responding to this concern. The first is raised by Hanks, Hill, Mortimer and Walker (2009). They argue that methodology for judicial review is rarely static and that judges have long been involved in renewing and refining criteria for judicial review in many areas of law (Hanks, Hill, Mortimer and Walker 2009, 15–16). The Bill's reasonableness review criteria are then not problematic. A second response is that the doctrine of principled reasoning imposes limits on the discretion of judges. Dworkin argues that we hold judges accountable for their

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16 See the extensive analysis of 'reasonableness', particularly as developed in the South African Constitutional Court, in Fredman 2008, 113–23.

decisions through an expectation that they will provide principled reasons (Dworkin 2003, 4). We expect this precisely because judges are unelected and independent. The requirement to provide reasons curbs unprincipled decision making and alleviates concerns about flexibility in reasonableness review.

Yet, even if reasonableness review can adequately guide judges adjudicating ESC rights, is it enough to enable judges to reach decisions? Or, does the concept of a 'minimum core' play a role here?

### *The limits of reasonableness and the minimum core issue*

As mentioned, the report's concept of reasonableness review hails from an approach developed by the South African Constitutional Court. That court has preferred using reasonableness to contextually assess government action and has rejected, at least for now, the relevance of the minimum core to its jurisdiction. The 'minimum core' describes the minimum essential levels of a human right.<sup>17</sup> This can be further understood as the minimum basic resources necessary for individuals to live free from threats to their survival; to move beyond starvation, thirst and homelessness; and to achieve a minimum level of well-being. The minimum core may not encompass the resources necessary to live a dignified life or for human flourishing.

Using the minimum core as a benchmark to assess government compliance with ESC rights obligations would seem to require courts to issue a categorical statement of the contents of each right. However, in *Grootboom*, Justice Yacoob concluded that it was not 'necessary to decide whether it is appropriate for a court in the first instance to determine the minimum core of a right' (at [33]). That court sees its role in adjudicating ESC rights as being restricted to triggering what government should be doing, but not working out the details of how to do it. The South African cases of *Minister of Health v Treatment Action Campaign (No 2)*, 2002, and *Mazibuko v City of Johannesburg*, 2009, show this approach in practice. In both cases, the court signed off on plans to remedy ESC rights violations where the plans were designed not by the court but by the parties themselves.

The South African approach, relying on reasonableness review, nonetheless raises doubt. Bilchitz (2006) argues that courts cannot specify 'reasonable measures' without making reference to some substantive content for ESC rights. He points out that giving content to rights is exactly what courts do when they make remedial orders in ESC

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17 For more extensive analysis of the minimum core — and a caution against it — see Young 2008. For a pragmatic exploration of the minimum core in the context of health care, see Bilchitz 2006.

rights cases. Courts should admit to this and accept that minimum core obligations are necessary to justify the outcome of decisions, rather than disguise what they are doing behind concepts such as reasonableness and dignity. On the other hand, it can be argued that the minimum core approach inherently involves judicial activism and violates the constraints of judicial minimalism.<sup>18</sup> On this view, the minimum core issue is about democratic legitimacy.

The minimum core debate also revolves around questions of competency. Can courts dictate the exact nutritional specifications required to fulfil the right to food, for example?<sup>19</sup> Fredman (2008) argues that where courts lack institutional competence for polycentric decision-making, such as in ESC rights cases, they can be assisted or adapted for this purpose through experts and interveners. Gearty's (in Gearty and Mantouvolou 2011) response to lack of competence is more blunt. He argues that this is precisely why courts should not be involved in adjudicating ESC rights in the first place. Moreover, adapting courts for the task dilutes their authority to decide (Gearty and Mantouvolou 2011, 59).

The Indian Supreme Court in *Paschim v State of West Bengal*, 1996, challenged the assumption that courts aren't competent to make such decisions. In *Paschim*, the claimant, a labourer, fell off a train and suffered severe head injuries and brain haemorrhage. The claimant was ferried between six different health centres and hospitals, each refusing to admit him for various reasons, before being admitted and treated at the seventh, more than 15 hours after his accident. The court held that this experience violated the claimant's fundamental right to life under Art 21 of the Indian Constitution. The court made specific orders about how emergency services should be provided.<sup>20</sup> The problem with the Indian court's approach, though, is that imposing top-down, technocratic decisions may not lead to effective or satisfactory remedies that are owned by rights holders and respected by duty bearers. Still, we can argue that the Indian court, and indeed other courts, should be making these types of decisions simply because no-one else is.

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18 Sunstein (1996) defines judicial minimalism as saying no more than is necessary to justify an outcome, leaving as much as possible undecided.

19 The Indian Supreme Court was asked to determine minimum daily nutrition requirements in *People's Union for Civil Liberties v Union of India*, 2001.

20 The order included that adequate facilities are available at primary health centres where patients can be given immediate primary treatment to stabilise their condition; that ambulances are adequately provided with necessary equipment and medical personnel; and that, in order to ensure the availability of a bed in an emergency at state-level hospitals, there is a centralised communication system so that a patient can be sent immediately to the hospital where a bed is available.

One further concern links reasonableness and the minimum core. The concern is that reasonableness has the effect of placing an unfair burden on claimants to show that the state's own lack of action is unreasonable. Liebenberg has contended instead for a presumption of unreasonableness which the state must rebut (Liebenberg 2005, 9). This approach may be preferred because it is then not necessary to define precise standards which must be met to fulfil a minimum core. Instead, the minimum core is defined according to parameters of effectiveness, participation, accountability and equality. The accountability parameter is reinforced by the state having to rebut the presumption of unreasonableness. The report could have enlightened debate by considering these alternative approaches to reasonableness and the minimum core.

Since the report does not present a clear stance on the minimum core, it leaves open the possibility that ACT judges could be involved in developing minimum core content for ESC rights even while referring to reasonableness to justify their approach. The report's case studies point to this possibility. In one case study, the right to education is said to entail an obligation to provide access for all children to free and full-time education (report, 169–70). It is difficult to see how reasonableness alone, without reference to a minimum core, could lead to such a precise formulation of the right. One conclusion we can draw is that there may be limits to how reasonableness can assist courts in adjudicating ESC rights. Without accepting or rejecting the minimum core approach (or proposing an alternative), the report fails to engage with a significant question in the ESC rights debate. This is a missed opportunity for the report to enrich the Australian debate.

### *An explicit instruction to judges?*

Another example of the Bill's novel drafting is s 33A(2)'s explicit instruction to judges that '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'. This provision makes it clear that the task of reviewing government action for reasonableness is subject to the principle that the primary responsibility for decisions relating to the expenditure of the ACT's public money lies with the executive and legislative branches. It also acknowledges that courts are not institutionally equipped to decide how public money should be spent, or how economic and social priorities should be set, and that, in any case, such a role would be democratically illegitimate. The provision appears to be designed both to remind judges of their role in ESC rights adjudication and to appease detractors by limiting the power of judges. But telling courts how to think and behave is uncomfortable. One wonders if it was necessary for the Bill to go this far. This tight drafting may also have the effect of delimiting and diluting the role of judges to such an extent that one

could ask what the point of involving judges was in the first place. The provision is a curious and, arguably, less than considered aspect of the Bill.

### *Remedies: is there more to it than declarations?*

The availability of effective remedies for rights violations is critical to any proposal for protecting human rights in law. It is also one area where the report lacks depth. By focusing on declaratory remedies, the report fails to explore other remedies available in the HRA.

The declaration of incompatibility is a key remedy in the HRA. The report's recommendation to extend the declaration to ESC rights reinforces its theme of the equal importance of all rights. The declaration currently applies where legislation cannot be interpreted compatibly with civil and political rights. It does not invalidate legislation, but instead triggers a process which ends in review by the legislature. The declaration does not impose a remedy on the other branches of government, which would otherwise see courts overstep their constitutional mandate. Instead, it works as a catalyst for democratic initiative.

In this sense, the declaration appears to be central to the 'dialogue' model. It enhances the deliberative and democratic role courts play in adjudicating ESC rights. Fredman argues that the involvement of courts in adjudicating ESC rights is legitimate to the extent that they fulfil an auxiliary role in securing the values of accountability, participation and equality that underlie the democratic ideal (Fredman 2008, 103–13). The declaration promotes accountability and participation by prompting a response from government and requiring it to justify its decisions to the people affected. It is an example of dynamic interplay between law and politics to bring about rights realisation. Dyzenhaus also argues that this accountability role is inherently democratic and justifies the use of public power (Dyzenhaus 1997, 305). In this, it resolves, rather than inflames, tension between the role of courts, the legislature and the executive in adjudicating rights.

However, the High Court in *Momcilovic* recently criticised the 'dialogue' metaphor to describe the relationship between courts, the executive and the legislature created by the declaratory mechanism. The court deemed the term dialogue 'inappropriate' (at [172]), 'inapposite' (at [534]) and 'apt to mislead' (at [146]) because, among other reasons, the term encourages 'false assumptions of homogeneity between disparate constitutional systems' (at [146]) and therefore distracts from recognition of the existing, well-established constitutional relationship between the three arms of government. The court's criticism raises a question about whether 'dialogue' has become a term of art or a buzz word in human rights circles — easy currency, but

with questionable real value. The report could have further investigated the nature of dialogue promoted by the HRA and led the way for a more meaningful understanding of the dialogue model for human rights protection in Australia.

Another concern is that the report does not address the limitations of declarations as remedies for ESC rights violations. *Grootboom* shows the ineffectiveness of declarations in polycentric rights litigation. That case concerned a group of people who had been living in a squatter settlement near Cape Town. They decided to move onto private land after being on a waiting list for public housing for seven years. The court declared that although the state had developed a housing program that allowed people to move from shacks into formal housing, it was unreasonable for it not to also develop another program that provided shelter for people in desperate need who had no roof over their heads at all. Despite this strong recognition of the claimants' rights, the court's declaration offered no guidance as to how the government could fulfil its obligation to the claimants. It did not bind the government to a time limit but instead relied on its goodwill to respond, and the court played no role in supervising enforcement of the declaration. Almost inevitably, the government was slow to respond and many of the original claimants never had their housing needs met.<sup>21</sup>

Another concern is that the report does not consider the constitutional validity of declarations in depth. This issue is even more pertinent following *Momcilovic*. A bare majority of the court held that declarations issued under the Victorian Charter do not compromise the institutional integrity of courts, but raised doubt as to whether this involved the exercise of a judicial power. *Momcilovic* leaves the status of declarations under Australian human rights legislation, and the ability to seek judicial review of declarations, open to challenge.

The report also seems to overlook the fact that the ACT Supreme Court can issue any remedy, other than damages, for breaches of rights in the HRA (report, 159). The report's emphasis on declarations detracts from considering how these other remedies might work. The South African Constitutional Court's ESC rights jurisprudence is

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21 For more incisive commentary on *Grootboom*, see Sachs 2003; 2009.

particularly relevant here, having developed a number of interesting remedies since *Grootboom*. In *Treatment Action Campaign*, the court recognised the rights of pregnant women and their newborn children to have access to health services — namely, the antiretroviral drug nevirapine — to combat mother-to-child HIV transmission.<sup>22</sup> The court rejected issuing a declaration alone, saying that a clear breach of human rights required an ‘effective’ remedy. Instead, it designed a synthesis of declaratory and mandatory remedies. The court order required the government to lift restrictions on nevirapine and gave the court a supervisory role in implementation. The order also built in flexibility to allow for ongoing deliberation between the parties.

These examples illustrate both the limitations of declaratory remedies and the potential for alternative remedies in ESC rights cases. The report’s arguments for including ESC rights in the HRA would be strengthened by closer examination of how remedies other than the declaration could operate. The provision of effective remedies will be key to convincing the ACT community to protect ESC rights in the HRA.

## Conclusion

In July 2011, the ACT government announced a community consultation on the inclusion of ESC rights in the HRA, following up on its 2009 review commitment. It is hoped that the consultation will be an opportunity to raise community awareness of ESC rights as well as to garner views. However, a consultation period of just three weeks seems to limit significant community engagement.

The question remains whether the report’s support for protecting ESC rights in the HRA proves that the lawyers’ bandwagon is gathering pace or convinces us that ESC rights are best realised through law. This article has argued that the report makes some valuable contributions to the debate about ESC rights. The model Bill is the report’s signal achievement. The Bill offers innovative and practical insight into how ESC rights could be operationalised in the ACT. In a debate about rights often polarised by politics, the Bill makes rights real.

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22 *Treatment Action Campaign* was decided under ss 27(1) and 27(2) of the South African Bill of Rights, which provides that ‘everyone has the right to have access to — health care services’ and ‘[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’. The court found that ss 27(1) and 27(2) required the government ‘to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV’ (at [135]).

In other ways, however, the report misses opportunities to convince us of the need to make ESC rights justiciable. Overall, the report raises more questions than it answers. The result of this year's consultation may give the ACT more certainty, but the future direction of ESC rights in Australia at large remains unclear, lacking both vision and commitment. ●

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