SECOND-CLASS RIGHTS YET AGAIN? ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE REPORT OF THE NATIONAL HUMAN RIGHTS CONSULTATION

ANDREW BYRNES*

> The Committee learnt that economic, social and cultural rights are important to the Australian community, and the way they are protected and promoted has a big impact on the lives of many. 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. … The Committee acknowledges that it would be very difficult, if not impossible, to make such rights matters for determination in the courts.[1]

I INTRODUCTION

On 21 April 2010 the Commonwealth Attorney-General, the Hon Robert McClelland, announced the launch of Australia's Human Rights Framework.[2] The Framework[3] was the government's formal policy response to the Report of the National Human Rights Consultation Committee ('NHRCC'),[4] which had been delivered to the government in September 2009. In this important initiative, the government accepted many of the recommendations made by the NHRCC to improve the implementation and enjoyment of human rights in Australia. However, it did not take up a central recommendation of the NHRCC, namely that the Commonwealth Parliament should enact a statutory Bill of Rights

* Australian Human Rights Centre and Professor of International Law in the Faculty of Law, UNSW. I am grateful to Luke Beck for his assistance with the research on which this article is based, and to Renuka Thilagaratnam, Peter Bailey, Katharine Young, and the anonymous referees for their comments on a draft. This article forms part of an Australian Research Council-funded Linkage Project (LP0989167), *Protecting Economic, Social and Cultural Rights in the ACT: Models, Methods and Impact*, involving the Centre for International Governance and Justice, Regulatory Institutions Network ('RegNet'), ANU, the Australian Human Rights Centre, and the ACT Department of Justice and Community Safety. Part of the research for this paper was carried out while I was a visiting scholar at the Harvard Project on Disability in January 2010, and I am grateful to Professors William Alford and Michael Stein for that opportunity.

1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 344, 365.

2 Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

3 Australian Government, *Australia's Human Rights Framework* (2010) ('Framework').

4 National Human Rights Consultation Committee, above n 1.

embodying civil and political rights, although it did not reject that possibility out of hand for the future. Nevertheless, the government's response included an undertaking to review the 'impact and effectiveness' of the Framework in 2014,[5] at which stage the issue of a statutory Charter of Rights is likely once again to be on the agenda.

The NHRC Report itself represented a milestone in the Australian discussion of human rights protection. Although the NHRCC's recommendations fell short of the reforms argued for by some human rights advocates,[6] they were nonetheless a significant endorsement of proposals for major institutional and legislative changes in the protection of human rights at the Commonwealth level. The NHRCC's proposals added little that is new to the substantive proposals put forward in the consultations and inquiries that had taken place at state and territory level in the last decade.[7] However, the fact of their endorsement by this body, and the extent of the consultation on which the NHRCC based its findings, added particular weight to its conclusions and recommendations. If public consultations are intended to provide a basis on which community support for particular initiatives can be gauged, then – notwithstanding the concerns that were expressed about 'campaign' submissions on both sides of the Bill of Rights debate[8] – the arguably unprecedented scale of this consultation should have made it evident to politicians that there was a significant level of public support for a Human Rights Act ('HRA') at the Commonwealth level.

While a centrepiece of the NHRCC's recommendations was the proposal for the adoption of a legislative Bill of Rights based on the so-called 'dialogue' model seen in the existing models in the United Kingdom ('UK'), the Australian Capital Territory ('ACT') and Victoria,[9] the Report offered the government a smorgasbord of options. The NHRCC viewed most of its proposals as ideally accompanying a HRA, but many could be implemented whether or not a statutory Charter of Rights was adopted. Some of the measures proposed would not have involved formal changes to the processes of public policy-making, the legislative process or the powers of the courts – for example, improved and expanded human rights education, an audit of existing Commonwealth legislation for consistency with human rights standards, and the better evaluation of the human rights impact of laws and policies within government. Other proposals would have involved important institutional or legislative changes – for example, the strengthening of parliamentary rights-based scrutiny of Bills and subordinate legislation, the enactment of provisions requiring legislation to be interpreted consistently with human rights and explicitly making human rights a relevant

5 McClelland, above n 2.

6 The NHRCC was also constrained by its terms of reference, which excluded the possibility of constitutional protection of rights from the range of recommendations potentially open to the NHRCC.

7 In relation to those consultations, see generally Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) ch 6. In relation to economic, social and cultural rights, see below Part VI.

8 See, eg, Jim Wallace, 'Rights Overkill Isn't Majority View', *The Australian* (Sydney), 13 October 2009.

9 *Human Rights Act 1998* (UK) c 42; *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) respectively.

consideration for the purposes of the exercise of administrative discretions. While these could be integral elements of a statutory Charter (as they are in the UK, ACT and Victorian legislation), they could also be introduced as independent reforms.

The government took full advantage of the smorgasbord offered by the NHRCC and adopted a selection of the NHRCC's significant recommendations; those taken up may lead to important improvements in the normative, procedural and substantive protection of human rights in Australia. The recommendations that the government did *not* adopt had a common thread – they all involved a greater role for the judiciary in the supervision and enforcement of human rights obligations, whether by means of an interpretation provision requiring statutes to be interpreted consistently with human rights, the inclusion of human rights as a relevant consideration in administrative decision-making, or the direct enforceability of human rights set out in a statutory Bill of Rights.

By adopting only reforms that do not directly affect the role of the courts, the Commonwealth government was able to avoid one of the more contentious issues in the debate over a Bill of Rights and the judicial enforcement of rights: the status and best method of protection of economic, social and cultural rights ('ESC rights'), as compared with civil and political rights ('C&P rights'). The NHRCC devoted a good deal of attention to this issue and put forward recommendations that distinguished between the two categories of rights in important ways, in particular in relation to their judicial enforceability. The government's response, by sidestepping the issue of judicial enforceability of either category of rights, essentially did not directly engage with this important debate.

Although aspects of the Framework implicitly reject some of the recommendations of the NHRCC in relation to the different treatment of ESC rights, the debate over these issues remains unresolved. The analysis of ESC rights undertaken by the NHRCC is important not just to our understanding of the nature of those rights generally, but may also be relevant to the operation of the Framework and to its proposed review in 2014, as well as to the more immediate discussions at territory and state level about the inclusion of ESC rights in existing state and territory Bills of Rights.

This article examines the analysis and recommendations of the NHRCC in relation to ESC rights in light of the ongoing debate over the status of ESC rights and their inclusion in statutory Charters of Rights, as well as in the context of the proposed reforms set out in the Framework.

The NHRCC accepted that both C&P rights and ESC rights were of equal status under international law and that the enjoyment of rights in one category is frequently closely linked to, or dependent on, the enjoyment of rights in the other category. Equally, the NHRCC accepted the importance of many of the interests reflected in guarantees of ESC rights, and the priority of those interests in the lives of many members of the community. Consequently, many of its recommendations applied to both categories of rights.

On the other hand, the NHRCC largely accepted arguments that ESC rights are different in important respects from C&P rights, and that these differences

mean that some of the measures proposed for the protection of C&P rights are not appropriate for the protection and implementation of ESC rights. In particular, the NHRCC was unconvinced of the 'justiciability' of ESC rights, the competence of the courts to play a significant role in the supervision of their implementation, or the appropriateness of any such role. Consequently, the NHRCC did not support the inclusion of ESC rights in a statutory Charter[10] and recommended that if they were to be included, they not be made 'justiciable'.

This article argues that, while the NHRCC's recommendations had the potential to improve the observance and enjoyment of ESC rights, its proposals to limit the full inclusion of ESC rights in its preferred scheme of rights protection were underpinned by an undue emphasis on differences between ESC rights and C&P rights. These recommendations were also based on a traditional understanding of the nature of ESC rights that has been fundamentally challenged as a result of academic and judicial developments over the last three decades. In adopting this approach, the NHRCC once again constituted ESC rights as the poor cousin in the world of human rights protection, even as it made proposals that would strengthen their protection in some respects.

The article first briefly describes the ESC rights that are the subject of the discussion, and reviews the classical debates over the nature of ESC rights. It then moves to an overview of the developments of the last few decades which have refined our understanding of the nature and content of ESC rights and C&P rights, and shown that the differences between the two types of rights are overstated and that the legal implementation and judicial supervision and enforcement of important dimensions of ESC rights do not pose insuperable conceptual or practical barriers. The article then reviews the treatment of ESC rights in the consultations on Bills of Rights that have taken place in Australia in the last decade and recent consideration of this issue in the UK. This is followed by a detailed examination of the NHRCC's treatment of ESC rights and a critique of its recommendations in relation to those rights. Finally, the article notes the potential for the protection of ESC rights through the utilisation of C&P rights in a Bill of Rights. It concludes that, while the Framework has sidelined the issue of the nature of ESC rights to some extent, it will still be important in the ACT and Victorian discussions about the inclusion of ESC rights in existing human rights legislation, in the implementation of aspects of the Framework, and in the 2014 review of the Framework.

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10 The exception is the right to property, the inclusion of which the NHRCC did recommend. The right to property is generally considered to be both a civil right as well as an economic right. The right appears in the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (10 December 1948), but it does not appear in either the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), nor the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). However, it does appear in art 1 of Protocol 1 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

II 'ECONOMIC, SOCIAL AND CULTURAL RIGHTS' – WHAT WE MEAN

The ESC rights referred to in this article and in the NHRC Report are those recognised in the major international instruments – above all the *Universal Declaration of Human Rights*[11] and the *International Covenant on Economic, Social and Cultural Rights*.[12] These include: the right to work and to just and favourable conditions of work;[13] the right to form trade unions and related industrial rights,[14] the right to social security;[15] the right to an adequate standard of living for oneself and one's family;[16] the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;[17] the right to education; the right of parents and legal guardians to choose for their children schools other than public schools and to ensure the religious and moral education of their children in conformity with their own convictions; the right of individuals and bodies to establish and direct educational institutions that satisfy minimum prescribed standards;[18] 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;[19] and 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.[20] In addition there is the right to the enjoyment of all ESC rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social

11 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (10 December 1948) ('*UDHR*').

12 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('*ICESCR*'). Commentators have noted that there are important differences between economic and social rights on the one hand, and cultural rights on the other, that lead to the need for separate analysis, and also that the rights contained in art 15 of the *ICESCR* are only part of the broader category of cultural rights under international law. See, eg, Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 118–20; Yvonne M Donders, *Towards a Right to Cultural Identity?* (Intersentia/Hart, 2002) 139–63; Dominic McGoldrick, 'Culture, Cultures, and Cultural Rights' in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 447; Stephen P Marks, 'Defining Cultural Rights' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff, 2003) 293. Much of the NHRCC's discussion (and the discussion in this article) is concerned with economic and social rights. However, many of the same points about the content and judicial enforceability of State Party obligations and the rights guaranteed apply equally to the rights set out in *ICESCR* art 15 (on its own and in conjunction with arts 2 and 3), so no attempt is made to distinguish between the categories of rights in this article, or to engage with the broader category of 'cultural rights'.

13 *ICESCR* arts 6, 7.

14 Ibid art 8.

15 Ibid art 9.

16 Ibid art 11.

17 Ibid art 12.

18 Ibid art 13.

19 Ibid art 15.

20 *UDHR* art 17.

origin, property, birth or other status',[21] 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*.[22] In addition to the provisions which set forth rights as such, article 10 of the *ICESCR* also obliges States Parties to ensure that 'the widest possible protection and assistance should be accorded to the family', that marriage is 'entered into with the free consent of the intending spouses', and that special protection is afforded to women before and after childbirth, and to children, including measures to prevent exploitation in employment.[23]

ESC rights are drawn from many sources – national and international – and their formulations vary. While the *ICESCR* (and the *UDHR*) are the major reference points in the debate over ESC rights, they are not the exclusive source of those rights, nor the only possible articulation of them.[24] Nevertheless, 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'),[25] as well as specific obligations in individual articles,[26] is fundamental to the debate over the implementation of ESC rights. Furthermore, rights guaranteed by the *ICESCR* may be subject to limitations, whether under the general limitations clause (article 4)[27] or the specific limitations provided for in individual articles.[28]

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21 *ICESCR* art 2(2). *UDHR* art 2 guarantees the enjoyment of all rights set out in the *UDHR* 'without distinction of any kind', including distinctions on the grounds listed in the *ICESCR*.

22 *ICESCR* art 3.

23 Ibid art 10.

24 Other treaties such as the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), and the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008) also include ESC rights, as do specialised conventions adopted by the International Labour Organization and the United Nations Educational Scientific and Cultural Organization ('UNESCO').

25 *ICESCR* art 2(1) provides:

> 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.

26 See, eg, ibid arts 11(2), 12(2).

27 Ibid 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.

28 See, eg, ibid arts 8(2), (3).

III THE CLASSIC DEBATES OVER ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND RECENT DEVELOPMENTS IN ANALYSIS AND PRACTICE

The nature and status of ESC rights as compared with C&P rights has been contentious for decades. The dominant traditional view has been that the two categories of rights are fundamentally different, and that consequently the methods for their implementation and enforcement cannot be the same, but rather need to reflect those differences. There are those who resist the characterisation of ESC rights as human rights at all, arguing that they embody aspirational and resource dependent goals that require positive State action for their realisation, while authentic human rights are those which can be realised immediately, by State abstention from action, with little or no demand for additional resources.[29] Even for many of those who accept ESC rights as legitimate human rights, the claimed difference between the negative obligations that are said to be the essence of C&P rights (the State must respect those rights, essentially by refraining from taking actions that infringe them) and the positive obligations at the heart of ESC rights (the State must allocate resources to the achievement of these goals) makes them hesitant about treating the two categories of rights identically. These perceived differences are reflected in the requirement of the *International Covenant on Civil and Political Rights* that States Parties 'respect and … ensure'[30] C&P rights – 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.[31]

A further difference between the two categories of rights is said to be the relative vagueness and generality of ESC rights when compared with C&P rights, a characteristic that is said to make them non-justiciable. Objections to the judicial enforcement of ESC rights also draw on the perception that judicial resolution of alleged violations of ESC rights will almost always require a court to decide between competing priorities for limited resources – a task which requires expertise that courts do not have, for which the curial process is poorly

29 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.

30 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 2(1).

31 *ICESCR* art 2(1). For an overview and analysis of some of these arguments see, eg, 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 Tomaševski (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) 3, 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.

designed, and which is pre-eminently a question for the democratically elected legislature to determine. Conferring the power on courts to do this would, it is argued, violate the separation of powers and have a number of undesirable consequences.

The last few decades have seen a considerable amount of scholarly analysis, international practice, and domestic litigation which have challenged the traditional stark dichotomy between the two categories of rights, and brought a more sophisticated understanding of both sets of rights.[32] The notion that C&P rights involve purely negative obligations, and ESC rights only positive obligations, has been rebutted by the emergence of extensive positive obligations of States to ensure the enjoyment of C&P rights by persons within their jurisdiction.[33] Equally, evolving analyses of ESC rights have resulted in the development of a typology of obligations (to respect, to protect, and to fulfil/promote) drawing on the work of Henry Shue and Asbjørn Eide, which highlights the negative obligation dimensions of ESC rights as well as the positive.[34] This typology has also been useful in elucidating the various dimensions of C&P rights. While it is probably the case that in general ESC rights require the allocation of more resources for their full realisation than C&P rights, it has also been pointed out that many C&P rights are not cost-free: the establishment and maintenance of a court system that provides the fundamental procedural guarantees provided for in the *ICCPR* is a commonly cited example. It is rather that these resources are allocated as a matter of course and in a sense become invisible when analysing the costs of rights.

The assertion that ESC rights are not capable of being the subject of meaningful and legitimate judicial enforcement by international adjudicatory bodies or by national courts has also been debunked by the number and variety of instances in which international and national adjudication of ESC rights claims has taken place in the last decades.[35] There is perhaps no better means by which

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

33 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).

34 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; Donders, above n 12, 87–90.

35 See generally 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).

to ascertain the ways a right can be enforced by the courts than to give the courts the opportunity to consider the right in the context of litigation.

At the international level, complaints of non-fulfilment of obligations to ensure the enjoyment of ESC rights have been brought against States in the context of the *European Social Charter (Revised)*,[36] before the African Commission on Human and Peoples' Rights,[37] under the *American Convention on Human Rights*[38] (including the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*),[39] as well as before International Labour Organization ('ILO') supervisory bodies and other bodies. The adoption of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*[40] represents an important stage in acceptance of the justiciability of *ICESCR* provisions before an international body.[41] At the domestic level there has been extensive litigation based directly, or indirectly, on ESC rights contained in national constitutions or human rights statutes, or in an international treaty which has become part of domestic law. The experience in a number of countries (for example, South Africa) shows that there are ways to ensure that courts do not usurp the power of legislatures to decide contentious issues relating to the allocation of limited resources. There are many examples of courts playing a constructive role in supervising the implementation of ESC rights, particularly in some developing countries where the courts are seen (or see themselves) as having an important role as agents of social transformation.

IV THE INTERNATIONAL OBLIGATIONS AND THEIR IMPLICATIONS FOR DOMESTIC IMPLEMENTATION

Under international law, States Parties to the *ICESCR* are obliged to take whatever steps are necessary to ensure that the substantive obligations they

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36 Opened for signature 3 May 1996, CETS 163 (entered into force 1 July 1999). See 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), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 195.

37 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), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 139.

38 Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

39 Opened for signature 17 November 1988, 28 ILM 156 (entered into force 16 November 1999) ('*Protocol of San Salvador*'). Verónica Gómez, 'Economic, Social, and Cultural Rights in the Inter-American System' in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 167.

40 GA Res 63/117, UN GAOR, 63rd sess, 66th plen mtg, UN Doc A/RES/63/117 (5 March 2009) ('*Optional Protocol to the ICESCR*').

41 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.

assume under the treaty are carried out.[42] It is clear that legislative measures are necessary,[43] but that much more than legislation is required to ensure the enjoyment of ESC rights – appropriate policies, budgeting, and programmes will often be more important than legal measures.[44]

Nevertheless, some legal measures are required. Two important questions have arisen in this context. The first is whether the *ICESCR* requires States Parties to incorporate its provisions into domestic law, so that they can be invoked before the national courts;[45] the second is whether the *ICESCR* requires States Parties to provide judicial remedies for claimed violations of the rights guaranteed by the *ICESCR*. The answer to the first question is relatively clear: the *ICESCR* does not require that the provisions of the treaty be incorporated directly as part of domestic law (and indeed, simply doing that would not be enough to fulfil the State Party's *ICESCR* obligations, even its obligations to adopt appropriate legislative measures and judicial remedies). Nonetheless, the United Nations ('UN') Committee on Economic, Social and Cultural Rights ('CESCR') has urged States Parties, including Australia,[46] to incorporate the *ICESCR* as part of domestic law.[47] State practice has varied in this regard,[48] with the *ICESCR* forming part of domestic law in many countries where ratified treaties become part of domestic law under the applicable constitutional law rules

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42 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(2) *Human Rights Quarterly* 156–229.

43 Craven, above n 34, 126.

44 See Dowell-Jones, above n 34, 4. As Mary Dowell-Jones points out, much of the academic discussion in the human rights literature and among activists has been dominated by legal analysis of *ICESCR* obligations and directed to establishing that ESC rights are real rights and that they are in certain respects capable of judicial enforcement. The result has been a skewed emphasis on the legal measures necessary or appropriate for their implementation with a resulting neglect of the many other policies and strategies necessary to ensure the enjoyment of the rights guaranteed.

45 A treaty may form part of domestic law by operation of the relevant constitutional rule of reception, but at the same time not be invocable before a court as a source of rights (directly applicable) because of the nature of the provisions involved.

46 The CESCR has 'regretted' the non-incorporation of the *ICESCR* into Australian domestic law (most recently in 2009) and urged the government to:

> 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.

Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (22 May 2009) [11].

47 Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, 5th sess, UN Doc E/1991/23 (14 December 1990) [5]; Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998) [8].

48 Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998) [6].

regulating the reception of international law, but in many other jurisdictions not being received directly as part of national law.

The question of whether judicial remedies are required to be made available for allegations of some, or all, ESC rights violations, and the form any such remedies should take, is more complex. The CESCR has argued that the provision of remedies for alleged violations of *ICESCR* rights is a corollary of States Parties' obligation to provide effective protection of the rights – and that judicial remedies may sometimes be a necessary or appropriate measure (in addition to other forms of remedy).[49] The provision of judicial remedies, of course, depends on the rights in question being capable of enforcement by a court (directly applicable) and the CESCR has consistently maintained that aspects of all the rights in the *ICESCR* are in fact capable of judicial enforcement.[50]

V JUDICIAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS[51]

The possibility, and legitimacy, of the judicial enforcement of ESC rights has been the sticking point of discussion about more effective procedures for the implementation of ESC rights at the national and international level. The debate in this context is about the role of courts in enforcing *broad* guarantees of ESC rights. Courts and tribunals already directly enforce ESC rights in many ways – protecting tenants against unlawful eviction, determining entitlements to social security or health benefits, or deciding claims of discrimination in education or employment, are just some examples of the ways in which courts implement ESC rights every day. However, in these cases, courts are usually applying detailed rules laid down in primary and secondary legislation and relevant case law. In such cases the State has partly implemented its obligations under the *ICESCR* to ensure the relevant rights by specifying the applicable domestic rules that will be applied and by identifying and empowering the domestic institutions for their implementation and enforcement. In the context of a HRA, the challenge is normally the interpretation and application of broadly worded rights, both in relation to C&P rights and ESC rights.

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49 Ibid [3], [9].

50 Ibid [8]–[11]. See also Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, 5th sess, E/1991/23, (14 December 1990) [5], where the CESCR had argued that 'the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies' and that there are other provisions of the *ICESCR* – including arts 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) – 'which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain'.

51 This section draws on Andrew Byrnes and Catherine Renshaw, 'Within the State' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), *International Human Rights Law* (Oxford University Press, 2010) 498.

The enforceability of ESC rights (and C&P rights) can be analysed at two levels – the international and the domestic. While many similar issues arise at each level in relation to ESC rights, there are important differences. A critical difference is the way in which the relevant right or related State obligation is formulated. In the case of the *ICESCR*, the debate has generally been whether it is possible to make a sensible (quasi) judicial assessment of whether the State has given effect to its obligation of 'progressive realisation' in article 2(1) of the *ICESCR* (though that is not a State's only obligation under the treaty). The adoption by the UN General Assembly of the *Optional Protocol to the ICESCR* in December 2008, after years of debate and negotiation, demonstrates the emergence of a consensus that it is possible to carry out such a quasi-judicial evaluation at the international level.

However, the issues may be different at the national level. This depends in part on the formulation of the rights under domestic law (and any corresponding State obligations). Simple enactment of the *ICESCR* itself, for example, may bring similar challenges of interpretation and application to those that exist at the international level, complicated by the fact that the 'State' for the purpose of international law in this context is one entity, while at the domestic level it comprises a range of institutions with different responsibilities. However, if the formulation of rights and obligations is adapted to the domestic context, some of the problems at least may be avoided. For example, a State might choose simply to enact a general guarantee of the right to education (subject to reasonable limitations) as part of its implementation of its obligations under articles 2(1), 3 and 13 of the *ICESCR*. This may be based on the view of the State that this right is already being complied with, that issues of resources are not a major factor in the implementation of that right, and that a generally worded right may provide a safety net for aspects of the right not covered by existing legislation and policy. Such a right could readily be enforceable by domestic courts, as the UK experience with the right to education under the *Human Rights Act 1998* (UK) c 42 shows.[52]

Alternatively, in an area where the State is concerned about the limited resources impeding the full implementation of the right, and where individual or subjective claims might be in tension with collective dimensions of enjoyment of the right, the right or obligation of the State could be formulated differently. An example is the *Constitution of the Republic of South Africa Act 1996* (South Africa), which includes a number of ESC rights which are subject to enforcement by the courts. However, the formulation of those rights reflects the different

52 See generally Neville Harris, 'Education: Hard or Soft Lessons in Human Rights?' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart Publishing, 2005) 81, 83–105. Harris concludes at 111 that

> while, from a purely legal perspective, the HRA has not had a significant impact on education thus far, it has contributed to a general cultural shift. Human rights have entered the political vocabulary and are increasingly referred to in debates about education policy … The Government is learning that an increased sensitivity to human rights in education is necessary …

dimensions of the rights 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.[53]

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. 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).[54]

Thus, an answer to the question whether rights guarantees (be they ESC rights or C&P rights) can, and should, be enforced through courts (as well as implemented in other ways) involves taking into account a number of factors: the source of those rights and their status in the domestic legal system; the particular formulation of the guarantees adopted; the 'justiciability' of those rights both in the sense of whether it is politically or institutionally appropriate for a court to pronounce on the issues raised and in the sense that the rights or obligations in question provide judicially manageable standards for a curial determination (directly applicable or self-executing being two terms commonly used in this context); and the accepted constitutional role of the courts in relation to the other branches of government. Further, certain aspects of the right may be enforceable in the same way as classical C&P rights, while others may be subject to judicial scrutiny of the 'reasonableness measures'; and it is possible that the implementation of some obligations will be left entirely to the discretion of the executive and legislature.

ESC rights have come into domestic systems in a variety of ways, including through direct incorporation of the terms of a treaty (by constitutional rule of reception or specific enactment, such as in many civil law jurisdictions, the United States or Nepal), in the form of constitutional guarantees of ESC rights (such as South Africa or Hong Kong),[55] and in the form of specific statutes guaranteeing ESC rights in general or specific terms. The courts of many

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

54 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; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co, 2010).

55 Though there is still some question as to whether the inclusion of the *ICESCR* in Hong Kong's Basic Law 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* [2010] HKCA 31 (3 February 2010) [98].

countries have given effect to a variety of treaty provisions relating to ESC rights, both in direct reliance on a treaty such as the *ICESCR* or an ILO convention as the primary norm,[56] 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.[57]

Courts in other countries have not been so ready to find ESC rights directly applicable, particularly where reliance is placed directly on the *ICESCR*. The reluctance has arisen not just from concern about the nature and justiciability of individual ESC rights, but in particular from the terms of the *ICESCR*, under which States Parties undertake to realise the rights guaranteed 'progressively'.[58] One example is a 1994 case before the Swiss Federal Supreme Court involving a challenge to an increase in university fees to be paid by students, on the ground that it was inconsistent with article 13(2) of the *ICESCR*.[59] The Court held that, in general, the rights guaranteed by the *ICESCR* 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.[60]

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 – particularly the work of the CESCR – which has pointed out the directly applicable aspects of many of the rights in the *ICESCR*.[61] Other courts

56 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* (Organisation Internationale du Travail, 2004) 249.

57 See generally Langford, above n 35; International Labour Organization, *Use of International Law by Domestic Courts: Compendium of Court Decisions* (December 2007) <http://training.itcilo.org/ils/CD_Use_Int_Law_web/Additional/English>.

58 See Yuji Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Oxford University Press, 1998) 56–61.

59 Article 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'.

60 *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; 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 revised ed, 1997) 105.

61 See, eg, Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998) [3], [9].

(in particular, but not only, Latin American courts)[62] have found that the 'progressive implementation' obligation under the *ICESCR* is no bar to finding that some provisions of the *ICESCR* (or aspects of them) are directly applicable.[63] For example, *Mariela Viceconte v Argentinian Ministry of Health and Social Welfare – Poder Judicial de la Nación*[64] was a case involving a claim based on article 12(2)(c) of the *ICESCR*[65] 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 the decision of the Supreme Court of Argentina in the *Campodónico de Beviacqua* case,[66] 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 that the right to health in the *ICESCR* and the *Constitution of the Argentine Nation* required the government to continue to provide the drug to the child.

In other cases, 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.[67] 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.[68]

In principle, it is possible for some provisions of a treaty to be considered directly applicable while others are not. For example, in 2008 the Swiss Federal

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62 Victor Abramovich and Christian Courtis, 'Hacia la Exigibilidad de los Derechos Económicos, Sociales y Culturales: Estándares Internacionales y Criterios de Aplicación ante los Tribunales Locales' in Martín Abregú and Christian Courtis (eds), *La Aplicación de los Tratados Internacionales Sobre Derechos Humanos por lost Tribunals Locales* (Editores del Puerto, 2nd ed, 1998) 283–350; Víctor Abramovich, Alberto Bovino and Christian Courtis (eds), *La Aplicación de los Tratados Sobre de Derechos Humanos en el Ámbito Local. La Experiencia de Una Década (1994–2005)* (Ed del Puerto, 2007); 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) 169–84.

63 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.

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

65 Article 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'.

66 *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.

67 Article 39 of the *Basic Law of the Hong Kong Special Administrative Region of the People' Republic of China* incorporates both the *ICCPR* and the *ICESCR* as constitutional guarantees.

68 *Clean Air Foundation Ltd v Government of the Hong Kong SAR* [2007] HKCFI 757 (26 July 2007) [43].

Supreme Court held that articles 7(1) and 18(1) of the *Convention on the Rights of the Child*[69] (right to registration on birth, to a name, to a nationality and to know his or her parents; right of the child to be heard in proceedings affecting the child) are directly applicable, while other provisions of the *CRC* are not (obligations relating to the rights of children with disability under article 23, and the right of the child to benefit from social security under article 26, among others).[70] The same would apply to provisions of the *ICESCR* where it is clear that immediate steps can be taken to ensure the enjoyment of the right (for example, in relation to discrimination or recognition of the right to form trade unions, among other rights). A 1986 decision of the Dutch Central Appeals Court, for example, noted that while the rights in the *ICESCR* might not in general have direct effect, some might – in that case the right to equal remuneration for work of equal value.[71]

Thus, the experience in a range of different jurisdictions around the world has been that ESC rights 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 so enforceable, as a matter of practicality, and as a matter of ensuring that the courts are not confronted with, or assume, a task which is beyond their competence, or constitutionally inappropriate for other reasons. The experience in South Africa[72] has been frequently held out as one of the leading examples that demonstrate that courts can responsibly and appropriately enforce or scrutinise the implementation of ESC rights without encroaching on the proper role of the executive and the legislature. 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

69 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

70 *Bundesamt für Sozialversicherungen v K*, Bundesgericht, 22 November 2008, No 295/2008, §4.2.

71 *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 LANM Barnhoorn, 'Netherlands Judicial Decisions Involving Questions of Public International Law' (1988) 19 *Netherlands Yearbook of International Law* 427, discussed by Iwasawa, above n 58, 60. See also *Catholic Diocese of Hong Kong v Secretary for Justice* [2010] HKCA 31 (3 February 2010) [98] (claim of violation of right to education rejected).

72 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).

Australian courts on existing Bills of Rights or on ESC rights issues[73] involving treaty interpretation do not suggest that Australian courts would take an unpredictable or impermissibly expansive approach to interpreting justiciable ESC rights guarantees that would undermine the separation of powers. To maintain that courts cannot play a meaningful role in the direct enforcement of ESC rights, or that it is 'too difficult', flies in the face of the now extensive experience in many jurisdictions and legal systems, including those comparable to Australia.

VI ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE STATE AND TERRITORY CONSULTATIONS AND UK DISCUSSIONS ABOUT A BRITISH BILL OF RIGHTS

A Economic, Social and Cultural Rights in Australian State and Territory Consultations on Human Rights

In the decade prior to the NHRCC's Report there were four independent, extra-parliamentary inquiries or consultations on human rights at the state or territory level in which the question of the possible inclusion of ESC rights in any Charter of Rights was considered: the ACT, Victoria, Tasmania and Western Australia.[74] In each case the consultation committee recommended the adoption of a legislative Charter of Rights along the lines of the UK statute – the *Human Rights Act 1998* (UK) c 42. Three of the four committees recommended the inclusion of ESC rights in such a Bill of Rights (ACT, Tasmania and Western Australia).

1 *Australian Capital Territory*

In the ACT, the ACT Bill of Rights Consultative Committee ('ACT Committee') which carried out a consultation in 2003 on the desirability of a HRA for the Territory, recommended the adoption of a HRA based on the model

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73 Australian courts and tribunals have specifically considered ESC rights guarantees in a number of cases, for example: the right to work (*Wickham v Canberra District Rugby League Football Club Ltd* [1998] ATPR 41-664; *Communications Electrical v WA Electronic Energy Specialty Alloys Pty Ltd* [1995] IRCA 600 (12 October 1995)); the right to adequate housing (*Sheather v Daley* [2003] NSWADT 51); recognition of the family as the fundamental group in society (*McBain v Victoria* (2000) 99 FCR 116 (Sundberg J)); the right to social security (Re *Secretary, Department of Social Security v Dagher* (1997) 50 ALD 258); and the right to strike (*Victoria v MacBean* (1996) 138 ALR 456. See NSW Bar Association, Human Rights Committee, *Options Paper for a Charter of Rights for NSW* (2007) [120] <http://www.nswbar.asn.au/docs/resources/publications/human_rights.pdf>. See also the cases cited below n 180.

74 To this might be added the NSW Parliamentary Inquiry that recommended against the adoption of a Bill of Rights, preferring to bolster the process of parliamentary scrutiny through the establishment of the Legislation Review Committee with a human rights mandate: see NSW Parliament Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights*, Parl Paper No 893 (2001). There was no focused discussion on how ESC rights should fit into any Bill of Rights; the concern of the inquiry was very much whether a Bill of Rights should be adopted at all.

of the UK *Human Rights Act 1998* (UK) c 42, and the inclusion of ESC rights in that Act.[75] In an innovative piece of drafting intended to underline the interconnectedness of the two categories of rights,[76] the Draft Human Rights Bill 2003 proposed by the ACT Committee[77] grouped related C&P rights and ESC rights 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);[78] and the right not to be subjected to torture or medical experimentation was grouped with the right to health.[79]

At the same time the ACT Committee felt the need to address concerns about the perceived differences in the two types of rights. In an effort to do this, it offered two alternative drafts. The first approach recognised the different obligations of implementation 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:[80] 'In other words, the obligation on the ACT government to protect ESC rights is one to take reasonable measures within its available resources to realise the rights progressively'.[81]

The second approach did not distinguish between the two categories of rights, but incorporated issues about the nature of ESC rights into a general limitations clause, in which the nature of the right was a factor to be considered in determining whether a limitation on the enjoyment of a right was permissible. It provided that limitations may be placed on rights if the limitations were 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,

75 ACT Bill of Rights Consultative Committee, Parliament of ACT, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) 6, 90–1, 95–100. The Committee did not recommend the inclusion of all the *ICESCR* rights, on the ground that the ACT did not have the power to ensure them as a result of the Commonwealth's legislative power in the area. These were the right to form and join trade unions, the right to social security, and rights in relation to marriage and children: at 91. One might argue that the full scope of all these rights was not covered by existing Commonwealth legislation (which might change in the future) and that they could have been included in an ACT HRA and have some area of operation. The Commonwealth Parliament has overriding legislative authority over many other areas of human rights in the ACT in respect of which the ACT legislature can also make laws (eg freedom of assembly).

76 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, 2006) 289, 290–1.

77 Draft Human Rights Bill 2003, in ACT Bill of Rights Consultative Committee, Parliament of ACT, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) app 4.

78 Ibid 15 (cl 2).

79 Ibid 15 (cl 3).

80 Ibid 23 (cl 14(3)).

81 ACT Bill of Rights Consultative Committee, Parliament of ACT, above n 75, 100.

and whether there were less restrictive means to achieve the limitation's purpose.[82]

The ACT Committee expressed a 'strong preference' for the second alternative, which it considered 'more consistent with the idea of the indivisibility of human rights'.[83] While this approach has the virtue of underlining the similarities between the different categories of rights, it is analytically less satisfying insofar as it treats what might be seen as an issue of the essence of the obligations as a matter of limitation of those obligations.

Although the ACT government adopted the recommendation of the ACT Committee that a legislative Charter of Rights be enacted, it did not take up its recommendation to include ESC rights in the document. However, the ACT government accepted that, as part of the one year review of the operation of the Act, it would consider whether ESC rights should be included in that Act, and a provision to this effect was included in the *Human Rights Act 2004* (ACT) ('ACT *HRA*').[84]

In fact, the 12 month timetable for review proved too ambitious to address this issue, and in the first review of the ACT *HRA*, the issue was essentially deferred to the second review of the Act, to take place five years after its commencement. The ACT government recognised that there had been many important developments in relation to ESC rights, 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'.[85] The review concluded:

> So, 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.[86]

The report recommended that the ACT 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 economic, social and cultural rights' and 'should revisit the question of economic, social and cultural rights as part of the five-year review under the HRA'.[87] The five year

82 Draft Human Rights Bill, above n 77, 23 (alternative 2, cl 14(1)).

83 ACT Bill of Rights Consultative Committee, Parliament of ACT, above n 75, 100.

84 *Human Rights Act 2004* (ACT) s 43. This provision has since been removed as it expired on 1 January 2007.

85 ACT Department of Justice and Community Safety, Parliament of ACT, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) 37–49 <http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf>.

86 Ibid 49.

87 Ibid.

review commenced in mid-2009[88] and is likely to be completed by the end of 2010.[89]

2 *Victoria*

In the case of the Victorian consultation conducted in 2005, the Victorian government had made it quite clear in its Statement of Intent that it was not interested in receiving recommendations about the inclusion of ESC rights in any Bill of Rights the Victorian Human Rights Consultation Committee ('VHRCC') might recommend, at least in the short-term.[90] The VHRCC responded to this by recommending that ESC rights not be included in the proposed Charter. Their reasons were that the rights '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*; that such rights were not included in the legislative Charters adopted in the UK, New Zealand or the ACT (with the exception of the right to education in the UK); that there was 'limited experience on what effect ESC rights may have within a legal system like Victoria's'; and that 'the inclusion of ESC rights would make Victoria exceptional amongst the models of human rights protection enacted in similar jurisdictions'[91] (though exceptionality was not a bar to other elements of the proposed Charter). Although the Committee's consideration of the substantive issues is extremely brief, it had clearly read the political tea leaves and presumably concluded that a Bill of Rights with standard C&P rights would be more readily accepted initially, and that it might be possible to add further rights later. The Committee recommended reviews of the Act after four and eight years – such reviews to include the question of whether ESC rights should be included. A provision for a review of this sort was included as section

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88 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 Project (2009) <http://acthra.anu.edu.au/PESCR/Publications>; the ACT Government does not appear to have a website on which submissions are available.

89 See generally ACT Economic, Social and Cultural Rights Project website: Australian National University, *ACT ESCR Project: Protecting Economic, Social and Cultural Rights in the ACT* (2010) <http://acthra.anu.edu.au/PESCR>.

90 The Committee is asked to focus on the rights in the *ICCPR* in considering a statutory human rights model as a starting point in its deliberations. The 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 *ICESC* rights, such as the right to adequate food, clothing and housing, is complicated by the fact that such rights can 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.
Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent* (2005) reproduced in Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), app B, 163.

91 Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 29.

44 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which requires consideration of the inclusion of *ICESCR* rights, as well as rights contained in the *Convention on the Elimination of All Forms of Discrimination against Women*[92] and the *CRC*.[93]

3 *Tasmania*

In Tasmania, a consultation into the desirability of a Bill of Rights was conducted by the Tasmanian Law Reform Institute ('TLRI') in 2007. After reviewing the arguments for and against the inclusion of ESC rights in any Bill of Rights, the TLRI recommended that ESC rights be included, concluding:

> 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.[94]

The TLRI recommended that if its recommendation for inclusion of ESC rights at the outset were not accepted, then the issue should be considered in the prescribed reviews of the Act.[95] However, a number of changes of Attorney-General following the report meant that the issue of a Charter was not followed up.[96]

4 *Western Australia*

The WA Consultation Committee for a Proposed Human Rights Act ('WA Committee') also took up the issue in its 2007 consultation. The Western Australian government had made it clear in its Statement of Intent[97] that its preferred approach was not to include ESC rights, at least initially, and it did not include ESC rights in the draft HRA it published as part of the consultation materials.[98] Unlike its Victorian counterpart, and notwithstanding the WA government's clear indication on the issue, the WA Committee recommended that the scope of any Act be expanded to include ESC rights. Noting the

92 Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

93 Human Rights Consultation Committee, Parliament of Victoria, above n 91, 29.

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

95 Ibid 122, 123.

96 Byrnes, Charlesworth and McKinnon, above n 7, 141–2.

97 Western Australian Government, *A WA Human Rights Act: Statement of Intent by the Western Australian Government* (2007) 4, reproduced in Consultation Committee for a Proposed WA Human Rights Act (WA Committee), *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007) app A.

98 Draft Human Rights Bill 2007, reproduced 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) app B.

importance of the interests protected by ESC rights to the people of Western Australia, the WA Committee reviewed the arguments for and against the inclusion of ESC rights,[99] and recommended that they be included.[100]

Seeing constitutional or other difficulties with including some of the rights in the *ICESCR*, the WA Committee recommended that any Act include the right of everyone to the highest attainable standard of physical and mental health, the right to an education, the right to have access to adequate housing, the right to take part in cultural life, and the right not to be deprived of property other than in accordance with the law, and on just terms.[101] The WA Committee considered a variety of ways in which these ESC rights might be protected under a HRA, ranging from a model that treated them in the same way as C&P rights to indirect protection through the use of C&P rights guarantees.[102] The WA Committee's recommendation was that the selected ESC rights be treated in the same way as the C&P rights included in any HRA,[103] though it noted that the model which would provide only administrative and not judicial redress for ESC rights violations, was likely to be attractive to the WA government as representing 'a lesser "risk"'.[104] A lukewarm response from the government and its subsequent loss of a parliamentary majority and then the 2008 election took the matter off the agenda.[105]

5 *Summary of Consultations*

Thus, before the NHRCC there had already been extensive consultation and discussion in Australia about the desirability and practicability of including ESC rights in legislative Charters of Rights. The inquiries had shown, in varying degrees, that there was much community concern about the interests protected by ESC rights, there was significant support for (as well as concern about) the inclusion of ESC rights in any Bill of Rights, and that many of the traditional arguments about ESC rights could not be maintained as persuasive objections to the inclusion of ESC rights in some form. In Tasmania and Western Australia, despite the strong endorsement of a statutory Bill of Rights and the inclusion of ESC rights by the inquiries in those States, the loss of political support and changes of Minister or government meant that the realisation of any statutory Bill of Rights – let alone the inclusion of ESC rights in such a statute – went off the

99 Ibid ch 4.
100 Ibid 76.
101 Ibid 82.
102 The six models were: (a) treating the selected ESC rights in the same way as C&P rights; (b) inclusion of ESC rights 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 ESC rights violations but instead providing for administrative remedies; (d) inclusion of ESC rights as non-binding principles or objectives; (e) the pursuit of ESC rights through different means, such as human rights audits or regular reviews; and (f) reliance on the indirect protection of ESC rights through the implementation and enforcement of C&P rights: ibid 82–6.
103 Ibid 87.
104 Ibid 87, 116.
105 Byrnes, Charlesworth and McKinnon above n 7, 143–4.

agenda. In the case of the ACT, despite the strong support of the ACT Committee for the inclusion of ESC rights, at the time of the enactment of the ACT *HRA* the ACT government had not yet been persuaded to include them, though it was prepared to revisit the issue in its reviews of the ACT *HRA*. Similarly, although neither the VHRCC nor the Victorian government were persuaded of the desirability of including ESC rights in the first version of any legislative Charter of Rights, the VHRCC proposed, and the government accepted, that this was a question that could be revisited in the scheduled reviews of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

In sum, although it might be said that the intellectual, social and legal case had been strongly made for the inclusion of some form of explicit protection of ESC rights in a HRA and the various options for this had been extensively explored, by the end of 2008, when the NHRCC commenced its work, no Australian jurisdiction had a human rights statute which contained substantial explicit protection for these rights.

B Economic, Social and Cultural Rights and Discussions about a UK Bill of Rights: The Joint Committee on Human Rights[106]

Not only had there been the four Australian inquiries to inform the NHRCC's consideration of the issue, but a similar debate had also been taking place in the United Kingdom in the context of discussion about the adoption of a British Bill of Rights. The UK Parliament's Joint Committee on Human Rights ('JCHR') had adopted reports on ESC rights in 2004[107] and 2008[108] and engaged with the UK government over the possible inclusion of ESC rights in domestic human rights legislation.[109] While recognising that it was inappropriate for courts to become involved in policy decisions about 'large-scale redistribution of resources',[110] the JCHR rejected the traditional arguments advanced by the government and others about the nature of ESC rights and the possibility of their judicial enforcement;[111] the JCHR also noted that the right to property and the right to education under the HRA were 'without difficulty guaranteed and applied by the UK courts, if in relatively circumscribed and qualified form, alongside the civil and political guarantees'.[112]

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106 The following paragraphs draw on the discussion of the reports of the Joint Committee on Human Rights contained in NSW Bar Association, Submission to National Human Rights Consultation, *National Human Rights Consultation*, 9 June 2009, [26]–[35], to which the author contributed.

107 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).

108 Joint Committee on Human Rights, *A Bill of Rights for the UK?*, House of Lords Paper 165, House of Commons Paper No 150, Session 2007–08 (2008) ch 5.

109 See Ed Bates, 'The United Kingdom and the *International Covenant on Economic, Social and Cultural Rights*' in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 257, 272–99; NSW Bar Association, above n 106, [26]–[35].

110 Joint Committee on Human Rights, above n 107, [71]. However, the JCHR also noted that some court decisions on civil and political rights may have 'substantial resource implications': at [72].

111 Ibid [21], [26], [48]; Joint Committee on Human Rights, above n 108, [155], [183]–[191].

112 Joint Committee on Human Rights, above n 107, [22].

Drawing in particular on the South African experience, the JCHR put forward three proposals as to how ESC rights might be included in a British Bill of Rights, namely: (a) as fully justiciable and legally enforceable rights; (b) as 'directive principles of State policy' (the models being the constitutions of India and Ireland); or (c) in a hybrid model involving a duty of progressive realisation with a closely circumscribed judicial role (based on the South African constitutional experience).[113] The JCHR considered that the last option was the best way of providing judicial oversight, while still maintaining the proper separation of powers between the courts and the legislature and executive.[114] 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'.[115]

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 by individuals, but rather that the courts have a very closely circumscribed role in reviewing the measures taken by the government.

The JCHR proposal is in fact more restricted than the South African model and the proposals of the ACT, Tasmanian and WA consultative bodies, as it would not allow any of the listed ESC rights to be directly enforced by the courts. Nonetheless, the JCHR's endorsement of the inclusion of ESC rights is important and makes clear that the South African experience cannot be dismissed as appropriate to a developing country with relative new democratic institutions but not to Australia.[116]

113 The JCHR also rejected the option of a 'purely declaratory model' of 'wholly symbolic rather than legal effect': Joint Committee on Human Rights, above n 108, [165].

114 Ibid [172].

115 Ibid [192].

116 As the NSW Bar Association commented in relation to this proposal:

> while 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 economic, social and cultural rights 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 civil and political rights 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.

See NSW Bar Association, above n 106, [35] (citations omitted).

VII ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE COMMITTEE'S REPORT

A General Approach of the NHRCC

The National Human Rights Consultation Committee thus covered much familiar ground in its Report. The NHRCC's discussion of ESC rights is largely a descriptive account, in which it sets out the arguments for and against the inclusion of ESC rights by summarising the submissions made on this issue, engaging in limited analysis and critique of the materials, and stating its conclusions in fairly cursory form.[117] The NHRCC made clear that it considered the interests that were protected by ESC rights – in particular, rights to education, an adequate standard of living, work and health – to be fundamental and a priority for many Australians, and that these rights and interests were, in many cases, of great importance to marginalised and disadvantaged members of the community. At the same time, the NHRCC recognised the status of ESC rights *as rights*, in particular as they were embodied in a number of international instruments (above all the *UDHR* and the *ICESCR*).

Nevertheless, for a variety of reasons, the NHRCC was not prepared to treat ESC rights as identical with C&P rights and, while it incorporated some or all ESC rights in many of its recommendations, it saw differences between the two categories of rights which necessitated a different level and form of legal protection in important respects. Most critically, the NHRCC did not support the inclusion of ESC rights (with the exception of the right to property)[118] in the HRA it recommended, and proposed that if such rights were included, they be a limited list of such rights and not be capable of enforcement by the courts in any respect. Thus, in the implementation and monitoring of ESC rights, the NHRCC saw more of a role for legislative, policy and programmatic measures, and less of a role for judicial scrutiny or enforcement than it did for C&P rights. Nonetheless, though it accepted that both categories of rights need a variety of measures for their effective implementation – and that even C&P rights cannot rely for their realisation only on judicial enforcement – it did not take into account in any significant way that some aspects of ESC rights may be protected through judicial enforcement. The NHRCC's specific analysis and proposals are discussed in the following sections.

B The Gageler/Burmester Opinions

An important contribution to the NHRCC's consideration was legal advice in the form of two opinions provided to the NHRCC, at its request, by leading government lawyers – the Commonwealth Solicitor-General, Stephen Gageler, and the then Australian government Solicitor Chief General Counsel, Henry Burmester. The main reason for requesting these opinions was to attempt to lay

117 National Human Rights Consultation Committee, above n 1, 78–82, 314–16, 365–6.

118 Ibid 36–7. The right had not been included in the *Human Rights Act 2004* (ACT), but was included in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

to rest the concerns that a 'dialogue' model HRA, providing for the making of a declaration of incompatibility by a court, might fall foul of the *Commonwealth Constitution*. The particular concern was that it would not be possible to confer on courts exercising federal judicial power the ability to make a declaration which was expressly stated not to affect the rights and duties of the parties under the law, since this would mean that the order of the court would have no effect and the court would not be engaged in a valid exercise of federal judicial power.

This issue attracted a great deal of attention during the consultation, though it is not clear if an Act that contained such a provision would have been struck down in its entirety if the power to issue a declaration of incompatibility had been constitutionally wanting. Some constitutional lawyers were also of the view that there were ways of drafting a substantially similar arrangement that would pass constitutional muster. Concerted efforts were made by the Australian Human Rights Commission and others to take back the legal ground on this issue,[119] though opponents of a Bill of Rights argued that the uncertainty surrounding the issue made it inadvisable to take the risk of adopting a model that might be constitutionally infirm. The commissioning of these opinions was intended to allay concerns, or perhaps to identify any issues that would need to be addressed. Thus, ESC rights were not a central element of the background to these opinions.

However, ESC rights became caught up in the issue of constitutionality, and unfortunately were not dealt with in an entirely satisfactory way in the legal opinions (which presumably provided part of the basis for the NHRCC's recommendations against the inclusion of ESC rights in any Act, though the Gageler/Burmester conclusions are not explicitly integrated into its final reasoning). The opinions essentially accept uncritically traditional critiques about the justiciability of ESC rights – in particular, an asserted lack of judicially manageable standards in relation to ESC rights – and these concerns are then used as a basis for reasoning that their inclusion might give rise to constitutional problems.

The Gageler/Burmester legal advice took the view that a declaration of incompatibility in relation to C&P rights contained in a legislative Charter of Rights along the lines of the Victorian Charter would be constitutional.[120] 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

119 See the statement that emerged from a meeting of constitutional and human rights lawyers convened by the Australian Human Rights Commission on 22 April 2009 to the effect that a HRA which contained in substance a provision for a court to make a finding of inconsistency would be constitutional: Australian Human Rights Commission, *Constitutional Validity of an Australian Human Rights Act* (2009) <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>.

120 Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Opinion*, Solicitor-General Opinion Nos 40, 68 (2009).

standards"'.[121] In response to this comment, the NHRCC sought further advice on the issue, asking that if 'human rights' were defined to include not only C&P 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, if it would

> constitute a valid exercise of judicial power for a court to:
>
> d) interpret a provision of Commonwealth legislation consistently with those rights or make a declaration of incompatibility?
>
> e) determine that a public authority had acted incompatibly with those rights?[122]

The first sub-question elided two related but separate issues: (i) whether *ICESCR* rights could properly be used as a standard for interpretation of Commonwealth legislation by a Chapter III court,[123] and (ii) whether the issuing of a declaration of incompatibility on the basis of inconsistency with *ICESCR* rights generally, would be constitutional.

The answer given to the question was: 'Probably no, in relation to the general rights in Arts 7, 11, 12 and 13 of the *ICESCR*'.[124] This response applied to all three aspects of the questions asked, yet it seems an unlikely result that if a provision of the *Acts Interpretation Act 1901* (Cth) directed a court to interpret the provisions of Commonwealth legislation in accordance with Australia's obligations under the *ICESCR*, this injunction would be unconstitutional because of the broadly worded standards in the treaty. Given that it has been a largely uncontested principle of statutory interpretation since the early days of the Commonwealth that statutes are to be interpreted in accordance with international treaty obligations and that reference is made in various statutes to treaties regulating ESC rights in terms that are similar, it would not seem to be the case that such an interpretative provision would be constitutionally flawed.

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121 Ibid [30]. They also noted it may be 'that the need for an existing dispute, and hence a matter, provides sufficient protection for the courts from being required to adjudicate in relation to rights not traditionally regarded as judicially manageable'.

122 Ibid [35(g)].

123 Chapter III of the *Commonwealth Constitution* provides for the exercise of the judicial power of the Commonwealth by certain courts (including federal courts). In order for there to be a constitutional conferral of power on those courts and exercise by them of that power, the courts must possess a number of characteristics, which include independence and security of tenure, among other characteristics. Such courts can only exercise judicial power, which involves determination of a 'matter' by judicially manageable standards.

124 Gageler and Burmester, above n 120, [36(g)].

Indeed, it may be that the response to the NHRCC's question was not explicitly directed to an interpretive provision.[125]

The Gageler/Burmester advice saw 'considerable difficulty concerning the ability of a court in the exercise of judicial power to interpret and enforce the rights set out in articles 7, 11, 12 and 13 of the *ICESCR*'.[126] This concern arises from Chapter III of the *Commonwealth Constitution* which requires that the exercise of federal judicial power must 'always … involve the application of criteria or standards that are sufficiently definite'.[127] In their view:

> An examination of the content of those rights as set out in the *ICESCR* demonstrates a general absence of what would traditionally be regarded as judicially manageable standards. Given the issues of resource allocation that are necessarily involved, how is a court to assess, for instance, whether or not a person is being denied 'just and favorable conditions of work' (Art 7), 'an adequate standard of living' (Art 11) or 'the enjoyment of the highest attainable standard of physical and mental health' (Art 12)?[128]

At the same time the opinion notes that there are aspects of those articles that are more specific and would represent 'judicially manageable standards'; these include the obligation in article 7(a)(i) for equal pay for equal work; in article 7(d) for remuneration for public holidays; and in article 13(2)(a) for free and compulsory primary education.[129] But these individual provisions do not solve the general problem and, apart from these examples,

> any general provision for enforcement of the rights set out in articles 7, 11, 12 and 13 of the *ICESCR* would be unlikely to be held to involve the exercise of judicial power within the meaning of Chapter III of the *Constitution*. The position would be the same whether or not an issue concerning those rights arose in the course of proceedings for some other relief or remedy.[130]

This analysis very much represents the traditional approach to ESC rights that has been overtaken in the last decades. For example, 'the examination of the content of those rights as set out in the *ICESCR*'[131] which underpins the

125 The Gageler/Burmester Supplementary Opinion makes the surprising suggestion that the general terms of many of the rights in the *ICESCR* – 'which might be sought to be achieved through any one or more of a range of measures' – might not support the making of a laws under the external affairs powers because they 'would be likely to be regarded by the High Court as lacking "sufficient specificity" to support the making of a law under the external affairs power': ibid [40]. This conclusion was justified by reference to a passage in the majority judgment in *Victoria v Commonwealth* (1996) 187 CLR 416, 486 ('*Industrial Relations Act Case*'). To the extent that the Supplementary Opinion relies on that passage to suggest that a Commonwealth law implementing the *ICESCR* would not be a valid exercise of the external affairs power, it would not seem to sit comfortably with the similar treaties considered in that case, or with the detailed content of the rights under the *ICESCR*. In any event, as the Supplementary Opinion states, there would be no such constitutional limitation on an Act implementing the *ICESCR* in relation to Commonwealth public authorities and the interpretation of Commonwealth legislation: ibid [31]; the problems here relate to the issue of justiciability and whether there is a 'matter'. This point was noted by the NHRCC in its Report.

126 Gageler and Burmester, above n 120, [48].

127 Ibid.

128 Ibid [49].

129 Ibid [50].

130 Ibid [51].

131 Ibid [49].

reasoning, makes no reference to the extensive jurisprudence of the CESCR, or of national and international tribunals under other similar treaties such as ILO conventions or the *European Social Charter*. It remains, essentially, an assertion based primarily on a reading of the bare text of the treaty – an approach which fails to appreciate the current state of international law on these issues. This is not to say that these obligations may not still cause problems of interpretation and application in a concrete case, but the characterisation adopted in the Supplementary Opinion does not provide a sound basis for drawing a conclusion that these rights (and the accompanying obligations) do not provide judicially manageable standards for ESC rights other than the small number of examples mentioned in the Supplementary Opinion.[132] The Gageler/Burmester opinion also made no reference to the important guarantees of non-discrimination in the enjoyment of *ICESCR* rights that are generally considered to provide judicially manageable standards in both international tribunals and before national courts.[133]

Unfortunately, the NHRCC was prepared to accept these conclusions without searching scrutiny, restating the conclusions set out in the Supplementary Opinion, and presumably weighing that as a factor in its ultimate recommendations that any statutory Charter should not include a judicial enforcement component for any ESC rights, but rather look to other remedial options (such as the Australian Human Rights Committee ('AHRC')).[134]

C The NHRCC's Substantive Recommendations

1 *Education, an Audit of Government and a Whole of Government Approach to Realising Rights*

In relation to better human rights education and the goal of enhancing the creation of a human rights culture the NHRCC concluded that:

> Human rights are not well understood by the Australian community, and there is a need for better education about human rights generally and the way in which they are protected and promoted.[135]

Accordingly, much more was needed to be done in this field, since it was a critical area of action if one were serious about achieving practical improvements in the protection of human rights.[136] The NHRCC considered that education should be 'the highest priority for improving and promoting human rights in

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132 For a rebuttal of a number of aspects of these opinions as they relate to ESC rights, in particular in relation to the argument that ESC rights, unlike C&P rights, do not involve judicially manageable standards and involve decisions over resource allocations, see Peter Hanks et al, *Proposed Commonwealth Human Rights Act: Justiciability of Economic, Social and Cultural Rights: Memorandum of Advice* (9 December 2009) <http://www.hrlrc.org.au/files/Advice-on-Constitutionality-and-Justiciability-of-ESC-Rights.pdf>.

133 See Andrew Byrnes and Jane Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the *Women's Convention*?' (1996) 21 *Brooklyn Journal of International Law* 679.

134 National Human Rights Consultation Committee, above n 1, 317.

135 Ibid 149.

136 See Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (VDM, 2008).

Australia', and that a national human rights education plan be adopted, with 'human rights education [to] be based on Australia's international human rights obligations, as well as those that have been implemented domestically (whether in a Human Rights Act or otherwise), and the mechanisms for enforcement of those rights'.[137] Initiatives needed to be undertaken in schools and the broader community, within the public service and in other sectors of society.

In this area, the NHRCC unsurprisingly drew no distinction between C&P rights and ESC rights, being evidently of the view that education was needed about all types of rights (and also relevant individual and community responsibilities), and that this would, so far as ESC rights were concerned, not be affected in any way by the particular characteristics of those rights. The NHRCC also drew no general distinction between the two categories of rights for the purpose of its proposed audit of law and policies for consistency with human rights[138] (except insofar as it did not opt for full inclusion of ESC rights in its *interim* list of rights, discussed below), or for the whole of government approach to human rights it recommended.[139]

This dimension of the NHRCC's recommendations was taken up by the government in the Human Rights Framework in its proposed initiative for human rights education in schools, the community and the public sector.[140] Like the NHRCC, the government did not distinguish between the two categories of rights when it comes to education.

2 *The 'Interim' and 'Definitive' Lists of Protected Rights*

As a means to assist the proposed audit of legislation and policy and in relation to the improved parliamentary scrutiny of human rights, the NHRCC proposed a measure that would have, at least in the short-term, distinguished between C&P rights and ESC rights. The NHRCC recognised that such an audit would require a list of rights against which a comprehensive audit (as well as pre-parliamentary scrutiny and parliamentary scrutiny) could take place. The NHRCC considered that it 'would be best to ensure compliance with all of Australia's international human rights obligations using a stand-alone, consolidated document that takes account of matters such as overlapping rights and the modification of rights for the Australian context', but that this would be a 'quite technical' and 'will take time'.[141] The NHRCC recommended that an interim list of rights be drawn up and that this

137 National Human Rights Consultation Committee, above n 1, 151–2.
138 Ibid 164.
139 Ibid ch 7.
140 Australian Government, above n 3, 5.
141 National Human Rights Consultation Committee, above n 1, 356.

> include the civil and political rights listed in the [*ICCPR*] and the primary economic and social rights listed in the [*ICESCR*] that are of greatest concern to those who participated in all aspects of the consultation – the right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education.[142]

This interim list was to be replaced with a 'definitive list of Australia's international human rights obligations within two years of the publication'.[143]

This was a curious recommendation in a number of respects. First, with the exception of the *Convention on the Rights of Persons with Disabilities*,[144] Australia's ratifications of or accessions to the principal substantive UN human rights treaties are not recent and the Australian government has submitted a number of reports under these treaties in which it describes the measures taken to fulfil its obligations under the treaties.[145] So at least the broad contours of Australia's human rights obligations should be well-known within government, even if one might consider that the scope and depth of understanding of the obligations is not as good as it should be. These reports and related hearings before the UN committees are a form of 'audit', though a more extensive and detailed audit carried out at the national level has the potential to be a productive exercise. It is not clear exactly what form of audit was envisaged by the NHRCC; something like the Australian Law Reform Commission's inquiry into equality before the law in the 1990s would provide one model.

So far as a consolidation of overlapping or congruent obligations under those treaties goes, a considerable amount of work has already been done on this at the UN level[146] and also within government. Indeed, the Australian government's report submitted to the UN in the form of a 'common core document' in 2006,[147] as part of its fifth report under the *ICESCR*, does exactly this, describing the

142 Ibid 356–7.

143 Ibid 357.

144 Opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).

145 If one also includes ILO conventions with human rights content, these overlap significantly with the UN human rights treaties and are in any case the subject of regular reporting to and review by the ILO supervisory bodies. Relevant UNESCO conventions and other UN treaties with human rights provisions that are not accompanied by reporting procedures also largely overlap with the principal human rights treaties and, in any event, few of these involve recent ratifications.

146 This has taken place in the context of efforts to reform the UN human rights treaty body system, in particular through harmonisation of reporting guidelines. This has involved the identification of similar ('congruent') guarantees in most of the 'principal' UN human rights treaties (that is, those for which an international monitoring committee exists). See, eg, 'Chart of Congruence in the Substantive Provisions of the Seven Core International Human Rights Treaties' in *Guidelines on an Expanded Core Document and Treaty-Specific Targeted Reports and Harmonized Guidelines on Reporting under the International Human Rights Treaties Report of the Secretariat*, Third Inter-Committee Meeting, Geneva, 21–22 June 2004, Sixteenth Meeting of Chairpersons of the Human Rights Treaty Bodies, Geneva, 23–25 June 2004, HRI/MC/2004/3, 9–10.

147 Australian Government, *Common Core Document Forming Part of the Reports of States Parties – Australia – Incorporating Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights*, HRI/CORE/AUS/2007 (2006).

nature and extent of protection of human rights according to particular rights and listing them in a way that brings together the provisions from the various treaties.

The NHRCC's recommendation that only some ESC rights from the *ICESCR* be included is also curious. No selection is made of the rights in the *ICCPR* that 'are of greatest concern to those who participated in all aspects of the consultation'[148] – all *ICCPR* rights are to be included in the list. While the NHRCC proposed the inclusion of the rights to an adequate standard of living; the right to health; and the right to education, this left out other important rights – the right to work (including the right to just and favourable conditions of work, fair wages and equal remuneration for work of equal value) (articles 6–7); the right to form trade unions and related rights (including the right to strike); the right to social security (article 8); the right to protection of the family, mothers and children (article 10); the right to participate in cultural life and to enjoy the benefits of scientific progress; and the rights of authors of creative or scientific works benefit from the protection of their interests (article 15).

While the last of these is perhaps the least known in the community, it has received considerable attention in Australian government reports under the *ICESCR*,[149] in the literature[150] and at the level of international practice.[151] It is therefore difficult to see why this and the other rights are not to be included in an interim list. They are the subject, in most cases, of extensive protection and regulation by Commonwealth law and practice, and involve a number of areas where there has been criticism of existing and previous legislation for its failure to comply with those guarantees. The suggestion that these are too technical or that the task of conducting an up to date audit is too difficult, seems hard to maintain. It appears to reflect the NHRCC's underlying approach to ESC rights – one of ambivalence in treating them as on a par with C&P rights, a perspective which seems to be based on many of the traditional concerns about ESC rights rather than a more nuanced reading of them. There would thus appear to be no real impediment to inclusion of all *ICESCR* rights in the interim list of rights given the work done on them over many years, especially as the NHRCC is apparently of the view that they should be included in the definitive list of rights in any event. The challenge would seem to be, not so much the standards to be applied, but how to structure such an audit (including how to benefit from the

148 National Human Rights Consultation Committee, above n 1, 356–7.

149 See, eg, *Third Periodic Report of Australia under the International Covenant on Economic, Social and Cultural Rights*, E/1994/104/Add.22 (23 July 1998), [322]–[365]; Australian Government, Common Core Document (2006) [582]–[605].

150 See, eg, Marks, above n 12.

151 See, eg, the treaties and other instruments cited in ibid. The Committee on Economic, Social and Cultural Rights has adopted two general comments on various aspects of art 15: Committee on Economic, Social and Cultural Rights, *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 (Article 15, Paragraph 1 (c), of the Covenant)*, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006); Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life, Art 15, [1(a)] of the International Covenant on Economic, Social and Cultural Rights*, 43rd sess, UN Doc E/C.12/GC/21 (21 December 2009).

internal and external auditing that takes place when Australia submits reports to UN human rights treaty bodies) and which body or bodies would be best suited to carry it out.

Indeed, in its response the Commonwealth government did not take up the notion of interim and final lists of rights, but simply proposed the use of the standards contained in the seven core UN human rights treaties to which Australia is already a party. These will provide the normative and policy framework for increased human rights education, for the compatibility statements that will accompany draft legislation and subordinate legislation laid before the Parliament, for the mandate of the proposed Joint Parliamentary Committee on Human Rights, and for the proposed review of laws, policies and practices.[152]

3 *Statements of Compatibility of Bills and Legislative Instruments and the Human Rights Mandate of a Parliamentary Committee*

Similar comments apply in relation to the NHRCC's proposal that, whether or not a HRA containing such provisions is enacted, all Bills introduced into Parliament and all legislative instruments should be accompanied by a statement of compatibility,[153] and that either a new Joint Human Rights Committee of Parliament be established with a mandate that includes explicitly vetting Bills for consistency with human rights obligations or the mandates of one or more existing committees be amended to include such a role. Once again, the NHRCC proposes staged implementation – initially the test of compatibility for inclusion in a statement of compatibility, and the scrutiny mandate of the responsible parliamentary committee, will be conformity with those rights contained in the 'interim' list of rights, and at a later stage, with the 'definitive list of Australia's human rights obligations'.[154] Once again, there seems to be no persuasive reason why compatibility should not be examined from the outset against *all* of Australia's international obligations, in particular against those contained in the two international covenants. It also raises the question of whether this scrutiny does not already take place (as it certainly should, and in many areas plainly does).[155]

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152 Australian Government, above n 3, 9.

153 National Human Rights Consultation Committee, above n 1, 175 (Recommendation 6), 357.

154 Ibid 175 (Recommendations 6–7).

155 The *Department of the Prime Minister and Cabinet, Legislation Handbook* (2000) 32, [6.34] provides in the preparation of legislative proposals that

> the Attorney-General's Department should be consulted on proposed provisions that may be inconsistent with, or contrary to, an international instrument relating to human rights, in particular:
>
> (a) the *International Covenant on Civil and Political Rights*, set out in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986* [now the *Australian Human Rights Commission Act*];
>
> (b) instruments dealing with discrimination on the ground of sex, race or national or ethnic origin as set out in Schedules to the *Sex Discrimination Act 1984* and the *Racial Discrimination Act 1975* and discrimination in the area of employment and occupation as set out in Schedule 1 of the *Human Rights and Equal Opportunity Commission Act 1986.*
>
> But there is no explicit reference to other treaties scheduled to the *Australian Human Rights Commission Act 1986* (Cth) (eg, *CRC*), or to treaties such as the *ICESCR* which are not scheduled or declared instruments for the purposes of this Act nor schedules to any other Act.

As with other proposals, the Commonwealth government's response does not propose distinguishing between ESC rights and C&P rights in compatibility requirements or in drawing up the mandate of the new Joint Committee on Human Rights; once again, the core UN human rights treaties provide the relevant framework.

4 *Possible Amendments to the Acts Interpretation Act*

The NHRCC also made a number of recommendations concerning the rules of statutory interpretation to enhance rights-consistent interpretation. The NHRCC addressed the issue of interpretation in two possible situations. The first was if no HRA were adopted; the second concerned the content of a HRA (the NHRCC's preferred scenario). The NHRCC recommended that, if a HRA 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 the interim list of rights and, later, the definitive list of Australia's human rights obligations'.[156] However, it appears from later in the Report that this recommendation was to apply only if a Commonwealth HRA were *not* enacted. The assumption was that such an Act would contain an interpretive provision requiring statutes to be interpreted in accordance with the human rights in the Act.

On the other hand, if a HRA were enacted, then the interpretive obligation would not have applied in relation to ESC rights. This is because the NHRCC's preference was simply not to include ESC rights in any Act but that, if contrary to its recommendation, such rights were included, then the interpretative provision in any HRA 'should not apply in relation to economic, social and cultural rights'.[157]

Thus, there appears to be an inconsistency in the NHRCC's position so far as the interpretation of statutes in accordance with ESC rights is concerned.[158] If no HRA were adopted, the NHRCC was content for statutes to be interpreted in accordance with ESC rights (presumably because there are no accompanying duties that can be enforced through judicial proceedings). If a HRA were adopted, the NHRCC did not wish to see ESC rights included at all, and if they were, did not wish an interpretive provision to apply to them. Thus, the NHRCC's preferred option of a HRA meant that there would have been no explicit direction to interpret statutes in accordance with ESC rights, unless its *Acts Interpretation Act* recommendation were simultaneously adopted with respect to ESC rights – something it did not propose. It would also have been feasible to include an ESC rights-consistent interpretive obligation in a HRA (and thus implement the earlier free-standing recommendation), while still

156 National Human Rights Consultation Committee, above n 1, 359.

157 Ibid 373.

158 See Katharine Young and Renuka Thilagaratnam, 'Big Question Is Whether Govt Will Adopt Human Rights Act', *The Canberra Times* (Canberra), 10 December 2009, 21.

preventing actions from being brought on the basis that there was an incompatibility between a statute and an ESC right, or that a public authority had failed to comply with an ESC right.

The point made earlier about the unjustified exclusion of ESC rights from the interim list of rights in relation to the audit, statements of compatibility, and parliamentary committee mandate, applies equally here: there is no technical or other persuasive reason why all the rights listed in the *ICESCR* should not be included as relevant interpretive standards from the outset. Indeed, 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,[159] although it seems that 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.[160] A direct instruction to the courts is likely to focus the mind of the courts on that issue and lead to more detailed examination of the relevant international standards. The effect of such a provision may also expand, or at least clarify, the application of this principle to statutes which have been enacted before Australia's signature, ratification or accession to the treaty in question, both as regards past and also future statutes. This proposal was a sound one and could be applied generally to all Australia's human rights treaty obligations.[161]

In its response to the NHRCC's Report, the Commonwealth government did not take up the suggestion of including a clear directive to the courts to interpret legislation in accordance with the core UN human rights treaties by which Australia is bound. The Framework refers to the existing rules of statutory interpretation and presumptions against erosion of fundamental rights and of consistency with international obligations, and indicates that statements of compatibility and any report of the new Joint Committee on Human Rights are relevant interpretive materials, at least where the relevant statute is unclear or ambiguous.[162] This aspect of the Framework in essence involves little change to the existing situation, and falls short of the NHRCC's proposal for an amendment to the Acts Interpretation Act. While the government's response draws no distinction between ESC rights and C&P rights, it is hard to see that the courts will consider themselves encouraged to make greater use of unincorporated

159 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 recent 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).

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

161 Indeed, there would appear to be no reason in principle why it should not apply to all Australia's treaty obligations and also to customary international law obligations binding on Australia. The latter are already covered by the general principle (*Polites v Commonwealth* (1945) 70 CLR 60 involved a rule of customary international law), but as rules of customary international law are often difficult to establish, the rule is likely to have less application in this context.

162 Australian Government, above n 3, 10.

international standards than they presently do. This is consistent with the government's underlying purpose in designing the Framework, which is to ensure that no new role is given to the courts in relation to any human rights standards.

5 *Statements of Compatibility of Bills with ESC Rights*

The NHRC Report also raised the possibility of a gap in coverage of ESC rights in relation to the scrutiny of legislation. The NHRCC recommended that ESC rights not be included in any HRA that was adopted. However, if – contrary to the NHRCC's advice – ESC rights had been included in an Act, then, 'statements of compatibility would need to deal with whether the proposed legislation is reasonably tailored to progressive realisation of these rights'.[163] If ESC rights were *not* to be included in a HRA, then it would plainly be important for the parliamentary committee which is given the overall rights scrutiny function to have ESC rights as part of its mandate. This is because conferring on a scrutiny committee terms of reference that refer only to the C&P rights in any HRA, is unlikely to lead to systematic review of ESC rights, even though these rights might arguably be covered by the existing mandates of that scrutiny committee.[164]

As events have developed, the government's Framework ensures that both ESC rights and C&P rights will form part of the Joint Committee's mandate, by stipulating that the Committee will have the core UN human rights treaties as part of its normative framework.

6 *'Non-Justiciability' of any ESC Rights Included in a Human Rights Act*

As already noted, the NHRCC's preference was that no ESC rights be included in a HRA. Its alternative proposal was that, if ESC rights were included, then they not be 'justiciable'. This recommendation has a number of dimensions, but essentially the NHRCC appeared concerned to ensure that a HRA would not explicitly empower a court to find that (a) a law or action of a public authority was inconsistent with an ESC right and thus possibly make a declaration of incompatibility, or (b) a public authority had failed to carry out a duty to act in a manner consistent with ESC rights.

The NHRCC's concern to ensure that the inclusion of any ESC rights in a HRA would not give rise to an independent right of action to enforce such rights was made clear by its recommendation relating to the creation of an independent

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163 National Human Rights Consultation Committee, above n 1, 366.

164 See, eg, the experience in NSW where the Legislation Review Committee has claimed that it has the mandate to scrutinise legislation for conformity with a range of international treaties, including the *ICESCR*, but devotes very little time to examination of these issues, focusing more on the sub-set of C&P rights that are at the core of the traditional common law scrutiny committee functions. See 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' [2009] University of New South Wales Law Research Series 43 <http://law.bepress.com/unswwps/flrps09/art44>.

right of action (which went beyond the ACT and Victorian Acts in permitting damages to be awarded in appropriate cases):[165]

> The Committee recommends that under any federal Human Rights Act an individual be able to institute an independent cause of action against a federal public authority for breach of human rights and that a court be able to provide the usual suite of remedies – including damages, as is the case under the UK Human Rights Act. The independent cause of action should not be available in relation to economic, social and cultural rights.[166]

There are a number of comments that one can make here. Many of the concerns about ESC rights have been formulated in a context where a court has the power to strike down statutes and in effect bind a government to take appropriate steps to implement a judgment. That is not the model adopted in a 'dialogue' Bill of Rights, since Parliament's decision as embodied in a statute remains valid, notwithstanding a declaration of incompatibility, until Parliament chooses to change it. This is something which it may or may not do in response to a court decision under a HRA, especially one relating to certain decisions on ESC rights (particularly if they had major distributional consequences). Of course, if a court interprets a statute differently to its established interpretation so that a more ESC rights-consistent interpretation is adopted, then that interpretation would stand unless and until the legislature decides to reverse that decision. (The same is true of an interpretation of a statute that adopts a C&P rights-consistent reading of a statute that the Parliament/executive had not anticipated or does not agree with.) The effect of the recommendation not to include ESC rights as enforceable rights would be that even clearly justiciable dimensions of ESC rights would simply be excluded from the ambit of a HRA.

The government's unwillingness to adopt a HRA (or other reforms) that makes even C&P rights justiciable under such legislation means that it did not have to address the issue. However, one assumes that these issues will return in the review of the Framework scheduled for 2014 (as well perhaps in non-curial examination of ESCR compatibility), as well as being of more immediate relevance in the context of the reviews of the ACT and Victorian human rights legislation.

7 *Judicial Review – The Relevance of Human Rights in General and ESC Rights in Particular*

The picture is further complicated by the NHRCC's recommendations regarding the relevance of the different categories of rights to the judicial review of administrative decisions:

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165 *Human Rights Act 2004* (ACT) s 40C(4); *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

166 National Human Rights Consultation Committee, above n 1, 377.

> 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.[167]

The proposal to amend the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to include the definitive list of human rights (including ESC rights) as a relevant consideration for the purposes of administrative decision-making[168] reflected the ACT *HRA* (section 40B(1)), which itself combines elements from the Victorian Charter (section 38(1)) and the UK *HRA* (section 6). However, it went beyond the UK position where the scrutiny by the court is of whether the decision reached is consistent with human rights, not whether the decision-maker has taken human rights appropriately into account in making the decision.[169]

While the proposed change would not have made ESC rights justiciable in the sense that a failure to comply with ESC rights would found a separate cause of action, it nevertheless would have provided (or affirmed) a basis on which judicial review of an administrative decision could be sought. In a sense, it may even have provided a higher level of protection, since a decision made by a decision-maker who fails to take into account a relevant ESC rights or to give it 'proper consideration' is reviewable, even if the decision reached does not in fact violate ESC rights or Australia's obligations under the *ICESCR*.[170] 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. Of course, judicial review provides procedural protection, so it may be that a court would be slow to refuse relief, even if it were clear that the decision-maker was likely to make the same decision.

The government's response to the NHRC Report proposes no changes to the existing law so far as the relevance of human rights standards to judicial review of administrative decision-making. The Framework merely notes that the Commonwealth 'has a comprehensive and extensive framework for independent review of administrative decisions' and that existing avenues for review of

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167 Ibid 376 (emphasis added).

168 Ibid 369.

169 The distinction between the two processes – one of vetting the ultimate decision for substantive compliance with human rights, and the other vetting the decision-making process to ensure that the decision-maker has given proper consideration to human rights (regardless of the rights-consistency of the decision ultimately reached) – has given rise to some confusion: see, eg *Tran v ACT Planning and Land Authority and Iron Property Pty Ltd (Administrative Review)* [2009] ACAT 46 (15 December 2009) [21]–[23], where the Tribunal refers to s 40B(1)(b), but appears to consider the case under s 40B(1)(a).

170 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; *Secretary of State for the Home Department v Nasseri* [2010] 1 AC 1, 19 (Lord Hoffmann).

administrative decision-making 'will now be supplemented by an increased focus on human rights in the development and implementation of government policies and practice'.[171] The sole change proposed is adding the President of the Australian Human Rights Commission as a permanent member of the Administrative Review Council. Once again, the desire to avoid any new functions for the courts applies to both categories of rights.

8 *The Role of the Australian Human Rights Commission in Relation to ESC Rights*

Although it did not recommend that ESC rights be directly invocable before the courts, the NHRCC was prepared to provide some additional avenues for the consideration of complaints of violations of ESC rights. The NHRCC recommended that the functions of the AHRC be significantly expanded so that its mandate in relation to 'human rights' include *all* the principal UN human rights treaties to which Australia is party (the *ICESCR* is currently not included).[172] It also recommended that the AHRC have the role of examining any Bill at the request of the Attorney-General or a parliamentary rights committee for consistency with the interim and definitive lists of Australia's human rights obligations, and also that it have the power to inquire into any act of practice of a federal public authority or entity performing a public function under federal law for consistency with the interim/definitive list of rights.[173] These were all useful recommendations, though once again there seemed to be no reason for a two-stage process with an interim list of rights followed by a definitive list.

The NHRCC went further, though, in recommending that the AHRC be given the power to consider complaints of violation of any human right. The AHRC would first attempt to conciliate these complaints, but if conciliation failed, the complaints could be brought before the courts. However, the NHRCC expressly recommended that the full range of procedures and remedies *not* be available to those complaining of ESC rights violations: if conciliation failed in the case of ESC rights-complaints 'there should be no scope to bring court proceedings'.[174] On the other hand, the NHRCC recommended that complaints under the *Convention Concerning Discrimination in Respect of Employment and Occupation*,[175] relating to discrimination in occupation and employment, should be able to be brought to court if conciliation fails At present, if the AHRC finds that there has been discrimination within the terms of that convention (or on one of the additional grounds of prohibited discrimination that Australia has specified under the treaty), it may report to the Attorney-General (who must table the

171 Australian Government, above n 3, 10.
172 See *Australian Human Rights Commission Act 1986* (Cth).
173 National Human Rights Consultation Committee, above n 1, 360.
174 Ibid.
175 Opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) ('*ILO Convention No 111*').

report in Parliament).[176] It is not possible to take the matter to court, as it is in the case of those forms of discrimination covered by one of the discrimination statutes which the Commission also administers.

ILO Convention No 111 is, of course, a treaty which embodies obligations to ensure the enjoyment of an economic right – the right to enjoy equality of opportunity and treatment, and not to be subject to discrimination, in the field of work. The *Convention* does not explicitly confer individual rights but imposes obligations on States Parties to 'to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof'.[177] Appropriate measures to ensure the observance of the policy include the adoption of legislation and the repeal of inconsistent laws. Thus, this is one example of ESC rights that the NHRCC was prepared to permit to be enforced ultimately by the courts at the national level. It may be that this was because it involves discrimination in employment – an area where there is a long history of judicial supervision and enforcement of rights – or because it involves discrimination, since claims of discrimination in the enjoyment of rights are generally considered to be justiciable before international bodies and domestic courts in relation to both C&P rights and ESC rights,[178] even when there is unease about allowing an underlying ESC right to be independently enforceable.

However, the NHRCC did not draw the obvious implication from its recommendation, namely that if alleged violations of the right to equality and non-discrimination in the context of employment and occupation can appropriately be brought before the courts, then there would appear to be no persuasive reason why similar provision could not be made in relation to the non-discrimination components of *all* the substantive rights guaranteed in the *ICESCR*. Article 2(2) of the *ICESCR* provides for non-discrimination in the enjoyment of rights, while article 3 provides additional guarantees against sex discrimination in the enjoyment of *Covenant* rights. It is generally accepted that these guarantees are justiciable, a point underlined by the international jurisprudence on the scope of article 26 of the *ICCPR* to the effect that a State

176 See the description of the process in Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint by Ms Tracy Gordon of Discrimination in Employment on the Basis of Criminal Record* (February 2006) app 1 <http://www.hreoc.gov.au/legal/humanrightsreports/hrc_report_33.html>. Reports to the Minister under the Act can be found at Human Rights and Equal Opportunity Commission, *Reports to the Minister under the AHRC Act* (2009) <http://www.hreoc.gov.au/legal/humanrightsreports/index.html>.

177 *ILO Convention No 111* art 2.

178 Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, 5th sess, UN Doc E/1991/23 (14 December 1990) [5]. At art 2(3)(a):

> The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the *International Covenant on Civil and Political Rights* are already obligated (by virtue of arts 2(1), 2(3), 3, 26 of that *Covenant* to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that *Covenant* are violated, 'shall have an effective remedy' …

Party is obliged to avoid discrimination not just in relation to C&P rights but also in relation to ESC rights.[179]

It would appear difficult to draw a distinction between providing protection against discrimination in employment, but not providing protection against discrimination in education (also an area which falls within existing discrimination statutes, though that need not be a determinative feature). Similarly, protection against discrimination in relation to health, housing, social security and other rights would appear to pose no greater conceptual or practical difficulties than discrimination in employment under *ILO Convention No 111* – indeed, some of these issues have been addressed under existing law. Further, Australian courts and tribunals have on many occasions considered the international dimensions of the rights to freedom of association and related trade union rights, or other rights as guaranteed by ILO conventions, generally where those standards have been referred to directly in statutes.[180]

The government's response has deferred these issues to another day or to other contexts, since the Framework proposes no new complaints jurisdiction for the AHRC in relation to any category of rights. The status quo remains, and this means that even under its existing complaints jurisdiction the AHRC has the power to investigate claims of violations of *ICCPR* rights, but not of *ICESCR* rights.

VIII THE OVERALL ASSESSMENT AND JUSTIFICATION FOR ASSIGNING ESC RIGHTS' 'POOR COUSIN' STATUS

The NHRCC summarised its reasoning for refusing to recommend that ESC rights be made judicially enforceable in the same way as C&P rights in chapter

179 See Martin Scheinin and Malcolm Langford, 'Evolution or Revolution? Extrapolating from the Experience of the Human Rights Committee' (2009) 27(1) *Nordic Journal of Human Rights* 97, 104–9; Martin Scheinin, 'Human Rights Committee: Not Only a Committee on Civil and Political Rights', in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009),540; Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769.

180 See, eg, *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, in which the High Court considered the terms of the *Convention concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, [1994] ATS 4, (entered into force 23 November 1985) ('*ILO Convention 158*'); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 (considering ILO Conventions Nos 111 and 158 and the interpretations of ILO supervisory bodies); *Stannard, re an application for a Writ of Mandamus and a Writ of Certiorari against Honourable Vice President McIntyre* [2004] FCAFC 310 (25 November 2004) [67] (ILO Convention No 158); *CSR Viridian Limited (formerly Pilkington Australia Limited) v Claveria* [2008] FCAFC 177 (30 October 2008) (extensive discussion of provision of ILO Convention No 158); *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910 (29 August 2003) [155]–[192] (consideration of rights to freedom of association and right to organise contained in ILO Conventions Nos 87 and 98, the *ICCPR* and *ICESCR*); *Lee v Hills Before & After School Care Pty Ltd* [2007] FMCA 4 (15 January 2007) (extensive discussion of art 6 of ILO Convention No 158, its drafting history and practice under it, to elucidate meaning of section of Act); *Konrad v Victoria Police* (1999) 165 ALR 23 (*ILO Convention No 158*).

15 of the Report.[181] It argued (or concluded) that 'it would be very difficult, if not impossible, to make such rights matters for determination in the courts'.[182] Yet neither in the report generally nor in this section did the NHRCC make any substantial reference to experience elsewhere, other than South Africa, preferring to rest its arguments on general statements about the nature of ESC rights and their non-justiciability. While the matter is not uncomplicated, the experience in the countries mentioned above (among others) makes it clear that it is certainly not 'impossible' and arguably not 'very difficult' to provide for some level of judicial enforceability of appropriate aspects of ESC rights. The issue is not whether the only avenue for implementation of ESC rights is by way of judicial enforcement, or even whether all, or most, dimensions of ESC rights can be judicially enforced, but rather whether there are aspects of such rights which can be appropriately and effectively implemented in this way. Abundant experience elsewhere makes it clear that there are.[183]

The NHRCC's second objection was that the implementation of ESC rights involves the types of debate over resources that can and should only be dealt with by the elected legislature, and that it would be inappropriate for courts to engage in determinations of this sort[184] – a reprise of the expertise, institutional competence and separation of powers arguments in relation to ESC rights. Yet not all adjudications of ESC rights involve such decisions (forced eviction jurisprudence shows this, and many discrimination claims are par excellence justiciable). The experience in South Africa and elsewhere shows that there is a role for the courts in monitoring ESC rights, even where resource allocation is at the heart of disputes. The NHRCC also downplayed the relevance of the resource implications of many C&P rights determinations, as well as of other decisions the courts are called on to make.[185]

The third argument was that it is the states and territories that are primarily responsible for delivery of services in these areas of greatest relevance to ESC rights. The same point might be made in relation to C&P rights, given the importance of state regulation of areas such as criminal law and justice, defamation, and rights of assembly. In any event it underplays considerably the importance of Commonwealth powers, legislation and activities in areas of importance to ESC rights.[186] Social security, employment, trade union rights, and intellectual property rights are just some areas of Commonwealth regulation and activity. Furthermore, the notion that because the Commonwealth simply funds activities means that there is no role for it to include human rights standards in its funding agreements along with the many other performance indicators seems an

181 National Human Rights Consultation Committee, above n 1, 365–6.
182 Ibid 365.
183 See the discussion above at Part V ('Judicial Enforcement of Economic, Social and Cultural Rights').
184 National Human Rights Consultation Committee, above n 1, 365.
185 See Hanks et al, above n 132, [22]–[31].
186 Indeed, it is ironic that the ACT and Victoria chose not to include some rights in their Human Rights Acts (including some ESC rights, such as the right to social security and the right to form trade unions) because they fell within areas largely regulated by the Commonwealth.

unduly narrow approach to take (especially given the NHRCC's recommendations in relation to audits of all government activities for human-rights consistency). Indeed, this approach has the potential to maintain a gap in protection, not just where a state or territory does not have a HRA, but even where it does. This is because it is not clear the extent to which state or territory activities conducted under the provisions of Commonwealth legislation or a binding agreement with the Commonwealth government are subject to state/territory Bills of Rights. The area of cooperative schemes and Commonwealth-state funding agreements is a major area of intergovernmental activity and should be brought within a human rights framework.

The NHRCC dismissed the South African experience as 'unique',[187] without demonstrating that it is so or why the lessons learnt there and elsewhere are not relevant to Australia (certainly the UK Joint Committee on Human Rights has been prepared to draw lessons for the UK from that experience).[188] The NHRCC further concluded, without argument, that it was 'not prudent' to 'impose' on Australian courts the type of review function the South African Constitutional Court undertakes, though the South African formulation and the role it confers on judges is not the only model of judicial protection of ESC rights.

The NHRCC appeared to place some considerable weight on the view of 'many judges and retired judges' who 'have expressed their concerns about the courts' capacity to determine the limits on economic and social rights, saying it is not appropriate for judges to opine whether the government has dedicated enough resources to achieving particular economic and social rights'.[189] It has frequently been the case that some judges have objected to the introduction of Bills of Rights (even those embodying only C&P rights) on the ground that it is not appropriate for the courts to be given such tasks. Often these concerns have not been supported by an informed understanding of the extensive developments in human rights law in other jurisdictions, and concerns about undermining the courts or fundamentally distributing the relationship between the different branches of government have in nearly all cases proved to be unfounded.

The NHRCC also called in aid the observations of Professor Campbell and Dr Nicholas Barry, who submitted that:

> Courts have a bias towards negative rights, which protect the individual from interference by the state. Because ensuring the protection of socioeconomic rights requires positive action by the state, it involves decisions about the allocation of state resources which courts do not have the expertise or information to make.[190]

This passage essentially restates the traditional position, assumes that ESC rights invariably and only involve major distributional choices, and fails to respond to the many arguments that have shown that such a simplistic dichotomy does not represent current thinking or practice in relation to ESC rights.

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187 National Human Rights Consultation Committee, above n 1, 365.
188 See above Part VI(B).
189 National Human Rights Consultation Committee, above n 1, 365.
190 Ibid 366.

However, the passage that perhaps best captured the concerns of the NHRCC was its description of the situation of which it learnt, at the roundtable it held in the remote community of Mintabie, an opal mining community in South Australia with a population of around 200 people, which had both a small school and a health clinic. According to the NHRCC, a choice was made to close the town's health clinic but to maintain the primary school (it is not clear from the Report where the funding came from, but the available resources apparently did not extend to maintaining both facilities). The NHRCC wrote:

> If it came to a choice between the maintenance of the clinic or the primary school, there would be no suitable criteria a judge could apply to make such determination. If the residents had petitioned the court to maintain the clinic, the judge might not even be apprised of the fact that the school was being maintained.[191]

One might ask whether this is either a realistic or fair way to portray the situation that might arise if, say the right to health, right to education and right to non-discrimination were included in a HRA that applied to the government with responsibility for providing those services. If a case were brought to contest the closure of a publicly funded clinic, it seems highly unlikely that the government, as defendant, would not raise the issue of resources. If the government did see itself as having to make a choice, arguments to support its claim that resources were not available and a description of how it set the priorities it did, would surely be put before the court; the question of the core obligation or of reasonable limitations on the enjoyment of the rights concerned would also need to be explored. Requiring government to undertake this analysis using a human rights framework may even provide a spur to finding additional resources to fund the health clinic or ensure appropriate health services in some other way. The role of the judge in such a case depends in part on the formulation of the rights in question: the South African model provides one formulation of a right that does not involve the judge deciding on the allocation of resources, while the UK Joint Committee on Human Rights proposals offer another. Thus, rather than forcing a judge into overturning a government's decisions on allocating resources, the inclusion of ESC rights as justiciable rights may stimulate an analysis of the situation in rights terms and may facilitate ways of addressing the shortfall or at least making transparent the rational decision-making process that underlies it.

In short, the NHRCC's summary of the concerns and arguments that lead to its major conclusion on ESC rights – fundamentally its acceptance of the traditional portrayal of the nature of ESC rights and the possibilities of appropriate judicial oversight of them – is far from persuasive.

191 Ibid 365–6.

IX THE RELEVANCE OF CIVIL AND POLITICAL RIGHTS TO THE PROTECTION OF ESC RIGHTS

Where human rights legislation provides less extensive protection for ESC rights than for C&P rights by excluding the justiciability of ESC rights, attempts to use the enforceable C&P rights to achieve the advancement of economic and social interests and thus indirectly the enforcement of ESC rights, is likely. This has parallels at the international level and in other jurisdictions where only C&P rights may be available;[192] significant protection of aspects of ESC rights have been achieved in this way.[193] Of particular importance in this regard is be the right to non-discrimination and equality in the enjoyment of rights – especially if a HRA reproduces article 26 of the *ICCPR* which guarantees protection against discrimination in the enjoyment of ESC rights as well as C&P rights.[194]

On the other hand, this may mean that claims which are in essence ESC rights will be sought to be packaged as C&P rights claims; and in any case the overlap between the two sets of rights and interest protected by them is not complete, and relying on C&P rights to try to enforce ESC rights can only be a partial and unsatisfactory approach.

While this was the situation that would have been created by the NHRCC recommendations of a C&P rights-based HRA, the government's refusal to propose such an Act leaves the issue moot in the context of the Framework.

X CONCLUSION

Notwithstanding the importance of the many recommendations the NHRCC made – generally, and in relation to ESC rights in particular – it is hard not to feel a real sense of disappointment at its failure to engage more fully with the issues relating to ESC rights. For all its boldness on other matters, the NHRCC proved to be timid on this important issue. There was a considerable body of opinion, from inquiries and other bodies such as the UK Joint Committee on Human Rights (to say nothing of other commentary), that should have encouraged it to be bolder in its recommendations than it has been.

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192 See, eg, the role of C&P rights in relation to protection of aspects of the right to housing: ACT ESCR Research Project, 'Protecting the Right to Adequate Housing in the ACT' (Discussion Paper, Australian National University RegNet and University of New South Wales AHRC, October 2009).

193 See generally Colin Warbrick, 'Economic and Social Interests and the *European Convention on Human Rights*' in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 243, 272–97; Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff, 2009); Ellie Palmer, *Judicial Review, Socio-Economic Rights, and the Human Rights Act* (Hart Publishing, 2007).

194 Both s 8 of the *Human Rights Act 2004* (ACT) and s 8 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) would appear to have this effect, but the question has not been the subject of any judicial decision to date. See Denise Meyerson, 'Equality Guarantees and Distributive Inequity' (2008) 19 *Public Law Review* 32.

While the scale of the NHRC was large and the time limited, it was a significant opportunity for a substantive and detailed exploration of the important theoretical and practical issues around the protection of ESC rights. While the NHRCC's proposals – both those taken up by the government and those that were not – were important ways of strengthening the protection of human rights (including ESC rights), the NHRCC's unwillingness to challenge the traditional and out-of-date discourse around ESC rights and to set out possible options for judicial enforcement of some aspects of ESC rights, is unfortunate. The upshot of its underlying ambivalence towards those rights means that on the issue of the full recognition of ESC rights the NHRCC turned out to be one of the least progressive of all the independent bodies that have examined the issue in Australia or the UK in recent years.

The NHRCC's failure to propose that ESC rights receive a similar level of protection before the courts as C&P rights would have limited the chances that even a government committed to the adoption of a HRA would have included ESC rights as justiciable rights in some form. The government's rejection of any form of HRA that involves rights enforceable by the courts renders the NHRCC's distinction between the two categories of right moot in the short term, though it may influence debates on the issue in the ACT and Victoria over the inclusion of ESC rights in their Bills of Rights.

Ironically, in Australia's Human Rights Framework, the Commonwealth government draws no distinction between C&P rights and ESC rights. This is not because it sees them as identical for all purposes – and certainly one could not assume that the government would support the inclusion of justiciable ESC rights in any Commonwealth HRA it might eventually be persuaded to adopt. The identical treatment of both categories of rights arises from the government's studious avoidance of conferring any new powers on the courts in relation to either category of rights; in other areas such as education, an audit and the parliamentary process, it appears to see no reason to distinguish between them. Nonetheless, debate over the nature and content of ESC rights and differences between them is likely to emerge in the context of parliamentary scrutiny of Bills and delegated legislation, albeit with limited opportunities for such considerations to affect judicial interpretation and application of these rights.

Whether the debate over a Bills of Rights will still be live (or have come back to life) in 2014, is unclear. If it is, the work of the NHRCC will still be relevant to the form and content of any legislation that might be adopted, and it will be important to be aware of the limitations of the analysis of ESC rights and their justiciability that the NHRCC has set forth. In the meantime, however, it seems that once again Australia will need to rely on either the ACT ('Australia's first Bill of Rights') or Victoria ('Australia's first state Bill of Rights') to lead the way by incorporating more extensive protection for ESC rights into their existing Human Rights Acts as they review and improve the operation of their human rights legislation.