

Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

Submission from the undersigned members of the Economic, Social and Cultural Rights (ESCR) Network (Australia & Aotearoa/New Zealand) and associated legal academics & professionals.

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Written by:

[Associate Professor Cristy Clark](#), University of Canberra Law School

[Professor Beth Goldblatt](#), University of Technology Sydney Faculty of Law; Visiting Professor of the School of Law at the University of the Witwatersrand, South Africa

[Associate Professor Jessie Hohmann](#), University of Technology Sydney Faculty of Law

[Dr Genevieve Wilkinson](#), University of Technology Sydney Faculty of Law

Endorsed by:

Dr Lida Ayoubi, Senior Lecturer Auckland University of Technology Law School

Associate Professor Amy Barrow, Macquarie Law School

Associate Professor Becky Batagol, Faculty of Law Monash University

Dr Louise Buckingham, Adjunct, UTS Faculty of Law

Associate Professor Julie Debeljak, Faculty of Law Monash University

Dr Sara Dehm, Senior Lecturer, UTS Faculty of Law

Dr Julia Dehm, Senior Lecturer, La Trobe Law School

Kate Eastman AM, SC (New Chambers)

Associate Professor Colin Hawes, UTS Faculty of Law

Professor Sarah Joseph, Griffith Law School

Associate Professor Daniel Joyce, School of Global and Public Law, Faculty of Law and Justice, UNSW.

Professor Helene Lambert, UTS Faculty of Law

Dr Dani Larkin, Senior Lecturer in Law, University of Queensland

Associate Professor Teresa Liebesman, UTS Faculty of Law

Professor Lucas Lixinski, School of Global and Public Law, Faculty of Law & Justice, UNSW

Professor Craig Longman, Professor of Practice, Jumbunna: Institute for Indigenous Education and Research, Research Unit.

Professor Arlie Loughnan, Professor of Criminal Law and Criminal Law Theory, The University of Sydney

Associate Professor Trish Luker, UTS Faculty of Law

Professor Alan Morris Professor, UTS Institute for Public Policy and Governance

Dr Sean Mulcahy, Research Officer, Gender, Law and Drugs Program La Trobe University

Professor Brian Opeskin, UTS Faculty of Law.

Associate Professor Sophie Riley, UTS Faculty of Law

Dr Gerald Roche, Senior Research Fellow, Department of Politics, Media & Philosophy, La Trobe University

Professor Ben Saul, Challis Chair of International Law, The University of Sydney

Dr Laura Smith-Khan, Chancellor's Postdoctoral Research Fellow, UTS Faculty of Law.

Associate Professor Ramona Vijayarasa, UTS Faculty of Law

Recommendations

Recommendation 1: Include fully justiciable economic, social and cultural rights for individuals in a new Commonwealth Human Rights Act, using the clearly articulated international law, standards, and jurisprudence to guide Australia's path.

Recommendation 2: Consider including an interpretive provision similar to section 31 of the *Human Rights Act 2004* (ACT) to guide the interpretation of the rights contained in a new Commonwealth Human Rights Act.

Recommendation 3: Include a free-standing right of legal action in a new Commonwealth Human Rights Act.

Recommendation 4: Include a complaints mechanism, facilitated by the Australian Human Rights Commission, in a new Commonwealth Human Rights Act.

Recommendation 5: Include a fully justiciable right for individuals to the highest attainable standard of physical and mental health, reflecting Australia's obligations to respect, protect and fulfil all elements of the right.

Recommendation 6: Include a fully justiciable right to adequate housing, with the standards set out in ICESCR and subsequently interpreted in international law as the minimum standard reflecting Australia's obligations in international law.

Recommendation 7: Include a fully justiciable right to social security, including social insurance, social assistance and social services for the social protection of all.

Recommendation 8: Include a fully justiciable right for individuals and groups to the human right to water, reflecting Australia's international obligations to respect, protect and fulfil all elements of the right.

Recommendation 9: Consider including specific language recognising the unique reciprocal relationship of Aboriginal and Torres Strait Islander peoples to water, and the related right to self-determination in water access and management for Traditional Owners.

Recommendation 10: Include a fully justiciable right for individuals and groups to the human right to a healthy environment.

Recommendation 11: Consider including specific language recognising the unique reciprocal relationship of Aboriginal and Torres Strait Islander peoples to lands and waterways, and the related right to free, prior and informed consent in relation to any proposed projects that might impact their territories.

Recommendation 12: Australia should ratify the Optional Protocol to the ICESCR.

Recommendation 13: The *Australian Human Rights Commission Act 1986* (Cth) should be amended to include ICESCR in the definition of human rights so that the covenant is explicitly within the mandate of the AHRC.

Recommendation 14: Human rights education about economic, social and cultural rights included in international law and a new Commonwealth Human Rights Act is important for the community, advocates, judiciary and government bodies.

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1. Introduction

The Economic, Social and Cultural Rights (ESCR) [Network](#) (Australia & Aotearoa/New Zealand) was established in 2019 at a conference held at the University of Technology Sydney Faculty of Law. The purposes of the network are to:

- raise the profile of economic, social and cultural rights research and advocacy in Australia and Aotearoa/New Zealand;
- strengthen collaboration between scholars working on these rights, and engagement with government, advocates and others;
- contribute our economic, social and cultural rights expertise to addressing real world problems;
- provide a home for economic, social and cultural rights scholarship, discussion, news, and events.

The authors of this report are members of the ESCR Network and acknowledged global experts on social and economic rights, and specifically, the right to housing (A/Prof Jessie Hohmann), the right to health (Dr Genevieve Wilkinson), the right to water (A/Prof Cristy Clark), and the right to social security (Prof Beth Goldblatt).

The purpose of this submission is to argue for the full equivalence of economic, social and cultural rights (ESCRs) with civil and political rights (C&PRs) in any proposed Human Rights legislation emerging from this Inquiry and within a proposed human rights framework for Australia and for the inclusion of environmental rights. The submission is in part a response to the Australian Human Rights Commission (AHRC) position paper which, while acknowledging the equivalence of civil and political and economic, social and cultural rights, recommends that ESCRs should be somewhat limited to immediate, realisable rights by removing obligations of 'progressive realisation' from the reach of the courts and restricting these to other parts of the human rights framework (including parliamentary scrutiny of proposed laws). Its Position Paper stated:

The Commission has designed its proposals for ICESCR implementation with the aim of ensuring compliance with Australia's Constitution. The Commission therefore proposes articulations of ICESCR rights that are somewhat narrower than the full expression of those rights contained in ICESCR. Specifically, the Commission has chosen not to require progressive realisation principles to be considered by the courts. The Commission notes that it does not consider progressive realisation principles to be inherently non-justiciable. However, it acknowledges the importance of providing certainty that the implementation of ICESCR is constitutional, suitably adapted for the Australian context, and directly enforceable by the courts. It also recognises the importance of providing sufficient clarity about the contents of rights – both for the benefit of judges and public authorities interpreting and applying the rights; and for the benefit of individuals that seek to rely upon them through complaints and judicial review processes.¹

The AHRC Report does not elaborate on the purported constitutional barriers to enforceability or suitability and how excluding progressive realisation might compromise clarity by judges,

¹ Australian Human Rights Commission, *Position Paper: A Human Rights Act For Australia* (2023), 128 <https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf>.

courts or the public. However, this was an issue that arose in the 2009 Report of the National Human Rights Consultation Committee (NHRCC),² that has been subject to expert critique in the years that followed,³ and should now be considered outdated.

Our submission argues for the inclusion of fuller justiciable federal rights, including progressive realisation, that go beyond existing state and territory human rights laws.

2. Our Vision: A Human Rights Act for Australia in the 21st Century

Australia finds itself in the unique position of being able to enshrine a Commonwealth Human Rights Act that is forward looking and responds to the present and future. The aim of the Australian government and public should be a charter of rights for our 21st century challenges and opportunities, including the relationship between human beings and the unique and precious Australian land/seascape and environment; the relationship between Australia's First Peoples and those who have since made Australia home; emerging technologies and new ways of living; and new forms of inequality or disadvantage.

Currently, Australia is an outlier and significantly behind other democracies in its protection of human rights. UN bodies which oversee the obligations that Australia has taken on in international law have repeatedly called on Australia to enact legislation that protects human rights domestically to give effect to those international obligations on the ground where people can claim them. At the same time, UN bodies have urged Australia to make the full range of rights in international law claimable at the international level, notably by signing the Optional Protocol to the ICESCR, which would allow Australians to make human rights complaints under that Covenant, as is possible under the ICCPR.

State and Territories are ahead of the federal government in enacting human rights legislation, and these legislative enactments have been valuable in advancing rights protections and in holding governments accountable. They demonstrate that well-conceived charters of rights can lead to greater fairness, and a better legal and policy landscape.

Once bills of rights are enshrined, they can be legally or politically difficult to update or change. This is why it is vital for Australia to embrace the potential of future-facing human rights.⁴ The major challenges of the 21st century (which include climate change, unregulated AI, economic inequality, democratic erosion, insecurity and growing inequality) require a visionary approach to human rights that equips our society and governments with the tools to ensure these challenges are informed by appropriate rights and rights frameworks.

² National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 344, 365.

³ See, eg, Andrew Byrnes, 'Second-class rights yet again? Economic, social and cultural rights in the report of the national human rights consultation' (2010) 33(1) *UNSW Law Journal* 193.

⁴ The international human rights Australia has accepted under the ICESCR include the right to the continuous improvement of living conditions, as an aspect of the right to an adequate standard of living. Australia is in a position to re-think how continuous improvement of living conditions can be understood through existing ESCRs, and in light of pressing crises such as climate change. See further Hohmann and Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Bloomsbury 2021).

3. What a Federal Human Rights Act should include

While we hope that Australia will embrace the opportunity for a visionary human rights act that looks to the future, we are also concerned to point out one specific angle where Australia's human rights legislation must be robust and clear. That is on economic, social and cultural rights (ESCRs).

We propose inclusion, on an equal basis with C&PRs, ESCRs, alongside environmental rights, in federal human rights legislation, consistent with our obligations under international human rights treaties to which Australia is a party. The economic, social, cultural and environmental rights should emerge from this international framework but also be adapted to our specific values, needs and vision as a country. We begin by setting out why Australia should join the vast majority of countries in the world that protect these rights, and why such rights are critically important. We explain how the content of these rights, and the obligations they impose on government, can be easily interpreted by Chapter 3 Courts, consistent with their institutional role within our constitutional model and legal system.

3.1 *Equivalence of human rights*

The international community determined in the 1993 Vienna Declaration and Programme of Action that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.⁵

In recent decades there has been a marked increase in the number of national constitutions that contain social and economic rights. In 2013, more than 90 percent of 195 constitutions contained at least one social or economic right, the most common being the right to education.⁶ The then United Nations Special Rapporteur on extreme poverty and human rights, Prof Philip Alston, noting this constitutional trend, pointed to a worrying 'paradox' of inadequate legislative and institutional translation of such rights into law, particularly in some of the wealthiest countries.⁷ He stressed the philosophical reasons for addressing this problem, i.e. that 'the two sets of rights are indispensable elements in enabling individuals to live dignified and fulfilling lives' and the doctrinal basis for equivalence baked into the UDHR and all of the human rights treaties.⁸ He did acknowledge that each country must ensure the realisation of these rights in ways that are consistent with their contexts, histories and traditions, but that institutionalisation must be approached with urgency to overcome 'growing inequality and widespread material deprivation in a world of plenty'.⁹

⁵ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993).

⁶ Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and social rights in national constitutions' (2014) 62(4) *American Journal of Comparative Law* 1043 doi:10.5131/AJCL.2014.0030.

⁷ *Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc A/HRC/32/31 (28 April 2016).

⁸ *Ibid.*

⁹ *Ibid.*

The inclusion of social, economic and cultural rights in the human rights legislation of Queensland and the ACT are evidence that these rights are in fact consistent with our human rights culture as a country and are constitutionally, legislatively and judicially capable of operating effectively to hold government to account on key rights such as health care, education, housing, workplace rights, culture and, most recently, the environment.¹⁰ These rights have been incrementally expanded in the ACT, demonstrating that progressive evolution is necessary and desirable. Federal human rights legislation is an opportunity to extend these successful models and provide full equivalence of all human rights at the national level.

3.2 Justiciability

The justiciability of economic, social and cultural rights is beyond doubt. Since at least 1990, there has been a clear understanding by the UN Committee on Economic, Social and Cultural Rights ('UN CESCR') that rights under the Covenant are justiciable.¹¹ This has been reiterated by UN Special Rapporteurs,¹² the UN CESCR,¹³ the Office of the High Commissioner for Human Rights ('OHCHR'),¹⁴ and numerous expert scholars.¹⁵ The question of justiciability is inherently linked to the question of state obligations for the rights, which we discuss below.

Although the 2009 Report of the NHRCC reiterated the equal status of ESCRs and C&PRs, it adopted the position that ESCRs were not justiciable for constitutional reasons. Under Australian constitutional law, a strict separation of powers is imposed at the federal level with

¹⁰ The ACT Government has committed to progressing legislation to include a right to a healthy environment in the *Human Rights Act 2004* during this term of government: ACT Government, 'Your Say Report – Right to a Healthy Environment – Report on What We Heard', *Paper For Tabling, Presented by Tara Cheyne to the Legislative Assembly for the Australian Capital Territory* (December 2022), <https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your_Say_Report_-_Right_To_A_Healthy_Environment_-_Report_On_What_We_Heard.pdf>.

¹¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations* (Art. 2, par. 1), 5th CESCR sess, UN Doc E/1991/23 (1990).

¹² In the context of housing, see eg E/CN.4/Sub.2/1993/15 para 108-112; E/CN.4/Sub.2/1994/20 para 27 'Myth 6: Housing Rights are Non-Justiciable'; E/CN.4/Sub.2/1995/12 para 79-96.

¹³ See, particularly, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant* (1998) UN Doc E/C.12/1998/24 [4]: 'In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.'

¹⁴ OHCHR, Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights (2008) 30-31: 'Judicial enforcement of human rights is fundamental. A right without a remedy raises questions of whether it is in fact a right at all.'

¹⁵ See, eg, Aoife Nolan, Bruce Porter, and Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal* (16 July 2009), *CHRGJ Working Paper No. 15*, available at <<https://ssrn.com/abstract=1434944>>; Bruce Porter, 'The Reasonableness of Article 8 (4) – Adjudicating Claims from the Margins' (2009) 27(1) *Nordisk Tidsskrift for Menneskerettigheter*, 39–53; Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) Cambridge University Press: Cambridge, 3-45 doi:10.1017/CBO9780511815485.003; Rebecca Young 'Justiciable socio-economic rights? South African insights into Australia's debate' (2008) (15) *Australian International Law Journal* 181–211.

the result that federal courts cannot exercise non-judicial powers.¹⁶ Relevantly the exercise of judicial power involves the determination of a legal 'matter' by judicially manageable standards.¹⁷ The NHRCC received advice from the then Commonwealth Solicitor-General, Stephen Gageler, and the then Australian government Solicitor Chief General Counsel, Henry Burmester, that certain ESCRs lacked judicially manageable standards due to being insufficiently definite.¹⁸ Here Gageler and Burmester pointed particularly to the apparently open-ended language in articles 7, 11, 12 and 13 of the ICESCR, and argued, '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)?'¹⁹

This advice appears to have been accepted and incorporated into the recommendations of the 2009 Report of the NHRCC.²⁰ However, while it was provided by eminent constitutional experts, it was informed by decontextualised reading of the text of the ICESCR, rather than drawing on established international jurisprudence and theory on the content of ESCRs and the nature of the obligations imposed by the ICESCR. As Emeritus Professor Andrew Byrnes summarised the following year:

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' which underpins the reasoning, makes no reference to the extensive jurisprudence of the CDESCR, 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.²¹

It is also notable that the advice was contradicted at the time by expert legal advice requested by the Human Rights Law Centre.²²

In the following section, we have sought to clarify the nature of the obligations imposed by the ICESCR, and to demonstrate that the content of ESCRs is sufficiently definite for judicial enforcement.

¹⁶ *R v Kirby; ex parte Boilermakers' Society of Australia* [1956] HCA 10; 94 CLR 254; [1956] ALR 163.

¹⁷ *Huddart Parker v Morehead* (1909) 8 CLR 330.

¹⁸ Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Opinion*, Solicitor-General Opinion Nos 40, 68 (2009) [48].

¹⁹ Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Opinion*, Solicitor-General Opinion Nos 40, 68 (2009) [49].

²⁰ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 317.

²¹ Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *University of New South Wales Law Journal*, 193, 220-221.

²² Peter Hanks QC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic, Social and Cultural Rights: Memorandum of Advice* (9 December 2009) <<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/615b8302e84c6260dd892dbc/1633387271898/Advice+on+Constitutionality+and+Justiciability+of+ESC+Rights.pdf>>.

3.3 Obligations

Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. The obligation to respect can generally be correlated with the 'negative' duty not to take any actions that might negatively impact on social and economic rights. The obligation to protect places an obligation on governments to prevent the impairment of rights by third parties. This obligation primarily requires State regulatory action to prevent third parties from infringing the rights of others. Finally, the obligation to fulfil involves an obligation to take positive action to provide for the realisation of the rights protected under the ICESCR – including obligations such as funding and carrying out programs designed to directly assist in the realisation of the rights in question, as well as adopting appropriate legislative, judicial and administrative frameworks to support the promotion of these rights. In order to provide further clarity, CESCR has outlined three subcategories of the obligation to fulfil: facilitate, promote, and provide.

Article 2(1) of the ICESCR sets out the obligation to progressively realise economic, social and cultural rights using the maximum of resources available,²³ and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. The interpretation of Article 2(1) of the ICESCR has historically been the subject of debate.²⁴ It has been argued that the standard of progressive realisation, and the qualification regarding resource availability, means that the obligations under the ICESCR are 'devoid of meaningful content.'²⁵ However, it is widely acknowledged that this debate is outdated,²⁶ and CESCR,²⁷ the International Commission of Jurists,²⁸ and many scholars have

²³ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)*, UN Doc E/1991/23(1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

²⁴ For an overview of this debate, see Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Politics, Morality* (2nd ed, 2002) 246-275. For a detailed analysis of this issue in the context of South Africa's constitutional recognition of socioeconomic rights, see Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010) 191-198. For an overview of the historical debates on this subject, see Daniel J. Whelan, 'Unpacking a 'violations approach' to protecting economic, social and cultural rights' (Paper presented at the *Annual Meeting of the American Political Science Association*, Chicago, 30 August - 2 September 2007); Arjun Sengupta, 'On the Theory and Practice of the Right to Development' in Arjun Sengupta, Archana Negi and Moushumi Basu (eds), *Reflections on the Right to Development* (2005) 81.

²⁵ See, eg, Michael J. Dennis and David P. Stewart, 'Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health?' (2004) 98(3) *American Journal of International Law* 462. For a summary of other examples of these arguments, see also Alston and Steiner, *International Human Rights in Context: Law, Politics, Morality* (2nd ed, 2002) 246.

²⁶ See, eg, Philip Alston, 'Forward – Philip Alston' in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) Cambridge University Press, Cambridge, ix-xiv (doi:10.1017/CBO9780511815485.001): 'By and large, however, the growing number of social rights cases decided by judicial and quasi-judicial institutions, the range of issues they deal with, the diversity of jurisdictions in which they have occurred, and a thriving scholarly literature have combined to make such debates largely irrelevant in practice.'

²⁷ *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990); *General Comment No. 9: The Domestic Application of the Covenant*, 19th CESCR sess, UN Doc E/C.12/1998/24 (1998).

²⁸ *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986).

contradicted this analysis by demonstrating that it is possible to find clear, meaningful content within the standard of progressive realisation (even in the context of genuine resource scarcity).²⁹ This view has been reinforced by the adoption of the Optional Protocol to the ICESCR, and by the jurisprudence of a number of domestic judiciaries,³⁰ with the South African Constitutional Court being a leading example of developing a distinct jurisprudence around the concept of progressive realisation.³¹

3.3.1 Obligations of immediate effect

OHCHR notes that the relevance of resource availability is also dependent on the cost of fulfilling particular categories of obligation.³² Although the obligation to fulfil may involve a claim on the public purse, the obligations to respect and protect will often involve so-called negative duties that do not have significant resource implications for the State.

CESCR has also outlined a number of obligations of immediate effect,³³ including the obligation of non-discrimination (contained in article 2(2)); the obligations 'to take steps' and

²⁹ See, eg, Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81; Malcolm Langford, 'The justiciability of social rights: from practice to theory' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) 3, 29-40; Tara J. Melish, 'Rethinking the "Less as more" thesis: Supranational litigation of economic, social and cultural rights in the Americas' (2007) 31 *N.Y.U. Journal of International Law & Politics* 171.

³⁰ Progressive realisation has been considered in several jurisdictions, including Argentina: *Viceconti v. Ministry of Health and Social Welfare - Poder Judicial de la Nación*; Ecuador: *Mendoza & Ors v Minister of Public Health and the Director of the National AIDS-HIV-STI Program (Tribunal Constitucional, 3ra. Sala, Ecuador, Resolucion No. 0749-2003-RA, 28 Jan. 2004)*; India: *Unnikrishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645; Colombia: see Magdalena Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Injustice' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) citing T-595/02; T-025/04 (in which the Colombian Constitutional Court explicitly refers to General Comments Nos 3 and 14); T-602/03.

³¹ For early leading examples of South African jurisprudence on the progressive realisation of socioeconomic rights see *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC); *Minister of Health v Treatment Action Campaign [TAC case]* (2002) 5 SA 721 (ZACC). For a thorough analysis of the role of progressive realisation in socioeconomic rights jurisprudence in South Africa (and beyond) see Sandra Liebenberg, *Socio-Economic Rights: adjudication under a transformative constitution* (2010) 187-202. See also Cass R. Sunstein, 'Social and Economic Rights? Lessons from South Africa' (Public Law Working Paper No 12, University of Chicago, 2001) – Sunstein had long argued against the idea that socioeconomic rights had any meaningful content until he was convinced by the emerging jurisprudence in South Africa.

³² OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 9.

³³ See, eg, *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990), para 1. See also Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81, 93; *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986), paras 8, 16, 21, 35; OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) para 15.

to use 'all appropriate means,' and the presumption against retrogressive measures.³⁴ The former UN Special Rapporteur on the human right to water has, for example, asserted that 'States have an immediate obligation to guarantee non-discrimination in the exercise of the rights to water and sanitation.'³⁵ The obligation of non-discrimination, thus, requires that States pay special attention to vulnerable or marginalised individuals and groups, including homeless populations, persons with disabilities, indigenous communities, prisoners and detainees, and women and children.³⁶

A standard of progressive realisation also indicates that States Parties should continue to 'take steps' to realise the rights protected under the ICESCR, meaning that doing nothing in the face of non-enjoyment of the rights would be considered to be a violation of the Covenant.³⁷ Additionally, it means that States should refrain from taking steps that would negatively impact on the realisation of the rights protected under the ICESCR – a rule that CESCR describes as the 'presumption against retrogressive measures.'³⁸ This presumption does mean that retrogressive measures may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

3.3.2 Maximum available resources

It is of the utmost importance to understand that the obligation of progressive realisation applies *only* where the state has run out of resources to fulfil the right in question. It is distinct from the obligation to use the maximum available resources.³⁹ The obligation to use maximum available resource is an immediate obligation. It is only when resources are not available that a state may progressively work toward full realisation of ESCRs.

An important consideration regarding the calculation of 'available resources' is over-all spending priorities. As CESCR declares in General Comment No.3, the obligation of progressive realisation should not be dependent on a State Party's capacity to increase available resources.⁴⁰ States Parties are instead obliged to make effective use of the resources that they already have available to them, while paying attention to ensure non-discrimination in their allocation.⁴¹ This is particularly relevant to many social and economic rights, such as the right to water, since the realisation of these rights would actually result in financial savings for many governments. As UNDP points out, the cost of providing access

³⁴ See *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) para 9.

³⁵ Catarina de Albuquerque, *Stigma and the realization of the human rights to water and sanitation*, 21st sess HRC, UN Doc A/HRC/21/42 (2012) para 51.

³⁶ *Ibid* para 22, 25, 26, 28, 30, 35, 42; *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) para 16.

³⁷ Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81, 93.

³⁸ See *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) para 9.

³⁹ This appears to be misunderstood in the AHRC Position paper (see page 151).

⁴⁰ *CESCR General Comment No. 3: The nature of States parties obligations (Art 2, Para 1, of the Covenant)*, 5th CESCR sess, UN Doc E/1991/23 (1990) paras 10, 12. See also *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986) [27].

⁴¹ *Ibid*.

to basic water and sanitation services are dwarfed by the returns generated in increased productivity and reduced burdens on the health system.⁴² For example, they estimate that countries in the Global South would save around \$1.6 billion from their annual health budgets if they provided universal access to even the most basic water and sanitation services.⁴³ With regard to the right to housing, a recent study conducted to underpin the Welsh Government's inquiry into a potential constitutional right to housing found that incorporating a right to housing in Welsh law (along the lines of the right under ICESCR) would result in significant savings. In fact, over 20 years, the cost of ensuring the right to housing would be £5 billion, while over the same period the total benefit to Wales would be £11.5 billion.⁴⁴ This demonstrates that the idea that the realisation of economic and social rights is unaffordable to states often fails to account for their economic benefits.

3.3.3 Illustrative example - the right to housing

We further illustrate the scheme of obligations for ESCRs in international law with an example based around realisation of the right to housing.

In an advanced economy such as Australia's, the inclusion of an obligation of progressive realisation does not excuse the state from any of the following, all of which are immediate obligations:

- a) Negative obligations such as repealing discriminatory laws in the housing and housing policy sphere and the regulation of the construction, banking (eg mortgage) and real estate (including letting) industries. The cost of regulation and legal reform is not significant so as to bring in the progressive realisation caveat.
- b) Any positive obligation that the state can afford using its maximum available resources. It must be understood that maximum available resources do not only include what the government decides to make available in the budget, but also other dimensions of public finance (such as monetary policy and government borrowing) and can encompass human, technological, organisational, natural and informational resources.ⁱ
- c) Fulfilling the 'core' of the right is an immediate obligation.ⁱⁱ With respect to the right to housing, for example, this would mean the following on an immediate basis:
 - ending homelessness;
 - ending all discrimination in housing; and
 - ensuring housing in all tenures meets basic habitability standards through regulation of the public and private sector.

⁴² UNDP, *Human Development Report - Beyond scarcity: Power, poverty and the global water crisis* (2006) 43-46.

⁴³ *Ibid* 43.

⁴⁴ Alma Economics 'The Right to Adequate Housing in Wales: Cost-Benefit Analysis' (September 2022) available here: <https://www.taipawb.org/wp-content/uploads/2022/09/Alma-Economics-Back-the-Bill-Final-Phase-2-report.pdf>.

- d) An economically secure country like Australia cannot claim that it cannot meet the core obligations of the right to housing, this excuse is only available to states that lack financial or technical means, as 'in order for a State party to be able to attribute its failure to meet the minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'ⁱⁱⁱ Australia cannot demonstrate that it is doing so, because it is consciously dedicating resources to policies that undermine the right to housing.^{iv}
- e) The state has a 'margin of appreciation' (a range of policy options and choices) for how it fulfils the rights, and it is clear that implementation of measures can take some time.^v However, the obligation to move as rapidly as possible toward the full realisation of the rights using maximum available resources must be kept conceptually separate from the obligation of progressive realisation, which only 'kicks in' after resources have been exhausted. This was also clarified by the CESCR in a complaint brought before it. In the *Djazia and Bellili v Spain* case,^{vi} the CESCR rejected Spain's argument that it had made all possible efforts, using all available resources, to realise the right to housing of persons in dire need, because the state had not 'demonstrate[d] that the decision was based on the most thorough consideration possible and was justified in respect of all the rights under the Covenant and that all available resources were used.'^{vii}
- f) Where the state's chosen path to realise the right to housing might entail significant resource obligations that it cannot currently afford, only then can further aspects of the right be progressively realised over time. For example, should the state wish to undertake a major house building initiative to provide social housing, this could be achieved over a decade, for example (though, it is submitted, that it might be possible for the state to undertake such a building scheme cost effectively through taxation and regulation of the private sector building industry, for example).

ⁱ D Elson, R Balakrishnan and J Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in A Nolan, R O'Connell, and C Harvey (eds) *Human Rights and Public Finance* (2014, Hart) 14; Robertson 'Measuring State Compliance with the Obligation to Devote the Maximum Resources to Realizing Economic, Social and Cultural Rights' (1994) 16 *HRQ* 693.

ⁱⁱ It is the view of the authors that the AHRC Position Paper significantly understates the core of elements of ESCRs. See AHRC Position Paper 148. The core obligation is set out in CESCR General Comment No 3 [10].

ⁱⁱⁱ CESCR General Comment No 3 [10].

^{iv} For an analysis with respect to the element of affordability as an aspect of housing and Australia's housing policy see J Hohmann, 'Toward a right to housing for Australia: Reframing Affordability Debates through Article 11(1) of the International Covenant on Economic, Social and Cultural Rights' (2020) 26(2) *AJHR* 292.

^v As noted in AHRC position paper 151.

^{vi} Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015.

^{vii} *Ibid* para 17.5 and 17.6.

3.3.4 Existing state and territory human rights legislation

Section 31 of the *Human Rights Act 2004* (ACT) provides:

- (1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.
- (2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:
 - (a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;
 - (b) the undesirability of prolonging proceedings without compensating advantage;
 - (c) the accessibility of the material to the public.
- (3) For subsection (2) (c), material in the ACT legislation register is taken to be accessible to the public.

This provision enables the rights contained in the *Human Rights Act 2004* (ACT) to be interpreted in line with evolving international jurisprudence, while also ensuring accessibility and relevance to the ACT context. A similar approach should be considered for a new Commonwealth Human Rights Act.

Under the *Human Rights Act 2004* (ACT) applicants can bring a free-standing legal action to the Supreme Court in relation to a claimed breach of one or more of their rights under the Act. In contrast, applicants in both Victoria and Queensland can only raise a human rights complaint in court if it is 'piggy-backed' onto another cause of action. While the ability to bring a free-standing legal action in the ACT is a positive step in favour of realising the right to a remedy, bringing a legal action to the Supreme Court is expensive and complex. As the Australia Lawyers for Human Rights have argued, '[t]here are significant cost barriers associated with this type of legal action, and for most people - bringing a legal complaint to the Supreme Court can be an extremely intimidating, complex and inaccessible process.'⁴⁵

In contrast, applicants in Queensland are able to make a complaint to the Queensland Human Rights Commission if they have satisfied a number of requirements, including first making an internal complaint to the public entity about the alleged contravention. This simple, low-cost pathway to bringing human rights complaints offers a number of significant benefits in terms of accessibility and efficiency, and would provide an excellent complement the current free standing legal action available in the ACT. This approach of offering a free-standing legal action alongside a cost-effective, accessible complaints procedure should be considered for a new Commonwealth Human Rights Act.

⁴⁵ Australian Lawyers for Human Rights, 'No Rights Without Remedy', Submission to Inquiry into Petition 32-21, Standing Committee on Justice and Community Safety (13 April 2022) 6, <https://www.parliament.act.gov.au/__data/assets/pdf_file/0010/1990162/Submission-15-Australian-Lawyers-for-Human-Rights-Inc.pdf>.

Recommendation 1: Include fully justiciable economic, social and cultural rights for individuals in a new Commonwealth Human Rights Act, using the clearly articulated international law, standards, and jurisprudence to guide Australia's path.

Recommendation 2: Consider including an interpretive provision similar to section 31 of the *Human Rights Act 2004* (ACT) to guide the interpretation of the rights contained in a new Commonwealth Human Rights Act.

Recommendation 3: Include a free standing right of legal action in a new Commonwealth Human Rights Act.

Recommendation 4: Include a complaints mechanism, facilitated by the Australian Human Rights Commission, in a new Commonwealth Human Rights Act.

3.4 Specific rights

The AHRC Position Paper lists the rights that should be included in a Commonwealth Human Rights Act. This next section focuses on the specific rights to health, housing, livelihood, social security and the environment to expand on the proposed framing of these social and environmental rights, as examples of how other social and economic rights (including education, workplace rights, cultural rights, etc) should be framed as fully justiciable rights in future legislation. Where versions of these rights already exist in State or Territory human rights laws these are discussed and developed to ensure that they are more fully elaborated in federal legislation.

3.4.1 The right to health

Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) protects the 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.⁴⁶ Globally, the right to health has been widely recognised in domestic human rights instruments.⁴⁷ Key features of the international right are the requirements that states respect, protect and fulfil the right to health. Fulfilment requires states to 'facilitate, provide and promote' the right to health and 'to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health'.⁴⁸ This reflects an expectation that there will be progressive improvement

⁴⁶ This right is also protected in other core human rights agreements, some of which enshrine additional protection, specific to vulnerability. For example, article 17 of the Convention of the Rights of the Child, protects the rights of children to access health information.

⁴⁷ At least 115 national constitutions protect the right to health: OHCHR, *The Right to Health* (UN, 2008) <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>. For example,

⁴⁸ Committee on Economic Social and Cultural Rights, General Comment 12 [33]

of healthcare standards which is reinforced by a prohibition on retrogression from the realisation of the right.⁴⁹

In many jurisdictions, the right functions as an individual justiciable right and judicial interpretation of the right recognises resource limitations of governments.⁵⁰ However, this does not mean that it is appropriate to only recognise a narrow right to health that is well below standards that have already been achieved. This is inconsistent with progressive realisation obligations and the prohibition on retrogression. A right that reflects existing standards is better suited to ensure that there is no violation of these obligations but should also recognise that the right should be progressively realised to accommodate the dynamic nature of healthcare which benefits from advances in science and responds to changes such as the emergence of new diseases and changing prevalence of existing diseases.

The Queensland *Human Rights Act 2019* is the only state and territory human rights instrument in Australia that currently protects a right to health, providing that:

Every person has the right to access health services without discrimination. A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.

Although it is modelled on article 12 of ICESCR,⁵¹ the wording of the provision risks a narrow interpretation of the right to health services. A broader wording would be more consistent with international interpretation of the right. Article 12 requires states to 'ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups'.⁵² Other core obligations of the right require: guaranteeing underlying determinants of health including adequate food, water, shelter, housing and sanitation; providing essential drugs; and ensuring equitable distribution of all health facilities, goods and services.⁵³ Although Australian governments may fulfil these core obligations, the federal government does not currently provide sufficient monitoring and accountability to ensure that the right to health is progressively realised. The Queensland provision enshrines significantly narrower protection than the *ICESCR* right.⁵⁴

Currently, Australia fails to meet the further core obligation to use participatory and transparent processes to adopt and implement a periodically reviewed national public health strategy and plan of action using right to health indicators and benchmarks to monitor progress, giving

⁴⁹ Ibid [32].

⁵⁰ See, for example, *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC); *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC). Progressive realisation is explicitly recognised as part of the right to health enshrined in the section 27 of the South African Constitution.

⁵¹ Human Rights Bill 2018 Explanatory Notes, 27

⁵² General Comment 12 [43].

⁵³ Ibid. The CESCR identifies further obligations of comparable priority regarding maternal and child healthcare, immunisation, control of endemic and epidemic diseases, community health education and access to information and training for health personnel: *ibid* [44].

⁵⁴ See, generally, General Comment 12 and, specifically, General Comment 12 [4].

particular attention to all vulnerable and marginalised groups.⁵⁵ Introduction of a right to health into federal legislation and the inclusion of *ICESCR* in the mandate of the AHRC can address this failure. Activities of the Queensland Human Rights Commission following introduction of the right to health evidence increasing inclusion of right to health benchmarks and indicators into public health systems.⁵⁶

Distinguishing between the right to health and public health measures (while recognising that they also overlap) is critical to implementing the right appropriately.⁵⁷ Although the individual right encompasses access to public health services, state obligations to respect, protect and fulfil the individual right to the highest attainable standard of physical and mental health are not limited to the provision of public health services.⁵⁸ For example, in Australia the health service providing all individuals with access to a safe vaccine for protection against Covid-19 is a public health measure that also engages multiple dimensions of the right to health. The right to health obliges states to provide access to health facilities, goods and services without discrimination.⁵⁹ States are also obliged to take measures to 'prevent, treat and control epidemic and endemic diseases'.⁶⁰ This compels states to provide access to relevant vaccines through healthcare services. States are also obliged to protect individuals from threats to health posed by third parties which requires governments to independently assess vaccine safety and effectiveness and to safeguard the supply chain so counterfeit vaccines do not circulate.⁶¹ These dimensions of the right can be important for determining obligations to provide access to safe vaccines and treatment in future pandemics.

Legislation should also monitor whether limitations on the right to health for public health protection (and for other purposes) are proportional, of limited duration and subject to review.⁶² For example, public health focused border control measures to limit the spread of infection between states and territories during the Covid-19 pandemic limited access to healthcare for individuals whose closest, appropriate health care was in another state.⁶³ Impacted individuals

⁵⁵ Ibid [43]. See Concluding Observations on the Fifth Report, UN Doc E/C.12/AUS/CO/5. See also Genevieve Wilkinson, *Founding a Human Rights Culture for Trade Marks*, (UTS, 2018) <https://opus.lib.uts.edu.au/bitstream/10453/133332/2/02whole.pdf> 151-160.

⁵⁶ Queensland Human Rights Commission, *2020-2021 Annual report on the operation of the Human Rights Act 2019* (2021).

⁵⁷ Genevieve Wilkinson, *Founding a Human Rights Culture for Trade Marks*, (UTS, 2018) <https://opus.lib.uts.edu.au/bitstream/10453/133332/2/02whole.pdf> 124-131. This is also important for protection of other human rights. Certain specific civil and political rights such as freedom of expression recognise that public health interests may justify permissible limitations on the right. See, for example, ICCPR art 19(3)(b). Protection of the right to health may separately permit restriction on the right to freedom of expression pursuant to ICCPR art 19(3)(a).

⁵⁸ See Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge University Press, 2016) 37.

⁵⁹ *General Comment No. 12 on the right to adequate food* (Art.11) 20th CESCR sess, UN Doc E/C.12/1999/5 [43].

⁶⁰ Ibid [44].

⁶¹ Ibid [51]. See also Genevieve Wilkinson and Evana Wright, 'Unblocking the Right to Access the Benefits of Science in the Covid-19 era' in Jens Schovsbo (ed), *IPR in Times of Crisis: Lessons Learned from the COVID-19 Pandemic* (Edward Elgar, forthcoming).

⁶² *General Comment No. 12 on the right to adequate food* (Art.11) 20th CESCR sess, UN Doc E/C.12/1999/5 [29].

⁶³ [Queensland border restrictions prevent NSW baby accessing crucial brain scan - ABC News](#)

had no opportunity to have these limitations on their right to health assessed and appropriately addressed.

Australian human rights legislation should emulate the approach taken to implementation of *ICESCR* obligations by other *ICESCR* parties and recognise a right to the highest attainable standard of physical and mental health, using the mechanisms of progressive realisation to safeguard achievement of the right.⁶⁴

Recommendation 5: Include a fully justiciable right for individuals to the highest attainable standard of physical and mental health, reflecting Australia's obligations to respect, protect and fulfil all elements of the right.

3.4.2 The right to housing

Australians have recognised that the right to adequate housing is of particular importance to the Australian community.⁶⁵ At the same time, Australia is currently experiencing a housing crisis. Housing is increasingly unaffordable and inaccessible across all tenures. There is insufficient social housing to support those increasing numbers who cannot afford market prices, and that housing tends to be of poor quality. Habitability issues (mould, damp, heat) in the private rental sector are at high levels. Violence in the home is a leading cause of homelessness for women and children. And there are high levels of homelessness including street homelessness, overcrowding, 'couch surfing' and other insecure forms of living.⁶⁶

ICESCR includes the right to housing as an aspect of the right to an adequate standard of living, in Article 11(1):

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

⁶⁴ Article 43 of the Kenyan Constitution relevantly provides: '(1) Every person has the right-- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care...(2) A person shall not be denied emergency medical treatment.' Article 21(2) requires the states to take the legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of Article 43 rights.

⁶⁵ As set out in Australian Human Rights Commission, *Position Paper: A Human Rights Act For Australia* (2023), 128 <https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf>.

⁶⁶ On the Australian housing crisis: Hal Pawson 'The Housing and Homelessness Crisis in NSW Explained in 9 Charts' (The Conversation, 16 March 2023). Available at <https://theconversation.com/the-housing-and-homelessness-crisis-in-nsw-explained-in-9-charts-200523>; ACOSS 'A Secure, Affordable Home for Everybody' at <https://www.acoss.org.au/housing-homelessness/>. On Homelessness in particular see Hal Pawson, Vivienne Milligan and Judith Yates, *Housing Policy in Australia: A Case for System Reform* (Palgrave Macmillan, 2020); Chris Chamberlain, Guy Johnson and Catherine Robinson (eds), *Homelessness in Australia: An Introduction* (UNSW Press, 2014).

Housing is thus seen as a building block for a life in community with others. The right is to *adequate housing*: a place to live ‘in security, peace and dignity.’⁶⁷ It must not be equated with a mere ‘roof over one’s head’ or viewed ‘exclusively as a commodity’.⁶⁸ Moreover, it is to be ensured ‘to all persons, irrespective of income or access to economic resources’.⁶⁹ No discrimination in housing is permitted.⁷⁰ Adequate housing has been interpreted by the expert body overseeing ICESCR, the CESCR as including seven essential elements. These are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy⁷¹ These elements represent an attempt to separate out the multifaceted roles that housing plays in the lives of individuals, households and communities, and to bring clarity to how adequate housing can be protected and ensured across widely different social, political and economic circumstances. These elements underpin adequate housing—without them, in other words, housing is inadequate. As explained above (see para xx), states must immediately ensure the minimum core of the right, and must use all available resources toward fulfilling the right. Standards of progressive realisation apply for any further aspects that cannot be met due to substantial costs or technical difficulties.

The right to housing under ICESCR is not an entitlement to state-provided or subsidised dwellings for all. Rather, Article 11(1), coupled with Article 2(1) provides a sophisticated mix—of negative and positive; immediate and longer-term obligations—which aim to realise improvement in peoples’ living conditions through the protection of housing.

The lack of adequate housing is a serious deprivation. Housing shields us from the elements and provides refuge from external threats, and gives us a base from which to shape a livelihood and take part in community life, while housing also provides a space in which our psychological needs can be met and fostered.⁷² The recognition of the right to housing as a human right is based on an appreciation of the importance of housing to privacy, autonomy and freedom; its function in facilitating participation and inclusion in society; and its role in providing the material goods that make these things meaningful and possible.⁷³ It is fundamental to a good life and should be included in any Australian Human Rights legislation with the standards set out in ICESCR and subsequently interpreted in international law as the minimum standard.

Recommendation 6: Include a fully justiciable right to adequate housing, with the standards set out in ICESCR and subsequently interpreted in international law as the minimum standard reflecting Australia’s obligations in international law.

⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant), UN Doc E/1992/23 (13 December 1991) [7].

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ See ICESCR, Article 2(2) on non-discrimination in enjoyment of the covenant rights. This also reflects the prohibition on discrimination in customary international law.

⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant), UN Doc E/1992/23 (13 December 1991) para 8; see also J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (2013, Hart) 20–29.

⁷² Ibid 231.

⁷³ Ibid.

3.4.3 The right to social security

The right to social security, set out in the UDHR, ICESCR and a number of ILO Conventions to which Australia is a party, is also found in the major international human rights treaties relating to discrimination against women; children; racial discrimination; the protection of migrant workers and their families; and persons with disabilities.⁷⁴ The CESCR has provided detailed interpretation of the right in General Comment 19 and provided communications in terms of the ICESCR Optional Protocol.⁷⁵ The Human Rights Committee has also considered issues related to the right to social security where they overlap with rights under the International Covenant on Civil and Political Rights such as discrimination against women or men.⁷⁶

The right to social security requires comprehensive cover of a range of risks and contingencies. The CESCR has explained that it must also be available to all, be adequate and accessible.⁷⁷ The Committee is clear that this right, like other ESCRs, must be progressively realised within maximum available resources, without discrimination and must guarantee a minimum enjoyment of the right.⁷⁸

The right is not present in any of the three state or territory human rights acts since the Commonwealth is responsible for providing the major income support payments. The gap in rights protection at the federal level means that rights violations in this area cannot be challenged domestically.⁷⁹ The Parliamentary Joint Committee on Human Rights has considered the compatibility of proposed legislation concerning social security on many occasions and has completed four out of its eight inquiries over the past 10 years related to the right: [Examination of the Social Security Amendment \(Fair Incentives to Work\) Act 2012](#), [Review of Stronger Futures in the Northern Territory Act 2012 and related legislation](#), [Examination of the Stronger Futures in the Northern Territory Act 2012 and related legislation](#) and [ParentsNext: examination of Social Security \(Parenting payment participation requirements - class of persons\) instrument 2021](#)

All of these inquiries found there to be significant intrusions into the social security rights of vulnerable groups in Australia including Indigenous Australians (income management) and sole parents (cuts to Parenting Payments and the ParentsNext program). In recent months, with a change of government and following significant public and international pressure, all of these problematic measures have been scrapped in large part. However, during the decade in which the PJCHR raised serious human rights concerns with the relevant legislation, an

⁷⁴ See Beth Goldblatt 'The Right to Social Security' in Malcolm Langford and Katharine Young (eds), *The Oxford Handbook of Economic and Social Rights* (online edn, Oxford Academic, 18 Aug. 2022) <<https://academic.oup.com/edited-volume/44323/chapter/372773904>>.

⁷⁵ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights., *The Right to Social Security* (art. 9), U.N. Doc. E/C.12/GC/19 (2008) ['General Comment No. 19'].

⁷⁶ On a number of occasions treaty bodies and UN Special Procedures mandates holders have observed that Australia was in violation of the social security rights of certain groups (those on income management, sole parents, etc) and recommended that the government address these.

⁷⁷ CESCR (2008), 'General Comment No. 19 on the right to social security', E/C.12/GC/19.

⁷⁸ *Ibid.*, at para 4.

⁷⁹ Although note the case currently being considered by the Federal Court concerning whether the Age Pension should be provided at an earlier age to Aboriginal people due to lower life expectancy of this group in terms of the *Racial Discrimination Act 1975 Cth: Fisher v The Cth & Ors (VID 545 of 2021)*.

intransigent government failed to address the problems. This demonstrates very clearly the inadequacy of the current human rights framework and the need for stronger human rights mechanisms to protect the rights to social security of some of the poorest and most vulnerable groups in our society.

A further example of the abuse of the human rights of vulnerable Australians has come to light in the Royal Commission into Robodebt where lives were lost and other severe consequences ensued for social security recipients who were unfairly targeted to repay debts that in many cases they did not owe and could not afford. A human rights act protecting the social security rights of these victims of government harms is likely to have assisted some people to halt the scheme or obtain restitution and reparation. While administrative law has proved effective in protecting social security applicants and recipients from some government misuse of the law, a right to social security would bolster and extend these protections for some of the most disadvantaged groups in our society.

We propose that federal human rights legislation includes a right to social security that requires the state, along the lines of s 27(2) of the South African Constitution, to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of ... (the) right'. To ensure that the right is understood as widely as possible it could be framed to include social security, social insurance, social assistance and other forms of social protection. This would ensure that it covers employer schemes, superannuation, government provided income support, emergency relief measures, etc. The right should also cover social services, such as for the elderly and families, as elaborated in CESCR General Comment 19 (paras 15 and 18). It should also be wide enough to cover the need for government support for those undertaking the unpaid work of caring for others.

Recommendation 7: Include a fully justiciable right to social security, including social insurance, social assistance and social services for the social protection of all.

3.4.4 The right to water

In July 2010, the United Nations General Assembly ('UNGA') adopted a resolution recognising the human right to water and sanitation.⁸⁰ The Human Rights Council ('HRC') followed this by adopting a similar resolution on 24 September 2010, which affirmed the existence of the human right to safe drinking water and sanitation.⁸¹ The resolution situates the right as being derived from the right to an adequate standard of living,⁸² and inextricably related to the right to the highest attainable standard of physical and mental health,⁸³ as well as the right to life and human dignity.⁸⁴ These resolutions build on a growing international recognition of the right

⁸⁰ *The human right to water and sanitation*, 64th UNGA sess, UN Doc A/Res/64/292 (2010).

⁸¹ *Resolution on Human rights and access to safe drinking water and sanitation*, 15th HRC sess, UN Doc A/HRC/15/L.14 (2010).

⁸² *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 3 January 1976, 160 States Parties (as of 3 October 2012), art 11(1).

⁸³ *Ibid* art 12(1).

⁸⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), entered into force on 23 March 1976, 167 States Parties (as of 3 October 2012) art 6(1).

to water, which has been reflected in a number of UN declarations and recognised in General Comment No.15, in which CESCR found that a right to water can be implied from the right to an adequate standard of living and the right to the highest attainable standard of physical and mental health.⁸⁵ CESCR also concluded that the right to water guarantees access for everyone to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'⁸⁶ As detailed above, CESCR has also clarified that the obligations imposed on States Parties by the ICESCR can be delineated into three categories of duties: respect, protect and fulfil.⁸⁷

Respect - The obligation to respect can generally be correlated with the 'negative' duty not to take any actions that might negatively impact on socioeconomic rights.⁸⁸ In relation to the right to water, CESCR states, 'the obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water'.⁸⁹

Protect - The obligation to protect places an obligation on governments to prevent the impairment of rights by third parties.⁹⁰ This obligation primarily requires State regulatory action to prevent third parties from infringing the rights of others, and would include measures to prevent third parties from contaminating water sources or denying others access to adequate water.⁹¹ This has particular relevance to the ongoing State obligations to protect the right to water in situations where the public system has been contracted out to private entities.⁹²

Fulfil - The obligation to fulfil involves an obligation to take positive action to provide for the realisation of the rights protected under the ICESCR – including obligations such as funding and carrying out programs designed to directly assist in the realisation of the rights in question, as well as adopting appropriate legislative, judicial and administrative frameworks to support

⁸⁵ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002).

⁸⁶ *Ibid* [1]-[2].

⁸⁷ See *General Comment No. 12 on the right to adequate food* (Art.11) 20th CESCR sess, UN Doc E/C.12/1999/5 [15]. The Committee affirmed that these categories of obligations applied to the right to water in *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) [20].

⁸⁸ See *General Comment No. 12 on the right to adequate food* (Art.11) 20th CESCR sess, UN Doc E/C.12/1999/5 [15]; OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) [10].

⁸⁹ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) [21].

⁹⁰ See *General Comment No. 12 on the right to adequate food* (Art.11) 20th CESCR sess, UN Doc E/C.12/1999/5 [15]; OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) [10].

⁹¹ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C/12/2002/11 (2002) [23].

⁹² See, eg, Catarina de Albuquerque, *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*, 15th sess HRC, UN Doc A/HRC/15/31 (2010).

the promotion of these rights.⁹³ In order to provide further clarity, CESCR has outlined three subcategories of the obligation to fulfil: facilitate, promote, and provide.⁹⁴

Facilitate, promote, and provide - The most significant aspect of the obligation to *facilitate* the realisation of the right to water is the need to expand services to previously unserved and underserved areas – particularly by ensuring that appropriate regulations are in place and removing any structural barriers to access. Other positive measures to both *facilitate* and *promote* may include empowering individuals and groups to participate in water governance, which raises the issue of transparency or access to information, as the community will need access to relevant information in order to participate effectively.⁹⁵ Finally, the obligation to *provide* might require the provision of State subsidies to ensure affordability.⁹⁶

To provide some illustration for how these obligations might be relevant to Australia, it is relevant to consider some of the issues facing many Indigenous communities in relation to the protection and realisation of their rights to water. The NSW town of Walgett, for example, has a significant Indigenous population and has been experiencing serious limitations of the right to water due to the combined effect of drought, river contamination, groundwater salinisation, and inadequate government action to protect and facilitate safe and affordable access for the community.⁹⁷ In a recent UNSW study, 44% of the surveyed Walgett Aboriginal community reported experiencing water insecurity; 91% reported being worried about water quality at some time in the last year; and some respondents reported spending \$30-50 dollars per week on bottled water.⁹⁸ Additionally, '[p]revious reports on water quality revealed that the sodium content was around 300mg sodium/Litre – ... almost twice the accepted levels for palatability in the Australian government's drinking water guidelines and around 15 times the levels recommended for people with hypertension.'⁹⁹

Similar issues of water insecurity stemming from regressive government action and inadequate regulatory protections for the right to water have been affecting many Indigenous communities in the Northern Territory and elsewhere in Australia.¹⁰⁰ These issues have, for

⁹³ See *General Comment No. 12 on the right to adequate food* (Art.11) 20th CESCR sess, UN Doc E/C.12/1999/5 [15]; OHCHR, *Report of the High Commissioner to the 2007 substantive session of ECOSOC (dedicated to the issue of progressive realization of economic, social and cultural rights)*, ECOSOC substantive sess of 2007, UN Doc E/2007/82 (2007) [10].

⁹⁴ *General Comment No. 15 on the Right to Water*, 29th CESCR sess, Agenda item 3, UN Doc E/C.12/2002/11 (2002) [25].

⁹⁵ *Ibid* [12].

⁹⁶ *Ibid* [27].

⁹⁷ See, eg, T Tonkin, A Deane, A Trindall, L Weatherall, T Madden, B Moore, N Earle, M Nathan, S Young, R McCausland, G Leslie, K Bennett-Brook, W Spencer, C Corby OAM, J Webster, E Rosewarne, *Food and Water for Life, Key findings from the Food and Water Security Surveys in Walgett: Yuwaya Ngarra-li Community Briefing Report*, Yuwaya Ngarra-li (2023) <<https://www.igd.unsw.edu.au/sites/default/files/documents/Walgett%20Food%20and%20Water%20Security%20Survey%20Report%20Feb23.pdf>>.

⁹⁸ 'New YN [Yuwaya Ngarra-li] report on the findings from the Walgett Food and Water Security Survey', Institute for Global Development UNSW Sydney (2023), <<https://www.igd.unsw.edu.au/new-yn-report-findings-walgett-food-and-water-security-survey>>.

⁹⁹ *Ibid*.

¹⁰⁰ See, eg, Erin O'Donnell, Marcia Langton and Sue Jackson, 'Regressive changes to Northern Territory water laws could undermine Indigenous rights', *The Conversation* (2 September 2021), <<https://theconversation.com/regressive-changes-to-northern-territory-water-laws-could-undermine-indigenous-rights-166561>>.

example, resulted in high levels of lead and uranium in community drinking water due to existing unmanaged concentrations,¹⁰¹ and the inadequate regulation of mining activities that contaminate water sources,¹⁰² with concerning implications for health. A rights-based approach to these issues, including a judicially enforceable human right to water, would provide a greater level of accountability and clarity around the obligations owed to these communities, whose rights to water have been ignored for far too long.

Indigenous water rights are also relevant to the issue of facilitating and promoting the right to water through enabling community participation in water governance. Recent research has demonstrated that Indigenous water holdings continue to decrease under current water governance policies and, in the Murray-Darling Basin, for example, have declined to account for well under 1% of water rights.¹⁰³ This dispossession and exclusion from water governance has coincided with a crisis in the Murray-Darling Basin that has included drinking water shortages (such as the one affecting Walgett, described above),¹⁰⁴ drying rivers and significant fish kills.¹⁰⁵ In a recent report, the Special Rapporteur on the human rights to safe drinking water and sanitation identified the need 'to clarify the steps that need to be taken to promote democratic water governance, taking a sustainable and human rights-based approach in ... areas inhabited by indigenous peoples or indigenous peoples' lands and territories' as a key priority.¹⁰⁶ In this context, the Special Rapporteur made particular reference to the central importance of community management of water, and the need to empower communities to protect water and associated ecosystems.

¹⁰¹ Isaac Nowroozi, 'Concerns about drinking water quality in "almost all" remote NT communities. What can be done about it?' *ABC News* (11 April 2022) <<https://www.abc.net.au/news/2022-04-11/concerns-drinking-water-quality-remote-communities-nt/100955522>>.

¹⁰² See, eg, Jane Bardon, 'Indigenous mining town residents demand blood tests after lead found in water' *ABC News*, (20 April 2018) <<https://www.abc.net.au/news/2018-04-20/borrooloola-water-supply-tests-positive-to-lead-contamination/9677638>>; Royce Kurlmelovs and Isabella Moore, "'It makes us sick": remote NT community wants answers about uranium in its water supply' *The Guardian* (18 October 2021) <<https://www.theguardian.com/australia-news/2021/oct/18/uranium-in-the-water-remote-nt-community-wants-answers-about-safety>>.

¹⁰³ Lana D. Hartwig, Sue Jackson and Natalie Osborne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy*, 104869, <https://doi.org/10.1016/j.landusepol.2020.104869>. See also summary in Lana D. Hartwig, Sue Jackson and Natalie Osborne, 'Australia has an ugly legacy of denying water rights to Aboriginal people. Not much has changed', *The Conversation* (24 July 2020), <<https://theconversation.com/australia-has-an-ugly-legacy-of-denying-water-rights-to-aboriginal-people-not-much-has-changed-141743>>.

¹⁰⁴ See n 39 above [T Tonkin, A Deane, A Trindall, L Weatherall, T Madden, B Moore, N Earle, M Nathan, S Young, R McCausland, G Leslie, K Bennett-Brook, W Spencer, C Corby OAM, J Webster, E Rosewarne, Food and Water for Life, Key findings from the Food and Water Security Surveys in Walgett: Yuwaya Ngarra-li Community Briefing Report, Yuwaya Ngarra-li (2023) <<https://www.igd.unsw.edu.au/sites/default/files/documents/Walgett%20Food%20and%20Water%20Security%20Survey%20Report%20Feb23.pdf>>].

¹⁰⁵ See, eg, Bradley J. Moggridge and Ross M Thompson, 'Aboriginal voices are missing from the Murray-Darling Basin crisis', *The Conversation* (31 January 2019), <<https://theconversation.com/aboriginal-voices-are-missing-from-the-murray-darling-basin-crisis-110769>>; Fleur Connick, 'NSW to investigate Menindee mass fish kill as 'pollution incident'', *The Guardian* (19 April 2023), <<https://www.theguardian.com/australia-news/2023/apr/19/nsw-to-investigate-menindee-mass-fish-kill-as-pollution-incident>>.

¹⁰⁶ Pedro Arrojo-Agudo, 'Report of the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, Pedro Arrojo Agudo: Plan and Vision for the Mandate from 2020 to 2023' (Human Rights Council, July 5, 2021), [9]-[10].

Recommendation 8: Include a fully justiciable right for individuals and groups to the human right to water, reflecting Australia's international obligations to respect, protect and fulfil all elements of the right.

Recommendation 9: Consider including specific language recognising the unique reciprocal relationship of Aboriginal and Torres Strait Islander peoples to water, and the related right to self-determination in water access and management for Traditional Owners.

3.4.5 The right to a healthy environment

On 28 July 2022, the United Nations General Assembly (UNGA) recognised the right to a clean, healthy and sustainable environment as a new human right.¹⁰⁷ This right is novel and important in focusing on the interrelationship between the full enjoyment of all human rights with the protection of the environment, including ecosystems. Globally, the 156 nations that recognise the RTHE. In Australia, the RTHE has yet to be recognised as a standalone right, but could be implied from a number of rights recognised under territory or state human rights legislation, such as rights to privacy and life, and the cultural and other rights of Aboriginal and Torres Strait Islander peoples. In Queensland, for example, this line of argument was both made and accepted in the *Waratah Coal* case.¹⁰⁸ In the ACT, in addition to being open to such interpretations, the *Human Rights Act 2004* (ACT) will be amended in the current term of government to include a standalone RTHE.¹⁰⁹

The 2022 UNGA resolution on '[t]he human right to a clean, healthy and sustainable environment' is premised on the recognition that climate change and other human-driven environmental harms have direct and indirect negative implications for the enjoyment of all other human rights.¹¹⁰ The Inter-American Court of Human Rights has stressed, in its advisory opinion on the environment and human rights, that there is an 'undeniable relationship' between the protection of the environment and human rights, including social and economic rights such as health, water, food and housing.¹¹¹ The United Nations Special Rapporteur on

¹⁰⁷ United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/76/L.75.

¹⁰⁸ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21.

¹⁰⁹ Tara Cheyne, 'Your Say Report – Right to a Healthy Environment – Report on What We Heard', Paper For Tabling, The Legislative Assembly for the Australian Capital Territory (December 2022), <https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your_Say_Report_-_Right_To_A_Healthy_Environment_-_Report_On_What_We_Heard.pdf>.

¹¹⁰ United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/76/L.75.

¹¹¹ Inter-American Court Of Human Rights, 'The Environment and Human Rights' (Advisory Opinion, requested by the Republic Of Colombia, 15 November 2017) Oc-23/17 paras 47-66. Also see Lucas Carlos Lima, 'The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments' (2020) 3 *Rivista Giuridica Ambiente* 495.

Human Rights and the Environment in 2018 noted, within the framework principles on human rights and the environment, that:¹¹²

Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights, including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development...

The Special Rapporteur on the Right to a Healthy Environment defines the right to a healthy environment as being comprised of six substantive elements: the right to clean air, the right to a safe climate, access to safe drinking water and sanitation, the right to healthy biodiversity and ecosystems, the right to live, work and play in toxic free environments, and the right to healthy and sustainably produced food.¹¹³ Additionally, the right carries a number of procedural elements, including the right to information, the right to participate in decision-making, and access to justice.¹¹⁴ The Special Rapporteur has also identified sixteen Framework Principles human rights and the environment that can guide States in the implementations of their obligations under the RTHE.¹¹⁵

The 16 framework principles include providing additional attention to vulnerable groups in society (principle 14),¹¹⁶ Indigenous peoples (principle 15),¹¹⁷ and the need to prevent discrimination and ensure equal enjoyment of a safe, clean, healthy and sustainable environment (principle 3).¹¹⁸ The Environmental Defender's Office have noted:¹¹⁹

¹¹² UN Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) UN Doc A/HRC/37/59 7.

¹¹³ David R Boyd, Special Rapporteur on Human Rights and the Environment, Right to a Healthy Environment: Good Practices, UN DOC A/HRC/43/53 (30 December 2019). See also A/HRC/40/55; A/74/161; A/HRC/46/28; A/75/161; A/HRC/49/53; A/76/179.

¹¹⁴ Ibid [14]-[37].

¹¹⁵ John H Knox, Special Rapporteur on Human Rights and the Environment, Framework principles on human rights and the environment, UN Doc. A/HRC/37/59 (24 January 2018).

¹¹⁶ 'Principle 14: States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.'

¹¹⁷ 'Principle 15: States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by: (a) Recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used; (b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources; (c) respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources; (d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.'

¹¹⁸ 'Principle 3: States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.'

¹¹⁹ Melanie Montalban and Frances Bradshaw, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Environmental Defenders Office, 2023) 12, <https://www.edo.org.au/wp-content/uploads/2022/08/EDO_HealthyEnvironment_Full_Web.pdf>.

Framework Principles 3, 14 and 15 are particularly important with respect to First Nations in Australia. Because of the intimate spiritual and cultural connections that First Nations have to their lands, waters, territories and resources, they are particularly at risk of harm from destroyed, degraded and polluted environments. The right to a healthy environment must be applied based on the principle of nondiscrimination and the recognition that First Nations are distinct peoples with collective rights, including the right to self-determination and the right to culture. This means recognising that there is an intimate and interdependent relationship between a right to a healthy environment and the right to culture for First Nations and that the right to a healthy environment includes respecting and protecting these spiritual and cultural connections to the environment. A healthy environment, and the wellbeing, health and cultural identities of First Nations, are bound together and this interdependence is protected by a right to a healthy environment.

This was echoed in the responses to the ACT Government's 2022 consultation on the RTHE, where '[s]ome participants said that there should be consultation with First Nations people and consideration of collectivist world views, the cultural significance of 'country' [sic] and traditional land management practices.'¹²⁰ Participants also emphasised the need to 'include Aboriginal and Torres Strait Islander people in decision-making processes regarding lands, waterways and resources; [and] employ a decolonising approach to environmental decision making'.¹²¹

Recommendation 10: Include a fully justiciable right for individuals and groups to the human right to a healthy environment.

Recommendation 11: Consider including specific language recognising the unique reciprocal relationship of Aboriginal and Torres Strait Islander peoples to lands and waterways, and the related right to free, prior and informed consent in relation to any proposed projects that might impact their territories.

3.5 Equality and non-discrimination in relation to social and economic rights

Equality and non-discrimination are central to the equal enjoyment of social and economic rights as elaborated by the CESCR in General Comment 20.¹²² The General Comment notes the widely accepted principle that non-discrimination is an immediate obligation, not subject

¹²⁰ ACT Government, 'Your Say Report – Right to a Healthy Environment – Report on What We Heard', Paper For Tabling, Presented by Tara Cheyne to the Legislative Assembly for the Australian Capital Territory (December 2022), 2 <https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your_Say_Report_-_Right_To_A_Healthy_Environment_-_Report_On_What_We_Heard.pdf>.

¹²¹ Ibid.

¹²² Committee on Economic, Social and Cultural Rights, General Comment No. 20 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/GC/20 2 July 2009.

to progressive realisation. In the context of significant economic inequality and poverty in Australia and discrimination against a range of groups on the basis of race, gender, disability, age and other attributes in relation to provision of, for example, housing and social security, a strong equality right must be central to any future human rights legislation. The AHRC proposes that the definition of discrimination in such legislation should align with that in the various federal discrimination statutes. In addition, we recommended that consolidation and reform of anti-discrimination legislation is undertaken as an urgent priority to ensure that a strong and effective legal framework aligns with and supports the new human rights act.

4. Framework

This section proposes further steps for improvement of existing mechanisms to protect economic, social and cultural rights in the federal context.

4.1 Ratify the Optional Protocol

Australia should ratify the Optional Protocol to the ICESCR (Optional Protocol).¹²³ The Optional Protocol provides an individual complaints mechanism for individuals in Member States who have ratified the protocol to make a complaint when all domestic remedies to assert their ICESCR rights have been exhausted. The Optional Protocol provides a valuable monitoring and accountability mechanism to ensure effective implementation of ICESCR and decisions regarding any individual complaints can provide valuable guidance for states regarding interpretation of the agreement where there is uncertainty.

Recommendation 12: Australia should ratify the Optional Protocol to the ICESCR.

4.2 ICESCR in the mandate of the AHRC

As Australia's national human rights institution, the AHRC should be able to monitor all human rights without restriction, consistent with the Paris Principles.¹²⁴ So that it can adequately monitor the economic, social and cultural rights of all individuals in its jurisdiction, Australia should ensure that ICESCR is explicitly included within the mandate of the AHRC, with all the other primary human rights agreements to which Australia is a party.¹²⁵

Recommendation 13: The *Australian Human Rights Commission Act 1986 (Cth)* should be amended to include ICESCR in the definition of human rights so that the covenant is explicitly within the mandate of the AHRC.

¹²³ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UN Doc A/RES/63/117 (5 March 2009, adopted 10 December 2008).

¹²⁴ 'Accreditation' Global Alliance of National Human Rights Institutions (Web Page) <<https://ganhri.org/accreditation/>>. See Meg Brodie, 'Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire' (2015) 38(3) *UNSW Law Journal* 1215, 1255-1260.

¹²⁵ *Australian Human Rights Commission Act 1986 (Cth)* ss 3, 11.

4.3 Human rights education

Extensive jurisprudence from jurisdictions that have already introduced economic, social and cultural rights can support judicial education regarding economic, social and cultural rights. Following the introduction of the Human Rights Act 2019 (Qld) the Queensland Human Rights Commission has conducted sessions to train advocates for vulnerable groups so that they can better understand 'their rights and how the Act can be used to address human rights issues'.¹²⁶ The Commission has also developed indicators of a human rights culture within government bodies that support increasing awareness of human rights obligations, including 'reviews of policies and procedures, and development of guides or tools to support decision-making'.¹²⁷

Human rights education can support a greater understanding of the nature of economic, social and cultural rights and mechanisms for implementation in specific settings once they are enshrined in legislation. The Queensland Human Rights Commission has identified a need for greater community education to address a lack of understanding of the existence of the Human Rights Act 2019 (Qld) following its introduction.¹²⁸ Human rights education 'is critical to ensuring that the Act meets the goals of protecting and promoting human rights culture and promoting a dialogue about the nature, meaning and scope of human rights'.¹²⁹ The activities of the Queensland Human Rights Commission demonstrate the value of education of specific government bodies about human rights obligations

Recommendation 14: Human rights education about economic, social and cultural rights included in international law and a new Commonwealth Human Rights Act is important for the community, advocates, judiciary and government bodies.

¹²⁶ Queensland Human Rights Commission, *2020-2021 Annual report on the operation of the Human Rights Act 2019* (2021) 171.

¹²⁷ *Ibid* 91.

¹²⁸ *Ibid* 167.

¹²⁹ *Ibid* 168.