

The Necessity of the Inclusion of Socio-Economic Rights in a Federal Charter of Human Rights

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I. Introduction

1. A mere glance at the most recent census makes it clear that for many Australians, their primary human rights concerns might not relate only to civil and political rights; to name but a few examples, young Australians between the ages of 15-24 face double the unemployment rate as the rest of the country,¹ more than one million Australians report a nil or negative weekly income,² Aboriginal and Torres Strait Islanders represent a high proportion of those with low household income.³ Many Australians are daily faced with the challenge of being able to fulfil the basic necessities of life. The inclusion of socio-economic rights in a Federal Charter of Human Rights is necessary to lend a voice to these Australians.
2. As Australia faces the consequences of the global economic crisis, the tendency may be, more than ever, to marginalise socio-economic rights; to suggest that Australia cannot afford to protect them in the same manner as civil and political rights. In reality, however, as the risk that Australians may not have access to the essentials of life increases, so too does the need for legal protection of access to such essentials for all Australians.
3. I believe that any meaningful Federal Charter must protect socio-economic rights in a manner which is equivalent to the protection offered to civil and political rights. Australian colonies were amongst the first in the world to give women the right to vote. In 1967, more than 90% of Australians voted to remove the race power from the Australian Constitution. Although Australia's protection of civil and political rights is imperfect, such issues at least make it onto the national agenda. In contrast, socio-economic rights remain marginalised. A Federal Charter of Human Rights offers Australia a unique opportunity to confirm our national commitment to giving everyone a "fair go". A Charter without socio-economic rights would ignore the needs of large sections of the Australian community and be grossly out of touch with international human rights law and the examples of success socio-economic rights protections in countries whose legal systems are similar to Australia.
4. In the aftermath of the Second World War, Australia played a prominent role in pursuing a safer world order through its participation in the drafting of the *Universal Declaration of Human Rights*, which pledges its commitment to the

¹ A Picture of the Nation: The Statistician's Report on the 2006 Census, accessed from the website of the Australian Bureau of Statistics on 17 April 2009, page 11, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.0922/\\$File/20700_Work_overview.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.0922/$File/20700_Work_overview.pdf).

² A Picture of the Nation: The Statistician's Report on the 2006 Census, accessed from the website of the Australian Bureau of Statistics on 17 April 2009, page 4, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.0926/\\$File/20700_Economic_resources_overview.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.0926/$File/20700_Economic_resources_overview.pdf).

³ Ibid, page 11.

promotion of social progress and better standards of living.⁴ Sadly, as one of the only remaining countries in the world without a legislative or constitutional charter of rights, Australia has long ceased to be a leader in the field of human rights. The inclusion of socio-economic rights in a Federal Charter offers Australia the opportunity to join together as a nation and reaffirm our commitment to enabling all Australians to access the basic necessities of life and, in so doing, we can once again proudly resume our position as a progressive country committed to the meaningful protection of all human rights.

5. This submission argues that socio-economic rights should be included in a Federal Charter, with the possibility of justiciable socio-economic rights being worthy of consideration. It does so through an examination of international human rights law, the results of human rights consultations in Australian states and territories and a detailed comparative study of the example of comprehensive socio-economic rights protections in other countries. This submission argues that debate about the inclusion socio-economic rights needs to move beyond simplistic assertions that such inclusion is too expensive or interferes with the separation of powers, but must instead analyse the issues and options in a rigorous manner. Thus, the submission concludes with suggested questions to inform future meaningful exploration of socio-economic rights by the National Human Rights Consultation.

II. International Perspectives on Socio-Economic Rights

6. The inclusion of socio-economic rights in a Federal Charter is consistent with international trends which favour increased legal and political recognition of socio-economic rights. The Federal Charter offers Australia an opportunity to domestically reflect international support for socio-economic rights and thereby become a leader in the field of legally protected socio-economic rights.

A. Prominent Voices in Support of Protecting Socio-Economic Rights

7. At the international level, developments in human rights law are consistently moving in the direction of meaningful recognition of and respect for socio-economic rights as is evidenced by prominent international figures who have spoken out in favour of their increased legal protection. Louise Arbour, speaking as the United Nations High Commissioner for Human Rights, stated to the European Court of Human Rights in an address during January 2008 that:

⁴ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (1948), preamble.

a final issue that has been close to my heart is the effort to bring economic, social and cultural rights back into what should be their natural environment – the courts.⁵

8. The United Nations Commissioner for Human Rights has more generally summarised the trend towards increased respect for socio-economic rights in the following terms:

Economic, social and cultural rights are more and more recognized as creating legal entitlements and legally binding obligations ... Domestic courts in all regions and across diverse legal systems are developing jurisprudence on a wide variety of economic, social and cultural rights ... Treaty bodies have done much to clarify the content of specific [socio-economic] rights.⁶

9. Kofi Annan, speaking as the UN Secretary-General in 2003 noted that:

While some wish to focus on civil and political rights, others would like to see equal attention paid to economic, social and cultural rights, complaining bitterly that the right to vote is worth little if their children are hungry and do not have access to safe water ... Human rights – whether they be civil, political, economic, social or cultural – are universal and by forging unity and determination in their defence, you can set an example of common progress for the broader international community.⁷

B. Examples of Increased International Acceptance of Socio-Economic Rights

10. Although the *International Covenant on Economic, Social and Cultural Rights*⁸ (ICESCR) has been in force for well over thirty years, it is well known that these rights have not been given the same respect as civil and political rights. Their status, enforcement and protection are less than their civil and political counterparts.⁹ Their classification as human rights is often questioned¹⁰ and

⁵ Louise Arbour, 'Human Rights at the Opening of the Judicial Year 2008' (Speech delivered at the European Court of Human Rights, Strasbourg, 25 January 2008) <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/96475D3D6D044429C12573DE007107F9?opendocument> at 16 February 2008.

⁶ *Report of the United Nations Commissioner for Human Rights*, UN ESCOR, 62nd sess, agenda item 14(g), [4], UN Doc. 2006 E/2006/86 (2006).

⁷ United Nations Headquarters, *Human Rights -- Whether Civil, Political, Economic, Social or Cultural -- Are Universal, Must Be Upheld in Every Country, Secretary-General Says*, UN SG/SM/8675 HR/CN/1043 (2003), available at www.unis.unvienna.org/unis/pressrels/2003/sqsm8675.html.

⁸ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).

⁹ See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 2 (entered into force 3 January 1976) (ICESCR); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2-3 (entered into force 23 March 1976) (ICCPR); Melissa Castan, Sarah Joseph and Jenny Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, Oxford, 2004, 2nd edn) 7.

¹⁰ See Philip Alston and Henry J. Steiner, *International Human Rights in Context: Law, Politics and Morals* (Clarendon Press, Oxford, 1996) 256.

even if accepted, their suitability for judicial enforcement is doubted. In the words of long-time critic, E.W Vierdag, 'the rights granted by the *International Covenant on Economic, Social and Cultural Rights* are of such a nature as to be legally negligible'.¹¹ This Part of the submission suggests that these views are outdated and fail to acknowledge the clear international push which recognises socio-economic rights as of equivalent importance to civil and political rights.

(i) Clarification of Content

11. Since the entry into force of the *International Covenant on Economic, Social and Cultural Rights*¹² steps have been steadily taken to both clarify the content of the socio-economic rights contained in the Covenant and provide further guidance on the identification of violations of its provisions. The Committee on Economic, Cultural and Social Rights (CESCR) General Comments specify the content of many of the rights in ICESCR,¹³ with the only substantive provisions not yet subject to such elucidation being the protection of the family¹⁴ General Comments sometimes prescribe greater obligations than originally envisaged by ICESCR.¹⁵ For example, there are General Comments about the socio-economic rights of disabled¹⁶ and older persons,¹⁷ as well as a General Comment on the right to water,¹⁸ even though such persons and entitlements are not expressly mentioned in ICESCR. Thus, over time, the content and scope of socio-economic rights in international human rights law has been steadily expanding. Such expansion reflects increased international respect for the importance of socio-economic rights.
12. The *Maastricht Guidelines*¹⁹ of 2002 and the earlier *Limburg Principles*²⁰ of 1987, both the result of expert forums convened by CESCR, implicitly look towards a position of justiciable socio-economic rights by establishing interpretive

¹¹ E.W Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69, 105.

¹² Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).

¹³ Housing (General Comments 4 and 7), Education (General Comments 11 and 13), Food (General Comment 12), Health (General Comment 14), Water (General Comment 15), Work (General Comment 18).

¹⁴ ICESCR art 10.

¹⁵ Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462, 492.

¹⁶ General Comment 5, *Persons With Disabilities*, CESCR, 11th sess, UN Doc E/1995/22 (1994).

¹⁷ General Comment 6, *The Economic, Social and Cultural Rights of Older Persons*, CESCR, 13th sess, UN Doc E/1996/22 (1995).

¹⁸ General Comment 15, *The Right to Water*, CESCR, 29th sess, UN Doc. E/C.12/2002/11 (2003).

¹⁹ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, UN ESCOR, CESCR, 24th sess, agenda item 3, UN Doc E/C.12/2000/13 (2000).

²⁰ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 4th Comm, 43rd sess, Annex, UN Doc E/CN.4/1987/17 (1987).

principles to identify violations of obligations under ICESCR.²¹ The *Maastricht Guidelines* list possible violations of ICESCR²² and the nature of State obligations in relation to these.²³ The Guidelines also speak of the role of domestic legal application²⁴ and the legal profession.²⁵ Such elucidation of the nature of socio-economic rights and its role in domestic law endorses the possibility of socio-economic rights not merely being protected, but potentially enjoying justiciable status, in a given State.

(ii) The Optional Protocol to ICESCR

13. On the 10 December 2008, the United Nations General Assembly adopted a resolution on the Optional Protocol to ICESCR which recommended that the Optional Protocol be open for signature in 2009.²⁶ Once it has entered into force, this instrument will bring enforcement measures under the ICESCR into line with those connected to the *International Covenant on Civil and Political Rights* (ICCPR).²⁷ Thus, the international community has finally taken steps to realise the goal embodied in the *Universal Declaration of Human Rights* of a global community in which all rights are recognised as indivisible, interdependent and interrelated,²⁸ sharing organic unity.²⁹ The increased enforcement capacity also constitutes a step closer towards fulfilment of the obligations under the *Charter of the United Nations* which require States to work towards higher standards of living, employment and conditions of economic and social progress and development.³⁰ The move towards the Optional Protocol is also in keeping with the spirit of the International Bill of Rights process; in 1950, the United Nations General Assembly requested a clear expression of economic, cultural and social rights and the manner in which they relate to civil and political freedoms in a single International Covenant on Human Rights.³¹ The eventual decision to divide the international covenant into two separate covenants was, at least partially, a result of inevitable political compromise between developed Western

²¹ Ibid [16]-[41].

²² *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, UN ESCOR, CESCR, 24th sess, agenda item 3, UN Doc E/C.12/2000/13 (2000) [14]-[15].

²³ Ibid [16].

²⁴ Ibid [26].

²⁵ Ibid [28].

²⁶ UNGA Res A/RES/63/117.

²⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

²⁸ See *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (1948), preamble; *ICESCR*, preamble; *ICCPR*, preamble; *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, art 5, UN Doc A/CONF.157/23 (1993).

²⁹ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia, 1999) 88.

³⁰ *Charter of the United Nations* art 55.

³¹ GA Res 421(V), UN GAOR, 5th sess, 317th plen mtg, UN Doc. A/1775 (1950).

nations prioritising civil and political rights and the Soviet emphasis on socio-economic rights,³² and was never intended to represent socio-economic rights as a “lesser” type of right. The Optional Protocol thus clarifies that the separation of the two types of rights was a historical anomaly and the move to equalise the enforcement mechanisms for the ICESCR and the ICCPR is a clear international statement that socio-economic rights may no longer be maligned as the “poor cousin” of civil and political rights.

(iii) Acknowledging Socio-Economic Rights Through Indirect Means

14. The manner in which socio-economic rights have been indirectly protected in a variety of international forum also demonstrates growing interest in their proper recognition. For example, the Human Rights Committee has found that equality before the law under the ICCPR³³ could be invoked even in relation to rights contained within ICESCR, even though ICESCR had no mechanism for the receipt of individual complaints.³⁴ The European Court has frequently emphasised that the nature of human rights is such that they must be interpreted in a practical and effective, rather than theoretical and illusory, manner.³⁵ It has held that in addition to negative undertakings, there may be positive obligations inherent in effective respect for the rights guaranteed by the European Convention on Human Rights. Thus, the false dichotomy of civil and political rights being negative in nature, whereas socio-economic rights are positive, is dispelled by the European jurisprudence. All human rights contain both positive and negative elements, thus nothing inherent to the nature of socio-economic rights prevents them from enjoying legal protection in the same manner as other rights.

(iv) Socio-Economic Rights In Other Human Rights Instruments

15. As the most widely ratified human rights instruments, it is worth considering the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*,³⁶ the *International Convention on the Elimination of All Forms of*

³² Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-1966* (The Federation Press, Sydney, 2005) 16; Kitty Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can An Ideal Become Reality?' (1996) 2 *University of California, Davis Journal of International Law and Policy* 111, 121; *Report of the United Nations Commissioner for Human Rights*, UN ESCOR, 62nd sess, agenda item 14(g), [7], UN Doc. 2006 E/2006/86 (2006); Philip Alston and Henry J. Steiner, *International Human Rights in Context: Law, Politics and Morals* (Clarendon Press, Oxford, 1996) 256.

³³ ICCPR, art 26.

³⁴ *FH Zwaan-de Vries v The Netherlands*, views adopted 9 April 1987, Communication No. 182/1984 (Netherlands, CCPR/C/29/D/182/1984).

³⁵ *Airey v Ireland*, no. 6289/73, Judgment of 9 October 1979, paragraph 24; *Artico v Italy*, no. 6694/74, Judgment of 13 May 1980, paragraph 33; *United Communist Party of Turkey v Turkey*, no. 133/1996/752/951, Judgment of 30 January 1998 [Grand Chamber], paragraph 33.

³⁶ Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'). Membership of 170 as of 19 September 2006.

Discrimination Against Women (CEDAW),³⁷ and the *Convention on the Rights of the Child (CRC)*.³⁸ These incorporate civil and political rights and socio-economic rights as equal, including in terms of enforcement³⁹ by employing the same level of obligation and same implementation methods for all 'types' of rights.⁴⁰ This inclusive approach to treaty drafting looks implicitly towards the increased recognition of socio-economic rights. Additionally, a broad range of socio-economic rights can currently be brought before other international bodies, such as the Committee on Freedom of Association of the Governing Body of the International Labor Organisation and the Committee on Conventions and Recommendations of the Executive Board of the United Nations Educational, Scientific and Cultural Organisation, in a quasi-judicial manner.⁴¹

C. Summary

16. **At the international level, the Secretary-General of the United Nations and the UN High Commissioner for Human Rights have called for increased recognition of socio-economic rights. The bridging of the gap between socio-economic rights and their civil and political counterparts is also evident in the approval of the text of the Optional Protocol to ICESCR by the United Nations General Assembly. Increased international respect for socio-economic rights is also evident in other developments, such as increased elucidation of the content of the socio-economic rights, their indirect recognition by international judicial or quasi-judicial bodies and the equivalent treatment of socio-economic rights with civil and political rights in the most widely ratified human rights instruments in the world. Australia is now uniquely placed to reflect this growing international respect for and recognition of socio-economic rights in a Federal Charter.**

III. Australian Perspectives on Socio-Economic Rights

17. The lack of legal protection for socio-economic rights in Australia is out of touch with the growing recognition of these rights internationally. Human rights consultation processes in the states and territories reveal a governmental reticence to take socio-economic seriously. Accordingly, the National Human Rights Consultation has a responsibility to the Australian people to ensure that

³⁷ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'). Membership of 184 as of 19 September 2006.

³⁸ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'). Membership of 192 as of 19 September 2006.

³⁹ See *CERD*, art 5; *CEDAW*, arts 11, 13-14; *CRC*, arts 24, 26-28, 31-32.

⁴⁰ See *CERD*, arts 6, 11; *CEDAW*, art 18; *CRC*, art 44.

⁴¹ Hatem Kotrane, *Independent Expert Report on the Question of a Draft Optional Protocol to the International Covenant for Economic, Social and Cultural Rights*, UN ESCOR, 59th sess, agenda item 10, UN Doc. E/CN.4/2003/53 (2003) [43]-[49].

the need for the protection of socio-economic rights is not given short thrift in the name of government budgetary concerns.

A. *Australian Silence on Socio-Economic Rights*

18. Australia signed the ICESCR on 18 December 1972 and the Covenant entered into force for Australia on 10 March 1976.⁴² Despite this, it has not yet been incorporated into Australian law.⁴³ The explanatory memorandum to the *Australian Bill of Rights Bill 1985* (Cth) purported to incorporate the ICCPR into Australian law but made no mention of the ICESCR.⁴⁴ The Australian Democrat's Parliamentary *Charter of Rights and Freedoms Bill 2001* (Cth)⁴⁵ also included exclusively civil and political rights.⁴⁶ The only attempt to introduce a Bill of Rights in federal parliament which included reference to ICESCR rights was a private member's bill introduced by Dr Andrew Theophanous MP which failed to reach second reading stage in the House of Representatives.⁴⁷ The implementation of the ICESCR has thus not featured highly on the Australian political agenda.

B. *Socio-Economic Rights in State and Territory Human Rights Consultations*

19. This is confirmed by examination of the experiences of the ACT and Victoria with their enactment of human rights instruments. The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) failed to include socio-economic rights, except the right to property,⁴⁸ although it must be acknowledged that this occurred in the context of a clear government position that socio-economic rights should remain the domain of parliament.⁴⁹ The consultation committee for the Victorian Charter pointed out that while 41% of submissions to the committee advocated for the inclusion of socio-economic rights, over 90% advocated for civil and political rights.⁵⁰ Interestingly, West Australians seem far more concerned about this matter than Victorians, with the

⁴² See International Covenant on Economic, Social and Cultural Rights, *Australian Treaty Series* 1976 No. 5.

⁴³ Although very selective incorporation is evident in the *Supported Accommodation Assistance Act 1994* (Cth) preamble; *Workplace Relations Act 1996* (Cth) s 4; *Disability Discrimination Act 1992* (Cth) s 12; *Native Title Act 1993* (Cth) Notes; *Housing Assistance Act 1996* (Cth) Notes; *Aboriginal and Torres Strait Islander Act 2005* (Cth) Notes; *Age Discrimination Act 2004* (Cth) s 10.

⁴⁴ Explanatory Memorandum, *Australian Bill of Rights Bill 1985* (Cth).

⁴⁵ Reintroduced to parliament by Senator Natasha Stott-Despoja in 2005 and 2008.

⁴⁶ See Explanatory Memorandum, *Parliamentary Charter of Rights and Freedoms Bill 2001* (Cth).

⁴⁷ *Australian Bill of Rights Bill 2001* (Cth).

⁴⁸ The Report of the Human Rights Consultation Committee (Victoria), 'Rights, Responsibilities and Respect' (December 2005) (Victorian Report) [2.2.2].

⁴⁹ Victorian Department of Justice, *Human Rights in Victoria – Statement of Intent* (May 2005).

⁵⁰ The Report of the Human Rights Consultation Committee (Victoria), 'Rights, Responsibilities and Respect' (December 2005) (Victorian Report) [2.2.2].

the WA Report observed that 79% of submissions which addressed the issue, of which rights should be protected, advocated inclusion of socio-economic rights.⁵¹

20. In the ACT, the consultative committee recommended that socio-economic rights be included, arguing that perceived difficulties with the implementation of these rights were over-stated and the distinctions between the two types of rights simplistic.⁵² The eventual *Human Rights Act 2004* (ACT) did not accept this recommendation. The view of the ACT government focussed ultimately on resource scarcity, stating that:

there is concern that application of policies to individual situations where there is a difficult question of allocation of scarce resources may expose the Government to liability. As there are few countries where the ICESCR rights are enshrined in law, there is little guidance in the form of decided cases about the extent of that liability.⁵³

21. Section 43 of the *Human Rights Act 2004* (ACT) mandated that the Attorney-General would undertake a review after the Act had been in operation for one year and this review would consider whether rights under the ICESCR should be included. This review noted that the Victorian Charter did not include these rights and that the ACT's inclusion would be exceptional, recommending that these issues should be revisited at the Act's five year review.⁵⁴ For both Victoria and the ACT, it seems that the unknown nature of socio-economic rights made their inclusion ultimately undesirable.
22. The Tasmanian Law Reform Institute has stridently recommended a Charter of Rights which includes rights to work, to food, clothing and housing, to the highest attainable standards of mental and physical health and to education.⁵⁵ Moreover, the breach of such rights could give rise to an independent cause of action in the courts. In WA, the committee's report on the proposed Human Rights Act noted the overwhelming public support for the inclusion of economic, social and cultural rights and recommended that they be included and enforced by the same mechanisms as civil and political rights.⁵⁶ This was the committee's recommendation, even though the WA government had expressed a preference that socio-economic rights not be included.⁵⁷ The New South Wales (NSW) Bar

⁵¹ Report of the Consultation Committee for a Proposed WA Human Rights Act, 'A WA Human Rights Act' (September 2007) (WA Report) [4.2.2].

⁵² Report of the ACT Bill of Rights Consultative Committee, 'Towards an ACT Human Rights Act' (May 2003) (ACT Report), [5.32], 109.

⁵³ Government Response to the Report of the ACT Bill of Rights Consultative Committee: towards an ACT Human Rights Act, Tabling Speech, 23 October 2003 (ACT Government Response).

⁵⁴ ACT Department of Justice and Community Safety, 'Human Rights Act 2004: Twelve Month Review Report', (June 2006) 49 (ACT Twelve Month Report).

⁵⁵ Tasmania Law Reform Institute, 'A Charter of Rights for Tasmania' Report No 10 (October 2007)(Tasmanian Report) [4.15.13].

⁵⁶ WA Report, [4.2.2], [4.2.6], [4.4.7].

⁵⁷ Ibid [4.1].

- Council's recommendations on a Charter of Rights for NSW⁵⁸ recommended the inclusion of socio-economic rights, at the same time as acknowledging that these may need to be protected in a different manner than civil and political rights.⁵⁹
23. Thus, the outcome of consultation processes with the Australian people, conducted by experts in human rights, appears to clearly favour the inclusion of socio-economic rights in human rights charters. The position of Australian governments appears often to ignore such recommendation, citing resource scarcity concerns or concerns about the unknown nature of such rights. The consistent recommendation of the inclusion of socio-economic rights at the state level should not be ignored by the National Human Rights Consultation.

C. *Socio-Economic Rights before Australian Judicial and Administrative Bodies*

24. Given the lack of express legal protection of the socio-economic rights contained in ICESCR in Australian law, it is unsurprising that the matter has rarely been considered by Australian courts. A review of the decisions of the High Court of Australia finds scant reference to the ICESCR. When it is referred to, it is often mentioned only loosely in combination with other international instruments to support a desired statutory interpretation or development of common law principle.⁶⁰ For example, in *Cattanach v Melchior*,⁶¹ the ICCPR, the ICESCR and the Convention on the Rights of the Child are presented to persuade the Court of the status of the family as the fundamental unit of society. At a more general level, Justice Kirby of the High Court of Australia has referred to the inevitability of economic ramifications of judicial decisions. Justice Kirby has determined that:

Arguments of inconvenience and potential political embarrassment for the Court should fall on deaf judicial ears ... This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences.⁶²

25. Judicial consideration of socio-economic rights in Australian states and territories is also rare. Miles CJ of the Supreme Court of the ACT has noted that given that administrative decision makers are required to take into account treaties to which Australia is party, there is no reason why judicial decision-makers are not similarly obliged when exercising discretion or adjudicating on a question of

⁵⁸ New South Wales Bar Association Human Rights Committee, 'Options Paper for a Charter of Human Rights for NSW (July 2007) (NSW Bar Report). This Report is not part of an official government consultation. The New South Wales Standing Committee on Law and Justice Report, *A NSW Bill of Rights: Report of the Standing Committee on Law and Justice*, NSW Parliament, October 2001 recommended that NSW not adopt a Bill of Rights. The NSW government accepted this recommendation on 21 October 2001.

⁵⁹ NSW Bar Report, [128].

⁶⁰ See eg *Re Woolleys* [2004] HCA 49 [221]; *Kartinyeri v the Commonwealth* [1998] HCA 22 [167] (Kirby J); *Thorpe v Commonwealth (No 3)* [1997] HCA 21 [24] (Kirby J); *Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15 [6] (Brennan J); *Dowal v Murray* [1978] HCA 53 [8] (Murphy J); *Koowarta v Bjelke-Petersen* [1982] HCA 27 [9] (Murphy J).

⁶¹ [2003] HCA 38 [35] (Hayne J).

⁶² *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 414.

reasonableness.⁶³ Based on this, Miles CJ considered that the right to work in article 6 of the ICESCR could be appropriately considered, although eventually finding that restraint of trade issue in the case was not affected by the operation of this right.⁶⁴ Despite its still infant state, the interpretation of the *Human Rights Act 2004* (ACT) has also shown some willingness to utilise protected civil and political rights to support socio-economic rights. In *The Commissioner for Housing in the ACT v Y*,⁶⁵ Higgins CJ was prepared to use the Act's protection of children and the family unit in the context of enabling a single mother to access subsidised housing. A first reading of Higgins CJ's findings even suggest that he is recognising a right to housing which does not exist in the Act itself: 'those rights [ie those in sections 11 and 34 of the Act] require that the rights of a family, and of children in particular, to secure and appropriate housing be recognised and that Territory laws be so interpreted as to preserve and advance those rights where possible'.⁶⁶

D. Summary

26. **Given that socio-economic rights do not have status in Australian law, it is unsurprising that they have rarely been considered by Australian courts. In addition, they have not featured prominently on the Australian political agenda. Nonetheless, this does not indicate that they are not wanted or necessary within Australia. Of those states or territories which have undergone human rights consultation processes, all except Victoria recommended the inclusion of socio-economic rights in the final instrument. The figures from Western Australia suggest that as many as 79% of Australians are concerned about the inclusion of such rights. Moreover, the tendency of governments to be reticent towards such inclusion makes it all the more important for the National Human Rights Consultation to consider their inclusion thoroughly and provide a forceful recommendation on this issue.**

IV. The Question of Justiciability

27. The purpose of this submission is not to provide a comprehensive discussion of the mechanism by which socio-economic rights should be included in a Federal Charter but to highlight the importance of their inclusion in whatever form. While such inclusion might occur through any number of enforcement

⁶³ *Wickham v Canberra District Rugby League Football Club Ltd* [1998] ACTSC 370 (10 September 1998) [67-68] (Miles CJ).

⁶⁴ *Ibid* [69-70].

⁶⁵ [2007] ACTSC (12 October 2007) (Higgins CJ).

⁶⁶ *Ibid* [48].

mechanisms, the possibility of including such rights in a fully justiciable form⁶⁷ should not be discounted.

A. CESCR's View

28. In the context of international law, the CESCR acknowledges that while states may approach their treaty obligations flexibly, the ICESCR clearly envisages a role for the judicial adjudication of socio-economic rights domestically. General Comment 3 makes it explicit that many rights in the ICESCR 'would seem to be capable of immediate application by judicial and other organs in many national legal systems'.⁶⁸ These include, *inter alia*, the right to equality in the enjoyment of socio-economic rights,⁶⁹ the right to fair wages,⁷⁰ trade union related rights,⁷¹ a child's right to protection from economic and social exploitation⁷² and the right to free compulsory primary education.⁷³ In addition, while singling these rights out as suitable for immediate judicial adjudication in many states, the overall approach of CESCR is that these are mere illustrations and that 'there is no Covenant rights which could not, in the great majority of legal systems, be considered to possess, at least some significant justiciable dimension' and that 'the adoption of a rigid classification of economic, social and cultural rights which puts them by definition beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent'.⁷⁴

B. Domestic Legal Systems – South Africa

29. Justiciable socio-economic rights also feature in many domestic legal systems around the world. Of the domestic legal systems which have embraced a greater role for justiciable socio-economic rights, none have done so more extensively than South Africa. Under the South African Constitution protected socio-economic rights include freedom of trade, occupation and profession,⁷⁵ labour relations rights,⁷⁶ property ownership,⁷⁷ housing,⁷⁸ health care, food, water and

⁶⁷ I.E. in a form which is capable of judicial adjudication.

⁶⁸ General Comment 3, *The Nature of States Parties Obligations*, CESCR, 5th sess, [10], UN Doc E/1991/23 (1990) [5].

⁶⁹ ICESCR, art 3.

⁷⁰ ICESCR, art 7(1)(a)(i).

⁷¹ ICESCR, art 8.

⁷² ICESCR, art 10(3).

⁷³ ICESCR, art 13(2)(a).

⁷⁴ General Comment 9, *The Domestic Application of the Covenant*, CESCR, 17th sess [10], UN Doc E/C.12/1997/8 (1997).

⁷⁵ South African Constitution s 22.

⁷⁶ South African Constitution s 23.

⁷⁷ South African Constitution s 25.

⁷⁸ South African Constitution s 26.

social security,⁷⁹ specific rights relating to children including nutrition, shelter, health care, social services and freedom from labour exploitation,⁸⁰ and education.⁸¹ Each of these socio-economic rights encompasses obligations to respect, protect, promote and fulfil the right.⁸² The rights to access housing,⁸³ health care, food, water and social security⁸⁴ require the State 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. All types of rights are justiciable by virtue of section 38 which permits breaches of any of the rights in the Constitution to be adjudicated upon by the Constitutional Court.

C. Other Domestic Legal Systems

30. These domestic developments are not isolated to South Africa. In India, constitutional socio-economic directive principles enjoy increased justiciability.⁸⁵ For example, the right to life includes a right to the means to live.⁸⁶ In Latvia, constitutional recognition of a right to social security requires establishment of specified implementation mechanisms to ensure this obligation's fulfilment.⁸⁷ Even absent express constitutional mandate, the Supreme Court of Switzerland recognises an implied right to the satisfaction of elementary human needs as an indispensable element of a democratic polity.⁸⁸

D. Summary

31. National judiciaries in diverse contexts are embracing their ability to adjudicate upon socio-economic rights. Thus, the option of the inclusion of

⁷⁹ South African Constitution s 27.

⁸⁰ South African Constitution s 28.

⁸¹ South African Constitution s 29.

⁸² South African Constitution s 7(2).

⁸³ South African Constitution s 26(2).

⁸⁴ South African Constitution s 27(2).

⁸⁵ See *Daily Rated Casual Labour Employed Under P & T Department through Bharatiya Dak Tar Mazdoor Manch v Union of India and others* (AIR, 1987, SC 234); *Apparel Export Promotion Council v A. K. Chopra* (AIR, 1999, SC 625) as discussed in *Selection of Case Law on Economic, Social and Cultural Rights*, above n 129; See also Upendra Baxi, 'Judicial Discourse: Dialectics of the Face and the Mask' (1993) 35 *Journal of the Indian Law Institute* 1; Philip Alston and Henry J. Steiner, *International Human Rights in Context: Law, Politics and Morals* (Clarendon Press, Oxford, 1996) 307-309.

⁸⁶ *Olga Tellis and Others v Bombay Municipal Corporation and Others* (AIR, 1986, SC 180); *People's Union for Civil Liberties v Union of India and Others*, Writ Petition [Civil] No. 196 of 2001- Supreme Court of India as discussed in as discussed in *Selection of Case Law on Economic, Social and Cultural Rights*, U.N ESCOR, 61st sess, UN Doc. E/CN.4/2005/WG.23/CRP.1 (2004); See also Patrick Macklem and Craig Scott, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992-1993) 141 *University of Pennsylvania Law Review* 1, 120.

⁸⁷ Case No. 2000-08-0109, Constitutional Court of Latvia (2001) as discussed in Hatem Kotrane, *Independent Expert Report on the Question of a Draft Optional Protocol to the International Covenant for Economic, Social and Cultural Rights*, UN ESCOR, 59th sess, agenda item 10, UN Doc. E/CN.4/2003/53 (2003) [43]-[49].

⁸⁸ *Gebrueder v Regierungsrat des Kanton Berns*, Supreme Court of Switzerland as discussed in *Selection of Case Law on Economic, Social and Cultural Rights*, U.N ESCOR, 61st sess, UN Doc. E/CN.4/2005/WG.23/CRP.1 (2004).

socio-economic rights which may be the subject of adjudication by courts features in many legal systems, including through a very comprehensive system in South Africa. Moreover, the CESC, which is the leading body charged with interpretation of the ICESCR accepts that many socio-economic rights are inherently justiciable within the domestic context.

V. Lessons from the South African Example

32. Those who speak out against the inclusion of socio-economic rights in any Federal Charter often refer to inter-related concerns about the separation of powers, the remedial competence of a judicial body, judicial competence and resource scarcity. This part demonstrates the manner in which the South African model of justiciable socio-economic rights responds to these concerns in a manner which may be relevant to Australia. If the case for justiciable socio-economic rights can be made, so too can the case for socio-economic rights protection through a “lesser” mechanism.

A. Reasonableness: The South Africa Approach to Justiciable Socio-Economic Rights

33. The South African experience demonstrates that justiciable socio-economic rights benefit from the presence of a flexible, process-based standard for judicial assessment of their realisation. In this respect, the approach adopted by South African courts diverges from that of CESC in its replacement of the concept of the minimum core with a reasonableness based approach. The minimum core emerged from General Comment 3 which expressed an expectation that each socio-economic right under the ICESCR encompasses a minimum essential level of achievement which each state is required to realise and this minimum level varies according to resource constraints.⁸⁹ The content of this minimum core makes reference to essential foodstuffs, essential primary health care, basic shelter and the most basic forms of education.⁹⁰ For example, while the right to education includes access to free primary, secondary and higher education,⁹¹ the minimum core of the right to education in a resources-poor state might involve only free primary education.⁹²

34. In contrast to this minimum core notion, South African courts have relied on the concept of reasonableness. An understanding of this concept requires a basic understanding of the development of the South African jurisprudence.⁹³

⁸⁹ General Comment 3, *The Nature of States Parties Obligations*, [10]: see generally Katherine G Young, ‘The Minimum Core of Economics and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113.

⁹⁰ General Comment 3, *The Nature of States Parties Obligations*.

⁹¹ ICESCR, art 13.

⁹² General Comment 13, [8]-[10].

⁹³ The first substantive decision in which these socio-economic rights provisions were applied was *Soobramoney v Minister for Health (Soobramoney)* in 1998 [*Soobramoney v Minister for Health, KwaZulu Natal* 1998 (‘*Soobramoney*’) (1) SA 765 (CC)]. The applicant in this case suffered from a terminal and chronic kidney disease and his life could only be

Whereas the minimum core standard focuses on declaring an absolute minimum level of achievement, the Constitutional Court's reasonableness standard embraces a contextual analysis of what measures the government is taking to realise a given socio-economic right.⁹⁴ The Court analyses whether government measures targeted at a constitutional right progressively realise that right, taking into account the means available to the state.⁹⁵ Having made it clear that the reasonableness test balances the constitutional objective against the resources available to achieve it, the Court has focused not so much on more definitively stating this legal test, but on detailing the characteristics associated with reasonable government measures. According to the Court, reasonable measures allocate responsibilities to appropriate spheres of government and provide requisite financial and human resources.⁹⁶ Reasonable measures include well-directed (executive) programmes.⁹⁷ Such programmes must facilitate the

prolonged through access to dialysis machines. He was denied treatment because the use of the limited number of machines was prioritised for those with acute kidney failure from which they might fully recover and those who were awaiting kidney transplants [1-3]. In its first attempt at socio-economic rights adjudication, the Constitutional Court would not interfere with a government programme aimed at achieving the right to health if it was fair, rational and in good faith [25-29].

The next opportunity at socio-economic rights adjudication was the 2001 decision of *Government of the Republic of South Africa v Grootboom (Grootboom)* [Grootboom 2001 (1) SA 765 (CC)], in which the standard for determining whether government action passed constitutional muster was developed significantly from the notion of mere rationality and good faith. *Grootboom* involved the right of access to housing under section 26 of the Constitution. It was brought by destitute applicants living in informal squatter camps who could not access government-provided housing due to long waiting lists. In adjudicating the right of access to housing, the Court elected not to adopt the international standard of a minimum core to give effect to socio-economic rights obligations, but instead developed its own legal standard of reasonableness [33].

This reasonableness standard has been subsequently applied by the Constitutional Court in *Minister for Health v Treatment Action Campaign (TAC)* [TAC 2002 (5) SA 721 (CC)] in 2002 which revisited the right to health previously considered in *Soobramoney*. The government had received a free supply of the anti retroviral drug, Nevirapine. A single dose of the drug could potentially prevent mother-to-child transmission of HIV. The government only made the drug available at two test and research sites in each province. This restriction was to continue for at least two years therefore only 10% of expectant mothers had access to Nevirapine, [62] despite the fact that an estimated 70 000 South African children are annually born HIV positive [19]. In the circumstances, the lack of clear plans to increase Nevirapine access and the ban preventing doctors outside the test sites from prescribing the drug were unreasonable [135]. South African jurisprudence, therefore, has developed from an initial view in which rational and good faith attempts to realise rights would not be questioned to one in which the court itself assesses the reasonableness of attempts to achieve a right, including considering the overall policy context.

⁹⁴ For general discussion of the South African jurisprudence see eg Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal of Human Rights* 284; Marius Pieterse, 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal of Human Rights* 383; Darrel Moellendorf, 'Reasoning about Resources: Soobramoney and the Future' (1998) 14 *South African Journal of Human Rights* 327; Mark S Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective' (2003) 6 *Chapman Law Review* 137; Kevin Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitation Clause' (2004) 20 *South African Journal of Human Rights* 448; David Bilchitz, above n 98; David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 119 *South African Law Journal* 484; Pierre de Vos, 'Substantive Equality after Grootboom: the Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence [2001] *Acta Juridica* 52; Sandra Liebenberg, 'The Rights to Social Assistance: The Implications of Grootboom for Policy Reforms in South Africa' (2001) 17 *South African Journal of Human Rights* 232; Kameshni Pillay, 'Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights' (2002) 6 *Law, Democracy and Developments* 255; Albie Sachs, 'Enforcement of Social and Economic Rights' (2007) 22 *American University International Law Review* 673, 691-2; Rosalind Dixon, 'Creating Dialogue about Socio-economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391.

⁹⁵ *Grootboom* 2001 (1) SA 765 (CC) [41].

⁹⁶ *Ibid* [39].

⁹⁷ *Ibid* [42].

realisation of the right in question,⁹⁸ be reasonable in their conception and implementation,⁹⁹ be balanced and flexible paying appropriate attention to short, medium and long-term needs,¹⁰⁰ provide for continuous review¹⁰¹ and become progressively available to an increased number and breadth of people.¹⁰² Most importantly, a reasonable program cannot exclude a significant segment of society¹⁰³ and must assist those in desperate need.¹⁰⁴ The amici in *TAC* asked the Court to reconsider its apparent rejection of the minimum core, an offer declined by the Court.¹⁰⁵

35. The primary difference between the minimum core and reasonableness standards is that reasonableness is more flexible and adaptive. Each government measure or policy which comes before the Constitutional Court will be considered anew – with an analysis of the constitutional objective as compared to the resources available to achieve it. A minimum core, on the other hand, lays down an objective and tangible ‘floor’ for achievement of a right. While this core entitlement can change over time as resource availability changes, most judicial bodies adopt some notion of the doctrine of precedent. This means that it will be more difficult to justify to an adjudicative body that the core’s content requires alteration, than to simply analyse government measures without reference to previous fixed standards. The rigidity of a judicially determined minimum core standard seems inappropriate where socio-economic rights focus on progressive realisation. Where standards of achievement are likely to increase, fixed content-based standards seem counter-productive.
36. In considering the inclusion of justiciable socio-economic rights in a Federal Charter, Australia too must grapple with the question of identifying an appropriate standard by which to assess the implementation of a right. The South African method of affixing such a standard warrants consideration by Australia because it is one of the most highly developed socio-economic rights jurisprudence in the world. It is also one of the few examples of justiciable socio-economic rights in the common law context.¹⁰⁶ South Africa and Australia’s

⁹⁸ Ibid [39].

⁹⁹ Ibid [42].

¹⁰⁰ Ibid [43]; See also *TAC* 2002 (5) SA 721 (CC) [17].

¹⁰¹ Ibid.

¹⁰² Ibid [45].

¹⁰³ Ibid [43].

¹⁰⁴ Ibid [66].

¹⁰⁵ *TAC* 2002 (5) SA 721 (CC) [28-29].

¹⁰⁶ Cf justiciable socio-economic rights in a number of civil legal systems: Argentinean and Venezuelan courts has ordered the government to provide medical treatment, including appropriate drugs, to sufferers of HIV/AIDS, see CSJN, 1/6/2000, ‘Asociacion Benghalesnsis y otros c/ Ministerio de Salud y Accion Social – Estado Nacional s/ amparo ley 16.986, L.L. (2000- A-986, 13) (Supreme Court of Argentina), as discussed in Horacio Javier Etchichury, ‘Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIS’ (2006) 22 *American University International Law Review* 101, 111; Bermudez et al v Ministerio de Sanidad y Astencia Social, Supreme Court of Venezuela, Case No. 15, 789, Decision No. 916 (1999), as discussed in Ellen Wiles, ‘Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law’ (2006) 22 *American University International Law Review* 35, 47.

shared common law heritage indicate prima facie potential for the South African standard to be of potential utility to Australia's socio-economic rights debate. The United Kingdom itself has also considered future adoption of socio-economic rights based on South Africa's reasonableness approach.¹⁰⁷ The fact that all state and territory committees thus far have found it necessary to consider the South African approach further attests to the relevance of the South African example, as does the comfort of Australian court in the use of reasonableness-based standards. Therefore, even if it is not ultimately 'adopted', there is a need to consider the advantages and suitability of a flexible reasonableness-based standard in an Australian context.

B. *Separation of powers*

37. The flexibility offered by the reasonableness-approach is the key to addressing one of the most common reasons advanced to deny the appropriateness of adjudication socio-economic rights – the doctrine of separation of powers. It is in the task of maintaining the fine distinction between scrutiny, rather than *de facto* making, of government policy and legislative measures, that the advantages of the reasonableness standard over the minimum core emerge. If *Grootboom* adopted a minimum core approach, an order might have been made that the right to housing required everyone in need to be provided with tents and sewerage facilities. This would then become a minimum standard to which budgetary resources must be directed, thus dictating budgetary allocations. The actual order in *Grootboom* required accelerating the emergency short-term housing programme and supplementing it with a comprehensive medium-term strategy,¹⁰⁸ an order which has budgetary implications but does not specifically dictate budgetary allocations. The South African Constitutional Court recognises that it is poorly qualified to dictate precisely how the state should meet the socio-economic needs of the people¹⁰⁹ and therefore leaves the precise contours and content of measures to be adopted firmly within legislative and executive hands.¹¹⁰ While the Constitutional Court in *Grootboom* highlighted to the government what needed to be done, it gave the government considerable leeway to independently determine how this would occur. The reasonableness standard allows a degree of deference which ensures that the judiciary remains within the bounds of judicial review, whereas a minimum core could lead to far more explicit dictation of executive choices.

¹⁰⁷ Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003-2004*, p 26.

¹⁰⁸ *Grootboom* 2001 (1) SA 765 (CC) [99].

¹⁰⁹ Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal of Human Rights* 284, 294.

¹¹⁰ *Grootboom* 2001 (1) SA 765 (CC) [41].

38. While the South African conception of separation of powers may be particularly conducive to adopting flexible standards,¹¹¹ it is not so exceptional that any relevance outside of South Africa should be denied. Even in constitutional systems without such openness and co-operation in their conception of the separation of powers, the doctrine still involves checks and balances¹¹² and such interactive mechanisms include notions of judicial review. The development of administrative law in many Western nations clearly demonstrates that administrative performance can be reviewed and remedied without infringing the separation of powers.¹¹³

C. Remedial approach

39. Flexibility not only in standards of assessment, but also in the judicial approach to remedies is also a fundamental feature of the South African jurisprudence. It is a feature which addresses the concern that socio-economic rights should not be justiciable because a court is incapable of granting suitable remedies. The decision in *TAC* considers the question of remedies in detail, in response to a government contention that the separation of powers demands that the Court could only offer declaratory, not mandatory, relief.¹¹⁴ The Court has found that where constitutional obligations are not being fulfilled, its minimum obligation is to provide a declaration to that effect,¹¹⁵ yet this does not represent the extent of the Court's power. The Court has the power to provide appropriate relief,¹¹⁶ which has been held to mean 'an effective remedy' with the Court being 'obliged to "forge new tools" and shape new remedies'.¹¹⁷ In addition, not only is mandatory relief possible, so too is some form of supervisory jurisdiction,¹¹⁸ for example in *Grootboom* the Human Rights Commission was ordered to supervise government policies.¹¹⁹ The Court's approach to remedies is undoubtedly coloured by the extent of its powers under the Constitution, however, *TAC* also reviews jurisprudence in the USA, India, Germany, Canada and the UK and concludes that 'the various courts adopt different attitudes towards when such remedies [ie injunctive relief] should be granted, but all accept that within the

¹¹¹ See eg South African Constitution ss 42(3), 55, 85, 92, 165; Constitutional Principle VI as discussed in *First Certification* 1996 (4) SA 744 (CC) [45].

¹¹² Philip B. Kurland, 'The Rise and Fall of the "Doctrine" of Separation of Powers' (1986) 85 *Michigan Law Review* 592, 593, 597, 603-4.

¹¹³ Philip Alston, 'International Law and the Human Right to Food' in Philip Alston and K. Tomasevski (eds), *The Right to Food*, (Nijhoff, The Hague, 1984) 58; See also Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, London, 2001) 234.

¹¹⁴ *TAC* 2002 (5) SA 721 (CC) [96], [99].

¹¹⁵ *Ibid*; South African Constitution s 172(1)(a).

¹¹⁶ *TAC* 2002 (5) SA 721 (CC) [101].

¹¹⁷ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [69].

¹¹⁸ *TAC* 2002 (5) SA 721 (CC) [104].

¹¹⁹ *Grootboom* 2001 (1) SA 765 (CC) [97].

- separation of powers they have the power to make use of such remedies'.¹²⁰ This recognises that a broad approach to remedial options is not unique to South Africa and is not only a consequence of unique constitutional authorisation.
40. In the case of socio-economic rights, the ultimate remedy is protection of that right. The form of order in *TAC* may provide a model for the type of order most helpful in promoting fulfilment of socio-economic rights. The order declares the basic content of the right in question in relation to the subject matter of the dispute. It next outlines the basic requirements for progressive realisation and then specifics how the government programme failed to meet these requirements. The order then outlines specific steps to be taken to achieve progressive realisation. Finally, and importantly, the order notes that the government is not precluded from adopting different policies or steps if these are equally appropriate or better than those specified in the order.¹²¹ Such a form of order appears to provide more guidance and flexibility in respect of fulfilling the right than the *Grootboom* order which simply states that there has been a failure to fulfil the right and that a programme must be created to address this.¹²²
41. Of course, a discussion of the South African experience would not be complete without acknowledging that there are questions of the extent to which it has delivered tangible outcomes in terms of socio-economic rights.¹²³ Despite *Grootboom*, the housing crisis in South Africa remains acute.¹²⁴ Embracing the justiciability of socio-economic rights is useless unless it improves their implementation. Yet these criticisms alone cannot undermine the utility of the South African jurisprudence. Even in Australia, a lack of practical impact does not offer a justification to avoid the judicial task altogether. Recent decisions of the Federal Court of Australia in the context of attempts to seek injunctions against Japanese whaling in the Australian Antarctic Territory, have emphasised that even if there is no practical mechanism by which a court order can be enforced, this in itself is not sufficient basis to deny making the order when the Court is appropriately seized of jurisdiction.¹²⁵

D. *Judicial competence*

42. The critique that judges are not institutionally competent to adjudicate socio-economic rights disputes is one which has been dispelled in South Africa

¹²⁰ *TAC* 2002 (5) SA 721 (CC) [112].

¹²¹ *Ibid* [135].

¹²² *Grootboom* 2001 (1) SA 765 (CC) [99].

¹²³ Rosalind Dixon, 'Creating Dialogue about Socio-economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391, 392; Dennis Davis, 'Socioeconomic Rights in South Africa: The Record after Ten Years' (2004) 2 *New Zealand Journal of Public and International Law* 47.

¹²⁴ Lilian Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8 *Human Rights Law Review* 105, 105-106.

¹²⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (15 January 2008) [46] (Allsop J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [16] (Black CJ and Finkelstein J).

through the adoption of a number of tangible techniques. The South African experience demonstrates that judges are capable of effectively dealing with these polycentric disputes. This capacity is evidenced by the Constitutional Court's ongoing awareness of the polycentric elements of socio-economic rights cases, with the Court generously allowing a range of participants to be heard on diverse topics in each of its socio-economic rights cases, enabling the Court to obtain a broader view on the issues than might have otherwise occurred.¹²⁶ Effectively, 'by focussing on the attributes of the program – its flexibility, impartiality, basis in justifiable policy or verifiable information etc – the evidence before the Court is not limited to a snapshot of conditions or the treatment of one individual'.¹²⁷

43. The relevance of this to Australia is that the South African experience highlights the polycentric nature of disputes about socio-economic rights and the need to ensure that a judiciary asked to adjudicate on socio-economic rights matters has the appropriate tools with which to do so. The South African experience demonstrates that flexible standing requirements and a willingness to hear submissions from a range of *amici curiae* can be useful in terms of allowing a court to consider the diverse interests involved. Increased flexibility in this regard might be essential to Australian courts being competent to adjudicate in socio-economic rights cases.

E. *Resource scarcity*

44. A practical approach to the challenges of adjudicating socio-economic rights is also evident in relation to resource scarcity. The interpretation of socio-economic rights so that they do not give rise to an immediate entitlement due to all is an important method of addressing very real concerns¹²⁸ that socio-economic rights cannot be meaningfully enforced in the face of resource scarcity. Concerns about resource scarcity are addressed by judicial deference in remedial determination, the concept of progressive realisation and a pragmatic approach to the immediacy of such rights. The Constitutional Court has consistently rejected notions of socio-economic rights as being absolute, for example, through rejecting notions of an absolute minimum core and through imposing limitations on the socio-economic rights of children which is not evident on the face of the

¹²⁶ See eg *TAC* 2002 (5) SA 721 (CC) [81], [94]; *Grootboom* 2001 (1) SA 765 (CC) [19], [65]. This is allowed by broad standing requirements incorporated within section 38 of the South African Constitution. In addition it is demonstrated by the large number of *amici curiae* permitted to intervene in socio-economic rights cases on a variety of issues.

¹²⁷ Eric C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321, 377.

¹²⁸ See Judith Streak, 'Government's Social Development Response to Children Made Vulnerable by HIV/AIDS: Identifying Gaps in Policy and Budgeting' (Institute for Democracy in South Africa Occasional Paper, 9 September 2005); Sean Phillips, 'The Expanded Public Works Programme' (Paper presented at the discussion forum on Overcoming Underdevelopment in South Africa's Second Economy, 28-29th October 2004); Stacey Leigh-Joseph, 'Reporting to the Courts: Litigation and the Crisis in the Administration of Social Grants in the Eastern Cape' (Report of the Public Service Accountability Monitor, Rhodes University, 27 October 2005); *TAC* 2002 (5) SA 721 (CC) [1].

Constitution itself.¹²⁹ Having rejected immediacy, South Africa addresses the resource scarcity issue primarily by creating a hierarchy of entitlement amongst rights-bearers, with those in most dire need of protection receiving first priority.¹³⁰

45. In Australia, the experience in the states and territory indicate that questions of resource scarcity may feature prominently in any debate. The ACT government has stated that 'a difficult question of allocation of scarce resources may expose the government to liability'.¹³¹ The South African experience is a powerful example on the issue of resource scarcity. The South African combination of resource scarcity and extremely high demand for basic housing, welfare and health care, is not one which would be replicated in the context of any Australian charters of rights. Assessments in 2004 suggested that 22 million South Africans live below the poverty line and only 63.8% of the South African population live in formal permanent housing.¹³² Even if potential Australian charters of rights contained very comprehensive socio-economic rights protections, the demand for these protections would not be comparable to the level of demand in South Africa. Moreover, a widespread culture of bureaucratic non-responsiveness¹³³ likely plays a role in affecting South African service outcomes. Ultimately, this hurdle to effective implementation of judicial decisions is unlikely to arise so acutely in an Australian context. For this reason, if South Africa can address the concern of resource scarcity, it is unlikely to be an insurmountable problem in Australia.

F. Summary

- 46. A close understanding of the South African model of justiciable socio-economic rights¹³⁴ is essential to Australia's debate about a Federal Charter because it dispels many of the common claims made by those who seek to exclude socio-economic rights from meaningful protection. Judicial**

¹²⁹ See Eric C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321, 384.

¹³⁰ See eg *Grootboom* 2001 (1) SA 765 (CC) [36], [43]-[44], [56], [63]-[64]; *TAC* 2002 (5) SA 721 (CC) [24], [70]; *Khosa CCT* 12/03 [74].

¹³¹ ACT Government Response; NSW Bar Report, , [128]; See also WA Report, [4.2.3].

¹³² Debbie Newton and Jacqui Boule, *Evaluation of Legal Resources Centre Housing Programme Final Report* (2004), 7-8, Legal Resources Centre, <http://www.lrc.co.za/Docs/Papers/LRC_Housing_Evaluation.doc> at 20 April 2008.

¹³³ Eg Adrienne Carlisle, 'Minister appeared unaware of his own law' (2008), Dispatch News, <<http://www.dispatch.co.za/article.aspx?id=184938>> at 20 April 2008 which outlines an example in which several NGOs spent three years litigating against the Minister of Social Development in relation to the constitutionality of a social welfare regulation which removed discretion to accept alternative forms of ID from welfare applicants. The Minister had purportedly re-instated the discretion in April 2006, yet neither he nor his department seemed aware of this. The litigation continued to be pursued until April 2008, two years after the offending provisions had been removed.

¹³⁴ In this sense, I refer to South Africa's model of justiciable socio-economic rights, rather than its use of a constitutional, as opposed to legislative model, for human rights protection more generally. The insights offered by the South African jurisprudence are potentially applicable to Australia regardless of whether any Federal Charter adopts a constitutional or legislative format.

assessment of socio-economic rights using a reasonableness-based standard avoids interference with the separation of powers, as does a deferential approach by the judiciary on the issue of remedies. Specific techniques are available to overcome concerns with judicial competence. Moreover, given Australia's economic position in comparison to other nations which have introduced justiciable socio-economic rights, the claim that resource scarcity cannot allow such protections lacks credibility. In addition, the South African example demonstrates the availability of judicial techniques to address concerns of resource scarcity, such as the notion of a non-immediate entitlement which is distributed first to those rights-bearers who are in most urgent need.

VI. The Way Forward for the National Human Rights Consultation

47. The South African example powerfully demonstrates that the "typical" criticisms of socio-economic rights are often exaggerated and that a carefully structured Federal Charter which gives appropriate consideration to the judicial tools necessary to resolve socio-economic rights matters could suitably include even justiciable socio-economic rights. Such a development would be consistent with the voices of Australians, as expressed through state and territory human rights consultations, who have demanded that human rights protections include respect for socio-economic rights. It would also be consistent with the direction of international human rights law which increasingly suggests that socio-economic rights should be enforced and protected in the same manner as civil and political rights.
48. The South African experience identifies fundamental questions with which Australian debate regarding the possible inclusion of justiciable socio-economic rights in a Charter of Rights must engage:
 - (i) Can and should the branches of government interact differently in the context of socio-economic protections (or human rights protection more broadly);
 - (ii) How might socio-economic rights entitlements be appropriately limited;
 - (iii) To what extent does Australia consider itself bound by the interpretations of the ICESCR undertaken by CESCR or might the scope and nature of these rights be interpreted to suit the domestic context;
 - (iv) To what extent is the Australian judiciary suited to undertake this type of adjudication;
 - (v) By what standards is achievement of socio-economic rights to be assessed;

- (vi) What are the potential tools available to allow the judiciary the degree of flexibility necessary to ensure that its task remains purely judicial; and
- (vii) How might procedural mechanisms such as standing, intervention and supervision be necessary to effective socio-economic rights adjudication?

49. In light of international and South African developments, combined with the voices of the Australian people who regard these rights as important to their daily lives, the indivisibility and interdependence of all rights can receive practical application in the commensurate treatment of all 'types' of human rights in a Federal Charter.