



Protecting ESC Rights in the ACT

Submission to the Department of Justice and
Community Safety regarding on the review of the ACT
Human Rights Act 2004

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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1. Overview

1. The *Human Rights Act 2004 (HR Act)* came into force in the Australian Capital Territory (**ACT**) on 1 July 2004. It was the first charter of rights to be passed in Australia. The HR Act incorporates most of the civil and political rights contained in the *International Covenant on Civil and Political Rights (ICCPR)*. However, despite recommendations of the Bill of Rights Consultative Committee to include economic, social and cultural rights (**ESC rights**) those rights were not included.
2. In June 2006, after seeking input from the ACT community, the Department of Justice and Community Safety (the **Department**) released a report detailing the performance of the HR Act in its first twelve months (**the First Review**).¹ The First Review considered the inclusion of ESC Rights, and recommended that the Government should explore support for the direct enforceability of specific rights, such as the right to health, education and housing, but should not amend the HR Act to include economic, social and cultural rights.² Instead, the Government should revisit the question of economic, social and cultural rights as part of the five year review under section 44 of the HR Act.³
3. In May 2009 the ACT Government published a report on the five year review of the HR Act.⁴ Disappointingly, the five year review does not appear to consider the question of protection of ESC rights at all. However, the Department now seeks input into the debate on protecting ESC rights within the HR Act. In particular, it seeks submissions on the nature of the protection, the scope of rights and possible economic impacts of amendments to the HR Act which incorporate ESC rights.
4. The Human Rights Law Resource Centre (**HRLRC**) unreservedly supports the incorporation of ESC rights into the HR Act. This submission sets out:
 - (a) the scope of ESC rights to be protected;
 - (b) the nature of the protection to be provided to those rights;

¹ As required by section 43 of the *Human Rights Act 2004*.

² ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review Report*, June 2006, Recommendation 10.

³ ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review Report*, June 2006, Recommendation 11.

⁴ Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) The ACT Human Rights Act Research Project, 6.

- (c) the benefits of including ESC rights in the HR Act, including economic benefits; and
- (d) responses to arguments against incorporating ESC rights in the HR Act.

2. Recommendations

5. The HRLRC makes the following recommendations in relation to the inclusion of ESC rights in the HR Act:

Recommendation 1:

The HR Act should include the following ESC rights derived from the ICESCR:

- the right to an adequate standard of living, including adequate housing and adequate food, water and sanitation;
- the right to work, including the right to gain one's living at work that is freely chosen and accepted;
- just conditions of work and wages sufficient to support a minimum standard of living;
- the right to equal pay for equal work and equal opportunity for advancement;
- the right to form trade unions and the right to strike;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to social security;
- free primary education, and accessible education at all levels; and
- children's freedom from social exploitation.

Recommendation 2:

If the ACT Government decides not to include all ESC rights in the HR Act, it should at a minimum protect:

- (a) the right to an adequate standard of living – including adequate food, clothing and housing;
- (b) the right to the enjoyment of the highest attainable standard of physical and mental health; and
- (c) the right to education.

Recommendation 3:

The HR Act should require the ACT Government to respect, protect and fulfil ESC rights. This will require the ACT Government to take steps to the maximum of its available resources, with a view to progressively realising ESC rights.

Recommendation 4:

The HR Act must provide for a range of remedies for breaches of ESC rights.

Recommendation 5:

The HR Act should provide judicial remedies for the violation of *all* ESC rights, including damages and any such remedies that a court considers just and appropriate in the circumstances.

Recommendation 6:

The Human Rights Commissioner should be appointed to investigate and conciliate complaints relating to all human rights (including ESC rights) and to investigate systemic issues.

3. Scope of ESC rights to be protected

3.1 Protection of all ESC Rights

6. All ESC rights in the International Covenant on Economic, Social and Cultural Rights (*ICESCR*) should be protected in the HR Act.⁵ The ICESCR sets out the basic ESC rights necessary to live with human dignity. The rights enshrined in the ICESCR include:
- (a) the right to an adequate standard of living, including adequate food, water, sanitation and housing (Article 11);
 - (b) the right to work, including the right to gain one's living at work that is freely chosen and accepted, and to just conditions of work and wages sufficient to support a minimum standard of living (Articles 6 and 7);
 - (c) the right to equal pay for equal work and equal opportunity for advancement (Article 7) and the right to form trade unions and to strike (Article 8);
 - (d) the right of families and children to special protection (Article 10);

- (e) the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12);
 - (f) the right to social security (Article 9); and
 - (g) the right to free primary education and accessible education at all levels (Article 13).
7. The omission of ESC rights from the HR Act means that a large number of internationally recognised rights that are necessary to live with dignity remain unprotected in the ACT.
8. ESC rights protection is as essential as the protection of civil and political rights. This has always been the case. In 1948, the *Universal Declaration of Human Rights (UDHR)* enshrined all the civil, political, economic, social and cultural minimum standards that must be respected, protected and fulfilled to enable people to live with dignity. Human rights are indivisible and interdependent, representing a comprehensive scheme of core minimum standards that conceptually should not – and practically cannot – exist in isolation.

Recommendation 1:

The HR Act should include the following ESC rights derived from the ICESCR:

- the right to an adequate standard of living, including adequate housing and adequate food, water and sanitation;
- the right to work, including the right to gain one's living at work that is freely chosen and accepted;
- just conditions of work and wages sufficient to support a minimum standard of living;
- the right to equal pay for equal work and equal opportunity for advancement;
- the right to form trade unions and the right to strike;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to social security;
- free primary education, and accessible education at all levels; and
- children's freedom from social exploitation.

3.2 Protection of Particular ESC Rights

9. If the ACT Government decides not to include all ESC rights in the HR Act, it should at a minimum protect:

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). On 16 December 1966, the ICESCR was adopted by the General Assembly of the United Nations, the same day on which the General Assembly adopted the ICCPR. On 10 December 1975, Australia ratified the ICESCR.

- (a) the right to an adequate standard of living – including adequate food, clothing and housing;
 - (b) the right to the enjoyment of the highest attainable standard of physical and mental health; and
 - (c) the right to education.
10. The National Human Rights Consultation, the biggest federal consultation on any issue in Australia's history, found that these three rights matter most to Australians, because they are the rights at greatest risk, especially for vulnerable groups in the community.⁶

Recommendation 2:

If the ACT Government decides not to include all ESC rights in the HR Act, it should at a minimum protect:

- (a) the right to an adequate standard of living – including adequate food, clothing and housing;
- (b) the right to the enjoyment of the highest attainable standard of physical and mental health; and
- (c) the right to education.

4. Nature of ESC Rights Protection

4.1 Obligations on the ACT Government

11. In accordance with international human rights law, the HR Act should require all 'public authorities' under the Act to respect, protect and fulfil ESC rights. In accordance with the obligations set out in the ICESCR, this will require the ACT Government to take steps to the maximum of its available resources, with a view to progressively realising of each of the rights.⁷ This would assist in the implementation of the obligations on States in the ICESCR, which apply equally to the ACT Government.⁸

⁶ National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009, p 344.

⁷ Article 2 of the ICESCR requires each state party to take steps within the maximum of available resources to progressively realise the rights in the Covenant. The obligation on states differs from the obligations under the ICCPR. Article 2 of the ICCPR requires a State Party to 'take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

⁸ Article 28 of the ICESCR states that 'the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'.

(a) Respect, Protect, Fulfil

12. The tripartite duty to respect, protect and fulfil all human rights in that Covenant means that the State must refrain from unduly encroaching upon the rights of those who fall within its jurisdiction ('respect'), prevent such interference by third parties and provide forums for redress if this occurs ('protect') and promote and facilitate access to ESC rights ('fulfil').⁹ Common examples of the respect, protect, fulfil typology are as follows:

- Respect – under the right to housing, the requirement that there be no forced evictions by the State;
- Protect – setting up frameworks to prevent breaches of ESC rights, such as the protection against discrimination in the enjoyment of ESC rights; and
- Fulfil – taking legislative, policy and budgetary measures to ensure the enjoyment of rights in the community, for example by establishing an education plan.

13. All human rights, whether they be ESC rights or civil and political rights, therefore require a State both to refrain from acting in certain cases and to be proactive in others. Within this tripartite typology, states are obliged to do what is *reasonable* to realise ESC rights.

(b) Minimum Obligations

14. As stated above, the HRLRC proposes that the HR Act be amended to contain duties to respect, protect and fulfil *all* human rights, including ESC rights. In accordance with those broad obligations, the ACT Government would be subject to the following minimum obligations in respect of ESC rights:

- (a) the requirement to immediately take concrete steps towards fulfilment of ESC rights;
- (b) the immediate attainment of minimum core standards for ESC rights;
- (c) the immediate prohibition of discrimination in the enjoyment of ESC rights;
- (d) the requirement to deploy the maximum available resources;
- (e) the prohibition against retrogressive steps or measures;
- (f) the monitoring of the enjoyment of ESC rights among different groups; and
- (g) progressive full attainment of ESC rights for all.

⁹ See discussion of the respect, protect, fulfil typology in UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, 20th sess, UN Doc E/C.12/1999/5 (1995) available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. See also UN Committee on Economic, Social and Cultural Rights,

15. A detailed discussion of the nature of each of these obligations is contained in the Human Rights Law Resource Centre's submission on a Homelessness Act for Australia, which can be found at www.hrlrc.org.au.¹⁰

Recommendation 3:

The HR Act should require the ACT Government to respect, protect and fulfil ESC rights. This will require the ACT Government to take steps to the maximum of its available resources, with a view to progressively realising ESC rights.

4.2 Remedies for Violations of Human Rights

16. The protection and promotion of human rights requires the provision of adequate and effective remedies for any violations of such rights. Consistent with the international human rights framework, the HR Act should provide 'appropriate means of redress...to any aggrieved individual or group', whether the redress is for a breach of economic, social or cultural rights or civil and political rights.¹¹ The failure to provide effective remedies may, in itself, constitute a violation of Australia's international obligations.¹²
17. Effective remedies must be supported by accessible and affordable legal advice and efficient administration of justice.¹³

Recommendation 4:

The HR Act must provide for a range of remedies for breaches of ESC rights.

(a) Judicial enforcement of the ESC rights

18. The HR Act should provide for judicially enforceable ESC rights. The HRLRC submits that the protections offered in the HR Act be similar to the protection of ESC rights in South Africa, where the right does not create 'rights on demand' but rather obliges the state to take reasonable steps to ensure the progressive realisation of the right within the maximum of

General Comment 15: The right to water, 29th sess, UN Doc E/C.12/2002/11, (2003), [20], in which the CESCR Committee states that all human rights impose the respect, protect and fulfil obligations on State Parties.

¹⁰ <http://www.hrlrc.org.au/content/topics/esc-rights/housing-rights-submission-to-australian-parliament-on-homelessness-legislation-aug-2009/>

¹¹ CESCR, *General Comment 9: The Domestic Application of the Covenant*, [2], UN E/C.12.1998/24 (1998).

¹² UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), 29.

¹³ Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2002/59), [46](f).

available resources. The question of whether the government has acted reasonably in the development of policy or legislation is subject to review by the courts.

19. Judicial remedies should include damages or compensation (where there is no effective or appropriate alternative remedy) or any such remedies as are 'just and appropriate'.¹⁴ While some may be concerned about allowing for a breach of the HR Act to sound in damages, that concern is unfounded. The UK Act extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil case.¹⁵ However, damages are rarely awarded under the UK Act, with judicial review and declaratory and injunctive relief more often providing effective remediation of breaches or proposed breaches of human rights. Nevertheless, the UK courts do retain the discretion to award damages where it is just and appropriate to do so. In the UK, only three cases in the 10 years since the HR Act was enacted have resulted in the payment of compensation.¹⁶
20. The HRLRC submits that the HR Act should allow for damages to be awarded for a breach of civil and political and ESC rights. Where damages are awarded, they should be available to cover actual financial loss, for example loss of earnings, loss in the value of property, or loss of employment prospects. Damages should also be available for non-pecuniary loss such as anxiety or distress.

Recommendation 5:

The HR Act should provide judicial remedies for the violation of *all* ESC rights, including damages and any such remedies that a court considers just and appropriate in the circumstances.

(b) Alternative enforcement mechanisms

21. The HRLRC acknowledges that there are concerns as to how ESC rights might be interpreted by the courts, should the HR Act provide for such rights to be directly enforceable.¹⁷
22. The HRLRC's strongly preferred position would be for the HR Act to provide for directly enforceable ESC rights protections, in accordance with internationally accepted principles of the interdependence and indivisibility of human rights. This would complement the cause of

¹⁴ See, for example, UK Human Rights Act s 8.

¹⁵ See, for example, UK Human Rights Act s 8.

¹⁶ According to the UK Department for Constitutional Affairs, there were only three reported cases by 2006 (6 years after the implementation of the UK Human Rights Act) that awarded damages under the UK Human Rights Act: *R (Bernard) v Enfield Borough Council* [2003] HRLR 111; *R(KB) v Mental Health Review Tribunal* [2004] QB 936; and *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360; UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006); UK Ministry of Justice, Constitution and Strategy Directorates, *Human Rights Insight Project*, UK Ministry of Justice Research Series 1/08 (January 2008), 18.

¹⁷ See eg, ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review Report*, June 2006.

action that is currently available for violations of civil and political rights in section 40C of the HR Act.

23. However, judicial enforcement is not the only important aspect of human rights protection. Ensuring that policy makers and law makers integrate a human rights-based approach in their work should be a very high priority. The creation of a rights-compliant culture is possible through education and does not always require legal enforcement. We also note that judicial challenges to ESC rights are more likely to result in the courts providing government with a range of reasonable options that are considered to be rights-compliant (and findings of breach will be largely left to the most stark factual circumstances).
24. The HRLRC therefore puts forward, as an alternative, a model which provides judicial and non-judicial remedies for breaches of civil and political rights, and, at first instance, only non-judicial remedies for breaches of economic, social and cultural rights. This is the model of ESC rights protection recommended by the National Human Rights Consultation.¹⁸
25. The HRLRC submits that, as an alternative to providing, from the outset, for judicial remedies for breaches of ESC rights, the HR Act could provide for the Human Rights Commissioner to hear complaints from individuals who allege a breach of their ESC rights.¹⁹
26. All public authorities should be required to publish the details of all complaints received, the Commissioner's recommendations and any actions taken in response or the reasons for not taking remedial action, in their annual audit reports. The Commission, in its annual report, should also publish details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken. The information gained by this process would be extremely useful in allowing public authorities and Government to target policy areas that are in need of urgent attention, and will provide a basis for future reviews of the HR Act to determine how and when to bolster the protection of economic, social and cultural rights.

Recommendation 6:

The Human Rights Commissioner should be appointed to investigate and conciliate complaints relating to all human rights (including ESC rights) and to investigate systemic issues.

¹⁸ National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009, Recommendation 22.

¹⁹ An important related issue will be the implementation of a public education program to ensure that people are made aware of the distinction between their civil and political rights and economic, social and cultural rights: see s 9.

5. Benefits of Incorporating ESC Rights

27. The HRLRC submits that, as well as enshrining peoples' rights in law and providing redress for the existing gaps in human rights protection, including ESC rights in the HR Act would provide important social, economic and cultural benefits. There are a number of key benefits set out below.

5.1 Improving law-making and government policy

28. According to former High Court Chief Justice Brennan:

The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.²⁰

29. Including ESC rights in the HR Act could improve the quality of all laws by making the consideration of *all* human rights part of law-making and policy development processes in the ACT, in particular by:

- (a) requiring Parliament to scrutinise new laws and consider whether the law infringes peoples' human rights;
- (b) requiring the executive arm of government (ie, ministers and their departments) to respect human rights when developing policy, implementing laws and otherwise making decisions; and
- (c) requiring courts to interpret all legislation, as far as is possible, in accordance with civil, political, economic, social and cultural rights.

30. Although the HR Act may not go so far as *preventing* Government and courts from acting contrary to human rights in all circumstances, it would require all human rights to be *considered*. In this way, including ESC rights in the HR Act makes it 'more difficult for Parliament to compromise those rights unreasonably',²¹ whether deliberately or inadvertently.

31. Recognition of the interdependence of human rights in the HR Act would improve decision-making and policy design processes. By seeking to identify all of the various civil, political, social, economic and cultural factors that contribute to policy 'problems', the HR Act could promote a more sophisticated analysis of social issues, capturing their multidimensional and interrelated elements. By focusing on the conditions and capabilities that people need to meaningfully participate in society, it would encourage an integrated and holistic response to

²⁰ Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights' (Paper presented at the Human Rights Law Resource Centre seminar, Melbourne, 12 March 2008), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/sir-gerard-brennan/>.

²¹ Julian Burnside, 'Justice will prevail', *The Sunday Age* (Melbourne), 18 May 2008, Opinion 21.

the problems identified. In short, recognition of the interdependence of civil and political rights and ESC rights would encourage 'joined up solutions to joined up problems'.²²

5.2 Protecting rights that matter to marginalised and disadvantaged people

32. First, it is common sense to say that ESC rights may play a more important role than civil and political rights to persons living in poverty. ESC rights should, at least, be given equal priority. In 2003, Kofi Annan (then Secretary-General of the UN) stated 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.²³

5.3 Protecting civil and political rights properly

33. Human rights do not exist in isolation. Rather, the enjoyment of many rights is dependent or contingent on, and contributes to, the enjoyment of other human rights.²⁴ The enjoyment of ESC rights is crucial to the enjoyment of civil and political rights. Social inclusion is essential to political participation, and therefore to the maintenance of a truly democratic system.²⁵ For example:

- (a) meaningful exercise of the right to participate in political life and public affairs requires access to information and realisation of the right to education;
- (b) the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing; and
- (c) access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

²² OHCHR, above n 24, 4–5; Geoff Mulgan and Andrea Lee, *Better Policy Delivery and Design: A Discussion Paper* (2001); Mark Moore, *Creating Public Value: Strategic Management in Governance* (1995) 10; Andrew Jones and Paul Smyth, 'Social Exclusion: A New Framework for Social Policy Analysis?' (1999) 17 *Just Policy* 11, 16.

²³ 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.

²⁴ OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3; United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN A/CONF.157/23 (1993).

²⁵ See Keith D Ewing, 'Judicial Review, Socio-Economic Rights and the Human Rights Act', *International Journal of Constitutional Law*, 16 December 2008, 14.

34. ESC rights should be incorporated into the HR Act because social and economic policy should be developed, interpreted and applied compatibly with social and economic rights. It is more appropriate and preferable, for example, that the courts interpret and apply residential tenancies legislation, so far as possible, consistently with the right to adequate housing than in a manner that has no regard to, or is inconsistent with, this fundamental human right.
35. Finally, the arbitrary division of civil and political rights and ESC rights makes no sense to the rights holder and does not respond to the aspirations or needs of people, particularly people experiencing marginalisation or disadvantage. As one homeless man, Bill, wrote in his submission to the Victorian Charter Consultative Committee, '[h]aving freedom of movement and expression without the right to health and housing is like having icing without a cake'.²⁶

5.4 Complement and Strengthen Rights that Matter to all Australians

36. By incorporating ESC rights into the HR Act, the ACT Government will better protect rights that matter to its citizens.
37. The importance of ESC rights to Australians was put succinctly at the May 2009 review of Australia's periodic report to the Committee. At that hearing, Australia's Permanent Representative to the United Nations stated:

...it will come as no surprise to you and other distinguished members of the Committee that the rights enshrined in the Covenant matter to Australians.

Thus our compliance with the Covenant is more than a question of Australian compliance with an international treaty obligation. It is also a question of meeting the expectations of the Australian public.²⁷

38. As stated above, the Brennan report confirmed that rights to health, housing and education are the rights that matter most to Australians.²⁸

5.5 Economic value add

39. There is clearly an economic cost associated with policies that do not effectively protect the lives and safety of citizens. There is an increasing body of economic research which

²⁶ PILCH Homeless Persons' Legal Clinic, *Homelessness and Human Rights in Victoria; Submission to the Human Rights Consultation Committee* (August 2005), 41

²⁷ Opening Statement by Caroline Millar, Permanent Representative to the United Nations and Head of Delegation, Appearance by Australia (5-6May), Committee on Economic, Social and Cultural Rights, available at <<http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>>

²⁸ National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009, 344.

demonstrates that there is a strong correlation between effective and equitable social policy, on the one hand, and economic development and growth on the other.²⁹

40. For example, when the Productivity Commission conducted a review of the *Disability Discrimination Act 1992 (Cth) (DDA)*, it found that the benefits of the Act in the community fell into two broad categories, one of which was the productive capacity of the economy. It stated:³⁰

First, reductions in discrimination can lead to an increase in the productive capacity of the economy. For example, reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. In turn, better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community.

Second, an effective DDA that improved the acceptance and integration of people with disabilities in society would benefit the community in less tangible but not less significant ways, by promoting greater trust and mutual cooperation.

41. Indeed, although difficult to quantify, the Productivity Commission found that the impact of the DDA had been to produce a net benefit to the community. It stated:³¹

...taking a broad view of all costs and benefits flowing from the Act, the Productivity Commission considers that the DDA is very likely to have produced a net community benefit in the period since its introduction.

42. The economic benefits of closing the gap in life expectancy between Indigenous and non-Indigenous Australians have also been confirmed by a study. An Access Economics report states that there is clear economic justification for reducing Indigenous disadvantage, including improving government budgets by \$8.3 billion per year and boosting national income by \$10 billion.³²
43. The effective implementation of ESC rights in the HR Act may yield substantial economic benefit for the ACT community. Being one of the first jurisdictions in Australia to enact human

²⁹ See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

³⁰ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report Vol 1, Report No 30, (30 April 2004) 134.

³¹ *Ibid*, 152.

³² Access Economics and Reconciliation Australia, *An overview of the economic impact of Indigenous disadvantage* (30 September 2008). 'The report estimates government revenue would be \$4.6 billion higher than otherwise in 2029, including a \$1.7 billion increase in the income tax take and \$530 million extra from the GST, which goes to the states. Government spending would be \$3.7 billion lower, saving \$1.3 billion in health, \$1.2 billion in welfare and \$850 million on the justice system.' Mike Sketekee, 'Closing prosperity gap a \$10bn gain', *The Australian*, 30 September 2008, available at <http://www.theaustralian.news.com.au/story/0,24423119-25072,00.html>.

rights legislation, the ACT is already part of the way towards achieving the maximum economic benefits for its citizens.

6. Responses to arguments against Incorporating ESC Rights

44. Arguments against the implementation ESC rights in the HR Act are likely to concern the justiciability of the rights outlined in the ICESCR. It has been argued that the rights contained in the ICESCR are, by their nature, inherently incapable of being assessed or enforced by a third party.³³
45. This part of the submission will first consider the justiciability of rights generally, and then the separate issues related to the justiciability of collective rights.
46. Three main points are generally raised to argue against the justiciability of ESC rights:
- (a) ESC rights are fundamentally different types of rights from civil and political rights;
 - (b) ESC rights cannot be properly enforced by a court or non-governmental body because realisation of these rights involves policy decisions regarding allocation of resources; and
 - (c) ESC rights are incapable of precise interpretation, application or determination by courts or other non-governmental bodies because their realisation is intended to be progressive and aspirational.
47. Each of these arguments are addressed in turn below.

6.1 ESC Rights are not relevantly different

48. ESC rights are not fundamentally different from civil and political rights. In fact, the two are theoretically and in practice indivisible, interdependent and interrelated. The Vienna Declaration acknowledged this and called on the international community to treat human rights in a fair and equal manner.³⁴
49. The interrelationship and interdependence of economic, social, cultural, political and civil rights can be seen in the drafting of the ICCPR and the ICESCR. It was originally intended for

³³ In this sense, the concept of 'justiciability' is taken to mean an examination of 'the nature of the rights and obligations in question and whether complaints about their violation are susceptible to a rational and meaningful solution by a duly empowered decision maker.' See M Dennis and D 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) *The American Journal of International Law* 462, p 474.

³⁴ Adopted by the World Conference on Human Rights on 25 June 1993.

all human rights to be enumerated in one covenant,³⁵ and Australia was one of the countries that pushed for a single binding instrument that would include ESC rights together with civil and political rights.³⁶

50. While ESC rights and civil and political rights may entail different obligations, these rights are indivisible and are equally capable of determination and enforcement. In fact, even where ESC rights are not expressly protected, they can become the subject of judicial consideration and determination through the operation of existing laws or the enforcement of positive obligations under civil and political rights.³⁷ This proves the justiciability of ESC rights.

6.2 Requirement of courts to make decisions regarding the allocation of public resources

51. A common argument for excluding ESC rights from human rights instruments is that it is not appropriate to have issues concerning the allocation of public resources dealt with by courts; such issues should instead be addressed by Parliament, consistent with the principles of parliamentary sovereignty and the separation of powers.

52. There are four responses to this criticism:

- (a) First, the assumption that enshrining ESC rights will require courts to make resource allocation decisions that are properly the domain of Parliament is misconceived. If ESC rights were included in the HR Act, the extent to which ACT courts would have a say about resource allocation would depend on the model adopted (see paragraph 54 for a discussion on the 'reasonableness test' that could be implemented).
- (b) Secondly, the assumption that courts do not already engage in some resource allocation decisions is a falsehood. For example, when the High Court removed a blanket ban on prisoners voting and determined that prisoners serving sentences of

³⁵ GA Res. 421 E (V) (4 December 1950). Note in particular subparagraph 7(a) and (b) which states that the General Assembly 'Decides to include in the Covenant on Human Rights economic, social and cultural rights...Calls upon the Economic and Social Council to request the Commission on Human Rights, in the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the draft Covenant...'

³⁶ Louis Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982-1983) 32 *The American University Law Review* 1, 38; Paul Kennedy, *The Parliament of Man* (2006), 183-4.

³⁷ For example in *Airey v Ireland* [1979] 2 EHHR 305 at [26]. In this case, the applicant was an Irish national who had been subject to ongoing domestic violence by her husband and was seeking a judicial annulment of her marriage. Under Irish law, no legal aid was available for any civil matters, including judicial marriage separations and the applicant did not have sufficient means to pay for a lawyer. The Court found that a number of the applicant's rights had been breached under the European Convention on Human Rights, including the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (article 6) and the right to respect for private and family life (article 8). Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention [emphasis added]. The facts of the case demonstrate that interdependence and inter-related nature of civil and political rights and ESC rights are interdependent and interrelated - the right to effective access to a court required the State to make legal aid available to the applicant.

less than three years were entitled to vote, it necessarily involved the deployment of resources to prisons, such as mobile voting booths and personnel.³⁸ As Justice Kirby of the High Court stated in a different judgment:

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.³⁹

- (c) Thirdly, many of the substantive rights enunciated in ICESCR include freedoms to act that do not require resource allocation at all.⁴⁰ It is a common misconception that civil and political rights are 'negative' and ESC rights are 'positive'. All human rights (including civil and political rights), entail negative and positive duties on the State which flow from the State's duties to protect, respect and fulfil human rights. As the Chief Justice Pius Langa of the Constitutional Court of South Africa states, 'At the very minimum, socio-economic rights can be negatively protected from improper invasion.'⁴¹ Non-discrimination in the enjoyment of rights is also immediately realisable, as is the requirement that the Government establish a plan to address ESC rights within the bounds of available resources.
53. The jurisprudence of the South African Constitutional Court provides helpful guidance as to the role that ACT courts could properly play with respect to ESC rights if enacted in the HR Act. Appropriately, the South African Constitutional Court has, in its own words, been 'slow to interfere with rational decisions taken in good faith by the political organs ... whose responsibility it is to deal with such matters'.⁴²
54. ACT courts could consider the reasonableness of government action in relation to ESC rights, rather than whether a particular policy is more desirable or rights-compliant than another. The South African Court has considered the issue of 'reasonableness' in determining the extent to which governments have acted or should act in respect of ESC rights. According to the Court in the *Grootboom Case*, which concerned the right to adequate housing:

³⁸ *Roach v Electoral Commissioner* [2007] HCA 43.

³⁹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 414.

⁴⁰ Stein Evju points to Articles 6, 7 and 8 of the ICESCR, which guarantee the right of persons to freely choose their work, to just and favourable conditions of work and to form and join trade unions, see 'Should Norway Ratify the Optional Protocol to the ICESCR? – That is the Question', (2009) 27:1 *Nordisk Tidsskrift For Menneskerettigheter*, 90. The right to equality and non-discrimination between men and women in the enjoyment of ESC rights should also be considered to be immediately realisable and not subject to resource allocation.

⁴¹ Chief Justice Pius Langa, 'Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR', (2009) 27:1 *Nordisk Tidsskrift For Menneskerettigheter*, 33.

⁴² *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].

A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent ... It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.⁴³

55. In a further decision, the *Treatment Action Campaign Case*, which concerned access to anti-retroviral drugs in accordance with the right to health, the Constitutional Court held that:

Determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging the budgets. ... All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights.⁴⁴

56. The Canadian Supreme Court has taken a very similar approach when adjudicating economic, social and cultural aspects of civil and political rights, reviewing policies, programs and practices for consistency with the *Canadian Charter of Rights and Freedoms (Canadian Charter)* but deferring to government to then fashion an appropriate remedy.

57. It should also be noted that assessing the reasonableness of action is a familiar and conventional legal method in Australian law, where courts are routinely required to determine the reasonableness of private and government conduct in a range of matters including:

- (a) tortious claims involving an assessment of the conduct of the 'reasonable person';
- review under Administrative law, on grounds of the reasonableness of government action (such as *Wednesbury* unreasonableness) as well as on the appropriateness of considerations taken into account by the decision maker; and
 - Constitutional review, whereby for any government legislation that limits the rights in the Australian constitution, the limitations must be, among other things, 'reasonably appropriate and adapted' to the purpose of the limitation.

6.3 ESC rights are not sufficiently precise to be interpreted by the judiciary

58. The final argument, that ESC rights are not precise or certain enough to permit adjudication, can be largely dismissed by the existence of General Comments and case law in which those rights have been defined and enforced. In practice, ESC rights have been adjudicated upon by national, regional and international courts, tribunals and other bodies, for example:

- (a) Since 1987 the Committee has been drafting General Comments that assist in the interpretation of the articles of ICESCR and definition of ESC rights.⁴⁵ Further, ESC

⁴³ *Government of South Africa v Grootboom* [2001] 1 SA 46, [41].

rights are protected by other treaties, such as CERD, and have been subject to adjudication under the individual communication procedures pertaining to those treaties.⁴⁶

- (b) The South African Constitutional Court has considered and enforced ESC rights in a number of leading cases, including:
- (i) The right to housing: In *Government of the Republic of South Africa and others v Grootboom and others*,⁴⁷ the Constitutional Court of South Africa determined that the State had to take reasonable measures to implement the right to housing;⁴⁸ and
 - (ii) The right to health: In the *Treatment Action Case*, the Court required the South African government to provide the necessary treatment to prevent mother to child transmission of HIV as part of the State's obligation under the right to health to act reasonably in devising measures and policies to progressively advance the realisation of the right.⁴⁹
- (c) The right to respect for private and family life is protected by the HR Act already, and the European Convention on Human Rights and has been extensively examined at a regional level by the European Court of Human Rights.⁵⁰
- (d) The right to education is protected by the UK *Human Rights Act 1998* and the European Convention on Human Rights, and has been considered and enforced by UK and the European courts.⁵¹

⁴⁴ *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

⁴⁵ See General Comments at <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>>.

⁴⁶ ESC rights are protected by CERD (see article 5(e)) and the CERD Committee can hear individual and State complaints about violations of the rights under the CERD (See Articles 11 and 14).

⁴⁷ (2001) 1 SA 46 (CC).

⁴⁸ In this case, the plaintiffs were illegally living on unoccupied land and were evicted by the local municipality a day earlier than notified and their possessions and building materials were destroyed in the process. In the circumstances, the right to access adequate housing required the State to 'at the very least' carry out the eviction in a humane manner. The Supreme Court noted that the South African government had a long-term housing policy for the progressive realisation of the right to access adequate housing. However, it found (at [26]) that, under the circumstances this 'fell short of the obligations imposed upon the state...in that it failed to provide for any form of relief to those desperately in need of access to housing.'

⁴⁹ *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

⁵⁰ This is article 8 under the European Convention on Human Rights. See *Moldovan and others v Romania* (Application Nos. 41138/98 and 64320/01 of 12 July 2005), *Connors v United Kingdom* (Appn No. 66746/01 of 27 May 2004) *Chapman v United Kingdom* (2001) 33 EHRR 399, *Selçuk and Asker v Turkey* (1998) 26 EHRR 477, which all involved eviction of the plaintiffs by the various States, who were found to have breached this right. See also *López Ostra v Spain* (1995) EHRR 277, where the applicant alleged that the State had failed to regulate a privately owned tannery plant that was causing environmental pollution in the local area. The European Court of Human Rights held that the applicant's right to respect for private and family life had been breached. Note that article 10 of the ICESCR contains a right of protection and assistance for family and article 11 contains a right to an adequate standard of living for individuals and their families.

- (e) Other rights that have been considered by courts and are the subject of detailed jurisprudence at a national and regional level include the right to work,⁵² the right to social security⁵³ and the right to health.⁵⁴
 - (f) At an international level, in an advisory opinion, the International Court of Justice has examined realisation of rights under the ICESCR (among other human rights conventions) in connection with its analysis of the legal consequences of the construction of the wall in the Occupied Palestinian Territory.⁵⁵
59. On this basis, the HRLRC submits that ESC rights contained in the ICESCR are sufficiently certain and clearly capable of adjudication by the ACT judiciary if incorporated into the HR Act.

⁵¹ See for example *R v East Sussex, Ex parte Tandy* [1998] AC 714, House of Lords consideration of the meaning of a 'suitable education' and *Chapman v The United Kingdom* (Application no 27238/95). Also see *Case Relating to Certain Aspects of the Laws on Use of Languages in Education in Belgium v Belgium* (1979-80) 1 EHRR 241, (No 2) (1979-80) 1 EHRR 252. In that case the applicants were French speaking Belgians who lived in a Dutch-speaking commune of Belgium. Under Belgian law, children living in communes of 'special status', where both French and Dutch are used in administrative matters, could receive French language nursery and primary education (but not secondary education). Children living outside a 'special status' commune in Dutch unilingual areas of Belgium could access Dutch language education in a special status commune, but not French language education. The Court held that the right to education did not confer, at B [9], 'a right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures...'. The Court found that the laws were discriminatory and in contravention of the Convention. See also various decisions of the New York State Court of Appeals in *Campaign for Fiscal Equity v State of New York et al*, 86 NY2d 307, 100 NY2d 893, 29 AD3d 175.

⁵² See the decision by the African Commission on Human and Peoples' Rights, *Malawi African Association and Others v Mauritania* (Commn Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000)). This decision concerned allegations of grave and systematic human rights abuses against the minority black ethnic Mauritanian groups by the majority ethnic Moor government. The complaint alleged that over 100,000 black ethnic Mauritians were being used as slaves or were classified as 'freed slaves'. The African Commission on Human and Peoples' Rights found that a number of breaches of human rights under the African Charter on Human and Peoples' Rights had occurred. By reference to the right to work under article 7 of the ICESCR, the Commission found there was a breach of the right to respect of inherent human dignity because the conditions of work for these people were akin to slavery. The Commission also found that conditions in detention of black ethnic Mauritanian prisoners constituted a breach of the right to enjoy the best attainable state of physical and mental health under the Charter.

⁵³ See judgment of the Constitutional Court of South Africa in *Khosa and Others v Minister of Social Development and Others* (2004) 6 BCLR 569 (CC). In this case, the applicants were citizens of Mozambique who were long term permanent residents of South Africa. Under South African law, as non-citizens, the applicants were unable to access old-age grants or other forms of social assistance. The Constitutional Court held that these measures were not reasonable and that denial of social security rights constituted unfair discrimination.

⁵⁴ See judgment of the Federal Court of Appeals of Argentina, *Viceconte c/Estado Nacional-Ministerio de Salud y Acción Social-s/ amparo ley 16.986* (2 June 1998), which specifically cites article 12 of the ICESCR at paragraph V. In that case, the plaintiff sought an order from the Court that the Argentine government protect the right to health of people located in areas affected by hemorrhagic fever.

⁵⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136. In that case, the International Court of Justice held, at [111] that the ICESCR and the ICCPR were applicable to Israel's actions in the Occupied Palestinian Territory and construction of the wall was a violation of various rights under ICESCR that was not justified under article 4 of ICESCR. The Court found, at [134], construction of the wall impeded 'the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child', as well as rights under the ICCPR, the Fourth Geneva Convention and a number of Security Council Resolutions.