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**Australia's Ratification of the Optional Protocol to
the International Covenant on Economic, Social and
Cultural Rights**

July 2009

Human Rights Law Resource Centre Ltd

Level 17, 461 Bourke Street

Melbourne VIC 3000

Australia

www.hrlrc.org.au

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**), Australia's first specialist human rights legal service, is an independent community legal centre.

The HRLRC aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. The HRLRC also aims to support and 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 by undertaking and supporting the provision of legal services, litigation, education, training, research, policy analysis and advocacy regarding human rights.

The HRLRC works in four priority areas:

- (a) the development, operation and entrenchment of human rights legislation at a national, state and territory level;
- (b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- (c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the rights to adequate housing and health care; and
- (d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

Emily Howie

Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4432

F: + 61 3 8636 4455

E: emily.howie@hrlrc.org.au

W: www.hrlrc.org.au

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1. Overview

2. On 10 December 2008, the General Assembly of the United Nations (**UN**) adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (**Optional Protocol** and **ICESCR**).¹ The Optional Protocol will open for signature on 29 September 2009 by States who are party to the ICESCR, and will enter into force upon ratification or accession by ten states.
3. The Human Rights Law Resource Centre (**HRLRC**) unreservedly supports Australia's early and full ratification to the Optional Protocol, including Australia's acceptance of the two opt-in mechanisms in the Protocol.
4. This submission discusses how Australia's ratification to the Optional Protocol is in the national interest and why Australia should be a member of the first group of states to sign and ratify the Optional Protocol and thereby bring it into force.
5. This submission sets out:
 - (a) the background, content and operation of the Optional Protocol;
 - (b) the benefits of ratifying the Optional Protocol, including that it will;
 - (i) complement and strengthen rights that matter to Australians;
 - (ii) re-affirm Australia's commitment to constructive engagement with the United Nations system;
 - (iii) confirm Australia's position internationally as a leader in human rights;
 - (iv) enhance public awareness and understanding; and
 - (v) be capable of being implemented with relative ease in Australia's legal and political structures, without opening the way for a flood of litigation;
 - (c) some responses to possible arguments against ratification and implementation, such as the justiciability of economic, social and cultural rights; and
 - (d) the rationale for Australia opting to accept the Inter-State complaints and inquiry procedures of the Committee under the Optional Protocol.

¹ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution adopted by the General Assembly, 10 December 2008, A/RES/63/117.*

2. Background, Content and Operation of the Optional Protocol

2.1 The International Covenant on Economic, Social and Cultural Rights

6. On 16 December 1966, the ICESCR² was adopted by the General Assembly of the United Nations, the same day on which the General Assembly adopted the International Covenant on Civil and Political Rights³ (*ICCPR*). Together, the ICESCR and the ICCPR are considered to be complementary twin pillars, containing the civil, political, economic, social and cultural rights that are indivisible and necessary to ensure respect for human rights and human dignity.
7. The ICESCR sets out the basic economic, social, and cultural rights (*ESC rights*) necessary to live with human dignity. The rights enshrined by 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).
8. On 10 December 1975, Australia ratified the ICESCR. By ratifying the ICESCR, Australia committed to 'taking steps...to the maximum of its available resources, with a view to achieving progressively the full realisation' of the above rights in the Covenant (Article 2(1)).

² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976)

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

2.2 The Committee on Economic, Social and Cultural Rights

9. In 1987, the Economic and Social Council of the UN established the Committee on Economic, Social and Cultural Rights (the **Committee**). The Committee is comprised of 18 independent human rights experts, broadly representative of different geographic regions and working in their personal capacity. An eminent Australian, Professor Philip Alston, was Chairperson of the Committee from 1991 to 1998. The Committee's current role is twofold:
- to monitor implementation of the ICESCR by State parties, by reviewing periodic state reports on compliance; and
 - to interpret articles of the ICESCR through the publication of General Comments.
10. Since 1987, Australia has provided four periodic reports regarding its compliance with the ICESCR to the Committee. In response, the Committee has presented 'Concluding Observations' and recommendations on Australia's compliance with the ICESCR. Australia's most recent period report was presented to the Committee in May 2009, with Concluding Observations published on 22 May 2009.
11. Under the Optional Protocol, the Committee is given new responsibility for conducting the complaint and inquiry procedures, discussed below.

2.3 The Optional Protocol to ICESCR

12. Until recently, the ICESCR was one of only two of the core human rights treaties not accompanied by an individual communications procedure.⁴ Australia has already committed to allowing individual complaint procedures under the ICCPR, the Convention Against Torture (**CAT**), the Convention on the Elimination of All Forms of Racial Discrimination (**CERD**) and the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**).⁵
13. As stated above, the Optional Protocol was adopted on 10 December 2008 and will be open for signature on 29 September 2009. Ten states must ratify or accede to the Optional Protocol in order for it to enter into force.
14. The Optional Protocol does not grant any additional substantive rights above those already recognised in the ICESCR. Rather, the Optional Protocol establishes three procedures

⁴ The Committee on the Rights of the Child, which monitors implementation of the Convention on the Rights of the Child 1989, 1577 UTS 3 does not, yet, have a mandate to receive individual communications from alleged victims.

⁵ The communication procedures are established by the First Optional Protocol to the ICCPR; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, (entered into force 26 June 1987); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21

pursuant to which the Committee may consider complaints alleging violations of rights guaranteed under the ICESCR:

- the individual and group communication procedure;
 - the inter-state complaints procedure; and
 - the inquiry procedure.
15. The Committee can only receive complaints using the above procedures if a State has ratified both the ICESCR and the Optional Protocol.⁶ Each of the procedures is discussed in turn below.

(a) The Individual and Group Communication Procedure

16. The communication procedure permits individuals or groups of individuals to submit a complaint of an alleged violation of any of the rights contained in the ICESCR to the Committee and to seek redress for that violation (the **individual complaints mechanism**). Complaints can only be brought by, or on behalf of, victims who are 'under the jurisdiction' of a State party to the Optional Protocol.⁷

(i) Admissibility requirements

17. Not all complaints to the Committee will be heard. The Optional Protocol sets out the strict admissibility requirements that must be met before the Committee will consider the merits of a complaint brought using the individual complaints mechanism. It provides that:
- The author of the communication must have exhausted all available domestic remedies: *art 3(1)*;
 - Generally, a communication must be made within a year of exhausting domestic remedies: *art 3(2)(a)*;
 - The communication must not concern facts which pre-date the date on which the Optional Protocol entered into force for the State party: *art 3(2)(b)*;
 - The communication must not already be the subject of examination by the Committee or another international investigation (or a prior examination or investigation): *art 3(2)(c)*;

December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000).

⁶ Optional Protocol, Article 1.

⁷ Optional Protocol, Article 2.

- A communication must not be incompatible with the provisions of the Covenant: *art 3(2)(d)*;
- A communication will be inadmissible if it is:
 - manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media: *art 3(2)(e)*;
 - an abuse of the right to submit a communication: *art 3(2)(f)*; or
 - anonymous or not in writing: *art 3(2)(g)*.
- The Committee may decline a communication if it determines that it does not reveal that the author has suffered a clear disadvantage: *art 4*.

(ii) Procedure for Examination of Complaints

18. The Optional Protocol establishes the following participatory procedure for examination of admissible complaints:
- (a) First the Committee will bring the matter to the attention of the State party concerned.⁸
 - (b) The State party will then have six months in which to respond to the complaint, with a written explanation or statement with any clarification of the matter and details of any remedies that may have been provided by the State party.
 - (c) The Committee will consider the merits of the case in closed meetings,⁹ in light of all the documentation before it, including relevant material from UN bodies and specialised agencies.¹⁰
 - (d) After examining a communication, the Committee must transmit its 'views' on the communication, together with any 'recommendations', to the parties.¹¹
19. In 'exceptional circumstances', the Committee may also make an urgent request to a State party, prior to hearing the merits of the case, asking that it take interim measures to avoid possible irreparable damage to the victim/s of the alleged violations.¹²

⁸ Optional Protocol, Article 6(1).

⁹ Optional Protocol, Article 8(2).

¹⁰ Optional Protocol, Article 8(1). Under this article, the Committee may take into account 'relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State party concerned': Optional Protocol, Article 8(3).

¹¹ See Optional Protocol, Article 9(1).

¹² Optional Protocol, Article 5(2). The Optional Protocol expressly states that the invocation of these measures does not imply a determination on admissibility or on the merits of the communication.

(b) The Inter-State Communication Procedure

20. The Optional Protocol also contains an Inter-State communication procedure. This procedure allows the Committee to consider communications from one State party alleging that another State party is not fulfilling its obligations under the ICESCR.¹³
21. The Inter-State communication procedure provides first for a friendly resolution between the States, without the Committee's involvement. In the absence of a resolution, either State can refer the matter to the Committee.¹⁴ As with an individual communication, an Inter-State communication will not be examined until the Committee has ascertained that all domestic remedies have been exhausted.¹⁵ The Committee is also required to conduct its examination in private¹⁶ and is obliged to attempt to facilitate a 'friendly' resolution of the matter.¹⁷
22. The Committee is empowered to call upon the State Parties concerned to provide relevant information and each of these parties have a right to be represented and to make submissions to the Committee when it is under consideration.¹⁸
23. Under an Inter-State complaint, the Committee is to either:
 - (a) where a friendly resolution of the matter was able to be achieved, provide a brief report of the facts and solution; or
 - (b) where a friendly resolution was not achieved, provide a report setting out the relevant facts and may also express any views it considers relevant.¹⁹
24. The Inter-State communication procedure is an 'opt-in' procedure. This means that it will only be available where both States involved are party to the Optional Protocol *and* have made the necessary declarations recognising the competence of the Committee in this regard.²⁰

(c) The Inquiry Procedure

25. The Optional Protocol also establishes an inquiry procedure, which allows the Committee, upon receipt of reliable information, to initiate inquiries into grave or systemic violations by a

¹³ Optional Protocol, Article 10.

¹⁴ Optional Protocol, Article 10(b).

¹⁵ Optional Protocol, Article 10(1)(c).

¹⁶ Optional Protocol, Article 10(1)(e).

¹⁷ Optional Protocol, Article 10(1)(d).

¹⁸ Optional Protocol, Article 10(1)(f) and (g).

¹⁹ Optional Protocol, Article 10(h).

²⁰ Optional Protocol, Article 10(1): In order for a State party to be subject to the Inter-State complaint mechanism, it must declare that it recognises the competence of the Committee to receive and consider communications under Article 10.

- State party of any of the rights contained in the ICESCR. Whereas the individual communication mechanism aims to provide individual redress for human rights violations, the inquiry mechanism seeks to provide remedies for *systematic* human rights abuses within a state.
26. There are also stringent threshold requirements to be met before the Committee will initiate an inquiry, requiring that the Committee receive reliable information indicating grave or systemic violations by a State party of rights protected in the ICESCR.²¹
 27. Under Article 11, where the Committee embarks upon an inquiry, it will invite that State party to cooperate in the examination and make submissions with regard to the information received.²² The Committee's inquiry will be confidential.²³ It may include a visit to the State party concerned, but only with that party's consent.²⁴ The State party's co-operation in the process must be sought at all stages of the inquiry.²⁵
 28. Under the inquiry procedure, the Committee will transmit any findings, comments and recommendations arising from the inquiry to the State party concerned²⁶ and will invite the State party to respond.²⁷
 29. The Committee may also follow-up on the inquiry by inviting the State party to provide details of any measures taken in response to an inquiry, or it may invite the State party to include such information in its periodic reports to the Committee.²⁸
 30. As with the Inter-State complaint mechanism, the inquiry procedure requires States party to the Optional Protocol to 'opt-in' to the inquiry procedure by making a declaration that it recognises the Committee's competence to conduct such an inquiry.²⁹

2.4 The Nature of Committee Views, Findings and Recommendations

31. As discussed above, at the conclusion of the Committee's consideration of individual communications, Inter-State communications and inquiries, the Committee is variously empowered to provide views, findings, comments and recommendations.

²¹ Optional Protocol, Article 11(2).

²² Optional Protocol, Article 11(2).

²³ Optional Protocol, Article 11(4).

²⁴ Optional Protocol, Article 11(3).

²⁵ Optional Protocol, Article 11(4).

²⁶ Optional Protocol, Article 11(5).

²⁷ Optional Protocol, Article 11(6).

²⁸ Optional Protocol, Article 12.

32. Committee 'views' are not binding in the way that decisions of domestic courts are binding; nor are States free to disregard them at will. The legal force of Committee views lies between these two extremes, requiring that States act in good faith in cooperating with the Committee and treating the view as an 'authoritative determination by the organ established under the Covenant itself'.³⁰
33. The Committee's reports constitute, at a minimum, very persuasive analyses and guidance from independent experts on a States' compliance with ESC rights in a particular case. Further, the reports are given more weight given that they result from a collaborative and inclusive process, in which all relevant parties participate.
34. Ultimately, however, it will be up to the Australian Government to determine the extent to which it acts upon the reports resulting from the Committee's procedures under the Optional Protocol.

3. Benefits of Ratifying the Optional Protocol

3.1 Complement and Strengthen Rights that Matter to Australians

35. By ratifying the Optional Protocol, the Australian Government will better protect rights that matter to Australians.
36. 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.³¹

²⁹ Optional Protocol, Article 11(1).

³⁰ This issue was addressed by the Human Rights Committee in relation to the legal status of its views in *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, Ninety-fourth session, Geneva, 13-31 October 2008.

³¹ 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>>

37. The Federal Government's position is also that the promotion of human rights is an issue of national importance for all Australians. To this end, the Government has initiated a national consultation regarding the recognition and protection of human rights in Australia.³²
38. Currently there is only limited protection of ESC rights in Commonwealth, State and Territory legislation and policies.³³ The most recent Concluding Observations from the Committee set out the significant gaps in protection, and called on the Australian government to:
- consider the introduction of a Federal Charter of rights that includes recognition and protection of ESC rights;
 - enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all prohibited grounds;
 - empower the Australian Human Rights Commission to address ESC rights.³⁴
39. Even where domestic measures do exist to protect and promote ESC rights, in some circumstances they might fail. If this occurs, access to international mechanisms provides an essential procedure by which individuals can access a remedy for the contravention.³⁵
40. Ratifying the Optional Protocol, and participating in its procedures, will complement and strengthen the protection of ESC rights in Australia. The Optional Protocol is not intended to replace existing domestic remedies – in fact, one of the goals of the Optional Protocol is to strengthen the protection and promotion of ESC rights at the domestic level.³⁶ Ratification will improve protection both directly, by providing an avenue of redress for individuals, and indirectly, by improving awareness and understanding of ESC rights in government through engagement in the constructive, participatory and capacity building processes created by the Optional Protocol. The High Commissioner for Human Rights has noted that the Optional

³² http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference. The National Human Rights Consultation Committee is expected to report to the Federal Government on 31 August 2009.

³³ For a full discussion of the protection of ESC rights and the gaps in that protection, see the NGO Report to the Committee dated April 2008 and Addendum dated May 2009 available at <http://www.hrlrc.org.au/content/topics/esc-rights/icescr-ngo-report-australia-un-committee-on-economic-social-and-cultural-rights/>.

³⁴ Committee on Economic, Social and Cultural Rights, 42nd Session, Geneva, 4 to 22 May 2009 *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights – Australia* (E/C.12/AUS/CO/4), [11], [13], [14].

³⁵ It is a basic principle of international human rights law that the obligation to respect, protect and fulfil human rights includes a duty to provide effective remedies to victims where their rights have been breached: ICCPR, article 2(3); Office of the United Nations High Commissioner for Human Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

³⁶ The UN High Commissioner for Human Rights noted that the success of the Optional Protocol would be measured not only by the number of communications received and examined under the Optional Protocol, but also the extent to which it provides an incentive for strengthening national human rights protection mechanisms: Statement to the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, 31 March 2008, <http://www.unhcr.ch/hurricane/hurricane.nsf/0/56935B5FB6A5B376C12574250039EAE0?opendocument>, at 5 June 2009.

Protocol is an important mechanism for documenting violations, which can in turn be a tool that prompts the responsible authorities to respond.³⁷

3.2 Constructive Engagement with the UN Human Rights System

41. Active membership of the UN is one of the three pillars underpinning the Australian Government's approach to foreign policy.³⁸ The Government has already demonstrated its commitment to actively engaging with the UN by declaring its intention to bid for a seat on the Security Council; extending a standing invitation to United Nations human rights experts to visit Australia;³⁹ signing the Optional Protocols to the CAT and to CEDAW;⁴⁰ and conducting a parliamentary inquiry into ratifying the Optional Protocol on the Convention on the Rights of Persons with Disabilities.
42. Ratification will re-affirm Australia's commitment to constructive engagement with UN treaty bodies. Individual communications to UN treaty bodies are already an extremely important means by which Australia engages with the UN system.⁴¹ As a party to the Optional Protocol, Australia will be able to play a direct role in the development of the international ESC rights jurisprudence made by the Committee, whilst also engaging in a process by which it can better understand and discharge its international obligations.

3.3 Australia as an International Leader

43. The Australian Government has consistently stated the importance, as part of its re-engagement with the international human rights community, of Australia playing a leadership role in human rights.⁴² Australia played an historic and significant role in the development and adoption of the Universal Declaration on Human Rights, and Australia propounds its enduring commitment to the values contained in that instrument.⁴³

³⁷ *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, (UN Doc E/2009/90), 118.

³⁸ *National Interest Analysis* [2008] ATNIA 31, 3 December 2008, in relation to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

³⁹ On 7 August 2008 Australia issued a standing invitation to the Special Procedures of the UN Human Rights Council to visit Australia.

⁴⁰ On 22 May 2009, the Attorney General, the Hon Robert McClelland announced that the Australian government had signed Optional Protocol to the Convention Against Torture.

⁴¹ As stated above, Australia has also accepted the competence of the Committee against Torture, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women to hear and determine individual complaints regarding Australia.

⁴² See for example, The Hon Robert McClelland, Attorney-General, 'Human Rights: A Moral Compass', speech delivered to the Lowy Institute for International Policy, Sydney, 22 May 2009.

⁴³ See DFAT Publication, 'Australia: Seeking Human Rights for All', http://www.dfat.gov.au/hr/hr_for_all.html.

44. In fact, as part of its Security Council bid, the Australian government has relied upon its commitment to human rights as one of four key pillars to the bid. A DFAT overview of the candidacy states that 'Australia is a principled advocate of human rights for all' and is 'committed to the Universal Declaration of Human Rights and party to the major human rights treaties'. ESC rights are contained within the Universal Declaration, and the ICESCR is one of the main human rights treaties.
45. By ratifying the Optional Protocol early, upon it opening for signature, Australia will confirm its commitment to the Universal Declaration and present Australia as an international leader in human rights protection.

3.4 Enhance Public Awareness and Understanding

46. The Optional Protocol requires each State party to distribute and publicise both the ICESCR and the Optional Protocol as well as information about decisions of the Committee, particularly where decisions concern the State party.⁴⁴ This obligation will promote public awareness of the ICESCR and procedures under the Optional Protocol, and will help public understanding of the importance and justiciability of ESC rights.
47. Ratification of the Optional Protocol would therefore promote a more robust understanding of the ICESCR and the nature of ESC rights, and would contribute to the recognition and realisation of ESC rights, such as the rights to adequate health care and housing, in Australia.

3.5 The Optional Protocol can be Implemented with Relative Ease

48. The HRLRC considers that the Optional Protocol can be implemented with relative ease within Australia's existing political and legal structures.
49. Australia is already a party to ICESCR, which establishes Australia's substantive obligations in respect of protecting and promoting ESC rights. The Optional Protocol is a procedural instrument. It neither introduces new nor expands the ESC rights obligations that Australia has accepted through ratification of the ICESCR. The Optional Protocol does not impose any new substantive obligations other than a commitment to co-operate in the communication and inquiry procedure.

⁴⁴ Optional Protocol, Article 16.

50. Australia is already party to four other treaties by which it responds to individual complaints mechanisms.⁴⁵ As noted above, Australia is also working towards ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Australia's experience as a party to these human rights treaties shows that international communication mechanisms do not undermine democracy or introduce a Bill of Rights 'through the back door'.⁴⁶ Rather, they promote the recognition, enjoyment and exercise of human rights and fundamental freedoms of Australian citizens. Further, the Office of International Law within the Attorney-General's department has the necessary experience and expertise in managing individual complaints to UN mechanisms.

3.6 Implementation will not Result in a Flood of Complaints

51. Finally, ratification to the Optional Protocol is unlikely to subject the Australian Government to a flood of complaints and investigations.

52. As set out in paragraph 17 above, the Optional Protocol contains strict admissibility requirements that place strict time limits on claims, prevent duplication of claims between treaty bodies and that will operate to restrict claims to those that have exhausted domestic remedies and have some merit. Also, the experience of other UN human rights treaty bodies with similar individual communication procedures has not been a flood of complaints.

Recommendation 1:

That the Australian Government ratify the Optional Protocol.

4. Arguments against Ratifying the Optional Protocol

4.1 Overview

53. Arguments against the implementation of the Optional Protocol 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.⁴⁷ A number of countries, including Australia, have also expressed the view that the

⁴⁵ Australia has also accepted the competence of the Committee against Torture, the HRC, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women to hear and determine individual complaints regarding Australia.

⁴⁶ Hilary Charlesworth, "Australia's Ratification to the First Optional Protocol to the International Covenant on Civil and Political Rights". (1991-1992), 18 *Melbourne University Law Review* 428, 431.

⁴⁷ 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

collective rights contained in the ICESCR should not fall within the competence of the Committee.

54. 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.

4.2 Arguments about the Justiciability of ESC Rights Generally

55. 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.
56. Each of these arguments are addressed in turn below.

(a) Indivisibility of all human rights

57. 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.⁴⁸
58. 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 all human rights to be enumerated in one covenant,⁴⁹ and indeed Australia was one of the countries that pushed for a single binding instrument that would include ESC rights together with civil and political rights.⁵⁰

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.

⁴⁸ Adopted by the World Conference on Human Rights on 25 June 1993.

⁴⁹ 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...'

⁵⁰ 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.

59. Even after the General Assembly passed a resolution to create two separate conventions on 6 February 1952, both the ICCPR and the ICESCR continued to be drafted in tandem and were adopted on 16 December 1966 by the General Assembly with one resolution.
60. Civil and political rights and ESC rights are also interrelated in practice. Violations of civil and political rights will often impact upon a victim's ESC rights, and vice versa. But the interdependence and indivisibility is self evident, 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.
61. 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.⁵¹ This proves the justiciability of ESC rights.
- (b) ESC rights include positive and negative obligations and all human rights have implications for allocation of public resources**
62. ESC rights contain both positive and negative obligations on the State, and in both cases they can be justiciable.
- (i) ESC rights with negative obligations**
63. To the extent that ESC rights entail 'negative' obligations on the State, they do not involve resource allocation. Although some would classify civil and political rights as 'negative' rights (requiring the State to refrain from acting in a certain way and therefore not involving

⁵¹ 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.

- assessment of resource allocation because they do not require public expenditure) and ESC rights, as 'positive' rights (that can only be satisfied through government action, necessarily involve public expenditure), that distinction is clearly inaccurate and outdated.
64. All human rights have negative and positive aspects, because States have a general duty to respect, protect and fulfil *all* human rights.⁵² This means that a 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').⁵³ All human rights obligations, whether ESC rights or civil and political rights, require a State both to refrain from acting in certain cases and to be proactive in others.⁵⁴
65. To the extent particularly that States are required to 'respect' rights by refraining from doing something, the rights can be considered as having 'negative' obligations and are capable of immediate effect.⁵⁵ The Committee has also stated that that many rights in the ICESCR would seem to be capable of immediate application by judicial and other organs in many legal systems.⁵⁶ These rights include the right to equality between men and women in the enjoyment of ESC rights, the right to fair wages and the right to strike and participate in trade unions, a child's right to protection from economic and social exploitation and the right to free compulsory primary education.

(ii) Positive obligations and resource allocation

66. To the extent that ESC rights do require a consideration of resource allocation, an argument is sometimes put that it is not appropriate to have issues concerning the allocation of public resources dealt with by courts (or, by analogy, the Committee). It is argued that resource allocation issues should instead be addressed by Parliament, consistent with the principles of parliamentary sovereignty and the separation of powers.

⁵² Report of the Consultation Committee for a Proposed WA Human Rights Act (November 2007) (*WA Report*), p 71. See also International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (2008), pp 42-49.

⁵³ International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (2008), pp 42 to 49.

⁵⁴ See, for example, the comparative table by Dr Julie Debeljak of the Castan Centre for Human Rights Law at Monash University in the WA Report at p 70, which demonstrates that the right to life (a civil and political right) entails costs to government in the same way that the right to housing (an ESC right) does.

⁵⁵ In his Report of 13 January 2003, the Independent Expert on the question of a draft optional protocol to the ICESCR identified certain rights under the ICESCR that require states 'not to do something' as capable of immediate effect. Report by Mr Hatem Kotrane, independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, 'Economic, Social and Cultural Rights: Status of the international covenants on human rights', Commission on Human Rights (59th Session, E/CN.4/2003/53), p 10.

⁵⁶ General Comment 3: *The Nature of States Parties Obligations*, CESCR, at [10], available at <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>>.

67. There are three responses to this criticism:
- (a) First, the assumption that adjudicating on ESC rights will require the Committee to make resource allocation decisions that are properly the domain of the Australian Parliament is misconceived. If the Optional Protocol were ratified, the extent to which the Committee would have a say about resource allocation would depend on the response adopted by government to the views and recommendations of the Committee.
 - (b) Secondly, the assumption that courts and other quasi-judicial bodies 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 less than three years were entitled to vote, it necessarily involved the deployment of resources to prisons, such as mobile voting booths and personnel.⁵⁷ 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.⁵⁸
 - (c) Thirdly, the ICESCR requires governments to take steps to progressively realise the rights in the Covenant 'to the maximum of available resources'. The experience in South Africa, where ESC rights are justiciable under the Constitution, is that Courts will not seek to be involved in resource allocation per se, but will assess the reasonableness of government action.⁵⁹ Given the terms of the Optional Protocol, this is the analysis that the Committee is likely to use to assess of the measures taken by a State. Article 8(4) of the Optional Protocol explicitly requires the Committee to consider the reasonableness of the steps taken by the State Party and to bear in mind that the State party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.
68. Moreover, the Committee will not exercise its powers unfettered; rather, its actions are limited by the terms of the Optional Protocol. Any views or recommendations expressed by the Committee will require the Australian Government to act in order to have any direct effect in

⁵⁷ *Roach v Electoral Commissioner* [2007] HCA 43.

⁵⁸ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 414.

⁵⁹ 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'. *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].

Australia. It is therefore highly unlikely, if not impossible, for the processes established by the Optional Protocol to unduly impinge upon the policy decisions of the Australian Government.

(c) ESC rights are sufficiently precise to be interpreted by the Committee

69. 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.⁶⁰ Further, ESC rights are protected by other treaties, such as CERD, and have been subject to adjudication under the individual communication procedures pertaining to those treaties.⁶¹

(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*,⁶² the Constitutional Court of South Africa determined that the State had to take reasonable measures to implement the right to housing;⁶³ 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.⁶⁴

⁶⁰ See General Comments at <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>>.

⁶¹ 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).

⁶² (2001) 1 SA 46 (CC).

⁶³ 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.'

⁶⁴ *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

- (c) The right to respect for private and family life is protected by the European Convention on Human Rights and has been extensively examined at a regional level by the European Court of Human Rights.⁶⁵
- (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.⁶⁶
- (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,⁶⁷ the right to social security⁶⁸ and the right to health.⁶⁹
- (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

⁶⁵ 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.

⁶⁶ 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.

⁶⁷ 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.

⁶⁸ 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.

⁶⁹ 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.

conventions) in connection with its analysis of the legal consequences of the construction of the wall in the Occupied Palestinian Territory.⁷⁰

70. On this basis, the HRLRC submits that ESC rights contained in the ICESCR are sufficiently certain and clearly capable of adjudication by the Committee.

4.3 Justiciability of Collective ESC rights

71. International law recognises two categories of human rights: individual and collective. Individual human rights are possessed by individuals, while collective human rights are conferred upon a people to protect collective interests.
72. The ICESCR protects the following collective rights:
- the right of all peoples to self-determination;⁷¹
 - the right of trade unions to form national and international federations or confederations;⁷²
 - the right of trade unions to function freely;⁷³ and
 - the right of all peoples to enjoy their natural wealth and resources.⁷⁴
73. The collective rights recognised by the ICESCR are important and valuable rights for Australian people and people around the world. Australians are not merely individuals; they are also members of certain groups and communities established by reference to commonalities including interests, ethnicity, culture, religion, age and so on. Collective rights are conditional rights that people may possess because they belong to a certain community; for example the right to protect the cultural identity of an Indigenous people. The recognition of collective rights acknowledges the 'social nature' of individuals.
74. However, some have questioned the appropriateness of consideration by the Committee of alleged violations of collective ESC rights under the Optional Protocol.⁷⁵ Concerns are largely

⁷⁰ *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.

⁷¹ Article 1 of the ICESCR.

⁷² Article 8(1)(b) of the ICESCR.

⁷³ Article 8(1)(c) of the ICESCR.

⁷⁴ Article 25 of the ICESCR.

⁷⁵ See for example the statement delivered by Christine Ernst, Advisor, to the Third Committee of the General Assembly in its 63rd session, on the resolution on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 18 November 2008. The UK, Turkey, Canada and Switzerland have also expressed this view: Human Rights Council, 8th Session, Session Overview, *International Service for Human Rights*, 2 – 18 June 2008.

focused on a perceived lack of clarity surrounding questions such as who may exercise such rights and who may represent the group or community which seeks to enforce a collective right and the identity of the relevant duty bearer.⁷⁶

(a) Defining groups for enforcing collective rights

75. As stated above, the Optional Protocol allows communications to be submitted 'by or on behalf of individuals or groups of individuals' (Article 2). There is some ambiguity as to whether this article provides for the enforcement of collective rights by groups of individuals, or whether it only allows for a group of individuals to bring similar claims for violations of individual rights together.
76. The first Optional Protocol to the ICCPR contains a communication procedure (**ICCPR Communication Procedure**) which allows the Human Rights Committee to 'receive and consider communications from *individuals*'. The Human Rights Committee has expressed the view that the ICCPR Communication Procedure cannot be invoked in relation to an alleged violation of the right to self-determination, being a collective right.⁷⁷ The Human Rights Committee has observed that standing to submit a communication under the ICCPR Communication Procedure is conferred upon individuals (or a group of individuals), but not upon 'peoples'.⁷⁸ However, while not directly justiciable, the Human Rights Committee found that the right to self-determination is relevant to the interpretation of other rights protected by the ICCPR as follows:⁷⁹

While all peoples have the right of self determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated ... As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who

⁷⁶ Marlies Galenkamp, 'Collective Rights' *SIM Special 16*, 53 at 66, available at <http://www.uu.nl/NL/faculteiten/rebo/organisatie/departementen/departementrechtsgelcerdheid/organisatie/institutencentra/studieinformatiecentrummenserechten/publicaties/simspecials/16/Documents/16-3.pdf>, at 5 June 2009. We note that Galenkamp also raises the argument that collective rights can be used to justify violations of other rights (she cites the position of women in Indigenous societies as an oft-cited example of this). However, this argument is not particular to collective rights, as all rights are subject to the interrelationship and interaction and balancing against other rights.

⁷⁷ *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, UN Human Rights Committee, Communication No. 167/1984, 26 March 1990. This communication was made by a Cree Indian band which maintained its traditional culture, religion, political structure and subsistence economy. The author of the communication claimed that the band's right to self determination was violated by the Canadian Government allowing the Provincial Government of Alberta to expropriate the territory of the band for the benefit of other private interests.

⁷⁸ *Ibid*; *Grand Chief Marshall, Grand Captain Alexander Denny and Adviser Simon Marshall, as officers of the Grand Council of the Mikmaq tribal society v Canada*, Communication No. 205/1986, 3 December 1991.

⁷⁹ *Ibid* [13.3]; *Diergaardt et al. v Namibia*, UN Human Rights Committee, Communication No. 760/1997, 20 July 2000 at [10.3].

claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant.

77. An examination of the drafting discussions relating to the Optional Protocol shows that in 1997 the Committee proposed that standing to submit a communication should be available to 'individuals and groups' and stated that 'the right to self-determination should be dealt with under [the communication] procedure only in so far as economic, social and cultural rights...are involved'.⁸⁰ However, in its final version, the Optional Protocol grants standing to submit a communication to individuals and 'groups of individuals' (cf 'groups').
78. It is not yet clear whether the Committee will follow the Human Rights Committee's approach to the interpretation of 'group of individuals'. Despite the Human Rights Committee's findings, the Committee may decide that a 'group of individuals' may bring a complaint alleging a breach of the collective right of that group.
79. The HRLRC notes that even if collective rights were not accepted under the complaints procedure, the Committee would not be prevented from using the inquiry procedure in the event that the Committee receives 'reliable information indicating grave or systematic violations by a State party' of collective rights, such as the right to self-determination, as that procedure is available in relation to breaches of 'any of the economic, social and cultural rights set forth in the Covenant'.⁸¹

Recommendation 2:

The collective ESC rights guaranteed by the ICESCR provide important protections and should be affirmed by the Australian government's ratification to the Optional Protocol.

5. Opting In to Inquiries and Inter-State Complaints

80. The HRLRC submits that when Australia ratifies the Optional Protocol it should also make the two necessary declarations to allow the inquiry and Inter-State complaint mechanisms to operate. As stated above, both these mechanisms require States to opt-in to the processes. These two procedures are complementary to the communications mechanism in article 2.
81. The Inter-State communication process is important because it enables State parties to take a role in ensuring uniform compliance with the ICESCR by all other State parties. Further, this

⁸⁰ Status of the International Covenants on Human Rights: Draft Optional Protocol to the ICESCR, 18 December 1996, E/CN.4/1997/105, page 11.

⁸¹ See Optional Protocol, Article 11(2).

mechanism encourages States who may be involved in a dispute about compliance with the ICESCR to engage in dialogue and cooperate to resolve the conflict. The procedure permits the Committee to broker a 'friendly solution between States having made an appropriate declaration to accept such an instrument, in relation to concerns over international cooperation and assistance'.⁸²

82. Australia should also opt-in to the inquiry process. The communications mechanism, which is incident-specific, may not adequately address or uncover widespread or systemic violations of ESC rights. Therefore the inquiry procedure provides an appropriate means of addressing systemic rights issues. Further, there is a clear link between respect and protection for, and realisation of, ESC rights and civil and political rights. Addressing systemic violations of economic social and cultural rights will assist in ensuring that other human rights, such as civil and political rights, are respected. As noted by a group of United Nations human rights experts:⁸³

Widespread violations of economic, social and cultural rights are often root causes of social unrest and conflict which can lead to massive violations of civil and political rights.

83. The inquiry procedure also allows for grave or systematic violations of ICESCR to be investigated in circumstances where individuals are unable or unwilling to avail themselves of the communications mechanism under article 2, whether for fear of reprisals, lack of resources or other reasons unrelated to the merits of the communication.
84. Further, opting in to the Inter-State complaints mechanism is in the national interest for the reasons outlined in Part 3 of this paper. If Australia is to enjoy the full range of benefits that accompany ratification to the Option Protocol, it should ratify the Optional Protocol in full and opt-in to articles 10 and 11.

Recommendation 3:

That the Australian Government provide declarations that it recognises the competence of the Committee with respect to the Inter-State complaint procedure (Article 10) and the Inquiry procedure (Article 11) in the Optional Protocol.

⁸² C de Albuquerque, 'Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque: Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights' E/CN.4/2006/WG.23/2 (30 November 2005), p 13.

⁸³ Press Release, "'Economic, social and cultural rights: legal entitlements rather than charity" say UN Human Rights Experts' (10 December 2008), available at <<http://www.unhcr.ch>>.