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

***Justiciability of Economic, Social and Cultural
Rights***

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the development, operation and entrenchment of Charters of Rights 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 right to adequate health care; and
- (d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

1. Supplementary Submission on the Justiciability of ESC rights

2. On 1 July 2009 the Human Rights Law Resource Centre provided the Australian Government with a submission setting out why it is in Australia's national interest to ratify the Optional Protocol to the Covenant on Economic Social and Cultural Rights (the *Optional Protocol*). This supplementary submission addresses some additional arguments on the issue of the justiciability of economic, social and cultural rights (*ESC rights*). It states that:
- (a) ESC rights are clearly enforceable, and have been enforced as rights overseas in jurisdictions comparable to Australia;
 - (b) to the extent that the enjoyment of ESC rights involves resource allocation by the State, adjudicative bodies do not make decisions on the most appropriate way to spend State resources, but instead are only empowered to rule where Government programs clearly *unreasonably* infringe peoples' rights; and
 - (c) ESC rights are about more than resource allocation and to the extent that they impose negative obligations on States, ESC rights are immediately enforceable.

2. Justiciability of Economic, Social and Cultural Rights

2.1 Economic, Social and Cultural Rights Are Enforceable in Other Jurisdictions

3. ESC rights are already enforced by courts in domestic jurisdictions similar to Australia. The experience in comparative domestic jurisdictions is that economic, social and cultural rights are capable of being protected by law and enforced in courts. Put simply, the experience in comparative domestic jurisdictions is that economic, social and cultural rights are either:
- (a) expressly protected in the constitution or legislation, giving courts the role to assess the 'reasonableness' of government conduct or lack of action, allowing a margin of appreciation for governments to act in accordance with human rights and affording significant latitude to governments with respect to policy options and tools (eg, in South Africa);¹
 - (b) not explicitly included as rights in a constitution or legislative rights instrument, but protected to a limited extent through interpretation of civil and political rights that are protected by law, such as:

- (i) the right to equality (Canada);² or
- (ii) the right to life (India);³
- (c) partly protected by legislation (such as the right to education and property in the UK);⁴
or
- (d) partly protected by operation of existing common law actions and statutory interpretation rules (UK).⁵

2.2 Resource Allocation Questions

4. 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.
5. Our earlier submission dealt with three important counter arguments (page 16):
 - (a) If Australia is party to the Optional Protocol, the Committee on Economic, Social and Cultural Rights (the **Committee**) cannot make any decision that binds the Australian parliament under Australian law. 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) Australian Courts already make decisions that involve some resource allocation by the Government.
 - (c) In enforcing ESC rights, courts do not allocate resources *per se*, but address the reasonable of governmental conduct in doing so.
6. The following section provides further information on the final point; namely, on how ESC rights are justiciable, how courts have dealt with resource allocation issues in practice, and therefore how the Committee is likely to deal with resource allocation.

¹ The position in South Africa is discussed in more detail in section (c) below.

² See discussion in Bruce Porter, 'Twenty Years of Equality Rights, Reclaiming Expectation' (2006) 33 *Supreme Court Law Review* (2d).

³ The right to life has been held to include the right to live with human dignity, which in turn includes the bare necessities of life such as nutrition, clothing, shelter and facilities for reading, writing and expressing oneself: see for example *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 2 SCR 516.

⁴ See arts 1 and 2 of the *First Protocol* to the *European Convention for the Protection of Human Rights*, incorporated into the UK *Human Rights Act* by s 1(1)(b).

⁵ Certain economic, social and cultural rights (such as social security) may be made available under statute in the UK, and the decisions to provide assistance under those statutes could be subject to judicial review.

(a) The Committee is limited to a consideration of 'reasonableness'

7. It is clear that human rights standards can affect government policies and decision-making. Indeed this is the very nature and purpose of human rights instruments.
8. However, the extent to which the jurisprudence under the Optional Protocol will affect Australian Government resource allocation decision is limited by two important factors:
 - (a) the non-binding nature of the Committee's decisions;⁶ and,
 - (b) the Optional Protocol's requirement that the Committee enquire into the reasonableness of government action.
9. This section addresses the latter limitation. As is set out below, adjudicating on the reasonableness of action does not amount to courts dictating the specific allocation of resources but instead creates a normative framework for government action. In the words of Chief Justice Pius Langa of the Constitutional Court of South Africa, the remedial effect of taking an approach of reasonableness does 'not always create a tangible and immediate benefit [for a rights holder], but often does create guidelines to assist governments in realising their mandate.'⁷
10. Article 8(4) of the Optional Protocol explicitly requires the Committee to consider the "reasonableness" of the steps taken by the State Party to protect, respect and fulfil ESC rights. This is very similar to the requirement of reasonableness in the South African constitution, where Courts have not engaged in resource allocation *per se*, but instead will assess the reasonableness of government action.⁸ The availability of resources is an important factor in the assessment of the reasonableness of government action.⁹

(b) The Reasonableness Test Works in South Africa

11. The jurisprudence of the South African Constitutional Court provides helpful guidance as to the role that the Committee would properly play in resource allocation aspects of ESC rights

⁶ The manner in which decisions of the Committee made in relation to Australia under the OP ICESCR would impinge on Australian government policies must be considered in light of the significant caveat that those decisions are not binding in Australian law. Nevertheless, the Committee's decisions are likely to be persuasive and will develop norms of practice that will influence the development and understanding of ESC rights internationally.

⁷ Chief Justice Pius Langa, 'Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR', (2009) 27:1 *Nordisk Tidsskrift For Menneskerettigheter*, 32.

⁸ 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].

⁹ *Government of South Africa v Grootboom* [2001] 1 SA 46, [41]; see discussion by Chief Justice Pius Langa, 'Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR', (2009) 27:1 *Nordisk Tidsskrift For Menneskerettigheter*, 36.

under the OP ICESCR. 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'.¹⁰

12. In South Africa, the Courts 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. According to the Court in the *Grootboom Case*, which concerned the right to adequate housing:

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.¹¹

13. A further decision, the *Treatment Action Campaign Case*, concerned access to anti-retroviral drugs in accordance with the right to health. In that case, the South African Government was offered an anti-retroviral drug, Nevirapine, free for five years in order to treat mother to child transmission of HIV/AIDS. The Government, however, determined only to provide the drug at certain pilot sites, effectively denying most mothers access to the treatment. The Court heard that in the midst of an HIV/AIDS epidemic with more than 6 million people infected, the anti-retroviral drug Nevirapine offered the potential of preventing the infection of 30 – 40,000 children per year. The Court held that anti-retroviral drugs must be provided at all public hospitals, and not only at pilot sites. In relation to resource allocation, the Constitutional Court held that its decision concerned an assessment of the reasonableness of government action:

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.¹²

14. Importantly, in considering reasonableness, courts may have regard to the core minimum obligations that a State must discharge relation to a right, even where the right is being progressively realised. In the *Grootboom* case, the right to housing did not equate to a right of all citizens to housing on demand, but to a reasonable government programme to provide emergency accommodation and housing relief to indigent and vulnerable people.

¹⁰ *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].

¹¹ *Government of South Africa v Grootboom* [2001] 1 SA 46, [41].

¹² *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

(c) Reasonableness of Government Action is Already Justiciable in Australia

15. It should also be noted that assessing the reasonableness of action is a familiar and conventional legal method in Australian law, where courts and tribunals are routinely required to determine the reasonableness of private and government conduct in a range of matters including:
- tortious claims involving an assessment of the conduct of the 'reasonable person';
 - merits review, where courts and tribunals are required to consider whether the original decision maker arrived at the 'correct and preferable' decision;¹³
 - 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;
 - Constitutional review, whereby for any government legislation that limits rights under the Australian constitution, the limitations must be, among other things, 'reasonably appropriate and adapted' or 'proportionate' to the purpose of the limitation.¹⁴

2.3 Economic, Social and Cultural Rights are Not Only About Resource Issues

16. Finally, it should be noted that ESC rights involve much more than just the allocation of resources by governments.
17. First, the substantive rights enunciated in the Covenant include freedoms to act that do not require resource allocation at all.¹⁵
18. Secondly, as stated in our earlier submission, 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 (see paragraphs 63-65 of our earlier submission). As 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.'¹⁶ Non-discrimination in the enjoyment of rights is also immediately realisable, as is the requirement

¹³ See, eg, *Shi v Migration Agents Registration Authority* [2008] HCA 31..

¹⁴ See, eg, *Roach v Australian Electoral Commissioner & Anor* [2007] HCA 43.

¹⁵ 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.

that the Government establish a plan to address ESC rights within the bounds of available resources.

¹⁶ Chief Justice Pius Langa, 'Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR', (2009) 27:1 *Nordisk Tidsskrift For Menneskerettigheter*, 33. An example would be ensuring that persons are not subject to unlawful or arbitrary eviction from their home.