

Occasional Paper

Economic, social & cultural rights

and the Charter of Human Rights and Responsibilities
– A framework for discussion

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Victorian Equal Opportunity
& Human Rights Commission



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Contents

Acknowledgements.....	2
The purpose of this paper	2
What are economic, social and cultural rights?.....	3
A brief history	3
The indivisibility and interdependence of rights	4
Current recognition of economic, social and cultural rights in Victoria	4
Assumptions under economic, social and cultural rights	4
Should economic, social and cultural rights be protected under the Charter?	11
Which economic, social and cultural rights should be protected?	11
Models for the protection of economic, social and cultural rights.....	12
Conclusion.....	15
Further information.....	15

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The purpose of this paper

When the Human Rights Consultation Committee delivered its report to the Victorian Government in 2005 it recommended that economic, social and cultural rights should not be included in the Charter of Human Rights and Responsibilities Act (the Charter). But the committee was aware of the strong concerns and arguments regarding these rights within the community. It therefore recommended that the Charter should include a formal process of review to consider, among other things, whether the range of rights protected by the Charter should include some or all economic, social and cultural rights.

The Victorian Government accepted this recommendation and a review of the Charter must be provided by the Attorney-General to the Victorian Parliament before 1 October 2011. The Victorian Equal Opportunity and Human Rights Commission (the Commission) believes that before any meaningful consultation about the possible inclusion of economic, social and cultural rights in the Charter can take place, work needs to be done to ensure that Victorians understand what economic, social and cultural rights mean and how they might be included within a human rights statute like the Charter.

The aim of this occasional paper is to help Victorians develop this understanding. It does not seek to express a view about whether, and if so which, economic, social and cultural rights should be included in the Charter. Nor does it aim to set out how economic, social and cultural rights should be protected in the Charter. Instead, it aims to provide information that will contribute to a robust and informed consultation in relation to two key questions:

1. What are economic, social and cultural rights?
2. Should economic, social and cultural rights be protected under the Charter, and if so, how?

What are economic, social and cultural rights?

A brief history

When the Universal Declaration of Human Rights (UDHR) was adopted in 1948, the United Nations General Assembly made no attempt to classify or restrict the types of rights to be included within this instrument. It simply included all those rights which were considered necessary to secure the dignity and worth of every individual. This catalogue of rights under the UDHR includes what are generally referred to as civil and political rights, such as the right to life, freedom of expression and so-called economic, social and cultural rights (ESC) rights including the right to work, the right to education and the right to participate in cultural life.

The original plan was to transform the aspirations of the UDHR into a single international treaty that would become legally binding on States. Unfortunately, this objective became a victim of cold war politics. The divide between the western and communist States meant that the United Nations was forced to draft two treaties to accommodate the political realities of the day. This is why we now have the International Covenant on Civil and Political Rights (ICCPR), on which the Charter is based, and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The distinction between the two sets of rights is therefore largely artificial.

This also means that there is no formal or strict definition of what constitutes an economic, social and cultural right. The way such a right is most commonly identified is to assess whether it is included in the ICESCR.¹

Economic, social and cultural rights protected under the ICESCR

Article 2	The right to enjoy economic, social and cultural rights without discrimination
Article 3	The right to equality between men and women in the enjoyment of ESC rights
Article 6	The right to work
Article 7	The right to just and favourable conditions of work
Article 8	The right to form trade unions and the right to strike
Article 9	The right to social security
Article 10	The obligation to protect the family and an obligation to provide special protection for mothers and children
Article 11	The right to an adequate standard of living including food, clothing and housing
Article 12	The right to the highest attainable standard of health
Article 13	The right to education
Article 14	The right to free primary education
Article 15	The right to take part in cultural life; enjoy the benefits of scientific progress and receive protection for scientific, literary or artistic productions

As a general rule, the rights under the ICESCR relate to “the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education.”² However, it is wrong to assume that the enjoyment of rights in relation to these areas of life can be separated from civil and political rights.

The indivisibility and interdependence of rights

The official position within the United Nations is that economic, social and cultural rights and civil and political rights are interdependent and indivisible. This means that one set of rights does not have priority over the other *and* one set of rights cannot be enjoyed in a meaningful way if the other set of rights is also not enjoyed. For example, the right to vote and participate in public affairs will be weakened if an individual is denied food and water or deprived of the right to an education. The right to freedom from inhuman and degrading treatment will be compromised by a lack of adequate housing and access to health care.

Current recognition of economic, social and cultural rights in Victoria

Although the catalogue of rights under the ICESCR has not been incorporated into the Charter, there is some protection of economic, social and cultural rights in Victoria. For example, under the Victorian Equal Opportunity Act it is unlawful to discriminate against a person or group on the basis of a protected attribute in the provision of services and education. This means that where the government provides services such as health care, as well as in its delivery of public education, it cannot discriminate. This protection is enforceable by means of a complaint to the Victorian Equal Opportunity and Human Rights Commission, and proceedings in tribunals and courts if that is not successful. In the past, courts and tribunals have made significant decisions requiring the government to expand or change its manner of providing particular services to individuals and groups.³

There are a number of other ad hoc examples of where elements of economic, social and cultural rights are protected. In the case of education, for example, the *Education and Training Reform Act 2006* provides that instruction in the core learning areas is to be free for all students under the age of 20.⁴ A parent of a student with a disability or impairment is not required “to contribute to the cost of the provision of additional support for the education ... of that student.”⁵ Other examples include residential tenancy laws that protect

a limited sphere of the right to housing, and regulatory schemes intended to maintain health care standards. But there are gaps in the protection of these rights, particularly in comparison to the comprehensive system for the protection of civil and political rights under the Charter.

Assumptions under economic, social and cultural rights

States have generally accepted, at least in diplomatic circles, that economic, social and cultural rights should be accorded the same status as civil and political rights. To a certain extent this is reflected by the fact that 164 States have accepted the obligations under the ICCPR and 160 States have accepted the obligations under the ICESCR (Australia is a party to both). In practice, however, there is a “deep and enduring disagreement” as to the status of economic, social and cultural rights.⁶ The following analysis explores this disagreement by examining a range of assumptions that are often made about economic, social and cultural rights, as well as the evidence commonly offered as a response to those assumptions.

Assumption 1: Economic, social and cultural rights are mere aspirations

When Lord Robert Walker, a member of the House of Lords, was asked about the inclusion of economic, social and cultural rights in the UK Human Rights Act, he began his reply with the statement: “If we could build heaven on earth...”⁷ This comment reflects a view that the vision offered under the ICESCR is so ambitious that economic, social and cultural rights are merely aspirations and not real rights. They represent the world we might like to have, but not the one in which we live and which States are able to guarantee.

This view is in contrast to the approach adopted by the governments of the world, which have consistently affirmed the legitimacy of economic, social and cultural rights in the context of the United Nations. It is also inconsistent with international law, which demands that once a State has become a party to the ICESCR it has a good faith obligation to secure the rights under this treaty and make them effective.⁸ Finally, it is inconsistent with the reality that numerous States have adopted laws that protect various economic, social and cultural rights, especially in areas such as education and labour rights.⁹

Moreover, to conceive of economic, social and cultural rights as mere aspirations fails to recognise that the obligation imposed on States to implement such rights is, as will be explained below, heavily qualified and dependent upon resources.

Assumption 2: Economic, social and cultural rights are vague and ambiguous

For people living in western States, civil and political rights have a long history and are very familiar. Rights such as the right to life, freedom of expression and the prohibition against torture are thought to be well defined and have a generally accepted meaning. On the other hand, economic, social and cultural rights – such as the right to the highest attainable standard of health or the right to adequate housing – are often considered to be vague and ambiguous. Arguably, this misconstrues civil and political rights as well as economic, social and cultural rights. The reality is that the scope and meaning of *both* sets of rights are constantly evolving and although there are significantly fewer legal decisions on the meaning of economic, social and cultural rights, there are several principles that contribute to the understanding of these rights.

The obligation to respect, protect and fulfill a right

Historically, the obligations of a State with respect to a human right were considered to be negative or positive. Negative obligations were associated with civil and political rights and positive obligations were associated with economic, social and cultural rights. A negative obligation was one that prevented a State from interfering with a person’s rights. These were often described as “freedoms from”. For example, a State could not take away rights associated with an individual’s liberty unless it had a legitimate reason for doing so. In contrast, a positive obligation was one that required a State to take active measures to secure the enjoyment of a right. It was generally assumed that such measures were required for rights such as education and health but not for civil and political rights like freedom of expression and the right to life.

It is now accepted by the United Nations, domestic courts and most commentators that this contrast of negative versus positive obligations does not adequately explain the obligations for the two sets of rights. Instead, States are considered to have positive and negative obligations in relation to both civil and political rights and economic, social and cultural rights. More helpfully, the obligations of a State with respect to *any* right are often broken down to include obligations to protect, to respect and to fulfill. The following table illustrates this typology for the right to life and the right to housing.

	Right to life	Right to housing
Obligation to protect	A State or its agents cannot take a person’s life arbitrarily or unlawfully. For example, the police cannot shoot a person unless they are acting in self-defence.	A State or its agents cannot evict or deny a person from access to their home arbitrarily or unlawfully. For example, laws must be passed to protect people in public housing.
Obligation to respect	A State must take reasonable measures to ensure that <i>non-State actors</i> (which means private individuals) do not take a person’s life arbitrarily or unlawfully. For example, a State must create a police force to protect people against violence.	A State must take reasonable measures to ensure that <i>non-State actors</i> (private individuals) do not evict or deny a person access to their home arbitrarily or unlawfully. For example, a State must adopt residential tenancy legislation.
Obligation to fulfill	The State must take reasonable measures to reduce infant mortality and increase life expectancy by eliminating malnutrition and epidemics. For example, a State must provide access to immunisation.	The State must take reasonable measures to ensure that individuals have access to appropriate housing. For example, a State must ensure the provision of public housing for those without sufficient resources.

The qualitative elements of an economic, social and cultural right

The body responsible for monitoring implementation of the ICESCR, the Committee on Economic, Social and Cultural Rights (ESC Committee), has issued numerous general comments in which it details the nature and scope of various economic, social and cultural rights. A common approach adopted by the ESC Committee in these comments is to explain that each economic, social and cultural right requires that a State must ensure, subject to its available resources, that the right must be available, accessible, acceptable and of sufficient quality. The practical impact of these qualitative requirements with respect to the right to health is illustrated in the following table:¹⁰

Obligation	Right to health
Available	Reasonable measures must be taken to ensure the provision of a functioning public health system and health care facilities, goods and services that are available in sufficient quantity.
Accessible	Reasonable measures must be taken to ensure that health facilities, goods and services are accessible without discrimination. They must be physically accessible; economically accessible (or affordable); and be accompanied by access to appropriate information.
Acceptable	Reasonable measures must be taken to ensure that all health facilities, goods and services are respectful of medical ethics and appropriate from a gender, cultural and age perspective.
Quality	Reasonable measures must be taken to ensure that all health facilities, goods and services are scientifically and medically appropriate and of good quality.

Assumption 3: Economic, social and cultural rights are too expensive

It is true that the full realisation of many economic, social and cultural rights will be expensive. A comprehensive education, health and housing system will be extremely expensive. But to argue that economic, social and cultural rights are too expensive relative to civil and political rights and should not be included in a statutory regime for the protection of rights overlooks five significant points. First, the enjoyment of some economic, social and cultural rights will require relatively little expenditure by a government. For example, as noted by the ESC Committee, the following rights are all capable of immediate protection:

- the right to equality between men and women in the enjoyment of economic, social and cultural rights (article 3)
- the right to form and join trade unions (article 8)
- the obligation to protect children from exploitation (article 10(3))
- equal remuneration for work of equal value (article 7(a)(ii)).¹¹

Second, as Table 1.1 shows, the Victorian Government is already spending a significant amount of money on providing Victorians with access to services in areas such as education and health. Importantly, this money is allocated to these services because the Victorian Government recognises that the provision of high quality social services is a core function of government.

Third, the effective enjoyment of civil and political rights for all Victorians also requires the allocation of resources. For example, the right to life requires measures to protect an individual's life against State and non-State threats; to undertake an investigation when life has been taken; and to prosecute and punish those who are responsible for the unlawful taking of life before an independent and impartial court. When seen from this perspective, the entire criminal justice system in Victoria (which accounts for a significant proportion of the budget allocation to the Department of Justice identified in Table 1.1) plays a role in securing the right to life. This is an extremely expensive process.

Table 1.1 - Estimates for 2009-10 from Victorian Budget Papers

Education and Early Childhood Development	\$14.6b
Human Services	\$9.4b
Innovation Industry and Regional Development	\$1.76b
Justice	\$4.02b
Planning and City Development	\$0.64b
Premier and Cabinet	\$0.6b
Primary Industries	\$0.7b
Sustainability and Development	\$1.4b
Treasury and Finance	\$3.2b

Ultimately, the effective enjoyment of any right – not just economic, social and cultural rights – will always require the allocation of resources by a government.

The fourth point often overlooked in criticisms that economic, social and cultural rights are too expensive is that the obligation imposed on States to protect such rights takes account of the resources available to a State. Under the ICESCR, economic, social and cultural rights are not available on demand and article 2 requires that:

*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the **maximum of its available resources**, with a view to **achieving progressively** the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

This provision recognises that States will rarely have the resources available to secure the full enjoyment of the right to the highest attainable standard of health or the right to adequate housing *immediately*. States must move as expeditiously as possible towards the full realisation of each economic, social and cultural right in light of the available resources.¹²

In contrast, the ICCPR fails to take account of the fact that resources will be required to protect civil and political rights and requires that these rights must be protected immediately. The ICESCR is therefore more transparent in recognising that resources will be required to secure the full protection of economic,

social and cultural rights. The progressive nature of the obligation imposed on States is a pragmatic approach which seeks to balance the need to take steps towards realising economic, social and cultural rights and the development of a process that will contribute to the full and effective realisation of each economic, social and cultural right with the reality of resource constraints.

The final point to consider when assessing the expense of economic, social and cultural rights is that the resources allocated to ensure many of these rights will often generate significant economic benefits for a State.¹³ For example, investment in education is generally accepted as a key factor in strengthening the economic growth of a State. Investment in primary health care, which places an emphasis on prevention, is also generally accepted as improving the health of a population group, thus reducing the need for secondary and tertiary health interventions. However, it remains important to stress that the rationale for supporting the inclusion of economic, social and cultural rights in any regime for the protection of rights should never be dependent upon their potential economic benefit.

Assumption 4: Economic, social and cultural rights cannot be interpreted and enforced by courts

One of the most common arguments against legally enshrining economic, social and cultural rights, particularly in legal circles, is the claim that such rights are not justiciable (that is, they cannot be interpreted and enforced by courts). This criticism is mostly due to the fact that very few western legal systems have made provision for the enforcement of economic, social and cultural rights such as the right to health or housing. This has created a perception that economic, social and cultural rights must be non-justiciable – a perception that is being increasingly challenged at both an abstract level as well as in practice. As Philip Alston, the former chairperson of the ESC Committee, has explained, '[t]he claim that ESCR are justiciable does not imply that every issue arising in relation to the implementation of these rights is best determined by a court nor even that individuals should be able to bring a legal claim in respect of every single dimension of a particular right.'¹⁴ However, as the ESC Committee has also explained, there is no economic, social and cultural right "which could not... be considered to possess at least some significant justiciable dimensions."¹⁵

That these statements are not merely rhetorical is demonstrated by the UN General Assembly's adoption of an Optional Protocol to the ICESCR that will allow individuals to allege violations of the Covenant in communications to the ESC Committee. One hundred and twenty-two States voted in favour of this Protocol, with only the United States opposing the resolution. Although this system is yet to commence, the ESC Committee has indicated in a special Statement what factors it will consider when assessing the extent to which a State has complied with its obligations.¹⁶

At the domestic level, there are also an increasing number of legal systems where the courts now make decisions about economic, social and cultural rights.¹⁷ The most well known is South Africa, where the Bill of Rights includes a set of economic, social and cultural rights which are enforceable by the courts.

The approach adopted under the South African Constitution with respect to economic, social and cultural rights has led Justice Yacoob of the Constitutional Court to declare that the justiciability of such rights is beyond question.¹⁸ In this context, the more important question becomes the approach that should be employed when called upon to decide whether the State has failed to comply with its obligations under the Constitution. To date, the Constitutional Court has adopted a model of "reasonableness review" where it asks "whether the means chosen [by the relevant State authority] are reasonably capable of facilitating the realization of the socioeconomic rights in question."¹⁹ This model has been applied in a range of contexts including, as demonstrated in the following case studies, the rights to housing and access to health care.

Sections 26-29 South African Constitution

26. Housing

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security

1. Everyone has the right to have access to
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

28. Children

1. Every child has the right
 - a. to a name and a nationality from birth;
 - b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - c. to basic nutrition, shelter, basic health care services and social services ...

29. Education

1. Everyone has the right
 - a. to a basic education, including adult basic education; and
 - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC)

A group of homeless adults and their children decided to move onto private land when the conditions of the informal settlement in which they were living became intolerable. They were subsequently evicted and moved to a sports field. Their living conditions remained so poor that they applied to the courts for an order that the government provide them with temporary housing. The matter eventually went to the Constitutional Court which decided that there had been a violation of the obligation under the South African Constitution to provide, subject to available resources, everyone with a right to adequate housing. The authorities had actually developed a sophisticated housing policy that sought to address the medium- and long-term housing needs of South Africans. But the court said that this policy was still unreasonable because it did not include measures to address the immediate needs of those who were homeless.

Minister of Health and Others v Treatment Action Campaign and Ors (1) 2002 (10) BCLR 1033 (CC)

This case involved a challenge to the policy of the relevant South African authorities with respect to the measures adopted to prevent mother-to-child transmission of HIV. The authorities had confined access to an antiretroviral drug, Nevirapine (which had been made freely available by the manufacturer), to a limited number of public clinics. It did so because it wanted to trial the drug and argued there was a lack of trained staff to administer it and provide counselling to women who received the drug. The Constitutional Court rejected these arguments. It held that there was evidence that the drug was effective. It also held that the additional resources required to train the health care staff to administer the drug were negligible relative to the benefit that would be obtained if transmission of HIV from mothers to children were reduced. The court therefore found that the policy adopted by the relevant authorities was not consistent with the obligation to take reasonable measures to provide access to health care services.

Assumption 5: Consideration of economic, social and cultural rights by courts is anti-democratic

Even if it is accepted that economic, social and cultural rights are justiciable, many commentators argue that courts should have no role in passing judgement on matters which involve complex questions about social policy and the allocation of resources. For some these concerns are matters to be resolved in parliament and not by unelected judges. However, this separation of powers argument is often overstated and oversimplified. In the first place, it is generally accepted that courts already make decisions which have important resource implications.²⁰

To further suggest that the review of economic, social and cultural rights by courts is undemocratic ignores the fact that in jurisdictions like Victoria, courts are given their decision-making powers by the parliament under a democratic system of government.²¹

Moreover, the suggestion that judges will exceed their mandate and undermine the democratic process by making social policy does not accord with the experience of States where courts have the power to adjudicate economic, social and cultural rights. For example, in the first major case considered by the South African Constitutional Court concerning economic, social and cultural rights, the court had to determine whether the policy adopted by the authorities with respect to access to dialysis was reasonable.²² The court declared that it would “be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.”²³ In fact, it has been observed that the “majority of decisions in the area of social rights have been marked by a high degree of judicial cautiousness.”²⁴

Finally, a regime that allows for the justiciability of economic, social and cultural rights does not necessarily mean that courts must have the final say with respect to the implementation of economic, social and cultural rights. Under the dialogue model presently used for the implementation of rights under the Charter, parliament rather than the courts retains the final power on how to respond to matters that may have been found to be inconsistent with human rights.²⁵

Assumption 6: Courts lack the capacity to interpret and enforce economic, social and cultural rights

An argument related to concerns about separation of powers is the suggestion that courts do not have access to the relevant information and/or lack the expertise to examine the complex issues that arise from the development of social policy and the allocation of scarce resources. It is true that adjudicating rights will present challenges, but courts already deal with complex evidentiary issues in taxation, corporate law or intellectual property matters.

The experience in South Africa also suggests that judges do not perceive social policy development as their role. For example, in the *Treatment Action Campaign* case the Constitutional Court acknowledged that:

[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.²⁶

This obligation to review the actions of the relevant authorities against the standards that have been set down by the legislature is a traditional judicial role. The adjudication of economic, social and cultural rights may well require a special set of skills, but judges seldom if ever possess specialist knowledge in all areas of law when they are appointed. This knowledge is acquired on the job and via judicial education.

Should economic, social and cultural rights be protected under the Charter?

The preceding analysis is intended to facilitate informed debate on the question of whether Victoria should implement changes to provide for the systematic protection of economic, social and cultural rights. Some of the ad hoc protections that already exist in Victoria have been described. It may be thought that these are sufficient or that an ad hoc approach, tailored to particular rights and situations, is preferable and effective. It may be held that broad protections for economic, social and cultural rights are unnecessary or inappropriate, and that the four-year review of the Charter should not recommend any reforms in this area.

Should it be decided that no reforms are implemented in relation to economic, social and cultural rights, it is important to understand that this will not necessarily prevent attempts to ventilate economic, social and cultural issues via the Charter in its current form. In a number of States where economic, social and cultural rights are not specifically protected, advocates and courts have used civil and political rights to address inequalities that are more directly within the scope of economic, social and cultural rights. For example, the right to protection of a person's privacy and home has been used to address pollution; the prohibition against inhuman and degrading treatment has been used to address destitution; and the right to equality before the law is used regularly in relation to discrimination concerning the provision of services that are covered by economic, social and cultural rights.

Alternatively, if the view is that we need to do more to protect and promote economic, social and cultural rights in a systematic manner, then two further questions arise:

- Which economic, social and cultural rights should be protected?
- How can the Charter be amended to best protect economic, social and cultural rights?

Which economic, social and cultural rights should be protected?

The ICESCR contains a long list of economic, social and cultural rights which are often expressed in very broad terms. This gives rise to a question as to which economic, social and cultural rights should be included for protection under the Charter. There are four things to consider in providing an answer to this question. First, the subject matter of several economic, social and cultural rights is within the exclusive power of the Commonwealth. This means that Victoria has no authority to pass legislation with respect to the right to form and join trade unions (ICESCR article 8); the right to social security (ICESCR article 9); and rights in relation to marriage (ICESCR article 10(1)).

Second, with respect to those economic, social and cultural rights under the ICESCR that remain within the power of Victoria, there is a question as to whether all or some of these rights should be included in the Charter. With respect to this issue, the WA Human Rights Consultation Committee recommended that in light of the legal difficulties in regulating some aspects of economic, social and cultural rights, only a handful of economic, social and cultural rights should be included in a WA Human Rights Act – namely the right to the highest attainable standard of health; the right to an education; the right to adequate housing; and the right to take part in cultural life.²⁷ More recently, the National Human Rights Consultation Committee recommended that if economic, social and cultural rights are included in a federal act, priority recognition should be given to:²⁸

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

Whether either of these approaches might be appropriate for the Charter remains a matter for discussion. However, the key issue is that careful consideration must be given to whether the entire

catalogue of rights under the ICESCR should be imported into the Charter or a more selective approach adopted.

Third, once the relevant rights have been identified for inclusion in the Charter, there is a further question as to which formulation for each economic, social and cultural right should be adopted. Many of the rights under the ICESCR are expressed in very broad terms. For example, the right to health under article 12 of the ICESCR provides that:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

An issue arises as to whether the Charter should adopt this formulation with respect to the right to health or an alternative version. In the case of South Africa, the latter approach was adopted and the South African Constitution confines the right to health to a progressive right to have access to health care services and an immediate right not to be denied access to emergency medical treatment.

The fourth and final point to consider is whether any economic, social and cultural rights other than those included in the ICESCR should be included in the Charter. Additional economic, social and cultural rights could be found in other international treaties such as the Convention on the Rights of the Child (CRC) or the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

They could also be developed independently of international sources. For example, international law does not expressly recognise a right to pre-school or kindergarten, but there is an expectation that the Victorian Government should provide these services. As such, there is a question as to whether such a right should be included in the Charter.

Models for the protection of economic, social and cultural rights

There is a continuum of possible options for the treatment of economic, social and cultural rights under the Charter. The following discussion outlines some of these options. It does not provide an exhaustive list and there is the potential for overlap between the various options. Models 1 to 3 anticipate a role for the courts in reviewing economic, social and cultural rights. In contrast, models 4 and 5 envisage mechanisms and systems for the protection of economic, social and cultural rights that do not involve the courts.

Model 1: Treat economic, social and cultural rights the same as civil and political rights (the identical treatment model)

Under this model, the status of economic, social and cultural rights under the Charter would be identical to civil and political rights. Public authorities would have to consider economic, social and cultural rights in the same way that they must now consider civil and political rights. Any new legislation would have to be accompanied by a statement of compatibility that considered both sets of rights and courts would have to interpret legislation in light of economic, social and cultural rights and civil and political rights. The Consultative Committee for the ACT Human Rights Act and the proposed Western Australia Human Rights Act both expressed a preference for this model.²⁹ The benefit of this model, according to the ACT Consultation Committee, is that it is "more consistent with the idea of the indivisibility of human rights."³⁰

The identical treatment model would not include a provision similar to that which appears in the ICESCR to the effect that the obligation to implement economic, social and cultural rights is progressive and subject to available resources. This would not mean that all economic, social and cultural rights would have to be implemented immediately. For example, the inclusion of a right to adequate housing

would not mean that the Victorian Government would be under an immediate obligation to provide everyone in Victoria with housing irrespective of available resources.

On the contrary, the identical treatment model would allow for limitations to be placed on the enjoyment of any right, whether economic, social and cultural or civil and political, provided the limitations were reasonable and justifiable taking into account all the relevant factors that are now listed in section 7(2) of the Charter. In practice, this would mean that the availability of resources would be taken into account when assessing the reasonableness of any failure on the part of the State to secure a right to adequate housing.

Model 2: Make all economic, social and cultural rights subject to progressive implementation explicitly (the progressive model)

In contrast to the identical treatment model, the progressive model *would* include a specific provision in the Charter that the implementation of all economic, social and cultural rights would be undertaken progressively subject to available resources. This model was the second preference of the ACT and WA Consultation Committees.³¹

The benefit of such a model is that it is consistent with the obligation under the ICESCR and makes the progressive nature of the obligation with respect to economic, social and cultural rights explicit.

There are a number of ways in which this provision could be formulated. For example, the ACT Consultation Committee recommended that economic, social and cultural rights be subject to progressive realisation, which would require a consideration of the financial circumstances and estimated amount of expenditure required by a public authority to act in a manner compatible with economic, social and cultural rights.³² The UK Joint Parliamentary Committee on Human Rights also recommended a provision to the effect that the government take reasonable measures within its available resources to achieve the progressive realisation of economic, social and cultural rights and outlined several considerations, such as the availability of resources, when evaluating the reasonableness of the government's measures.³³

Model 3: The progressive implementation of some economic, social and cultural rights and immediate obligation with respect to other economic, social and cultural rights (the hybrid model)

This model is a hybrid of models 1 and 2. It would treat some elements of economic, social and cultural rights in the same way as civil and political rights, but impose a progressive obligation to take reasonable measures to secure the enjoyment of other aspects of economic, social and cultural rights. This is the approach adopted under the South African Constitution.

Certain aspects of each economic, social and cultural right are subject to progressive realisation whereas other aspects are subject to immediate implementation. For example, the rights to access adequate housing, health care services and social security are all subject to progressive realisation. In contrast, the right to emergency medical treatment, the right to a basic education and a child's rights to basic services are not subject to progressive realisation. The benefit of this approach is that it represents a response that is tailored to the circumstances and priorities of the South African people. Importantly, a further question that arises in the context of a hybrid model is whether those economic, social and cultural rights carrying an immediate obligation should be able to be subject to reasonable limitations (in South Africa they are).

Model 4: Treat economic, social and cultural rights as directive or non-binding principles (the symbolic model)

Unlike models 1 to 3, which give the courts a specific role in monitoring compliance with economic, social and cultural rights, an alternative model is to adopt a symbolic approach to the treatment of economic, social and cultural rights in which the courts would have no direct role in their protection. This is the approach adopted in Ireland and India where civil and political rights are directly enforceable before the courts but economic, social and cultural rights are relegated to the status of directive principles. Under this model, economic, social and cultural rights are treated as statements of aspiration rather than binding obligations. For example, article 37 of the Indian Constitution states that such provisions "shall

not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

In practice, the impact of directive principles depends on the State. In India, for example, the courts have used creative judicial techniques to effectively incorporate the directive principles into the right to life. In contrast, the directive principles under the Irish Constitution have had virtually no effect on the parliament or courts.

There are a number of ways in which the directive principles model could be incorporated into the Charter. For example, public authorities and parliamentarians could be encouraged to give consideration to economic, social and cultural rights in the hope that this would allow economic, social and cultural rights to inform and influence policy development and implementation. But the courts would have no powers or obligations with respect to economic, social and cultural rights.

The benefit of such a model is that it would place economic, social and cultural rights on the parliamentary agenda and avoid the issues associated with the review of economic, social and cultural rights by courts. At the same time, the United Kingdom Joint Parliamentary Committee on Human Rights has warned that there is a risk that economic, social and cultural rights will become meaningless in practice under such a model.³⁴ This is largely because there is no legislative obligation to require consideration of economic, social and cultural rights and no judicial oversight to monitor compliance with such an obligation.

Model 5: Institutional protection of economic, social and cultural rights by non-judicial bodies (the institutional model)

Instead of using the courts to play a role in reviewing the implementation of economic, social and cultural rights under the Charter, another institution could be used to perform such a role. Under the institutional model, the issues associated with the courts having a role to play in the protection of economic, social and cultural rights would be avoided. The relevant institution would also have an ongoing mandate

to monitor the implementation of economic, social and cultural rights and would not have to rely on an individual to commence an action in the courts in relation to their economic, social and cultural rights. The institution could examine the implementation of economic, social and cultural rights from a broader perspective, as opposed to the circumstances of an individual, and it would not be hampered by the complex rules of evidence used in courts.

There are several ways in which this institutional model could operate. For example, the report of the WA Consultation Committee discussed the creation of a new body with the power to conduct human rights audits of those government agencies responsible for the delivery of core economic, social and cultural rights such as health, housing and education.³⁵ This body would make recommendations and report to the relevant minister with respect to the outcome of its audits. Another option is the adoption of a committee system whereby government departments would report at regular intervals to the relevant committee on the measures undertaken to secure the progressive realisation of economic, social and cultural rights relevant to their department.³⁶

Alternatively, the existing mandate of the Victorian Equal Opportunity and Human Rights Commission could be expanded to allow it to perform a monitoring role with respect to the implementation of economic, social and cultural rights. For example, the Commission could be empowered to review the policies and practices of public authorities to assess their compatibility with economic, social and cultural rights. In the recently completed national consultation on human rights, the Committee recommended that the Australian Human Rights Commission be empowered to conciliate complaints relating to economic, social and cultural rights.³⁷

The institutional model is not without its limitations. There are issues concerning the resources required for the creation of a new body or the expansion in the mandate of an existing body such as the Commission. The different treatment of economic, social and cultural rights relative to civil and political rights would also maintain the artificial nature of the distinction between the two sets of rights.

Conclusion

To date, steps towards the constitutional or legislative protection of economic, social and cultural rights in western states have been tentative. The requirement of a four-year review under the Charter demands that Victorians must consider whether they wish to take this step. The decision to do so must be informed by intelligent and robust debate. This paper seeks to provide a basis from which this debate can take place.

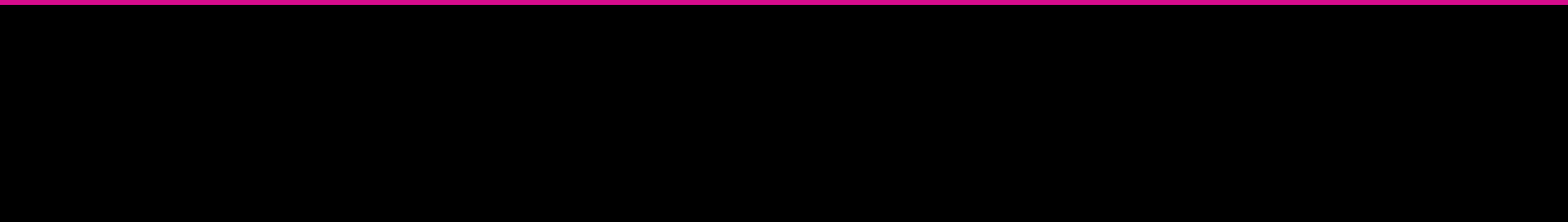
The challenge is to focus on what sort of vision is appropriate for the protection of economic, social and cultural rights in Victoria. It is clear that there is a strong expectation among Victorians that the state has a central role to play in securing several needs such as education, housing, health care and an adequate standard of living that are at the core of economic, social and cultural rights. Moreover, the Victorian Parliament and the government of the day fully understand this expectation. The key consideration now is whether there is a willingness to elevate these needs to the status of rights worthy of inclusion in the Charter and create a system of accountability in which public authorities will be formally directed to pursue the realisation of these rights for all Victorians.

Further information

A variety of additional information relating to economic, social and cultural rights is available at www.humanrightscommission.vic.gov.au

NOTES

- 1 ESC rights are also contained in the United Nations Convention on the Rights of the Child; the United Nations Convention on the Elimination of Discrimination Against Women; the United Nations Convention on the Elimination of All Forms of Racial Discrimination and numerous International Labour Organisation conventions.
- 2 Office of High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33, 1.
- 3 Examples include *Turner v Department of Education and Training* (Anti-Disc) [2007] VCAT 873, and the series of proceedings related to the closure of the Northland Secondary College, commencing with *Sinnapan v State of Victoria* (1994) EOC ¶192–567.
- 4 *Education and Training Reform Act 2006*, Division 2, section 2.2.4.
- 5 *Ibid*, Division 2, section 2.2.6.
- 6 Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law Politics and Morals* (3rd ed, 2008) 263.
- 7 Lord Robert Walker, “What Difference Can a Human Rights Charter Make?”, Human Rights Law Resource Centre Public Seminar, 15 August 2007.
- 8 Vienna Convention on the Law of Treaties, article 26.
- 9 See Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008); Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008).
- 10 See ESC Committee General Comment No. 14, “The Right to the Highest Attainable Standard of Health”, E/C.12/2000/4 (11 August 2000), para 12.
- 11 ESC Committee General Comment No. 3, “The Nature of States parties’ obligations”, para 5.
- 12 *Ibid*, para 9.
- 13 See, for example, Lanse Minkler, “Economic Rights and Political Decision Making” (May 2009) 31 *Human Rights Quarterly* 368, 371–84.
- 14 Philip Alston, “Putting Economic Social and Cultural Rights back on the Agenda of the United States”, Center for Human Rights and Global Justice, Working Paper No. 22 (2009) 11.
- 15 ESC General Comment No. 9, “Domestic Application of the Covenant”, E/1999/22 (1998) Annex IV, para 10.
- 16 ESC Committee Statement, “An Evaluation of the Obligation to Take Steps to the Maximum Extent of Available Resources under an Optional Protocol to the Covenant” (10 May 2007), E/C.12/2007/1.
- 17 See generally Malcolm Langford (ed), above n 9; International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2 (2009).
- 18 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 20.
- 19 Sandra Liebenberg, “Adjudicating Social Rights under a Transformative Constitution” in Malcolm Langford (ed), above n 9, 83.
- 20 ESC General Comment No. 9, above n 15, para 10.
- 21 Malcolm Langford, “The Justiciability of Social Rights: From Practice to Theory” in Malcolm Langford (ed), above n 9, 32.
- 22 *Soobramoney v Minister for Health* 1997 (12) BCLR 1696.
- 23 *Soobramoney v Minister for Health* 1997 (12) BCLR 1696 para 29.
- 24 Malcolm Langford (ed), above n 9, 33.
- 25 See *Towards an ACT Human Rights Act, Report of the ACT Bill of Rights Consultative Committee*, May 2003, para 5.47.
- 26 *Minister of Health and Others v Treatment Action Campaign and Ors* (1) 2002 (10) BCLR 1033 (CC) para 38.
- 27 *A WA Human Rights Act*, Report of the Consultation Committee for a Proposed WA Human Rights Act, November 2007, para 4.3.3.
- 28 *National Human Rights Consultation Report*, Report of the National Human Rights Consultation Committee, September 2009, 366.
- 29 *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, May 2003, para 5.46; *A WA Human Rights Act*, Report of the Consultation Committee for a Proposed WA Human Rights Act, November 2007, para 4.4.7.
- 30 *Towards an ACT Human Rights Act*, *ibid*, para 5.46.
- 31 *A WA Human Rights Act*, above n 27, para 4.4.2.
- 32 *Towards an ACT Human Rights Act*, above n 29, clause 14.3, Appendix 4.
- 33 United Kingdom Joint Committee on Human Rights, *Twenty-Ninth Report of Session 2007–08; A Bill of Rights for the UK?*, HL Paper 165–1, HC 150–1, para 192.
- 34 *Ibid*, para 169.
- 35 *A WA Human Rights Act*, above n 27, para 4.4.5.
- 36 *Ibid*.
- 37 *National Human Rights Consultation Report*, above n 28, 366.



**Victorian Equal Opportunity
& Human Rights Commission**