



**ACT Government consultation on the inclusion  
of Economic, Social and Cultural Rights in the  
Human Rights Act 2004**

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# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's work on human rights

Much of PIAC's substantive work involves human rights issues. This includes work on privacy, discrimination, freedom of information, detention, government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on human rights. A significant number of PIAC's casework clients have direct experience of what it means to have their human rights infringed.

PIAC has actively participated in the various inquiries conducted across Australia in the last five years into human rights protection, including the 2005 public consultation that culminated in the introduction of the Victorian *Charter of Human Rights and Responsibilities*,<sup>1</sup> and the Victorian Parliament's Scrutiny of Acts and Regulations Committee review of the *Charter of Human Rights*

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<sup>1</sup> Jane Stratton and Robin Banks, *Submission to Human Rights Consultation Committee, Victoria on a proposed Charter of Rights* (2005) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/sub-re-proposed-vic-charter-rights> at 23 May 2011.

*and Responsibilities Act 2006* (Vic).<sup>2</sup> PIAC also conducted a range of community consultations for the National Human Rights Consultation and worked closely with its diverse networks to encourage those least likely to respond to the Consultation to take part. This included working with people experiencing homelessness, people with mental illness, Indigenous people, older Australians, people with disability, and migrant women. Since 2003, PIAC has had a project, *Protecting Human Rights in Australia*, as a core area of its work.

## **Approach to the ACT consultation process**

PIAC welcomes the opportunity to take part in the Australian Capital Territory (ACT) Government's consultation into whether Economic, Social and Cultural Rights (ESCR) should be incorporated into the *Human Rights Act 2004* (ACT) (the HRA).

While PIAC is based in NSW, it has a national focus with significant experience in the ACT. PIAC receives no funding associated with the HRA and PIAC's sole objective in participating in this consultation process is to promote the principles of dignity and respect – principles that, of course, are almost universally shared among the representatives of the ACT's major political parties, the business community and civil society groups.

PIAC has approached the ACT Government's consultation process with the aim of providing an independent perspective on the operation of the HRA. PIAC recognises that human rights statutes, and more specifically the HRA, can ignite robust ideological debate. However, this submission is restricted to a rational analysis of the available evidence regarding the HRA's current operation and how the adoption of ESCR would impact on rights protection.

PIAC believes that in adopting an evidence-based approach, the clear conclusion is that the introduction of ESCR would have a positive impact in protecting human rights and, more importantly, the principles of dignity and respect that underlie human rights. PIAC has reached this conclusion partly with reference to the findings of the *Australian Capital Territory Economic, Social and Cultural Right Research Project Report* (the Project Report)<sup>3</sup> and by making comparative references to relevant examples from NSW.

While at first blush the legislative incorporation of ESCR might seem like a radical departure from the status quo, PIAC believes that in reality this is not the case. At present, the HRA protects only civil and political rights, but in practice the ambit of the HRA extends beyond any narrow definition of civil and political rights to provide meaningful protection to some socio-economic rights. This is quite unsurprising given the now widespread recognition that human rights are indivisible and co-dependent. In light of this, PIAC would characterise the proposal to protect ESCR in the HRA as nothing greater than an incremental and logical extension of the existing regime.

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<sup>2</sup> Edward Santow and Brenda Bailey, *Submission to the Human Rights Charter Review, respecting Victorians* (2011) Public Interest Advocacy Centre  
<http://www.piac.asn.au/publication/2011/06/human-rights-charter-review-respecting-victorians> at 16 August 2011.

<sup>3</sup> *Australian Capital Territory Economic, Social and Cultural Right Research Project Report* (2010).

This submission will provide an overview of the reasons supporting the inclusion of ESCR in the HRA as well as addressing many of the misconceptions and common arguments made against the introduction of such rights.

## **Economic, social and cultural rights in the HRA**

There are many compelling reasons for the inclusion of ESCR in the HRA. PIAC supports the findings of the Project Report about the positive role the inclusion of ESCR can play in enhancing the legislative, administrative and policy-development process of the ACT government. In addition to the arguments identified by the Project Report, PIAC believes ESCR rights should be implemented in the HRA for the following reasons.

### **Impact on protection and promotion of human rights**

PIAC believes the introduction of ESCR would enhance the HRA's ability to promote and protect the fundamental rights of people in the ACT.

As was found in the ACT Human Rights Research Project report, *The Human Rights Act 2004: the first five years of operation* (the 2009 Research Report), the HRA has had a considerable impact in improving 'the quality of law-making in the Territory' and ensuring 'that human rights concerns are given due consideration in the framing of new legislation and policy'.<sup>4</sup> However, the absence of ESCR protection under the HRA means that many groups are unable to obtain a remedy for important rights violations.

PIAC's experience in advocating for people whose human rights have been violated in NSW has shown the need for strong legislative protections of both civil and political rights (CPR) and ESCR. Based on our work in NSW, PIAC provides the following examples of the impact of an absence of ESCR protection.

#### **The Right To Housing**

The right to adequate housing is set out in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The nature of the right to adequate housing has been extensively defined by the UN Committee on Economic, Social and Cultural Rights. The Committee established that the right to adequate housing involves more than just having shelter; it also includes the 'right to live somewhere in security, peace and dignity'.<sup>5</sup> The Committee established seven indicia of adequacy, including security of tenure and affordability.<sup>6</sup>

As a State Party to ICESCR, Australia is required by Article 11(1) to take appropriate steps to ensure the realisation of the right to adequate housing. These appropriate steps are required by the ICESCR to be 'concrete', 'targeted', 'expeditious' and 'effective', and ICESCR includes the

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<sup>4</sup> ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 6.

<sup>5</sup> Office of the High Commissioner for Human Rights, ICESCR General Comment 4, The right to Adequate Housing, [7].

<sup>6</sup> Ibid, [8].

principle of ‘progressive realisation’, which takes account of the reality of there being finite resources available to the state.<sup>7</sup>

However, in the absence of express legislative protections, both federally and at the State and Territory level, the right to adequate housing has been consistently undermined by government practice. The failure of Australian governments of all levels to take ‘expeditious’, ‘effective’ or ‘targeted steps’ to ensure the realisation of the right to affordable and secure housing has been recognised by the UN Special Rapporteur on Adequate Housing. In 2006, the Special Rapporteur reported that Australia has ‘failed to implement its legal obligation to progressively realise the human right to adequate housing ... particularly in view of its responsibilities as a rich and prosperous country’.<sup>8</sup>

The impact of a lack of protection for the right to adequate housing is most discernable in relation to people experiencing homelessness in the ACT. The voluntary code of conduct, the ACT Homelessness Charter, promotes ‘the right to have all rights upheld by public authorities’ for homeless people in the ACT.<sup>9</sup> However, it appears that this has not translated into practice in relation to access to housing. PIAC notes the ACT Council of Social Service Inc. (ACTCOSS) submission to the ACT Department of Disability, Housing and Community Services’ (DHCS), *The Road Map: A discussion paper on the way forward for ACT homelessness services and related services* which expressed concerns about the considerable number of people waiting on the ACT Housing Priority and High Needs list.<sup>10</sup> ACTCOSS also identified the ACT government’s reliance on the private rental market as a means of solving the pressure placed on the public housing system as inappropriate and undermining peoples ability to exit homelessness.<sup>11</sup>

PIAC, through the Homeless Persons’ Legal Service (HPLS), frequently works with homeless people in NSW who have had their right to adequate housing undermined by government practice. A joint project of PIAC and the Public Interest Law Clearing House, HPLS provides free legal advice and on-going representation for people who are homeless or at risk of homelessness. In addition, HPLS works closely with people experiencing homelessness to identify effective public policy responses to issues facing homeless people.

HPLS has conducted several forums with people experiencing homelessness in relation to the right to housing in which participants have identified considerable barriers attempting to obtain stable, long-term accommodation from Housing NSW. Some of those consulted by HPLS spoke of the devastating impact of having to wait for up ten years on the NSW Housing list to receive accommodation. One respondent informed HPLS that he had become so sick of waiting for

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<sup>7</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)*, [2] and [9], UN Doc E/1991/23 (1990).

<sup>8</sup> Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, [126]UN Doc A/HRC/4/18/Add.2, (2007) <http://daccessdds.un.org/doc/UNDOC/GEN/G07/125/> at 13 August 2011.

<sup>9</sup> ACT Government, *ACT Homelessness Charter* [www.canfacs.org.au/files/acthomelessnesscharter.pdf](http://www.canfacs.org.au/files/acthomelessnesscharter.pdf) at 16 August 2011.

<sup>10</sup> ATCOSS, *Submission on the DHCS discussion paper*, (2010) ACT Council of Social Service Inc. 7 [http://www.actcoss.org.au/publications/Publications\\_2010/0510SUB.pdf](http://www.actcoss.org.au/publications/Publications_2010/0510SUB.pdf) at 16 August 2011.

<sup>11</sup> ATCOSS.7

housing, that he simply gave up and has accepted he will live the rest of his life on the street (he had been homeless for over 20 years).

Other comments received from this consultation show the link between a failure to make good on the right to adequate housing, and the proliferation and exacerbation of homelessness.

*I got temporary accommodation for a couple of days then nothing else. There was no follow-up from Housing at all (homeless person, Consumers' Forum, Hunter Region, November 2010).*

*Two weeks in temporary accommodation is not enough time to sort your shit out and find work (homeless person, Consumers' Forum, Hunter Region, November 2010).*

*Longer stays in refuges please! (homeless person, Consumers' Forum, Hunter Region, November 2010)*

*While you are waiting for accommodation to come through, you have to look for private rental places. I ended up being knocked back by 126 private rentals. All of this is just a joke as you know you are not going to get them and takes up time that you could be using to actually help yourself in other ways (homeless person, Consumers' Forum, Hunter Region, November 2010).*

*I need permanent housing. I am a single mother with a daughter so going for temporary accommodation is not really going to help me. I have recently lost my other daughter because I don't have secure housing, I need permanent housing to gain access to her (homeless person, Consumers' Forum, Hunter Region, November 2010).*

Based on the above experiences, PIAC believes the inclusion of ESCR under the HRA would have a positive impact upon ensuring access to housing for vulnerable people in the ACT. The 2009 Research Report found that the HRA was effective in ensuring that government and public authorities adopt practices consistent with CPR.<sup>12</sup> PIAC believes the inclusion of ESCR under the HRA will similarly assist one of the largest government agencies in the ACT, the DHCS to develop policies and practices in line with the right to adequate housing and ensure protection for the most vulnerable in the ACT.

### **The right to health**

PIAC has considerable experience of how the absence of any direct legislative incorporation of the right to health impacts disproportionately on people experiencing homelessness.

The right to health, as recognised in Article 12(1) of the ICESCR, provides the right to the highest attainable standards of physical and mental health. Under this right, Australia is required to ensure all individuals have access to adequate health care and services. The right to health is also referred to in the ACT Government's *Homelessness Charter*.<sup>13</sup>

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<sup>12</sup> ACT Human Rights Act Research Project, *The Human Rights Act 2004(ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 43.

<sup>13</sup> ACT Homelessness Committee, *ACT Homelessness Charter* (2008)  
<<http://www.canfacs.org.au/files/acthomelessnesscharter.pdf>> at 13 August 2011.

The links between homelessness and mental illness are well established, including in the ACT Government's Homelessness Strategy, *Breaking the Cycle*.<sup>14</sup> There is clear evidence that mental illness is not only a significant factor in individuals becoming homeless, but also that a person is more likely to develop a mental illness after experiencing homelessness for a period of time. Recent research revealed that 80 percent of homeless people with mental health problems have been homeless for one year or longer and that most homeless people (81 percent) who have mental health problems have experienced two or more episodes of homelessness.<sup>15</sup> Research has also shown the considerable experience of trauma among people who have experienced homelessness, with rates estimated to be as high as 90 percent.<sup>16</sup>

Whether it is a cause or effect of homelessness, it is clear that the majority of people with mental illness on the street find it difficult to access appropriate treatment under current service structures. The inability of homeless people to obtain adequate and substantive mental health treatment was identified by several participants in the 2010 Consumer Forums.

*On-going counselling is so hard to get if you are homeless. You might get the odd session here and there but nothing that lets you actually address the things you need to (homeless person, Consumers' Forum, Hunter Region, November 2010).*

*[I needed] a bit of support with my mental health; they just chuck keys at people with no help (homeless person, Consumers' Forum, Hunter Region, November 2010).*

*For the first few years I was homeless I did not access any services because I did not know any (homeless person, Consumers' Forum, Hunter Region, November 2010).*

*The government needs to make sure there is more information about how to access services when you first become homeless. Maybe I would not have had to struggle much (homeless person, Consumers' Forum, Hunter Region, November 2010).*

PIAC is aware that many people experiencing homelessness in ACT, have difficulties accessing adequate and timely mental health assistance. In 2002, ACTCOSS's discussion paper, *Needs Analysis of Homelessness in the ACT*, identified that the lack of appropriate mental health facilities in the ACT was having the impact of leaving people too unwell to access homelessness accommodation services.<sup>17</sup> However, there appears to have been little improvement in the ability of homeless people to obtain effective mental health treatment since this identification. PIAC notes in March 2011, the ACT Greens' requested that the ACT Government to ensure all patients

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<sup>14</sup> ACT Department of Disability, Housing and Community Services, *Breaking the Cycle of Homelessness* (2003) 15.

<sup>15</sup> Guy Johnson and Chris Chamberlain. (2011), 'Are the Homeless Mentally Ill?', *Australian Journal of Social Issues*, Autumn 2011.

<sup>16</sup> Robinson, Catherine (2010), *Rough Living, Surviving Violence and Homelessness*, UTS Press, Sydney, 2010.

<sup>17</sup> ATCOSS, *Needs Analysis of Homelessness in ACT*, (2002) ACT Council of Social Service Inc. 70 [www.dhcs.act.gov.au/\\_\\_data/assets/pdf\\_file/acthomelessnessreport.pdf](http://www.dhcs.act.gov.au/__data/assets/pdf_file/acthomelessnessreport.pdf) at 16 August 2011.



who are homeless and exiting acute mental health facilities are not exited into homelessness and instead proposed greater access acute mental health facilities.<sup>18</sup>

PIAC believes that adequate protection for the right to health in the ACT can only occur through express legislative protection. The ACT Homelessness Charter does recognise the right to health services; however, as with the right to housing, the voluntary nature of the charter means that no enforcement mechanisms are available in case of breach of this right.

## **Interdependent and indivisible nature of human rights.**

ESCR and civil and political rights are interdependent, and ESC rights underpin the full enjoyment of civil and political rights. For example, meaningful exercise of the civil and political right to participate in a democracy requires realisation of the right to education. As former Secretary-General of the United Nations Kofi Annan recognised, for many people “the right to vote is worth little if their children are hungry and do not have access to safe water.”<sup>19</sup>

The fact that human rights attach to each person by virtue of their humanity and they are interdependent renders them indivisible. This indivisibility is recognised at international law.<sup>20</sup> It was also recognised by the ACT Bill of Rights Consultative Committee in its 2003 report, *Towards an ACT Bill of Rights Act*, as part of its recommendation that ESCR be included in the HRA.<sup>21</sup>

The reliance of one right on the existence of another can be demonstrated by the fact that freedom of association can become meaningless if there is no right to personal security, or that the right to education is meaningless if there is no freedom of thought. ESCR, in many ways, are necessary precursors to the exercise of many of the civil and political rights contained in the HRA.

As the Project Report highlights, the indivisible nature of human rights protection is also evident in the fact that many ESCR are already being indirectly protected under the HRA’s current CPR-specific framework. For example, elements of the right to adequate housing have been established under s 8 of the HRA (the right to equality and non-discrimination)<sup>22</sup> and s 11 of the HRA (the protection of family and children).<sup>23</sup>

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<sup>18</sup> The ACT Greens, <http://act.greens.org.au/content/mental-health-and-homelessness> at 19 August 2011

<sup>19</sup> United Nations, *Human Rights—Whether Civil, Political, Economic, Social or Cultural—Are Universal, Must be Upheld in Every Country, Secretary-General Says*, UN SG/SM/8675 HR/CN/1043 (2003), available at [www.unis.unvienna.org/unis/pressrels/2003/sgsm8675.html](http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8675.html).

<sup>20</sup> The Vienna World Conference on Human Rights in 1993 declared that the correct approach was to regard all categories of rights as indivisible, universal, interrelated, and interdependent: see Vienna Declaration, UN Con A/CONF 157/24.

<sup>21</sup> Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, ACT (2003).

<sup>22</sup> See *Peters v ACT Housing* [2006] ACTRRT 6 and *Kiternas v Watts* [2006] ACTRRT 4

<sup>23</sup> See *Commissioner for Housing for the ACT v Allan* [2007] ACTRRT 21

However, such indirect incorporation is not sufficient protection for the ESCR. As was argued in ANU ESCR Research Project discussion paper, *Protecting the Right to Adequate Housing in the ACT*, the lack of direct protection does not promote ESCR consideration in the formation of policy and legislation.<sup>24</sup> Furthermore, PIAC believes express rights protection to be more effective than reliance on expansive interpretations by courts of the CPR rights framework of the HRA. In addition, the list of ESCR that have been protected indirectly under the HRA is limited, meaning that important rights not applicable under the existing CPR framework are left unprotected.

While ESCR violations would best be identified and rectified through the express protection, the current limited indirect protection does highlight that full inclusion of ESCR is simply a further incremental step.

## Community support for the inclusion of ESCR

Inquiries in Australia and subsequent reports about the type of rights to be included in human rights legislation have recommended the inclusion of economic, social and cultural rights. This included the recent National Human Rights Consultation, led by Father Frank Brennan. The Brennan Committee took into account an extraordinary level of input from the Australian community, gleaned from a large number of community round tables across Australia, written submissions and a population survey. This helped the Committee form the view that the majority of Australians placed a priority on the promotion of an adequate standard of living, education, and the highest attainable standard of health.<sup>25</sup>

Community support for the inclusion of ESCR right was also evident in responses to the ACT Government's 2006 discussion paper as part of the twelve-month review of the HRA. As noted in the Project Report, approximately 70 per cent of the submissions on the discussion paper addressed the protection of ESCR, and over 80 per cent of those supported their express inclusion in the HRA. Community support for the inclusion of ESCR was also evident in community workshops conducted by the ACT government between October 2009 and March 2010. Participants in the workshops clearly identified the role ESCR can play in identifying and addressing legislative and policy 'blind spots'.<sup>26</sup>

Moreover, the human rights consultation committees in Tasmania and Western Australia both recommended the inclusion of at least some economic, social and cultural rights in the human rights Acts that they proposed.<sup>27</sup> The Tasmanian Law Reform Institute stated that arguments for exclusion '[spoke] of timidity rather than rationality'.<sup>28</sup>

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<sup>24</sup> Australian Capital Territory Economic, Social and Cultural Right Research Project, *Discussion Paper: Protecting the Right to Adequate Housing in the Act* (2009) 9.

<sup>25</sup> Frank Brennan, Mary Kostakidis, Tammy Williams and Mick Palmer, *National Human Rights Consultation Report*, Attorney General's Department, Australia (2009) 72 and Recommendation 17.

<sup>26</sup> Australian Capital Territory Economic, Social and Cultural Right Research Project, *Report*, ACT Government (2010)

<sup>27</sup> Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), 169-170; Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), 76-77.

<sup>28</sup> Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10 (2007) at 122.

The Victorian Government, through the Victorian Parliament's Scrutiny of Acts and Regulations Committee review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), is also considering incorporating ESCR into the Victorian Charter.

## The role of courts in protecting ESCR

As noted above, PIAC believes the adoption of ESCR under the HRA to be a necessary and incremental measure for the ACT government to make.

In its response to the ACT Bill of Rights Consultative Committee's 2003 report, *Towards an ACT Bill of Rights Act*, the ACT Government expressed reservations about the implementation of ESCR in the HRA on the basis that such rights necessarily involved courts making determinations on government resource commitment.<sup>29</sup>

In recommending the adoption of ESCR, PIAC believes that concerns about the role of the courts in overstepping their constitutional role are unfounded. It is true that the ICESCR and domestic human rights instruments, such as the South African Constitution, express ESC rights in aspirational terms. However:

There is now a considerable body of international and comparative jurisprudence that recognises that economic, social and cultural rights can be adjudicated and applied in a similar manner to civil and political rights.<sup>30</sup>

For example, s 27 of the South African Constitution, which concerns health care, food, water and social security, reads as follows:

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.

Even though s 27(2) does not provide an absolute guarantee of these rights in the same way as, for example, s 11 of the South African Constitution guarantees the right to life, it still creates a real and ascertainable obligation on government.

The South African state is constitutionally obliged to 'take *reasonable* legislative and other measures' to provide health care, food and water and social security to its people. Naturally, the measure of what is 'reasonable' will be affected by 'its available resources'. That is why the realisation of these rights is to be 'progressive', but it does not mean that 'reasonable' has no ascertainable legal content.

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<sup>29</sup> For further discussion see Australian Capital Territory Economic, Social and Cultural Right Research Project, *Discussion Paper: Protecting the Right to Adequate Housing in the Act* (2009) 9.

<sup>30</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) at 156.

The *Treatment Action Campaign* case<sup>31</sup> provides an excellent example. This case concerned 'Nevirapine', an antiretroviral drug that prevents intrapartum mother-to-child transmission of HIV. It had been made available at only a small number of research facilities, and the claimants sought an order that the program be extended to all pregnant women. South Africa's Constitutional Court found in favour of the claimants. It held that, given the overwhelming social concern of HIV/AIDS, the Government was required to devise and implement, subject to available resources, a comprehensive and coordinated program 'to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV'. Its failure to do so breached s 27 of the Constitution, because the Government had failed 'to act reasonably to provide access to the socio-economic rights'.<sup>32</sup>

The argument is sometimes made that making human rights justiciable politicises the judiciary by requiring or encouraging the courts to consider what are, in essence, political questions.<sup>33</sup> This problem is said to be particularly acute in relation to ESC rights, given that decisions on these questions could have resource implications. A hypothetical example is of a court ruling that a legal right to housing means that the government must provide housing of a particular standard to all people who are homeless. This would involve the court dictating a particular policy to the government, and it would be required to reallocate resources in a way that might have undesirable consequences.

At one level, it is clear that the protection of human rights costs money. As Professors Holmes and Sunstein make clear, even civil and political rights, such as the right to a fair trial, require that tax dollars are spent on the court system (judges, jurors, registry staff, court buildings etc).<sup>34</sup> That a court enforcing such rights makes a claim on the public purse is, of course, inevitable. Just as the enforcement of certain property and other rights have similar implications.

The real problem is of courts overstepping the mark, and acting as if they were members of the legislature or executive. However, for a number of reasons, this is very unlikely in relation to including ESCR in the HRA.

First, the particular form of HRA in operation in the ACT does not empower the courts to determine or dictate socio-economic policy, as the courts would not be able to invalidate laws deemed incompatible with the rights set out in the HRA. Nor would it be unlawful for a public authority to rely on legislation that is incompatible with a particular right or rights.

Secondly, the standard of review applicable to ESCR could and should be calibrated to take into account the nature of the rights in question, the competing interests at stake, and the limits on judicial power. Thus, assuming that the HRA protected ESCR in a manner similar to that in the ICESCR and the South African Constitution, the courts would impose a less stringent form of

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<sup>31</sup> *Minister for Health v Treatment Action Campaign* [2002] 5 SA 721.

<sup>32</sup> *Minister for Health v Treatment Action Campaign* [2002] 5 SA 271 at [38].

<sup>33</sup> See, eg, James Allan, 'Siren Songs and Myths in the Bill of Rights Debate', (Senate Occasional Lecture, Canberra, 4 April 2008) at 16.

<sup>34</sup> Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (2000) at 25.

review in relation to ESCR than for civil and political rights. The courts would form judgments with reference to the limitations of ‘reasonableness’, the limited resources available to government and the principle of ‘progressive development’. As the South African Constitutional Court explained in the *Grootboom* case, which concerned forced evictions into homelessness:

A court considering reasonableness will not enquire whether other or more desirable or favourable methods 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.<sup>35</sup>

This careful delineation of the judicial role recognises that a state can ‘reasonably’ meet its human rights obligations in many different ways. The judicial deference in considering ESC rights – or, to put it another way, the ‘margin of appreciation’ that the courts give to the legislature and executive in these circumstances – is a consistent feature of international human rights law jurisprudence.<sup>36</sup> It is a limited judicial review that provides a safeguard for minimum human rights standards whilst respecting the principle of parliamentary supremacy and the limited constitutional role of the courts.

## Conclusion

The HRA has made a significant impact on the protection and promotion of human rights in the ACT. Despite initial fears that it would lead to excessive litigation and a transfer of power from the legislature to the judiciary, the evidence suggests that this has not eventuated and that, in fact, the HRA has had a very positive role in informing the practice of government and public authorities.

However, for all of the positive achievements of the HRA, there remains a gap in the protection of ESCR, which has a considerable impact on the day-to-day lives of vulnerable people in the ACT. PIAC believes the extension of the HRA to cover ESCR will not only close these gaps, but will further enshrine a culture of rights protection within the ACT government.

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<sup>35</sup> *Government of South Africa v Grootboom* [2001] 1 SA 46 at [41].

<sup>36</sup> See, eg, *Lawless v Ireland* (1961) 1 EHRR 15 at 82; *Handyside v United Kingdom* (1976) 1 EHRR 737 at 22; *Ireland v United Kingdom* (1980) 2 EHRR 25 at 86-87.