

Justiciable Socio-Economic Rights? South African Insights into Australia's Debate

REBECCA YOUNG*

Abstract

As Australia considers the appropriate form by which to represent her commitment to fundamental human rights, there is renewed opportunity to consider Australia's understanding of the interdependence and indivisibility of civil and political rights and socio-economic rights. Based on an understanding of justiciability as involving both normative and institutional justiciability, this article analyses the potential for judicial adjudication of socio-economic rights. This article argues that the South African example of constitutionally enshrined justiciable socio-economic rights offers practical mechanisms for addressing most of the common critiques levelled at the justiciability of socio-economic rights, including by providing a methodology for identifying an appropriate standard of judicial review, by avoiding separation of powers concerns through flexibility and judicial deference, by adopting a pragmatic approach to remedies and by using hierarchical needs-based assessments to address concerns of resource scarcity. This article argues that, thus far, the relevant human rights consultative committees in Australian states and territories have failed to fully engage with the well-developed South African example in their consideration of whether to include justiciable socio-economic rights and that such failures should not be repeated within the context of debate at the federal level.

Introduction

The *Universal Declaration of Human Rights (UDHR)*¹ represents the commitment of most of the global community to promote social progress and increased standards of living,² including through socio-economic rights.³ Socio-economic rights are those which protect labour, property and other economic interests, as well as those protecting other vital components of a decent standard of living including health care, food, water,

* BA/LLB(Hons) (Adel). The author is currently completing her LLM in International Law at the University of Edinburgh after having been awarded the the RBS Scots Australian Council Postgraduate Scholarship Award 2008. She is grateful to the staff of the Legal Resources Centre in Grahamstown, South Africa, for introducing her to the South African socio-economic rights jurisprudence.

1 *Universal Declaration of Human Rights*, GA Res 217A, 3 UN GAOR (183rd plen mtg) at 71 UN Doc A/810 (1948).

2 Id at preamble.

3 Id at arts 17, 20, 22–26.

clothing, shelter and education. A total of 157 states have committed themselves more explicitly to socio-economic rights through ratification of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,⁴ including Australia. Yet, 60 years after the UDHR's proclamation and more than 30 years after the ICESCR's entry into force, socio-economic rights remain marginalised. Their classification as human rights is questioned⁵ and even if accepted, their suitability for judicial enforcement is doubted.⁶ This article argues that socio-economic rights are legally significant and appropriate for adjudication. The case for the justiciability of socio-economic rights is made by reference to the case law of the South African Constitutional Court. This article then considers the extent to which the South African socio-economic rights jurisprudence is relevant to debate about any future charters of rights in Australia.

The significance of the justiciability of socio-economic rights has recently been emphasised by the United Nations High Commissioner for Human Rights, Louise Arbour, who stated to the European Court of Human Rights in January 2008 that 'a final issue that has been close to my heart is the effort to bring economic, social and cultural rights back into what should be their natural environment — the courts'.⁷ The Australian Labor Government's pre-election policy platform included commitment to a public inquiry and consultation regarding the best methods of protecting human rights and freedoms in Australia, with this issue featuring at the Australia 2020 Summit.⁸ The relevant committees considering human rights instruments in the Australian Capital Territory (ACT), Victoria, Western Australia (WA) and Tasmania have all referred to the example offered by the South African jurisprudence.⁹

Detailed consideration of this jurisprudence and its relevance to Australia is warranted. While grounded in the broader context of increased debate about potential human rights instruments in Australia, detailed consideration of the merits, nature and form of any eventual federal or state charters of rights is beyond the scope of this article,

4 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*). Membership status is as of 18 April 2008.

5 Philip Alston & Henry J Steiner, *International Human Rights in Context: Law, Politics and Morals* (1996) at 256.

6 E W Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69 at 105.

7 Louise Arbour, 'Human Rights at the Opening of the Judicial Year 2008', speech, European Court of Human Rights, Strasbourg, 25 January 2008 <www.unhcr.ch/hurricane/hurricane.nsf/view01/96475D3D6D044429C12573DE007107F9?opendocument> accessed 16 February 2008.

8 Australian Labor Party, 'Chapter 13 – Respecting Human Rights and Fair Go for All' (Paper presented at the Australian Labor Party 44th National Conference, Sydney, 27–29 April 2007) at cl 7–9 <www.alp.org.au/download/2007_platform_chapter13.pdf> accessed 17 February 2008; see generally also Ron Dyer, 'Anti-Terror Laws Mean we Need Bill of Rights' *The Age* (18 April, 2008); Michelle Grattan, 'Now the Plan of Action' *The Age Online* (21 April, 2008) <www.theage.com.au/articles/2008/04/20/1208629730818.html> accessed 29 April 2008; compare Michael Pelly, 'Top Judge Queries Need for Rights Bill' *The Australian* (28 April, 2008); Hilary Charlesworth, 'Who Wins Under a Bill of Rights' (2006) 25 *University of Queensland Law Journal* at 39.

9 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) at [5.33]–[5.41] (*'ACT Report'*); Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act* (2007) at [4.2.4] (*'WA Report'*); Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) at [2.2.2] (*'Victorian Report'*); Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania* (2007) at [3.7] (*'Tasmanian Report'*); see also New South Wales Bar Association Human Rights Committee, *Options Paper for a Charter of Human Rights for NSW* (2007) at [64]–[66] (*'NSW Bar Report'*).

as is the precise content or form of any socio-economic rights protections which might emerge. The author's concern is simply that the possibility of socio-economic rights which can be meaningfully enforced by the judiciary should not be dismissed summarily given the insights offered by South Africa on the potential for effective judicial adjudication of socio-economic rights.

Part one of this article explores the relevant historical context of justiciable socio-economic rights, both at the international and national level. On the international plane, the article outlines the emergence of socio-economic rights as subject to different enforcement mechanisms compared to their civil and political counterparts, as well as outlining recent movements towards greater justiciability for socio-economic rights. The Australian context is also explored. The manner in which socio-economic rights have been previously considered by Australian courts, parliament and human rights consultative committees is explained.

Armed with this understanding of the general approach to socio-economic rights and their justiciability, both in Australia and internationally, part two then outlines the conception of justiciability on which this article is based. Justiciability, in its most basic sense, refers to suitability for judicial adjudication. It involves two fundamental elements: whether there is a legal question (normative justiciability) and whether any extrinsic reasons make that question unsuited to judicial determination (institutional justiciability). Part two focuses on the normative justiciability of socio-economic rights.

Part three then deals with institutional justiciability. The purpose of this part is twofold. On one hand, it demonstrates that the South African example overcomes common reasons advanced to argue that socio-economic rights are unsuited for judicial adjudication, thus bearing out the view that the Committee on Economic, Social and Cultural Rights (CESCR) that all rights in the *ICESCR* are potentially justiciable.¹⁰ This part also draws attention to the relevance of the South African jurisprudence to Australia's own debate about including socio-economic rights as potentially justiciable in any future federal, state or territory charters of rights. Both a shared common law heritage and the fact that state and territory consultative committees have expressed concerns of the same nature as those addressed in the South African jurisprudence indicates the utility of this comparative approach. Thus far, consultative committees in the states and territories have failed to comprehensively engage with the South African experience. This article concludes that the South African offers an example of justiciable socio-economic rights which justifies extensive re-examination as Australia evaluates its own commitment to human rights.

I. Historical Context of Socio-Economic Rights

A. Justiciable Socio-Economic Rights in International Human Rights Law

Almost every State has ratified the *United Nations Charter*, therefore obliging them to work towards higher standards of living, employment and conditions of economic and social

¹⁰ General Comment 9, *The Domestic Application of the Covenant*, 17 CESCR at [10], UN Doc E/C.12/1997/8 (1997).

progress and development.¹¹ Since the adoption of the *UDHR*, the global community recognises all rights as indivisible, interdependent and interrelated,¹² sharing organic unity.¹³ Yet, the treatment of socio-economic rights in human rights instruments often differs compared to civil and political rights — indivisibility is honoured more in breach than in observance.¹⁴

In the twin Covenants, differentiation between civil and political rights and socio-economic rights first emerges. In 1950, the member states of the United Nations General Assembly requested a clear expression of economic, cultural and social rights and the manner in which they relate to civil and political freedoms in a single *International Covenant on Human Rights*.¹⁵ This was reconsidered after only one year when concerns were expressed about the differing nature of the rights; civil and political rights were matters on which legislation could be immediately enacted, whereas socio-economic rights were progressive.¹⁶ There was said to be a lack of appropriate enforcement and implementation mechanisms for a single covenant.¹⁷ Such concerns reflect the eventual covenants which adopt different methods of enforcement and implementation.¹⁸ The global community decided in 1951¹⁹ to instead draft two covenants,²⁰ thus giving birth to a distinction between socio-economic rights and civil and political rights which still persists. The decision was, at least partially, a result of inevitable political compromise between developed Western nations prioritising civil and political rights and the Soviet emphasis on socio-economic rights.²¹ Neither covenant purports superiority; their almost identical preambles state that the ideals espoused in the *UDHR* require protection of *all* rights. During drafting it was emphasised that states did not wish to deny socio-

-
- 11 *United Nations Charter*, adopted 26 June 1945, 892 UNTS 119 (entered into force 24 October 1945), art 55.
- 12 *UDHR*, above n1, preamble; *ICESCR*, above n4, preamble; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) (*ICCPR*), preamble; *Vienna Declaration and Program of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993), art 5; Department of Foreign Affairs and Trade, *Human Rights Manual* (2nd ed, 1998) at 13–14.
- 13 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999) at 88.
- 14 *Draft Report of the Committee on Economic, Social and Cultural Rights to the Economic and Social Council in Accordance with Economic and Social Council Resolution*, 7 CESCR at [2], UN Doc E/C.12/1992/CRP.2/Add.1 (1992); Tamara K Hervey & Jeff Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (2003) at 1; Chisanga Puta-Chekwe & Nora Flood, ‘From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights’ in Isfahan Merali & Valerie Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights* (2001) at 41; Matthew C R Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) at 9; Melissa Castan, Sarah Joseph & Jenny Schultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) at 7.
- 15 GA Res 421(V), 5 UN GAOR (317th plen mtg), UN Doc A/1775 (1950).
- 16 Concern expressed by representatives of Belgium, Canada, India, the United Kingdom, the United States and Uruguay, see ‘Consideration by the Economic and Social Council at its Thirteenth Session’ in *Yearbook of the United Nations 1951* (1971) at 480.
- 17 *Ibid.*
- 18 *ICESCR*, above n4, art 2; compare *ICCPR*, above n12, art 2; *ICESCR*, above n4, part IV; compare *ICCPR*, above n12, part IV.
- 19 ESC Res 384 (XIII), 13 UN ESCOR (1951) in ‘Consideration by the Economic and Social Council at its Thirteenth Session’, above n15 at 481.
- 20 The *ICCPR* and *ICESCR*, GA Res 543 (VI), 6 UN GAOR (275th plen mtg), UN Doc A/2119 (1952).

economic rights' enforceability and justiciability,²² but such theoretical recognition does not preclude significant differences between the two covenants.²³

The most obvious difference today is that the *ICESCR* lacks an optional protocol. However, there are moves towards such a protocol. On 18 June 2008, the Human Rights Council recommended that the General Assembly adopt and open for signature the draft Optional Protocol.²⁴ While it could be suggested that the current lack of an optional protocol reflects a view held by most States that socio-economic rights are not justiciable, this view is simplistic. It fails to acknowledge the political compromise involved in the drafting of the twin covenants and ignores early support for a single judicially-enforceable covenant. Moreover, it is inaccurate to suggest that a failure to include a mechanism for international judicial enforcement necessarily reflects a belief of States that these rights are non-justiciable. South Africa, for example, has not ratified the *ICESCR*²⁵ on a domestic level, yet it has some of the most comprehensive socio-economic rights protections in the world. The nature of the international legal system is such that what a State believes and what it will commit to on an international plane are often different. It must also be recognised that this notion of potential justiciability on an international level is potentially more difficult than the domestic pursuit of justiciability for socio-economic rights, given the inevitable State sovereignty concerns which arise.

Yet, despite the absence of an optional protocol, acceptance of justiciable socio-economic rights is not an anathema to international human rights law. For example, greater elucidation of the content of socio-economic rights may be an early step towards increased acceptance of their justiciability because most judicial traditions prefer adjudicating under the auspices of clearly defined standards.²⁶ CESCR's General Comments specify the content of many of the rights in the *ICESCR*.²⁷ The only substantive provision not yet subject to such elucidation is the right to protection of the

21 Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966* (2005) at 16; Kitty Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?' (1996) 2 *University of California Davis Journal of International Law and Policy* 111 at 121; *Report of the United Nations Commissioner for Human Rights*, 62 UN ESCOR, agenda item 14(g) at [7], UN Doc 2006 E/2006/86 (2006); Alston & Steiner, above n5 at 256; but see Michael J Dennis & David P Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law* 462 at 477.

22 See *Report of the United Nations Commissioner for Human Rights*, above n21 at [12]; see also Morsink, above n13 at 228.

23 Dennis & Stewart, above n21 at 465; for example compare more robust powers of the Human Rights Committee in *ICCPR*, arts 28–41 to powers of the Economic and Social Council (ECOSOC) in *ICESCR*, art 21; compare also *ICESCR*, art 2 to *ICCPR*, art 2.

24 Human Rights Council Resolution 8/2, 8 Human Rights Council, 18 June 2008, UN Doc A/HRC/RES/8/2.

25 Although South Africa signed the Convention on 3 October 1994, ratification has not yet occurred.

26 Although the South African experience in part three reveals that socio-economic rights may be justiciable even without content-based standards.

27 Housing (General Comments 4 and 7), Education (General Comments 11 and 13), Food (General Comment 12), Health (General Comment 14), Water (General Comment 15), Work (General Comment 18), Social Security (General Comment 19).

family.²⁸ While CESCR's General Comments are not legally binding, they are at least persuasive as interpretations of the *ICESCR*. While increased definition of the normative content of socio-economic rights is not in itself indicative of support for justiciable socio-economic rights, it is a development which may be seen as a potential step in the direction of justiciable socio-economic rights.²⁹

Case law under the *ICCPR* Optional Protocol also supports the potential justiciability of socio-economic rights, particularly in the context of non-discrimination. The Human Rights Committee (HRC) has found that equality before the law under the *ICCPR*³⁰ could be invoked even in relation to rights contained within the *ICESCR*.³¹ In addition, absent an official complaints procedure of its own, CESCR has adopted a more quasi-judicial role in the State reporting process than was originally envisaged.³² The Economic and Social Council (ECOSOC), which previously performed CESCR's current role, tended to make vague and deliberately inoffensive 'comments of a general nature' in relation to state reports.³³ In contrast, CESCR engages in active and more confrontational dialogue with the reporting State, often asking specific questions about particular aspects of implementation which may be based on NGO submissions received in relation to a particular State report.³⁴ Yet, the realities of dismal State engagement cannot be ignored. State parties often fail to comply with reporting procedures or do so in a late or cursory fashion.³⁵ This is indicative of general shortcomings of enforcement through State reporting alone, rather than an indication that these rights are inherently non-justiciable. The current move towards an optional protocol may assist in this regard.

B. Justiciable Socio-Economic Rights in Australia

Turning to socio-economic rights and their justiciability within the Australian context, Australia signed the *ICESCR* on 18 December 1972 and the covenant entered into force for Australia on 10 March 1976.³⁶ Despite this, it has not yet been incorporated into Australian law.³⁷ While the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (*HREOC Act*) annexes the *ICCPR* in order to give content to the definition of human rights for the purpose of the Act,³⁸ the rights contained in the *ICESCR* were not included in the Act's definition of 'human rights'. Even the Explanatory Memorandum

28 *ICESCR*, above n4, art 10.

29 This step might be reinforced by greater elucidation of possible violations of *ICESCR* in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN ESCOR, 24 CESCR, agenda item 3, UN Doc E/C.12/2000/13 (2000).

30 *ICCPR*, above n12, art 26.

31 *FH Zwaan-de Vries v The Netherlands*, views adopted 9 April 1987, Communication No 182/1984 (Netherlands, CCPR/C/29/D/182/1984).

32 Allan Rosas & Martin Scheinin, 'Implementation Mechanisms and Remedies' in Asbjorn Eide, Catarina Krause & Allan Rosas, *Economic, Social and Cultural Rights: A Textbook* (1995) at 357.

33 Craven, above n14 at 39–45.

34 See, for example National Association of Community Legal Centres et al, 'Freedom Respect Equality Dignity: Action NGO Submission to the UN Committee on Economic, Social and Cultural Rights: Australia' (April 2008) at 145–157; see also Arambulo, above n21 at 127.

35 Audrey Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23 at 28.

36 See International Covenant on Economic, Social and Cultural Rights, *Australian Treaty Series* 1976 No 5.

to the Australian Bill of Rights Bill 1985 (Cth), a portion of which was later incorporated into the *HREOC Act*, purported to incorporate the *ICCPR* into Australian law but made no mention of the *ICESCR*.³⁹ The Australian Democrat's Parliamentary Charter of Rights and Freedoms Bill 2001 (Cth)⁴⁰ also included exclusively civil and political rights.⁴¹ The only attempt to introduce a Bill of Rights in federal parliament which included reference to *ICESCR* rights was a private member's bill introduced by Dr Andrew Theophanous MP which failed to reach the second reading stage in the House of Representatives.⁴² Therefore, the implementation of the *ICESCR* has not featured highly on the Australian political agenda.

This is confirmed by an examination of the experiences of the ACT and Victoria with their enactment of human rights instruments. The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Victoria) (*Victorian Charter*) failed to include socio-economic rights except the right to property,⁴³ although it must be acknowledged that this occurred in the context of a clear government position that socio-economic rights should remain the domain of parliament.⁴⁴ The consultation committee for the *Victorian Charter* pointed out that while 41 per cent of submissions to the committee advocated for the inclusion of socio-economic rights, over 90 per cent advocated for civil and political rights.⁴⁵ Interestingly, the *WA Report* observed that 79 per cent of submissions which addressed the issue of which rights should be protected, advocated inclusion of socio-economic rights.⁴⁶ Although the Victorian committee agreed that socio-economic rights were important, it elected to focus 'on those democratic rights with broad support that applied equally to everyone'.⁴⁷ The committee expressed a concern that 'there is limited experience on what effect [economic, social and cultural] rights may have within a legal system like Victoria's'⁴⁸ and suggested that the Victorian Government should review in future whether the Charter should be expanded in this respect.⁴⁹

In the ACT, the consultative committee recommended that socio-economic rights be included, arguing that the perceived difficulties regarding the implementation of these rights were overstated and the distinctions between the two types of rights simplistic.⁵⁰ The consultative committee referred expressly to the jurisprudence of the South African

37 Although very selective incorporation is evident in the *Supported Accommodation Assistance Act 1994* (Cth) preamble; *Workplace Relations Act 1996* (Cth) s 4; *Disability Discrimination Act 1992* (Cth) s 12; *Native Title Act 1993* (Cth) Notes; *Housing Assistance Act 1996* (Cth) Notes; *Aboriginal and Torres Strait Islander Act 2005* (Cth) Notes; *Age Discrimination Act 2004* (Cth) s 10.

38 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3, sch 2.

39 Explanatory Memorandum, Australian Bill of Rights Bill 1985 (Cth).

40 Reintroduced to Parliament by Senator Natasha Stott-Despoja in 2005 and 2008.

41 Explanatory Memorandum, Parliamentary Charter of Rights and Freedoms Bill 2001 (Cth).

42 Australian Bill of Rights Bill 2001 (Cth).

43 *Victorian Report*, above n9.

44 Victorian Department of Justice, *Human Rights in Victoria – Statement of Intent* (May 2005).

45 *Victorian Report*, above n9 at [2.2.2].

46 *WA Report*, above n9 at [4.2.2].

47 George Williams, 'Victorian Charter: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880 at 896.

48 *Victorian Report*, above n9 at [2.2.2].

49 *Id* at [2.1].

50 *ACT Report*, above n9, at [5.32], 109.

Constitutional Court when outlining the possibility of granting such rights justiciable status.⁵¹ The eventual *Human Rights Act 2004* (ACT) did not accept this recommendation. The view of the ACT government focused ultimately on resource scarcity, stating that:

there is concern that application of policies to individual situations where there is a difficult question of allocation of scarce resources may expose the Government to liability. As there are few countries where the ICESCR rights are enshrined in law, there is little guidance in the form of decided cases about the extent of that liability.⁵²

Section 43 of the *Human Rights Act 2004* (ACT) mandated that the Attorney-General undertake a review after the Act had been in operation for one year and this review would consider whether rights under the ICESCR should be included. This review noted that the *Victorian Charter* did not include these rights and that the ACT's inclusion would be exceptional, recommending that these issues should be revisited at the Act's five year review.⁵³ For both Victoria and the ACT, it seems that the unknown nature of socio-economic rights made their inclusion ultimately undesirable.

Turning to those states in which a Bill of Rights is currently in a consultative phase, the Tasmanian Law Reform Institute has stridently recommended a Charter of Rights which includes rights to work, to food, clothing and housing, to the highest attainable standards of mental and physical health and to education.⁵⁴ Moreover, the breach of such rights could give rise to an independent cause of action in the courts. In WA, the committee's report on the proposed *Human Rights Act* noted the overwhelming public support for the inclusion of economic, social and cultural rights and recommended that they be included and enforced by the same mechanisms as civil and political rights.⁵⁵ This was the committee's recommendation, even though the WA Government had expressed a preference that socio-economic rights not be included.⁵⁶ The New South Wales (NSW) Bar Council's recommendations on a Charter of Rights for NSW⁵⁷ favoured the inclusion of socio-economic rights, though at the same time acknowledged that these may need to be protected in a different manner than civil and political rights.⁵⁸

51 Id [5.46].

52 Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act, Tabling Speech, 23 October 2003 ('ACT Government Response').

53 ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve Month Review Report*, (2006) at 49 ('ACT Twelve Month Report').

54 *Tasmanian Report*, above n9 at [4.15.13]. Any action on the Tasmanian recommendations, however, seem to have been deferred, with the Tasmanian Attorney-General having expressed the view that national consistency in the adoption of human rights instruments is desirable. See Maria Rae, 'Rights Charter Stranded', *The Mercury*, 12 March 2008.

55 *WA Report*, above n9 at [4.2.2], [4.2.6], [4.4.7].

56 Id at [4.1].

57 New South Wales Standing Committee on Law and Justice, *A NSW Bill of Rights: Report of the Standing Committee on Law and Justice* (2001) recommended that NSW not adopt a Bill of Rights. This Report is not part of an official government consultation but NSW Government accepted this recommendation on 21 October 2001.

58 *NSW Bar Report*, above n9 at [128].

The current lack of incorporation of the *ICESCR* into Australian law and the absence of any other express basis for the protection of socio-economic rights necessarily give a discussion of justiciable socio-economic rights in Australia limited scope. The development of the notion that international treaties which have been ratified by Australia but not incorporated into Australian law can still give rise to a legitimate expectation in administrative decision making, and the subsequent retreat from this concept, has been well documented.⁵⁹ Even in the period after the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh*⁶⁰ and prior to the decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*,⁶¹ no case in the Federal Court of Australia identified procedural fairness being infringed in relation to a legitimate expectation based on terms of the *ICESCR*. During this period, only one case citing the *ICESCR* was decided by the Administrative Appeals Tribunal (AAT).⁶² In this decision, the AAT actually overturned a decision of the Social Security Appeals Tribunal which relied upon a legitimate expectation based on Australia's ratification of the *ICESCR*.

A review of the decisions of the High Court of Australia finds scant reference to the *ICESCR*. When it is referred to, it is often mentioned only loosely in combination with other international instruments to support a desired statutory interpretation or development of common law principle.⁶³ For example, in *Cattanach v Melchior*,⁶⁴ the *ICCPR*, the *ICESCR* and the *Convention on the Rights of the Child*⁶⁵ were presented to persuade the court of the status of the family as the fundamental unit of society. Apart from this, the *ICESCR* is mentioned in High Court jurisprudence only in discrimination and labour-related contexts where the relevant legislation itself contains partial reference to the *ICESCR*.⁶⁶ In none of these cases is the reference to the *ICESCR* significant and often it appears only in summaries of submissions. Effectively, despite the numerous potential devices which exist to enable international law to be given a role in Australian judicial decisions,⁶⁷ Australian jurisprudence applying the *ICESCR* at the federal level is lacking.

Judicial consideration of socio-economic rights in Australian states and territories is also rare. Miles CJ of the Supreme Court of the ACT has noted that given that

59 See, for example Wendy Lacey, 'Case Commentary: A Prelude to the Demise of Teoh: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*' (2004) 26 *Sydney University Law Review* 131.

60 (1995) 183 CLR 273.

61 (2003) 214 CLR 1.

62 *Department of Social Security and Kozhaya Dagher* [1997] AATA 419.

63 See, for example *Re Woolleys* [2004] HCA 49 at [221]; *Kartinyeri v the Commonwealth* [1998] HCA 22 at [167]; *Thorpe v Commonwealth (No 3)* [1997] HCA 21 at [24]; *Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15 at [6]; *Donal v Murray* [1978] HCA 53 at [8]; *Koovarta v Bjelke-Petersen* [1982] HCA 27 at [9].

64 [2003] HCA 38 at [35].

65 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

66 See, for example *Disability Discrimination Act 1992* (Cth); *Qantas Airways Ltd v Christie* [1998] HCA 18 at [149].

67 Philip Lynch, 'The Establishment and Role of the Human Rights Law Resource Centre' (2006) 7 *Melbourne Journal of International Law* 225 at 227.

administrative decision makers are required to take into account treaties to which Australia is party, there is no reason why judicial decision-makers are not similarly obliged when exercising discretion or adjudicating on a question of reasonableness.⁶⁸ Based on this, Miles CJ considered that the right to work in article 6 of the *ICESCR* could be appropriately considered (although his Honour eventually found that the restraint of trade issue in the case was not affected by the operation of this right).⁶⁹ Despite its still infant state, the interpretation of the *Human Rights Act 2004* (ACT) has also shown some willingness to utilise protected civil and political rights to support socio-economic rights. In *Commissioner for Housing in the ACT v Y*,⁷⁰ Higgins CJ was prepared to use the Act's protection of children and the family unit in the context of enabling a single mother to access subsidised housing. A first reading of Higgins CJ's findings even suggests that his Honour is recognising a right to housing which does not exist in the Act itself: 'those rights [in sections 11 and 34 of the Act] require that the rights of a family, and of children in particular, to secure and appropriate housing be recognised and that Territory laws be so interpreted as to preserve and advance those rights where possible'.⁷¹ Despite this, the overwhelming theme is that potential adjudication of socio-economic rights in Australia has scant experience on which to draw.

2. The Normative Justiciability of Socio-Economic Rights

A. The Nature of Justiciability

Prior to outlining the case for the justiciability of socio-economic rights, the nature of justiciability itself must be considered. It is a question dealing with the very nature of the boundaries of law and adjudication.⁷² Effectively, justiciability considers whether something is 'capable of being considered legally and determined by the application of legal principles and techniques'.⁷³ Justiciability in international human rights law likely refers to whether a State's progress towards achieving a right is subject to any judicial or quasi-judicial adjudication by a duly authorised international committee or body.⁷⁴ In domestic contexts, justiciability involves appropriateness for judicial determination.⁷⁵ In Australia, this involves a threshold question of whether there is a 'matter' which requires the determination of an individual's legal rights or interests.⁷⁶ The founding jurisprudence on the meaning of 'matter' refers to some 'subject-matter for determination in legal proceedings' which requires 'some immediate right, duty or

68 *Wickham v Canberra District Rugby League Football Club Ltd* [1998] ACTSC 370 at [67]–[68].

69 *Id* at [69]–[70].

70 [2007] ACTSC.

71 *Id* at [48].

72 Ariel L Bendor, 'Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience' (1996–1997) 7 *Indiana International & Comparative Law Review* 311 at 312.

73 David M Walker, *The Oxford Companion to Law* (1980) at 694.

74 Dennis & Stewart, above n21 at 474–475.

75 Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784 at 788.

76 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 388–390; *Minister for Arts, Heritage and Environment v Peko-Walsend Ltd* (1987) 15 FCR 274 at 304; *In Re the Judiciary Act 1903–1920 and In Re the Navigation Act 1912–1920* (1921) 29 CLR 257 at 265–266.

liability to be established by determination of the Court'.⁷⁷ If so, its appropriateness for judicial review is assessed.⁷⁸

The complexity of the concept of justiciability must be acknowledged. Even figures of judicial competence, such as acting Chief Justice Ziberg of the Israeli Supreme Court has confessed 'without shame, that even I have not ever grasped the nature of this monstrous creation ... a precise legal analysis cannot be found that will allow us to grasp the content of this concept'.⁷⁹ Sir Anthony Mason has noted that 'justiciability is a controversial and difficult concept ... so far it has not been susceptible to definition'.⁸⁰ Thus, while remaining cognisant of the difficulty of the concept, considerations of the nature of justiciability often conclude that it has at least two elements.⁸¹ The two fundamental questions which underlie many conceptions of justiciability are: 1) whether there is a legal right or interest and 2) if so, whether there is any reason to deny judicial adjudication in relation to that right. The classic conception of the American 'political questions' doctrine is that a non-justiciable question is one which lacks discoverable and manageable standards (for instance, there is no legal right as such) or is constitutionally committed to a political department⁸² (for instance, there is a reason rendering judicial adjudication inappropriate).

A bifurcated approach to justiciability has been developed in greater detail elsewhere. For example, Ariel Bendor presents a view of justiciability as involving normative justiciability and institutional justiciability. Normative justiciability 'comes to answer the question whether there is legal criteria sufficient to determine a dispute presented before the Court'.⁸³ Generally, legal questions such as enforcement of rights will be justiciable in the normative sense⁸⁴ unless the questions are not capable of being answered⁸⁵ or involve contradictory norms which cannot be resolved based on legal rules.⁸⁶ Institutional justiciability addresses the question of whether the court is the most appropriate authority to determine a particular dispute. Institutional justiciability involves two elements: material institutional justiciability and organic institutional justiciability.⁸⁷ Material institutional justiciability refers to whether it is appropriate that a court adjudicate the subject matter of a dispute.⁸⁸ Organic institutional justiciability

77 *In Re the Judiciary Act 1903–1920 and In Re the Navigation Act 1912–1920* (1921) 29 CLR 257 at 265; see also *Fencott v Muller* (1983) 152 CLR 570 at 603; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 316–317; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 555, 570, 585, compare 524; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610–611.

78 At least in the context of judicial review of administrative decisions. See *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 304.

79 HC 295/65, *Oppenheimer v Minister of Interior and Health*, 20(1) PD 309, 328 quoted in Bendor, above n72 at 336.

80 Mason, above n75 at 787.

81 See, for example Peter Gordon Ingram, 'Justiciability' (1994) 39 *American Journal of Jurisprudence* 353 at 353.

82 *Goldwater v Carter*, 444 US 996 (1979) at 998–999.

83 HC 910/86, *Ressler v Minister of Defense*, 42(2) PD 441, 474 as quoted in Bendor, above n72 at 315.

84 Bendor, above n72 at 339.

85 *Id* at 334–5.

86 *Id* at 336.

87 *Id* at 338.

88 *Ibid*.

refers to whether it is appropriate for a court to rule upon the legality of actions of a particular body (for example, parliament). It is inherently dependent on constitutional and governmental structures and it is not presently useful to consider as an abstract question. After first summarising the typical case for the normative justiciability of socio-economic rights in the remainder of this part, this article will consider institutional justiciability for instance, whether it is appropriate for courts to adjudicate on socio-economic rights. According to Bendor, this must be considered based on a presumption that 'legal questions are per se justiciable from an institutional point of view' therefore 'we must examine then what the possible justifications for restricting material institutional justiciability in various types of situations are'.⁸⁹

B. Normative Justiciability — Socio-Economic Rights as 'Rights'

In the context of this article's discussion of the potential relevance of South African socio-economic rights jurisprudence to existing or future charters of rights in Australia, the normative justiciability of socio-economic rights is not problematic. Constitutionally or legislatively entrenched socio-economic rights have incontrovertibly achieved status as legal rights. Yet, given the broader objective of this article to demonstrate the general justiciability potential of socio-economic rights, a brief discussion of the normative justiciability of socio-economic rights is warranted. On a philosophical level, there is no 'correct' philosophy of rights against which socio-economic rights' status as rights can be definitively measured. Yet, in becoming party to *ICESCR*, 157 States have acknowledged that they consider socio-economic rights to be human rights. Thus, CESCR's own conception of socio-economic rights' status as rights under *ICESCR* warrants consideration.

CESCR conceives of human rights as embracing 'a trichotomy of obligations to respect, protect and fulfil'.⁹⁰ An obligation to respect a right accords with the simplest and so-called negative obligation of a government not to interfere with the enjoyment of a right. Obligations to protect and fulfil compel greater State action to realise a right. Both socio-economic and civil and political rights can be conceived in terms of these tripartite obligations.⁹¹ Where socio-economic rights differ from their civil and political counterparts is in the concept of progressive realisation. The *ICESCR* requires that each State party 'undertakes to take steps ... to the maximum of its available resources, with

⁸⁹ Bendor, above n72 at 339.

⁹⁰ See General Comment 12, *The Right to Adequate Food*, 20 CESCR at [15], UN Doc E/C.12/1999/5 (1999); General Comment 13, *The Right to Education*, above n164 at [50]; General Comment 14, *The Right to the Highest Attainable Standard of Health*, 22 CESCR at [33], UN Doc E/C.12/2000/4 (2000); General Comment 15, *The Right to Water*, 29 CESCR at [20], UN Doc E/C.12/2002/11 (2003); General Comment 16, *The Equal Rights of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, 24 CESCR at [17], UN Doc E/C.12/2005/4 (2005); General Comment 17, *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author*, 35 CESCR at [28], UN Doc E/C.12/GC/17 (2006); General Comment 18, *The Right to Work*, 35 CESCR at [22], UN Doc E/C.12/GC/18 (2006). The concept of dividing obligations under these categories is attributable to Henry Schue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980).

⁹¹ See David Marcus, 'The Normative Development of Socioeconomic Rights through Supranational Adjudication' (2006) 42 *Stanford Journal of International Law* 53 at 57–58.

a view to achieving progressively the full realization of the rights recognized in the present Covenant'.⁹² Progressive realisation is 'a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring the full realization of economic, social and cultural rights'.⁹³ While it may be impossible to absolutely achieve a right, it is possible to require that immediate steps be taken towards its achievement. This approach is adopted in South Africa to give socio-economic rights meaning, even in the context of an economy struggling with resource scarcity.⁹⁴

Yet, despite this conception of socio-economic rights as normatively justiciable, socio-economic rights' status as rights has been subjected to a number of criticisms which will be addressed only briefly here. Common critiques of socio-economic rights include that they lack practicability,⁹⁵ sufficient clarity of content⁹⁶ and universality.⁹⁷ In relation to the practicability critique,⁹⁸ most expressions of socio-economic rights address this through incorporation of a notion of progressive realisation.⁹⁹ Progressive realisation enables socio-economic rights to avoid relegation to the realm of impossibility.

Clarity of content or meaning might also be a necessary quality of a right,¹⁰⁰ yet the 'problem' of linguistic clarity of socio-economic rights is not uniform¹⁰¹ and is diminished by further elucidation of the content of the *ICESCR* rights.¹⁰² Moreover, the 'requirement' that the content of a right be capable of statement in an abstract yet appropriately specific manner may improperly remove rights from their practical context. There is perhaps not all that much that is difficult or ambiguous about determining whether children are dying due to lack of access to water or that people are sleeping rough due to an inability to access shelter.¹⁰³ Supranational adjudication from the European Committee on Social Rights (ECSR) and the African Commission on Human and Peoples' Rights demonstrate the efficacy of an 'I know it when I see it'

92 *ICESCR*, above n4, art 2(1).

93 General Comment 3, *The Nature of States Parties Obligations*, 5 CESCR at [10], UN Doc E/1991/23 (1990) ('General Comment 3').

94 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 765 (CC) [45]–[46] ('*Grootboom*').

95 Maurice Cranston, *What Are Human Rights?* (1973) at 66; Carl Wellman, *An Approach to Rights: Studies in the Philosophy of Law and Morals* (1997) at 106; Vierdag, above n6 at 78–83.

96 Vierdag, above n6 at 94; Wellman, above n95 at 108–109.

97 Cranston, above n95 at 67; Wellman, above n95 at 112–114.

98 Wellman, above n95 at 108, 116; Cranston, above n95 at 66; but see David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal of Human Rights* 1 at 21.

99 See, for example *ICESCR*, above n4, art 2(1); Constitution of the Republic of South Africa, Act 108 of 1996 ss 26(2), 27(2) ('South African Constitution'); see discussion of s 45 of the Irish Constitution 1937 and s 39 of the Indian Constitution in Vicki Jackson & Mark Tushnet, *Comparative Constitutional Law* (1999) at 1437–1440.

100 Vierdag, above n6 at 94; Wellman, above n95 at 108–109.

101 For example, compare the brief right to social security contained in *ICESCR*, art 9 to the extensive provisions in the *European Social Charter (Revised)* arts 12–14, opened for signature 3 May 1996, 2151 UNTS 279 (entered into force 1 July 1999) on the same subject matter.

102 See, for example General Comment 19, *The Right to Social Security*, 39 CESCR at [15], UN Doc E/C.12/GC/19 (2007).

103 David Beetham, 'What Future for Economic and Social Rights?' (1995) 43 *Political Studies* 41.

approach to breaches of socio-economic rights in the face of apparent normative vagueness.¹⁰⁴ Moreover, it should be kept in mind that the claim that socio-economic rights are not rights because they are too vague may yield a self-fulfilling prophecy because 'it prevents further normative development of socio-economic rights through adjudication'.¹⁰⁵

A human right should also be universal in the sense that it can be claimed by all.¹⁰⁶ In critiquing socio-economic rights, Maurice Cranston points out that they are only available to certain classes of people.¹⁰⁷ For example, the right to paid holiday leave is only available to employees, rather than universally.¹⁰⁸ To a certain extent every human right can only be enjoyed by fixed persons, for example only a person being tried claims a right to a fair trial. What makes a right universal is the fact that it is *possible* for everyone to come within the class of persons who might claim it. Claims that certain rights contained in the *ICESCR* are not universal simply obfuscate the reality that most rights in the *ICESCR* such as those to food, clothing, shelter, primary health care and education, are of fundamental importance to all persons.¹⁰⁹

Given that they are universal, practicable and appropriately specific, there is a case for the normative justiciability of socio-economic rights. Moreover, given the practical context of a global politico-legal environment in which many States have acknowledged socio-economic rights as rights and, in particular, given the more specific context of this article's discussion of South Africa's constitutionally entrenched rights and their possible relevance to constitutional or legislative entrenchment in Australia, normative justiciability is not truly in issue in this article. Thus, this article will now turn to institutional justiciability and discuss whether any external reasons deny the suitability of socio-economic rights for judicial adjudication.

3. Institutional Justiciability of Socio-Economic Rights

The underlying premise of this article is that it is desirable to promote the potential judicial adjudication of socio-economic rights. Acknowledging, however, that the appropriateness of human rights for judicial adjudication is a highly contested concept,¹¹⁰ further justification of this stance might be necessary. It might be suggested that the positive practical outcomes of judicial adjudication of human rights itself justifies the project¹¹¹ or that judicial engagement with human rights might lead to more humane

104 Marcus, above n91 at 67, 89.

105 Marcus, above n91 at 55.

106 Cranston, above n95 at 67; Wellman, above n95 at 112–114.

107 Cranston, above n95 at 67.

108 Ibid.

109 Beetham, above n103; see also Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 *New York University Journal of International Law and Policy* 1 at 8–9, 14–15.

110 See generally for example Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (1996); Jeremy Waldron, *Law and Disagreement* (1999); Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 *Oxford Journal of Legal Studies* 733.

111 See, generally Malcolm M Feeley & Edward L Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998).

and balanced jurisprudential approaches.¹¹² More conservatively, concerns about the appropriateness of judicial adjudication of human rights are deflected by demonstration that judicial decisions about human rights are not qualitatively different from other types of judicial decisions, such as those involving statutory interpretation or the development of common law.¹¹³ Significant in the context of debate about any future charters of rights is the possibility for the legislature to maintain ultimate authority in any human rights regime.¹¹⁴ The function of judicial review of legislation has also been presented as a necessary means of ensuring 'legitimacy in the making and application of law'.¹¹⁵ On the whole, the fundamentally contested nature of this question of the adjudicative suitability of rights, combined with the practical reality that many states accept such adjudicative function by the judiciary as appropriate,¹¹⁶ indicate that in the context of increased discussion of Australian charters of rights, consideration of the justiciable potential of socio-economic rights is warranted.

On the question of the institutional justiciability of socio-economic rights in domestic legal contexts, CESCR acknowledges that while states may approach their treaty obligations flexibly, the *ICESCR* clearly envisages a role for judicial adjudication. General Comment 3 makes it explicit that many rights in the *ICESCR* 'would seem to be capable of immediate application by judicial and other organs in many national legal systems'.¹¹⁷ These include, inter alia, the right to equality in the enjoyment of socio-economic rights,¹¹⁸ the right to fair wages,¹¹⁹ trade union related rights,¹²⁰ a child's right to protection from economic and social exploitation¹²¹ and the right to free compulsory primary education.¹²²

In addition, while singling these rights out as suitable for immediate judicial adjudication in many states, the overall approach of CESCR is that these are mere illustrations and that 'there is no Covenant rights which could not, in the great majority of legal systems, be considered to possess, at least some significant justiciable dimension' and that 'the adoption of a rigid classification of economic, social and cultural rights which puts them by definition beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and

112 See comparison of House of Lords' decision in *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56 to the decision of the Australian High Court in *Al Kateb v Godwin* (2004) 219 CLR 562 in Charlesworth, above n8 at 48.

113 Charlesworth, above n8 at 46–47; compare Timothy Macklem, 'Entrenching Bills of Rights' (2006) 26 *Oxford Journal of Legal Studies* 107.

114 Charlesworth, above n8 at 50.

115 Thomas Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 *Oxford Journal of Legal Studies* 697 at 725; see also Luc B Tremblay, 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law' (2003) 23 *Oxford Journal of Legal Studies* 525.

116 Michael J Perry, 'What is "the Constitution"? (and Other Fundamental Questions)' in Larry Alexander, *Constitutionalism, Philosophical Foundations* (1998) at 120.

117 General Comment 3, above n93 at [5].

118 *ICESCR*, above n4, art 3.

119 *ICESCR*, above n4, art 7(1)(a)(i).

120 *ICESCR*, above n4, art 8.

121 *ICESCR*, above n4, art 10(3).

122 *ICESCR*, above n4 art 13(2)(a).

interdependent'.¹²³ In reaching this view, CESCR relies on the principle enshrined in article 8 of the *UDHR* that everyone has the right to an effective remedy before a competent judicial tribunal. The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹²⁴ further support this view, indicating that in relation to gross violations of international human rights law (as embodied in the twin covenants), victims have the right to an effective judicial remedy.¹²⁵ CESCR's view is that the rights contained in the *ICESCR* are per se capable of judicial adjudication although the extent of such adjudication might vary.

A. The South African and Australian Contexts

Of the domestic legal systems which have embraced a greater role for justiciable socio-economic rights, none have done so more extensively than South Africa. It is logical, therefore, to consider the practical insights that the South African experience offers on the issue while, of course, recognising the unique features of South Africa's transformative constitution.¹²⁶ The South African Constitution was adopted in 1996, after extensive community consultation and a unique process whereby the Constitutional Court of South Africa verified that it complied with 34 constitutional principles.¹²⁷ This process embodied a desire to legally address the legacy of the apartheid era. Unsurprisingly, therefore, the Constitution's founding values include democracy, social justice, improving quality of life,¹²⁸ fundamental human rights,¹²⁹ the rule of law¹³⁰ and constitutionalism.¹³¹ Protected socio-economic rights include freedom of trade, occupation and profession,¹³² labour relations rights,¹³³ property ownership,¹³⁴ housing,¹³⁵ health care, food, water and social security,¹³⁶ specific rights relating to children including nutrition, shelter, health care, social services and freedom from labour exploitation,¹³⁷ and education.¹³⁸ Each of these socio-economic rights encompasses obligations to respect, protect, promote and fulfil the right,¹³⁹ thus clearly embracing a

123 General Comment 9, *The Domestic Application of the Covenant*, 17 CESCR at [10], UN Doc E/C.12/1997/8 (1997).

124 United General Assembly resolution 60/147, 64th plenary meeting, 16 December 2005 (Basic Principles).

125 Basic principles, above n124, art 12.

126 *S v Makwanyane and anor* 1995 (3) SA 391 (CC) at [7]; Sandra Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights in South Africa' (2005) 6 *ESR Review* 3.

127 Interim Constitution, Constitution of the Republic of South Africa, Act 200 of 1993 s 71(1).

128 South African Constitution preamble.

129 South African Constitution s 1(a).

130 South African Constitution s 1(c).

131 South African Constitution s 2.

132 South African Constitution s 22.

133 South African Constitution s 23.

134 South African Constitution s 25.

135 South African Constitution s 26.

136 South African Constitution s 27.

137 South African Constitution s 28.

138 South African Constitution s 29.

139 South African Constitution s 7(2).

conception consistent with the notion of rights as involving at least a tripartite of obligations. The rights to access housing,¹⁴⁰ health care, food, water and social security¹⁴¹ require the State 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. All types of rights are justiciable by virtue of section 38 which permits breaches of any of the rights in the constitution to be adjudicated upon by the Constitutional Court.

The importance of constitutional entrenchment and the historical and social context of South Africa cannot be ignored.¹⁴² The South African example 'must be understood in the context of the Court as a uniquely powerful institution with broad constitutional and moral authority to advance the human rights goals of the post apartheid South Africa'.¹⁴³ Yet, the historical context of the extreme indignities and social inequality of the apartheid era does not render the South African experience irrelevant to other States. While socio-economic problems may be particularly acute in South Africa due to apartheid's historic legacy, a multitude of other States have a history which includes the exclusion of certain groups in society from social and economic opportunities. It is such marginalised persons who potentially have the most to gain from the justiciability of socio-economic rights, for example, in Australia it is easy to imagine their potential relevance to indigenous Australians. One should remain aware of the context of the South African jurisprudence, but this does not necessarily dictate a jurisdictional scope beyond which it is no longer relevant.

The Australian and South African legal systems share a number of common features which may be relevant to the issue of justiciable socio-economic rights. These include a shared common law heritage, a well-developed jurisprudence on the separation of powers, openness to judicial review of administrative action and a demonstrated judicial willingness to exercise deference and restraint, particularly in the remedial context. As long as one also remains cognisant of the differences, there are sufficient similarities between the two legal systems to justify consideration of whether Australia can learn from South Africa's experiences and whether the discussions over rights which have taken place so far in Australia have properly utilised this potential resource.

By way of contrast to South Africa, the charters of rights adopted thus far in Australia have been legislatively entrenched, but this difference is not decisive for the purposes of this article. While the distinction between a constitutional and legislative enactment is significant, ultimately the issues raised in this article arise in relation to both forms of human rights enactments. The likelihood of the potential reasons to deny adjudication which have been overcome in South Africa featuring in Australian debate is high. The extremely cautious approach of the ACT government¹⁴⁴ is indicative of a general reluctance to embrace socio-economic rights. In fact, the primary reasons offered by the

140 South African Constitution s 26(2).

141 South African Constitution s 27(2).

142 *Minister for Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) [24] (TAC); *Grootboom* 2001 (1) SA 765 (CC) at [25].

143 Eric C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321 at 354.

144 *ACT Government Response*, above n52; see also *Victorian Report*, above n9; *WA Report*, above n9.

Victorian committee and the ACT Government for the decision not to include socio-economic rights,¹⁴⁵ let alone justiciable socio-economic rights, are the very same reasons the South African Constitutional Court addressed in its first ever consideration of socio-economic rights.¹⁴⁶

It is true that the current Australian enactments do not even include fully justiciable civil and political rights. The *Human Rights Act 2004* (ACT) empowers the Supreme Court to make non-binding declarations of incompatibility of a given law with human rights obligations.¹⁴⁷ The *Victorian Charter* similarly operates through such declarations,¹⁴⁸ although it does allow for a potential increased judicial role in that it may act as a type of subsidiary cause of action when a person is seeking relief based on unlawfulness which arises independently of the Charter.¹⁴⁹ Yet, this lack of justiciable civil and political rights does not necessarily render justiciable socio-economic rights an impossible dream. Reports by the relevant Tasmanian and Western Australian committees considering human rights instruments have recommended such inclusion,¹⁵⁰ with the Tasmanian Government not yet having given any clear indication of its views on this issue. Essentially, despite the current reluctance and caution, the fact that only two of nine potential jurisdictions have thus far failed to embrace fully justiciable human rights is not sufficient reason to abandon the project. If anything, it further supports the need to closely examine the nature of justiciable human rights and the manner in which they might function effectively. Part three advocates the South African example as one which can establish meaningful parameters for Australian debate and promote a sophisticated discussion of the complex issues involved.

B. Reasonableness or the Minimum Core?

The South African experience demonstrates that institutionally justiciable socio-economic rights benefit from the presence of a flexible, process-based standard for judicial assessment of their realisation. In this respect, the approach adopted by South African courts diverges from that of ECOSOC and CESCR in its replacement of the concept of the minimum core with a reasonableness based approach. The minimum core emerged from General Comment 3 which expressed an expectation that each socio-economic right under the *ICESCR* encompass a minimum essential level of achievement which each state is required to realise and that this minimum level varies according to resource constraints.¹⁵¹ The content of this minimum core makes reference to essential foodstuffs, essential primary health care, basic shelter and the most basic forms of

145 See text n47–52.

146 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) ('*First Certification*') in which the Constitutional Court dismissed concerns that the inclusion of justiciable socio-economic rights in the constitution violate constitutional principles related to both separation of powers and the scope of human rights protections.

147 *Human Rights Act 2004* (ACT) s 32.

148 *Victorian Charter of Human Rights and Responsibilities 2006* (Victoria) s 36.

149 *Victorian Charter of Human Rights and Responsibilities 2006* (Victoria) s 39.

150 *Tasmanian Report*, above n9 at [4.15.13]; *WA Report*, above n9 at [4.2.2], [4.2.6], [4.4.7].

151 General Comment 3, above n93 at [10]: see generally Katherine G Young, 'The Minimum Core of Economics and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.

education.¹⁵² For example, while the right to education includes access to free primary, secondary and higher education,¹⁵³ the minimum core of the right to education in a resource-poor state might involve only free primary education.¹⁵⁴

In contrast to this minimum core notion, South African courts have relied on the concept of reasonableness. An understanding of this concept requires a basic understanding of the development of the South African jurisprudence. The first substantive decision in which these socio-economic rights provisions were applied was *Soobramoney v Minister for Health (KwaZulu-Natal)* ('*Soobramoney*').¹⁵⁵ The applicant in this case suffered from a terminal and chronic kidney disease and his life could only be prolonged through access to dialysis machines. He was denied treatment because the use of the limited number of machines was prioritised for those with acute kidney failure from which they might fully recover and those who were awaiting kidney transplants.¹⁵⁶ In its first attempt at socio-economic rights adjudication, the Constitutional Court would not interfere with a government program aimed at achieving the right to health if it was fair, rational and in good faith.¹⁵⁷

The next opportunity for socio-economic rights adjudication was the decision of *Government of the Republic of South Africa v Grootboom* ('*Grootboom*'),¹⁵⁸ in which the standard for determining whether government action passed constitutional muster was developed significantly from the notion of mere rationality and good faith. *Grootboom* involved the right of access to housing under section 26 of the constitution. It was brought by destitute applicants living in informal squatter camps who could not access government-provided housing due to long waiting lists. In adjudicating the right of access to housing, the court elected not to adopt the international standard of a minimum core, but instead developed its own legal standard of reasonableness to give effect to socio-economic rights obligations.¹⁵⁹

This reasonableness standard has been subsequently applied by the Constitutional Court in *Minister for Health v Treatment Action Campaign (TAC)*¹⁶⁰ which revisited the right to health previously considered in *Soobramoney*.¹⁶¹ The government had received a free supply of the antiretroviral drug, Nevirapine. A single dose of the drug could potentially prevent mother-to-child transmission of HIV. The government only made the drug available at two test and research sites in each province. This restriction was to continue for at least two years therefore only 10 per cent of expectant mothers had access to Nevirapine,¹⁶² despite the fact that an estimated 70,000 South African children are born

152 General Comment 3, above n93.

153 ICESCR, above n4, art 13.

154 General Comment 13, above n90 at [8]–[10].

155 1998(1) SA 765 (CC).

156 Id at [1]–[3].

157 Id at [25], [29].

158 2001 (1) SA 765 (CC).

159 Id at [33]; see below n165.

160 2002 (5) SA 721 (CC).

161 The reasonableness standard has also been applied in *Khosa v Minister for Social Development* ('*Khosa*') CCT 12/03 but this case did not develop the jurisprudence significantly for present purposes.

162 Id at [62].

HIV-positive annually.¹⁶³ In the circumstances, the lack of clear plans to increase Nevirapine access and the ban on doctors outside the test sites from prescribing the drug were unreasonable.¹⁶⁴ South African jurisprudence, therefore, has developed from an initial view in which rational and good faith attempts to realise rights would not be questioned to one in which the court itself assesses the reasonableness of attempts to achieve a right, including considering the overall policy context.

Whereas the minimum core standard focuses on declaring an absolute minimum level of achievement, the Constitutional Court's reasonableness standard embraces a contextual analysis of what measures the government is taking to realise a given socio-economic right.¹⁶⁵ The court analyses whether government measures targeted at a constitutional right progressively realise that right, taking into account the means available to the State.¹⁶⁶ Having made it clear that the reasonableness test balances the constitutional objective against the resources available to achieve it, the court has focused not so much on stating this legal test more definitively, but on detailing the characteristics associated with reasonable government measures. According to the court, reasonable measures allocate responsibilities to appropriate spheres of government and provide requisite financial and human resources.¹⁶⁷ Reasonable measures include well-directed (executive) programs.¹⁶⁸ Such programs must facilitate the realisation of the right in question,¹⁶⁹ be reasonable in their conception and implementation,¹⁷⁰ be balanced and flexible paying appropriate attention to short, medium and long-term needs,¹⁷¹ provide for continuous review¹⁷² and become progressively available to an

163 Id at [19].

164 Id at [135].

165 For general discussion of the South African jurisprudence See, for example Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal of Human Rights* 284; Marius Pieterse, 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal of Human Rights* 383; Darrel Moellendorf, 'Reasoning about Resources: Soobramoney and the Future' (1998) 14 *South African Journal of Human Rights* 327; Mark S Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective' (2003) 6 *Chapman Law Review* 137; Kevin Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitation Clause' (2004) 20 *South African Journal of Human Rights* 448; Bilchitz, above n98; David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 119 *South African Law Journal* 484; Pierre de Vos, 'Substantive Equality after Grootboom: the Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence' [2001] *Acta Juridica* 52; Sandra Liebenberg, 'The Rights to Social Assistance: The Implications of Grootboom for Policy Reforms in South Africa' (2001) 17 *South African Journal of Human Rights* 232; Kameshni Pillay, 'Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights' (2002) 6 *Law, Democracy and Developments* 255; Albie Sachs, 'Enforcement of Social and Economic Rights' (2007) 22 *American University International Law Review* 673 at 691–2; Rosalind Dixon, 'Creating Dialogue about Socio-economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391.

166 *Grootboom* 2001 (1) SA 765 (CC) at [41].

167 Id at [39].

168 Id at [42].

169 Id at [39].

170 Id at [42].

171 Id at [43]; see also *TAC* 2002 (5) SA 721 (CC) at [17].

172 *Ibid.*

increased number and breadth of people.¹⁷³ Most importantly, a reasonable program cannot exclude a significant segment of society¹⁷⁴ and must assist those in desperate need.¹⁷⁵ The amici in *TAC* asked the court to reconsider its apparent rejection of the minimum core¹⁷⁶ — an offer declined by the court.¹⁷⁷ Although the door has not been completely closed to the minimum core,¹⁷⁸ in practical terms the Constitutional Court's reasonableness-based jurisprudence appears to be diverging from this concept.

The primary difference between the minimum core and reasonableness standards is that reasonableness is more flexible and adaptive. Each government measure or policy which comes before the Constitutional Court will be considered anew — with an analysis of the constitutional objective as compared to the resources available to achieve it. A minimum core, on the other hand, lays down an objective and tangible 'floor' for achievement of a right. While this core entitlement can change over time as resource availability changes, most judicial bodies adopt some notion of the doctrine of precedent. This means that it will be more difficult to justify to an adjudicative body that the core's content requires alteration, than to simply analyse government measures without reference to previous fixed standards. The rigidity of a judicially determined minimum core standard seems inappropriate where socio-economic rights focus on progressive realisation. Where standards of achievement are likely to increase, fixed content-based standards seem counter-productive.

In considering the inclusion of justiciable socio-economic rights in any potential charters of rights, Australia too must grapple with the question of identifying an appropriate standard by which to assess the implementation of a right. The South African method of affixing such a standard warrants consideration by Australia because it is one of the most highly developed socio-economic rights jurisprudence in the world.¹⁷⁹ It is also one of the few examples of justiciable socio-economic rights in the common law context.¹⁸⁰ South Africa and Australia's shared common law heritage indicate prima facie potential for the South African standard to be of utility to Australia's socio-economic rights debate. The United Kingdom itself has also considered future

173 Id at [45].

174 Id at [43].

175 Id at [66].

176 For academic comment regarding potential revival of the minimum core concept by the South African Constitutional Court see Bilchitz (2003), above n98; Bilchitz (2002), above n165.

177 *TAC* 2002 (5) SA 721 (CC) at [28]–[29].

178 See Bilchitz (2002), above n165; Sachs, above n165 at 691–692.

179 Although India's jurisprudence developed based on the directive principles of the Indian constitution it is similarly advanced. See, for example *Daily Rated Casual Labour Employed Under P & T Department through Bharatiya Dak Tar Mazdoor Manch v Union of India* (AIR, 1987, SC 234); *Apparel Export Promotion Council v A. K. Chopra* (AIR, 1999, SC 625); *Abmedabad Municipal Corporation v Nawab Khan Gulab Khan & others* (AIR, 1997 SC 152); *Olga Tellis and Others v Bombay Municipal Corporation* (AIR, 1986, SC 180); *People's Union for Civil Liberties v Union of India*, Writ Petition [Civil] No 196 of 2001 as discussed in *Selection of Case Law on Economic, Social and Cultural Rights*, 61 UN ESCOR, UN Doc E/CN.4/2005/WG.23/CRP.1 (2004); see also Upendra Baxi, 'Judicial Discourse: Dialectics of the Face and the Mask' (1993) 35 *Journal of the Indian Law Institute* 1; Alston & Steiner, above n5 at 307–309; see also Patrick Macklem & Craig Scott, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992–1993) 141 *University of Pennsylvania Law Review* 1120.

adoption of socio-economic rights based on South Africa's reasonableness approach.¹⁸¹ The fact that all state and territory committees thus far have found it necessary to consider the South African approach further attests to the relevance of the South African example, as does the comfort of Australian courts in the use of reasonableness-based standards. Therefore, even if it is not ultimately 'adopted' in the event of justiciable socio-economic rights in Australia, there is a need to consider the advantages and suitability of a flexible reasonableness-based standard in an Australian context.

The concern of this article is that state and territory committees have thus far failed to properly undertake such consideration. The state and territory reports so far have failed to fully grasp the implications of the South African approach. Consultative reports demonstrate a failure to understand that the South African and the *ICESCR*-based approaches are fundamentally different, often implying a belief that they are synonymous or, at the least, consistent.¹⁸² Closer examination of the example of the ACT demonstrates this failure to adequately engage with the minimum core versus reasonableness debate. Fundamentally, the recommendations of the ACT consultative committee fail to acknowledge that not endorsing a minimum core standard creates a lacuna in standards of assessment. While it is true that it is a legitimate option to leave the development of assessment standards to the court itself, as indeed occurred in South Africa, in the context of the comprehensive consultative reports one would expect this issue to at least have been explicitly discussed.

The initial Human Rights Bill proposed by the ACT consultative committee contained two alternative clauses, one which had different standards for measuring achievement of *ICCPR*-derived, as opposed to the *ICESCR*-derived, rights and one which used a reasonableness based notion in relation to all rights.¹⁸³ The former proposed clause stated that rights sourced solely from the *ICESCR*, are subject to 'progressive realisation'.¹⁸⁴ Yet, the consultative committee's report failed to

180 Compare justiciable socio-economic rights in a number of civil legal systems: Argentinean and Venezuelan courts have ordered the government to provide medical treatment, including appropriate drugs, to sufferers of HIV/AIDS, see CSJN, 1/6/2000; 'Asociacion Benghalesnsis y otros c/ Ministerio de Salud y Accion Social – Estado Nacional s/ amparo ley' 16.986, L.L. (2000–A–986, 13) (Supreme Court of Argentina), as discussed in Horacio Javier Etchichury, 'Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIS' (2006) 22 *American University International Law Review* 101 at 111; Bermudez et al v Ministerio de Sanidad y Astencia Social, Supreme Court of Venezuela, Case No 15, 789, Decision No 916 (1999), as discussed in Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) 22 *American University International Law Review* 35 at 47. In Latvia, constitutional recognition of a right to social security requires establishment of specified implementation mechanisms to ensure this obligation's fulfilment, see Case No 2000–08–0109, Constitutional Court of Latvia (2001) as discussed in Hatem Kotrane, *Independent Expert Report on the Question of a Draft Protocol on the International Covenant for Economic, Social and Cultural Rights*, 59 UN ESCOR, agenda item 10 at [43]–[49], UN Doc E/CN.4/2003/53 (2003). Even absent express constitutional mandate, the Supreme Court of Switzerland recognises an implied right to the satisfaction of elementary human needs as an indispensable element of a democratic polity, see *Gebrueder v Regierungsrat des Kanton Berns*, Supreme Court of Switzerland as discussed in *Selection of Case Law on Economic, Social and Cultural Rights*, above n180.

181 Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–2004* at 26.

182 *NSW Bar Report*, above n9 at [121], [125]; *WA Report*, above n9 at [4.2.4].

183 *ACT Report*, above n 9, appendix 4; Draft Human Rights Bill 2003, cl 14.

184 Draft Human Rights Bill 2003, cl 14.3.

acknowledge that the concept of progressive realisation is, in international law at least, usually inextricably connected to notions of a content-based minimum core. The direction in this draft clause that a court or tribunal must consider financial circumstances and estimated expenditure does not sit well with CESCR's own interpretation of the *ICESCR* that requires a minimum core of each right to be protected regardless of the related expenditure.¹⁸⁵ If the committee was therefore proposing to incorporate progressive realisation without the accompanying notion of a minimum core, close consideration of the South African example is inescapable. At the same time, however, the presentation of reasonableness as an alternative, rather than an assistant, to progressive realisation, suggests that this first option was intended to look more to the concepts contained in the *ICESCR*, rather than those used in South Africa. The South African jurisprudence demonstrates that once a minimum core is rejected, a different standard is needed by which to measure the achievement of progressive realisation. In terms of interpretive guidance, the consultative committee expressly suggested that a court should look to the *ICESCR* General Comments,¹⁸⁶ with their content-based guidance. However, the committee simultaneously created ambiguity by also suggesting that the process-based principles adopted by the South African Constitutional Court would be useful to ACT courts and tribunals.¹⁸⁷ Ultimately, South African jurisprudence seems to offer an alternative to the international standard of a minimum core which allows greater flexibility in socio-economic rights adjudication. Similarities between the Australian and South African legal systems justify close consideration of this South African approach, yet consultative committees so far have failed to expressly engage with the differences between CESCR's and South Africa's conceptions, thus depriving Australian debate of meaningful assessment of which, if any, standard would be more appropriate in an Australian context.

C. Separation of Powers

The flexibility offered by the reasonableness-approach is the key to addressing one of the most common reasons advanced to deny the appropriateness of adjudicating socio-economic rights — the doctrine of the separation of powers. It is in the task of maintaining the fine distinction between scrutiny, rather than de facto making, of government policy and legislative measures, that the advantages of the reasonableness standard over the minimum core emerge. If *Grootboom* adopted a minimum core approach, an order might have been made that the right to housing required everyone in need to be provided with tents and sewerage facilities. This would then become a minimum standard to which budgetary resources must be directed, thus dictating budgetary allocations. The actual order in *Grootboom* required accelerating the emergency short-term housing program and supplementing it with a comprehensive medium-term strategy,¹⁸⁸ an order which has budgetary implications but does not specifically dictate budgetary allocations. The Constitutional Court recognises that it is poorly qualified to

185 General Comment 3, above n93.

186 *ACT Report*, above n9 at [5.19].

187 *Id* at [5.44].

188 *Grootboom* 2001 (1) SA 765 (CC) at [99].

dictate precisely how the state should meet the socio-economic needs of the people¹⁸⁹ and therefore leaves the precise contours and content of measures to be adopted firmly within legislative and executive hands.¹⁹⁰ While the Constitutional Court in *Grootboom* highlighted to the government what needed to be done, it gave the government considerable leeway to independently determine how this would occur. The reasonableness standard allows a degree of deference which ensures that the judiciary remains within the bounds of judicial review, whereas a minimum core could lead to a far more explicit dictation of executive choices.

While the South African conception of separation of powers may be particularly conducive to adopting flexible standards,¹⁹¹ it is not so exceptional that any relevance outside of South Africa should be denied. Even in constitutional systems without such openness and co-operation in their conception of the separation of powers, the doctrine still involves checks and balances¹⁹² and such interactive mechanisms include notions of judicial review. The development of administrative law in many Western nations clearly demonstrates that administrative performance can be reviewed and remedied without infringing the separation of powers.¹⁹³

Separation of powers concerns will inevitably arise in Australian debate regarding granting justiciable status to socio-economic rights.¹⁹⁴ The Australian debate should begin from the premise that in the South African experience the primary mechanism through which separation of powers concerns can be avoided is the use of a flexible standard to measure the realisation of socio-economic rights within the context of a co-operative dialogue based separation of powers. The various state and territory consultative committees have recommended the potential utility of interactive structures for human rights legislation, advising that a human rights regime should involve the creation of a dialogue between all three branches of government.¹⁹⁵ The *WA Report* noted that ‘several submissions pointed out that this objection to including [economic, social and cultural] rights [based on court involvement in policy and resource allocation] disappears once a dialogue model for the protection of human rights is adopted’.¹⁹⁶ In South Africa the dialogue model embraces not merely a structure for the Bill of Rights, but is a fundamental constitutional structure. The South African example still provides a relevant demonstration of human rights dialogue between the branches of government. For example, the extent of judicial deference to executive and legislative policy in the

189 Wesson, above n165 at 294.

190 *Grootboom* 2001 (1) SA 765 (CC) at [41].

191 See, for example South African Constitution ss 42(3), 55, 85, 92, 165; Constitutional Principle VI as discussed in *First Certification* 1996 (4) SA 744 (CC) at [45].

192 Philip B Kurland, ‘The Rise and Fall of the “Doctrine” of Separation of Powers’ (1986) 85 *Michigan Law Review* 592 at 593, 597, 603–4.

193 Philip Alston, ‘International Law and the Human Right to Food’ in Philip Alston & K Tomasevski (eds), *The Right to Food*, (1984) at 58; see also Cass R Sunstein, *Designing Democracy: What Constitutions Do* (2001) at 234.

194 See, for example *WA Report*, above n9 at [4.2.4].

195 *ACT Report*, above n9 at [4.5]; *Tasmanian Report*, above n9 at [4.15.3].

196 *WA Report*, above n9 at [4.2.4].

orders of the Constitutional Court¹⁹⁷ demonstrates a possible technique which might alleviate concerns of judicial usurpation in Australian context.¹⁹⁸

Notwithstanding the willingness of states and territories to include open dialogue models which differ from those in the current Australian legal system,¹⁹⁹ the separation of powers at the federal level may make this more difficult. Any federal charter of rights will have to function within a pre-existing constitutional system, rather than benefit from a unique cooperative constitutional dialogue model.²⁰⁰ Obviously, at a federal level this means that there is the inevitable constraint that federal judicial power cannot be exercised by bodies other than Chapter III courts and that federal courts cannot exercise legislative or executive functions unless they are purely incidental.²⁰¹ This reality does not, however, prevent the framers of an Australian charter of rights from considering how the branches of government might interact in the human rights context and providing guidance on this structural question. The issue of which branch will be the ultimate arbiter in relation to socio-economic rights is one in relation to which the South African example might be a useful contrast. If a constitutionally enabled judiciary has not, in practice, undermined legislative or executive functions, the likelihood of this occurring is even less in a model which embraces legislative supremacy.

D. Remedial Approach

Flexibility not only in legal structures and standards of assessment, but also in the judicial approach to remedies is also a fundamental feature of the South African jurisprudence. It is a feature which addresses the concern that socio-economic rights should not be justiciable because a court is incapable of granting suitable remedies. The decision in *TAC* considered the question of remedies in detail, in response to a government contention that the separation of powers demands that the court only offer declaratory, not mandatory, relief.²⁰² The Constitutional Court found that where constitutional obligations are not being fulfilled, its minimum obligation is to provide a declaration to that effect,²⁰³ but this does not represent the extent of the court's power. The court has the power to provide appropriate relief,²⁰⁴ which has been held to mean 'an effective remedy' with the court being 'obliged to "forge new tools" and shape new remedies'.²⁰⁵ In addition, not only is mandatory relief possible, so too is some form of supervisory jurisdiction,²⁰⁶ for example in *Grootboom* the Human Rights Commission was ordered to supervise government policies.²⁰⁷ The court's approach to remedies is undoubtedly

197 See text n209.

198 See, for example comments in *Tasmanian Report*, above n9 at [4.15.4]; *NSW Bar Report*, above n9 at [121].

199 *ACT report*, above n9 at [3.50]; see also Carolyn Evans, 'Responsibility for Rights: The ACT Human Rights Act' (2004) 32 *Federal Law Review* 292 at 293.

200 Dixon, above n165 at 393.

201 Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205 at 207.

202 *TAC* 2002 (5) SA 721 (CC) at [96], [99].

203 *Ibid*; South African Constitution s 172(1)(a).

204 *TAC* 2002 (5) SA 721 (CC) at [101].

205 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [69].

206 *TAC* 2002 (5) SA 721 (CC) at [104].

coloured by the extent of its powers under the South African Constitution, however, *TAC* also reviewed jurisprudence in the United States of America, India, Germany, Canada and the United Kingdom and concluded that ‘the various courts adopt different attitudes towards when such [injunctive relief] should be granted, but all accept that within the separation of powers they have the power to make use of such remedies’.²⁰⁸ This recognises that a broad approach to remedial options is not unique to South Africa and is not only a consequence of unique constitutional authorisation.

In the case of socio-economic rights, the ultimate remedy is protection of that right. The form of order in *TAC* may provide a model for the type of order most helpful in promoting fulfilment of socio-economic rights. The order in *TAC* declared the basic content of the right in question in relation to the subject matter of the dispute. It next outlined the basic requirements for progressive realisation and then specified how the government program failed to meet these requirements. The order then outlined specific steps to be taken to achieve progressive realisation. Finally, and importantly, the order noted that the government is not precluded from adopting different policies or steps if these are equally appropriate or better than those specified in the order.²⁰⁹ Such a form of order appears to provide more guidance and flexibility in respect of fulfilling the right than the type of order *Grootboom* order which simply stated that there has been a failure to fulfil the right and that a program must be created to address this.²¹⁰

Of course, a discussion of the South African experience would not be complete without acknowledging that there are questions of the extent to which it has delivered tangible outcomes in terms of socio-economic rights.²¹¹ Despite *Grootboom*, the housing crisis in South Africa remains acute.²¹² Embracing the justiciability of socio-economic rights is useless unless it improves their implementation. Yet these criticisms alone cannot undermine the utility of the South African jurisprudence. Even in Australia, a lack of practical impact does not offer a justification to avoid the judicial task altogether. Recent decisions of the Federal Court of Australia in the context of attempts to seek injunctions against Japanese whaling in the Australian Antarctic Territory have emphasised that even if there is no practical mechanism by which a court order can be enforced, this in itself is not sufficient basis to deny making the order when the court is appropriately seised of jurisdiction.²¹³

The issue of the efficacy of remedies in the context of socio-economic rights adjudication has not emerged as a strong concern in committee reports from Australian jurisdictions. Given the scope of these reports and the general nature of their concerns,

207 *Grootboom* 2001 (1) SA 765 (CC) at [97].

208 *TAC* 2002 (5) SA 721 (CC) at [112].

209 *Id* at [135].

210 *Grootboom* 2001 (1) SA 765 (CC) at [99].

211 Dixon, above n165 at 392; Dennis Davis, ‘Socioeconomic Rights in South Africa: The Record After Ten Years’ (2004) 2 *New Zealand Journal of Public and International Law* 47.

212 Lilian Chenwi, ‘Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions’ (2008) 8 *Human Rights Law Review* 105 at 105–106.

213 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 at [46]; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [16].

it is unsurprising that they have not given extensive consideration to this question. In many ways, it is a question which cannot be usefully approached until further details about a model of socio-economic rights protection are known. If, for example, violations of socio-economic rights do not give rise to an independent cause of action, the scope of remedial action is restrained. The South African experience demonstrates that there are many questions relating to remedies which should be addressed when debating the justiciability of socio-economic rights. For example, should violations be subject to mandatory or declaratory relief? Is there a possibility of supervisory jurisdiction by either a court itself or a statutory human rights body and how could such a supervisory body function within Chapter III constraints? South African jurisprudence reflects the close relationship between remedial outcomes and judicial deference.²¹⁴ The form of order in *TAC*, for example, contained explicit instructions that the government was not restrained from adopting steps other than those contained in the order as long as these are equally appropriate or better than those in the order.²¹⁵ Examples such as this could be useful in Australian debate to demonstrate that judicial deference can diffuse interrelated concerns regarding remedies, separation of powers and judicial competence.

E. Judicial Competence

The critique that judges are not institutionally competent to adjudicate socio-economic rights disputes is one which has been dispelled in South Africa through the adoption of a number of tangible techniques. The South African experience demonstrates that judges are capable of effectively dealing with these polycentric disputes. This capacity is evidenced by the Constitutional Court's ongoing awareness of the polycentric elements of socio-economic rights cases, with the court generously allowing a range of participants to be heard on diverse topics in each of its socio-economic rights cases, enabling the court to obtain a broader view on the issues than what might have been otherwise achieved.²¹⁶ Effectively, 'by focussing on the attributes of the program — its flexibility, impartiality, basis in justifiable policy or verifiable information etc — the evidence before the Court is not limited to a snapshot of conditions or the treatment of one individual'.²¹⁷

The relevance of this to Australia is that the South African experience highlights the polycentric nature of disputes about socio-economic rights and the need to ensure that a judiciary asked to adjudicate socio-economic rights matters has the appropriate tools with which to do so. The South African experience demonstrates that flexible standing requirements and a willingness to hear submissions from a range of *amici curiae* can be useful in terms of allowing a court to consider the diverse interests involved. Increased flexibility in this regard might be essential to the competence of Australian courts to adjudicate socio-economic rights cases.

214 *Fose v Ministry of Safety and Security* (1997) 3 SA 786 (CC) at [19].

215 See text n209.

216 See, for example *TAC* 2002 (5) SA 721 (CC) at [81], [94]; *Grootboom* 2001 (1) SA 765 (CC) at [19], [65]. This is allowed by broad standing requirements incorporated within section 38 of the South African Constitution. In addition it is demonstrated by the large number of *amici curiae* permitted to intervene in socio-economic rights cases on a variety of issues.

217 Christiansen, above n143 at 377.

Moreover, while this approach to considering multiple interests demonstrates that polycentricity is not insufficient to deny the appropriateness of socio-economic rights for adjudication, ultimately the legitimacy of this critique as reason to deny justiciability is questionable. The nature of the judicial task of deciding the actual dispute before the court cannot be overlooked. In the words of the Constitutional Court, ‘we cannot deny strong actual claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups’.²¹⁸ Ultimately, a competent judiciary must be one capable of deciding the factual dispute before it, not one capable of considering the general interests of society and delivering a holistic solution.

F. Resource Scarcity

A practical approach to the challenges of adjudicating disputes on socio-economic rights is also evident in relation to resource scarcity. The interpretation of socio-economic rights so that they do not give rise to an immediate entitlement due to all is an important method of addressing very real concerns²¹⁹ that socio-economic rights cannot be meaningfully enforced in the face of resource scarcity. Concerns about resource scarcity are addressed by judicial deference in remedial determination — the concept of progressive realisation and a pragmatic approach to the immediacy of such rights. The Constitutional Court has consistently rejected notions of socio-economic rights as being absolute, for example, through rejecting notions of an absolute minimum core and imposing limitations on the socio-economic rights of children which is not evident on the face of the constitution itself.²²⁰ Having rejected immediacy, South Africa addresses the resource scarcity issue primarily by creating a hierarchy of entitlement amongst rights-bearers, with those in most dire need of protection receiving first priority.²²¹

In Australia, the experience in the states and territory indicates that questions of resource scarcity may feature prominently in any debate. The ACT Government has stated that ‘a difficult question of allocation of scarce resources may expose the government to liability’.²²² The South African experience is a powerful example on the issue of resource scarcity. The South African combination of resource scarcity and extremely high demand for basic housing, welfare and health care is not one which would be replicated in the context of any Australian charters of rights. Assessments in 2004

218 *August v Electoral Commission* 1999 (3) SA 1 (CC) at [30].

219 See Judith Streak, ‘Government’s Social Development Response to Children Made Vulnerable by HIV/AIDS: Identifying Gaps in Policy and Budgeting’, Occasional Paper, Institute for Democracy in South Africa, 9 September 2005; Sean Phillips, ‘The Expanded Public Works Program’ (Paper presented at the Discussion Forum on Overcoming Underdevelopment in South Africa’s Second Economy, 28–29 October 2004); Stacey Leigh-Joseph, ‘Reporting to the Courts: Litigation and the Crisis in the Administration of Social Grants in the Eastern Cape’ (Report of the Public Service Accountability Monitor, Rhodes University, 27 October 2005); *TAC* 2002 (5) SA 721 (CC) at [1].

220 Christiansen, above n143 at 384.

221 See, for example *Grootboom* 2001 (1) SA 765 (CC) [36], [43]–[44], [56], [63]–[64]; *TAC* 2002 (5) SA 721 (CC) at [24], [70]; *Khosa* CCT 12/03 at [74].

222 *ACT Government Response*, above n52; NSW Bar Report, above n9 at [128]; see also *WA Report*, above n9 at [4.2.3].

suggested that 22 million South Africans live below the poverty line and only 63.8 per cent of the South African population live in formal permanent housing.²²³ Even if potential Australian charters of rights contained very comprehensive socio-economic rights protections, the demand for these protections would not be comparable to the level of demand in South Africa. Moreover, a widespread culture of bureaucratic non-responsiveness²²⁴ likely plays a role in affecting South African service outcomes. Ultimately, this hurdle to effective implementation of judicial decisions is unlikely to arise so acutely in an Australian context. For this reason, if South Africa can address the concern of resource scarcity, it is unlikely to be an insurmountable problem in Australia.

The *WA report* expresses a strong belief that many Western Australians viewed their own personal needs as being related to socio-economic rights, rather than civil and political rights.²²⁵ Even if these sentiments reflect a potentially large 'demand' on socio-economic rights which cannot be addressed by available resources, the South African jurisprudence on prioritising entitlements might be a relevant technique to address this situation. At a minimum, the South African experience is a powerful reminder to Australia that issues of resource scarcity will inevitably arise in the event of the adoption of *absolute* socio-economic rights. Whilst it might seem obvious that any Australian charters of rights would contain some form of limitation on rights, particularly socio-economic rights, this proposition may not be as obvious as first appears. For example, the draft WA Bill does not contain express limitations on the rights contained within. This might be for a number of reasons. First, it is a bill generated for public debate and does not purport to represent a settled position. Second, it contains only civil and political rights. Nevertheless, the WA Committee recommended that socio-economic rights be added to the bill and that these be treated in the same way as civil and political rights²²⁶ for instance, not subject to express limitations. In light of the fact that the *ACT Report* and *NSW Bar Report* indicate that the resource scarcity ramifications of socio-economic rights protections are common concerns for Australians, this outcome seems quite extraordinary. At a minimum, it demonstrates the necessity of closer consideration of socio-economic rights issues in consultative phases. The South African example demonstrates that some form of limitation on rights-bearers' immediate entitlements might be imperative if justiciable socio-economic rights are to remain practicable in the face of resource constraints.

223 Debbie Newton & Jacqui Boule, *Evaluation of Legal Resources Centre Housing Program – Final Report* (August 2004) <www.lrc.co.za/Docs/Papers/LRC_Housing_Evaluation.doc> accessed 20 April 2008.

224 See, for example Adrienne Carlisle, 'Minister appeared unaware of his own law', *Daily Dispatch Online*, 20 March 2008 <www.dispatch.co.za/article.aspx?id=184938> accessed 20 April 2008 which outlines an example in which several NGOs spent three years litigating against the Minister of Social Development in relation to the constitutionality of a social welfare regulation which removed discretion to accept alternative forms of ID from welfare applicants. The Minister had purportedly re-instated the discretion in April 2006, yet neither he nor his department seemed aware of this. The litigation continued to be pursued until April 2008, two years after the offending provisions had been removed.

225 *WA Report*, above n9 at [4.2.2].

226 *Id* at 116.

G. Conclusions on Part Three

The preliminary observations in this article indicate that the principles and issues grappled with by the South African Constitutional Court have much to offer Australia in terms of identifying possible pitfalls, providing techniques to avoid major concerns and offering guidance to usefully focus the Australian debate. Even on a basic level, the South African example demonstrates to Australia that one of the primary challenges in adjudicating socio-economic rights is the identification and definition of an appropriate standard by which to measure the achievement of socio-economic rights. The application of any standard by the judiciary should be appropriately guided by flexibility and, ultimately, a degree of judicial deference. The structure of the relationship and interactions between the branches of government in the context of socio-economic rights protections should also be considered. Resource scarcity does not emerge as an insurmountable concern even given the far more acute nature of this problem in the South African context. If, as purported, it is truly the lack of examples of the operation of justiciable socio-economic rights that lies at the heart of the preference of the Victorian, ACT and WA governments to exclude these indivisible rights,²²⁷ careful engagement with the South African experience is vital.

Conclusion

The purpose of this article is twofold: to outline the justiciability of socio-economic rights with reference to the South African example and to consider the potential relevance of it to Australia. The claim that socio-economic rights are justiciable is supported by a concept of justiciability which requires both the existence of a right (normative justiciability) and an absence of extrinsic reasons to avoid adjudication (institutional justiciability). The normative justiciability of socio-economic rights in international law is supported by the comprehensive recognition of these rights as ‘rights’ as well as by their practicability, clarity of content and universality. Moreover, given the current context of potential future legislative entrenchment of socio-economic rights in Australia, the normative justiciability of socio-economic rights is not in issue. The potential institutional justiciability of socio-economic rights has been supported by a detailed analysis of the South African experience, which overcomes common concerns about the appropriateness of judicial adjudication primarily by embracing reasonableness as a flexible and process-based measure of achievement, thus lending support to the conclusion that no compelling reasons exist justify the obligatory denial of justiciable socio-economic rights which has emerged from some state and territory governments.

The immediate relevance of the South African example to the Australian debate about charters of rights is not so much as a definitive ‘model’ which should be replicated, but as a basis from which concerns derived from basic shared principles, such as separation of powers and resource scarcity, can be meaningfully addressed. Discussion at the state and territory level reflects a failure to fully engage with the South African jurisprudence, an omission which should be avoided in any future Australian debate. The

227 See *Victorian Report*, above n9 at [2.2.2]; *ACT Government Response*, above n52; *WA Report*, above n9 at [4.1].

South African example suggests that the Australian debate should avoid simplistic assertions that socio-economic rights are not justiciable and instead consider in detail whether and, if so, how, justiciable socio-economic rights might function within the Australian legal system.

The South African experience identifies fundamental questions with which the Australian debate regarding the possible inclusion of justiciable socio-economic rights in a charter of rights must engage: (i) can and should the branches of government interact differently in the context of socio-economic rights protection (or human rights protection more broadly); (ii) how might socio-economic rights entitlements be appropriately limited; (iii) to what extent does Australia consider itself bound by the interpretations of the *ICESCR* given by CESCR or might the scope and nature of these rights be interpreted to suit the domestic context; (iv) to what extent is the Australian judiciary suited to undertake this type of adjudication; (v) by what standards is achievement of socio-economic rights to be assessed; (vi) what are the potential tools available to allow the judiciary the degree of flexibility necessary to ensure that its task remains purely judicial; and (vii) how might procedural mechanisms such as standing, intervention and supervision be applied to achieve effective socio-economic rights adjudication?

It is evident that there has been much development in the half a century or so since a lack of consensus about appropriate enforcement led to the drafting of two separate covenants — the *ICCPR* and *ICESCR*. Growing interest in an optional protocol makes emerging international support for justiciable socio-economic rights explicit. In light of international and, in particular, South African developments, the indivisibility and interdependence of all rights can receive practical application in the commensurate justiciability of all ‘types’ of human rights. The Australian debate about the inclusion of socio-economic rights in prospective Australian charters of rights will deny socio-economic rights the legitimacy and recognition they demand if it fails to remain cognisant of the South African example and its demonstration of functional, successful, *justiciable* socio-economic rights.