PROPOSED COMMONWEALTH HUMAN RIGHTS ACT: JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS

Memorandum of Advice

1. We are briefed to advise on whether economic and social rights could be validly included in any Human Rights Act to be enacted by the Commonwealth – specifically, whether the application of economic and social rights involves judicially manageable criteria or standards.

2. In our view, there is no necessary constitutional objection to including economic and social rights in any federal Human Rights Act.

   2.1 It is true that many social and economic rights are broadly expressed; however, they are no more broadly expressed than many civil and political rights that can be interpreted and applied in the exercise of federal judicial power. Some broadly expressed social and economic rights are, for example, found in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Victorian Charter**).[1]

   2.2 It is also true that decisions about social and economic rights may often have implications for the allocation of budgetary resources. However, the same is true of many, if not all, human rights. For example, the right not to be subjected to an unfair trial requires the government to put in place structures that enable a fair trial (including appropriate arrangements for legal aid).

   2.3 For these reasons, the real issue is whether economic and social rights can be appropriately expressed, and the courts' role appropriately limited. This would seem possible, for the reasons given below.

BACKGROUND

3. In September 2009, a committee chaired by Father Frank Brennan (the **Committee**) released the *National Human Rights Consultation: Report* (the

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1 See for example s 17(1): "Families are the fundamental group unit of society and are entitled to be protected by society and the State". This is taken from Article 10 of the International Covenant on Economic, Social and Cultural Rights.

Report). The Report recommended (among other things) that Australia adopt a federal Human Rights Act.[2]

Gageler-Burmester opinion

4. Stephen Gageler SC (the Commonwealth Solicitor-General) and Henry Burmester QC prepared two legal opinions for the committee, including a supplementary opinion dated 7 September 2009 (the **Gageler-Burmester opinion**).[3]

   4.1 One issue considered in that opinion was whether the definition of "human rights" in any federal statutory charter of human rights could include the rights in Part 2 of the Victorian Charter and certain rights in the International Covenant on Economic, Social and Cultural Rights (the **ICESCR**). The specific ICESCR rights identified for consideration in the Gageler-Burmester opinion were the right to the enjoyment of just and favourable conditions of work (Art 7), the right to adequate housing (Art 11), the right to health (Art 12), and the right to education (Art 13).[4] We assume these particular ICESCR rights may have been indentified for consideration because they were the ones consistently raised during the consultation process.

   4.2 The specific question considered in the Gageler-Burmester opinion was whether it would constitute a valid exercise of federal judicial power for a court:

   (a) to interpret a provision of Commonwealth legislation consistently with those rights or to make a declaration of incompatibility;

   (b) to determine that a public authority had acted incompatibly with those rights.[5]

   4.3 The Gageler-Burmester opinion concluded that those functions would be a valid exercise of judicial power in relation to the rights contained in Part 2 of the Victorian Charter. However, the opinion concluded

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2 See Report, p xxxiv (recommendation 18).

3 These opinions are reproduced in Appendix E to the Report.

4 These articles are set out in the Appendix to this opinion.

5 Gageler-Burmester opinion, paragraph 4(7): Report, pp 442-443.

that those functions would "probably not" be valid in relation to the ICESCR rights.[6]

Purported constitutional difficulty – lack of judicially manageable standards

5. The main constitutional difficulty identified in relation to ICESCR rights was that the exercise of federal judicial power must involve the application of criteria or standards that are sufficiently definite.[7]

5.1 The Gageler-Burmester opinion states that, in the rights set out in the ICESCR, there is a "general absence of what would traditionally be regarded as judicially manageable standards".[8] The opinion continues:[9]

> Given the issues of resource allocation that are necessarily involved, how is a court to assess, for instance, whether or not a person is being denied "just and favourable conditions of work" (Art 7), "an adequate standard of living" (Art 11) or "the enjoyment of the highest attainable standard of physical and mental health" (Art 12)?

5.2 The Gageler-Burmester opinion states, however, that some of the elaboration of the rights in Art 7 (enjoyment of just and favourable conditions of work) and Art 13 (education) includes some more specific rights that may represent judicially manageable standards.[10] The more specific rights are said to be:

(a) equal pay for equal work: Art 7(a)(i);

(b) remuneration for public holidays: Art 7(d); and

(c) free and compulsory primary school education: Art 13(2)(a).[11]

6. In addition, the Gageler-Burmester opinion identified a separate constitutional difficulty. It is said that rights in the ICESCR that are very general in nature –

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6 Gageler-Burmester opinion, paragraph 5(7): Report, p 445.

7 Gageler-Burmester opinion, paragraph 17: Report, p 451.

8 Gageler-Burmester opinion, paragraph 18: Report, p 451.

9 Ibid.

10 Gageler-Burmester opinion, paragraph 19: Report, p 451.

11 Ibid.

referring to Arts 7, 11, 12 and 13 – may lack "sufficient specificity" to support the making of a law under the external affairs power.[12]

Discussion of economic and social rights in the Report

7. Consistently with the advice in the Gageler-Burmester opinion, the Report recommended against including economic and social rights in any federal Human Rights Act.

   7.1 The Committee considered that the realisation of primary economic and social rights is the main concern for most Australians. However, the Committee considered that "it would be very difficult, if not impossible, to make such rights matters for determination in the courts".[13]

   7.2 The Committee noted that the Constitutional Court of South Africa has a "broad mandate" under the final Constitution of South Africa to determine whether the State has taken reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of those rights. However, the Committee concluded that it "would not be prudent" to impose this role on Australian federal courts, and referred to submissions by judges and retired judges that "it is not appropriate for judges to opine on whether the government has dedicated enough resources to achieving particular economic and social rights".[14]

   7.3 The Committee endorsed the observations of Professor Tom Campbell and Dr Nicholas Barry that courts "have a bias towards negative rights", and that protection of socioeconomic rights "requires positive action by the State".[15]

<u>Recommendations relating to federal Human Rights Act</u>

8. The Report makes the following recommendations about the place of social and economic rights in any federal Human Rights Act.

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12 Gageler-Burmester opinion, paragraph 9: Report, p 448.

13 Report, p 365. The Report refers to the Gageler-Burmester opinion at p 317.

14 Report, p 365.

15 Report, p 366.

8.1 If economic and social rights are listed in a federal Human Rights Act, those rights should not be justiciable, and complaints about those rights should be heard by the Australian Human Rights Commission.[16]

8.2 Any interpretive provision in a federal Human Rights Act should not apply to social, economic and cultural rights.[17]

8.3 Any obligation imposed on public authorities to act in a manner compatible with human rights should not include economic and social rights. However, an obligation to give proper consideration to human rights when making decisions should extend to economic and social rights.[18]

8.4 An independent cause of action against a federal public authority for breach of human rights should not be available in respect of economic, social and cultural rights.[19]

Other recommendations about social and economic rights

9. Separately from any federal Human Rights Act, the Report makes the following recommendations about social and economic rights.

9.1 The federal government should immediately compile an interim list of rights for protection and promotion. This interim list would include several economic and social rights, being:

(a) the right to an adequate standard of living (including food, clothing and housing);

(b) the right to the highest attainable standard of health; and

(c) the right to education.

The government should replace this interim list with a definitive list of Australia's international human rights obligations within 2 years.[20]

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16 Report, p 366; see also p xxxv (recommendation 22).

17 Report, p 373; see also p xxxvii (recommendation 28).

18 Report, p 376; see also p xxxviii (recommendation 30).

19 Report, p 377; see also p xxxviii (recommendation 31).

20 Report, p 357; see also pp xxx-xxxi (recommendation 5).

9.2 The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) should be amended to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision-making.[21]

9.3 In the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) (the **Interpretation Act**) should be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.[22]

ANALYSIS

10. To summarise, the Gageler-Burmester opinion concludes that the identified rights in the ICESCR (Articles 7, 11, 12 and 13) cannot be interpreted or applied in the exercise of federal judicial power, because for the most part they lack any judicially manageable standards. It appears that two, related factors are important in reaching that conclusion.

10.1 The first factor is the breadth in which the identified rights in the ICESCR are expressed. The Gageler-Burmester opinion does not, by contrast, see any difficulty in a court ruling on some of the "more specific" aspects of ICESCR rights.

10.2 The second factor is that the application of rights in the ICESCR is said necessarily to involve issues of resource allocation. This presumably is a basis for distinguishing these rights from the rights contained in Part 2 of the Victorian Charter, the application of which is said not to raise any constitutional difficulties, although as noted some of the Part 2 rights are derived from the ICESCR.

11. It is helpful to consider those factors in more detail separately, even though (it appears) it is the combination of those factors that is the reason for the conclusion that the rights in the ICESCR cannot validly be applied in the exercise of federal judicial power.

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21 Report, p 359; see also p xxxii (recommendation 11).

22 Report, p 359; see also p xxxii (recommendation 12).

Economic and social rights no more open-ended than other rights

12. We accept (as stated in the Gageler-Burmester opinion) that the exercise of federal judicial power necessarily involves the application of judicially manageable standards. We also accept that many of the rights in the ICESCR are broadly expressed.

13. However, breadth of expression, by itself, does not mean that a provision lacks judicially manageable standards.

Thomas v Mowbray

14. In *Thomas v Mowbray*,[23] for example, the High Court upheld by majority the validity of a Commonwealth provision[24] that provided (relevantly) that a court can issue an interim control order if satisfied on the balance of probabilities that:

    14.1 making the order will substantially assist in preventing a terrorist act; and

    14.2 each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

15. Gummow and Crennan JJ observed that the case law shows the acceptance of broadly expressed standards (such as whether union rules are "oppressive, unreasonable or unjust").[25] Their Honours held that a criterion for judicial decision-making "may involve the prevention or occurrence of future steps taken by the executive branch of government in the exercise of its powers".[26]

16. On questions of policy, Gummow and Crennan JJ observed that courts "are now inevitably involved on a day-to-day basis in the consideration of what might be called 'policy'", to a degree not contemplated at the time of earlier cases on Chapter III of the Constitution.[27] A broad standard may not foreclose the exercise of strictly judicial techniques of decision-making – for example, a court

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23 (2007) 233 CLR 307.

24 See s 104.4(1)(c)(i) and (d) of the Criminal Code, which is the Schedule to the *Criminal Code Act 1995* (Cth).

25 *Thomas v Mowbray* (2007) 233 CLR 307 at [72]-[73].

26 (2007) 233 CLR 307 at [78].

27 (2007) 233 CLR 307 at [88].

will require evidence to be satisfied that a statutory criterion is met, and courts will give meaning to a broad criterion on a case-by-case basis.[28] It follows, in our view, that the fact that statutory criteria may be novel is no necessary bar to the validity of their application – it can be expected that the courts will develop principles to regulate the exercise of the criteria.[29] For example, this is precisely what has occurred in judicial decision-making about what does and does not constitute a "fair trial", and about when a person is or is not under a duty to take "reasonable care" to avoid injury to another.[30]

17. Finally, Gummow and Crennan JJ rejected an argument that the relevant provisions required consideration of issues that were non-justiciable. In this context, "non-justiciable" means "adjudication of obligations and undertakings that depend entirely on political sanctions and understandings".[31] A court deciding whether to make an interim control order is concerned with a "'matter' that was preceded by a political assessment" (that the laws were necessary to respond to terrorist threats); however, the court itself "is not making or challenging that assessment".[32]

Comparison with rights in Part 2 of Victorian Charter

18. Moreover, it is a common feature of human rights that they are expressed in general terms. As noted in paragraph 4.3 above, the Gageler-Burmester opinion did not see any constitutional difficulty with the application of the rights in Part 2 of the Victorian Charter. Yet some of those rights are expressed in very broad language – for example:

    18.1 "Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination": s 8(3);[33]

    18.2 "All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other

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28 (2007) 233 CLR 307 at [91]-[92], [96], [98].

29 Leslie Zines, *High Court and the Constitution* (5th edn, 2008) at 254-255.

30 See for example, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

31 (2007) 233 CLR 307 at [106].

32 (2007) 233 CLR 307 at [107].

33 We note that "discrimination" is defined with relative precision, operating by reference to s 6 of the *Equal Opportunity Act 1995* (Vic).

persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language": s 19(1);

18.3 "All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person": s 22(1).

19. Indeed, some of the rights in Part 2 of the Victorian Charter are derived from the ICESCR.[34]

Conclusions on breadth of expression

20. In our view, the mere breadth of the rights in the ICESCR does not make them non-justiciable. (To be fair, the Gageler-Burmester opinion is not based solely on the breadth of expression.) Although the ICESCR rights are expressed in broad terms, they are no more broadly expressed than rights in Part 2 of the Victorian Charter. Moreover, *Thomas v Mowbray* demonstrates that the courts can apply judicial technique to very general provisions,[35] by giving content to those provisions on a case-by-case basis, and by requiring the criteria to be satisfied by evidence.

21. For these reasons, we would disagree with any suggestion that the rights in the ICESCR lack "sufficient specificity" to support a law made under s 51(xxxix).[36] By their nature, international human rights instruments are expressed in broad terms. The rights in the ICESCR, although broadly expressed, do impose obligations on the signatory states. In our view, the ICESCR rights – contained in a solemn treaty[37] – do require "common action" by the signatory states,[38] and therefore engage the external affairs power.

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34 See footnote 1 above.

35 Including provisions which require value judgment, such as when an order is "necessary" or when a risk is "unacceptable".

36 Cf paragraph 6 above.

37 See *Pape v Commissioner of Taxation* (2009) 257 ALR 1 at [477] (Heydon J, dissenting in the result). The majority justices in that case did not need to consider the external affairs power.

38 See *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416 at 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

Courts can be given role that does not unduly transgress on political decisions about allocation of resources

22. The second, and apparently crucial factor in the Gageler-Burmester opinion is that ruling on rights in the ICESCR is said to involve decisions about the allocation of resources.

All decisions on rights have an effect on resource allocation

23. We accept that it is a principle of Australian constitutional law that it is for the elected branches of government, not the courts, to determine the allocation of public money. For example, Gleeson CJ stated in *Graham Barclay Oysters Pty Ltd v Ryan*,[39] a torts case:

> ... setting priorities by government for the raising of revenue and the allocation of resources is essentially a political matter, and ..., if the reasonableness of such priorities is a justiciable issue, that can be so only within limits.

24. Nonetheless, decisions by the courts clearly have implications for the allocation of public money, even if the courts do not rule directly on how resources should be allocated.

    24.1 Consider, for example, *Dietrich v The Queen*.[40] The High Court held that an accused would not get a fair trial in that case, because he was not legally represented. The Court held (by majority) that the appropriate order was that the trial be stayed.

    24.2 It is true that the Court in *Dietrich* did not make an order directly requiring the government to spend money (such as requiring that the government provide the accused with a lawyer at public expense). However, given that governments would not wish criminal trials to be stayed on the ground identified by the High Court, it was inevitable that the Court's decision would affect how resources were allocated – even if the amount allocated for legal aid was not increased, there would need to be an adjustment in the priority given to different cases.[41]

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39 (2002) 211 CLR 540 at [7].

40 (1992) 177 CLR 292.

41 See *Dietrich* (1992) 177 CLR 292 at 312 (Mason CJ and McHugh J): although there was no evidence of the financial impact of the Court's decision, it was likely that it

25. There is an argument (apparently accepted by the Committee)[42] that issues of resource allocation are particularly acute with economic and social rights, because they are "positive" rights that require the government to do something. By contrast, civil and political rights are said to be "negative" rights that merely prevent governments from doing something.

26. To the extent that this argument suggests that there is a sharp division between civil and political rights, on the one hand, and economic and social rights, on the other, it is overstated in two ways.

26.1 First, leading constitutional commentators have pointed out that even civil and political rights are "positive" in some of their applications.

(a) Stephen Holmes and Cass Sunstein observe that all legally enforceable rights are "positive" rights (in the sense of requiring the government to do something). There are costs to government of providing a system to redress legal wrongs.[43] Moreover, even apparently negative rights require positive action by the state to make those rights meaningful – for example, a right to be free from torture by police and prison guards is without content unless the state arranges prompt visits to jails and prisons by doctors who are prepared to give evidence at a trial.[44]

(b) To similar effect, Jeremy Waldron observes that civil and political rights such as the right to vote require the positive establishment and maintenance of certain frameworks, because a vote is only meaningful if it is counted and given effect in a political system that determines leadership and authority.[45] A right (whether civil or political, or social and economic) gives rise to what Waldron calls "waves of duty". Using the torture example, Waldron contends that the right not

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would require "no more than a re-ordering of the priorities according to which legal aid funds are presently allocated".

42 See paragraph 7.3 above.

43 Stephen Holmes and Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999) at 43.

44 Holmes and Sunstein at 44.

45 Jeremy Waldron, *Liberal Rights: Collected papers 1981-1991* (1993) at 24; see also 343.

to be subjected to torture generates a duty not to torture people, but also generates a duty to investigate complaints of torture, and a duty on government to set up systems that might be necessary to prevent torture.[46]

(c) There are similar observations about the right not to be subjected to inhuman or degrading treatment in *R (Limbuela) v Secretary of State for the Home Department*.[47] Lord Hope stated:[48]

> ... article 3 may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. The prohibition is in one sense negative in its effect, as it requires the state-or, in the domestic context, the public authority-to refrain from treatment of the kind it describes. But it may also require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article.

26.2 Secondly, and conversely, even economic and social rights can give rise to "negative" obligations. For example, a right to basic subsistence might require a government to refrain from taking action that disturbs a state of affairs in which people are not starving.[49] Moreover, the right of access to adequate housing in the South African Constitution gives rise (among other things) to a negative obligation on the State to desist from preventing or impairing the right of access.[50]

27. Therefore, the legal issue is not so much which rights are to be contained in a federal Human Rights Act,[51] but how those rights are framed and what powers are given to the courts in relation to those rights.

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46 Waldron at 25.

47 [2006] 1 AC 396. This right is contained in article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998 (UK).

48 [2001] 1 AC 396 at [46] (emphasis added); see also [92] (Lord Brown).

49 Waldron at 25.

50 *Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at [34] (Yacoob J, delivering the judgment of the Court).

51 We note further that, insofar as international human rights are already enshrined in federal anti-discrimination law, judicial decisions about what constitutes unlawful

Comparison with South Africa

28. As the Report noted, the final South African Constitution contains economic and social rights, such as:

28.1 the right of access to adequate housing: s 26(1) and a prohibition on arbitrary evictions: s 26(3);

28.2 the right to health care services: s 27(1)(a);

28.3 to sufficient food and water: s 27(1)(b);[52]

28.4 social security: s 27(1)(c);[53]

28.5 certain rights for children: s 28;

28.6 education rights: s 29.

29. In relation to the rights in s 27(1), the State "must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights": s 27(2). A similar provision applies to the right of access to adequate housing in s 26(1): s 26(2). The Committee appears to have taken the view that this role allows the Constitutional Court to determine whether the government has dedicated enough resources to achieving particular economic and social rights.[54]

30. It is important to appreciate that the inclusion of the social and economic rights in the final South African Constitution did not fundamentally alter the relationship between the courts and the elected branches of government.

30.1 When the Constitutional Court was deciding whether to certify a draft of what was to become the final Constitution, it considered and

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discrimination by the State are likely to have resource allocation consequences: see for example, *Hurst v State of Queensland* (2006) 151 FCR 562, a case about the non-provision of Auslan assistance to a deaf child. Moreover, we note that federal anti-discrimination statutes already address resource allocation issues by the incorporation of exceptions such as unjustifiable hardship: see for example s 21B of the *Disability Discrimination Act 1992* (Cth).

52 See *Mazibuko v City of Johannesburg* [2009] ZACC 28 (8 October 2009).

53 See *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC).

54 See paragraph 7.2 above. That is, the Report states that it would not be prudent to give Australian courts a role like the Constitutional Court, because judges in Australia believe it is not appropriate for courts to determine whether the government has dedicated enough resources to achieving particular economic and social rights.

rejected an argument that the social and economic rights were contrary to the separation of powers provided for in the Constitution. The argument was that the rights would require the courts to encroach on the proper terrain of the legislature and the executive, by dictating to the government how the budget should be allocated. In rejecting that argument, the Constitutional Court made the following points:

(a) Although the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters, the same is true with orders enforcing civil and political rights. The task conferred on the courts was not so different from the task ordinarily conferred on them by a bill of rights so as to breach the separation of powers.[55]

(b) The Court noted further that social and economic rights can, at the very minimum, be "negatively protected from improper invasion".[56]

30.2 In *Republic of South Africa v Grootboom*,[57] the Constitutional Court emphasised that s 26 of the final Constitution (right of access to housing) only required that the government take "reasonable" measures, within available resources. The Court stated "[t]he precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive", and held that the question is not whether "other desirable or favourable measures could have been adopted, or whether public money could have been better spent".[58]

30.3 In *Minister of Health v Treatment Action Campaign*,[59] the Constitutional Court rejected an argument that s 27(1)(a) (right to access to health treatment services) required "minimum core standards". The Court stated:[60]

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55 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 at [77].

56 1996 (4) SA 744 at [78].

57 2001 (1) SA 46 (CC).

58 2001 (1) SA 46 at [41] (Yacoob J, delivering the judgment of the Court).

59 2002 (5) SA 721 (CC).

60 2002 (5) SA 721 at [37]-[38] (the Court).

> ... the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards ... should be, nor for deciding how public revenues should most effectively be spent. ...
>
> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.

31. It can be seen that the Constitutional Court of South Africa accepts that the allocation of public money is primarily a matter for the elected branches, not the courts. Although social and economic rights have budgetary implications, the same is true of the civil and political rights in the Bill of Rights. Criminal process rights, always held up as paradigm civil rights, are good examples. However, the enforcement of equality rights can also have significant budgetary implications.

The crucial factor is how rights are framed

32. The preceding discussion indicates that there is no ready and clear distinction between civil and political rights, on the one hand, and social and economic rights, on the other hand. Social and economic rights can be enforced in a negative fashion. Admittedly, orders enforcing social and economic rights will commonly have implications for the budget. However, that is true of orders enforcing civil and political rights – as noted in paragraph 24.2 above, even the orders made in *Dietrich* had an obvious effect on government budgets.

Conclusion

33. For those reasons, we consider it is overstating the position to say that ICESCR rights (even the more broadly expressed rights) do not contain any judicially manageable standards.

    33.1 Much would depend on exactly how the rights were framed. It would seem to be possible, for example, to frame statutory provisions that give more specific content to the very general language of the introductory parts of the identified ICESCR rights. Admittedly, those

more specific provisions might be only a partial implementation of the ICESCR; however, that fact alone would not prevent reliance on the external affairs power.[61]

33.2 Much would also depend on the court's function in relation to the rights. As noted in paragraph 30 above, the South African Constitution confines the role of courts through the limitations that (1) measures need only be reasonable, and (2) reasonableness is assessed within available resources. We note reasonableness is already a familiar concept in federal and state anti-discrimination law.[62]

33.3 Consistently with this analysis, we note that the Report appears to consider that it would be possible for the Interpretation Act to require that all Commonwealth legislation be interpreted consistently with the interim list of rights, as far as it is possible to do so consistently with the legislation's purpose. The interim rights would include certain social and economic rights.[63] That kind of provision would be largely similar to an interpretive obligation in a Human Rights Act.

Dated: 8 December 2009

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61 We agree in this respect with the analysis in paragraphs 7 and 8 of the Gageler-Burmester opinion: Report, p 447. As noted in paragraph 21 above, we do not accept any suggestion that the rights in the ICESCR lack sufficient specificity to support a law made under s 51(xxix).

62 Moreover, Gummow and Crennan JJ described the concept of reasonableness as the "great workhorse of the common law", which "draws its determinative force from the circumstances of each action on the case": *Thomas v Mowbray* (2007) 233 CLR 307 at [100].

63 See paragraph 9.3 above.

APPENDIX

International Covenant on Economic, Social and Cultural Rights

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

   (a) *The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*

   (b) *The improvement of all aspects of environmental and industrial hygiene;*

   (c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

   (d) *The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

Article 13

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

   (a) *Primary education shall be compulsory and available free to all;*

   (b) *Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*

   (c) *Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

   (d) *Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*

   (e) *The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

3. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which*

conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. *No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*