



MONASH University
Castan Centre for Human Rights Law



**Economic, Social and Cultural Rights – A Good Idea for
Inclusion in the ACT *Human Rights Act 2004*?**

**Submission to ACT Government Department of Justice and
Community Safety**

Consultation

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Introduction/Summary

The Castan Centre supports the inclusion of economic, social and cultural (ESC) rights in the ACT's *Human Rights Act 2004* (Human Rights Act).

The Centre commends colleagues at the Australian National University (ANU) and University of New South Wales (UNSW) on their ESC Rights Research Project, the final report of which¹ was tabled in the ACT Legislative Assembly in December last year. The Centre endorses this report's recommendations,² and wishes to emphasise that any Bill or Charter of Rights should include ESC rights, because they are indivisible from, interdependent with, and just as important as civil and political rights. They are also the subject of international obligations to which Australia has committed (on behalf of all its constituent states and territories) by becoming party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).³

Importantly, the existing responsibilities of many Australian public authorities, including public servants and service providers, already fall within the ambit of ESC rights (such as the rights to adequate housing and health). The work of these service providers involves the implementation of policy developed at the political level, and is therefore indirectly subject to democratic scrutiny by means of regular elections. However, there is no reason why those who believe policies are being implemented unfairly should not have recourse to the courts to test their claims. ESC rights provide a platform for such cases in important areas of social policy. Such cases should not be seen collectively as an unreasonable intrusion into the domain of the executive by the judiciary (which, as the ANU/UNSW report points out,⁴ is a common criticism), but rather as a layer of accountability which has the potential to make real improvements to government service delivery at all levels.

This submission does not purport to cover the relevant issues in as much detail as the ANU/UNSW report, but the Centre has long supported the inclusion of ESC rights in proposed (and actual) Bills and Charters of Rights, and would like to add its voice to the call for their inclusion in the ACT Human Rights Act. The following is a brief exposition of the Centre's views on the nature of ESC rights and how they might operate in the ACT context.

The Nature of ESC Rights

States have obligations to respect, protect, and fulfil all of their human rights obligations, whether they concern civil and political rights, or ESC rights. Australia became party to the ICESCR in 1975 – so successive Australian Governments have had an obligation to protect ESC rights for more than 35 years. This is longer even than we have been bound by the International Covenant on Civil and Political Rights (ICCPR).⁵

¹ *Australian Capital Territory Economic, Social and Cultural Rights Research Project: Report* (September 2010): <<http://acthra.anu.edu.au>>.

² With the exception of the first part of Recommendation 3 – the Centre supports the inclusion of a right to self-determination in the Human Rights Act (see below under heading *No Reason to Exclude the Right to Self-determination*).

³ 999 UNTS 3 (16 December 1966, entry into force 3 January 1976).

⁴ *Ibid*, Chapters 2 & 3.

⁵ Entry into force for Australia of ICESCR: 10 March 1976; entry into force of ICCPR: 13 November 1980.

In a way, ESC rights are the obverse of a government's various duties of care. In many areas, such as education and social welfare, Australian governments already accept their duties to provide a minimum standard of care for all Australians.⁶ The inclusion of ESC rights in legislation could be said merely to reinforce these duties of care and to provide a more comprehensive mechanism to address breaches.

Human rights are not divisible. This principle was confirmed as a major outcome at the United Nations World Conference on Human Rights in Vienna.⁷ Civil and political rights such as the right to vote and the right to freedom of expression mean little if the right to education is not respected. Likewise, adequate and accessible healthcare and freedom from hunger are prerequisites for many vulnerable and disadvantaged people to enjoy any civil and political rights at all. Any domestic human rights framework must comprehensively protect and promote all categories of human rights for it to be effective.⁸

In recognition of the unequal global distribution of wealth, the guiding article of the ICESCR differs from its equivalent in the ICCPR (article 2(1) in each case):

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

The significant qualifications in this article in the ICESCR are part of the reason why questions exist over whether ESC rights are concrete enough to enable findings of violation by a court. There are many States in which education, emergency healthcare and a social security safety net for all are simply impossible due to the scarcity of available resources. However, Australia is in the fortunate position of having one of the world's strongest economies, which means it is one of the few States which cannot justify treating ESC rights as 'softer' than civil and political ones. Ironically, the most advanced jurisprudence on ESC rights comes from States which are far poorer than Australia.

Civil and political rights have historically been considered to be properly the subject of judicial consideration (justiciable), whereas ESC rights have not. These historical assumptions, which do not stand up to close scrutiny, have been based on the absence or presence of certain qualities. What

⁶ See eg FaHCSIA's Family Assistance Guide: <http://www.fahcsia.gov.au/guides_acts/fag/faguide-1/faguide-1.4/faguide-1.4.3/faguide-1.4.3.10.html>.

⁷ See the Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23 (1993) amongst others.

⁸ See eg Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), especially ch 3, ch 4, 110, 116; K D Ewing, "The Charter and Labour: The Limits of Constitutional Rights," in Gavin W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press Ltd, Great Britain, 1999) 75; K D Ewing, "Human Rights, Social Democracy and Constitutional Reform," in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights*, (Mansell Publishing Ltd, London, 1996) 40; Dianne Otto, "Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations?" in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) 281; or Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto, 1997).

qualities must a right, and its correlative duties, possess in order for the right to be considered justiciable? First, a justiciable right must usually be stated in the negative, be cost-free, immediate, and precise. An example commonly given is the right to be free from torture, which is well-defined and (for the sake of argument) merely requires the State to refrain from torturing people. By way of contrast, a non-justiciable right imposes positive obligations, is costly, is only capable of progressive (rather than immediate) realisation, and is vague. Traditionally, civil and political rights are considered to fall within the former category, whilst ESC rights fall within the latter category. However, this categorisation is an artificial division of the rights contained in the Universal Declaration of Human Rights⁹ and should be reconsidered.

As the ANU/UNSW report notes,¹⁰ many aspects of ESC rights are (contrary to the common perception) concrete and immediately enforceable – for example the right to housing in eviction cases or the right to strike in industrial disputes. The Maastricht Guidelines,¹¹ adopted by a group of ESC rights experts in 1997, clearly identified a number of possible violations of the ICESCR. These included:

Active violations

- (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
- (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
- (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
- (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
- (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
- (f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
- (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations by Omission

Violations of ESC rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include the failure on the part of a State party to the ICESCR to:

⁹ Proclaimed by the United Nations General Assembly in [Resolution 217 A \(III\)](#), Paris, 10 December 1948.

¹⁰ See in particular Chapter 4.

¹¹ Full text available at: <http://www1.umn.edu/humanrts/instate/Maastrichtguidelines.html>.

- (a) take appropriate steps as required under the Covenant;
- (b) reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
- (c) enforce legislation or put into effect policies designed to implement provisions of the Covenant;
- (d) regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
- (e) utilize the maximum of available resources towards the full realization of the Covenant;
- (f) monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
- (g) remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
- (h) implement without delay a right which it is required by the Covenant to provide immediately;
- (i) meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- (j) take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

Whilst it may or may not be appropriate to adopt all of these violations as law in the Australian context, they provide a useful guide to what the courts should be empowered to examine.

Examples

The artificiality of the distinction between civil and political rights and ESC rights can be demonstrated by comparing the right to be free from torture with (for example) the right to the highest attainable standard of physical and mental health. Whilst respect for the right to be free from torture merely entails restraint on the part of public officials, a full implementation requires the State to provide its officials with relevant training, to take legal measures to prohibit torture and enforce this prohibition, and to put in place preventive measures such as regular inspections of places of deprivation of liberty. Similarly, respect for the right to the highest attainable standard of health, at its most basic, merely requires States to refrain from actions directly damaging to health such as excessive pollution or providing unsafe conditions of work in the public sector. However, full realisation of this right requires measures such as legislation regulating private industrial pollution and occupational health and safety laws with associated enforcement mechanisms.¹² If we can define civil and political rights with sufficient precision to enshrine them in legislation, we can do the same for ESC rights.

To illustrate the point further, take the right to a fair trial. Proper protection of this right involves the establishment and maintenance of a court system, which is immensely costly. There are also endless arguments over the right's implications for the accused and how to balance it with victims' rights and the need to maintain community safety. We also accept that the provision of legal aid is

¹² See ICESCR, article 12(2).

necessary if there is to be justice for those unable to afford legal representation. However, no one argues seriously that these difficulties mean the right to a fair trial does not need to be protected by law, or that judges should not be allowed to determine what is in the interests of justice if their decisions will cost the government money. The right to adequate housing – a classic ESC right – is similarly multifaceted. First, States have a duty to respect this right, which is a largely negative, cost-free duty, exemplified by an obligation not to forcibly evict people. Secondly, States have a duty to protect the right to adequate housing, which comprises of partly negative and partly positive duties, and partly cost-free and partly costly duties, such as the duty to regulate evictions by third parties (such as landlords and developers). Thirdly, States have a duty to fulfil the right to adequate housing, which is a positive and costly duty, involving housing of the homeless and ensuring a sufficient supply of affordable housing.¹³

The argument that ESC rights possess certain qualities that make them non-justiciable is thus suspect. All categories of rights have positive and negative aspects, have cost-free and costly components, and are certain of meaning with vagueness around the edges. If civil and political rights, which display this mixture of qualities, are recognised as readily justiciable, ESC rights should also be so recognised.

South African and International Experience

The experience of South Africa demonstrates that ESC rights are readily justiciable. The South African Constitutional Court has enforced (and continues to enforce) ESC rights. The Constitutional Court has confirmed that, at a minimum, ESC rights must be protected. Moreover, it has confirmed that the positive obligations on the State are quite limited; being to take “reasonable legislative and other measures, within its available resources, to achieve progressive realisation” of those rights (in line with the ICESCR). The Constitutional Court’s decisions highlight that enforcement of ESC rights is about the rationality and reasonableness of decision making; that is, the State is to act rationally and reasonably in the provision of such rights. So, for example, the government need not go beyond its available resources in supplying adequate housing and shelter; rather, the court will ask whether the measures taken by the government to protect the right to adequate housing were reasonable.

This type of judicial supervision is well known to the Australian legal system, being no more and no less than what we require of administrative decision makers – that is, a similar analysis for judicial review of administrative action is adopted. Given the jurisprudential emphasis on the negative obligations, the recognition of progressive realisation of the positive obligations, and the focus on rationality and reasonableness, there is no reason to preclude formal and justiciable protection of ESC rights in Australia, including in the ACT.

The following summary of some of the jurisprudence generated under the South African Constitution demonstrates these points. In *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997),¹⁴ Soobramoney argued that a decision by a hospital to restrict dialysis to acute renal/kidney patients who did not also have heart disease violated his right to life and health. The Constitutional Court rejected this claim, given the intense demand on the hospital’s resources. It held that a “court

¹³ On the respect/protect/fulfil spectrum, see further eg UN Committee on Economic, Social and Cultural Rights, General Comment 13 (The Right to Education), UN Doc E/C.12/1999/10, 8 December 1999 [46-50].

¹⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.” In fact, it found that the limited facilities had to be made available on a priority basis to patients who could still qualify for a kidney transplant (i.e. those that had no heart problems), not a person like the applicant who was in an irreversible and final stage of chronic renal failure.

In *Government of the Republic South Africa & Ors v Grootboom and Ors* (2000),¹⁵ the plight of squatters was argued to be in violation of the right to housing and the right of children to shelter. The Constitutional Court held that the Government’s housing program was inadequate to protect the rights in question. In general terms, the Constitutional Court held that there was no free-standing right to housing or shelter, and that economic rights had to be considered in light of their historic and social context – that is, in light of South Africa’s economic and political situation. The Constitutional Court also held that the Government need not go beyond its available resources in supplying adequate housing and shelter. Rather, the Constitutional Court asked whether the measures taken by the Government to protect the rights were reasonable. This translated in budgetary terms to an obligation on the State to devote a reasonable part of the national housing budget to granting relief to those in desperate need, with the precise budgetary allocation being left up to the Government.

Finally, in *Minister of Health v Treatment Action Campaign* (2002),¹⁶ HIV/AIDS treatment was in issue. In particular, the case concerned the provision of a drug to reduce the transmission of HIV from mother to child during birth. The World Health Organisation had recommended a drug to use in this situation, called Nevirapine. The manufacturers of the drug offered it free of charge to governments for five years. The South African Government restricted access to this drug, arguing it had to consider and assess the outcomes of a pilot program testing the drug. The Government made the drug available in the public sector at only a small number of research and training sites. The Constitutional Court admitted it was not institutionally equipped to undertake across-the-board factual and political inquiries about public spending. It did, however, recognise its constitutional duty to make the State take measures in order to meet its obligations – the obligation being that the Government must act reasonably to provide access to the ESC rights contained in the Constitution. In doing this, the Court recognised that its decision could have budgetary implications, but the Court does not itself direct how budgets are to be arranged.

In its judgment, the Constitutional Court held that in assessing reasonableness, the degree and extent of the denial of the right must be accounted for. The Government program must also be balanced and flexible, taking into account short-, medium- and long-terms needs, which must not exclude a significant section of society. The test applied was whether the measures taken by the State to realise the rights were reasonable. In particular, the Court asked whether the policy to restrict the drug to the research and training sites was reasonable in the circumstances. The Court balanced the reasons for restricting access to the drug against the potential benefits of the drug. On balance, the Court held that the concerns (efficacy of the drug, the risk of people developing a resistance to the drug, and the safety of the drug) were not well-founded or did not justify restricting access to the drug, in the following terms:

¹⁵ *Government of the Republic South Africa & Ors v Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

¹⁶ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

[The] government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving [the drug] at the time of the birth... A potentially lifesaving drug was on offer and where testing and counselling faculties were available, it could have been administered within the available resources of the State without any known harm to mother or child.¹⁷

The Australian/ACT Context

ESC rights are justiciable: there is simply too much evidence to argue to the contrary. Courts across the world, largely in States that are poorer than Australia, have rendered numerous decisions on ESC rights.¹⁸ Furthermore, the UN Committee on Economic Social and Cultural Rights has issued numerous General Comments which add flesh to the obligations contained in the ICESCR. The UN General Assembly adopted (by consensus) the Optional Protocol to the ICESCR¹⁹ in December 2008. Once it enters into force, this Optional Protocol will allow individuals to submit complaints to the Committee regarding breaches of their ESC rights by States parties. This process will help to clarify further the limits of ICESCR rights.

The Centre acknowledges that the justiciability of ESC rights may not be absolutely congruent with that of civil and political rights. As the ANU/UNSW report states, the question is not whether they are able to be adjudicated in courts of law, “but rather which aspects of those rights are enforceable as a matter of practicality, and as a matter of ensuring that the courts are not confronted with, or assume, a task that is beyond their competence, or constitutionally inappropriate for other reasons.”²⁰ The report goes on to say that the Australian courts tend to take a conservative approach to treaty interpretation.²¹ This is also the Centre’s opinion, and we therefore predict that the courts would be unlikely to trespass unduly on the role of the executive to make budgetary decisions.

The ever-increasing body of jurisprudence and knowledge on ESC rights would allow the ACT Government to navigate its responsibilities with a greater degree of certainty. In addition, this type of rights-based decision making is not foreign to Australian law; it arises in the context of administrative law in particular. The argument that ESC rights considerations will inappropriately involve the judiciary in decisions regarding resource allocation falters when we consider that our judiciary already commonly considers complex matters relating to government policy, many of which have significant resource implications (e.g. cases concerning taxation, public housing and evictions, education and healthcare). Courts also already have significant jurisdiction over ESC rights in the context of anti-discrimination law, for instance with regard to employment and educational rights and the right to housing.

Under an amended Human Rights Act, the ACT Courts could be empowered merely to decide that a certain situation is a violation of the ESC rights of a particular individual; it could then be up to the

¹⁷ Ibid, [80].

¹⁸ See generally Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008).

¹⁹ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) UN Doc A/RES/63/117 (10 December 2008).

²⁰ ANU/UNSW Report [7.53].

²¹ Ibid [7.54].

Government to decide how to fix that situation. For example, a court could find that a person living in squalor without access to housing has had his or her rights breached, but order the government to remedy the breach in whatever way it sees fit. Indeed, such a system is in place in Europe. Under Article 46 of the European Convention on Human Rights,²² States parties have agreed to “abide by” decisions of the European Court. Essentially, the European Court will identify the deficiencies in the domestic legislation but will not direct a State how to remedy it. The State party is thus free to implement the decision in a manner determined by their own Government and/or Parliament. Deficiencies in the domestic law and practice of a State party must be rectified so as to meet the requirements of the ECHR, but the sovereign’s right to determine the precise manner of rectification is preserved.

The inclusion of ESC rights in the Human Rights Act would provide a basis for addressing the full range of human rights issues in the Territory. Such an approach would be consistent with the recent expression of human rights found in the Charter of Fundamental Rights of the European Union²³ and the Convention on the Rights of Persons with Disabilities,²⁴ as well as the Convention on the Elimination of All Forms of Racial Discrimination,²⁵ Convention on the Elimination of All Forms of Discrimination against Women,²⁶ Convention on the Rights of the Child,²⁷ and Declaration on the Rights of Indigenous Peoples.²⁸ In addition, all of these documents provide a template for an inclusive iteration of civil and political and ESC rights. The Centre agrees with the conclusion in the ANU/UNSW report that such instruments, which contain more up-to-date formulations of certain rights than the ICESCR, can provide a useful basis for the manner in which ESC could be expressed in the Human Rights Act.²⁹ As it stands, the Human Rights Act, without ESC rights, falls short of contemporary international human rights standards (even if it is ahead of the curve in the Australian domestic context).

Finally, as the ANU/UNSW report notes,³⁰ the courts are not the only relevant bodies. Bodies such as the South African Human Rights Commission gather information on measures taken towards the realisation of ESC rights, and conduct investigations and publish policy and other papers in this area. These publications are a good potential source of knowledge for the relevant ACT authorities seeking further information on the implementation of ESC rights. The work of the SAHRC could also inspire that of the ACT Human Rights Commission under an expanded Human Rights Act.

²² Council of Europe Treaty Series 005, entry into force 3 September 1953.

²³ Official Journal of the European Communities, 2000/C 364/01 (Adopted 7 December 2000, effective entry into force 1 December 2009).

²⁴ 189 UNTS 137 (13 December 2006, entry into force 3 May 2008)

²⁵ 660 UNTS 195 (7 March 1966, entry into force 4 January 1969)

²⁶ 1249 UNTS 13 (18 December 1979, entry into force 3 September 1981)

²⁷ 1577 UNTS 3 (20 November 1989, entry into force 2 September 1990)

²⁸ Adopted 13 September 2007 by UN General Assembly resolution A/RES/61/295.

²⁹ ANU/UNSW Report [9.52] & Model Bill (p 135).

³⁰ *Ibid*, [7.45-7.46].

No reason to Exclude the Right to Self-Determination³¹

The Centre notes the ANU/UNSW report's recommendation that the right of peoples to self-determination not be included in the Human Rights Act for the time being, since it requires further consultation and discussion – possibly in the context of the five-year review of the Act.³² We take no position on the timing of this discussion, but would like to contribute the following comments on self-determination for the record.

The Centre recommends inclusion in the Human Rights Act of the right to self-determination, which is recognised in Article 1 of both the ICCPR and the ICESCR. The Explanatory Statement to the Human Rights Act notes that this human right was omitted as “not appropriate to the ACT as a territory of the Commonwealth” because it “is a collective right of peoples,”³³ but the Centre wishes to stress that it is also a right belonging to each individual. The importance of the right to self-determination is illustrated by its inclusion in both the ICCPR and ICESCR.

The right to self-determination is often mistakenly viewed as a threat to the territorial integrity of a State. However, the United Nations General Assembly's 1970 Declaration on Principles of International Law addressed this concern, stating that the right should not be construed

...as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or color.³⁴

The right to self-determination is better viewed as a right which facilitates relations between peoples and their government. Self-determination is the right of peoples to a system that respects and facilitates their political, social and economic participation.³⁵

Recognition of the right to self-determination would affect most profoundly (but not exclusively) the rights of Indigenous peoples in the ACT. Historically, Indigenous peoples in Australia were not treated as legitimate political and economic entities.³⁶ This historical ‘wilful blindness’ generated fundamental flaws in the foundations of the Australian legal and political system concerning Indigenous peoples and their place in our political and social structure. Indigenous Australia's history is one of policies being imposed without consent or even consultation, ranging from *terra nullius* (which denied their existence), to the infamous policy of removing Indigenous children from their families, to more recent examples of the abolition of ATSIC³⁷ and the Northern Territory

³¹ See further M Castan & D Yarrow, ‘A Charter of (Some) Rights...for Some?’ 31 *Alternative Law Journal* 132 (2006). This article advocated the inclusion of a right to self-determination in the Victorian Charter of Rights and Responsibilities, and explained in detail the content of the right and possible consequences of its inclusion.

³² ANU/UNSW Report, Recommendation 3 (p 17).

³³ See Part 3.

³⁴ UNGA Resolution 2625 (XXV), *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* (1970).

³⁵ See J Debeljak, ‘Barriers to the Recognition of Indigenous Peoples’ Human Rights at the United Nations’ (2000) 26 *Monash University Law Review* 159.

³⁶ In contrast, note how treaties were concluded in other settler States, such as New Zealand and the United States.

³⁷ ATSIC was seen by many as suffering from transparency and governance issues. However, it also consisted of 17 regional councils and a central body which provided Indigenous peoples with representational strength.

intervention. Other groups have not been treated with such disrespect for their autonomy, dignity and rights.

This historically entrenched exclusion is exacerbated by continuing disadvantage, some of which is a legacy of explicit and egregious discriminatory laws and policies. Indigenous peoples are the most disadvantaged in Australia in terms of health, education, economic participation, political participation, property rights and representation in the criminal justice system. Their disadvantage is extreme in comparison to non-Indigenous people in Australia, and in comparison to Indigenous peoples in comparable countries such as Canada, New Zealand, and the United States.

Recognition of a right to self-determination would constitute a significant stepping stone towards true reconciliation in Australia. It would signal that the Charter was meant to embrace rights for Indigenous peoples along with all others in the ACT.

Conclusion

There is no reason for which the ACT should not move immediately on recognising ESC rights. These rights are interdependent with, indivisible from, and mutually reinforcing of civil and political rights. To embrace one set of rights without the other undermines full and effective protection and promotion of human rights. Moreover, the ACT should not fear “going it alone.” Although no other Australian jurisdiction has ESC rights to date, there is much guidance from the UN treaty system and comparative jurisdictions about implementing such rights. The increasing clarity and certainty about ESC rights alleviates much of the traditional apprehension about formally recognising these rights.

Perhaps the most compelling reason, however, is that ESC rights such as the right to adequate housing, education and healthcare are some of the rights most valued by the Australian community,³⁸ as demonstrated during the National Human Rights Consultation in 2009.³⁹ Their inclusion in the ACT Human Rights Act would be fitting recognition of this fact, which is too often ignored.

³⁸ Including in the ACT – the ANU/UNSW report notes that the 12-month review of the Human Rights Act by the Department of Justice and Community Safety clearly showed this to be the case [8.3].

³⁹ See National Human Rights Consultation Report (2009), Recommendation 22: <www.humanrightsconsultation.gov.au>.