In Search of 'Effective Remedies':
A framework for assessing Australia's progress towards the implementation of its obligations under the International Covenant on Economic, Social and Cultural Rights.

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Australia submitted its third periodic Report to the Committee on Economic, Social and Cultural Rights (CESCR) in July 1998.[1] *It purports to cover the period 1990-1997. A pre-sessional working group of the CESCR will give preliminary consideration to the Report in May 2000 and compose a list of questions arising from the Report for the Australian Government to reply to, in writing, before the Report is considered by the full CESCR in May 2001. At both stages of this process, members of the CESCR take account of information from non-governmental organisations (NGOs) in order to comprehensively analyse and respond to the Report.*[2] *This discussion paper aims to assist Australian NGOs to make a critical assessment of Australia's progress towards fully implementing its obligations under the International Covenant on Economic, Social and Cultural Rights (the Covenant), in order to participate more effectively in this process.*[3]

Australia is obliged to give domestic effect to the international legal obligations it has assumed by ratifying the Covenant, in the same way that it is bound by any other international treaty that it has ratified or acceded to. The specific legal obligation to implement the Covenant is set out in article 2 as follows:

> 2(1) *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
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> 2(2) *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

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[1] *Periodic Report: Australia 23/07/98.* E/1994/104/Add.22, 23 July 1998.

[2] *NGO participation in activities of the Committee on Economic, Social and Cultural Rights:* 12/05/93. E/C.12/1993/WP.14, 12 May 1993.

[3] The Australian Social and Economic Rights Project (ASERP) has been established to provide education and training on the domestic application of the Covenant, including participation of NGOs in the process of monitoring Australia's compliance with its obligations under the Covenant. To this end, a diverse group of Australian NGOs is presently undertaking an assessment of social and economic rights in Australia in order to submit a shadow report to the CESCR for consideration in its forthcoming review of Australia. For further details contact: farwise@attglobal.net

When considering implementation in a federated State like Australia, article 28 of the Covenant is also important because it makes it clear that the Federal Government must ensure that the rights enumerated in the Covenant are enjoyed throughout Australia, even where they fall under the jurisdiction of State and Territory Governments:[4]

> 28 *The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.*

As treaties are not self-executing in Australia, constitutional amendment or legislation is necessary to incorporate treaty obligations into domestic law or, in the language of the CESCR, to domestically implement the Covenant or make it domestically applicable. There are a variety of means by which the Covenant might be incorporated into domestic law. These include entrenchment of the rights as constitutional guarantees; enactment of the rights in a general scheme of legislative human rights or in a particular area of social or economic policy; and reliance on the Covenant for interpretative guidance in administrative and judicial decision-making where legislation is ambiguous.[5] Further, incorporation of the rights guaranteed by the Covenant into domestic law can be either direct or indirect, where the former involves the incorporation of the rights stated in the Covenant in their entirety and the latter involves the incorporation of some or all of the sub-rights that, in aggregate, would constitute a complete right. Also, direct or indirect incorporation may create either claim-rights or benefit-rights. Claim-rights create causes of action allowing people to go to an Australian court and claim a remedy for violation of their Covenant rights, while benefit-rights provide less access to judicial remedies and, in some instances, none at all. Finally, and importantly, implementation of the Covenant can take place through non-legislative measures, such as administrative or financial programs. Therefore, although the obligation to implement the Covenant clearly exists, diversity in the means of implementation can create a complex web of legislative and policy measures at the Federal, State and Territory levels of government that, in total, may fulfil Australia's obligations under the Covenant.

The predominant means of realising economic, social and cultural rights in Australia is through indirect legislative implementation creating benefit-rights. The complexity of indirect implementation, together with variations in the scope of benefit-rights and, in particular, differences in access to judicial remedies, makes scrutiny of Australia's compliance with its implementation obligations very difficult. Yet the ultimate effectiveness of the Covenant depends on Australian governments taking measures to implement it, which includes providing effective remedies when rights have been violated. The efficacy of implementation, in turn, relies on the community's ability to scrutinise the measures taken and highlight any deficiencies.

We hope to assist NGOs to understand the obligations Australia has assumed under articles 2 and 28, so that they are better equipped to make a critical assessment of progress towards implementation in their particular area of expertise: housing, health, education and so on. To this end, the paper is divided into two parts. First, we set out to clarify the obligations that are imposed by article 2 and, second, we outline the range of implementation measures and associated remedies that are available to Australian governments which may be relevant to making a full assessment of the extent to which specific economic, social and cultural rights have been realised.

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[4] Some confusion can arise from use of the term 'State' when considering the domestic application of international law in countries with a federal political system. In international law, the term 'State' refers to countries or nation-states, such as Australia, whereas in Australian domestic law the term refers to geographic political entities within the country, such as Victoria. We use the term in both ways throughout this paper; the reference should be clear from the context of those uses.

[5] Human rights treaties can also be a source for the development of the common law and constitutional law, and can give rise to a procedural right to be heard in the making of certain administrative decisions, but we do not canvas these options in this paper.

Ultimately, the question is whether the indirect methods of implementation adopted by Australian governments actually fulfil Australia's legal obligations under the Covenant.

1. Australia's Obligations to Implement the Rights Protected by the Covenant

Article 2(1) is a statement of Australia's legal obligations under the Covenant to implement the rights that are set out in articles 6-15, which include the right to work, the right to social security, the right to an adequate standard of living, the right to the highest attainable standard of health and the right to education. Article 2(2) obliges the Federal Government to ensure that these rights are enjoyed by everyone, without discrimination. Although it is the Federal Government that is accountable to the CESCR (and at international law) for fulfilling Australia's obligations under the Covenant, article 28 makes it clear that the obligations are not limited by the division of powers between different levels of government in Australia. That is, the Federal Government must ensure that *all* Australian governments fulfil the obligations in article 2. What is entailed in fulfilling these obligations can be understood by (i) a layered typology that breaks down the nature of all human rights obligations into four separate duties: to respect, to protect, to promote and to fulfil the enumerated rights; (ii) a close examination of the words of article 2, read against the background of the typology; and (iii) an outline of the presumptive (or *prima facie*) violations that result from our analysis. Each of these aspects will be considered in turn.

(i) the four components of the obligations

As part of the ongoing debate as to whether economic, social and cultural rights have the same moral and legal status as other commonly recognised human rights, such as civil and political rights, a 4-part typology of duties, applicable to all human rights, has been developed.[6] The objective is to show that economic, social and cultural rights share the same basic qualities as other human rights, can be treated the same as other human rights and, in particular, are equally capable of being incorporated into national and international legal systems and decision-making processes. As the CESCR has emphasised, every Covenant right has 'at least some significant justiciable dimensions' which, if violated, are appropriately resolved by courts.[7] The typology layers the legal obligation to fully realise each right in the Covenant into four separate duties: to respect, protect, promote, and fulfil. Achievement of all of these layers of duties arising from a particular right amounts to full realisation of that right, but it is possible that a State may achieve only one or two of the layers of duties, thus falling short of full realisation.

- *the duty to respect*

The duty to respect the rights enumerated in the Covenant refers to a State's negative obligation to refrain from acting in ways that would deprive people of their rights or impair their enjoyment of them, and is immediately applicable. Thus, for example, if the Government were to prevent single or unmarried women or lesbians from having access to IVF technology that is otherwise generally available, it may infringe article 10 which provides that '*the widest possible protection and assistance should be accorded to the family'.* Similarly, if the Government were to cut child support or social assistance allowances without ensuring adequate alternative means of support, it may infringe the duty to respect aspect of articles 11 (adequate standard of living) and 9 (social security). The duty to respect is a minimal undertaking that ensures that individuals are protected from interference by the State, and thus implements rights as negative limits on governmental power.

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[6] This typology was embraced in the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* UN Doc.E/CN.4/1987/17, annex. See also (1987) 9 *Human Rights Quarterly* 122. The typology was originally suggested by Henry Shue, *Basic Rights* (Princeton University Press 1980).

[7] *The domestic application of the Covenant: 03/12/98.* General Comment 9 E/C.12/1998/24, 3 December 1998, para 10.

This duty thus has minimal resource implications, but, as the social assistance example indicates, it may require the maintenance of existing levels of resource commitment in order to ensure no retrogression in existing levels of social and economic security.

- *the duty to protect*

The duty to protect requires States to act to ensure that third parties (private actors) do not violate human rights. This duty requires States to take positive measures, for example by adopting appropriate regulatory frameworks, which restrain others from abusing human rights. For example, the lack of regulation of private institutions that undertook to 'care' for Aboriginal children who had been removed from their families resulted in the violation of many social and economic rights of those children and their families. This layer of the typology requires a limited utilisation of resources and may not be immediately realisable due to impediments such as resource availability, or cultural and economic constraints. Unfortunately, the duty to protect has not traditionally extended to human rights violations that occur in the domestic sphere, where many women's rights abuses occur, but there is growing acceptance that it does so extend.[8]

- *the duty to promote*

The duty to promote the rights in the Covenant includes, importantly, human rights education at all levels of society, and accessible information about remedial measures available to those whose rights have been violated. According to this duty, it is not sufficient that a law or policy exists which, for example, recognises that Australian's have a right to affordable, secure and adequate housing, yet those who do not enjoy such a right do not know of the law and/or there is social stigma attached to appealing to the law and/or information about making a complaint is not available. Australia has been repeatedly criticised by the various UN Committees set up to monitor compliance with human rights treaty obligations for failing to sufficiently promote human rights.[9]

- *the duty to fulfil*

The duty to fulfil economic, social and cultural rights obliges States to take positive action to ensure that social and economic rights are realised or made accessible to everyone. This obligation requires States to guarantee a specified result, which may involve ensuring an immediate outcome or achieving a minimum standard directed at the progressive realisation of a right (see below). For example, the provision of social security for everyone whose income is below a certain livable level would satisfy the duty to fulfil in article 9. In this layer of the typology, rights enable claims to be made of the State to take positive steps to ensure the right is enjoyed by everyone. Considerable resources are usually required to satisfy the duty to fulfil. Failing to fulfil a right, whether it is to be immediately or progressively achieved, is a violation of omission.

(ii) the words of articles 2(1) and 2(2)

- *the obligation 'to take steps'*

The Government must 'take steps' towards realising the rights enumerated in the Covenant. Although this wording falls short of requiring the Government to 'guarantee' economic, social and cultural rights, it is a positive undertaking that has both an immediate and a continuing effect: the Government cannot be inactive, nor just refrain from taking steps that would otherwise result in a

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[8] See, for example, Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 85.

[9] For example, in response to Australia's 2nd Periodic report on articles 13-15 the CESCR recommended 'that further measures be taken to strengthen the human rights education component in formal and non-formal curricula' (para 14) and that Australia's reports to the CESCR and the Committee's responses be made 'widely know and available to the public' (para 16), *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, 03/06/93, E/C.12/1993/9, 3 June 1993.

violation of the Covenant. It must act to adopt measures towards achieving the 'full realisation' of the rights covered.[10]

Some steps are mandated, and they are outlined in the Covenant. For example article 6, the right to work, requires that the steps to be taken include *'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment'.* Other articles that specify steps or measures the Government is required to take are articles 11 (adequate standard of living/freedom from hunger), 12 (health), 13/14 (education) and 15 (culture). The steps outlined are not comprehensive, remain very broad, and leave considerable room for governments to interpret them as they see fit.

Other articles are silent on the steps to be taken, leaving it entirely up to the Government to determine the ways in which it will act to ensure enjoyment of the right. Examples of such articles are articles 7 (just and favourable conditions of work) and 9 (social security). Such silence, however, in no way alters the obligation, which exists with respect to every right enumerated, that 'steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'.[11]

- *the obligation to take steps 'individually and through international assistance and cooperation, especially economic and technical'*

These words highlight the interdependence of all States in realising economic, social and cultural rights and, in particular, that certain countries will be reliant on others to assist with economic and technical expertise and resources. For Australia, as a developed State, this involves the obligation to actively play its part in assisting and facilitating the full realisation of the rights in the Covenant in developing States.[12] The obligation to cooperate towards the achievement of international economic and social well-being was also assumed by Australia under the United Nations (UN) Charter.

- *the obligation 'to the maximum of its available resources'*

These words indicate that due priority must be given to the achievement of economic, social and cultural rights. The CESCR has explained that this involves 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.[13] The minimum core obligation includes the provision of essential food, essential primary health care, basic shelter and housing, and basic forms of education.

In a developed State like Australia, the concept of a minimum core obligation is not a very useful yardstick, as the resources available should enable the Government to come very close to fully realising the rights in the Covenant. Therefore, any shortfall in realising the minimum in Australia should be viewed extremely seriously, as even the poorest developing nations are required to demonstrate that they have made every effort to achieve the minimum.

Thus, we suggest that an assessment of Australia's progress towards fulfilling its obligations should be predominantly concerned with instances of, and the reasons for, any shortfall in the realisation of each of the rights in their entirety. Australia's economy has grown consistently through the 1990s and anything less than full enjoyment of economic, social and cultural rights raises fundamental questions about whether 'the maximum of available resources' have been devoted to their realisation. But, given this, any assessment should also draw attention to any circumstances revealing Australia's failure to comply with its minimum core obligations

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[10] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156.

[11] *Article 2, para. 1: the nature of States parties obligations:* 14/12/90. General Comment 3, para 2, 14 December 1990.

[12] *International technical assistance measures (Article 22):* 02/02/90. General Comment 2, 2 February 1990.

[13] General Comment 3, above n 11, para 10.

- *the obligation of 'achieving progressively the full realisation of the rights recognised'*

Implicit in this wording is the acceptance that States may not be able to realise economic, social and cultural rights immediately and, therefore, that they will need some time to fully achieve them. However, the CESCR emphasises that the obligation requires movement 'as expeditiously and effectively as possible towards the goal' of full realisation.[14] Of particular importance in the current Australian situation is that the obligation does not allow any retrogressive measures, except in the narrowest of circumstances. The CESCR cautions that such measures 'would require the most careful consideration and would need to be fully justified by reference to the totality of rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[15]

In addition, the CESCR has indicated that there are a number of provisions capable of *immediate* enforcement, for which 'progressive realisation' is inapplicable.[16] They are:

article 2(2): guaranteeing non-discrimination (see below for discussion);
article 3: the equal rights of women and men;
article 7(a)(i): equal remuneration for work of equal value without distinction of any kind;
article 8: the right of everyone to form and join trade unions, the right of trade unions to establish and join national and international trade-union organisations and to function freely, and the right to strike;
article 10(3): special measures of protection and assistance for children;
article 13(2)(a): compulsory primary education available to all;
article 13(3): the liberty of parents or legal guardians to choose their children's school;
article 13(4): freedom of educational institutions beyond their conformity with minimum standards laid down by the State;
article 15(3): the freedom indispensable for scientific research and creative activity.

Here too, we suggest that while the assessment of Australia's progress will tend to focus upon whether Australia has progressed to *full* implementation with respect to each right and, if not, why not, still it is important to consider whether Australia has implemented these minimum immediate obligations.

- *the obligation to use 'all appropriate means, including particularly the adoption of legislative measures'*

This obligation allows a great deal of scope for States to determine the measures they adopt in order to implement the Covenant, limited only by the requirement that the means be appropriate. The article places special importance on legislative measures, but it clearly also envisages other measures which might include judicial, administrative, financial, educational and social implementation. Consequently, a lack of legislative measures does not necessarily entail a failure to implement the obligations imposed by the Covenant because alternative measures may suffice and, indeed, in some circumstances, may be more appropriate. Nevertheless, some legislative measures will usually be necessary. Furthermore, legislative means may be desirable because their public nature leaves them open to effective scrutiny. In contrast, purely administrative means, such as contracts for the provision of services entered into between executive governments and private companies or service providers, may often be protected from public disclosure, even though the terms and targets they contain may be significant in determining whether a Covenant right has been appropriately realised. Leaving aside questions of scrutiny, administrative measures uncontrolled by legislation may also provide little means of redress to third parties whose rights are affected by failures to perform. This is significant because, as part of the obligation to implement rights through all appropriate means, the CESCR has identified an obligation to provide 'effective remedies' to those whose Covenant rights are violated. In particular, the CESCR is concerned that States provide

[14] Ibid, para 9.
[15] Ibid.
[16] Ibid, para 5.

sufficient access to judicial remedies.[17] Despite these shortcomings, it is important to recognise that administrative and other non-legislative measures can play an important role in implementing the Covenant, although their adequacy in providing effective remedies must be seriously questioned.

Making an assessment of Australia's legislative implementation and its obligation to provide effective remedies is the subject of the second part of this paper because it requires a consideration of different forms of legislative implementation, different forms of rights and different types of remedies. Therefore, suffice to say here that the most comprehensive implementation of rights in Australia would require a combination of legislative and other measures, including judicial and other remedies. At a minimum, it would seem that the Government is obliged to provide judicial or other effective remedies for violations of the rights that are capable of immediate enforcement (listed above). The CESCR particularly emphasises the appropriateness of judicial remedies for ensuring the right to non-discrimination, which is a justiciable aspect of all of the rights in the Covenant.[18] Further, Australia would be required to alter existing legislation that is clearly incompatible with the Covenant, for example if it is discriminatory, or expressly denies a right or has this effect, or allows violations without due process of law. With respect to legislation aimed at the realisation of economic, social and cultural rights, the CESCR has made it clear that it wants to be kept informed about whether any individual or group right of action has been created, indicating the importance it places on effective judicial remedies.[19]

Needless to say, the provision of domestic remedies is all the more important because there is no individual complaints mechanism attached to the Covenant which, in the absence or ineffectiveness of domestic measures, would enable individuals to make complaints directly to the CESCR.

- *the guarantee 'that the rights enunciated...will be exercised without discrimination'*

Article 2(2) requires States to *guarantee* the non-discriminatory enjoyment of economic, social and cultural rights, which necessitates a range of measures, but, in the words of the CESCR, 'the provision of some form of judicial remedy would seem indispensable'.[20] The article proscribes discrimination 'of any kind' and lists, non-exhaustively, various grounds of discrimination. Therefore, discrimination on a ground not specifically mentioned, for example sexual orientation or disability, must also be prevented. The Government is required to refrain from exercising its powers in a discriminatory manner and to alter any discriminatory laws and practices. It is also required to take positive measures to prohibit discrimination by private persons and organisations in any field of public life. In Australia, anti-discrimination legislation has been adopted in an incremental, rather than comprehensive, manner. Therefore it is most unlikely that article 2(2) has been fully implemented, despite its recognition as a justiciable right (ie a claim-right) and as an immediately realisable obligation.

The Covenant does allow for affirmative measures to be taken to ensure the equal enjoyment of rights by particular groups or individuals who need special assistance to overcome structural disadvantages in order to enjoy equality. The Covenant itself recognises that special measures are required to protect the rights of children and young people, and mothers for a reasonable period before and after childbirth. Such special measures are to be withdrawn once their objectives are achieved, but they provide an indispensable mechanism for addressing deeply embedded structural inequalities.

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[17] Ibid.

[18] Ibid.

[19] Ibid, para 6.

[20] General Comment 9, above n 7, para 9.

(iii) identifying violations

Interpreting the specific obligations imposed by Articles 2(1) and 2(2) of the Covenant, in conjunction with the 4-part typology of duties arising from all human rights obligations, allows for appropriate definition of what is required for Australia to fully realise each of the rights guaranteed by the Covenant. In turn, defining the requirements for full realisation allows for identification of where Australia is falling short or, in other words, where violations are occurring. Although it is far beyond the scope of this paper either to define those requirements or identify those violations, we can summarise the implications of the preceding analysis by stating a number of circumstances giving rise to presumptive violations of the Covenant. That is, circumstances that provide prima facie evidence of a violation and that shift the onus onto the Government to rebut the presumption that it has violated the Covenant. For example, where there is evidence that there is decreasing enjoyment of the right to adequate housing, the onus would be on the Government to explain the evidence and show that it is not a violation of the Covenant. This obligation lies with the Federal Government, even if the decreasing enjoyment of a Covenant right is due to the policies or practices of a State or Territory government.

- *discrimination as a presumptive violation*

In general terms, it is clear that while the Covenant recognises that Australia's obligations with respect to the realisation of any particular right are ultimately limited by the extent of available resources, the Covenant is nevertheless founded on the understanding that the obligation of non-discrimination can and must be met regardless of available resources. While the issue of whether guarantees of non-discrimination can be interpreted to the same effect as guarantees of substantive equality, at the very least Australia can be presumed to be in violation of the Covenant if there is any evidence of inequality, arising from discrimination, in the enjoyment of economic, social and cultural rights.

- *lack of minimum core entitlements as a presumptive violation*

The Covenant is also founded on the understanding that a State as affluent as Australia can and must meet all minimum core obligations. Therefore, Australia can be presumed to be in violation of the Covenant if there is any evidence of lack of enjoyment of minimum core economic, social and cultural entitlements. Since the vast majority of Australians obviously do not lack such entitlements, it is likely that any instances of failure to meet this obligation will also entail failure to meet the non-discrimination obligation.

- *entitlements above the minimum*

Furthermore, the Covenant is founded on the understanding that a State as affluent as Australia can and must ensure a fully adequate level of enjoyment of economic, social and cultural rights above the minimum core entitlements. This has two implications:

> (1) *decreases in entitlements as presumptive violations*
> First, that in the absence of a severe depletion in a State's available resources, the level and extent of enjoyment of economic, social and cultural rights above the minimum should not be diminished either by the State or third parties. Therefore, Australia can be presumed to be in violation of the Covenant if there is any evidence of decreasing enjoyment of economic, social or cultural rights.
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> (2) *stagnation of, or lack of improvement in, entitlements as presumptive violations*
> Second, in times of growth in a State's available resources, the level and extent of enjoyment of economic, social and cultural rights should continually improve (unless a State can show that such enjoyment has been fully realised). Therefore, Australia can be presumed to be in violation of the Covenant if there is any evidence that, in times of economic growth, the level and extent of enjoyment of economic, social and cultural rights is stagnant or failing to grow proportionately. Indeed, where there is evidence that the level

and extent of enjoyment of economic, social and cultural rights are not improving, Australia will be in violation of the Covenant even if available resources remain constant, unless it can show that it is already devoting the maximum of its available resources or that such enjoyment has been fully realised.

- *existence of violations as presumptive violation of remedial obligations*

If in any of these ways Australia is found to be falling short of its obligations with respect to the specific rights guaranteed by the Covenant then a further violation can also be presumed, that is, a violation of the obligation to ensure that there are appropriate and effective domestic remedies available for people whose economic, social or cultural rights have been violated.

In the second part of this paper we consider further this obligation to provide appropriate domestic remedies and briefly assess the extent to which it is being met in Australia. Before doing so, however, it is worth noting a further aspect to Australia's obligations under the Covenant which relates to the content of reports submitted by States and is crucial to the entire process of evaluating Australia's compliance with the Covenant.

- *the obligation to comply with Guidelines for Reporting*

The obligation that States parties report periodically to the CESCR on their progress towards fully implementing the Covenant is not merely a formal or procedural matter. The CESCR has emphasised that reporting serves a variety of important substantive objectives including ensuring a comprehensive review of the situation, regular monitoring, clearly articulated policies and the identification of specific benchmarks and goals.[21] Given the various aspects to the obligations imposed by the Covenant, and the multiplicity of recognised means of implementation, as outlined above, the CESCR itself faces significant challenges in performing the task of assessing Australia's compliance with the Covenant. Such challenges are all the greater for NGOs. One step taken by the CESCR to meet these challenges is the adoption of Guidelines for Reporting which seek to specify the breadth and depth of information that the CESCR expects to receive from States in order to enable it to assess their compliance with the Covenant.[22] One advantage of requiring compliance with the Guidelines is that the CESCR is able to gain specific information about the standards that the State has set for itself in seeking to ensure full realisation of the rights guaranteed by the Covenant. This enables the CESCR not only to evaluate the appropriateness of those standards but also to hold a State accountable to its own standards. Ideally, the challenges facing NGOs seeking to participate in the review of a State's compliance can also be alleviated to some extent by similar utilisation of information provided under the Guidelines.

However, this assumes that a State has complied with the Guidelines in furnishing its report to the CESCR which, with respect to Australia's Report, is not the case. Australia's failure to provide appropriate information, from all levels of government[23], undermines the very process of evaluating its compliance with its obligations under the Covenant. Therefore, it is appropriate for assessments of that compliance to draw attention to deficiencies in Australia's reporting. Moreover, it is possible to argue that Australia's claims to be observing its obligations under the Covenant cannot be taken seriously unless and until Australia is able to furnish the required information. At the very least, the failure to do so makes it all the more difficult for Australia to rebut any evidence of presumptive violations.

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[21] *Reporting by States parties:* 24/02/89.[get UN Doc number] General Comment 1, 24 February 1984.

[22] The CESCR provides States parties with a 22-page set of reporting guidelines which outline the type of information it requires to monitor compliance with the Covenant.

[23] The lack of comprehensiveness is particularly glaring when it comes to the contributions from State and Territory Governments, although the input from the Federal Government is piecemeal and almost invariably seriously out-dated or superficial.

2. Australia's Obligation to Provide Effective Remedies for Violations of the Covenant

In the preceding part we have elaborated upon States' obligations, arising from Articles 2(1) and 2(2) of the Covenant, as well as from the 4-part typology of duties correlating to all human rights, to implement the rights guaranteed by the Covenant. In the course of doing so we noted that States have a number of means of implementation available to them and that they enjoy significant discretion in determining the mix of measures they will adopt. But that discretion is bounded by the ultimate obligation to ensure the full realisation of the rights guaranteed by the Covenant and, according to the CESCR, this obligation will invariably necessitate some adoption of legislative measures. In other words, States will inevitably be obliged to use their law-making powers to ensure compliance with their obligations. In the parlance of the CESCR, this raises the issue of domestic application, that is, the extent of the requirement that a State must give effect to the Covenant in its domestic legal order. A critical component of this issue is the extent to which a State is obliged to provide effective remedies, including judicial remedies, for any violations of the rights guaranteed by the Covenant.

In a federated State like Australia, the obligation to implement the Covenant, and ensure effective remedies for violations of the Covenant, includes ensuring that State and Territory governments play their part in giving effect to the obligation, to the extent that implementation falls within their respective constitutional powers. Many of the rights enumerated in the Covenant fall into areas in which Australian State and Territory governments have a primary interest. Also, significant sections of the Australian legal system are administered by the States. While the Federal Government does have the constitutional power to legislate to implement its international treaty obligations under the external affairs power, it has been consistently reluctant to do so in the context of Australian federal arrangements which give States a great deal of power. Instead, successive federal governments have developed cooperative approaches towards the implementation of Australia's international obligations. Although the present Federal Government attests loudly to the effectiveness of the present 'Principles and Procedures for Commonwealth-State Consultation on Treaties', mechanisms based only on consultation and cooperation are always vulnerable to political exigencies and are not good instruments of accountability. The lack of accountability of States and Territories for the implementation of international human rights obligations is a major flaw in the Australia system of rights and must surely amount to a violation of the Convention.

Therefore, it is important that any evaluation of the domestic application of the Covenant in Australia examines implementation measures at both the Federal and State/Territory levels of government. Because the Australian Report is completely inadequate in this regard, it would be useful if NGOs were able to fill in some of the gaps left by the Report and, perhaps more importantly, suggest questions that the CESCR might ask in order to elicit this information from the Government. The different levels of government in Australia, and the complexity this adds to effective monitoring, should be borne in mind as we consider, in this part, Australia's compliance with its obligation to provide effective remedies. We do this in three steps, by (i) identifying how the obligation to provide effective remedies and, in particular, judicial remedies, arises; (ii) describing the relationship between different forms of implementation, different forms of rights and different types of remedies; and (iii) briefly assessing the adequacy of remedies provided in Australia.

(i) the obligation to provide effective remedies and the need for judicial remedies

According to the CESCR, since the obligation to implement the Covenant necessitates the adoption of legislative measures, States will need to undertake some degree of incorporation, or recognition, of the rights guaranteed by the Covenant into their domestic legal systems.[24] However, because

[24] General Comment 9, above n 7, para 2.

recognition does not of itself ensure compliance, the CESCR also states that the Covenant requires the provision of appropriate mechanisms for remedying violations of Covenant rights and for ensuring governments are accountable. Ultimately, this means that the Covenant will not be fully implemented in the absence of effective domestic remedies enabling individuals and groups to enforce the rights guaranteed in the Covenant. The term 'effective remedy' is not limited to judicial remedies. In particular, the CESCR accepts that administrative remedies, that is, remedies sought from administrative decision-makers exercising power under legislative measures, will often be appropriate. According to the CESCR, the test is simply whether a remedy is effective which, in the case of administrative remedies, means 'accessible, affordable, timely and effective'.[25] Indeed, those criteria are probably the benchmarks by which the effectiveness of all remedies should be judged.

However, while the CESCR recognises that non-judicial remedies may be effective, where the full realisation of a right guaranteed by the Covenant cannot be ensured in the absence of judicial remedies, then such remedies will be necessary. For instance, it may be necessary to ensure the availability of judicial review of administrative remedies. Generally speaking, access to judicial remedies is desirable because such remedies provide powerful and independent protection against violations of Covenant rights. Indeed, the CESCR has indicated that in many cases judicial remedies can be presumed to be necessary and appropriate and that in such cases States will face a heavy burden if they seek to justify a failure to complement or reinforce implementing measures with judicial remedies.[26]

Significantly for Australia, one factor which the CESCR will consider in assessing whether a State ought to provide judicial remedies for protection of Covenant rights is what remedies the State has provided for other human rights. This is significant because, as discussed further below, while the Federal Government's Human Rights and Equal Opportunity Commission (HREOC) system has been empowered to conciliate complaints about the violation of the rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR), it has no such powers with respect to complaints about violations of the rights guaranteed by the Covenant. The CESCR has said that where implementation differs significantly from that of other human rights treaties, 'there should be a compelling justification for this'.[27]

(ii) forms of implementation, forms of rights and types of remedies

While, in adopting legislative measures, there is plainly an obligation upon States to provide some degree of access to judicial remedies, as part of the broader obligation to provide effective remedies, it must be recognised that in the Australian legal system judicial remedies can vary in scope. In particular, judicial remedies can exert more or less control over administrative and other non-judicial remedies and decision-making processes. Generally speaking, rights and remedies are but different sides of the same coin: to legislatively provide a right is generally to enable a remedy in the sense that the very existence of a right entitles a person to demand that right and also to demand a remedy if that right is violated. Therefore, to identify when rights have been implemented is also to identify when remedies are available. However, since there are different ways in which to implement rights there are also different types of remedies. In particular, legislative implementation may provide administrative and/or judicial remedies and may provide them with differing scopes. In the following analysis, we distinguish direct from indirect legislative implementation of Covenant rights and we distinguish implementation in the form of claim-rights from implementation in the form of benefit-rights. These distinctions then enable us to illustrate how the scope of judicial remedies can vary.

At the outset, it is important to recognise that the rights identified in the Covenant as human rights, such as the right to work, the right to adequate housing or the right to health can and often must be

[25] Ibid, para 9.
[26] Ibid, para 3.
[27] Ibid, para 7.

understood as aggregated bundles of more specific entitlements or sub-rights. For instance, the CESCR has defined the right to adequate housing to include sub-rights to, amongst other things: the greatest possible security of tenure[28], strict control of circumstances in which evictions may be carried out[29], affordability, habitability and accessibility.[30] Therefore, while the clearest form of domestic implementation of a Covenant right would be a legislative measure granting the right in the same or similar terms (that is, in its aggregated form) from which sub-rights would flow by implication, it is equally possible to implement a right by legislative measures that only grant the sub-rights themselves. We call the first form of implementation 'direct implementation', and the second form 'indirect implementation'.[31] It is important to recognise this distinction in assessing a State's compliance with its obligations under the Covenant because failure to do so, or, more particularly, failure to take account of indirect implementation, may result in an underestimation of the extent of compliance.

Next, it is important to recognise that legislative measures, of either the direct or indirect kind, may compel implementation of a right or sub-right, or may merely empower implementation of a right or sub-right—the difference being the amount of discretion left to governments, or individuals, to define the scope and content of the right or sub-right. Or, in splitting the difference, a legislative measure may generally compel implementation while preserving some discretion as to scope and content. In our analysis, the more the implementation of a right is compelled, the more it is a 'claim-right', whereas the more it is left to discretion, the more it is a 'benefit-right'. The significance of this distinction is illustrated by the decision of the High Court of Australia in *Green v Daniels*.[32] In this case the applicant argued that she had been improperly denied unemployment benefits which the Director-General of Social Security was empowered to provide under the Social Services Act 1947 (Cth). Stephen J ordered a re-examination of her case on the grounds that, although the Department's decision was based upon the relevant policy manual, there were doubts as to whether the policy manual properly reflected her entitlement under the Act. However, Stephen J refused to actually order that she was entitled to the benefit because in his view the Act provided that that decision was at the discretion of the Director-General. He ruled that she lacked a sufficient cause of action to compel the provision of a benefit and that, in effect, 'unemployment benefit is no more than a gratuity, to payment of which the plaintiff can have no rights enforceable at law'.[33] Crucial to Stephen J's decision then is his holding that individuals cannot compel implementation of the sub-right to unemployment benefit (which is part of the aggregated right to social security). This incapacity leads him to designate the right as a mere benefit that is 'unenforceable at law' or, in other words, is insufficient to found a cause of action. On the basis of that designation, Stephen J refuses to provide a judicial remedy for the denial of the applicant's sub-right. In so doing, Stephen J reveals the importance of the distinction between claim-rights and benefit-rights: with only the former providing access to the full scope of judicial remedies.

It is also important, however, to recognise that just as the contrast between claim-rights and benefit-rights is more one of degree than kind, that is, they lie at opposite ends of a continuum rather than on either side of a dichotomy, so too can there be degrees of access to judicial remedies or, to put it another way, variations in the scope of judicial remedies. Indeed, as the fact of Stephen J's

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[28] *The right to adequate housing (Art. 11(1) of the Covenant)*. General Comment 7, E/C.12/1997/4, para 10.

[29] Ibid.

[30] *The right to adequate housing (Article 11(1))* General Comment 4. E/C.12/1991/4, para 8.

[31] In using the terms 'direct' and 'indirect' implementation, we would like to draw attention to General Comment 9 of the CESCR where the distinction in form, to which the terms refer, is implicit in the Committee's approach: above n 7, paras 4 and 8. Further, for an insightful description and analysis drawing attention to, in our terms, 'indirect implementation' of the right to an adequate standard of living by the Federal Government is Peter Bailey 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 4(1) *Australian Journal of Human Rights* 25.

[32] (1977) 51 ALJR 463. This case is discussed at greater length in Peter Bailey, *Human Rights: Australia in an International Context* (Butterworths 1990) 328.

[33] (1997) 51 ALJR 463, 469.

decision shows, even though the applicant's sub-right to unemployment benefit was ultimately held to be unenforceable, nevertheless she was able to obtain a judicial remedy for the Department's improper reliance upon a policy manual that allowed decisions that violated her sub-right. However, access to this judicial remedy is of only limited effectiveness in ensuring the enjoyment of Covenant rights. This is because, although the Department can be judicially compelled to exercise discretion consistently with the legislative definition of a sub-right, that definition may itself fall short of what the Covenant requires. Alternatively, while the legislative definition may be capable of encompassing what the Covenant requires, and may set some limits to how discretion can be exercised, it may nevertheless fail to proscribe exercises of discretion that fall short of the Covenant's requirements. Therefore, the actual level of social security may be determined by budgetary allocations and the need for administrative rationing, rather than actual need (as the Covenant may require) and, so long as this is within the scope of the discretion granted by the legislation of the sub-right, the scope of the judicial remedy will not extend to compelling provision for unmet need. By way of contrast, if the right to social security were directly implemented in its full aggregated form by means of constitutional entrenchment, then the scope of the judicial remedy thereby provided would be significantly greater. For instance, it would enable a challenge to the adequacy of the legislative definition of the sub-right to unemployment benefits and, indeed, may prevent any repeal or alteration of the sub-right.

(iii) assessing the effectiveness of remedies in Australia

In assessing Australia's compliance with its obligation to provide effective remedies for violations of Covenant rights, it is therefore necessary to investigate what form of implementation has taken place, what form of right has been created and what type and scope of remedy has been provided. As a guide to such investigations, we list several questions designed to assist in identifying the range of means by which Covenant rights can be recognised in Australia's domestic legal order. We also indicate the extent to which they have been used and consider the effectiveness of the remedies they provide.

- *Have Covenant rights been constitutionally entrenched?*

The most powerful and independent type of direct implementation is the enactment of constitutional human rights. The South African Constitution, the Canadian Charter of Rights and Freedoms and the United States Bill of Rights are all examples of this type of direct implementation. Constitutionally entrenched human rights are the most powerful because they operate by controlling law-making power and found claim-rights directly on violations of Covenant rights. Furthermore, they cannot be repealed or amended by the ordinary law-making process as this can only be achieved through extra-ordinary constitution-making procedures. Courts adjudicating such claim-rights can both strike down laws that cause rights violations and require laws to fulfil rights obligations.

This type of implementation has not occurred in any systematic way in Australia. The Commonwealth Constitution contains few express rights. They include a right to the free exercise of religion (which also prohibits the imposition of religious observance or the establishment of religion), a largely formal right to trial by jury, protection against discrimination on the basis of residence in one State rather than another, and a guarantee that compulsory acquisitions of property take place on just terms. There is also a guarantee that interstate trade, commerce and intercourse be 'absolutely free'.[34] More recently the High Court of Australia has upheld limited implied constitutional rights to freedom of political communication, movement and association and to procedural due process. However, the tenor of High Court decisions since these developments manifests a reluctance to imply any further rights; for instance, a minority opinion claiming that a right to

[34] For a considerably more expansive reading of express rights in the Australian Constitution see Peter Bailey, above n 31, 84-86.

equality is implied by the Constitution has been resisted in subsequent decisions of the Court.[35] Therefore, the Covenant lacks direct constitutional implementation at the Commonwealth level and the situation is the same with respect to all State Constitutions. Consequently, the most significant type of claim-right is unavailable in Australia, as is the most powerful and independent type of judicial remedy for violations of economic, social and cultural rights.

- *Have Covenant rights been legislatively enacted in a general scheme or bill of rights?*

A second type of direct implementation of international human rights is the enactment of general legislative human rights. There are two ways in which this might be undertaken. First, legislation may be enacted that grants and protects human rights in general. An example is the New Zealand Bill of Rights Act 1990 which grants and protects a number of important civil and political human rights. Similar enactments were proposed by the Federal Government in 1973 and 1984, but they were highly controversial and never materialised because of what has been described as the Australian 'reluctance' about rights.[36] Alternatively, legislation may be enacted that grants and protects equality or non-discrimination rights on specific grounds across a general range of areas of social activity. An example is the Sex Discrimination Act 1985 (Cth). These legislative human rights are general in the sense that they apply to a wide range of more particular legislation and associated administrative action. This type of implementation is less powerful than constitutional entrenchment because it cannot control future law-making, as Australian Parliaments do not have the power to bind their successors. Consequently, this type of implementation is always vulnerable to repeal or amendment through the ordinary operation of the political process. However, such implementation can operate to repeal earlier inconsistent laws and to condition the interpretation of future laws that do not expressly provide differently. Also, through the operation of section 109 of the Commonwealth Constitution, the rights contained in the Commonwealth legislation can override past, present and future inconsistent State legislation.

Whether implementation of this type grants claim-rights or benefit-rights, and so to what extent it provides access to judicial remedies, and of what scope, depends upon the detail of each enactment. An important question is also the extent to which Covenant rights are included within the ambit of such legislative enactments.

The only Australian example of the first type of legislative enactment of a general scheme of rights is the Human Rights and Equal Opportunity Commission (HREOC) Act 1986 (Cth), although it is extremely limited with respect to remedies. This Act grants individuals the right to complain to HREOC about violations of rights protected by certain international human rights instruments including the ICCPR. However, the rights granted can barely even be described as benefit-rights because HREOC is a non-judicial conciliation body and cannot compel compliance with its decisions. Indeed, its remedial power is limited to reporting to the Commonwealth Attorney-General in the event that a settlement cannot be reached by way of conciliation. Furthermore, only complaints with respect to laws, practices and actions of the Federal Government can be made, except for complaints of discrimination in employment which extend to actions by the State and Territory Governments as well.[37] Finally, and most significantly for present purposes, the rights guaranteed by the Covenant are not 'human rights' for the purposes of the HREOC Act 1986 which means that complaints of violations of economic, social and cultural rights cannot be conciliated. Further, the other functions of HREOC, which include human rights promotion, research and legislative review, do not apply to the rights in the Covenant. Indeed, the Covenant is the only major

[35] For a full discussion of implied rights in the Australian Constitution, and the changing approaches of the High Court to this, see George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999)

[36] Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

[37] This extension of HREOC jurisdiction with respect to discrimination in employment resulted from the scheduling of ILO Convention 111, Discrimination (Employment and Occupation) Convention 1958, to the HREOC Act 1986. The seven grounds of discrimination covered by Convention 111 are race, colour, sex, religion, political opinion, national extraction or social origin.

international human rights instrument that is not included within the ambit of the HREOC system. As already foreshadowed, this difference in treatment gravely undermines the relative effectiveness of remedies for violations of rights guaranteed by the Covenant and must cast doubt upon Australia's willingness to fulfil its obligations under the Covenant. Indeed, as we have said, the CESCR views differential treatment of Covenant rights, when compared to other human rights, very seriously indeed, and suggests that this would need a 'compelling justification'.[38]

The Federal and State Governments in Australia have made a better effort to undertake the second type of implementation of a general scheme of rights by way of anti-discrimination legislation. At the Commonwealth level there are the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992. The last of these Acts does implement some of Australia's obligations under the Covenant, but only with respect to people with disabilities. The inadequacies of the federal system mean that a great deal of reliance is placed in the State systems. All States have enacted anti-discrimination legislation[39] with minor, but often very significant, variations.[40] All these enactments grant rights to complain about discrimination on certain specified grounds in prescribed areas of activity by governments and private parties, but fall short of establishing the comprehensive regime envisaged by article 2(2). Also, while protection from discrimination should not be under-rated, especially for women and indigenous peoples, it does not necessarily ensure full realisation of the rights guaranteed by the Covenant and, for instance, may not even amount to a guarantee of substantive equality. Further, although some of this protection operates in the social/economic realm, for example non-discrimination, on specified grounds, in provision of accommodation, work, goods and services, an important ground which is not included is incapacity to pay. It is important to investigate how receptive judicial decision-makers are to reading the legislation as widely as possible so as to fully comprehend the social and economic dimensions of discrimination complaints. Ultimately, all of these enactments, including the three federal Acts, grant claim-rights in the sense that complainants do have access to judicial remedies which can order an end to discriminatory actions. However, it is important to note that anti-discrimination legislation invariably interposes filtering, conciliation and specialist tribunal procedures between complainants and judicial remedies. The effect of these procedures upon the effectiveness of remedies for violation of Covenant rights should also be investigated. For instance, while these procedures are no doubt motivated by a desire to alleviate the costs, delays, and formalities associated with non-specialist court proceedings, they may be equally unresponsive to claims of economic and social discrimination and can lack accountability in decision-making, especially with respect to the initial filtering of complaints.[41]

- *Have Covenant rights been legislatively enacted in a particular area of social or economic policy?*

A further type of direct implementation is the enactment of particular legislative human rights. For example, if Commonwealth or State housing legislation had a section stating: 'All people have a right to adequate housing and the Crown has a duty to provide such housing if people cannot otherwise secure it'. These legislative human rights are particular in the sense that they only apply to a particular area of legislation or social policy. Again, this type of implementation cannot control future law-making, cannot override inconsistent provisions in the same or other legislation and is

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[38] General Comment 9, above n 7, para 7.

[39] Discrimination Act 1991 (ACT), Anti-Discrimination Act 1977 (NSW), Anti-Discrimination Act 1992 (NT), Anti-Discrimination Act 1991 (Qld), Equal Opportunity Act 1984 (SA), Sex Discrimination Act 1994 (Tas), Equal Opportunity Act 1995 (Vic).

[40] For example, Tasmania only proscribes discrimination on the basis of sex, marital status, pregnancy and family responsibility, while discrimination on the basis of sexuality is not prohibited in Western Australia or Tasmania and only New South Wales has addressed same sex couple-based discrimination.

[41] For a discussion of anti-discrimination legislation and procedures, including shortcomings, see Peter Bailey and Annemarie Devereux, 'The operation of anti-discrimination laws in Australia" in Kinley (ed) *Human Rights in Australian Law* (The Federation Press; Annandale, NSW, 1998) 292.

always vulnerable to repeal by ordinary law-making processes. Nevertheless, particular legislative human rights can found claim-rights and, importantly, allow claimants to challenge the adequacy of entitlements and to exert some control over the exercise of administrative action under the legislation. However, neither the Commonwealth nor the States have any legislation undertaking such implementation of international human rights, including social and economic rights, although there is limited recognition of the sub-right to strike in industrial relations legislation.

- *Have Covenant sub-rights been legislatively enacted in a particular piece of legislation?*

A common type of indirect implementation is the enactment of independent but inter-related entitlements in particular legislation. This type of implementation shares the vulnerability to repeal or amendment of all implementation that is not constitutional. In addition, this type of implementation usually entails more limited claim-rights and therefore restricts the availability of judicial remedies because it is only violations of particular legislative entitlements, rather than violations of the right they in sum constitute, that can found causes of action. Moreover, as we have already noted, the legislative definition of particular entitlements tends to take the form of requiring the provision of particular assistance without requiring that such assistance actually meet existing needs. Therefore, as discussed in relation to the decision in *Green v Daniels*, the actual level of assistance will be dependent upon budgetary allocations and administrative rationing. Consequently, judicial remedies are confined to ensuring the provision, though not the adequacy, of entitlements and judicial remedies cannot counteract the legislative repeal or alteration of an entitlement. Therefore, the sub-rights provided in such enactments tend to be more in the nature of benefit-rights as the adequacy of entitlements can only be addressed through the pursuit of administrative remedies, that is, remedies that seek compliance with administrative policy and favourable exercise of administrative discretion. Although judicial and quasi-judicial bodies supervise compliance and discretionary action, they cannot order more than is required by the legislation.

This is the predominant form of implementation of Covenant rights in Australia. For example the Social Security Act 1991 (Cth) expresses no aggregate right to an adequate standard of living or social security, but provides a number of particular entitlements, or sub-rights—available to the unemployed, the aged, the disabled, single parents and others—that, together with entitlements in other Commonwealth and State legislation, may amount to provision of an adequate standard of living and thus implementation of the aggregate right. A further example is the Residential Tenancies Act 1997 (Vic) which does not require people on low-income to be provided with rental accommodation, nor does it prohibit security deposits, but does set up a fund to assist people in providing security deposits and allows evictions to be challenged if they would cause hardship. If these sub-rights were supplemented by entitlements in other legislation providing adequate rent subsidies, prohibiting discrimination against people on the ground that they are in receipt of social assistance, and so on, then the collection of sub-rights might enable people to secure the aggregate right to adequate housing. However, it is important to undertake an assessment of whether the sum of sub-rights does constitute the aggregate right granted in the Covenant, for the persistence of many forms of social and economic deprivation in Australia indicates that they do not. Further, to the extent that it is within the discretion of administrators to provide assistance to meet actual need, it is important to monitor and assess the effectiveness and responsiveness of internal administrative review and appeal procedures. In particular, it is important to discover the receptiveness of both administrative and judicial decision-makers to arguments that seek to use the fulfilment of Covenant rights as benchmarks for assessing the adequacy of legislative and administrative implementation. This issue is discussed further below in relation to the decision by the High Court in the *Teoh* case.

- *Have Covenant rights been enacted as statements of objectives in legislation?*

A further type of implementation is the enactment of statements of objectives that refer to international human rights (typically in aggregate) for particular legislative measures. For example, the Disability Services Act 1991 (ACT) empowers the responsible Minister to make grants of financial assistance to providers of services to the disabled, directly to disabled persons and to

researchers in the field of disability. This power is stated to have as its objective the enhancement of the equality, dignity and quality of life of disabled persons and the power is not to be exercised unless it furthers a list of rights of disabled people set out in a Schedule to the Act. Hence, the rights are not directly implemented, nor are any particular entitlements provided; the rights merely condition the exercise of administrative power under the Act. Therefore, at best only benefit-rights are provided, and it is important to assess whether those rights in fact fulfil the Covenant rights referred to as objectives of the legislation. Again, it is useful to investigate whether such fulfilment is accepted as a benchmark for assessing administrative achievement of the objectives. If not, the sincerity of legislative recognition of the rights of disabled people can be questioned.

- *Have Covenant rights been recognised as providing interpretative guidance where legislation is ambiguous?*

The final type of implementation we consider, is the general recognition of international human rights obligations as guides to interpretation. For instance, if there is some ambiguity in the meaning of a legislative entitlement or a requirement for administrative action, is a court or administrative decision-maker entitled to interpret the ambiguity so as to further the implementation of international human rights obligations undertaken by Australia? Usually this type of implementation is direct rather than indirect, that is, it refers to aggregate rights rather than sub-rights. Although this method of implementation has only limited operation, in that it is only relevant if there is legislative ambiguity, since interpretation is a notoriously creative enterprise, the CESCR believes that States have an obligation to encourage interpretations that conform to Covenant obligations and, in particular, that States should seek to encourage such interpretations in cases to which they are parties.[42] Despite its limited operation, this type of implementation has, on the one hand, been bolstered by the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh.*[43] In that case the Court held that Australia's undertaking of international human rights obligations can found a legitimate expectation in the minds of applicants that administrative discretion will be exercised consistently with those obligations. However, on the other hand, both past and present federal Governments have issued declarations expressly stating that the consistency of decisions with international obligations should not be expected, unless expressly required. While legislation of these declarations is pending, their legal effect has not yet been tested.[44] By the same token, and as the CESCR requires, successive governments have confirmed a more limited role for international human rights obligations as relevant considerations for the purposes of administrative decision-making and as sources for resolving legislative ambiguities.[45] Although there is ample evidence that Australian courts, in interpreting legislation and constructing the common law, are willing to be guided by international human rights obligations, it is important to investigate whether tribunals and courts are as willing to be influenced by international social and economic rights as they are other rights. The relative paucity of cases in which reference has been made to the Covenant, as well as the fleeting nature of those references, suggests not.

Conclusion

This paper is intended to assist efforts by the NGO community to assess Australia's compliance with its obligations under the Covenant. In the first part of the paper we have sought to clarify the obligations imposed by the Covenant through a consideration of the 4-part typology of duties arising from all human rights obligations and the specific words of the Covenant, as interpreted and applied by the CESCR. Although there are a variety of inter-related aspects to States' obligations, it is clear that the most comprehensive implementation of rights requires a combination of means. Further, it

[42] See General Comment 9, above n 7, para 11.

[43] (1995) 183 CLR 273.

[44] Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth), section 5.

[45] Ibid, section 7.

is possible to identify a series of circumstances in which a State can be presumed to be violating its obligations under the Covenant. These include circumstances of discrimination in the enjoyment of Covenant rights; denial of minimum core entitlements of Covenant rights; and decreases, stagnation or insufficiencies in improvements in above minimum entitlements to Covenant rights. The question then, which we do not address in any comprehensive way, is whether there is any evidence that these circumstances exist in Australia and, if so, whether the presumptions can be rebutted. A complete answer to that question is beyond the scope of this paper and, in any event, is presently being undertaken by the NGO community through the Australian Economic and Social Rights Project.[46] One obstacle that the NGO community is facing in performing that task is the lack of evidence supplied by Australia in its CESCR Report to support its positive assessments of its own performance. This we consider to be itself a violation of a further obligation upon States to comply with the Guidelines for Reporting of the CESCR.[47] Nevertheless, while we await the detailed assessment of the NGO community, the obvious persistence of economic and social deprivation in Australia indicates that violations of the Covenant are occurring.

This raises the issue of the obligation of States to provide effective domestic remedies for violations of Covenant rights. Having identified that obligation in the first part of this paper, in the second part we have sought to undertake a more sustained treatment of that obligation with the objective of identifying some important factors to consider in assessing Australia's compliance with that obligation. In order to satisfy the obligation to provide effective remedies for violations of the rights guaranteed by the Covenant, States need to establish comprehensive mechanisms of redress and accountability. Such mechanisms need not rely exclusively upon judicial remedies and, indeed, will tend to combine both judicial and non-judicial/administrative remedies. In other words, both claim-rights and benefit-rights have a role to play in the provision of effective remedies. However, States are ultimately obliged to ensure the effectiveness of the remedies they provide, so an important aspect of assessing Australia's compliance with its obligations under the Covenant is the investigation of this issue. By reference to some common forms of implementation, it is possible to identify some important factors to be considered in assessing the effectiveness of the various remedies provided in Australia. Those factors include whether Australia protects Covenant rights to the same extent that it protects other international human rights and whether the Covenant, and its associated jurisprudence, is an accepted benchmark for judicial or administrative review of definitions or applications of Covenant related claim-rights or benefit-rights. Although, again, it is largely beyond the scope of this paper to investigate those factors, one glaring failure is the single exclusion of the Covenant from the jurisdiction of HREOC to monitor compliance with international human rights instruments in Australia. While we have also indicated other problems, in particular the apparent lack of any comprehensive approach to implementation of the Covenant or to provision of remedies, as well as the heavy reliance upon benefit-rights rather than claim-rights, we believe that the exclusion of the Covenant from the jurisdiction of HREOC is representative of Australian Governments' general reluctance to undertake a good faith implementation of the Covenant and to ensure the realisation of its rights for all Australians.

[46] See above n 3.

[47] General Comment 1, above n 21.