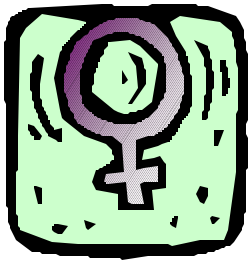

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RETREATING FROM THE FULL REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AUSTRALIA: A GENDERED ANALYSIS ©

Shadow Report to Australia's Third Periodic Report to the Committee on Economic, Social and Cultural Rights, covering the period 1990-1997

Introduction: the context of the 1990s

The globalisation of free market economic policies during the 1990s has demanded diminished social spending, privatisation of many public sector functions and the deregulation of labour markets around the world. In Australia, as with other western democracies, the result has been a major reconfiguration of the relationship between the individual and the State. While these changes were initiated by the Labor governments of the 1980s and early 1990s, the election of the conservative federal Government in March 1996 marked the end of efforts to ameliorate the inequities produced by the efficiencies of the market state. In Australia's federal system, much of the responsibility for human services delivery has since been devolved from the commonwealth to the states, and federal grants towards the provision of services at the state level have been largely untied. Also since 1996 (earlier in some states like Victoria), the shift to a minimalist, regulatory State has relocated much of the responsibility for the provision of social services and economic safety nets away from the public sector to individuals and to profit-driven private sector actors.

The dismantling of the redistributive state creates new impediments to the progressive realisation of social and economic rights in Australia. In the changed conditions, new ground rules are necessary to arrest the widening gap between the rich and the poor, and to ensure that social wealth is equitably distributed.[1] The monitoring of Australia's compliance with its international legal obligations under the Covenant on Economic, Social and Cultural Rights (hereafter 'the Covenant') is of critical importance, as there is the real possibility that economic liberalisation has resulted in a diminution of economic and social rights protections in Australia.

This Shadow Report, while inevitably raising issues of general concern, aims to provide a gender analysis of Australia's Report to the Committee on Economic, Social and Cultural Rights (CESCR). The social transformations won by the women's movements of the 1970s and 1980s have been hollowed out by a redirection of funds and policies that shows little respect for what makes life

[1] Donald Johnson, Secretary General of the OECD, said that 'surveys in Australia and overseas suggest the distribution of income and wealth is becoming increasingly skewed towards the top end', *The Age,* 16 October 1999, 11; ACOSS Federal Budget Briefing Kit 1996-7, warned that 'there is a real danger that outcomes for low income and disadvantaged people will be worse not better, that economic efficiency will be reduced not increased, and the social fabric of our nation will be weakened not strengthened'.

possible for most women. Economic, social and cultural rights are of special importance to women because they extend into the domestic sphere and have a central role to play in addressing women's social marginalisation, economic dependency and cultural oppression. We are concerned that the new market-driven regulatory state impacts disproportionately on women's enjoyment of economic and social rights, expanding their responsibilities in the area of unpaid work, reducing their access to social services and increasing their vulnerability to exploitation in the paid workforce. For example,

- when the social safety net is dismantled the most vulnerable members of the community, predominantly female-headed households and indigenous peoples, are most affected;
- when health care and other social and community services are inadequate, the burden falls onto the unpaid shoulders of local communities (ie women);
- when budget policies are driven by fiscal restraint, the resources available to counter discrimination are reduced;
- when the labour market is casualised, and individual workplace agreements are promoted in place of award guarantees, women form the majority of those with little bargaining power.

Although gender inequalities do not operate in isolation from other systems of hierarchy like those of race, class, sexuality, ethnicity and disability, the tenacity of discriminatory gender distinctions requires ongoing vigilance. There is now ample evidence that gender disparities are structurally embedded, and that the struggle to eradicate them requires long-term, specific and responsive strategies.

Australia's Report:[2]

Australia's Report makes no reference to the reshaped, market-driven state, nor to how the Government intends to promote the realisation of economic, social and cultural rights in the changed circumstances. The Report also fails to spell out the significant changes in social policy directions introduced since the present Government assumed office in March 1996. While our detailed concerns are spelled out in the body of this Shadow Report, there are some general concerns that arise from the changing social and economic context that results from budgets driven by surplus agendas, reduced social spending, and labour market restructuring which the Government should have addressed in its Report.

It should be kept in mind that the CESCR, in its 1996 Statement on Globalization, acknowledged that 'if not complemented by appropriate additional policies, globalization risks downgrading the central place accorded to human rights by the United Nations Charter...This is especially the case in relation to economic, social and cultural rights. Thus, for example, respect for the right to work and the right to just and favourable conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of the labour rights contained in the Covenant'.[3]

Major Concerns with Australia's Report:

- *What efforts have been made to assess the inequities produced by the efficiencies of the market state and what measures have been taken to ensure equitable distribution of the benefits from trade and investment?*
- *With the devolution of responsibility for many social and economic matters from the federal to the state/local level, what measures has the Government taken to ensure that its obligations under the Covenant are understood and fulfilled by the state/territory governments?*
- *What mechanisms are in place to ensure that private actors contracted by the governments of Australia to deliver social, economic and cultural services respect, protect, promote and fulfil*

[2] *Australia's Report under the International Covenant for Economic, Social and Cultural Rights, 1990-1997*, Australia, 23/07/98. E/1994/104/Add.2, 23 July 1998.

[3] *Statement on Globalisation and Economic, Social and Cultural Rights*, CESCR, May 1998, 01/05/98, para 3.

the economic, social and cultural rights covered by the Convention and thereby ensure that the Government's obligations under the Covenant are met?

ARTICLE 1: THE RIGHT TO SELF-DETERMINATION

Major Issues:

In 1972 'self-determination' became the cornerstone of Australian government policies with respect to indigenous Australians. This approach resulted in many positive outcomes. Of particular importance was the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1989 with the statutory function 'to ensure the maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them'.[4] Although the low participation of women in ATSIC has been an ongoing concern, this results largely from non-indigenous notions of authority and hierarchy as indigenous women play a crucial role in the survival of their communities locally.[5] In 1991, the long-overdue process of reconciliation between indigenous and non-indigenous Australians was legislated. In 1992, recommendations of the Royal Commission into Aboriginal Deaths in Custody were based on self-determination, resulting in the creation of the position of Aboriginal and Torres Strait Islander Social Justice Commissioner within the Human Rights and Equal Opportunity Commission (HREOC). In 1993, following the High Court's recognition of common law native title in the *Mabo case*[6], the Government passed the *Native Title Act 1993* in order to give legislative effect to native title, and committed itself to a social justice package to redress a wide spectrum of outstanding inequities.

However, since the change of government in 1996, there has been a shift in policy, away from self-determination to 'self-empowerment' or 'self-management'. This shift is consistent with the market-driven imperatives of the reshaped Australian state. As a result, the capacity of ATSIC to fulfil its statutory functions has been undermined. Its budget was cut in 1996 by $470 million over 4 years and some of its major programmes have been transferred to government departments. In 1998, money was taken out of ATSIC's budget to establish an alternative policy unit within the Department of Prime Minister and Cabinet, providing a competing source of policy advice to the Government that further undermines ATSIC's role. At a critical stage in the negotiations of amendments to the Native Title Act in June/July 1998, ATSIC and other indigenous groups were not even consulted by the Government.[7]

Despite overwhelming community support, the process of reconciliation is also under threat because of governmental resistance. For example, the Government has refused to accept many of the conclusions of the HREOC Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families[8] which found that the policies of removal, practiced by Australian governments as recently as 1967, constituted genocide. The Government has rejected the Inquiry's recommendations that a formal apology be made and that compensation be paid to the many thousands of indigenous people who are suffering lasting economic, social and cultural effects from removal.

In addition, Aboriginal imprisonment and black deaths in custody continue to occur in alarmingly disproportionate numbers, as Australian governments have been slow to fully implement the

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[4] ATSIC has 20 Commissioners and 60 Regional Councils. The Commissioners and members of the Regional Councils are all elected by Aboriginal and Torres Strait Islander people and are themselves indigenous.

[5] Terri Libesman, Sonia Pearce and Rhonda Kelly, 'Indigenous Women and Relations with the State', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 144, 150.

[6] *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

[7] Leonie Dickson, Tasmanian Regional Aboriginal Council, ATSIC, Testimony to the 1st Australian Tribunal on Women's Human Rights, Melbourne, 21 May 1999.

[8] HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

recommendations of the Royal Commission. The current restructuring of HREOC will abolish the position of Aboriginal and Torres Strait Islander Social Justice Commissioner, combining these responsibilities with those of the Race Discrimination Commissioner into a single portfolio, which will leave no adequately resourced agency specifically responsible for monitoring the human rights of Australia's most disadvantaged community - its indigenous peoples.

The promise of land rights, that was given life by the *Mabo* decision in 1992, suffered a severe setback with the Government's 1998 amendments to the *Native Title Act 1993* which further extinguish and impair native title, greatly reduce statutory protection of native title, allow for discriminatory action by governments and do not provide for appropriately different treatment of unique aspects of Aboriginal and Torres Strait Islander culture.[9] The Committee on the Elimination of Racial Discrimination (CERD) issued an early warning in March 1999, after examining these changes (see below).[10] In response, the Government has refused to accept the decision, calling into question the competence of CERD and warning CERD against visiting Australia to review the matter.

The complete litany of Governmental backsliding with respect to indigenous self-determination would take up many pages. In short, in its repudiation of the earlier self-determination model, the Government has largely rejected the need for special measures to ensure the protection of distinct indigenous identities and relationships with land and to achieve substantive equality. Instead, such measures have been mis-characterised and denigrated as discriminatory, which has, in turn, fueled racism among some sections of the population.

Previous UN Concerns/Recommendations:

In March 1999, and reaffirmed in August 1999[11], CERD, under its Early Warning/Urgent Action procedure, called on Australia to address the following concerns 'as a matter of utmost urgency':

- para 8: 'the amended Act appears to wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the *Native Title Act 1993.* As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concern about the State Party's compliance with Articles 2 and 5 of the Convention';
- para 9: 'The lack of effective participation by indigenous communities in the formulation of the amendments raises concerns with respect to the State Party's compliance with its obligations under Article 5(c);
- para 10: 'notes with concern the State Party's proposed changes to the overall structure of the [Human Rights and Equal Opportunity] Commission; abolishing the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner and assigning those functions to a generalist Deputy President.[12]

In 1997, CEDAW recommended:

- para 40: that 'the Government .collect statistical data on the participation of Aboriginal and Torres Strait Islander women in the workforce, in decision-making, in politics and administration, and in the judiciary with a view to enhancing programmes that would benefit them';
- para 41: 'that, in the light of the Mabo and Wik judgments of the High Court, the Government should develop necessary legislative and policy measures to ensure women's equal access to individual ownership of native land'.[13]

Further, in 1994 CERD had recommended:

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[9] Dickson, above n 7.
[10] *Decision 2(54) on Australia*: Australia. 18/03/99. CERD/C/54/Misc.40/Rev.2, 18 March 1999.
[11] *Decision on Australia*: Australia. 16/08/99. CERD/C/55/Misc.31/Rev.3, 16 August 1999.
[12] Above n 9.
[13] *Consideration of Reports: Third Periodic Report, Australia,* CEDAW/C/1997/II/L.1/Add.8, 22 July 1997.

- para 547: 'that Australia pursue an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past'.[14]

Australia's Report:

Australia's Report makes no reference whatsoever to the self-determination issues outlined above. The CESCR is referred to Australia's 4th Report under the International Covenant on Civil and Political Rights (ICCPR), prepared in 1994[15], and to appendices 2-4. The ICCPR Report by the previous Government, is not only seriously out of date. It also fails to acknowledge the very significant policy changes adopted by the present Government with respect to Aboriginal and Torres Strait Islander affairs. The statistics in appendices 2-4 show a projected growth in Australia's indigenous population from 1992-2001 which, thankfully, compares favourably to projected rates of growth in other western countries. However, later in the Report, appendix 12a briefly outlines statistics, with respect to education, employment, income and housing, that attest to the fact that Aborigines and Torres Strait Islanders still rank as the most disavantaged group in Australian society according to most, if not all, socio-economic indicators. That is, the majority of indigenous Australians still do not enjoy the minimum subsistence rights that Australia is obliged to ensure under the CESCR.

Major Concerns with Australia's Report:

- *At a minimum, the Government should provide an updated report on its progress towards realizing the internal right to self-determination of Aborigines and Torres Strait Islanders under art 1.*
- *As the right to self-determination is a prerequisite to the effective guarantee and observance of all other human rights, how can the Australian Government's dismantling of the indigenous self-determination policies and mechanisms established by the previous Government be consistent with its obligations under article 1?*
- *In particular,*
  (a) how can the extinguishment and impairment of already bare Native Title rights possibly be consistent with the right to self-determination? and
  (b) what measures have been adopted to assess the effects of disempowering ATSIC, the principle mechanism for ensuring the participation of indigenous peoples in determining their own social and economic policies, and how will any retrogressive impacts be addressed?

ARTICLE 2(1): TAKING STEPS TO ACHIEVE PROGRESSIVELY THE FULL REALISATION OF RIGHTS ENUMERATED

Major Issues:

As treaties are not self-executing in Australia, the Government must incorporate the Covenant by legislation in order to directly create the rights enumerated and impose substantive obligations on the State to respect, protect, promote and fulfil those rights. In the absence of direct incorporation, and as Australia has no constitutionally entrenched bill of rights, Australia relies on a complex web of indirect legislative and policy measures in order to fulfil its obligation to take steps to achieve progressively the full realization of the rights in the Covenant. Further, when considering implementation in a federated State like Australia, account must also be taken of measures at the local state/territory levels of government. The complexity of indirect means of implementation, together with the complications of federalism, makes scrutiny of Australia's compliance with art 2(1)

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[14] *Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination:* Australia. 19/09/94. A/49/18, 18 August 1994.

[15] *Core document forming part of the reports of State Parties: Australia*, HRI/CORE/1/Add.44, 27 June 1994, attached to Australia's Report, above n 1, as Appendix 1.

very difficult. It impedes effective monitoring within Australia, as well as by international bodies, and highlights the dearth of direct judicial remedies available to those whose rights have been violated. Given these complexities, it surely is incumbent on the Australian Government to provide the CESCR with detailed information about implementation at all levels of government in Australia. Further, the clear absence of direct domestic remedies speaks loudly of the need for an Optional Protocol to the Covenant that would allow individual complaints, and thereby put pressure on the Government to take its obligations to implement the Covenant seriously.

Despite these shortcomings in Australian implementation, previous governments established national mechanisms which went some way towards fulfilling Australia's obligations to respect, protect and promote human rights domestically: notably the HREOC, and national machineries with respect to women's affairs and matters concerning Aboriginal and Torres Strait Islanders (ATSIC has been referred to above). However, the present Government is systematically dismantling or downgrading these national mechanisms, thereby threatening the progressive realization of human rights in Australia.

(i) the Human Rights and Equal Opportunity Commission

The HREOC is a statutory authority charged with promoting respect for and observance of human rights. Its primary responsibilities relate to administering the Government's anti-discrimination regime.[16] It is also responsible for human rights education, advocacy, research, advice to the Government, and for overseeing Australia's obligations under seven international human rights instruments which are scheduled to the *HREOC Act 1986*[17], but this does *not* include the Covenant. While scheduling does not have the effect of incorporating the instruments into Australian law, it does define 'human rights' for the purposes of the Act. The exclusion of the Covenant means that Covenant rights are not even 'human rights' that are subject to the limited oversighting functions of HREOC. This is a serious omission that should be immediately rectified, and fully explained.

Since 1996, there have been significant changes in HREOC's funding, functions and structure. Funding has decreased 36% over the period 1997-1999, curtailing activities in the area of human rights education, limiting access to telephone contact in some states and forcing a focus on the core function of complaint handling and conciliation. The budget cuts also led to a halving of the Sex Discrimination Unit. There are further changes to HREOC planned. One change will see the removal of HREOC's inquiry/determination powers to the Federal Court, so that if a complaint of discrimination under the *Racial Discrimination Act 1975, Sex Discrimination Act 1984* or *Disability Discrimination Act 1992* is not resolved through conciliation, it can only be continued by making an application to the Court. While this change is constitutionally necessary[18], no measures have been taken to improve access to the Federal Court, which has recently significantly increased its fees while legal aid budgets have been substantially reduced. (Note that complaints under the *HREOC Act 1986,* with respect to the scheduled instruments, do not provide access to a judicial remedy at all.[19]) Another change will see a diminished focus on gender discrimination, as the responsibilities of

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[16] HREOC has responsibility for the *Human Rights and Equal Opportunity Act 1986, Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992* and assists the Privacy Commissioner in administering the *Privacy Act 1988.*

[17] The scheduled instruments are the *ICCPR*, the *Declaration of the Rights of the Child*, the *Declaration on the Rights of Disabled Persons*, the *Declaration on the Rights of Mentally Retarded Persons*, the *Convention concerning Discrimination in Respect of Employment and Occupation 1958* (ILO Convention No.111), and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* and the *Convention on the Rights of the Child.*

[18] *Brandy v HREOC* (1995) 183 CLR 245.

[19] The *HREOC Act 1986* grants individuals the right to complain about violations of the scheduled instruments to HREOC. The powers of HREOC are limited to conciliation and if a settlement cannot be conciliated, the only further action that can be taken is by way of a report from HREOC to the Attorney-General.

the Sex Discrimination Commissioner are combined with those of the Equal Opportunity Commissioner. Further, the name of the Commission is to be changed to the Human Rights and Responsibilities Commission, reflecting the Government's preference for individual self-sufficiency over a social guarantee that basic needs will be met. The significance of this change is that it locates primary responsibility for social and economic well-being in the individual, moving the Government into a secondary accountability for its international human rights obligations.

(ii) national women's machineries

Australian national women's policy machinery, which had earlier led the way internationally, has also been gradually dismantled in the name of 'mainstreaming' and efficiency.[20] The Office of the Status of Women in the Department of Prime Minister and Cabinet, first established in 1975, had its funds cut by 40% in 1996, mandating its withdrawal from coordinating and supporting women's policy work across government departments and diminishing its input to Cabinet. Further, the Annual Women's Budget Statement that has played a crucial role since 1984 in monitoring the gendered effects of government policies and programmes, was discontinued in 1996. While all state/territory Governments also produced Women's Budget Statements for periods of time, the practice survives today in only two places, the Northern Territory and Tasmania. The National Agenda for Women, which promoted a comprehensive and coordinated approach to policy development, was also discontinued in 1996. These are significant losses for Australian women, especially in the absence of specifically legislated economic and social rights, as budgets are powerful instruments of social and economic policy.

The policy of mainstreaming women's issues involves each government department taking responsibility for gender policy development, but measures to ensure accountability are ill-defined, and effective linkages and cooperation across departments are impossible without coordinating and oversighting machinery. In fact, women's policy units in several government departments have now been abolished[21], as has the Women's Statistics Unit in the Australian Bureau of Statistics. It is a mistake to think that mainstreaming can be a substitute for specific mechanisms as both are necessary. The loss of national women's monitoring machineries is compounded by the reduced access of national women's NGOs to consultative arrangements. They have largely been replaced by selected 'prominent individual women' at the now tightly controlled annual Round Table Conferences with the federal Government. Further, funding for national women's advocacy groups has been substantially reduced.

(iii) other retrogressive changes

Two other changes that reduce the Government's ability to achieve the progressive realisation of economic and social rights need mention here. First, drastic cuts to legal aid funds of $120 million over 3 years have so stretched the system that many ordinary people no longer have access to legal redress. Of particular concern are indigenous and migrant women, women suffering domestic violence, those seeking criminal injuries compensation, women requiring legal assistance with family law matters, and equal opportunity and discrimination cases. Second, severe budget cuts to the human rights units in the Attorney-Generals and Foreign Affairs Departments undermine their ability to effectively advise the government on human rights matters. Taken together, the changes in implementation that we have outlined chart a substantial backsliding rather than a continuous movement towards the full realisation of the rights in the Covenant. While this is consistent with the Government's new emphasis on individualism and the market economy, the changes vastly increase the potential for inequitable economic and social outcomes that the CESCR warned about in its Statement on Globalisation.[22]

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[20] Marian Sawer, 'The Watchers Within: Women and the Australian State', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 36.

[21] Ibid 46-47, referring to the DEETYA Women's Bureau and the ATSIC Office of Indigenous Women.

[22] Above n 3.

Previous UN Concerns/Recommendations:

In 1997 the CEDAW expressed concern:

- para 27: 'about the Government's apparent shift in attention and commitment to the human rights of women and the achievement of gender equality. Indications such as the cut by 38% in the budget of the Office of the Status of Women and a similar reduction of funding for the Human Rights and Equal Opportunity Commission gave rise to concern. While increased efforts at gender mainstreaming into all sectoral areas were commendable, the Committee was concerned about the weakened role of national machinery in policy advice on equality issues and in monitoring the effect of such policies';
- para 34: CEDAW recommended that the Government 'should carefully monitor the impact of recent policy changes...conduct analyses of the successes and shortcomings of the new policies...[and] design a long-term strategy aimed at the full implementation of the Convention'.[23]

In 1997 the CRC expressed concern:

- para 7: 'that although the Convention on the Rights of the Child has been declared a relevant international instrument under the HREOC Act 1986…this does not give rise to legitimate expectations that an administrative decision will be made in conformity with the requirements of that instrument. The Committee is also concerned that there is no right of citizens to launch complaints in the local courts on the basis of the Convention';
- para 9: about 'the absence of a comprehensive policy for children at the national level…[and] the lack of monitoring mechanisms at the federal and local levels'. [24]

In 1994, the CERD expressed concern that:

- para 542: although the Commonwealth Government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention and cannot be compelled to change their laws. Programmes and strategies designed, at the federal level...could be jeopardised by lack of cooperation from state or territory governments. The Committee will follow with concern any relvant developments in the relations between the governments in Australia'.[25]

In 1993 the CESCR suggested:

- para 13: 'the importance, in the context of federalism in Australia, of close cooperation and coordination between different authorities and organisations for the effective implementation...of the Covenant';
- para 16: 'the importance of taking steps to monitor more closely the general situation of Aboriginals and Torres Strait Islanders and other disadvantaged groups particularly in education and culture'.[26]

Australia's Report:

Australia's Report refers the CESCR to the Core Document, prepared for Australia's 1994 ICCPR Report[27], for an outline of Australia's legislative arrangements that implement its human rights obligations under the Covenant. In so doing, the Government glosses over the complexity of assessing the implementation of the Covenant in Australia. It also ignores the very real antipathy to economic, social and cultural rights in the Australian legal tradition, which has historically been more concerned with providing protection from interference by government, rather than with rights as

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[23] CEDAW 1997, above n 13.

[24] *Concluding observations of the Committee on the Rights of the Child: Australia,* 10/10/97, CRC/C/15/Add.79, 10 October 1997.

[25] CERD 1994, above n 14.

[26] *Concluding Observations of the Committee on Economic, Social and Cultural Rights*: Australia. 03/06/93. E/C.12/1993/9, 3 June 1993.

[27] *Core document,* above n 15.

positive claims. In the almost complete absence of express constitutional guarantees of economic and social rights[28], the Report evinces a great deal of faith in the institutionalised majoritarian processes of 'responsible government', the minimal rights protections that can be found in the common law, and the limited scope for judicial interpretation of statutes. All three of these 'implementation measures' are more receptive to civil and political rights than to economic, social and cultural rights, and to the negative rather than positive aspects of rights implementation, matters to which the Government fails to draw attention.

The Government states in the Report that:

> Australia believes that not every matter concerning human rights is best dealt with by resort to traditional legal sanctions. In many cases, rights are more readily promoted by less formal processes, often associated with inquiry, conciliation and report. (p5)

Given this stance, it is surely incumbent on the Government to explain and demonstrate how its less formal means of implementation constitute packages of protections that, in combination, realise the economic, social and cultural rights in the Covenant. Yet the Report lacks even the basic information that the CESCR requires in order to make such an assessment. Further, while the CESCR does recognise that non-judicial remedies may often be effective, it has indicated that in many cases judicial remedies can be presumed to be necessary and, that in such cases, States will face a heavy burden if they seek to justify a failure to complement or reinforce implementation measures with judicial remedies.[29]

Administrative law remedies and anti-discrimination legislation (see discussion of articles 2(2) and 3 below), constitute the predominant form of 'remedy' for the violation of economic and social rights in Australia. The federal Administrative Appeals Tribunal, established in 1975, is able to review federal Ministerial and official decision-making in areas that include social security, taxation, and veterans' entitlements.[30] Further, judicial review of decisions made under federal legislation is also available.[31] However, these mechanisms are severely limited in that they can only review administrative decision-making to ensure that it complies with the terms of legislation. They do not allow alteration of legislation if it violates, or has the effect of violating, social and economic rights. It is also of concern that Victoria is the only state that has matched the federal scheme of administrative review at the state level, and even this has been seriously eroded by the economic rationalist Victorian Government in recent years (which lost office in November 1999).

Outside of administrative and anti-discrimination remedies the scope for complaining about violations of the obligations assumed under the Covenant is extremely limited. Because the schedule to the HREOC Act does not include the Covenant, the rights enumerated are not even 'human rights' for the limited purposes of the Act. The various proposals for an Australian Bill of Rights have never included economic, social and cultural rights. Even basic social security entitlements are not justiciable at law as positive rights.[32] Thus our great concern at the decimation of the existing national machineries (changes not even mentioned in the Report) that at least provided some specific advocacy for the disadvantaged groups of women, Aboriginal and Torres Strait Islanders and other minority groups. While the major changes proposed for the HREOC are referred to in the Report as leading towards 'a streamlined structure and more focused principal functions', this really amounts to retrogressivity that the CESCR has said 'would require the most

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[28] The only express social and economic rights in *The Australian Constitution* are: s51(xxxi) requiring that property compulsorily acquired by the Federal Government must be acquired on just terms; and s117 protecting citizens from discrimination on the basis of residence in another state.

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

[30] Established by the *Administrative Appeals Tribunal Act 1975*, and supported by the *Ombudsman Act 1976*, the *Freedom of Information Act 1982*.

[31] Provided for by the *Administrative Decisions (Judicial Review) Act 1977*.

[32] *Green v Daniels* (1977) 51 ALJR 463.

careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[33] Such justifications are absent from the Report, as is any acknowledgement of the earlier concerns expressed by the CESCR, CERD, CRC and CEDAW about the adequacy of the indirect measures of implementation adopted by Australia.

[33] *The nature of States parties obligations (Article 2, para.1)*: 14/12/90. General Comment 3, 14 December 1990, para 9.

Major Concerns with Australia's Report:

- *Given the preponderance of indirect means of implementation, and the resulting complex of legislative and policy measures, surely it is incumbent on the Australian Government to provide a clear explanation and detailed information about its progress towards full implementation, rather than rely on its 1994 ICCPR report?*
- *In particular, what remedies, especially judicial remedies, are available to Australians who do not enjoy the rights covered by the Covenant?*
- *Following its drastic cuts to legal aid, can the Australian Government demonstrate that access to justice for disadvantaged Australians is still affordable?*
- *What measures have been adopted to assess the effect of dismantling national machineries that coordinate, monitor and promote women's economic and social policy concerns, and how will any retrogressive impacts be addressed?*
- *How can the halving of the HREOC Sex Discrimination Unit be justified?*
- *Why is the Covenant not one of the instruments scheduled to the HREOC Act 1986?*

ARTICLE 2(2): WITHOUT DISCRIMINATION
ARTICLE 3: EQUAL RIGHTS FOR MEN & WOMEN

Major Issues:

The federal anti-discrimination regime consists of the *Human Rights and Equal Opportunity Act 1986,* the *Racial Discrimination Act 1976* (RDA), the *Sex Discrimination Act 1984* (SDA) and the *Disability Discrimination Act 1992* (DDA). Each Act provides, ultimately, for a (costly) Federal Court determination of the merits of complaints when a conciliated settlement cannot be reached, and the planned changes to HREOC make this the *only* avenue besides conciliation. Other Australian jurisdictions have enacted some form of anti-discrimination legislation, which operates alongside the federal legislation, but the latter has national coverage. Across the board, the approach to the development of anti-discrimination legislation has been incremental rather than comprehensive, with additional grounds or areas of activity being added from time to time, motivated by political imperatives rather than the need to provide a right to be free from discrimination. Yet under article 2(2), Australia is bound to guarantee the enjoyment of economic, social and cultural rights, without discrimination 'of any kind', which obligues Australia to provide a comprehensive regime of protection. However, the Australian federal legislative framework does not include several of the grounds mentioned specifically in article 2(2) - language, social origin, property, birth or, most importantly, 'other status' which is a catch-all provision that would ensure comprehensive coverage. Also, coverage is confined to designated public spheres of activity and subject to a range of exemptions. Therefore it is unlikely that article 2(2) has been fully implemented, despite the CESCR's view that non-discrimination is a justiciable aspect of every human right, and that this must be realised immediately.[34]

(i) sex discrimination

With respect to women, there have been many advances, and the SDA makes discrimination on the grounds of sex, marital status and pregnancy unlawful. It also prohibits sexual harassment in certain areas and forbids dismissal from employment on the grounds of family responsibilities. However, it would be more effective if it contained a general right that women be free from discrimination as is provided for with respect to race in the RDA[35] and disability in the DDA[36],

[34] Ibid para 5.
[35] RDA s9(1).
[36] DDA s5.

instead of confining the right to specified grounds. Given the narrow approach, it is of great concern that breastfeeding is only a recognised ground in the Northern Territory and, to a limited extent, in Queensland.[37] Also, the recent national Pregnancy and Work Inquiry conducted by HREOC found that discrimination on the basis of pregnancy was a significant factor contributing to Australian women deciding not to have children or to limit the size of their families, despite this being a recognised ground in all Australian jurisdictions.[38]

The SDA is limited in a number of other ways. First and foremost, in common with the RDA and DDA, it fails to establish positive rights. The right provided is to be free from discrimination, rather than a right to equality. Also, complainants under all three Acts rely on the availability of the substantive right (eg the right to social security or to adequate housing) and can only seek redress if they are denied full enjoyment of the right, to the extent that it exists, on the basis of one of the specified grounds of discrimination. In the Australian legal system, where rights are characteristically conferred through indirect and negative measures, an assumption that the substantive right is available is often wrong. Secondly, the SDA is confined to specific areas of public activity, yet much of the discrimination suffered by women is in the private or domestic sphere. Thirdly, there are many exemptions from the application of the Act including State instrumentalities, educational institutions established for religious purposes, voluntary bodies, acts done under statutory authority, competitive sport, aspects of insurance and superannuation provision, taxation and social security laws.

(ii) sexuality discrimination

Further, discrimination against lesbians and gay men on the grounds of sexual orientation or sexuality is inadequately covered. The *HREOC Act* 1986 proscribes 'sexual orientation' discrimination in employment only and, at the state/territory level, discrimination on the basis of sexuality is not prohibited at all in Western Australia or Tasmania. In the remaining jurisdictions, a number of exemptions considerably narrow the ambit of the legislative protections. They include religious institutions, work in a private household and, in Victoria, Queensland and the Northern Territory, working with children.[39] Only NSW has adopted legislation that addresses same sex couple-based discrimination by including same sex cohabiting couples in the definition of 'de facto relationship' in 53 Acts.[40]

As with the other human rights protections covered by the limited provisions of the *HREOC Act 1986*, there is no recourse to legal adjudication for any complaint of discrimination on the basis of sexual orientation. The Human Rights Commissioner's powers are limited to holding an enquiry and effecting a non-binding settlement by conciliation. If a conciliated settlement cannot be reached, the only further measure available, and only where the allegation of discrimination has been substantiated, is a report by HREOC to the Attorney-General. In practice, this limits any hope of an effective response to complaints of violations by federal Government authorities. A federal bill to prohibit discrimination on the ground of sexuality or transgender identity was introduced to the Parliament by the Australian Democrats and is currently being debated (December 1999).

(iii) affirmative action

The Covenant allows 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 *Affirmative Action (Equal Opportunity for Women) Act 1986* is the only federal legislation that falls into this category. Until 1996, it required large employers to submit periodic reports on their progress in developing and implementing measures to secure the advancement of women in their organisations, and compliance was a prerequisite for eligibility for

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[37] Breastfeeding discrimination is limited to the provision of goods and services.
[38] HREOC, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999).
[39] Anna Chapman, 'Sexuality and Workplace Oppression', (1995) 20 *Melbourne University Law Review* 311.
[40] *De Facto Relationships Amendment Act 1998*.

various government contracts and forms of assistance. However, new reporting requirements were announced in October 1996, changing the requirement to submit periodic reports and abolishing compliance as an eligibility criterion for government benefits. Instead, a *voluntary* accreditation scheme for those with high quality equal opportunity programmes has been established. In parallel with its approach to Aboriginal and Torres Strait Islander affairs, the Government is favouring a formal rather than a substantive approach to equality, the latter being equated with negative or unfair discrimination. This approach completely misunderstands the critical importance of affirmative measures in addressing systemic systems of inequality.

(iv) equality between women and men

Article 3 in the Covenant underlines the obligation that States parties must ensure equality between women and men. The 1994 Australian Law Reform Commission Report, *Equality Before the Law: Justice for Women*, recommended the enactment of an Equality Act that would promote substantive equality and lead, in the longer term, to the entrenchment of an equality guarantee in the Australian Constitution.[41] Under the previous Government, a process was commenced to respond to the Report, but there has been no further progress since the change of government in 1996. When considered in the context of the dismantling of national women's machineries and the downgrading of anti-discrimination and affirmative action measures, the absence of any governmental response to the Report underlines a general backwards movement in the advancement of the equality of women and men.

Another indication of the Government's lack of concern for women's equality rights is its refusal to ratify the Optional Protocol to CEDAW, which was opened for signature in October 1999. The Government's explanation is that it believes that Australian women already enjoy equal rights and have no need for an international avenue of redress. However, if the Government really believed this, why wouldn't it happily adopt the Protocol?

Previous UN Concerns/Recommendations:

In 1997, CEDAW voiced the following concerns and suggestions:

- para 24: that 'the recommendation [of the Australian Law Reform Commission]...to enact an Equality Act...would...reinforce Australia's leadership role with regard to women's equality';
- para 28: was 'alarmed by policy changes that apparently slowed down, or reversed, Australia's progress in achieving equality for men and women, such as in housing and childcare programmes, and in employment assistance';
- para 29: 'that at a time of fiscal constraint, resources for programmes and policies benefiting women or aimed at overcoming discrimination, such as in health, in the provision of legal aid services, of training and awareness programmes for health workers, judicial, professional and others on violence against women, might be subjected to disproportionate budget cuts';
- para 40: 'encouraged the Government to collect statistical data on the participation of indigenous women in the workforce, in decision-making, in politics and administration, and in the judiciary'.[42]

Australia's Report:

The Government, in its Report, claims that it is 'fully committed to protecting each right guaranteed by the Covenant' (p2), and yet its Report falls a long way short of demonstrating this. The CESCR is again referred to the ICCPR Core Document for an outline of the institutional machinery and legislation that protects the rights enumerated in the Covenant. However, this Document, prepared for the 1994 ICCPR Report, makes no reference to the Covenant at all. Conveniently, it fails to acknowledge that the Covenant is not one of the scheduled instruments to the *HREOC Act 1986*,

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[41] The Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No. 69, 1994.
[42] CEDAW 1997, above n 13.

and makes no mention of the fact that its anti-discrimination regime falls short of the comprehensive protections required by the Covenant.

The Report also refers the CESCR to the discussion of the anti-discrimination provisions in Australia's Reports to the ICCPR (1994)[43], CEDAW (1995)[44] and CRC (1996).[45] As all three of these Reports were submitted before the present Government came to power and undertook the major policy changes outlined above, relying on them seems like little more than a cynical exercise aimed at disguising the retrogressive impact of its policies on the already incomplete anti-discrimination laws in Australia. This impression is supported by the, at best, piecemeal state and territory contributions with respect to articles 2 and 3.

Major Concerns with Australia's Report:

- *Why hasn't the Government introduced comprehensive anti-discrimination legislation that includes all the grounds specified in the Convention and, in particular, comprehensive coverage of all forms of gender and sexuality discrimination?*
- *What is the Government's position on affirmative measures to redress systemic discrimination and inequality and, in particular, why has it retreated from the mandatory measures in the* Affirmative Action (Equal Opportunity for Women) Act 1986*?*
- *Why has the Government not moved towards implementing the recommendations of t*he *1994 Australian Law Reform Commission Report,* Equality Before the Law: Justice for Women*?*
- *What standards have been established to ensure that measures aimed at overcoming discrimination against women are not compromised in the processes of fiscal restraint, privatization and outsourcing of Government services, and devolution of responsibilities to state and territory (local) governments?*
- *Why doesn't the Government intend to ratify the Optional Protocol to CEDAW?*

ARTICLE 6: THE RIGHT TO WORK

Major Issues:

As the emphasis shifts away from collective responsibility for guaranteeing social and economic safety nets to individual self-sufficiency and user-pay market-driven services, the right to work becomes even more important as it provides the basis for the enjoyment of other fundamental rights. Of critical importance is the workforce participation of groups who have traditionally been vulnerable to exclusion. In Australia, women constitute a significant proportion of these groups, especially if they are single parents, poor, indigenous or from a non-English speaking background. However, the deregulatory policies of the Government have increased the precariousness of women's workforce participation through the increased casualisation of the workforce, continuing high levels of unemployment and under-employment, and reduced affordability of child-care services. After more than a decade of rising rates of labour force participation by women, ABS Labour Force Surveys are starting to show a decline.[46]

(i) casualisation of the workforce

[43] *Reports of States Parties: Australia*, 27/06/94.
[44] *Third Periodic Reports of States Parties: Australia*, CEDAW/C/AUL/3, 27 September 1995.
[45] *Initial Report of States Parties: Australia*, CRC/C/8/Add.31.
[46] Deborah Mitchell, 'Family Policy and the State', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 73, 81.

In March 1999, 50% of Australian women were in paid work, constituting 40% of the total Australian workforce.[47] While these figures reflect an increase in women's workforce participation over last decade, only 56% of working women are employed full-time. Women make up 72.4% of all part-time workers and 63% of all casual workers. Almost one third (32%) of all working women are employed as casuals. As casual employment has increased from 13% in 1982 to 26% in 1996, and part-time employment has increased from 15% to 25% over the same period[48], women have been consistently over-represented. This is perhaps not surprising given that partial employment is characterised by insecurity of tenure, unpredictability of income and hours of work, low pay, low status, the absence of training and promotion opportunities, and few, if any, benefits like holiday pay and sick leave. Also, reduced public sector employment seriously affected women and indigenous people, which has traditionally been a source of more secure employment for both groups.

The increased casualisation of the labour force is a direct result of the restructured industrial relations framework that seeks to deregulate labour. In fact, Australia has one of highest rates of casualisation in the OECD.[49] While increased flexibility has been promoted by the Government and employers as providing benefits for women who juggle work and family responsibilities, this is often not the reality. The 1996 HREOC *Stretching Flexibility* Report found that 1 in 4 part-time women workers wanted to work more hours per week.[50] In many cases casual women workers are providing employers with the benefits of flexibility at ordinary rates of pay, while the unpredictability and insecurity of work exacerbates problems with child-care, and the stresses of poor working conditions take their toll on family life. There is also evidence that a growing proportion of non-standard workers is living in poverty.[51] At the same time full-time jobs are disappearing and, although restructuring has had highly gendered effects, it should be noted that men's position in the workforce has also deteriorated.

(ii) reduced affordability of child-care services

Access to affordable and good quality child-care is essential for women's enjoyment of the right to work. During the 1970s and 1980s, the child-care system in Australia developed within the framework of a community-based, non-profit vision of promoting the well-being of children within their communities. During the early 1990s, community-based child-care became increasingly marginalised as a result of the efforts of the previous federal Government to encourage commercial child-care provision, with the aim of reducing the public expenditure involved in community sector provision. However, it was not until the election of the present federal Government that child-care policy came to be driven by conservative forces intent on resurrecting the single-income two-parent family by encouraging (or forcing) women out of the workforce.[52] Since the first budget of the Government in 1996, childcare provision has become increasingly market-driven. Child-care tax rebates have been cut back and government support has moved from providing operational subsidies to community sector providers, including family day-care, long day-care centres and out of school hours centres, to the payment of child-care assistance directly to consumers. As costs have risen, accessibility has been dramatically reduced for single-parent, low and middle-income families.[53]

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[47] ACTU, 'Why the Proposed "Second Wave" Industrial relations Changes will Disadvantage Women', 1.
[48] Bernadine Van Gramberg, 'Women, Industrial Relations and Public Policy', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 99, 103.
[49] Ibid 104.
[50] Sara Charlesworth, *Stretching Flexibility: Enterprise Bargaining, Women Workers and Changes to Working Hours*, HREOC 1996.
[51] Van Gramberg, above n 48, 107.
[52] Deborah Brennan, 'Child care: Choice or Charade?', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 85. The budget reintroduced tax rebates for non-working spouses called Family Tax Assistance. Dependent Spouse Rebates had been abolished by the Labour Government in 1994.
[53] Ibid 96.

There is evidence that new private centres are concentrated in higher income areas[54] and that community child-care centres in low-income areas of high need are closing.[55] There is also emerging evidence that the changes to child-care arrangements have indeed affected women's workforce participation, with the ACTU and others expressing concern that women are leaving the workforce, 'possibly due to lack of access to affordable, quality childcare'.[56]

Article 6 requires the Government to implement measures that are aimed at ensuring work for everyone who is available to work. However, the massive restructuring of the Australian labour market over the last decade has had highly gendered effects with women disproportionately bearing the economic burdens of an increasingly casualised workforce and reduced government support for child-care. The right to work is fundamental to women's dignity as well as to their survival. Unregulated market forces are incapable of ensuring equitable access to full employment for groups that face structural marginalisation. In fact, the operation of the free market entrenches inequalities where they serve profit-driven agendas, as with cheap and flexible female labour. The Covenant requires the Government to act to ensure the right to work for everyone. At a minimum, this obligation must involve Government intervention when profit-driven agendas override the social interest in the right to work being available to everyone.

Previous UN Concerns/Recommendations:

In 1997, CEDAW recommended:

- para 35: 'evaluation and assessment..for Australia's new childcare benefit scheme [of the impact on women of different age groups, with different educational levels and in different occupational groups]';
- para 40: 'collect statistical data on the participation of indigenous women in the workforce';
- para 28: 'The Committee was alarmed by policy changes that apparently slowed down or reversed Australia's progress in achieving equality between women and men, such as in housing and childcare programmes, and in employment assistance'.[57]

Australia's Report:

The Government describes its industrial relations reforms as necessary to increase workplace productivity in the context of international competition. The shift from a centralised collective bargaining system to more individualised bargaining at the workplace level is described as a means to increase productivity and deliver greater rewards to employees. Further, the Government claims that its reforms will stimulate economic growth and 'thus employment growth and higher living standards'(p10). The Report makes no mention of the gendered effects of the dramatically increased levels of partial employment, or of the disincentives for working women introduced by its child-care reforms. (See article 7 for further discussion of the new industrial relations system and its implications for Covenant rights).

The Report outlines the Government's national Vocational Education and Training (VET) policies, emphasising efforts to ensure the participation of disadvantaged groups including women and girls, people with disabilities and indigenous people. It acknowledges that reduced government sector employment will have serious repercussions for the indigenous unemployment rate, which is already unacceptably high, but the Report offers no significant response.

Statistics in appendices 13-31 bear no relationship with the discussion in the Report, and are hard to follow in the absence of explanation. However, they do confirm that only about half of the waged

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[54] Ibid.
[55] Results of an Australian Services Union Study reported in *The Age,* 13 October 1999.
[56] ACTU, above n 47,1; HREOC, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999).
[57] CEDAW 1997, above n 13.

jobs in 1994-96 were long-term and permanent (appendix 22). They also appear to show continuing intractable problems with unemployment for young people, Aborigines and Torres Strait Islanders, and long-term unemployed people, yet the Report makes no mention of measures to counteract these difficulties beyond training programmes which, although necessary, are a clearly inadequate response.

Major Concerns with Australia's Report:

- *What effort has been made to assess the economic and social effects on the increasing numbers of casual and part-time workers, and what measures have been employed to ameliorate the resulting inequities?*
- *In particular, how will the Government address the negative effects of partial employment on women?*
- *How can the privatisation of child-care services and the concomitant increase in child-care costs be consistent with the Government's obligation to ensure women's right to work?*
- *As employment shifts from the public to the private sector, as a result of the Government's economic efficiency policies, how are corporate entities held accountable for their compliance with anti-discrimination and equal employment opportunity laws?*

ARTICLE 7: THE RIGHT TO JUST & FAVOURABLE CONDITIONS OF WORK

Major Issues:

The federal Government undertook a major restructuring of the law and policies governing workplace relations with the *Workplace Relations Act 1996* (WRA). Inspired by the global move to free market principles and promising greater productivity and efficiency, the Government's goals are to deregulate the labour market, decentralise systems of arbitration and conciliation, reduce the power of trade unions, and replace industry awards with individualised agreements. As the objects of the Act make clear, the Government's aim is to dismantle the long-standing collectivised system of industrial regulation in Australia by reducing the oversighting role of the Industrial Relations Tribunal and diminishing the scope for advocacy by trade unions, 'ensuring that the primary responsibility for determining matters affecting relations between employers and employees rests with the employer and employees at the workplace or enterprise level'.[58]

The new approach has been replicated in all states, except for NSW which has retained a collective model. The ILO has voiced many concerns about the new system, which the Government has failed to address (see below). On the contrary, the Government introduced amendments to the WRA in 1999 that would have further reduced the role of collective industrial relations mechanisms and virtually eliminated the right to strike, but they have fortunately been rejected by the Upper House of Parliament. Many important workers' rights issues are at stake in the restructuring process, but we wish to highlight four in particular: the disadvantages faced by women in the individual bargaining process; the lack of adequate minimum standards including anti-discrimination protections and paid maternity leave; the lack of progress in dismantling the highly gender-segmented workforce and achieving equal pay; and the need for regulation of home-based workers.

(i) disadvantages faced by women in individual bargaining

One of the cornerstones of the WRA is the promotion of individual Australian Workplace Agreements (AWAs) over collective awards. The Act does provide a range of options, including the more collectivised Certified Agreements, but the preference for individual bargaining is clear. Women can be disadvantaged even in collective bargaining processes, but their weaker bargaining position

[58] *Workplace Relations Act 1996* (WRA), s3(b).

is exacerbated in individual bargaining for a range of reasons. First, they are less likely to be unionised than men and less likely to have the specialist skills that strengthen the bargaining position of individual workers. Secondly, because of the high levels of gender segregation in the workforce, and the related concentration of women in lower paid and partial employment, women are often not in a position to bargain effectively on their own behalf. The option of employing a Bargaining Agent is not, in reality, available to women on low incomes, and migrant women in particular are disempowered and less likely to be adequately informed.[59] Thirdly, because women continue to shoulder the primary responsibility for children and family support, they have particular needs with respect to hours and conditions of work, which further weakens their bargaining position. Finally, women's leave provisions, for example maternity leave, become even more dispensable in a deregulated environment.

The WRA does specify certain requirements that employers must fulfil with respect to ensuring that employees are informed, consulted and aware of their rights in the process of bargaining. However, legislative prescription falls a long way short of genuinely involving and empowering employees in the negotiation process. These concerns are born out in the evidence of recent Australian studies showing that larger wage increases have occurred in sectors where men work[60] and, as the Industrial Relations Commission warned earlier, that wages have fallen for disadvantaged groups including women, young people and migrant workers.[61] Also, there is evidence of increased work intensification and longer working hours for the same pay in female dominated industries, like nursing.[62] The philosophy of choice, autonomy and freedom of contract has the potential to disregard, and even implicitly condone, exploitation in situations of inequality in bargaining power.

(ii) the lack of adequate minimum standards

One way to ameliorate unequal bargaining power is to have in place a package of compulsory minimum standards that help to ensure fair and equitable agreements. For women, these standards would include effective protections against discrimination, paid maternity leave provisions, and adequate pay increases tied to a national system of equal pay determination. The minimum content requirement for AWAs and Certified Agreements are indeed minimal and do not include maternity leave or equal pay standards. But they do require a non-discrimination clause.[63] While this sounds good in theory, in reality the standard non-discrimination clause is very general and there are enforcement difficulties. Where an AWA is discriminatory, it would appear that a complainant must seek redress from an anti-discrimination tribunal. This places a considerable burden on individual workers and does not address the need to institute positive measures to combat systemic discrimination.[64] As discussed earlier with respect to articles 2(2) and 3, the anti-discrimination regime in Australia is less than adequate. In the employment context, the most common type of complaint is about sex discrimination and, in 1995-96, 48% of complaints under the *Sex Discrimination Act 1984* involved the issue of sexual harassment[65], which is also an issue of occupational health and safety. Further, discrimination on the basis of pregnancy has been found to be widespread[66] and breastfeeding mothers also face considerable difficulties.[67] There is obviously an urgent need to strengthen anti-discrimination measures in the context of employment. However, the Government recently revealed the extent of its lack of resolve in this regard when it argued at an

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[59] Van Gramberg, above n 48, 105.
[60] Women's Electoral Lobby study 1999.
[61] Van Gramberg, above n 48, 99.
[62] Ibid 107-108.
[63] WRA s 170VG. The only other mandatory requirement is a dispute resolution clause.
[64] Therese MacDermott, 'Labour Law and Human Rights', in David Kinley (ed), *Human Rights in Australian Law* (1998) 194, 215-216.
[65] Ibid 199.
[66] HREOC, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999).
[67] Ibid. The HREOC recommends clarifying the SDA to protect the rights of breastfeeding mothers.

ILO meeting that employers should be able to conduct pregnancy tests on women seeking jobs.[68] (The Government has since denied that this was its intention.)

Paid or even *unpaid* maternity leave is not required in workplace or certified agreements. Australian governments have never committed themselves to ensuring the provision of paid maternity leave. Australia has a CEDAW reservation to this effect[69], has not ratified the ILO *Maternity Protection Convention 1952* (No 103) because it would be inconsistent with its workplace reforms, and argued recently against the ILO setting an international standard for paid maternity leave.[70] Although the Commonwealth public service does provide 3 months paid maternity leave, this is rarely available to private sector employees. The recent HREOC pregnancy inquiry found that inability to obtain paid maternity leave was a significant factor contributing to Australian women and their partners deciding to not have children or to limit the size of their families, and recommended that the Government remove its CEDAW reservation.[71] Reduced public sector employment and decentralised individual and workplace bargaining, in combination, threaten to reduce the already precarious and uneven provision of leave related to maternity. Yet the Government is its Report concedes that it is unlikely to ratify ILO Convention No 103 in the foreseeable future (p34).

With respect to equal pay, the WRA retained equal remuneration provisions that were introduced by the previous government in the *Industrial Relations Reform Act 1993,* although the present Government had originally planned to repeal them. Under the provisions, an application for an Equal Remuneration Order can be made to the Industrial Relations Commission by an employee, trade union, or the Sex Discrimination Commissioner.[72] While filing fees and costs awards are powerful disincentives to women who might otherwise utilise this avenue of redress, the greatest impediment to the effectiveness of these provisions has proved to be the narrow technical requirement that a complainant must establish that differential remuneration was *based on* sex discrimination. That is, 'the issue is not who performs the work but the basis on which the rates have been established'.[73] Thus, for example, gender segmentation does not amount to a requirement or condition that is discriminatory. More broadly, this approach fails to recognise that there are many circumstances where remuneration has clearly been affected by the sex of the worker, but it would be difficult or impossible to *prove* discrimination under any definition.[74] Further, the requirement that differential wage rates must be shown to be based on sex discrimination is not in keeping with ILO Convention 100 on Equal Pay.[75] The reality of tackling the seemingly intractable differential between male and female wages requires a concerted national effort (see below for further discussion).

Despite the Government's tireless promotion of its new industrial relations regime, many female-dominated industries continue to rely on award coverage, a fact that further underlines women's lack of personal and organisational power in the changed circumstances. The award system would provide an adequate underpinning to the new bargaining arrangements if it had been left intact, but the powers of the Industrial Relations Commission to make, vary and enforce awards has been substantially reduced, and restricted to 20 'allowable award matters'.[76] The result is that the award

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[68] *The Sydney Morning Herald*, 4 October 1999.
[69] CEDAW article 11(2) requires States Parties to provide paid maternity leave for all women workers.
[70] Above n 68.
[71] HREOC, above n 66, rec 44.
[72] WRA, s 170BD.
[73] Commissioner Whelan, *AMWU and The Age [Print R3273], C No. 32261 of 1999* following the approach of the first test case *AMWU v HPM Industries (No.1[Print P9210] and No.2 [Print Q10021]*. For discussion see Women's Electoral Lobby et al, *Submission to the Senate Employment, Workplace Relations, Small Business and Education Committee, Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, submission 1.
[74] Ibid 3, citing Justice Glynn, *NSW Pay Equity Inquiry*, NSW Industrial Relations Commission.
[75] Ibid.
[76] WRA, s89A.

system can provide only minimal safety net protections, which is a far cry from the dynamic, socially responsible and forward-looking system of the past. For women workers who are already in receipt of lower rates of pay than men, the maintenance of award rates and conditions is obviously critical, but the new system does not allow this to happen. Indeed, the goal of the Government is to convert the award system to a safety-net measure, which further undermines the quality and effectiveness of the collectivist system.

(iii) the lack of progress towards achieving equal pay

Unequal pay is deeply entrenched in the Australian system, legitimated by the first national test case to fix wages policy in 1907, which awarded women 50% of the male 'family wage' rate.[77] It was not until the Equal Pay cases of 1969 and 1972 that equal pay was accepted as a national wage-fixing principle. However, the implementation of this principle has been less than satisfactory and there is, as yet, no effective system for making a 'fair and equal' comparison between female and male occupations. The equal remuneration provisions of the WRA are throwing up further barriers to the realisation of equal pay, rather than assisting the process (see above). Giving effect to the principle of equal pay is especially challenged by the endemic gender segmentation of the Australian workforce.[78] Women workers are mainly concentrated in 2 industries, retail trade, and health and community services. They also make up the majority of workers in 2 other industries, education and accommodation/cafes/restaurants, and constitute a significant sector in manufacturing (26%). Even within these industries, and after 30 years of equal pay in principle, women are further concentrated in a narrow range of occupational categories at lower levels of status and pay. This gender hierarchy has persisted despite award coverage in these industries so, although preferable to individual bargaining regimes for most women, the award system has never been a panacea for women workers.

As a result, equal pay remains a long way from realisation. In 1999, comparing the earnings of all employees, women earn 66.3c to men's $1; if only full-time workers are considered, women earn 80.5c to men's $1.[79] There is also evidence that the gender gap in income is widening as 1994 figures indicated that, for full-time workers, women earned 84c to men's $1.[80] The gap obviously bears some relationship to women's lack of bargaining power, discussed above. It is also the result of male dominated trade unions, and less access to discretionary over-award payments that play a significant part in lifting many male wages.[81] The 1992 HREOC Report into over-award payments, found it likely that women's differential access to such payments was due to discrimination in the form of gendered assessments of the value of work.[82] Article 7(a)(i) obliges the Government to guarantee women, 'as a minimum..fair wages and equal remuneration for work of equal value', and the CESCR has made it clear that this provision is capable of immediate enforcement.[83] In a developed country like Australia, the absence of measures that will ensure the attainment of this minimum is surely a serious violation of the Covenant. The Government should develop guidelines on equal remuneration that are consistent with its obligations under the Covenant and the ILO, and establish mechanisms that ensure national compliance.

(iv) the particular vulnerability of home-based workers

Home-based workers, or outworkers as they are known in the textile industry in Australia, are particularly vulnerable to low wages, exploitative employment contracts and unsafe working conditions. It is estimated that there are 329,000 outworkers in Australia and that the majority are

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[77] Harvester Case (1907) 2 CAR 173.
[78] ACTU, above n 47; Van Gramberg, above n 48, 104.
[79] Ibid (ACTU); *The Age,* 30 September 1999.
[80] Van Gramberg, above n 48, 100; ACTU, above n 47, 2-3.
[81] Ibid (ACTU) 5.
[82] HREOC, *Just Rewards* (1992).
[83] General Comment 3, above n 33, para 5.

non-English speaking migrant women with very little knowledge of their rights and entitlements.[84] These workers are not covered by awards in Victoria, because they are considered to be independent contractors, and elsewhere in Australia award coverage is not enforced. Home-based work arrangements also raise issues with respect to child labour. It should be noted that the Government, in its Report, claims that child labour is not a problem in Australai (p35) but there is considerable evidence of children working in the home-based textile industry. A Senate Inquiry into the issue of outworkers nation-wide recommended the implementation of a Homeworkers Code of Practice, but this measure was expressly rejected by the Government in 1998. Outworkers and often their children are perhaps the most unprotected workers in Australia. Their situation falls substantially below the minimum standards that article 7 requires and thus it is incumbent on the Government to explain how this situation has been allowed to develop and outline effective remedies, including judicial remedies[85], that will immediately address it.

[84] Textile, Clothing and Footwear Union of Australia, *Fairwear Campaign Kit: Background Information.*
[85] General Comment 3, above n 33, para 5.

Previous UN Concerns/Recommendations:

In 1997, the ILO Committee of Experts made the following requests with respect to Australia's compliance with its obligations under *Convention No. 98: The Right to Organise and Collective Bargain, 1949*:

- para 4: 'that the provisions of the [Workplace Relations] Act do not promote collective bargaining as required under Article 4 of the Convention..therefore, requests the Government to indicate in its next report any steps taken to review these provisions of the Act and to amend it to ensure that it will encourage collective bargaining'.

The Committee expressed similar reservations with respect to legislation in Queensland, Western Australia and South Australia.

In 1997, the CEDAW:

- para 32: expressed concern 'that the legislation on industrial relations providing for the negotiation of individual contracts between employer and employee may have a disproportionately negative impact on women. Part-time and casual workers, of which women formed a disproportionate share, are usually in a weaker position than other workers to negotiate favourable working conditions, in particular with regard to benefits';
- para 32: noted 'with concern Australia's reservation to CEDAW with respect to paid maternity leave, and non-ratification of ILO Convention 103';
- para 35: recommended 'an evaluation should be conducted of the Workplace Relations Act of 1996, assessing its impact upon women of different age groups, with different educational levels and in different occupational groups. The Government should assess whether the Act leads to increased or decreased part-time and casual work, and its impact on women workers' benefits and on workers with family responsibilities, particularly women's ability to obtain maternity leave'.[86]

In 1997, CRC recommended that:

- para 29: 'specific minimum age(s) be set for employment of children at all levels of government';
- para 31: Australia 'review its legislation and make paid maternity leave mandatory for employers in all sectors, in light of the best interests of the child.[87]

Australia's Report:

The Government briefly outlines its workplace relations reforms, describing them as 'workplace productivity measures' (p10) and using the language of negative liberties - 'freedom of choice of employment' and 'political and economic freedoms of the individual' - rather than rights. The CESCR is referred to appendix 102 for further information, which is a comprehensive guide to the new legislation produced by the Government. Couched in the Government's own promotional terms, this provides a one-sided overview that makes no attempt at a critical assessment of the changes. There is no reference to the disadvantages faced by women in the bargaining process, nor to the inadequacy of the minimum standards set under the Act, yet these issues have been the focus of women's submissions to the Government for some time.[88] Further, the Government does not address any of the concerns expressed by the ILO in 1997, nor acknowledge the high levels of anxiety and insecurity experienced by workers who face reduced job security, higher demands for mobility and flexibility, and greater individual responsibility for bargaining wages and conditions.

The Report also places a great deal of faith in the now residual award system as a means of ensuring fair and adequate minimum wages. While it is important that a national standard is maintained, the Government has argued, without fail, against any rise in the minimum wage each year since it came to power. This is surely inconsistent with the Government's obligations under the Convention. Further, the legislation requires that the Industrial Relations Commission must have

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[86] CEDAW 1997, above n 13.

[87] CRC 1997, above n 24.

[88] See, for example, Submission, above n 73, from Women's Electoral Lobby, National Pay Equity Coalition, and Business and Professional Women of Australia (NSW Division).

regard to 'the need to encourage making agreements between employers and employees with a much reduced role for uninvited third party intervention' in setting minimum wages (p12). This puts the Government's economic rationalist ideology on an equal footing with considerations of fairness in the determination of minimum wages, yet the Covenant in article 7(a)(ii) requires that minimums be set according to need, in order to provide, for 'all workers...a decent living for themselves and their families'.

The Government acknowledges that women's wages are still lower than men's, listing some factors that influence this and referring vaguely to the provisions in the WRA that address the issue of equal pay (p14-15), but there is no indication that the Government envisages any further measures to address the discrepancies, despite evidence that the gap has grown wider since the introduction of its reforms. The Government also reports on the success of the Affirmative Action Agency, established by the *Affirmative Action (Equal Opportunity for Women) Act 1986,* reporting that 2,750 of Australia's largest organisations reported, in 1996-97, on their progress in implementing affirmative action programmes for women. The Report makes no mention of the Government's new reporting requirements, announced in October 1996, that replace the system of compulsory annual reporting with a voluntary accreditation scheme which effectively undermines these successes and makes affirmative action optional.

As elsewhere in the Report, there is completely inadequate reporting of state level industrial relations legislative changes and their impact on the right to just and favourable conditions of work. In light of ILO criticism of these regimes, this is surely unacceptable. Further, the statistics in appendices 32-37 do not provide any data specifically linked to the new system, revealing a more general problem that there is an absence of mechanisms established to monitor the operations of the WRA.

Major Concerns with Australia's Report:

- *How can Australia meet its obligations under article 7 to 'recognise the right of everyone to the enjoyment of just and favourable conditions of work' when the primary negotiation of these matters takes place between individual employers and employees at the workplace level and the oversighting functions of the Industrial Relations Commission have been significantly diminished?*
- *In the light of evidence that women's inequality in bargaining power has led to falling wages and work intensification - regressions that are a clear violation of the Convention - how does the Government intend to ensure that women, and other disadvantaged groups, are sufficiently empowered in the bargaining process to make it fair?*
- *Without an adequate package of mandatory minimum standards and effective mechanisms that enforce compliance, how can the Government assure the CESCR that it has complied with its obligations under the Covenant to provide 'fair wages and equal remuneration', 'safe and healthy working conditions', 'equal opportunity for everyone to be promoted', and 'reasonable limitation of working hours and periodic holidays with pay'?*
- *How does the Government justify its refusal to guarantee paid maternity leave in light of international standards to the contrary, and the improbability that this would become a widespread entitlement in the process of individual workplace bargaining?*
- *What measures will the Government adopt to ensure equal remuneration for women, given the foundering of equal pay claims under the provisions of the WRA and evidence that the gender gap in wages is increasing?*
- *How does the Government plan to address the exploitative wages and conditions experienced by outworkers in the textile industry since it does not support the Homeworkers Code of Practice?*
- *What mechanisms does the Government have in place to monitor the effects of the Workplace Relations Act 1996 on disadvantaged workers, especially women, and how is this data made available to the community?*

ARTICLE 8: THE RIGHT TO FORM & JOIN TRADE UNIONS

Major Issues:

The general effect of the WRA is to discourage unionism, which is at odds with the recognition in article 8 that collective organisation by workers is necessary 'for the promotion of [their] economic and social interests'. The right to collectively organise is of particular importance for women, given their comparatively weaker individual bargaining power, their changing patterns of work as family responsibilities alter, and the entrenched male domination of industrial relations. Although trade unionism has not remedied all of the disadvantages that women face in the workforce, the centralised system of regulating wages and working conditions in a comprehensive manner has been of vital importance to women. The continuing high levels of reliance on awards in female dominated industries attests to ongoing importance of collective mechanisms for women despite the promotion of individual bargaining by the Government. In the current climate, only effective trade union advocacy for disadvantaged women workers can hope to reverse the move towards reducing awards to minimum safety nets, which will leave many women and their families in poverty.

The right to form and join trade unions is made up of several component rights, including the right to freedom of association and the right to strike. The ILO has found that the WRA breaches Australia's treaty obligations with respect to both of these rights (see below). The right of freedom of association is generally understood as a positive right for people to choose to belong to trade unions, as reflected in the wording of article 8. However, the WRA places unprecedented emphasis on right of workers *not* to join trade unions.[89] This emphasis is arguably not in the spirit of the freedoms envisaged by the Covenant or the ILO instruments. In combination with other provisions that prohibit compulsory unionism and preference, reduce the minimum numbers required for a union to be registered, limit rights of entry of trade unions to workplaces, and extend earlier provisions prohibiting discrimination on the basis of union membership to include discrimination because of non-union membership, the effect is to fragment and disempower unions rather than protect their right to exist and function effectively in the interests of workers.

The circumstances in which it is lawful to strike have been drastically curtailed by the WRA. In essence, industrial action is recognised as legitimate only during the process of negotiation of an AWA or a single-business (not multiple-business) Certified Agreement. Even then certain preconditions must be fulfilled: negotiations must have been commenced by giving written notice, attempts to reach agreement must have been tried and failed, and advance notice of 3 working days must have been given to the employer. Once an agreement has been reached, industrial action is unlawful for the duration of the agreement. The powers of the Industrial Relations Commission to stop or prevent unlawful strikes have been strengthened. The Act treats lockouts by employers in the same manner as industrial action by employees which, as with the emphasis on the freedom *not* to join a union, misrepresents the unequal distribution of power in industrial relations. As early as 1991 an ILO Committee of Experts found that the right to strike was compromised by the combined effect of laws and practices in Australia. The degree of non-compliance can only have been worsened by the WPA.

Article 8 does allow states some leeway to regulate trade union organisation as may be necessary to protect national security or public order or the rights and freedoms of others. However, these limitations must be interpreted narrowly. The Limburg Principles on the Implementation of the Covenant, for example, stress that national security will itself be endangered by systematic violation

[89] WRA s3(f).

of economic, social and cultural rights, and that such violations may even threaten international peace and security.[90] The extremity of the limitations placed on trade unionism by the WRA cannot be justified in the terms allowed by article 8, which leads to the conclusion that they violate Australia's obligations under the Covenant.

Previous UN Concerns/Recommendations:

As early as 1991, the ILO Committee on Freedom of Association expressed concern:

- that the cumulative effect of restrictive laws and practices with respect to the right to strike 'could be to deprive workers of the capacity to lawfully take strike action to promote and defend their economic and social interests'.[91]

In 1997, the ILO Committee of Experts made the following requests with respect to Australia's compliance with its obligations under *Convention No. 98: The Right to Organise and Collective Bargain, 1949*:

- para 3: that the Government 'take the necessary measures to ensure that workers are adequately protected against discrimination based on trade union activities, including negotiating a collective agreement at whatever level the parties deem appropriate'.

In 1998, the ILO Committee of Experts made further requests with respect to Australia's compliance with its obligations under *Convention No. 87: Freedom of Association and Protection of the Right to Organise, 1948*:

- to reverse the excessive limitations that have been placed on the subject matter of strikes;
- to repeal the general limitations on sympathy strikes;
- to repeal restrictions on strikes and boycotts beyond essential services;
- to attend to similar difficulties with legislation in Queensland, South Australia and Western Australia.

Australia's Report:

The Report describes the WRA as containing 'extensive freedom of association provisions' (p20) and as 'widen[ing] the right to engage in protected industrial action' (p22).This is an example of the misleading double-speak that has been used by the Government domestically to promote its industrial relations agenda, which includes diminishing the power of trade unions to engage in collective bargaining. It is mystifying why the Government has included statistics on trade union membership (appendix 38) when it has made every effort to reduce membership. Compounding the unsatisfactory nature of the Government's reporting on article 8, the Report does not acknowledge the veracity of any of the concerns expressed by the ILO about the right of workers to organise collectively and to strike.

Major Concerns with Australia's Report:

- How is the restrictive regulation of trade unions by the WRA consistent with the principle, implicit in article 8, that collective organisation by workers is necessary 'for the promotion of [their] economic and social interests'?
- How can the Government justify the excessive limitations it has placed on the right to strike given that the discretion allowed by article 8 is to be read narrowly?

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[90] *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, approved by a groups of experts in international law, Maastricht, Netherlands, 2-6 June 1986. See (1987) 9 *Human Rights Quarterly* 122.

[91] 277th Report of the ILO Committee on Freedom of Association, Geneva, 1991, paras 151-246; ILO, Committee of Experts on the Application of Conventions and recommendations, Freedom of Association and Collective Bargaining, Geneva, 1994, paras 136-151.

ARTICLE 9: THE RIGHT TO SOCIAL SECURITY & SOCIAL INSURANCE

Major Issues:

Universal provision of social assistance is clearly not consistant with the new era of the minimalist state. Instead, the emphasis is on self-provision and the state's responsibility is confined to a safety net role. As a result, increasing limitations have been placed on access to income support and social wage benefits. For example, more rigorous income and assets tests have been introduced across the board, and there have been cuts to student allowances, rent assistance, child disability allowances, child-care subsidies (see above), income support for 16-18 year olds, and virtually all social security supports for newly arrived migrants for the first 2 years have been withdrawn.

Yet the deregulated labour market makes workers more vulnerable to variations in demand for labour and, as discussed above, it has dramatically increased the extent of partial and under-employment, especially for women. Social security policies need to be responsive to the 'flexibility' of labour required by the market. This means more flexible social assistance is required, rather than a more fragile, tightly targetted social safety net, which is the goal of the Government. Those who are most likely to be dependent on social assistance are those people already disadvantaged by structural inequalities - female-headed households, indigenous people[92], recently arrived immigrants and elderly people, the majority of whom are women. While the Government's emphasis on self-provision is not necessarily inconsistent with the realisation of economic, social and cultural rights, as the CESCR has said,

> while much energy and many resources have been expended by governments on promoting the trends and policies that are associated with globalisation, insufficient efforts are being made to devise new or complementary approaches which would enhance the compatibility of those trends and policies with full respect for economic, social and cultural rights.[93]

The dismantling of the centralised wage-fixing system, and the regressive tax regime that will see the introduction of a goods and services tax in July 2000, also raise important questions about the state's role in redistribution. It is clear that market forces cannot be relied upon to distribute wealth equitably and that the state has an important responsibility to put policies in place that ensure that the benefits of economic development are spread evenly throughout the community. However, the tax policies of the Government, together with its restrictive social security policies, appear to be exacerbating the growing gap between rich and poor rather than ameliorating it.

A major component of the new emphasis on self-provision is the introduction of occupational superannuation that will provide the basis for self-funded retirement income. Contributions are paid by employers and are based on individual income. Women are fundamentally disadvantaged by this scheme because of their unequal position in the workforce: lower pay, partial employment, interrupted patterns workforce participation, and less opportunity for promotion and incremental salary increases. In 1994, women on average spent 17 years in labour force compared with men's 39 years.[94] While this is changing, the predictions are that women currently entering the workforce will spend an average of 28 years in it. This is still considerably less than men and suggests that the disadvantages faced by women will be ongoing. Thus women, in retirement, will have fewer financial resources than men for many years to come and will be more likely to be dependent on the

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[92] Government Report, above n 2, appendix 44, indicates that 55% of Aborigines and Torres Strait Islanders received their main source of income as a government payment in 1994.

[93] *Statement on Globalisation*, above n 3, para 4.

[94] Older Women's Network, *Women and Pensions*, paper presented to the Senate Standing Committee on Superannuation, 1995, 5.

aged pension. Already in June 1993, 68% of aged pensioners were women, and 68% of those were dependent on the full pension.[95] That is, they had no other significant source of income. Therefore the disadvantages women face with increasingly self-funded retirement incomes based on superannuation must be mitigated by government assistance.[96] This means maintaining pension rates at livable level and/or introducing a supplement for those who are dependent solely on the pension. The present system of maintaining pensions at 25% of Male Average Weekly Earnings has inherent problems since it ignores the receipt of non-income benefits by wage earners, which can be very considerable.

A second area that impacts disproportionately on women is the rule that new migrants and refugees have no access to social security for the first 2 years after arrival. This policy just seems punitive, rather than even having an economic rationalist basis. Newly arrived women immigrants are forced to find ways to keep themselves and their families without even safety net support. The grounds of availability of Special Benefits to these people depends on fulfilling prohibitively narrow criteria. Women's refuges report that large numbers of refugee and immigrant women are dependent on them for housing, income and support because of the minimal access to governmental assistance.

It is of great concern to us that the provision of social assistance in Australia is in the form of a gratuity. There is no *right* to minimum income support that is enforceable at law.[97] The only 'remedy' available to someone who has been denied social security support is an administrative law remedy that allows judicial review of the decision-making process that resulted in the applicant being denied the benefit. The administrative decision can only be reviewed with respect to its compliance with the terms of the legislation that makes the benefit available. If the legislation itself denies the benefit to the applicant, the courts have no power to alter the legislation to make it consistent with Australia's international obligations under the Covenant.
Whether this complies with Australia's obligations under article 2(1) 'to take steps...by all appropriate means' to achieve the full realisation of the rights in the Covenant, in this instance the right to social security, is an important question for the CESCR. While the CESCR has acknowledged that non-judicial remedies may be effective, they have also said that judicial remedies (ie direct judicial enforcement of the Covenant rights) will be necessary where the right cannot be otherwise ensured.[98] In our view, the right to a minimum income is one such right because it provides an indispensable foundation upon which to base other aspects of the right to social security.

Australia's Report:

The Government has undertaken an extensive programme of reform and simplification of the social security system, as outlined in its Report. However, the rhetoric of equity and individualisation of benefits must be read cautiously in light of the emphasis on 'mutual obligation', self-provision, and the overriding goal to substantially reduce social security outlays. Provided these changes are designed to fulfil Australia's obligations under the Covenant, there is nothing to fear from them. But Australia's Report makes no attempt to link its new policies to the safety net minimums that it is obliged to ensure. In fact, there are no mechanisms in place to guarantee a minimum income to all, yet Australia is a developed country that has experienced continuous economic growth through the 1990s. The absence of any reference to the gendered effects of its superannuation policies is an indication that the Government is unwilling to acknowledge and address any inequitable consequences that its new policies might engender, which strengthens the argument that judicial

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[95] Ibid 5.
[96] Sue Walpole, 'Indirect Discrimination and Superannuation', in EPAC/OSW, *Women and Superannuation: Selected Seminar Papers* (1994).
[97] *Green v Daniels* (1977) 51 ALJR 463.
[98] *The domestic application of the Covenant: 03/12/98*. General Comment 9, E/C.12/1998/24, 3 December 1998, para 3.

remedies are necessary to ensure that Australia's minimum obligations under the Covenant are fulfilled.

Major Concerns with Australia's Report:

- *How does the Government understand the redistributive responsibility of the state in the context of its facilitation of market-based distributive mechanisms?*
- *How does the Government justify the introduction of regressive taxation, like the Goods and Services Tax (GST), when free market economics are increasing the gap between the rich and poor? Shouldn't Government policy seek to reduce and ameliorate that gap?*
- *What plans does the Government have to redress the gender inequities that are deeply embedded in its self-funded retirement policies?*
- *Can the Government assure the CESCR that newly arrived migrants are guaranteed minimum safety net supports, commensurate with Australia's capacity to provide them?*
- *How does the Government justify the provision of social assistance as a gratuity or benefit, rather than as a right to a guaranteed minimum income that is judicially enforceable?*

ARTICLE 10: PROTECTION & ASSISTANCE FOR THE FAMILY

Major Issues:

Family policy under the current Federal Government is promoting a conservative ideology about family forms and values, which represents a major reversal of the social transformations towards achieving women's equality that took place during the 1970s and 1980s. The family assistance measures introduced by the former Labour governments were directed towards reducing women's economic dependence in families. Government payments for children's support were directed away from the primary breadwinner (men) to the primary carer (women) and, as referred to above, the dependent spouse tax rebate was abolished in 1994.[99] These policies reflected the changing demographics of Australian families, with a rapid decline in two-parent single-income households (from 25% in 1982 to 14% in 1993-4)[100], and increasing reliance on community child-care. This direction has been reversed by the present Government. Family assistance has been reorganised and largely removed from the social security system to be delivered through the Family Tax Assistance Programme. In the revised system, the greatest benefits are gained if the higher income earner opts to claim the tax relief - usually the male partner. The costs of child-care have been shifted back onto families and have become prohibitive for many single parents, and low and middle-income earners.

One place where this change of family policy has devastating repercussions for women is the Government's approach to domestic violence. The incidence of domestic violence in Australia continues to be high, despite significant government and community efforts to address the problem over many years. In 1996, the Australian Bureau of Statistics found that 38% (2.6 million) women had experienced at least one incident of violence since they were 15, and that more women experienced violence from a current or previous partner than from a stranger or other man known to them.[101] Domestic violence is experienced by women from all socio-economic and ethnic/racial groups, including indigenous women, and has proved to be a diverse and complex problem, linked fundamentally to dominant social conceptions of masculinity and femininity. The federal Government introduced its Partnerships Against Domestic Violence Programme in 1998 as 'helping families

[99] Mitchell, above n 46, 78.
[100] Michael Pusey, 'The Impact of Economic Restructuring on Women and Families', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 216, 220.
[101] LH 165

under pressure', restoring 'the sanctity of family life', and 'helping children and young people to break the cycle of violence between generations'.[102] The new policies completely ignore the experience and knowledge about domestic violence that women's services have painstakingly accrued over the previous 20 years. It is as though we have returned to a pre-feminist era. The problem of domestic violence is again represented as a degendered 'family problem', which disguises the reality that it is primarily perpetrated by male family members against women; it is portrayed as a problem of dysfunctional families, making it an individual pathology rather than emanating from a social context that condones violence against women in many ways; and is conceived as a problem of generational transfer from one 'problem family' to another, which denies male agency and may suggest that perpetrators are not responsible for their actions.[103] Compounding these difficulties, there has been a reduction in funding for women's refuges and reductions in Federal legal aid funding (a $120 million cut in 1997 alone) have resulted in drastic limits on the legal aid available for Family Court representation, which disproportionately affects women as men are more likely to be able to afford legal representation.

Several other matters need mention here. First, families (read women[104]) generally are expected to fill the gaps left by the increasingly fragile social safety net - including financially supporting young people for longer periods of their lives (until they reach 25 in many cases), caring for sick, disabled and elderly family members, contributing more voluntary labour to schools and community services, and providing child-care in lieu of diminishing public provision. Secondly, while the Government expresses support and respect for 'the choices made by Australians in defining their own family' (p36 Report), lesbians suffer discrimination in their access to IVF technologies (in Victoria it is a criminal offence) and there are scandalously high rates of unlawful sterilisation of young women with disabilities.[105] Finally, the ongoing refusal of the Government to compensate victims of the Stolen Generation, Aboriginal and Torres Strait Islanders who were forcibly removed from their families when they were very young, as a result of the assimilationist[106] policies of past Australian governments, is completely unacceptable. Its refusal is counter to the recommendations of the 1997 HREOC Inquiry and not in keeping with the recommendations of the CERD.[107]

Previous UN Concerns/Recommendations:

In 1997, CEDAW recommended:

- para 35: 'evaluation and assessment..for Australia's new childcare benefit scheme [of the impact on women of different age groups, with different educational levels and in different occupational groups]
- para 38: 'that a comprehensive strategy to eliminate violence against women should be adopted...with an emphasis on prevention, and with sufficient funding' (the Committee also noted 'the absence of data concerning violence against Aboriginal and Torres Strait Islander women and assessment of programmes directed at reducing such violence' (para 30))
- para 38: 'that ways should be found to involve women's groups in the development of strategies to reduce violence in the media, including the electronic media, and that they should participate in the development of self-regulatory codes of practice of the media...[and] the Government should further assess its monitoring and enforcement responsibilities in that regard';

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[102] Office of the Status of Women, 'Helping families under pressure: partnerships against domestic violence', http://www.dpmc.gov.au/osw/homewarw.htm, 30 August 1998.

[103] Lee Fitzroy, 'Just Outcomes for Women? State Responses to Violence Against Women', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 163, 168-170.

[104] Pusey, above n 100, 227, notes that working women are still responsible for 70% domestic labour. Women also, of course retain primary responsibility for child-care.

[105] Susan M Brady and Dr Sonia Grover, *The Sterilisation of Girls and Young Women in Australia* (1998), a report commissioned by the Federal Disability Discrimination Commissioner.

[106] HREOC, *Bringing Them Home,* above n 8, found this to be a policy of genocide.

[107] CERD 1994, above n 14, para 547.

- para 31: 'The Committee was also concerned about...the situation of women brought to Australia as brides'.[108]

In 1997, CRC recommended that:

- para 26: 'cases of abuse and ill-treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to predators and publicity given to decisions taken.[109]

Australia's Report:

The outline of family assistance measures in the Report is seriously outdated and silent on a number of important issues. The Government does not acknowledge the conservative policies about women and families that have driven its changes in family policy. Also, no mention is made of domestic violence strategies, nor of the effects of its massive cuts to legal aid funding that have disproportionately affected women's access to justice in family matters. There is no assessment of its child-care policies on women from different socio-economic backgrounds, even though CEDAW expressed concern about this in 1997. Finally, there is no explicit reference to indigenous families, despite the decimation they have suffered due to past government policies. This has forced individual claimants to pursue costly civil remedies that threaten to swamp the courts. The only state report offered is from NSW, which hardly provides a comprehensive overview of the national situation, as much of the responsibility for family policy has been devolved to the states/territories by this Government.

Major Concerns with Australia's Report:

- *How are the Government's reforms to family assistance measures, which diminish women's financial independence, consistent with promoting the equality of women and men (article 3)?*
- *Why has the Government promoted gender 'neutral' policies with respect to domestic violence that seriously misrepresent the problem, and prioritise family-based solutions that reduce the opportunities for women to leave abusive relationships and thus have the potential to expose women and children to continuing violence?*
- *What measures has the Government adopted to ensure that its cuts to legal aid are not born disproportionately by women?*
- *What policies does the Government have in place to ensure that lesbian and gay families, and families of people with disabilities, have access to all the rights and benefits available to conventional nuclear families?*
- *How can the Government justify denying compensation to the Stolen Generation of Aboriginal and Torres Strait Islander people when it is consistent with international standards, and necessary for justice and reconciliation in Australia?*

ARTICLE 11: THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Major Issues:

The distribution of wealth in Australia has become increasingly inequitable. A 1991 study showed that for the bottom 70% of urban households, the average income had fallen in absolute terms and was lower in 1991 than in 1976, with the lowest 5% experiencing a drop of 23%. In contrast, the

[108] CEDAW 1997, above n 13.
[109] CRC 1997, above n 24.

average income of the top 5% of households had increased by 23%.[110] This trend has continued through the decade of the 1990s, with a large proportion of female-headed households living in poverty. Further, Aborigines and Torres Strait Islanders still rank as the most disavantaged group in Australian society in terms of education, unemployment, health, life expectancy, housing, socio-economic status and quality of life.[111] Therefore, despite Australia's first world affluence, the majority of indigenous Australians do not enjoy the minimum core of subsistence rights that the Convention guarantees. The Government's preference for strategies that promote formal equality with non-indigenous Australians, rather than special measures aimed at achieving substantive equality, are compounding the situation. Also, homelessness continues to be a significant problem in Australia, particularly for young people, single mothers, elderly single people, and poor families. Yet housing advocacy groups like the National Youth Coalition for Housing and National Shelter have been defunded by the Government. Major funding cuts have also been made to the public housing sector, while 230,000 Australians remain on public housing waiting lists. New rental assistance arrangements benefit private landlords rather than tenants, again reflecting the Government's reliance on market forces to address social need in preference to the public sector. How this approach can be seen to be consistent with Australia's obligations under article 11 to *ensure* the right of everyone 'to live somewhere in security, peace and dignity'[112] is not clear.

It is the dismantling and downsizing of the public sector, and its replacement with the private, market-driven provision of social and community services, that we wish to draw particular attention to, as it impacts across the board with respect to the requirement that the Government fulfil 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.[113] 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 country 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.

At the centre of the Government's efforts to reduce social spending and harness market forces to deliver community services and address social need, is the metamorphosis of the state from a provider to a purchaser of services. This has involved a major shift in the relationship between the state and state-funded services, from a two-way partnership that promoted local empowerment and community self-help, to a tightly controlled commercial relationship that promotes centralised service-delivery according to government-determined, output-oriented performance indicators. In the rush to increased efficiency and quantifiable outcomes, many small services have been forced to amalgamate with larger services or have their funding cut at the expense of specific expertise, diversity in service models, and community involvement.[114] Commercial confidentiality, which is a feature of for-profit business contracts, prevents the community from scrutinising the agreements that governments are entering on their behalf, and the all-important democratic mechanisms of transparency and accountability are lost. Further, with intensified service-delivery workloads, workers have less time for policy development and community advocacy which, in any event, do not qualify as output measures. Taken together with the dismantling of indigenous and women's advocacy machineries discussed earlier, and the defunding of the Australian Pensioners and Superannuants' Federation, the Government appears to have effectively shielded itself from critical

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[110] Pusey, above n 100, citing R G Gregory and B Hunter, 'The macro economy and growth of urban ghettos and poverty in Australia', address to the National Press Club, April 1995, *Discussion Paper 325,* ANU: Centre for Economic Policy Research.

[111] *Aboriginal and Torres Strait Islander Social Justice Annual Report* 1998.

[112] *The right to adequate housing (article 11(1)),* General Comment 4, E/C.12/1991/4, para 7.

[113] General Comment 3, above n 33, para 10.

[114] Fitzroy, above n 103, 171-172.

voices and disempowered the invaluable community-based infrastructure that had assisted previous governments in responding to community need.

For 'consumers', there has been an increase in user pay regimes, and a focus on short-term reactive 'solutions' to what are often deeply embedded multi-dimensional structural inequities. Further, as with the provision of social security discussed above, there are no direct remedies that people can seek if they are denied the right, for example, to adequate housing. Anti-discrimination and administrative law remedies provide only partial protections. In short, we suggest that the privatisation of the public sector, in the absence of direct judicial remedies for violations of Covenant rights, amounts to an abrogation, by the Government, of its responsibilities under the Covenant.

Previous UN Concerns/Recommendations:

In 1997, the CEDAW:

- para 28: 'was alarmed by policy changes that apparently slowed down, or reversed, Australia's progress in achieving equality between women and men, such as in housing and childcare programmes';
- para 34: 'recommended that the Government should carefully monitor the impact of recent policy changes in all areas covered by the Convention'.[115]

In 1997, the CRC recommended that:

- para 33: 'further research be carried out to identify the causes of the spread of homelessness, particularly among young persons and children'.[116]

Australia's Report:

The Report makes no reference to the Government's full-scale efforts to downsize, outsource and privatise what were previously government and community-based services. It therefore avoids making an assessment of the impact of these changes on the enjoyment of social and economic rights in Australia. Further, it provides no information on the avenues of redress available to people whose rights may have been violated.

Major Concerns with Australia's Report:

- *How does the Government account for the falling levels of real household incomes during a period of economic growth?*
- *How do reductions in the public housing sector address the continuing problem of homelessness? On what basis does the Government believe that the private sector is better able to meet the housing needs of low-income people?*
- *By what means does the Government ensure that the private sector organisations it contracts to deliver previously public services meet its international obligations under the Covenant?*
- *How does the Government mitigate the lack of transparency of commercial confidentiality clauses and ensure that the community and the CESCR are able to effectively scrutinise its policies and practices?*
- *Has the Government replaced the mechanisms for community input and consultation that were defunded (national Shelter, National Youth Coalition for Housing etc) with alternative mechanisms? If so, what are they? And if not, how does the Government seek organised and coordinated community input?*
- *What remedies are available to those who do not enjoy the right to adequate housing?*

[115] CEDAW 1997, above n 13.
[116] CRC 1997, above n 24.

ARTICLE 12: THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

Major Issues:

During the 1970s and 1980s, the community-based women's health movement was influential in shaping policies and delivering services that responded to women's health needs. During the 1980s, women's health units were established in all states and in 1989, a National Women's Health Policy and National Women's Health Programme (NWHP) were launched. In 1987, the Australian Health Minister's Advisory Council established a Sub-Committee for Women and Health. By 1994, there were 55 women's health centres funded by the NWHP spread across the country providing information, education, support and counselling services.[117] Some also offered direct medical services. Furthermore, there were 262 services funded to assist women fleeing violence of various forms.

However, these advances in women's health have proved to be short-lived. Decreasing social expenditure, devolution of responsibilities from Federal to state/territory levels, and increasing privatisation of health services have had a detrimental effect on women's health policy development and specialist service delivery. The women's health policy machinery has been largely dismantled at state as well as federal levels and the Health Minister's national Sub-Committee for Women and Health was abolished as of 31 October 1998, all ostensibly in the interests of down-sizing government and cost saving. Among the many national public health programmes that have been devolved to the states/territories are the NWHP, the cervical screening and breast screening programmes, the female genital mutilation education programme, the alternative birthing programme and the family planning programme.[118] This was achieved by through the National Public Health Partnership that commenced operation in 1997-98. It means that the federal funding for these programmes has been combined, along with the funding for other devolved programmes, into one untied specific purpose payment to the states/territories without any agreed standards, monitoring mechanisms or commitments to spend the money on specific programmes. It is entirely up to the states/territories to determine priorities and interpret women's health issues as they please. The Steering Group established under the Partnership does not include consumers or women's health movement representation. In sum, this is a serious erosion of the gains women made during the previous 2 decades. These developments have retrogressive consequences for women's equal access to quality health care and for the responsiveness of health services to women's health needs. They are also anathema to a human rights approach to health care which would emphasise, amongst other things, women's participation and empowerment.

As in other areas of social spending, government policy in health is promoting a more market-driven approach. This involves a shift away from public provision of health services to user-pay systems and private sector service providers. There have been massive cuts to public hospitals, in the order of $1 billion, with further serious consequences for women and indigenous people, especially low-income earners and those with families who must rely exclusively on public health provision. The pressures on the public health system emanating from the cuts have been compounded by casemix hospital funding. This has necessitated early hospital discharges and the increased use of day surgery which, in turn, has put increasing pressure on women in community-based services and families to look after those who would previously have been hospitalised. It has been suggested that the Government's economic agenda is to increase the capacity for community care in order to

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[117] Gwen Gray, 'Women's Health in a Restructuring State', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 205, 209.
[118] Ibid 211.

further reduce expenditure on hospitals.[119] There is also an increased emphasis on private medical and health insurance, with the Government devising expensive tax incentives for higher income earners to leave the public system and imposing increased charges for those who remain.

Reproductive health appears to be low on the Government's agenda, although it should be noted that Australia ranks among those with the lowest maternal and infant mortality rates in the world, except with respect to indigenous women and children. Federal family planning funding was cut by 10% before responsibility for family planning services was devolved to the states. While abortion is generally available, it is becoming more expensive for public patients because the Medicare (public) insurance scheme has not been indexed for several years, so the gap between cost and insurance coverage has grown considerably. Abortion is still, inappropriately, regulated by the criminal law in all states except Western Australia and the *Theraputic Goods Amendment Act 1996* made some contraceptive alternatives more difficult to import.

Previous UN Concerns/Recommendations:

In 1997 CEDAW expressed concern;

- para 29: that fiscal restraints might diminish 'resources for programmes and policies benefiting women or aimed at overcoming discrimination, such as in health, in the provision...of training and awareness programmes for health workers';
- para 33: 'at the continuing adverse situation of Aboriginal and Torres Strait Islander women. Major causes of concern included a higher incidence of maternal mortality, lower life expectancy, reduced access to the full range of health services, a high incidence of violence, including domestic violence, and high unemployment rates'.

The Committee made the following suggestions and recommendations:

- para 36: encouraged the Government 'to assess the benefits of a continuing national women's health policy and to ensure that any further change in that policy did not lead to a decreased access by women, especially vulnerable groups of women, to comprehensive health services';
- para 36: recommended 'that data and indicators on health should be collected, disaggregated by sex, age, ethnicity, rural/urban areas and other distinctions. Data should also be collected on the impact of the shift in responsibility for health care from the federal to the state level'.[120]

In 1997, CRC recommended that:

- para 32: Australia 'take further steps to raise the standards of health...of disadvantaged groups, particularly Aboriginals, Torres Strait Islanders, new immigrants, and children living in rural and remote areas'.[121]

Australia's Report:

While referring positively to the National Women's Health Policy and specific women's health strategies, the Report does not acknowledge that the Government has seriously weakened women's health policy machineries and devolved responsibility for many women's health programmes to the states/territories without any corresponding accountability mechanism to ensure that federal funds will actually be spent on those programmes. The National Public Health Partnership is described in glowing terms, but the detail of untied funding arrangements and the absence of national standards is not reported.

While Australia has a proud record in innovative and responsive health service development and delivery, which is reflected in the Report, there is no mention of the Government's major restructuring of the health system in line with market-based priorities and the effects this will have on programmes for disadvantaged groups like women and indigenous people. It is common

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[119] Linda Hancock, 'How will women's health fare in the latest round of market state reforms?' (1998) 55 *Health Issues* 26.
[120] CEDAW 1997, above n 13.
[121] CRC 1997, above n 24.

knowledge that much of the public health system is in crisis because of funding cuts and new competitive funding arrangements, but the Report makes no reference to it. These changes raise fundamental concerns about whether the Government is able to 'assure to all medical service and medical attention in the event of sickness'. The extra burden this creates for community carers is also not acknowledged.

Because Aborigines and Torres Strait Islanders continue to suffer much poorer health than the general population, it is surprising that the Report does not make a more concerted effort to show how the Government intends to improve this situation.

Major Concerns with Australia's Report:

- *With the devolution of responsibility for health policy and services to the state/territory level, what measures has the Government adopted to ensure that its obligations under article 12 are understood and fulfilled by state/territory governments?*
- *Why has the Government devolved responsibility for women's health matters without establishing national standards, monitoring mechanisms, and consultative processes with women's health networks?*
- *Why has the Government reduced its commitment to family planning services?*
- *What mechanisms are in place to ensure that private actors, contracted by the Government to deliver health services, are bound to fulfil the Government's obligations under the Covenant?*
- *What new strategies has the Government adopted to respond to the health needs of Aborigines and Torres Strait Islanders, which continue to be significantly greater than those of the general population according to almost every indicator?*

ARTICLE 13: THE RIGHT TO EDUCATION
ARTICLE 14: COMPULSORY PRIMARY EDUCATION FREE OF CHARGE

Major Issues:

As with other major areas of social spending, education has also become increasingly shaped by market imperatives at all levels. The strong Australian tradition of centralist state educational systems, committed to promoting equity in educational provision, has shifted into an increasingly deregulated, market-driven framework. In the new marketplace of primary and secondary schools, choice in education and competition for students are seen as the means of achieving efficiency, productivity and better outcomes.[122] To promote this change, funding for state schools is increasingly based on student enrolment, and equity subsidies are based on the characteristics of individual students rather than on the community that the school serves. In fact, the 'community' of a school becomes, in this paradigm, 'an arbitrary aggregate of individual choices'.[123] The core functions of our schools and the roles they play in the community are changing dramatically, moving away from imparting values of social responsibility and interconnection to rewarding self-interest and rivalry.

In this competitive environment, education has become increasingly vocationalised, focussed on achieving outcomes in standardised tests and global performance indicators, which can be used by 'consumers' to make comparisons in the school selection process. This shift from a broader civic

[122] Jill Blackmore, 'Shifts in Governance: Schools of the Future', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 178, 182-183.
[123] Ibid 184.

education to a focus on paid employment, has seen substantially reduced resources committed to promoting gender equity in schools, and has led to the dismantling of the infrastructure that supported inclusive curriculum development during the 1970s and 1980s. The result is an educational system that falls short of the quality education envisaged by article 13, which requires that education 'be directed to the full development of the human personality and the sense of its dignity'.

The new environment has also encouraged a substantial movement of students from the state system into non-government schools. This movement has been accompanied by increased government funding of non-government schools, and a parallel decrease in expenditure on state schools.[124] Further, many state schools now have expectations that parent(s) will make fee-like financial contributions, which has been prohibitive for poorer sections of the population and resulted in discrimination on the basis of inability to pay. State schools are becoming increasingly privatised in other ways as well. They are expected to seek sponsorship from local businesses and to rely extensively on parental contributions in the classroom, in school administration and in fundraising. The result is a two-tiered state education system of rich and poor schools, which clearly does not provide equal opportunity in education.

At the tertiary level, education has been massively restructured with the goal of participating competitively in a global educational marketplace. To force this change, the Government has made huge cuts to university operating grants, student fees have been increased and incentives to pay them up-front have been strengthened, student income support by way of Austudy and Abstudy has been reduced, and restrictions have been placed on childcare provisions for student parents. Universities have had to corporatise, seek private funding, compete for students, and 'rationalise' its employment practices.[125] These changes have had severe consequences for regional universities. It has deepened the hierarchy among tertiary institutions, much like the rich/poor schools layering of primary and secondary education, which creates inequalities in provision and quality. The higher costs mean that universal access is no longer a reality. Those primarily affected are low income, indigenous and mature aged students, many of whom are women.

Finally, we want to highlight the inadequacies of human rights education in Australia. Article 13 promotes education that 'strengthen[s] the respect for human rights and fundamental freedoms'. As discussed above, the orientation towards results-based, self-interested education does not value education for civic responsibility. In any event, knowledge of human rights in Australia has always been very poor.[126] Human rights treaty monitoring bodies have frequently expressed concerns about the lack of general knowledge in the community about the human rights conventions that Australia is a party to and the role that human rights should play in the community.[127] Although the Government has consistently been asked by treaty Committees to widely disseminate its Reports and the Committee's responses and recommendations, this has never happened effectively.

Previous UN Concerns/Recommendations:

In 1993 the CESCR noted the following as principal subjects of concern:

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[124] Linda Hancock and Sally Cowling, *Searching for Social Advantage: What has Happened to the 'Social Dividend' for Victorians?*, Women's Audit Project, Centre for Public Policy, University of Melbourne, September 1999.

[125] Jane Kenway and Diana Langmead, 'Is There a Future for Feminism in the Contemporary University?', in Linda Hancock (ed), *Women, Public Policy and the State* (1999) 192, 193-195.

[126] Brian Galligan and Ian McAllister, 'Citizens and Elite Attitudes Towards and Australian Bill of Rights', in Galligan and Samford (eds), *Rethinking Human Rights* (1997) 146.

[127] See for, example, CRC 1997, above n 24, para 10.

- para 8 - 'the situation of disadvantaged groups in the education system...specifically...the situation of Aboriginal and Torres Strait Islanders in education...as well as the problems of illiteracy among the adults of this group';
- para 9 - 'the lack of opportunities available to persons with disabilities to fully enjoy their rights to education';
- para 10 - 'the effects of funding accorded to non-governmental schools on the quality of education in government schools'.

The CESCR made the following suggestions and recommendations:

- para 14: 'that activities be undertaken throughout the federal structure of Australia to sensitize society to the situation and different needs of persons with disabilities and other groups', and specifically 'that further measures be taken to strengthen the human rights education component in formal and non-formal curricula';
- para 16: 'that attention be given to the development of indicators for measuring progress in the implementation of the rights covered by articles 13-15', and that information regarding this be provided in Australia's next report;
- para 17: 'to direct major efforts towards assessing and addressing the needs [of persons with disabilities and of the elderly] in relation to their rights under articles 13 and 15';
- para 18: 'to implement equity in schooling as a matter of public responsibility...legislative efforts be undertaken to eliminate remaining obstacles in the equitable access to educational establishments';
- para 19: welcomes information in Australia's next report 'on any differences identified in the quality of education between government and non-government schools'.[128]

In 1997, CEDAW made the following suggestion:

- para 42: that the Government 'strengthen its support for women's studies, to provide funding for research and teaching, and to facilitate international academic exchange and cooperation in the field'.[129]

In 1997, CRC recommended that:

- para 32: Australia 'take further steps to raise the standards of ...education of disadvantaged groups, particularly Aboriginals, Torres Strait Islanders, new immigrants, and children living in rural and remote areas'.[130]

Australia's Report:

The Government is clear in its support for increased 'parental choice' in education (p50) and expresses the view that this will improve educational outcomes. At the same time, the Government recognises that there is a continuing need to provide special assistance for disadvantaged groups and Aboriginal and Torres Strait Islander children, and that year 12 retention rates have fallen since 1992, affecting mainly disadvantaged students (p52). However, the Government misses the point that the two strategies - marketisation and equity - are pulling in opposite directions. That is, allowing the market to be the distributive mechanism for education is to entrench and deepen inequalities. Equity measures in this context can only hope to provide marginal and precarious respite because they are not structurally consistent with the dominant educational philosophy.

The Report makes no reference to the increased costs of education being born by parents and students that have flowed from the new market driven model of funding. Nor does it discuss equity in curriculum content. The CESCR, in 1993, specifically requested that the Government provide information about any differences identified in the quality of education between government and non-government schools, but this has not been done. Finally, there is no reference to human rights education.

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[128] CESCR 1993, above n 25.
[129] CEDAW 1997, above n 13.
[130] CRC 1997, above 24.

Major Concerns with Australia's Report:

- *Why has the Government not provided information on the differences, if any, in the quality of education between government and non-government schools as requested by the CESCR in 1993?*
- *In the new marketplace of education, what measures has the Government adopted to ensure that primary and secondary education is available to all free of charge?*
- *To what extent is human rights education taught in schools and why is this not a performance indicator in funding considerations?*
- *By what means is the Government promoting principles of equity and inclusiveness in curriculum development?*
- *How is the growing gap between rich and poor educational institutions at all levels of the education system consistent with the principle of equal opportunity in education?*

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