Equal Recognition and Protection of Economic and Social Rights: International Context and Comparative Perspective

A Submission to the

NSW Legislative Council Standing Committee on Law and Justice

NSW Bill of Rights Inquiry

Submission from

David Wiseman

Table of Contents

Biographical Note

David Wiseman is a Legal Researcher specialising in Economic and Social Rights. Formerly an Assistant Lecturer in the Faculty of Law at Monash University, he is presently pursuing his doctorate at the University of Toronto. Since relocating to Toronto he has provided research assistance to a variety of organisations, including the Centre for Equality Rights in Accommodation (CERA) in respect of its submissions to the recent Review of the *Canadian Human Rights Act*.

Executive Summary

This submission considers the issue of whether to include economic and social rights in a NSW Bill of Rights and recommends recognition and protection of economic and social rights equal to that accorded other rights included in a NSW Bill of Rights or, in short, *equal recognition and protection of economic and social rights.* This submission focuses its attention not so much upon whether there ought to be a NSW Bill of Rights but whether, if there is to be such an instrument, it ought to include economic and social rights.

Given the persistence of economic and social disadvantage in NSW, given the consequences of such disadvantage for fundamental human and democratic values of equality, dignity and personal integrity, and given that economic and social rights offer protection against this disadvantage, this submission assumes a presumptive case exists for the inclusion of such rights in a NSW Bill of Rights. What this submission considers is the international context and comparative perspective that strengthens this case.

In considering the international context, this submission argues that the need to accord equal recognition and protection to economic and social rights arises from the existence of international human rights norms, binding upon Australia, that confirm the equal status of these rights and that oblige NSW to share Australia's responsibility for implementing them. In particular, NSW needs to address its failure to comply with the obligation to provide effective judicial remedies for violations of economic and social rights. In doing so, NSW would also be bringing its practice into line with steps being taken in other jurisdictions around the world.

In considering comparative perspective, this submission recognises that any proposal for the judicial enforcement of economic and social rights must grapple with the view that such rights are unsuitable for adjudication (i.e.: injusticiable) or would lead to a judicial take-over of social policy-making. This submission tests these views with a consideration of comparative experience from Canada and South Africa. This consideration shows that assertions of injusticiability have failed to keep pace with modern understandings of the nature of human rights—understandings that are now reflected in judicial practice. This consideration also shows that such judicial practice has taken pains to preserve an appropriate separation of functions and responsibilities between governments and courts. Consequently, economic and social rights adjudication has become characterised by deferential, though principled, approaches to both the definition of obligations and the design of remedies—approaches which it can be anticipated would be adopted by NSW courts.

Consequently, while the persistence of economic and social disadvantage in NSW, and its consequences, is in itself sufficient reason to accord equal recognition and protection to economic and social rights in a NSW Bill of Rights, further reasons for doing so can be drawn from the international context relevant to human rights recognition and protection,

while certain fears about doing so can be laid to rest by a consideration of comparative perspective.

Introduction: The Significance of Economic and Social Rights

This submission addresses a number of issues concerning the inclusion of economic and social rights in a NSW Bill of Rights that arise from paragraph b) of the Inquiry's Terms of Reference: 'whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights.'

This submission **recommends** recognition and protection of economic and social rights equal to that accorded other rights included in a NSW Bill of Rights or, in short, *equal recognition and protection of economic and social rights in a NSW Bill of Rights.* This requires that the NSW Bill of Rights include economic and social rights and that it provide the same mechanisms for enforcing economic and social rights as it provides for the enforcement of whatever other rights its includes.

It is not the purpose of this submission to argue that their ought to be a NSW Bill of Rights. Rather, the purpose of this submission is to argue that, if there is to be such an instrument, then it ought to accord equal recognition and protection to economic and social rights. That argument is made in two stages. First, consideration is given to the international context relevant to domestic human rights recognition and protection. That consideration shows that according equal recognition and protection to economic and social rights accords with developments in, and obligations imposed by, international law and the international community. Second, consideration is given to certain fears about the consequences of enacting judicially enforceable economic and social rights. This consideration shows how concerns over the justiciability of economic and social rights, and fears that judicial enforcement of such rights might lead to a take-over of social-policy making, are ill-founded.

Before proceeding to those arguments, however, it is worth noting that it is also not the purpose of this submission to establish the necessity for economic and social rights recognition and protection in NSW. Rather, this submission assumes the existence of a presumptive case for the recognition and protection of such rights and seeks only to

strengthen that case by a consideration of international context and comparative perspective. That presumptive case arises when it is acknowledged that, on the one hand, the people of NSW share a commitment to such fundamental human and democratic values as equality, dignity and personal integrity but that, on the other hand, economic and social disadvantage persists in NSW.

Human rights protect the values which the people of NSW share, but those values are as much put at risk by economic and social disadvantage as they are by civil and political oppression. The invidious, and catastrophic, effects of economic and social disadvantage upon people's physical and mental health, well-being and personal security, upon their dignity and sense of self-worth and upon their capacity to participate in community life, let alone democratic institutions, are well known. And it is equally well known that much economic and social disadvantage has a discriminatory basis, concentrated as it is among indigenous people, women and new-comers. Economic and social rights provide protection against economic and social disadvantage and so, like all human rights, economic and social rights protect and reflect fundamental human and democratic values.

Consequently, the denial of economic and social rights is no less significant than the denial of other human rights and so economic and social rights are entitled to be accorded equal recognition and protection in any NSW Bill of Rights. Indeed, given the level of enjoyment of civil and political rights in NSW, and yet the persistence of economic and social disadvantage, it would be perverse for a NSW Bill of Rights to accord lesser recognition or protection to rights that appear more immediately in jeopardy.

A presumptive case therefore exists for the equal recognition and protection of economic and social rights in a NSW Bill of Rights. This submission now turns to consider how that case is strengthened by a consideration of international context and comparative perspective

1. International Context: The Obligation to Recognise and Protect Economic and Social Rights

NSW is of course not alone in facing prevalent and persistent economic and social disadvantage, indeed, such disadvantage is developing into the most significant human rights concern for democratic societies around the world. The focus of human rights in the last century was justifiably, perhaps, on civil and political rights. They emerged at a time when the power of the modern state and its unprecedented assaults on human freedom and dignity through totalitarian governments was the most obvious threat to democracies. While these threats continue, the increased attention to economic and social rights in democratic peoples throughout the world is a response to a different experience of the "perils" to democracy—the experience of governments in global "retreat" from the state's positive protective and regulatory functions, reduced transparency of and participation in social policy formulation and a sense of powerlessness in the face of deregulation, economic globalization, social exclusion and marginalization.

In South Africa, for example, the express inclusion of economic and social rights in the post-apartheid constitution sends a clear message that a country deeply committed to protecting its new democratic freedoms must also ensure that human rights play an ongoing part in all aspects of the democracy, including the social and political realm. Even the UK, a traditional bastion of resistance to "constitutionalism" has recently acceded to the European Social Charter while the European Union has itself taken steps to strengthen the Charter's effectiveness by establishing a complaints procedure.[1] These developments reflect that human freedom and dignity depends upon equal respect for all human rights, not just civil and political rights and, further, that equal respect for economic and social rights means comparable implementation and enforcement mechanisms. These developments also accord with the equal status of economic and social rights in international law and, in particular, the obligation under the ICESCR,

[1] As discussed in M. Jackman and B. Porter, "Women's Substantive Equality and the Protection of Economic and social Rights under the Canadian Human Rights Act" in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) at 65 (available online at <www.swc-cfc.gc.ca>).

which most countries have ratified, to protect economic and social rights and to provide effective remedies for denials of those rights.[2]

(A) The Equal Status of Economic and Social Rights in International Law

The ultimate source of human rights norms in international law is the *Universal Declaration of Human Rights* (UDHR).[3] The UDHR recognises civil, political, economic, social and cultural rights of individuals and groups and forms the basis of two treaties: the *International Covenant on Civil and Political Rights*[4] (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*[5] (ICESCR). Both Covenants affirm, in their preambles, the interdependence of civil, political, economic, social and cultural rights. Although there are differences in the wording of the obligations clauses in each Covenant, and although an Optional Protocol allowing individual complaints applies to the former and not the latter, nevertheless the rights they contain are equally recognised in international law and have equal status in international law. And as a State Party to each of these Covenants, Australia has affirmed its commitment to this equal recognition and status.

(B) The ICESCR Obligation to Protect Economic and Social Rights

The specific legal obligation to implement the ICESCR is set out in Article 2 as follows:

> 2(1) *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to*

---

[2] For analysis of the relationship between international obligations and domestic economic and social legislation in Australia see P. Bailey, *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990) and "The Right to an Adequate Standard of Living: New Issues for Australian Law" (1997) 4(1) *Australian Journal of Human Rights* 25. For very instructive discussion of the relationship between international obligations and domestic protection of economic and social rights in the Canadian context, see B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" forthcoming in (2000) 15 *Journal of Law & Social Policy*.

[3] U.N.G.A. Res. 217 (III), 3 U.N. GAOR, Supp. (No. 13) 71, U.N. Doc. A/810 (1948).

[4] *Adopted* 19 Dec. 1966, 999 U.N.T.S. 171.

[5] *Adopted* 16 Dec. 1966, 993 U.N.T.S. 3.

> *achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
>
> 2(2) *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Although in Australia it is the federal government that has responsibility for ratifying treaties such as the ICESCR, and it is also the federal government upon whom the responsibility falls to answer for any failure to comply with international law obligations, nevertheless the implementation obligations under the ICESCR expressly extends to Australian States and Territories by virtue of Article 28 of the ICESCR, which provides:

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

Therefore, although the NSW State government is not directly answerable to the international community for any failure to implement the ICESCR, nevertheless it shares a responsibility to ensure compliance within its jurisdiction and, in particular, to recognise and protect the economic and social rights contained in the ICESCR.

One aspect of compliance of particular significance to this Inquiry is the obligation to provide 'effective remedies' for violations of rights guaranteed by the ICESCR. This obligation has been discussed by the U.N. Committee on Economic, Social and Cultural Rights (CESCR), the body responsible for interpreting the ICESCR and monitoring State compliance with its terms, in its *General Comment No 9: The Domestic Application of the Covenant*.[6] According to CESCR, the ICESCR will not be fully implemented in the absence of effective domestic remedies enabling individuals and groups to enforce the rights guaranteed in the ICESCR. Although the term 'effective remedy' is not limited to judicial remedies, where the full realisation of a right guaranteed by the ICECSR cannot be

[6] U.N. Doc. E/C.12/1998/24, 3 December 1998.

ensured in the absence of judicial remedies, then such remedies will be necessary. Generally speaking, access to judicial remedies is desirable because such remedies provide powerful and independent protection against violations of ICESCR rights. Indeed, CESCR has indicated that in many cases judicial remedies can be presumed to be necessary and appropriate and that in such cases States will face a heavy burden if they seek to justify a failure to complement or reinforce implementing measures with judicial remedies.[7] Further, one factor which CESCR will consider in assessing whether a State ought to provide judicial remedies for protection of ICESCR rights is what remedies the State has provided for other human rights.

This obligation to provide effective remedies is significant for the present Inquiry because, at present, NSW is failing to adequately comply with this obligation. Economic and social rights are not presently guaranteed or protected by any legislation in NSW. While there is some degree of protection against discrimination in the economic and social sphere, this protection is far from comprehensive and has been made less effective by continuing declines in legal aid funding.[8] Thus, enactment of a NSW Bill of Rights according equal recognition and equal protection to economic and social rights would be one way in which the NSW State government could seek to improve its compliance with the ICESCR within its jurisdiction.

The need to accord equal recognition and protection to economic and social rights in any NSW Bill of Rights thus arises in the first place from the significance of economic and social rights for human dignity and personal integrity and the dire consequences of the economic and social disadvantage that still persists in NSW. This need is then magnified when put in an international context of international instruments and developments recognising and protecting those rights and of international obligations requiring the same.

---

[7] Ibid, para 3.

[8] *ASERP National Report*, forthcoming (on file with author). See also P. Bailey and A. Devereux, 'The operation of anti-discrimination laws in Australia" in Kinley (ed) *Human Rights in Australian Law* (The Federation Press; Annandale, NSW, 1998) 292.

2. Comparative Perspective: Issues in the Judicial Enforcement of Economic and Social Rights

Nevertheless, any proposal to accord equal recognition and protection to economic and social rights in a NSW Bill of Rights will need to grapple with at least two concerns that are typically expressed with respect to the specific issue of establishing judicially enforceable economic and social rights. Those concerns are, first, that such rights are unsuitable for judicial enforcement or, in other words, injusticiable and, second, that their judicial enforcement would lead to a judicial take-over of government responsibility for economic and social policy-making. While public, judicial and political concerns about the appropriate roles of governmental institutions are important, and must be respected, on the particular issue of judicial enforcement of economic and social rights, they tend to be based upon outmoded conceptions of human rights jurisprudence and practise and are therefore ill-founded. This can be shown by a consideration of contemporary human rights jurisprudence as well as comparative experience with the adjudication of economic and social rights.

(A) The Issue of Justiciability

The argument that economic and social rights are not justiciable, that is, not suitable for judicial enforcement, comes in various guises and is not new.[9] Given that civil and political rights can be claimed before adjudicative bodies, including both courts and tribunals, in most legal systems, the factors relevant to justiciability have tended to be equated with the perceived attributes of civil and political rights.[10] On the one hand, civil and political rights were perceived to be *negative* constraints on government action,

---

[9] E. W. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights (1978) 9 *Netherlands Yearbook of International Law* 69; D. Davis, "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 *South African Journal on Human Rights* 475. For instructive overviews of justiciability arguments, see: C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall Law Journal* 769; C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1.

[10] Vierdag, ibid.

capable of *precise* definition, implemented *immediately*, at *little cost*. On the other hand, economic and social rights were perceived to be *positive* requirements for government action, involving *significant resources*, encompassing a *vague* range of actors, actions and standards that could only be implemented *progressively*, as governmental resources grew, and were therefore too *complex to be dealt with in a judicial context*.[11] On this basis, economic and social rights were categorized as injusticiable.

Subsequently, as the implications of economic and social disadvantage have become more acute and more and more countries have undertaken, both domestically and internationally, to protect economic and social rights, these perceptions have received considerable attention from courts, scholars and human rights advocates and institutions. From this attention something of a consensus has emerged rejecting the early claim of injusticiability.[12]

CESCR reflects the new consensus when it rejects the "rigid classification" of economic and social rights as injusticiable. In its *General Comment No. 9* the Committee states that:

> The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[13]

While courts are not the only venue through which economic and social rights claims can be adjudicated, the Committee insists that the general assumption must be that economic and social rights would be protected in a similar fashion to civil and political rights:

---

[11] The attribute labels are taken from C. Scott, above n 9.
[12] For example: G. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views" in P. Alston and K. Tomasevski (eds) *The Right to Food* (Dordrecht: Martinus Nijhoff Publishers, 1984); E. Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *South African Journal on Human Rights* 464; M. Jackman "The Protection of Welfare Rights Under the Charter" (1988) 20 *Ottawa Law Review* 257; P. Bailey, above n 2.
[13] Above, n 6 at paras. 7, 9, 10.

> Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.[14]

Crucial to this consensus has been the recognition that all human rights—civil, political, social, economic, cultural—give rise to a multi-layered set of obligations to respect, protect, promote and fulfill.[15] The obligation to respect requires that governments refrain from acting in ways that would deprive people of their rights or impair their enjoyment of them, and is immediately applicable. The obligation to protect requires that governments act to prevent third parties (private actors) from violating human rights, and typically involves the establishment of regulatory regimes and remedial processes. The obligation to promote requires government action to ensure, for instance, accessible information about remedial processes is available to those whose rights have been violated. Finally, the obligation to fulfill requires immediate government action to ensure adequate levels of human rights enjoyment across society and progressive government action to improve conditions so that human rights are fully realised, for every person.

Once this multi-layered framework is recognised it can then be seen that it is these different categories of obligations, rather than the different categories of rights, that span the spectrum from negative to positive, from cost-free to resource-intensive, from precise to vague, and so on. For instance, with respect to the negative to positive spectrum, the right to life, which is categorised as a civil and political right, gives rise to obligations that the government: negatively refrain from taking or endangering life (i.e.: respect the right to life); positively prohibit, investigate and prosecute those who take or endanger other's lives (i.e.: protect); and, positively establish and maintain, or ensure the existence and maintenance of, facilities adequate to assist or treat people whose lives or health is endangered (i.e.: fulfill). Likewise, the right to adequate housing, which is categorised as a economic and social right, gives rise to obligations that the government: negatively

[14] Ibid. para. 7.

refrain from forced evictions or otherwise depriving a person of adequate housing (i.e.: respect); positively implement legislative protections from arbitrary evictions by others without due process (i.e.: protect); and, positively establish and maintain, or ensure access to adequate housing through income assistance and/or housing supply programs (ie. fulfill). Just as the obligations arising from these rights vary in their degrees of negativity and positivity as they move from respecting towards fulfilling, so too do they tend to vary in the degrees to which they exhibit the other attributes, such as immediacy and costliness of implementation.

While the High Court of Australia has had no occasion to consider these issues, in other countries courts seem to recognise that the arguments as to injusticiability have been overstated. For instance, while the Supreme Court of Canada has not explicitly adopted this framework of "duties", the international approach is consistent with the Court's recognition that rights have both positive and negative component. The Court has consistently refused to restrict justiciability to "negative" components of rights. For instance, the Court has noted that an equality right is "a hybrid of sorts, since it is neither purely positive nor purely negative.[16] It has adopted a similar approach with respect to other rights in the Charter such as "freedom of expression"[17] , minority language rights[18], and the right under section 7 to life, liberty and security of the person.[19]

Recognizing that positive components of rights ought to be justiciable does not, however, mean that courts must approach these aspects of rights in the same manner. Along with a growing appreciation for the importance of adjudicating economic and social rights claims has come a recognition that violations of obligations requiring more positive, progressive and resource-intensive remedial responses also require greater adjudicative creativity and sensitivity. But rather than confuse those requirements with injusticiability, courts and

---

[15] This typology was developed from the work of H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).
[16] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at p. 702.
[17] *Haig* v. *Canada* (Chief Electoral Officer), [1993] 2 S.C.R. 995.
[18] *Mahé* v. *Alberta*, [1990] 1 S.C.R. 342 at 393; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839 at 862-63, 866.

commentators have developed other more appropriate means of enforcing rights, while respecting governments' role in designing and implementing programs. These approaches are considered in the next section.

(B) The Issue of Social Policy Take-over

Where courts have come to adjudicate economic and social rights claims they have done so without taking over the social policy-making function of governments. The maintenance of this relatively confined role for the courts is attributable to two factors: first, inherent practical limitations upon courts; and, second, shared jurisprudential understandings as to the definition and application of economic and social rights.

(i) Inherent Limitations on Courts

Although any inclusion of judicially enforceable economic and social rights in a NSW Bill of Rights would be intended to subject governmental decisions on economic and social matters to human rights scrutiny, it must be recognised that the sheer volume of such decisions means that only a small proportion of those decisions could ever be subjected to adjudicative review.[20] Consequently, judicial intervention will tend to be limited to those cases which the public, the court and the parties recognise as being of sufficient importance to warrant legal proceedings. The primary effect of economic and social rights adjudication will therefore tend to occur through influence rather than intervention; democratic decision-making of parliament will hopefully be influenced by considerations of compliance with a Bill of Rights, as clarified by selective, adjudicated claims.

---

[19] *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)* [1999] S.C.J. No. 47.

[20] This point has been made with respect to judicial review in the US by N. Komesar, "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society" (1988) 86 *Michigan Law Review* 657.

(ii) Shared Jurisprudential Understandings

Given that the High Court of Australia has confirmed the interpretive relevance of international legal norms, courts enforcing a NSW Bill of Rights could be expected to look to the obligations clause of Article 2(1) of the ICESCR, which Australia has accepted, in defining government obligations in relation to substantive economic and social rights claims. And since this Article respects and preserves government's social policy making function, this expectation provides further reason not to fear equal recognition and protection of economic and social rights.

Recall that, as quoted above, Article 2(1) of the ICESCR defines States obligations in terms of taking steps, to the maximum of available resources, to progressively achieve full realization of economic and social rights by a variety of appropriate means.[21] There now exists a significant body of jurisprudence interpreting and applying these concepts which can be expected to inform the task of adjudicating economic and social rights claims in NSW.[22] Generally speaking, courts adjudicating economic and social rights have come to share the understanding, captured in Article 2(1), that economic and social rights can be implemented through a variety of means that require time to plan, execute, review and modify as necessary.

In turn, this understanding has influenced the approach to designing remedies for violations of economic and social rights, with courts recognising that effective remedies require the complementary efforts of all branches of government. Thus, the appropriate remedy to these types of claims may be the development of a plan and a schedule to which the government is willing to commit in order to ensure that progress is made. The role of the court would not then be to require certain policies as much as to measure progress and

---

[21] See, above, section (1)(B) for quotation of this Article. The obligations arising from this Article are considered in M. Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995).

[22] See, for instance, M. Craven, ibid; P. Alston and G. Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156; A. Chapman "A Violation Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 *Human Rights Quarterly* 23.

outcomes of whatever policies the government decides to adopt. The social policy-making function of government is thus protected not by courts declining to adjudicate social rights claims but rather by properly distinguishing the role of the court or tribunal from the role of parliament at the remedial stage.

In the next sections of this submission the Canadian and South African experiences with the adjudication of economic and social rights are described in order to illustrate these approaches.

(a) The Canadian Experience

Ever since the inception of the Canadian Charter of Rights and Freedoms[23] (the Charter) the Supreme Court of Canada has been concerned to distinguish its role from that of Parliament's or, in the parlance of the Court, to tread the line between reviewing and second-guessing government decisions. Under the Charter, this concern is most pressing when it comes to the s. 1 assessment of government arguments that the limitations they have imposed upon a right or freedom guaranteed by the Charter are demonstrably justifiable in a free and democratic society. As the Court has explained:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform the role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect the others' role and the role of the courts. [24]

Moreover, in its applications of the s. 1 test in the particular context of economic and social claims, the Supreme Court has reinforced the ultimate authority and responsibility of

---

[23] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
[24] *Vriend v Alberta* [1998] 1 S.C.R. 493 at para. 136. (This case concerned a successful claim that the omission of the ground of sexual orientation from the province's human rights code violated the Charter's equality gauarantee.)

government by adopting a more cautious and deferential approach than characterizes its application in other contexts. As the Court has put it:

> It is also clear that while financial considerations alone may not justify Charter infringements …, governments must be afforded wide latitude to determine the proper distribution of resources in society… This is especially true where Parliament, in providing social benefits, has to choose between disadvantaged groups.[25]

In a recent decision the Supreme Court has further elaborated on how deference will affect a section 1 analysis:

> Under s. 1, the burden is on the legislature to prove that the infringement of a right is justified. In attempting to discharge this burden, the legislature will have to provide the court with evidence and arguments to support its general claim of justification. Sometimes this will involve demonstrating why the legislature had to make certain policy choices and why it considered these choices to be reasonable in the circumstances. These policy choices may be of the type that the legislature is in a better position than the court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research … Courts must be cautious not to overstep the bounds of their institutional competence in reviewing such decisions. The question of deference, therefore, is ultimately tied up with the nature of the particular claim or evidence at issue and not in the general application of the s. 1 test; it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis.[26]

The identification and elaboration of the factors relevant to the adoption of a deferential approach under s. 1 of the Charter is in many respects still in its infancy. Nevertheless, as these passages make clear, courts, when faced with the challenges arising from the need to adjudicate economic and social matters, can be expected to be concerned about respecting the government function of social policy-making.

---

[25] *Eldridge v British Columbia* [1997] 3 S.C.R. 624. at para. 85 (citations omitted). (This case concerned a successful claim that failure to provide medical interpretation services to deaf patients seeking public health care violated the Charter's equality guarantee.)

Where courts find it necessary to intervene in the economic and social arena to protect fundamental rights, they are still able to respect the role of legislators by adopting alternative approaches to remedy. In *Eldridge v. British Columbia*,[27] for example, the Court found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a violation of the equality guaranteed by s.15(1) of the Charter. While the Court found the formal constitutional violation to reside in the failure of the Medical Services Board to fund interpreter services when it had the discretion to do so, it recognized that there are "myriad options available to the government that may rectify the unconstitutionality of the current system." Thus, in designing its remedy, the court was content to declare the government's constitutional responsibility to ensure that sign language interpreters will be provided where necessary for effective communication in the delivery of medical services, by whatever means it considers most appropriate.

> Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.[28]

More recently, in a case where the Supreme Court held a legislative provision to be in violation of the equality guarantee, it declared the offending provision of no force or effect but suspended the application of the declaration for six months for the express purpose of enabling the Parliament "some latitude in order to address these issues in a more comprehensive fashion."[29]

Thus, it is clear that Canadian courts have been willing and able to develop an approach to remedies under the Charter which respects the role of parliament and legislators in designing and implementing social programs.

---

[26] *M. v. H.* [1999] 2 S.C.R. 3. at para. 79. (This case concerned a successful claim that the exclusion of same-sex couples from the post-relationship maintenance provisions of the family law regime violated the Charter's equality guarantee.)
[27] Above, n 25.
[28] *Eldridge*, above n 25 at 631-32.
[29] *M. v. H.*, above n 26 at para. 147.

(b) The South African Experience

The experience with adjudication of economic and social claims in South Africa, though still at its early stages, is worth noting here because even though, in contrast to Canada, economic and social rights are expressly constitutionalised there, South African courts have adopted a similar approach of deference and remedial innovation as have Canadian courts.

The Constitutional Court of South Africa first considered its approach to adjudicating economic and social rights in *Soobramoney v Minister of Health, KwaZulu-Natal*[30] in which the general approach of the Court to economic and social rights was expressed. In *Soobramoney* it was claimed that a public hospital's refusal of kidney dialysis treatment to the applicant, who was chronically ill and could not afford private treatment, violated both the right not to be refused emergency medical treatment and the right of access to health care services (each of which is protected by s. 27 of the Constitution of the Republic of South Africa Act 108 of 1996). In rejecting the claim on both counts, the Court noted that this section also expressly allows progressive realisation within available resources and emphasized that the hospital, which had limited resources, had established a rational policy for determining who would receive the very expensive treatment and that the criteria used in the policy were objectively fair and properly applied to the applicant. In encapsulating its general position with respect to such claims, the Court noted that courts "will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility its is to deal with such matters."[31]

More recently the High Court of South Africa in *Grootboom v Oostenberg Municipality*[32] considered a claim by a group of squatters comprised of 390 adults and 510 children. The group had been living in extremely poor conditions in a squatter camp and so moved to

[30] 1997 (12) BCLR 1696 (CC).
[31] *Ibid.* at para 29.

nearby land they considered to be vacant. When the owners of the land brought proceedings for their removal the group agreed to leave, but since their original space in the camp had by then been occupied, they became truly homeless and were forced to camp at a sportsfield without tents or facilities. Subsequently they launched a claim against all relevant governments, from local to national, alleging violation of their right to adequate housing, as protected by s. 26 of the Constitution, or, alternatively, violation of the children's right to basic shelter, as protected by s. 28 of the Constitution. The court was not prepared to find for the group under s. 26 because the governments could show that, in a context of scarce financial resources, they had initiated a rational housing programme. This defense was made available by the wording of the section which establishes a right of access to adequate housing and obliges the government to take "reasonable legislative and other measures, within its available resources, to achieve a progressive realisation of this right."

On the other hand, the Court was prepared to accept the claim under s. 28 because that section established a right of every child to basic nutrition, shelter, health care services and social services and was not expressed to be subject to the "progressive realization" provision.

Nevertheless, the Court was greatly concerned not to intrude upon the responsibility and functions of the various levels of government concerned, nor to pre-empt the development of an appropriate remedy. Thus, the court declared that the various levels of government were jointly responsible for a violation of the children's right to basic shelter, and in so doing indicated certain minimum requirements, including that the shelter accommodate both parents and children and that it minimally consist of tents, portable latrines and a regular supply of water. However, the court also ordered that the governments report back to the court on matters of implementation within three months, that the applicants

---

[32] (Unreported as yet) High Court of South Africa, Cape of Good Hope Provincial Division, 17 December, 1999, Case No. 6826/99.

then have a further month to comment on the report, followed by a reply from the governments. Only then, if necessary, would the court make a further remedial order.

The express inclusion of justiciable economic and social rights in the Constitution has not, therefore, led to South African courts to take-over the social policy function of government. Indeed, there is concern among advocates for economic and social rights in South Africa that the courts there may carry the principle of deference too far, and fail to fulfill their constitutional responsibility to adjudicate economic and social rights claims.

It can be expected that in NSW, as in Canada and South Africa, statutory protection of economic and social rights will not alter the courts' appreciation of the distinctive role of parliament or dramatically increase their appetite for designing social policy. Poor people will take claims forward and governments will argue for deference. The courts will decide, on a contextual basis, when judicial intervention is warranted, and in what form. And assuming that NSW courts would rarely take action themselves, nevertheless these rights will at least be on the table, for the courts to consider for the first time as human rights, and perhaps in NSW, as in South Africa, some homeless families and children could, by claiming their rights, prod governments into acting.

Conclusion: Economic and Social Rights and Democracy

This examination of comparative experience thus suggests that commonly-held concerns over the idea of judicial enforcement of economic and social rights are overstated and fail to justify a refusal to accord the equal recognition and protection that the significance, and international acceptance, of such rights requires. But what it also suggests is the emergence of an alternative perspective from which to approach the issue of the proper role of judicial enforcement of human rights in democratic societies such as NSW. A number of commentators have described the relations between institutions which adjudicate rights claims and the legislatures as a "dialogue" between the respective

institutions.[33] The extent to which this idea is manifest in Canadian institutional practice has recently been explored by Hogg and Bushell who reveal that in the vast majority of instances in which courts have struck down legislation for violation of Charter rights and freedoms there has remained an opportunity for a more careful and appropriate legislative measure aimed at the same or similar objective.[34] Moreover, legislatures routinely take up this opportunity, although in doing so "the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision."[35]

In similar vein, Philip Alston, the (Australian) former chair of the CESCR, has argued, in the context of proposing an individual complaints procedure (or Optional Protocol) in relation to economic and social rights, that such procedures offer a unique form of particularized participation and scrutiny that complements the more general perspective of legislation and policy-making.[36] In his words, "a complaints procedure brings concrete and tangible issues into relief" and makes "real problems confronting individuals and groups come alive."[37]

Economic and social rights define the fundamental human rights values linked with equality, dignity and personal integrity within the economic and social sphere. Including them in our human rights protections thus assists courts to distinguish between second-guessing legislative decisions and protecting fundamental values. The details and priorities in a government housing program, for instance, will usually be legislative decisions which courts do not need to second-guess. But when government action or inaction leaves families without access to adequate housing or deprives children of adequate nutrition,

---

[33] See, for example, C. Scott and J. Nedelsky, "Constitutional Dialogue" in *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).
[34] P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35:1 *Osgoode Hall Law Journal* 75.
[35] Ibid at 79.
[36] P. Alston "No Right to Complain About Being Poor: The Need for an Optional Protocol to the UN Covenant" in A. Eide and J. Helgensen, eds, *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address (Essays in Honour of Torkel Opsah)* (Oslo: Norwegian University Press) 79.
[37] Ibid at 91-2.

these policies engage fundamental human rights values. In those instances, economic and social rights would legitimate a human rights review which, in the view of this submission, is essential for the health and legitimacy of our democratic institutions, as much as for the equality, dignity and personal integrity of the people concerned.

The issue of perceived competence of courts ought to be secondary to the issue of the responsibility of legislatures and courts in a democratic society. In the view of this submission, adjudicating economic and social rights claims does not so much over-ride or intrude upon as complement democratic decision-making.[38] The traditional controversy over unelected courts usurping democratic decision-making fails to take account of the fact that the vast majority of political systems reach decisions on important matters of social policy through a combination of institutions, including legislatures, executives, administrative agencies, markets, courts and tribunals. The increasing attention to the role of economic and social rights adjudication in modern democracies is reflective of a growing recognition that without economic and social rights, our democracies may be in increasing peril.

Depriving members of our community of institutional mechanisms to bring to the fore and to review, from a human rights standpoint, systemic assaults on dignity, equality and security, simply because they occur in the economic and social domain, undermines the fundamental human and democratic values of dignity, personal integrity and equality. For this reason alone economic and social rights ought to be accorded equal recognition and protection in a NSW Bill of Rights. The fact that in many jurisdictions throughout the world steps are being taken in this direction, without undermining appropriate separations of institutional functions and responsibilities, reinforces this imperative. Moreover, taking

---

[38] For an analysis of a recent term of decisions of the Supreme Court of Canada which contemplates a democracy-complementing role for the Court, see B. Baines and C. Greenfield, "Developments in Constitutional Law: the 1995-96 term" (1997) 8 *Supreme Court Law Review* 77. See also A. Gutman "The Rule of Rights or the Right to Rule?" in J. Pennock and J. Chapman (eds) *Justification: Nomos XXVIII* (New York: NYU Press, 1986, 15 at 166 (cited and discussed in C. Scott "Social Rights: Towards a Principled, Pragmatic Judicial Role" (1999) 1:4 *ESR Review: Economic and Social Rights in South Africa Newsletter* 4; and W. Black, "*Vriend*, Rights and Democracy" (1996) 7 *Constitutional Forum* 126.

such steps ultimately involves nothing more than complying with long-standing international human rights obligations undertaken for the benefit of all Australians, and for the benefit of Australian democracy as well. While taking the step of according equal recognition and protection to economic and social rights in Australia is long overdue, the present Inquiry offers NSW an opportunity to lead the way in establishing institutional mechanisms for redressing the dire problems that beset too many people in too many communities. If this Inquiry is to recommend the enactment of a NSW Bill of Rights, then, in the view of this submission, it ought also to recommend the equal recognition and protection of economic and social rights within that NSW Bill of Rights. And although the issue of whether to recommend that amendments be made to the *Interpretation Act 1987* requiring courts to the take into account rights contained in International Conventions has not been directly addressed in this submission, the arguments made in this submission are nevertheless applicable and support amendments requiring not only courts, but also administrative tribunals, to take account of the International Covenant on Economic, Social and Cultural Rights.