**Submission of the Australian Government**

**General Discussion on the Draft General Comment on Article 7 of the International Covenant on Economic, Social and Cultural Rights**

1. The Australian Government presents its compliments to the United Nations Committee on Economic Social and Cultural Rights (the Committee), and has the honour to refer to the Committee’s call for submissions contributing to the General Discussion on the draft General Comment on the right to just and favourable conditions of work, to be held on 16 June 2015.
2. Australia is a longstanding party to the International Covenant on Economic, Social and Cultural Rights, and is firmly committed to upholding the Covenant’s obligations.
3. The Australian Government commends the Committee for its initiative in establishing a General Discussion on a draft General Comment on the right to just and favourable conditions of work. Australia considers that the adoption of a General Comment on the right to just and favourable conditions of work will provide valuable guidance to States Parties in interpreting their obligations under the Covenant.
4. The Australian Government thanks the Committee for the opportunity to provide a written submission on the draft General Comment. It sets out its views below and invites the Committee to clarify certain statements in the draft General Comment regarding the scope of the legal obligations of States Parties under the Covenant.

**Substantive matters**

*International cooperation and extraterritoriality*

1. Paragraphs 68 and 69 of the draft General Comment set out the Committee’s views as to the nature of the obligations in Article 7 with respect to the actions of nationals and domestic enterprises outside of the territorial jurisdiction of a State Party. In doing so, they draw on principles set out in the United Nations Guiding Principles on Business and Human Rights. Australia notes that the Guiding Principles on Business and Human Rights are a set of non‑binding standards aimed at preventing and addressing the risk of adverse human rights impacts linked to business activity. They do not reflect the obligations set out in the Covenant, nor are States Parties to the Covenant bound by them.
2. The Covenant does not contain a specific scope of application provision. However, in Australia’s view, the Covenant is primarily territorial in nature. States Parties would only owe obligations under the Covenant extraterritorially where there is a high degree of authority or control being exercised over the activities in question. With respect to the circumstances described by the Committee, particularly those described in Paragraph 69, Australia has little or no control over the actions of nationals or domestic enterprises operating extraterritorially, nor over the law of the countries in which such actions may be occurring.
3. While Article 2(1) of the Covenant requires States Parties to take steps, including through international assistance and cooperation, to fully realise the rights under the Covenant, this obligation does not extend to the matters set out in paragraphs 68 and 69. The Committee has previously stated that Article 2(1) requires a State Party, in fulfilling its obligations under the Covenant through taking steps to the maximum of its available resources, to utilise ‘both the resources existing within a state and those available from the international community through international cooperation and assistance’.[[1]](#footnote-1) Australia respectfully submits that paragraphs 68 and 69 are not reflective of obligations under the Covenant and should be removed from the General Comment.
4. The Australian Government also notes the statement in the first sentence of paragraph 66, that ‘[w]here a State party is not in a position to meet its obligations to realise the right, it *must* seek international assistance’ (emph. added). Australia does not consider that this necessarily reflects the obligation in Article 2(1). Australia suggests that the mandatory language be removed, and replaced with a reference to the need to seek international assistance where appropriate.

*Equality and non-discrimination*

1. With respect to the right to equal remuneration for work of equal value without distinction, the Committee refers in the second half of paragraph 12 to the principle of equality, including equality as it applies between men and women and as it applies ‘to all workers without distinction based on race, ethnicity, nationality, migrant or health status, disability, age, sexual orientation, gender identity or any other ground’.
2. It is unclear whether the Committee, in referencing the principle of equality, is referring to the right to equal remuneration for work of equal value, or whether it is referring to the broader concept of the right to equality and non-discrimination reflected in Article 2(2) of the Covenant. With respect to the right to equality and non-discrimination, Australia notes that States Parties may not *discriminate* against workers on the basis of race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status. However, in certain circumstances, *distinctions* made on the basis of such grounds may be legitimate. This reflects the well-established principle under international law that legitimate differential treatment (that is, distinctions that are aimed at a legitimate purpose, are based on reasonable and objective criteria and are proportionate) will not constitute discrimination. It also allows for ‘special measures’ as the concept exists in certain human rights treaties.[[2]](#footnote-2)
3. Australia suggests that paragraph 12 be clarified, by removing references to ‘equality’ and referring specifically to the concept of ‘equal remuneration for work of equal value’ between all workers, particularly men and women. If it is intended to refer to the broader right to equality and non-discrimination in Article 2(2), Australia suggests that reference be made to equal treatment as it applies to all workers without *discrimination*, rather than *distinction*.
4. Australia also notes that, in listing the grounds referred to in paragraph 12, the Committee references Article 2(2) of the Covenant and the Committee’s General Comment No. 20 on ‘Non-discrimination in economic, social and cultural rights’. However, these grounds do not fully reflect those that appear in Article 2(2) nor in General Comment No. 20.
5. Article 2(2) refers to race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status. General Comment No. 20 refers to those groups set out in Article 2(2) and also elaborates on other status as including disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence or economic and social situation. Australia notes that a more consistent statement is set out in paragraph 64(a) of the draft General Comment. Australia suggests that a consistent formulation be used both within the document, and with relevant external authorities, such as that set out in paragraph 64(a).
6. The Committee also states in paragraph (v) on migrant workers under ‘the right to just and favourable conditions of work for specific groups’ on page 12 that ‘[l]aws, policies and regulations should ensure that migrant workers enjoy treatment no less favourable than national workers in relation to remuneration and conditions of work’. As noted above, while States Parties must not *discriminate* against migrant workers in the enjoyment of the right to just and favourable conditions of work, in certain circumstances distinctions between groups will not amount to discrimination, but rather constitute legitimate differential treatment. Australia suggests that this statement be revised, for example ‘[l]aws, policies and regulations should ensure that migrant workers are not subject to discrimination in relation to remuneration and conditions of work’.

*Non-state actors*

1. Paragraph 3 reflects the Committee’s concern that ‘the importance of the right to just and favourable conditions of work has yet to be fully recognised by State and non-state actors’. Paragraphs 73 – 75 also relate to obligations of non-state actors. Australia notes that the right to just and favourable conditions of work, as it exists in Article 7 of the Covenant, only applies to States Parties to the Covenant. While States Parties’ obligations extend to taking steps to prevent, investigate, punish and redress abuse by third parties through effective regulation, the Covenant does not place obligations on non-state actors.

*Unpaid workers*

1. Paragraph 6 addresses the scope of the right to just and favourable conditions of work and states that, with respect to the reference to ‘everyone’ in Article 7, the normative scope of the right extends to unpaid workers. While Australia considers that there may be certain aspects of the right to just and favourable conditions of work which are relevant to unpaid workers (for example, safe and healthy working conditions), Australia does not agree that the right in its totality applies to unpaid workers. For example, Australia does not agree that rights relating to remuneration in Article 7(a) apply to unpaid workers. Australia suggests that the extent to which Article 7 applies to unpaid workers be clarified throughout the General Comment.

*Review of public sector promotions*

1. Paragraph 35 addresses standards of promotion in the public sector and states that ‘[p]ublic sector promotions should be subject to independent review’. In Australia’s view, Article 7(c) does not extend to such a right. Australia suggests that consideration be given to removing this sentence.

*Weekly hours of work*

1. Paragraphs 37-39 address limits on daily and weekly hours of work. Paragraph 39 recommends that States parties take steps to progressively achieve a target of a forty hour working week. Australia suggests that this statement be qualified by referring to ‘a maximum of’ forty hours per week, to allow States Parties flexibility in regulating working hours.

**Other matters**

1. Australia suggests that the references in footnote 1 to the right to just and favourable conditions of work as it exists in a range of international human rights treaties be amended. While rights to just and favourable conditions of work are reflected in the Universal Declaration of Human Rights (UDHR), the UDHR is not a human rights treaty, but rather a non-binding Resolution of the General Assembly.
2. Australia suggests that the introductory paragraphs under the heading ‘Normative Content’ could also include references to, and details of, rights to just and favourable conditions of work (and other relevant rights) as they exist in other human rights treaties, including in the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the International Convention on the Elimination of All Forms of Racial Discrimination.
3. Australia notes that the reference to the right to work in paragraph 2 defines the right to work in Article 7 of the Covenant ‘as freely chosen and accepted work’. Australia submits that the right to work, while including the right to the opportunity to gain a living by work which is freely chosen and accepted, is broader in scope and also includes other aspects, such as the right to vocational education and training. Australia suggests that the reference be clarified (for example, by referring to the totality of the right to work as reflected in Article 7).
4. Paragraph 20 addresses the right to remuneration which provides for a decent living and refers to other relevant rights in the Covenant, including the right to an adequate standard of living. Australia recommends that the reference to the content of the right to an adequate standard of living reflect the content of the right as expressed in Article 11 (that is, ‘adequate food, clothing and housing’).
5. Australia suggests that the statement on the need for ‘temporary special measures’ to accelerate de facto equality in paragraph 34 be accompanied by a reference to Article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women, in addition to the references to the Committee’s own General Comments.
6. Australia reiterates its firm support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.
1. CESCR General Comment No. 3 ‘The nature of States parties obligations (Art. 2, par: 1)’ (14/12/1990), paragraph 13. [↑](#footnote-ref-1)
2. For example, Article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women. [↑](#footnote-ref-2)