**Submission of the Australian Government**

**Draft General Comment on Article 15 of the International Covenant on Economic, Social and Cultural Rights**

1. The Australian Government (Australia) 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 on its draft General Comment on science and economic, social and cultural rights.[[1]](#footnote-1)
2. Australia is a longstanding party to the *International Covenant on Economic, Social and Cultural Rights* (the Covenant), and is firmly committed to upholding the Covenant’s obligations.
3. Australia appreciates the Committee’s work in preparing the draft General Comment and its role in ‘assisting States parties in fulfilling their reporting obligations’.[[2]](#footnote-2)
4. Australia 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 under the Covenant. Australia notes that it has not engaged in an exhaustive examination of the draft General Comment, but has focused on those issues it sees most benefit in raising.

*Scope of States Parties obligation*

1. Australia appreciates the Committee’s efforts to consider the various aspects of Article 15 as they relate to science. In particular, Australia notes the Committee’s focus on ‘the right of everyone to enjoy the benefits of scientific progress and its applications’ (Article 15(1)(b)).
2. Australia agrees with the Committee that, as with all human rights obligations, the obligations contained in Article 15(1)(b) must be interpreted ‘in accordance with article 31 of the *Vienna Convention on the Law of Treaties*’ (VCLT).[[3]](#footnote-3) Australia notes that the starting point under Article 31(1) of the VCLT is that a treaty must be interpreted ‘in good faith in accordance with *the ordinary meaning to be given to the terms of the treaty* in their context and in the light of its object and purpose’ (emphasis added). Accordingly, Australia encourages the Committee to base its interpretation more closely on the text of Article 15.
3. The draft General Comment states:

Cultural life is larger than science as it includes other aspects of human existence, such as arts or literature; it is however reasonable to include scientific activity in cultural life. Thus, the general right of everyone to take part in cultural life includes the right of every person to take part in scientific endeavours and in decisions concerning the developments of science.[[4]](#footnote-4)

1. Australia considers that such an interpretation of Article 15 purports to create new legal obligations, beyond the terms of the terms of the Covenant, to include a right to ‘take part in’ as opposed to ‘enjoy the benefits of’ scientific progress. This is not consistent with the ‘ordinary meaning’ of Article 15.[[5]](#footnote-5) While science is an aspect of cultural life, the terms of Article 15(1)(b) specifically clarify the scope of any rights in relation to science which may exist as a subsidiary part of Article 15(1)(a), that is, ‘[t]o enjoy the benefits of scientific progress and its applications’.
2. Australia appreciates that alongside the ordinary meaning of the Covenant, the context and object and purpose of the provisions must also be considered. Relevantly, Article 31(2)(b) of the VCLT provides that context for the purpose of interpretation of a treaty includes ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’.
3. The draft General Comment states: ‘[t]he context includes other provisions of the Covenant, including the preamble, and other international legal instruments clearly related to the Covenant, such as the [Universal Declaration of Human Rights (UDHR)]’.[[6]](#footnote-6) In Australia’s view the UDHR, having been concluded eighteen years prior to the Covenant, cannot properly be characterised as an agreement made ‘in connection with the conclusion’ of the Covenant.
4. Australia appreciates the Committee’s efforts to consider the scope of the States Parties’ obligations in relation to science, including as it may relate to culture. However, Australia considers that the draft General Comment should interpret the scope of States Parties’ obligations in accordance with the rules of treaty interpretation in the VCLT and would welcome the Committee’s clarification on the scope of States Parties’ legal obligations under the Covenant.

*States Parties core obligations under the Covenant*

1. Australia disagrees with the Committee’s formulation of States Parties’ core obligations of the ‘minimum essential levels of the rights related to science’.[[7]](#footnote-7) While there are aspects of the Covenant, such as non-discrimination, that are subject to immediate realisation, it is not clear on what basis the Committee considers certain elements to be ‘core obligations’. Rather, many of these elements appear to be closer to policy recommendations, for example ‘the development of international contacts and cooperation in the scientific field’, rather than reflecting binding legal obligations.
2. Australia is of the view that the ‘core obligations’ articulated in the draft General Comment are overly broad and would benefit from being less prescriptive, in recognition of the different circumstances of each State party. Australia therefore invites the Committee to clarify the statements in the draft General Comment regarding States Parties’ ‘core obligations’ and reframe them consistently with obligations of non-discrimination, or, in the alternative, as policy recommendations only.

 *Precautionary principle*

1. The draft General Comment addresses participation and the precautionary principle.[[8]](#footnote-8) At the outset, Australia notes that by referring to the precautionary ‘principle’, the draft General Comment does not reflect the current state of international law. This is because the term ‘precautionary principle’ risks incorrectly implying that it is an accepted rule of customary international law.
2. Australia is of the view that in lieu of the term ‘precautionary principle’, the term ‘precautionary approach’ should be used. This is because the term ‘precautionary approach’ better reflects the content and legal status of Principle 15 of the [Rio Declaration on Environment and Development](https://sedac.ciesin.columbia.edu/entri/texts/rio.declaration.1992.html), which represents a carefully balanced, internationally agreed approach to precaution tied to science-based decision-making in the context of environmental protection.
3. The draft General Comment also seeks to broaden the reference to the ‘precautionary principle’ to include an action or policy that may lead to ‘morally unacceptable harm to the public or the environment’.[[9]](#footnote-9) Australia disagrees with attempts to bring non-environmental elements (including socioeconomic concerns, cultural, ethical or moral issues) within the scope of the precautionary approach, as such elements could undermine science-based decision-making.
4. Australia considers that any references to the precautionary approach should be consistent with Rio Principle 15 and its caveats and would be grateful for the Committee’s clarification on this issue in the draft General Comment.

*Principle of free, prior and informed consent*

1. In relation to indigenous peoples and science, the draft General Comment states ‘[c]onsultation in order to obtain free, prior and informed consent is necessary, whenever the State party or non-state actors make decisions or create policies related to science that have an impact on indigenous peoples’.[[10]](#footnote-10) The principle of free, prior and informed consent (FPIC) is drawn from the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).
2. Australia recognises the importance of engaging in good faith with indigenous peoples in relation to decisions that affect them, and makes efforts to consult in line with the principles of FPIC. However, the Declaration is not a legally binding instrument and therefore, the concept of FPIC does not reflect an obligation under international human rights law. As such, it may be more appropriate for the language of the draft General Comment to reflect this, by replacing the language of ‘necessary’ with ‘should be considered’.

*Privitisation of scientific research and intellectual property*

1. The draft General Comment also considers the consequences of the privitisation of scientific research and intellectual property (IP) on the enjoyment of Article 15 of the Covenant.[[11]](#footnote-11) In this regard, it is noted that the majority of research and development in Australia is Government funded.
2. The draft General Comment states ‘States have to take all steps to avoid the possible negative effects of IP on the enjoyment of the right to share in scientific progress…’[[12]](#footnote-12)  However, any possible IP system needs to balance appropriate incentives for innovation and scientific progress against any effects that may unreasonably impede further innovation.
3. Australia reiterates its concerns that the draft general comment is overly prescriptive. The use of mandatory language such as ‘have’ or ‘should’ purports to extend the responsibilities of States Parties beyond the text of the Convention. Such ‘obligations’ should be reframed as recommendations, allowing States Parties to take into account, and balance, relevant policy issues.

*Controlled substances and science*

1. Australia notes the draft General Comment’s consideration of the relationship between scientific research and the international drug control conventions. Australia further notes that international drug control conventions recognise that medical and scientific purposes are an important factor in how drugs are controlled under the international regime and permit the use of listed drugs, including those identified in the draft General Comment, for medical and scientific purposes.
2. Australia welcomes the draft General Comment’s reference to Article 4 of the Covenant and recognition that the enjoyment of the rights in the Covenant may be subject to limitations. Australia considers its obligations under both the Covenant and the international drug control conventions and their relevant frameworks are consistent and complementary. In particular, Australia is of the view that controlled access to drugs in accordance with the international drugs conventions is entirely consistent with Article 4 of the Covenant being ‘limitations … for the purpose of promoting the general welfare in a democratic society’.

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1. Australia reiterates its support for the work of the Committee and avails itself of the opportunity to renew to the Committee the assurance of its highest consideration.
1. Committee on Economic, Social and Cultural Rights, *Draft General Comment on Science* (Draft version 2 January 2020)(‘draft General Comment’). [↑](#footnote-ref-1)
2. Committee on Economic, Social and Cultural Rights, *Rules of Procedure of the Committee*, E/C.12/1990/4/Rev.1 (1 September 1993), rule 65. [↑](#footnote-ref-2)
3. Draft General Comment, paragraph 11; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘VCLT’). [↑](#footnote-ref-3)
4. Draft General Comment, paragraph 12. [↑](#footnote-ref-4)
5. VCLT, Article 31(1). [↑](#footnote-ref-5)
6. Draft General Comment, paragraph 11. [↑](#footnote-ref-6)
7. Ibid, paragraph 56. [↑](#footnote-ref-7)
8. Ibid, paragraphs 60 – 61. [↑](#footnote-ref-8)
9. Ibid, paragraph 60. [↑](#footnote-ref-9)
10. Ibid, paragraph 68. [↑](#footnote-ref-10)
11. Ibid, paragraph, 62 – 66. [↑](#footnote-ref-11)
12. Ibid, paragraph 66. [↑](#footnote-ref-12)