

**RE: Comment on the Draft General Comment No. 19: On Public Spending and the Rights of the Child (Article 4 of the Convention on the Rights of the Child)**

**Submission of the Australian Government**

The Permanent Mission of Australia to the United Nations and other international organisations in Geneva hereby presents the Australian Government’s comments on the draft General Comment on Public Spending and the Rights of the Child (Art 4).

1. Australia is a longstanding party to the Convention on the Rights of the Child (the Convention), and is firmly committed to upholding the Convention’s obligations.
2. The Australian Government commends the Committee for its initiative in drafting a General Comment on Public Spending and the Rights of the Child. Australia considers that the adoption of this General Comment will provide valuable guidance to States Parties in assisting in the implementation of their obligations under the Convention.
3. 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 Convention.

**Substantive matters**

*Nature of the General Comment*

1. The Australian Government suggests that discussion of public spending obligations be broadened throughout the final General Comment to better reflect the flexibility available to States Parties in fulfilling obligations under the Convention. Australia suggests the General Comment could focus on a principles-based discussion, incorporating examples which demonstrate that there are a range of ways of fulfilling obligations under the Convention.
2. Australia agrees that public spending could be considered an ‘appropriate legislative, administrative and other measure’ under Article 4 relating to the implementation of rights recognized in the Convention. However, the draft General Comment is overly prescriptive and identifies specific actions a State Party must take to meet obligations in respect of public spending. As a matter of treaty interpretation, Australia queries whether such specificity can be derived from the broadly‑worded obligation in Article 4. In practice, States Parties have different budget processes and are afforded a necessary measure of discretion in how they implement their obligations.
3. Paragraph 1 states that ensuring public spending to realize the rights of children ‘entails obligations’ to perform listed functions. In Australia’s view, there are a number of ways to ensure public spending realises children’s rights and the specified functions are not the only method to do so, nor are they explicitly required under Article 4.
4. Paragraphs 66 onward are particularly prescriptive and include measures which may not be utilised, or even feasible, in every State Party. For example, the draft General Comment states that States Parties should utilise pre-budget statements (paragraphs 100‑102), classification systems that include particular budget lines and codes (paragraphs 104, 119-122), and should task the Supreme Audit Institution to carry out audits of expenditure in relation to the rights of children (paragraphs 127-133). Australia suggests that these measures do not constitute the only way of ensuring that funding is allocated to the advancement of the rights of the child and spent on children’s programmes.
5. A further example is in relation to the Child Rights Impact Assessment, described in paragraph 53 and referred to throughout the draft General Comment. In paragraph 86, the Committee ‘emphasizes the responsibility of States to conduct child rights impact assessment of all laws, policies and programmes’. The Australian Government submits that consideration of the best interest of the child in public spending can be achieved through a variety of methods.
6. In Australia’s view, it is important that such examples (described above) are not considered as exhaustive means of meeting the relevant obligations in the Convention, given the discretion provided to States Parties in meeting their obligations under Article 4.

*Obligations to promote rights and evidence of outcomes*

1. The Australian Government’s view is that while children’s rights are a significant priority in public spending, they are not the only priority in public expenditure. Most States Parties to the Convention are also party to other core United Nations human rights treaties and will have a range of priorities in relation to public spending – including persons with disabilities, Indigenous persons and women. Article 4 does not require that States Parties should expend all resources, including public spending, to promote children’s rights.
2. The Committee states that ‘[t]he obligation to promote the rights of the child in relation to public spending means that priority should be given to children’s rights in the allocation of resources’ (para 32, emph omitted). In paragraph 51, the Committee also describes this obligation as ‘to make the best interests of the child a primary consideration’ and at paragraph 68, that States Parties must ‘prioritize allocations and spending toward child rights-related areas’.
3. Australia interprets these statements of the Committee in accordance with its view that children’s rights are one of a number of priorities to be considered in public spending and that in relation to expenditure on, or related to children, the best interests of children will be a primary consideration.
4. In relation to the obligation to provide ‘evidence of outcome results for children’, rather than evidence of measures taken (para 27), Australia recommends that the Committee expand on what it considers will be suitable evidence to guide States Parties.

*International cooperation*

1. Paragraphs 43-44 of the draft General Comment set out the Committee’s views on the nature of the obligation on States Parties with respect to international cooperation. In the Committee’s view, States Parties ‘are obliged to seek cooperation (bilateral, regional, inter regional, global or multilateral) if it would facilitate the implementation of the rights of the Convention’ (para 43). Further, ‘developed States are obliged to provide international cooperation to developing States, with the aim to facilitate the implementation’ of the Convention (para 43).
2. Australia submits that these statements do not reflect the obligation in Article 4 of the Convention. Article 4 requires States Parties to undertake measures ‘within the framework of international co-operation’. In the Australian Government’s view, Article 4 requires States 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 does not consider that Article 4 places an obligation on States Parties to either seek, or provide, international assistance. Australia suggests that the mandatory language be removed, and replaced with a reference to the need to seek and provide international assistance where appropriate.

*Discussion of economic, social and cultural rights*

1. The Australian Government commends the Committee on its discussion of economic, social and cultural rights as rights of progressive realisation and considers that this provides valuable guidance to States Parties. Australia raises two suggestions to further guide States Parties relating to retrogressive measures and minimum core obligations.
2. With respect to retrogressive measures, the Committee states its view in paragraph 20(c) that ‘States cannot take deliberate retrogressive measures in relation to articles of the Convention, including in times of economic austerity’.
3. This text should be qualified to acknowledge that not every backward step is a violation of the Convention – only those steps that are unjustifiable considering the full circumstances of the State Party. The Committee on Economic, Social and Cultural Rights (the CESCR) has indicated that: ‘States cannot take deliberate retrogressive measures in relation to articles of the Convention *unless taken with the most careful consideration and with full justification by reference to the totality of the rights provided for by the Convention and in the context of the full use of the maximum available resources*’.[[2]](#footnote-2)
4. With respect to economic, social and cultural rights, the Committee refers in paragraph 37 to ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’. The view adopted by the Committee is that ‘[l]ack of available resources is never a valid argument for States not to comply with this core obligation’. Australia is concerned that this discussion does not align with the concept of a ‘minimum core’ as developed by the CESCR.
5. Australia notes that what constitutes a ‘minimum core obligation’ is highly contested between States and will differ according to State capacity and resources. The CESCR has stated that ‘for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.[[3]](#footnote-3) This discussion suggests that a lack of resources may be a legitimate reason for failing to provide a minimum core of particular economic, social and cultural rights.

*Obligations to respect, promote, protect and fulfil*

1. The discussion of the general principles of respect, promote, protect and fulfil in paragraphs 31-34 is not consistent with other treaty bodies’ views on the content of these principles.
2. Paragraph 31 describes the obligation on States Parties to respect the rights of the child as including an obligation to ‘not directly or indirectly facilitate, aid and abet any infringement of children’s rights’. The obligation to respect is generally described as requiring States Parties to refrain from interfering directly or indirectly with the enjoyment of rights.[[4]](#footnote-4) If this draft statement is intended to refer to state responsibility for internationally wrongful acts,[[5]](#footnote-5) Australia suggests that the Committee clarify its intention.

*Discussion of right to life and potential inclusion of other rights*

1. Australia suggests that discussion surrounding the right to life (paras 54-58) might be strengthened by referencing other rights in the Convention.
2. The right to life in Article 6 of the Convention is primarily based on Article 6 of the International Covenant on Civil and Political Rights which is the right not to be arbitrarily deprived of one’s life. Australia acknowledges that, in accordance with drafting intentions, the right to life under the Convention has a positive connotation and should take into account economic, social and cultural conditions. However, in Australia’s view, paragraphs 54-58 extend the right to life to include obligations which are better considered as aspects of other rights such as the right to education (Arts 28 and 29); right to adequate standard of living (Arts 24(2)(c) and 27); right to health (Arts 24 and 25); and right to benefit from social security (Article 26). These articles provide important and specific obligations related to State Party investment in children which go beyond the right to life. Extending the right to life to include general obligations risks confusing and undermining the content of the right to life.
3. Australia recommends including reference to the above rights as examples of crucial basic rights which must be considered as part of broader obligations surrounding public spending on children.

*Non-State actors*

1. Paragraph 89 refers to private actors and business enterprises, including that ‘all businesses must meet their responsibilities regarding children’s rights and States must ensure they do so’. Australia notes that the obligations, duties and responsibilities provided for in the Convention only apply to States Parties. While States Parties’ obligations extend to taking steps to prevent, investigate, punish and redress abuse by third parties through effective regulation, the Convention does not place obligations or responsibilities directly on non-state actors. Australia suggests that reference could instead be made to the general obligation to ‘protect’, which generally requires States Parties to take measures that prevent third parties from interfering with the enjoyment of rights.

*Clarification of discrimination*

1. Paragraphs 31 and 47-50 relate to the obligation on States Parties not to discriminate against children on the basis of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status (Article 2(1)). Paragraph 50 recognises that ‘special measures’ may be required in certain circumstances. However, there is no recognition of 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. Australia suggests that reference to this principle be made.

*Clarification of ambit of comment*

1. The Australian Government respectfully suggests the following clarifications be made relating to the ambit of the draft General Comment.
2. Paragraph 1 summarises obligations on States Parties as including an obligation to ‘[r]eport on, evaluate and audit budgets’. Australia suggests that this be amended to ‘report on, evaluate and audit public spending in relation to children’ to better reflect the scope of both the General Comment and the Committee’s mandate.
3. In paragraph 10, the definition of laws as ‘all child rights’ should be clarified. Australia suggests that ‘laws’ should be defined as all domestic legislation related to children’s rights. In the context of describing relevant international law, Australia suggests that the wording should be nuanced to reflect the fact that States Parties will have differing obligations – particularly in relation to regional instruments.
4. In Australia’s view, the list of actors described in paragraph 18 as involved in the budget process is too broad and not necessarily applicable to all States Parties. Australia has a separation of powers and the Judiciary is not involved in the budget making process, which falls to Parliament. Other actors such as ombudspersons, or bilateral, regional, inter-regional, global and multilateral donors and institutions are not necessarily involved in the budget process and we would not consider the description of their role in the General Comment to be accurate.
5. In paragraph 21 of the General Comment, the Committee provides that obligations in relation to public spending can be invoked before a court. However, whether this is the case will depend on the constitutional or legal system of each State. In Australia, as in many dualist States, international law is not enforceable in domestic courts until implemented as domestic law and the obligations described in relation to public spending may not be automatically enforceable in domestic courts. If paragraph 21 is a reference to the International Court of Justice, we suggest making this clear.

*Other Matters*

1. Australia suggests that the second sentence in paragraph 20(a) requires the word ‘appropriate’ to be added to read: ‘This means that States are obliged to take all *appropriate* measures at their disposal…’. This is consistent with the obligation in Article 4 and without this, the description significantly expands the obligation.
2. 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. This accords with the interpretation of similar, but more specific, provisions in the International Covenant on Economic, Social and Cultural Rights: Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, *The nature of States parties obligations* (Art. 2, par. 1), UN Doc. E/1991/23, 14 December 1990, [13]. [↑](#footnote-ref-1)
2. Ibid, [10]. [↑](#footnote-ref-2)
3. Ibid, [10]. [↑](#footnote-ref-3)
4. See, for example, CESCR General Comments No. 14, [33]; No. 15, [21], No. 18, [22]. [↑](#footnote-ref-4)
5. See, for example, International Law Commission’s *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th session, 85th plenary meeting, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex (‘*Responsibility of States for Internationally Wrongful Act*’). [↑](#footnote-ref-5)