

# **The Meaning of “Social Origin” in International Human Rights Treaties: A Critique of the CESCRC’s Approach to “Social Origin” Discrimination in the ICESCR and its (Ir)relevance to National Contexts such as Australia**

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## **Abstract**

A number of international human rights treaties prohibit discrimination on the basis of “social origin”. This paper discusses the meaning of the term “social origin” in international human rights treaties. It articulates what meaning United Nations (UN) treaty bodies attribute to the term “social origin”, and the concept of “social origin” discrimination, in the international human rights treaty each body monitors. This paper finds that the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), is the only UN treaty body which provides a clear and detailed interpretation of the term “social origin” in an international human rights treaty (the ICESCR). It argues that the meaning which the CESCR attributes to the term “social origin” in the ICESCR may have some value to understanding what the term might mean in Australian legislation which prohibits discrimination based on “social origin”. This paper finds that, according to the CESCR, “social origin” in the ICESCR refers to “inherited social status”. This paper critiques the CESCR’s approach to “social origin” and “inherited social status”. It argues that the CESCR’s approach to “social origin” requires development if it is to have relevance and its intended effect (prohibiting discrimination on the basis of “inherited social status”) in national contexts such as Australia. This paper thus proposes a view of discrimination based on “inherited social status” (and therefore “social origin”) that has relevance and application in settings such as Australia.

## **Key words**

Social origin, discrimination, social origin discrimination, ICESCR, CESCR, discrimination law, human rights, international human rights law, social status, inherited social status, ascribed status, Australia, labour law.

## **Introduction**

In an article which has been published in the UNSW Law Journal this author discusses the meaning of the term “social origin” in International Labour Organization (ILO) Conventions and the relevance of “social origin” discrimination principles to the Australian context.<sup>1</sup> This paper will build on that research and consider what “social origin” discrimination means in international

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<sup>1</sup> See Angelo Capuano “Giving Meaning to ‘Social Origin’ in ILO Conventions: ‘Class’ Discrimination and its Relevance to the Australian Context” (2016) 39(1) UNSWLJ 84.

human rights law, and whether this meaning has relevance in national contexts such as Australia. This is important because the concept of “social origin” discrimination is ambiguous and largely unexplored in case law and academic literature. To determine what meaning “social origin” bears in international human rights treaties, this paper will look to interpretations of the term by United Nations (UN) treaty bodies.

Based on a detailed study of a number of reports of various UN treaty bodies, this paper finds that the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), is the only UN treaty body which provides a clear and detailed interpretation of the term “social origin” in an international human rights treaty. This interpretation is found within the CESCR’s *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* dated 2 July 2009 (General Comment 20). This paper will, therefore, focus primarily on discussing and critiquing the approach to “social origin” discrimination by the CESCR, though for completeness it will also cover the reports of other UN treaty bodies.

This paper will consist of several parts. Part I of this paper will identify the core international human rights treaties which prohibit discrimination on the basis of “social origin”. Part II of this paper will then briefly discuss the UN treaty body system, and the reports each of these bodies produce when interpreting specific international human rights treaties. Based on these reports, Part III of this paper will articulate what meaning these UN treaty bodies attribute to the term “social origin” and the concept of “social origin” discrimination in the international human rights treaty each body monitors. Based on the finding that the CESCR is the only UN treaty body which provides any useful guidance on the concept of “social origin” discrimination in an international human rights treaty (the ICESCR), Part IV of this paper will then critique the approach to “social origin” discrimination by the CESCR. This part will, in particular, focus on whether the approach to “social origin” by the CESCR has any relevance in national contexts such as Australia, and it will ask whether this approach should be broadened to be more useful within such contexts. Part V of this paper will, after critiquing the CESCR’s approach to “social origin”, propose a view of “social origin” discrimination that is likely to have more relevance in the Australian context. This view of “social origin” will also likely be relevant to other countries, such as New Zealand and Canada for example.

## **“Social Origin” Discrimination and International Human Rights Treaties**

Each of the nine core international human rights treaties addresses a particular area of human rights. These are the:<sup>2</sup>

- International Covenant on Civil and Political Rights<sup>3</sup> (ICCPR);
- International Covenant on Economic, Social and Cultural Rights<sup>4</sup> (ICESCR);

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<sup>2</sup> UN Office of the High Commissioner for Human Rights “The Core International Human Rights Instruments and their monitoring bodies” (2016) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>3</sup> 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

<sup>4</sup> 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

- Convention on the Rights of the Child<sup>5</sup> (Convention RC);
- International Convention on the Elimination of All Forms of Racial Discrimination<sup>6</sup> (ICERD);
- Convention on the Elimination of All Forms of Discrimination against Women<sup>7</sup> (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>8</sup> (CAT);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>9</sup> (ICMW);
- International Convention for the Protection of All Persons from Enforced Disappearance<sup>10</sup> (CPED); and
- Convention on the Rights of Persons with Disabilities<sup>11</sup> (CRPD).

Discrimination on the basis of “social origin” is prohibited in only four of these treaties: the ICCPR,<sup>12</sup> ICESCR,<sup>13</sup> Convention RC<sup>14</sup> and ICMW.<sup>15</sup> These treaties do not define “social origin” and none of the optional protocols supplementing these treaties elaborate on the meaning of “social origin”.<sup>16</sup> The International Court of Justice (ICJ) has also not, in any of its decisions, defined or given meaning to the term “social origin”, as it appears in an international human rights treaty. Accordingly, guidance on what meaning “social origin” bears in the ICCPR, CESC, Convention RC and ICMW must be sought from sources which have interpreted the meaning of “social origin” in these treaties. Such interpretations, it will now be argued, can potentially be found within the reports of UN treaty bodies.

## UN Treaty Body System

A country “assumes a legal obligation to implement the rights set out in” the ICCPR, CESC, Convention RC and/or ICMW when it accepts those treaties through “ratification, accession or

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<sup>5</sup> 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

<sup>6</sup> 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

<sup>7</sup> 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).

<sup>8</sup> 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

<sup>9</sup> 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003).

<sup>10</sup> 2716 UNTS 3 (opened for signature 6 February 2007, entered into force 23 December 2010).

<sup>11</sup> 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008). While the CRPD does not prohibit “social origin” discrimination, in its preamble it expresses concern “about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of...social origin”.

<sup>12</sup> See ICCPR, above n 3, arts 2, 4, 24 and 26.

<sup>13</sup> See ICESCR, above n 4, art 2(2).

<sup>14</sup> See Convention RC, above n 5, art 2.

<sup>15</sup> See ICMW, above n 9, arts 1 and 7.

<sup>16</sup> See *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* GA Res 63/117 (2009); *Optional Protocol to the International Covenant on Civil and Political Rights* GA Res 2200A, XXI (1966); *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* GA Res 54/263 (2000); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* GA Res 54/263 (2000).

succession”.<sup>17</sup> To assist countries that have accepted human rights treaties to meet their obligations under those treaties, treaty bodies (with “a mandate related to a specific treaty”<sup>18</sup>) were developed to monitor the implementation of a specific treaty. In relation to the four core international human rights treaties that prohibit “social origin” discrimination, the four corresponding treaty bodies are the:<sup>19</sup>

- Human Rights Committee (HRC), which monitors the implementation of the ICCPR;
- Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR;
- Committee on the Rights of the Child (CRC), which monitors the implementation of the Convention RC; and
- Committee on Migrant Workers (CMW), which monitors the implementation of the ICMW.

The HRC, CRC and CMW were “created in accordance with the provisions of the treaties they monitor”,<sup>20</sup> while the CESCR was established by the Economic and Social Council of the UN (ECOSOC).<sup>21</sup> Membership of each of these treaty bodies is determined by elections held by the state parties to each treaty (except for the membership to the CESCR, “whose members are elected by ECOSOC”).<sup>22</sup> Candidates for election are nominated by the countries in which they are nationals as required by each treaty (except the ICESCR, but this has “nevertheless become practice”).<sup>23</sup> Once elected, members to each treaty body can serve fixed terms of four years<sup>24</sup> and are expected to serve the treaty body in their personal capacity as independent experts<sup>25</sup> and not their particular country or government.<sup>26</sup> These members are held to certain criteria which are expressed in each treaty (or in the case of the ICESCR, the ECOSOC Resolution) and require, among other things, “high moral standing and recognised competence in the field of human rights”<sup>27</sup> or “the specific subject-matter of the respective treaty.”<sup>28</sup> Lawyers and legal experts are strongly represented in most treaty bodies.<sup>29</sup>

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<sup>17</sup> UN Office of the High Commissioner for Human Rights *The United Nations Human Rights Treaty System* (Fact Sheet No 30 Rev 1, 2012) at 19, available at <www.ohchr.org>.

<sup>18</sup> At 21.

<sup>19</sup> At 19–20. See also Kerstin Mechlem “Treaty Bodies and the Interpretation of Human Rights” (2009) 42 *Vand J Transnat’l L* 905 at 914.

<sup>20</sup> Mechlem, at 914.

<sup>21</sup> See *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights* ESC Res 1985/17 (1985); ESC Res 1985/17 (1985) ESCOR Supp 1 at 15–16.

<sup>22</sup> ESC Res 1985/17, at 2 as cited in Mechlem, above n 19, at 915.

<sup>23</sup> Mechlem, above n 19, at 915.

<sup>24</sup> UN Office of the High Commissioner for Human Rights, above n 17, at 20.

<sup>25</sup> At 19. Members of the treaty bodies are described as “independent experts”.

<sup>26</sup> Mechlem, above n 19, at 915.

<sup>27</sup> CAT, above n 8, art 17(1); CPED, above n 10, art 26(1); ICERD, above n 6, art 8(1) (which requires only high moral standing); ICCPR, above n 3, art 28(2); ESC Res 1985/17, above n 21 (which requires only competence in the field of human rights): all as cited in Mechlem, above n 19, at 915. See also UN Office of the High Commissioner for Human Rights, above n 17, at 20.

<sup>28</sup> Mechlem, above n 19, at 915. See, for example, Convention RC, above n 5, art 43(2). See also UN Office of the High Commissioner for Human Rights “Elections of Treaty Body Members” (2016) <www.ohchr.org>.

<sup>29</sup> Mechlem, above n 19, at 917.

The treaty bodies which monitor human rights treaties prohibiting “social origin” discrimination – the HRC, CESCR, CRC and CMW – perform various functions when monitoring the implementation of the ICCPR, ICESCR, Convention RC and ICMW respectively. These functions result in the publication of reports by a treaty body in which that body interprets, and, therefore, gives meaning to the treaty it monitors. These publications can take several forms, but the most relevant for the purposes of this paper are: (1) “general comments”, which can be undertaken by the HRC, CESCR, CRC and CMW; (2) “concluding observations”, which can also be undertaken by the HRC, CESCR, CRC and CMW; (3) “views” in response to individual complaints, which can only be undertaken by the HRC (of the four treaty bodies discussed in this paper); and (4) “country inquiries”, which can only be undertaken by the CESCR and the CRC (of the four treaty bodies discussed in this paper).<sup>30</sup>

“General comments” and “concluding observations”, as just noted, are published by the HRC, CESCR, CRC and CMW.<sup>31</sup> “General comments” include the “comprehensive interpretations of substantive provisions” within the treaty that the treaty body monitors<sup>32</sup> and are usually of an abstract and general nature<sup>33</sup> rather than in response to any particular state, complaint or facts.

In contrast to general comments, “concluding observations” are published by the HRC, CESCR, CRC and CMW after these bodies consider periodic reports submitted to them by state parties which address compliance with the relevant treaty each body monitors. After examining the report in the presence of delegates of that state party and engaging in dialogue with those delegates, the body then publishes its recommendations and concerns which are called “concluding observations”.<sup>34</sup>

The HRC and CRC<sup>35</sup> are the only UN treaty bodies of the four discussed in this paper that can hear complaints and petitions from individuals regarding non-compliance with the ICCPR (to be heard by the HRC) and Convention RC (to be heard by the CRC) when domestic remedies have been exhausted.<sup>36</sup> The HRC can, in response to these complaints, adopt “views” that set out whether it believes the complaint is warranted and substantiated. The interpretation of the ICCPR by the HRC may, therefore, be reflected in its “views”.

The CESCR and CRC are two UN treaty bodies of the four discussed in this paper which can conduct country inquiries under certain conditions based on reliable information that a treaty is being seriously, gravely or systematically violated in a certain country.<sup>37</sup> These country inquiries

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<sup>30</sup> UN Office of the High Commissioner for Human Rights “Monitoring the core international human rights treaties” (2016) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>31</sup> UN Office of the High Commissioner for Human Rights, above n30.

<sup>32</sup> UN Office of the High Commissioner for Human Rights, above n 30; UN Office of the High Commissioner for Human Rights “Treaty Bodies – General Comments” (2016) <[www.ohchr.org](http://www.ohchr.org)>; UN Office of the High Commissioner for Human Rights, above n 17, at 36.

<sup>33</sup> Nisuke Ando “General Comments/Recommendations” in *Max Planck Encyclopedia of Public International Law* (2010, online ed) at [2].

<sup>34</sup> UN Office of the High Commissioner for Human Rights, above n 30.

<sup>35</sup> See UN Office of the High Commissioner for Human Rights “Committee on the Rights of the Child” (2016) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>36</sup> See *Optional Protocol to the International Covenant on Civil and Political Rights*, above n16, art 2.

<sup>37</sup> UN Office of the High Commissioner for Human Rights, above n 30. See UN Office of the High Commissioner for Human Rights, above n 35.

can also shed light on the way the CESCR interprets the ICESCR and the CRC interprets the Convention RC.

The above text has established that four UN treaty bodies – the HRC, CESCR, CRC and CMW – actively interpret the ICCPR, ICESCR, Convention RC and ICMW respectively, through the publication of “general comments”, “concluding observations”, “views” responding to individual complaints (for the HRC and CRC) and “country inquiries” (for the CESCR and CRC). This paper will now consider whether any of these UN treaty bodies has interpreted the term “social origin” within the treaties it monitors, and if so, what meaning “social origin” has been given by the body or bodies.

## **How Have UN Treaty Bodies Interpreted the Term “Social Origin”?**

An extensive search of UN treaty body databases reveals that the concept of “social origin” discrimination has received very little attention by UN treaty bodies. Three UN treaty bodies have considered the idea of “social origin” discrimination within the treaties they monitor – the CESCR, the CRC and the HRC. The below text will discuss the way each of these bodies has addressed the concept of “social origin” discrimination.

### **The CESCR on “social origin” in the ICESCR**

The CESCR is an organ of the UN that reports to its “parent body”, ECOSOC.<sup>38</sup> It is described as an “independent and impartial body” with its membership made up of “experts”.<sup>39</sup> The CESCR consists of 18 independent experts.

The CESCR has turned its attention to “social origin” discrimination in two of its publications: General Comment 20 and its *Concluding observations...relating to the United Kingdom of Great Britain and Northern Ireland including its Crown Dependencies* (concluding observations to the UK).<sup>40</sup> These two publications of the CESCR, and their potential usefulness in understanding the meaning of “social origin” in the ICESCR, will now be discussed.

#### *General Comment 20 of the CESCR on “social origin”*

On 2 July 2009, the CESCR<sup>41</sup> released General Comment 20 which directly interpreted the meaning of “social origin” in art 2(2) of the ICESCR.<sup>42</sup> Article 2(2) of the ICESCR prohibits

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<sup>38</sup> Mechlem, above n 19, at 915.

<sup>39</sup> At 915.

<sup>40</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights relating to the United Kingdom of Great Britain and Northern Ireland including its Crown Dependencies* E/C.12/1994/19 (1994).

<sup>41</sup> See UN “Index to the Proceedings of the Economic and Social Council” (2010) <www.un.org>.

<sup>42</sup> See *Committee on Economic, Social and Cultural Rights Report on the forty-second and forty-third sessions: Supplement No 2* E/C.12/2009/3 (4–22 May 2009, 2–20 November 2009) at 110. Justice Ariranga Govindasamy Pillay of Mauritius served as Chairperson, and Professors Zdzislaw Kedzia of Poland and Nikolaas Jan Schrijver of the Netherlands served as Vice-Chairpersons. See United Nations *Index to the Proceedings of the Economic and Social Council* (2010) at [xvi].

discrimination on the basis of “social origin” and other grounds. In its General Comment 20, the CESCR defined the term “social origin” in art 2(2) of the ICESCR, noting that:<sup>43</sup>

Social origin’ refers to a person’s inherited social status, which is discussed more fully below in the context of ‘property’ status, *descent-based discrimination* under ‘birth’ and ‘economic and social status.

On this basis, a person may experience “social origin” discrimination where they face discrimination based on their “inherited social status”. It also appears that “property status”, “descent” and “economic and social status” are viewed by the CESCR as useful indicia of a person’s “inherited social status”. This seems to be the case because just after the CESCR notes that “social origin” refers to a person’s “inherited social status”, it clarifies that “inherited social status” “is discussed more fully [in General Comment 20]... in the context of ‘property’ status, descent-based discrimination under ‘birth’ and ‘economic and social status’”.<sup>44</sup> General Comment 20 does refer to property status, descent based discrimination, and economic and social status. Accordingly, the below text will proceed on the basis that the CESCR’s discussion of these three concepts in its General Comment 20 can clarify what the CESCR means by “inherited social status”.

In relation to “property status”, the CESCR noted in its General Comment 20 that:<sup>45</sup>

Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person’s land tenure status, such as living in an informal settlement.

Based on this text, it seems that “property status” refers to, and is determined by, land ownership (or lack thereof), tenure over real property (such as whether a person rents or lives in public housing or an “informal settlement”<sup>46</sup>), and/or the extent of a person’s personal property or *lack* of such property. It, therefore, seems that, for the CESCR, discrimination against a person on the basis of their ownership (or non-ownership) of land, tenure over real property or the extent of their personal property (or lack of such property), can be “social origin” discrimination if such property or lack of such property is inherited.

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<sup>43</sup> *CESCR General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2)* E/C.12/GC/20 (4–22 May 2009) at [24].

<sup>44</sup> General Comment 20, above n 43, at [24].

<sup>45</sup> General Comment 20, above n 43, at [25].

<sup>46</sup> *CESCR General Comment 4: The right to adequate housing (art 11 (1))* E/1992/23 (adopted at the Sixth Session of the CESCR, 13 December 1991) at [8]. In General Comment 4, the CESCR wrote: “Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property.” General Comment 4 was cited in General Comment 20, above n 43, at [25], after the CESCR explained “property status”.

In relation to “descent-based discrimination”, the CESCR notes that this form of discrimination includes discrimination on the “basis of caste and analogous systems of inherited status”<sup>47</sup> and membership to a “descent-based community”.<sup>48</sup> When the CESCR defined descent-based discrimination as discrimination on the basis of “caste” and “analogous systems of inherited status”, it referred to a “comprehensive overview of State obligations in this regard” in *General Comment No 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on Article 1, Paragraph 1, Regarding Descent*.<sup>49</sup> However, as this overview does not appear to clarify in any helpful way the meaning of “caste” or “analogous systems of inherited status” it will not be discussed any further in this paper.<sup>50</sup> When discussing discrimination based on “birth”, the CESCR also noted that “[d]istinctions must...not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons”.<sup>51</sup>

In relation to “economic and social status”, the CESCR refers to its comments on “economic and social situation” in [35] of its General Comment 20, which reads:<sup>52</sup>

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

It, therefore, seems that, for the CESCR, discrimination on the basis of a person’s “economic and social status” (such as poverty or homelessness) can be “social origin” discrimination where that “economic and social status” is inherited.

Based on the above material, it is clear that the CESCR defines “social origin” in terms of “inherited social status”. Therefore, for the CESCR, “social origin” discrimination may include discrimination on the basis of “inherited social status”. While there may be some mystery as to what the CESCR means by “inherited social status”, this is addressed somewhat by the CESCR when it notes, in General Comment 20, that “inherited social status” is more fully discussed in the context of, and presumably refers to, “property status” (such as the extent of a person’s real or personal property, or land tenure), social stratification based on “descent” (such as caste) and “economic and social situation” (such as poverty and homelessness).

In addition to this position of the CESCR in its General Comment 20, the CESCR also refers to “social origin” discrimination in one of its “concluding observations”, which will now be discussed.

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<sup>47</sup> General Comment 20, above n 43, at [26].

<sup>48</sup> At [26].

<sup>49</sup> At [26], n 15.

<sup>50</sup> *CERD General Comment 29 (art 1, para 1)* (23 August 2002).

<sup>51</sup> General Comment 20, above n 43, at [26].

<sup>52</sup> General Comment 20, above n 43, at [35].



*Concluding observations to the UK*

In its concluding observation to the UK, published on 21 December 1994, the CESCR noted “the grave disparities which appear to prevail in the level of education depending on the social origin of the pupil”.<sup>53</sup> This particular observation appeared to relate to the dependent territories of the UK,<sup>54</sup> so clues as to what the CESCR might have meant by “social origin” can potentially be found within the four state party reports by the UK<sup>55</sup> to which the CESCR was responding when making this concluding observation - three second periodic reports<sup>56</sup> and one report with additional information.<sup>57</sup>

The state report that provides the most clues about what “social origin” might have meant to the CESCR appears to be E/1990/7/Add.16 because it focusses on the question of education in the UK and its dependent territories. At the outset it must be stressed that these clues will not be particularly clear because, as the CESCR notes:<sup>58</sup>

The State party reported no specific factor or difficulty affecting the implementation of the Covenant. The Committee, however, notes that notwithstanding the absence of such an [sic] information in the reports it is clear that certain economic and social difficulties continue to be faced by the most vulnerable segments of society, partly as a result of the imposed budgetary constraints.

The CESCR, therefore, appears to rely on the tenor of these reports and the economic and social difficulties faced by certain people, rather than specific references to “social origin” discrimination, to conclude that a pupil’s “social origin” can influence that pupil’s level of education. Read as a whole, E/1990/7/Add.16 appears to suggest that access to higher education was heavily contingent on where a person grew up, such that support to attend educational institutions in England, for example, differed for residents of the dependent territories of the UK depending on where they came from. For example, people from the Falkland Islands were only required to gain admission to a UK university to receive generous financial support by the Falkland Islands government to attend that university<sup>59</sup> while in other territories access to higher education or other opportunities seemed to be much more difficult.<sup>60</sup> Further clues as to what the CESCR might have meant by “social origin” may be able to be found within the annexes to

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<sup>53</sup> E/C.12/1994/19, above n 40, at [12].

<sup>54</sup> At [8].

<sup>55</sup> At [1].

<sup>56</sup> E/1990/7/Add.16 (1993), E/1986/4/Add.27 (1993), and E/1986/4/Add.28 (1994).

<sup>57</sup> E/1989/5/Add.9 (1993).

<sup>58</sup> E/C.12/1994/19, at [6].

<sup>59</sup> *Second periodic reports submitted by States parties to the Covenant concerning rights covered by arts 13 to 15, in accordance with the third stage of the programme established by the Economic and Social Council in its resolution 1988 (LX) Addendum, United Kingdom of Great Britain and Northern Ireland and Dependent Territories* E/1990/7/Add.16 (1993) at [230].

<sup>60</sup> Some children in Bermuda were also described as particularly disadvantaged, and this required intervention and a special program called the Child Development Project. See: *Second periodic reports submitted by States parties to the Covenant, concerning rights covered by articles 10 to 12, in accordance with the second stage of the programme established by Economic and Social Council resolution 1988 (LX), United Kingdom of Great Britain and Northern Ireland: Dependent Territories* (24 November 1993), E/1986/4/Add.27, para [17].

E/1990/7/Add.16 to which the state party refers in [90] of the report,<sup>61</sup> but unfortunately these annexes cannot be located by the UN library.<sup>62</sup> Summary records of the sessions and meetings at which the state reports were considered by the CESCR can, however, be found, but these records do not seem to be of much assistance.

The CESCR considered the relevant state reports in its 11<sup>th</sup> session<sup>63</sup> as well as its 33<sup>rd</sup><sup>64</sup> and 34<sup>th</sup><sup>65</sup> meetings held on 23 November 1994. In its 11<sup>th</sup> session (33<sup>rd</sup> meeting), the CESCR noted that children from “poor families” were at a disadvantage in education resulting from what was recognised as a “growing tendency...to solicit voluntary contributions from parents”.<sup>66</sup> However, beyond this, there appear to be no further clues as to what the CESCR might have meant by the term “social origin” when it noted the “grave disparities which appear to prevail in the level of education depending on the social origin of the pupil”.<sup>67</sup>

The CESCR’s concluding observation relating to the UK does specifically refer to “social origin”, but, based on the above text, this reference appears to be quite cryptic such that it is very difficult to conclusively determine what the CESCR meant by “social origin”. More to the point, there is no indication that the CESCR’s mention of “social origin” specifically referred to the term within art 2(2) of the ICESCR. It is, therefore, uncertain whether the CESCR’s reference to “social origin” in its concluding observation relating to the UK was in fact an interpretation of the term “social origin” within art 2(2) of the ICESCR. There is a chance it may have been a reference to a person’s “social origin” in the ordinary sense and not a legal sense. For these reasons, the CESCR’s concluding observation relating to the UK should be disregarded as a potential source of guidance on the meaning of “social origin” within the ICESCR.

Only General Comment 20 of the CESCR can, therefore, be regarded as potentially useful in giving meaning to the term “social origin” within the ICESCR. Having considered what meaning “social origin” might bear in the ICESCR, this paper will now turn to consider what “social origin” might mean in the Convention RC and the ICCPR. In relation to the meaning of “social origin” in the Convention RC and the ICCPR, appropriate guidance may be sought from the CRC and HRC respectively. The attention that each of these bodies have given to the idea of “social origin” discrimination will now be discussed.

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<sup>61</sup> E/1990/7/Add.16, at [90].

<sup>62</sup> Email from Angelo Capuano to United Nations Library, and corresponding reply regarding E/1990/7/Add.16 (3 September 2014–4 September 2014).

<sup>63</sup> UN Office of the High Commissioner for Human Rights “CESCR – International Covenant on Economic, Social and Cultural Rights 11 Session” (21 November 1994–9 December 1994) <[www.ohchr.org](http://www.ohchr.org)>; *Report on the tenth and eleventh sessions* ESC Supplement No 3 E/1995/22(SUPP) (2–20 May 1994, 21 November–9 December 1994).

<sup>64</sup> *Eleventh Session, Summary Record of the 33rd Meeting* ESC E/C.12/1994/SR.33 (28 November 1994).

<sup>65</sup> See: Committee on Economic, Social and Cultural Rights, Eleventh Session, Summary Record of the 34<sup>th</sup> Meeting, (Geneva, 23 November 1994) E/C.12/1994/SR.34 dated 30 November 1994 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1994%2fSR.34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1994%2fSR.34&Lang=en)>.

<sup>66</sup> E/C.12/1994/SR.33, at [34] and [40].

<sup>67</sup> E/C.12/1994/19, at [12].

## The CRC on “social origin” in the Convention RC

A study of CRC publications reveals that “social origin” discrimination is only mentioned in the CRC’s concluding observations relating to Bangladesh dated 26 June 2009,<sup>68</sup> in which the CRC expressed concern that “children face discrimination on the basis of social origin”.<sup>69</sup> Within the text of this concluding observation, the CRC did not elaborate on this point, but guidance as to the way the CRC might have understood “social origin” can be drawn from the state report to which the CRC was responding when it made this concluding observation.

In this concluding observation relating to Bangladesh, the CRC was considering “the combined third and fourth periodic report of the People’s Republic of Bangladesh at its 1411th and 1412th meetings, held on 3 June 2009”.<sup>70</sup> The third and fourth periodic report of the People’s Republic of Bangladesh is a very large document of 141 pages. The section of the state report that is perhaps most relevant to “social origin” discrimination is the one dealing with non-discrimination. This section focuses heavily on gender inequality and the underrepresentation of girls in education,<sup>71</sup> but it also refers to other categories of children such as:

- child brides;<sup>72</sup>
- street children;<sup>73</sup>
- tribal children;<sup>74</sup>
- orphans;<sup>75</sup> and
- marginalised people and children living in remote areas, including “the Gypsy (*Bede*), tea garden workers, *haor/beel* (large water bodies) inhabitants, *chalrlanders* (people living in small island of rivers), so on.”<sup>76</sup>

With the exceptions of “social origin” and “birth”, it can be argued that many of these categories of children – without more information – do not seem to fall under the other grounds upon which the Convention RC prohibits discrimination (race, colour, sex, language, religion, political or other opinion, national origin, ethnic origin, property or disability<sup>77</sup>). This suggests that children within these categories (street children or orphans, for example) may project a “social origin” or “birth” and descent that can make them prone to discrimination. The CRC’s attention to the idea of “social origin” discrimination is, however, extremely brief, and there is no guarantee that the CRC actually

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<sup>68</sup> During this time, membership of the CRC consisted of: Ms Agnes Akosua Aidoo, Ms Hadeel Al-Asmar, Mr Luigi Citarella, Mr Kamel Filali, Mr Peter Gurán, Ms Maria Herczog, Ms Azza el-Ashmawy, Mr Sanphasit Koompraphant, Mr Hatem Kotrane, Mr Lothar Friedrich Krappmann, Ms Yanghee Lee, Ms Marta Maurás Perez, Ms Rosa Maria Ortiz, Mr Awich Pollar, Mr Dainius Puras, Ms Kamla Devi Varmah, Ms Susana Villarán de la Puente and Mr Jean Zermatten. See UN Office of the High Commissioner for Human Rights “Membership of the Committee on the Rights of the Child” (1 March 2005–28 February 2007) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>69</sup> *Concluding observations of the Committee on the Rights of the Child: Bangladesh CRC/C/BGD/CO/4* (26 June 2009) at [32].

<sup>70</sup> At [1]. See *CRC/C/BGD/4*, *CRC/C/SR.1411* and *CRC/C/SR.1412*.

<sup>71</sup> *Third and fourth periodic report of the People’s Republic of Bangladesh CRC/C/BGD/4* (23 October 2008) at [88]–[94].

<sup>72</sup> At [89].

<sup>73</sup> At [95].

<sup>74</sup> At [96]–[97].

<sup>75</sup> At [96].

<sup>76</sup> At [98].

<sup>77</sup> Convention RC, above n 5, art 2. The Convention RC also refers to “social origin” and “other status”.

thought that these categories of children were relevant to “social origin”. For this reason, the concluding observation of the CRC relating to Bangladesh should not contribute to the meaning of “social origin” in the Convention RC. This means that the publications of the HRC are the only remaining guides which can potentially clarify the meaning of “social origin” in an international human rights treaty, the ICCPR (in addition to General Comment 20 of the CESCR, which interprets the term “social origin” in the ICESCR). The approach of the HRC to the question of “social origin” discrimination will now be discussed.

### The HRC on “social origin” in the ICCPR

The HRC has published a number of views, which are described as having a legal character,<sup>78</sup> in response to complaints by individuals who have alleged “social origin” discrimination contrary to the ICCPR. In *Gennadi Sipin v Estonia*,<sup>79</sup> *Vjatšeslav Borzov v Estonia*<sup>80</sup> and *Vjatseslav Tsarjov v Estonia*<sup>81</sup> the complainants alleged that measures taken by the Estonian government to deny Estonian citizenship or residence to people that had served as members of foreign armed forces was “social origin” discrimination and a violation of art 26 of the ICCPR.<sup>82</sup> In response to these complaints, the HRC was of the view that there was no violation of art 26 of the ICCPR because the prohibition by the Estonian government was justified on national security grounds.<sup>83</sup> It may be, based on the complaints, that national extraction is an aspect of “social origin” but this was not made clear by the HRC. The meaning of “social origin” was also not discussed by the HRC, which means that these views offer no guidance as to the meaning of “social origin” discrimination. Other complaints of “social origin” discrimination made to the HRC have similarly shed very little light on what the term “social origin” means in the ICCPR.<sup>84</sup> Accordingly, these views of the HRC that address complaints of “social origin” discrimination are not helpful to understanding what “social origin” might mean in the ICCPR, because they find no violation of the ICCPR and/or do not explain what “social origin” means.

<sup>78</sup> Mechlem, above n 19, at 924.

<sup>79</sup> Communication No 1432/2005 CCPR/C/93/D/1423/2005.

<sup>80</sup> Communication No 1136/2002 CCPR/C/81/D/1136/2002.

<sup>81</sup> Communication No 1223/2003 CCPR/C/91/D/1223/2003.

<sup>82</sup> Art 26 of the ICCPR reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>83</sup> See *Gennadi Sipin v Estonia*, above n 79, at [7.1]–[7.5] and [8]; *Vjatšeslav Borzov v Estonia*, above n 80, at [7.1]–[7.4] and [8]; *Vjatseslav Tsarjov v Estonia*, above n 81, at [7.1]–[7.6] and [8].

<sup>84</sup> See *George Kazantzis v Cyprus*, Communication No 972/2001 CCPR/C/78/D/972/2001; *Mohammed Sahid, on his own behalf and on behalf of his daughter and his grandson v New Zealand*, Communication No 893/1999 CCPR/C/77/D/893/1999; *Amalia Castaño López v Spain*, Communication No 1313/2004 CCPR/C/87/D/1313/2004; *Sucha Singh Shergill et al v Canada*, Communication No 1506/2006 CCPR/C/94/D/1506/2006; *VH v Czech Republic*, Communication No 1546/2007 CCPR/C/102/D/1546/2007; *Pohl et al v Austria*, Communication No 1160/2003 CCPR/C/81/D/1160/2003; *Monika v Cameroon*, Communication No 1965/2010 CCPR/C/112/D/1965/2010; *Pezoldova v Czech Republic*, Communication No 757/1997 CCPR/C/76/D/757/1997 (in which the Human Rights Committee was of the “view that the facts before it reveal a violation of article 26” but did not discuss the meaning of “social origin”); *Ivan Somers v Hungary*, Communication No 566/1993 CCPR/C/53/D/566/1993; *Arenz, Paul; Röder, Thomas and Dagmar v Germany*, Communication No 1138/2002 CCPR/C/80/D/1138/2002; *Mariano Gallego Díaz v Spain*, Communication No 988/2001 CCPR/C/82/D/988/2001; *Gobin v Mauritius*, Communication No 787/1997 CCPR/C/72/D/787/1997; *Mrs Alzbeta Pezoldova v The Czech Republic*, Communication No 757/1997 CCPR/C/75/D/757/1997 (2002).

For the above reasons, it can be argued that the only report of a UN treaty body that provides a clear, direct and reasonably detailed interpretation of “social origin” in an international human rights treaty is the CESCR’s General Comment 20, which interprets the meaning of “social origin” in the ICESCR. This paper will now turn to critique the CESCR’s approach to “social origin” and ask whether it is likely to be relevant to national contexts such as Australia.

## **A Critique of the CESCR’s Approach to “Social Origin” and its (Ir)relevance to National Contexts such as Australia**

Section 351 of the Fair Work Act 2009 (Cth) (FW Act) prohibits adverse action on the basis of “social origin” and s 772 prohibits termination of employment on the basis of “social origin”. The prohibition against “social origin” discrimination was introduced into Australian labour legislation by the Industrial Relations Reform Act 1993 (Cth). The new principal object of the Industrial Relations Act 1988 (Cth) was to “help prevent and eliminate discrimination on various grounds” and, as the Industrial Relations Reform Bill 1993 Supplementary Explanatory Memorandum explains, “some or all of these grounds are referred to in Article 2.2” of the ICESCR as well as in ILO instruments.<sup>85</sup> The object of the FW Act is, among other things, to “take into account Australia’s international labour obligations”.<sup>86</sup> Australia has international labour obligations under the ICESCR and other instruments<sup>87</sup> and Australian courts have noted that Australian labour laws “should be construed conformably with Australia’s international obligations”, including the ICESCR.<sup>88</sup>

In Australia it is recognised that “subject to any clear contrary intention, statutory provisions are to be interpreted consistently with Australia’s international obligations under treaties and covenants, as far as language permits”.<sup>89</sup> This “principle makes relevant the articles of” the ICESCR when interpreting the provisions of domestic legislation in a manner consistent with Australia’s international obligations.<sup>90</sup> Australian courts have used general comments of the CESCR to interpret the ICESCR.<sup>91</sup> While not legally binding,<sup>92</sup> the general comments of the CESCR – which aim to assist states in interpreting and understanding their obligations under the

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<sup>85</sup> Industrial Relations Reform Bill 1993, Supplementary Explanatory Memorandum, at 12. See also Industrial Relations Reform Bill 1993, Explanatory Memorandum at 5.

<sup>86</sup> See FW Act, s 3.

<sup>87</sup> Fair Work Bill 2008, Explanatory Memorandum at [2251].

<sup>88</sup> *Australian Meat Industry Employees’ Union v Beldra Pty Ltd (with Corrigendum dated 5 November 2003)* [2003] FCA 910 at [197].

<sup>89</sup> *Royal Women’s Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [75] (Maxwell P) as cited in *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267 at [67], [81] and [95] (Bell J). See further *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (Teoh’s case)* [1995] HCA 20 at [26]; *Coleman v Power* [2004] HCA 39 at [17]–[19] (Gleeson CJ); *Kruger v Commonwealth (Stolen Generations case)* [1997] HCA 27 (Dawson J). See also Benedict Coxon “Human Rights at Common Law: Two Interpretive Principles” (2014) 35(1) Stat LR 35 at 45.

<sup>90</sup> See *ZZ v Secretary, Department of Justice & Anor*, above n 89, at [80].

<sup>91</sup> See *W B M v Chief Commissioner of Police* [2012] VSCA 159 at [170]; *ZZ v Secretary, Department of Justice & Anor*, above n 89. See further *Sheather v Daley* [2003] NSWADT 51 at [51].

<sup>92</sup> Eibe Riedel “Committee on Economic, Social and Cultural Rights (CESCR)” in *Max Planck Encyclopedia of Public International Law* (2010, online ed) at [12].

ICESCR<sup>93</sup> – are seen to carry weight as the most authoritative interpretations of the ICESCR and as jurisprudence on rights in the ICESCR<sup>94</sup>. In particular, general comments of the CESCR “may be considered the most important interpretation aids for the rights enshrined in the ICESCR”.<sup>95</sup> It is notable that the CESCR comprises of 18 independent experts and in drafting general comments the CESCR “draws on its expert knowledge of state practice in the application of the Covenant”.<sup>96</sup> It can be argued that the reports of the CESCR have a role to play in helping to clarify Australia’s obligations under the ICESCR and, in turn, informing a construction of domestic legislation which is consistent with such obligations. Therefore, the meaning which the CESCR attributes to the term “social origin” in the ICESCR may have some value to understanding what “social origin” might mean in the FW Act if this statute is to be interpreted consistently with Australia’s international obligations, including under the ICESCR.

An important question sought to be answered by this paper, however, is whether elucidations of the concept of “social origin” discrimination by the CESCR are relevant to national contexts such as Australia. It can be argued that, while legislation should be interpreted consistently with Australia’s international obligations and the reports of the CESCR may be valuable guides which can help clarify those obligations, the legislature would intend “social origin” discrimination laws to have relevance in the Australian context so that these laws can address the mischief they are designed to remedy – “social origin” discrimination in employment.

The CESCR in its General Comment 20, which provides an interpretation of the meaning of “social origin” in art 2(2) of the ICESCR, clearly notes that “social origin” refers to “inherited social status”. “Inherited social status”, according to the CESCR and as discussed above, is to be understood in the context of “property status” (such as ownership or non-ownership of land, tenure over real property or the extent of a person’s personal property, or the lack of such property), descent-based discrimination (such as caste) and “social and economic status” (such as homelessness or poverty). It therefore seems that, for the CESCR, discrimination based on

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<sup>93</sup> *Rules of Procedure of the Committee on Economic, Social and Cultural Rights* E/C.12/1990/4/Rev.1 (1993), rule 65.

<sup>94</sup> UN Office of the High Commissioner for Human Rights *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (Professional Training Series No 12, HR/P/PT/12, 2005) at 7; Ashfaq Khalfan “Division of Responsibility Amongst States” in Malcolm Langford and others (eds) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, Cambridge, 2013) 300; David Keane and Yvonne McDermott “Introduction” in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing, Cheltenham, 2012) 1, at 7; International Council on Human Rights Policy *Duties Sans Frontieres: Human Rights and Global Social Justice* (2003) at 28; Takele Soboka Bulto “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?” (2011) 12 *Melb J Int Law* 290; Dianne Otto and David Wiseman “In Search of ‘Effective Remedies’: Applying the International Covenant on Economic, Social and Cultural Rights to Australia” (2001) 7(1) *AJHR* 5. See further Kerstin Mechlem “Treaty Bodies and the Interpretation of Human Rights” (2009) 42 *Vand J Transnat’l L* 905 at 920, 922, 927 and 929; Blake Conway *Normative Instruments in International Human Rights Law: Locating the General Comment* (Center for Human Rights and Global Justice, Working Paper No 17, 2008) at 38; Paula Gerber, Joanna Kyriakakis and Katie O’Byrne “General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect?” (2013) 14 *Melb J Int Law* 1 at 9.

<sup>95</sup> Riedel, above n 92, at [12].

<sup>96</sup> Holger Hestermeyer “Access to Medication as a Human Right” in *Max Planck Yearbook of United Nations Law* (2004) vol 8 at 121.

inherited social status is “social origin” discrimination, and “inherited social status” is measured predominately by reference to property and wealth.

It will be argued that the CESCR’s view of “social origin” (and, in particular, “social status”), as it is currently framed in General Comment 20, is unlikely to have any real application in (and is thus largely irrelevant to) the Australian context. This paper will, therefore, argue that, for laws prohibiting discrimination on the basis of “inherited social status” to have more relevance and any real application in the Australian context, the CESCR’s view of “social status” must be broadened and developed. This paper will, after critiquing the CESCR’s approach to “social origin”, propose a view of “inherited social status” discrimination that has more relevance in the Australian context.

It will now be argued that the CESCR’s approach to “social origin”, as it is currently expressed in General Comment 20, will not likely have much relevance in the Australian context.

### **Will the CESCR’s approach to “social origin” catch cases of discrimination based on “social status” or discrimination based on wealth and poverty?**

The first reason why the CESCR’s approach to “social origin” will not likely have much relevance in the Australian context is because of the way that the CESCR seems to give content to the concept of “social status” in its General Comment 20. The CESCR’s view of “social origin”, as just noted, is that it refers to “inherited social status” and “social status” appears to be understood in the context of, and by reference to, property status, wealth and economic status, including homelessness and poverty.<sup>97</sup> The CESCR, therefore, takes a view of “social status” that is predominately formed by economic factors. The following discussion will not aim to define “social status”,<sup>98</sup> but rather show that a person’s “social status” is reflected more by prestige and esteem rather than merely property status, wealth or economic status. The CESCR’s view of “inherited social status” therefore does not seem to accurately capture the idea of “social status”.

Ralph Linton is credited with giving “social status” “a very concrete meaning in the social sciences”.<sup>99</sup> For Linton, social status can be determined by a person’s sex,<sup>100</sup> age,<sup>101</sup> biological relationships<sup>102</sup> such as with “close relatives”,<sup>103</sup> sexual associations such as marriage,<sup>104</sup> race or religion.<sup>105</sup> Linton explains:<sup>106</sup>

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<sup>97</sup> General Comment 20, above n 43.

<sup>98</sup> For a discussion of status, see Yoram Weiss and Chaim Fershtman “Social status and economic performance: A survey” (1998) 42 *Eur Econ Rev* 801 at 804–807.

<sup>99</sup> Juan Díez Nicolás “Socio-Demographic Conditions” in *Encyclopedia of Psychological Assessment* (online ed, 2003).

<sup>100</sup> Ralph Linton *Study of Man* (reprint, D Appleton-Century Company, New York, 1936) at 115–118.

<sup>101</sup> At 118–122.

<sup>102</sup> At 122.

<sup>103</sup> At 123.

<sup>104</sup> At 124.

<sup>105</sup> Linton clearly states that being a “Negro” or “Catholic” would have influenced a person’s ability to become president of the United States.

<sup>106</sup> Linton, above n 100, at 127.

The factor of social class or caste rarely if ever replaces the factors of sex, age, and biological relationship in the determination of status. Rather, it supplements these, defining the roles of individuals still more clearly.

More to the point, Linton is credited with the view that a person's status or "social position...is viewed in terms of the degree of attributed prestige, esteem, and respect rather than in terms of possessing wealth and power."<sup>107</sup> For example, an uneducated janitor or office cleaner may own several houses in their old age from living a frugal life and saving money over the course of a number of decades, but their social status is likely to be lower than most university educated professionals. By way of another example, public figures such as Fr Frank Brennan (a law professor and leading legal thinker in Australia) and many other prominent Jesuits are likely to have high social status despite presumably having taken a vow of poverty. Therefore, it seems that a person can have high social status despite being poor and low social status despite being wealthy. Social status is, thus, a very difficult concept, and it would be unwise to measure it predominately in terms of wealth or poverty as the CDESCR appears to do.

The CDESCR, in contrast to Linton, appears to adopt a view of "social status" that is formed almost exclusively by economic considerations – property, or the lack of it, and economic status such as homelessness or poverty. This view of "social status" by the CDESCR does not seem to capture the complex nature of "social status", but rather merely "wealth" or "poverty". Accordingly, the approach to "social origin" by the CDESCR will not likely address, in countries such as Australia, most cases of discrimination on the basis of "social status", as it purportedly sets out to do, but rather will address discrimination on the basis of wealth and poverty, for example.

### **Is the CDESCR's approach to "social origin" likely to have much relevance in Australian workplaces?**

The second reason why the CDESCR's approach to "social origin" will not likely have much relevance in the Australian context is because the criteria which the CDESCR seems to use to give content to the concept of "social status" – property status, caste, and economic and social status such as homelessness and poverty – are not likely to be bases upon which an employer will commonly have the opportunity to discriminate. This is certainly not to suggest that discrimination on the basis of such criteria in employment never occurs, but rather that it is likely to be very rare in Australia.

These criteria are unlikely to be common points of distinction between most employees or job candidates. Such criteria are also unlikely to be on a job candidate's resume, known to an employer or be requested (or obvious) in interviews. Discrimination on the basis of homelessness appears to be widespread in "accommodation and the provision of goods and services".<sup>108</sup> This is not to say that discrimination on the basis of homelessness does not occur in employment. However, it appears that people experiencing homelessness are likely to be more prone to face discrimination in the provision of accommodation, goods and services. This makes sense, because efforts can be

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<sup>107</sup> See Vasiliki Kantzara "Status" in *Blackwell Encyclopedia of Sociology Online* citing M Zelditch Jr "Social Status" in *International Encyclopedia of Social Sciences* (1968) at 250–257.

<sup>108</sup> See Philip Lynch and Bella Stagoll "Promoting Equality: Homelessness And Discrimination" (2002) 7(2) *Deakin LR* 295. See further Homeless Law in Practice "Discrimination against Homeless People" (2016) <[www.hlp.org.au](http://www.hlp.org.au)>.



made to conceal homelessness from a potential employer. While discrimination in employment on the basis of inherited social status, as measured by homelessness, poverty or caste for example, may occur it is likely to be infrequent. This means that, if “social origin” is to be understood in terms of “inherited social status” and “inherited social status” is to be measured by reference to criteria such as poverty, homelessness or caste, the concept will not likely have much of an application to Australian workplaces.

Therefore, for reasons discussed above, it is proposed that the CESCR’s approach to “inherited social status” (and therefore “social origin”) discrimination be broadened to make it more relevant in national contexts such as Australia.

### **Proposing a View of “Inherited Social Status” that is (more) Relevant to the Australian Context**

According to Linton, “status” “means the sum total of all the statuses” which a person occupies, and it represents a person’s position “with relation to the total society”.<sup>109</sup> “Status” as a member of a community may, therefore, derive “from a combination of all the statuses” a person holds, including in professional life and personal life.<sup>110</sup> These statuses held by a person can be understood as rights and duties which “find expression only through the medium of individuals”.<sup>111</sup> When that person puts these rights and duties which constitute status into effect they are performing a “role”<sup>112</sup> within society. Linton describes two types of statuses in his seminal work *Study of Man: ascribed status and achieved status*.<sup>113</sup>

A status is *ascribed* when it is assigned “to individuals without reference to their innate differences of abilities”<sup>114</sup> which means that it is determined by “accident of birth”.<sup>115</sup> In other words, an *ascribed* status is “inherited”. Linton writes that “[t]he bulk of” ascribed statuses “in all social systems are parcelled out to individuals on the basis of sex, age, and family relationships”.<sup>116</sup> In other words, ascribed statuses are involuntary characteristics that “have nothing to do with an individual’s efforts or input”.<sup>117</sup> Examples of “ascribed status” can, therefore, include son, daughter, grandson, granddaughter, niece, or nephew. For example, by virtue of being the son of Charles, both William and Harry have an ascribed status as the son of Charles. Additionally, because Charles is the son of Elizabeth Windsor (Elizabeth II) he, William and Harry have ascribed statuses as Princes. By way of another example, because John is the son of a judge he would have some degree of status in the legal community because of his ascribed status as the son of a judge.

A status is *achieved* when it requires “special qualities”, although it is “not necessarily limited to these”, and achieved statuses “are not assigned to individuals from birth but are left open to be

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<sup>109</sup> Linton, above n 100, at 113.

<sup>110</sup> At 113.

<sup>111</sup> At 113.

<sup>112</sup> At 114.

<sup>113</sup> At 115.

<sup>114</sup> At 115.

<sup>115</sup> Irving Foladare “A Clarification of ‘Ascribed Status’ and ‘Achieved Status’” (1969) 10(1) *Sociol Q* 53 at 53.

<sup>116</sup> Linton, above n 100, at 126.

<sup>117</sup> Amber Thompson “Ascribed Status” in *Encyclopedia of Diversity and Social Justice* (2015) at 74–75.

filled through competition and individual effort.”<sup>118</sup> An *achieved* status therefore has, in theory, very little to do with “inheritance” because it is determined by “performance or effort or volition”.<sup>119</sup> It is, in other words, based on merit or effort rather than birth. Examples of “achieved status” may therefore include doctor, lawyer, rapist, thief, Olympian and athlete. For example, although John is the son of a judge he worked very hard to become a doctor and has the achieved status of doctor.

A person’s ascribed status can also assist that person to develop achieved status. It does seem “very likely that an individual’s ascribed status whether physical, mental, or social in nature, will provide an advantage or disadvantage in pursuit of achieved status”.<sup>120</sup> For example, if a person is born into a wealthy high status family (ascribed status) they will have more resources available to them which can be used to complete tertiary education and then “achieve” entry into an occupation of choice. In contrast, a person born into a poor low status family will likely not have access to the same level of resources to “achieve” entry into the same occupation. As Thomson explains, there is a blurring of ascribed and achieved status<sup>121</sup> – a relationship between the two – whereby ascribed status (family wealth) can influence achieved status (an occupation)<sup>122</sup>. This suggests that a person has the opportunity to “achieve” a certain status due to opportunities resulting from their “ascribed” status. In Linton’s own words, many ascribed statuses “can be predicted and trained for from the moment of birth”.<sup>123</sup> This is reflected by the existence of elite private schools in Australia, which demand extremely high fees and which in most cases only the wealthiest Australians can afford.

When one thinks of “inherited” social status, the most privileged Australians who “inherited” family businesses tend to come to mind.<sup>124</sup> While these Australians may have been required to exert some personal effort to maintain or grow their inheritances it can be argued that, for them, status is largely inherited. Any (or most) achieved status is likely to be contingent on ascribed status. However, it is likely that “social origin” discrimination laws will be used most not by people who inherit property or who inherit powerful positions in life but, rather, by those who *do not* inherit property (because such people will be more in need of protection from discrimination, in contrast to people who inherit, and thus own, family businesses for example). For the purpose of laws which prohibit discrimination on the basis of “inherited social status” (as an aspect of “social origin” discrimination), what precisely constitutes “inherited” social status in Australia requires some careful thought.

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<sup>118</sup> Linton, above n 100, at 115.

<sup>119</sup> Foladare, above n 115, at 53.

<sup>120</sup> Thompson, above n 117, at 74 citing Pierre Bourdieu *Outline of a Theory of Practice* (Cambridge University Press, New York, 1977) and Pierre Bourdieu and Jean-Claude Passeron *Reproduction in Education, Society and Culture* (2nd ed, SAGE Publications, London, 1990).

<sup>121</sup> Thompson, above n 117.

<sup>122</sup> See also Margaret Andersen and Howard Taylor *Sociology: Understanding a Diverse Society* (4th ed, Thomson/Wadsworth, Florence (KY), 2008) at 114.

<sup>123</sup> Linton, above n100, at 115.

<sup>124</sup> Examples of such people might include Gina Rinehart (the daughter of iron ore magnate Lang Hancock who is now Chairman of Hancock Prospecting Group), Anthony Pratt (the son of Richard Pratt and grandson of Leon Pratt, who is the Chairman and CEO of Pratt Industries), Daniel Grollo (the son of Bruno Grollo, who inherited Grocon Party Limited from his father), James Packer (son of Kerry Packer, who inherited Consolidated Press Holdings Limited from his father), and Rupert Murdoch (son of Sir Keith Arthur Murdoch, who inherited News Limited from his father).

While discrimination on the basis of “inherited social status” may be difficult to conceptualise, Linton’s concepts of “achieved status” and “ascribed status” can serve as a useful foundation upon which to build a view of “inherited social status” discrimination which is likely to have more relevance in national contexts such as Australia. It can be argued that, in most cases, the criteria by which the CESCRC appear to measure “social status” – for example, poverty and homelessness – are likely to be intergenerational and “inherited”.<sup>125</sup> Caste, no doubt, is inherited from one’s parents and discrimination on the basis of caste will likely be discrimination on the basis of “inherited social status”.<sup>126</sup> However, as discussed above, in Australia “social status” is unlikely to be accurately measured by reference purely to economic factors (such as wealth or poverty) and a person’s homelessness, poverty or caste in Australia is perhaps only in very limited circumstances likely to be a point of distinction in employment decisions. The CESCRC’s view of “social origin” discrimination is, therefore, likely to have very little application in Australian workplaces, and it may, thus, be largely irrelevant. This paper will now, based on Linton’s view of “ascribed status” and “achieved status”, set out to propose how the CESCRC’s view of “inherited social status” can be broadened to more effectively prohibit in employment its conception of “social origin” discrimination (“inherited social status” discrimination).

It will now be argued that, in Australia, there are at least three ways which “inherited social status” (and therefore “social origin”) discrimination can occur, in addition to what has been noted by the CESCRC.

First, “ascribed status” discrimination can occur where an employment decision is based on family relationships. For example, if a law firm bases a hiring decision on the fact that the successful candidate’s mother is a Chief Executive Officer (CEO) of a large client of the firm, this would be based on the candidate’s ascribed status as a son or daughter. This is likely to mean that, because the unsuccessful candidate’s mother is not a CEO who can bring business to the firm, the decision is based on the unsuccessful candidate’s ascribed status as a son or daughter of factory workers for example.

Second, “ascribed status” discrimination can occur where an employment decision is based on attending a particular primary school or secondary school. For instance, suppose an employer bases the decision to hire a person on the basis that this person attended the same elite private school as the employer. The employer enjoys chatting with ‘old collegians’ because they tend to have things in common with them, and they also tend to have parents who can bring business to the employer. Attending an elite private school, especially without a merit based scholarship, is an ascribed status because it tends to be an accident of birth – parents in the know will often plan a child’s education from conception, and such education tends to be contingent on the ability of the parents to pay the schools. In contrast, a child does not choose to attend disadvantaged schools and be exposed to gangs and drugs. Therefore, being an ‘old collegian’ of an elite school or a disadvantaged school

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<sup>125</sup> See further Paul Flatau and others *Lifetime and intergenerational experiences of homelessness in Australia* (Australian Housing and Urban Research Institute, UWA Research Centre, UNSW-UWS Research Centre, Monash University Research Centre, February 2013, AHURI Final Report No 200).

<sup>126</sup> ‘Ascribed status’ discrimination can occur where an employment decision is based on caste. As the CESCRC does not define or clarify caste, it is not possible to elaborate on this point, though not hiring a person because the person is of a particular caste, or born to parents of a particular caste, is caste discrimination. This might include a situation where a *Brahmin* shop owner does not hire a person because he or she is *Dalit*.

is an ascribed status. This is likely to mean that, if a person is preferred for a job because they attended an elite school, an unsuccessful candidate for that job who did not have the opportunity to attend the elite school in question will likely face discrimination on the basis of an “ascribed status” as a person who did not attend that elite school.

Third, “ascribed status” discrimination can occur where an employment decision is based on certain circumstances of childhood. For example, if an employer bases a hiring decision on the fact that the unsuccessful candidate experienced homelessness, refugee status or immigrant status etc *as a child*, this would be based on the candidate’s “ascribed status”. Homelessness, being an immigrant or refugee and many other factors in childhood are “ascribed statuses” because a child is most certainly not able to choose whether to be homeless, an immigrant, a refugee, or, in some cases, even a criminal. Whilst, admittedly, discrimination on the basis of such circumstances of childhood may not be likely to occur in Australian workplaces, such conduct would still be an example of discrimination that is based on “ascribed status” (and therefore “inherited social status”).

The above three examples are clearly purely “inherited” or “ascribed” status because these circumstances tend to be determined by birth, usually do not change throughout a person’s life, do not tend to require effort to build or maintain, and are usually not the result of one’s own efforts (or lack of effort). The above three examples are also clearly relevant to social status, because a person’s family relationships (son of a judge or owner of a multinational company), ‘old school tie’ or circumstances of childhood can contribute to a person’s esteem and prestige. This, in turn, can contribute to the person’s social status.

Additionally, there is evidence that discrimination based on family relationships and attending a particular primary or secondary school occurs in Australia. This is evident in findings that nepotism is “rife” in the Victorian public service,<sup>127</sup> which signals that discrimination based on family connections occurs. There are allegations from lawyers that the law firms within which they work select candidates based on the school they went to (on the basis that people who attend private schools are likely to have connections which can benefit the firm).<sup>128</sup> These very recent examples show that discrimination in Australia based on the forms of ascribed (inherited) status just discussed are likely to be relevant in the Australian context, and occur quite frequently in employment. Additionally, a person’s primary or secondary school history and family connections (or assumptions about the person’s family connections, based on schooling) are very likely to be known to an employer, requested at interviews or detailed in resumes. This means that there is considerable scope for discrimination in employment on the basis of the ascribed statuses just discussed: family connections, and primary and secondary schooling in particular.

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<sup>127</sup> Victorian Ombudsman *Report on issues in public sector employment* (tabled in Parliament 27 November 2013). See also Victorian Ombudsman *Conflict of interest in the Victorian public sector – ongoing concerns* (tabled in Parliament 12 March 2014).

<sup>128</sup> Rebecca Douglas “Did public school kids ever have a chance?” *The Drum, ABC* (29 July 2013).

## Conclusion

This paper set out to determine the meaning of “social origin” in the ICCPR, ICESCR, CRC and ICMW, which are four core international human rights treaties which prohibit discrimination on the basis of “social origin”. Given that the term “social origin” is not defined within the text of any of these treaties, this paper relied on interpretations of the term “social origin” by the UN treaty bodies that are responsible for monitoring the implementation of these treaties. After extensively researching reports of UN treaty bodies which discuss “social origin” discrimination and carefully analysing these reports to adduce a meaning of “social origin”, this paper found that only the CESCR (which monitors the ICESCR) has interpreted and given meaning to the term “social origin” in a useful, direct, reasonably detailed and clear manner. This interpretation is found within the CESCR’s General Comment 20, and many commentators would argue that this general comment of the CESCR is an authoritative interpretation of the ICESCR.

This paper has argued that, according to the CESCR in its General Comment 20, “social origin” in art 2(2) of the ICESCR refers to “inherited social status”. It further argued that, in the view of the CESCR, “inherited social status” is to be understood in terms of property status (such as ownership or non-ownership of land, tenure over real property or the extent of a person’s personal property, or the lack of such property), social stratification based on descent (such as caste), and economic and social status (such as homelessness or poverty).

An important question posed in this paper is whether the CESCR’s approach to “social origin”, as it is found within the CESCR’S General Comment 20, has any relevance in the Australian context. This paper argued that the CESCR’s approach to “social origin” requires development if it is to have its intended effect (prohibiting discrimination on the basis of “inherited social status”) in national contexts such as Australia. It was argued in this paper that the CESCR’s view of “social origin” is unlikely to have much relevance in the Australian context, as it is currently framed in General Comment 20, for two reasons. First, the CESCR’s approach to “social status” will not likely address “social status” discrimination in Australia, but rather discrimination on the basis of “wealth” or “poverty”. Second, the CESCR’s approach to “social origin” is unlikely to have much relevance in Australian workplaces.

This paper proposed that the CESCR’s view of “inherited social status” discrimination (and therefore “social origin” discrimination) should be broadened if it is to have more relevance in national contexts such as Australia. Based on Linton’s theory of social status, it was argued that in Australia there are at least three circumstances, in addition to the (limited) role of the CESCR’s approach to “social origin” discrimination, where an employee or job candidate can experience discrimination based on an “ascribed status” or, in other words, “inherited social status”. Such discrimination might occur where an employment decision is based on an employee’s or job candidate’s: (1) family relationships (“ascribed status” as a son, daughter, grandson, granddaughter and/or some other unchangeable and unearned family relationships); (2) attending a particular primary school or secondary school (“ascribed status” as an ‘old collegian’); and (3) circumstances of childhood (such as parentage, homelessness, refugee or immigrant status, or, in some cases, drug use, criminal charges and convictions). It was argued that discrimination in employment based on these forms of “inherited social status” (particularly the first two) are likely to be much

more prevalent in Australia than the forms of “inherited social status” which appear to be advanced by the CESCR.

For these reasons, the position in this paper is that the view of the CESCR (in its General Comment 20) that “social origin” refers to “inherited social status” should be accepted, while its view of “social status” should be broadened. The refined and broadened view of “social status” adopted in this paper covers conduct that can properly be regarded as “inherited social status” (and therefore “social origin”) discrimination. It is contended that this broadened view of “social status” should inform, and be included within, the concept of “social origin” in Australian labour law. Thus, the concept of “social origin” discrimination will have relevance and application in Australian workplaces.

The CESCR’s view of “social origin”, and the refinements of this view which are proposed in this paper, are not inconsistent with the meaning which ILO supervisory bodies attribute to the term “social origin” in ILO Conventions. The position that “social origin” refers to “inherited social status” enriches the meaning of “social origin” in ILO Conventions. The term “social origin” in ILO Conventions comprises of a number of constituent elements: class, caste and socio-occupational category.<sup>129</sup> The CESCR’s view of “social origin” adds “inherited social status” to that mix. Whilst “inherited social status” may overlap with caste and aspects of class, for example, the concept is consistent with these elements and it seems to clearly cover discrimination on the basis of “ascribed status”.

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<sup>129</sup> See generally Capuano, above n 1.