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Implementation and uses of international human rights law in Australian domestic law

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Research Paper 2: Implementation and uses of international human rights law in Australian domestic law

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1. Introduction

The constitutional framework by which the domestic legal system of each state treats international law varies. As Charlesworth and others have noted, the relationship between international and Australian law is more complex than the classical 'monist/dualist' and 'incorporation/transformation' theories allow.[1] There is no single model for understanding the use of international human rights law in Australia's legal system. In each circumstance, it is

[1] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 426. The 'monist' view is, broadly, that international and domestic law are part of a unified legal order, so there is no need for international conventions, for example, to be translated into the domestic legal system for them to be given effect in domestic courts and administrative decision-making. Rather, they are automatically 'incorporated' as domestic law. The 'dualist' view is that international and domestic law are instead separate legal systems, and so for international law to have domestic application, it must be 'transformed' into domestic law: see Annemarie Devereux and Sarah McCosker, 'International Law and Australian Law', D. R. Rothwell, *International Law in Australia* (Thomson Reuters, 2016), 24, also 25 – 26 (for on criticisms of the monism/dualism approach and the lessening of their traditional significance in modern international law).

necessary to analyse the form or source of international human rights law that is invoked and the domestic legal context in which it arises.[2]

The sources of international law are themselves diverse and proliferating.[3] Article 38(1) of the *Statute of the International Court of Justice* ('ICJ Statute') states the generally accepted position in describing four basic sources of international law.[4] They are:

- international conventions;
- customary international law;
- general principles of law recognised by civilised nations; and
- judicial decisions and teachings of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

It is useful to briefly describe those first two categories of sources of international law, as they are the most relevant to obligations in Australian domestic law that we discuss below.[5]

As a matter of international law, 'conventions' within the meaning of the ICJ Statute , or 'treaties', are written international agreements concluded between states, the terms of which impose obligations on state parties.[6] States become parties through the process of ratifying or acceding to a treaty; consenting voluntarily to comply with the obligations set out in the convention.[7] It is a foundational principle of international law that treaties do not bind non-parties.[8]

International customary law is derived from two interrelated elements.[9] The first element is uniform and consistent practice among states. 'Practice' encompasses both positive acts as well as omissions. Generally consistent state practice, rather than absolute conformity, is required for

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[2] Justin Gleeson SC, 'The Australian Constitution and international law' (2015) 40 *Australian Bar Review* 149, 150.

[3] See Hilary Charlesworth, 'Law-making and sources', in J Crawford and M Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 187 ('The sources of international law are a complex tangle of ideas, commitments and aspirations.'). See also Justin Gleeson SC, 'The Australian Constitution and international law' (2015) 40 *Australian Bar Review* 149, 150 (on the proliferation of sources of international law).

[4] United Nations, *Statute of the International Court of Justice*, 18 April 1946. See Hilary Charlesworth on the meaning of 'general principles' and renewed interest in general principles as a source of international law in the context of soft law instruments: Hilary Charlesworth, 'Law-making and sources', in J Crawford and M Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 187, 195 - 197.

[5] For more detailed definition and discussion of the other two sources described in article 38(1)(c)-(d) of the ICJ Statute, see Hilary Charlesworth, 'Law-making and sources', in J Crawford and M Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 189.

[6] Article 1(a) of the Vienna Convention on the Law of Treaties provides the formal definition of 'treaty' at international law: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'). The VCLT codifies the principles applying to the interpretation of treaties, to the extent not provided for in the provisions of the treaty in question itself.

[7] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*') arts 14 (on ratification) and 15 (on accession).

[8] Malcolm Shaw, *International Law* (5th ed, 2003) 88.

[9] *North Sea Continental Shelf Case* [1969] ICJ Rep 3. State practice and the existence of a belief held by states that an international norm is legally binding may be evidenced, for example, by: proceedings of international conferences, documents related to sessions or meetings of UN bodies or organs, UN Security Council or General Assembly resolutions, as well as domestic sources such as legislation, case law, policy papers and government legal advice, government media releases and declarations.

a customary rule to exist. Some derogation from the rule in state practice will not undermine its status as a customary international law principle, to the extent it is seen as a breach of the generally applicable principle.[10]

The second element, called *opinio juris* or the 'subjective element', is that states must undertake the practice out of a sense that they are required to do so, in order to comply with a legal obligation.[11]

Unlike treaties, to which states voluntarily commit themselves, general rules of customary international law bind all states, subject to a state's status as a 'persistent objector'.[12] A state that 'persistently objects' to a rule during its formation and subsequently maintains its objection to the rule will not be bound by it, except in the case of the special category of customary international law principles called *jus cogens*, or peremptory norms from which no derogation by states is permitted. *Jus cogens* norms are of particular importance in the context of international human rights law. While there is no definitive list, many of the norms that are generally accepted as *jus cogens* are human rights protective, including the prohibitions on genocide, slavery and torture, for example.

The relationship between customary international law and international treaties is deeply inter-connected and can be somewhat circular. Treaties may codify or reflect existing principles of customary international law, or serve as evidence of state practice that is pursuant to customary international law. Many of the principles described in the core international human rights treaties, for example, are also recognised as customary law rules.

Under international law, states may be bound by rules derived from both treaty and customary law on the same matters simultaneously.[13] To the extent that there is a hierarchy of sources of international law,[14] a treaty obligation will be invalid if it is inconsistent with a *jus cogens* norm.[15]

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[10] State practice does not need to be in absolute conformity for a rule of customary international law to exist; rather, state practice should be generally consistent with it, so that derogating state practice is treated as a breach of the rule. Where a state does not comply with its obligations, but seeks to justify its actions through relevant exceptions to the rule, this serves to support rather than weaken the existence of the rule as law: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep [1986] 14, 98 [186].

[11] *North Sea Continental Shelf Case* [1969] ICJ Rep 3. State practice and the existence of a belief held by states that an international norm is legally binding may be evidenced, for example, by: proceedings of international conferences, documents related to sessions or meetings of UN bodies or organs, UN Security Council or General Assembly resolutions, as well as domestic sources such as legislation, case law, policy papers and government legal advice, government media releases and declarations.

[12] *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 3, 116.

[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep [1986] 14, 98.

[14] On the notion of whether there is a 'hierarchy' created in article 38(1), see James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 20-1; Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974-75) 47 *British Yearbook of International Law* 273.

[15] This principle is codified in *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*') Article 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)).

In *Polyukhovich v Commonwealth*,[16] Brennan J stated that article 38 comprises all sources of law. However, some contemporary scholars consider that the sources of international law extend to 'soft' international law, a category of growing importance.[17] 'Soft' law describes international instruments that have no binding effect on states, but nevertheless have legal and political ramifications. These might include resolutions and declarations by international institutions, for example resolutions by the UN General Assembly, or recommendations and statements of UN human rights treaty-monitoring bodies, such as comments by those bodies on the interpretation of human rights treaty provisions. Soft law can also 'harden' over time into rules of customary international law.[18] Moreover, soft international law can be relevant in Australian domestic law.

How these different sources of international law apply within the Australian legal system is not without complication. Broadly speaking, the dualist / transformation model is predominant in respect of Australia's international treaty obligations, protecting the Commonwealth constitutional principle of the separation of powers.[19]

While Australia may be bound by international human rights treaties as a matter of international law, those obligations must still be 'transformed' into domestic legislation for them to have local effect. However, even where not incorporated into domestic law, human rights treaties may have some domestic legal ramifications. The position in respect of administrative decision-making and customary international law principles, for example, is more complex, as we discuss below.

This research paper provides background on the implementation and uses of international human rights law in Australian domestic law. We describe the core international human rights treaties to which Australia is a party and Australia's reservations and declarations to them. We discuss treaty making within the Australian constitutional system, as well as the implementation of treaties through legislation and administrative decision-making. The paper also contains a discussion of the Commonwealth human rights parliamentary scrutiny regime, by which proposed legislation is subject to scrutiny against international human rights standards.

We proceed to address uses of international human rights law in statutory interpretation, as well as uses of international law in developing the common law and in the exercise of judicial discretion. We address particular issues of uses of 'soft' international law in Australian domestic law. Finally, the paper discusses the role of international and comparative human rights law in constitutional interpretation.

Research paper 7 focuses on monitoring of Australia's implementation of, and compliance with, its human rights treaty obligations by international human rights bodies, and complaints procedures which apply in the event that Australia breaches those obligations.

2. Australia's ratification of international human rights treaties

The framework for human rights protection in international conventions has expanded since the adoption of the *Universal Declaration* in 1948 and the conclusion of the *ICCPR* and *ICESCR*. There are currently nine core international human rights treaties in force. Australia has acceded to or ratified seven. Australia has also ratified a number of optional protocols to those core treaties.

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[16] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 559 (Brennan J).

[17] Hilary Charlesworth, 'Law-making and sources', in J Crawford and M Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 189 and 198 – 200.

[18] Ibid, 189, 194.

[19] Glen Cranwell, 'Treaties and Australia Law – Administrative Discretions, Statutes and the Common Law' (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 49.

For example, the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* was ratified in December 2017.

Those optional protocols create additional rights and obligations in a specific area or establish additional procedures for monitoring compliance with the core treaty obligations. A number also establish mechanisms by which individuals can bring complaints for violations of their human rights to a UN human rights treaty body (for example, the Committee on the Elimination of Racial Discrimination). We discuss these international monitoring and complaint mechanisms in research paper 7.

Appendix A describes the core provisions and rights and obligations enumerated in each of the core international human rights treaties and their optional protocols. *Appendix B* sets out other multilateral treaties to which Australia is a party which contain human rights protective obligations. *Appendix C* summarises United Nations treaty body communications in respect of Australia in the period since 2010. *Appendix E* identifies sources of additional information on human rights law, including Australia's ratification of UN treaties and the monitoring of compliance with international human rights obligations.

Table 2.1 Australia's ratification of human rights treaties

Treaty	**Date on which the treaty entered into force**	**Date of Australia's ratification or entry into force for Australia**
Convention on the Elimination of All Forms of Racial Discrimination ('*ICERD*')[20]	4 January 1969	30 October 1975
International Covenant on Civil and Political Rights ('*ICCPR'*)	23 March 1976	13 November 1980
International Covenant on Economic, Social and Cultural Rights ('*ICESCR'*)	3 January 1976	10 March 1976
Convention on the Elimination of Discrimination Against Women (*'CEDAW'*)[21]	3 September 1981	27 August 1983

[20] *International Convention on the Elimination of all forms of Racial* Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[21] *Convention on the Elimination of all Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (*'CAT'*)[22]	26 June 1987	7 September 1989
Convention on the Rights of the Child (*'CRC'*)[23]	2 September 1990	16 January 1991
Convention on the Rights of Persons with Disabilities (*'CRPD'*)[24]	3 May 2008	17 July 2008
First Optional Protocol to the International Covenant on Civil and Political Rights ('*OP-ICCPR*')	23 March 1976	25 September 1991
Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty[25]	11 July 1991	11 July 1991
Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women[26] ('*OP-CEDAW*')	22 December 2000	4 March 2009
Optional Protocol to the Convention on the Rights of the Child on the Involvement	12 February 2002	26 October 2002

[22] *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).
[23] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[24] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[25] *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 128, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989) 1642 UNTS 414 (entered into force 7 July 1991).
[26] *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999) 2131 UNTS 83 (entered into force 22 December 2000).

of Children in Armed Conflict[27] (‘*CRC-OPAC*’)		
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[28] (‘*CRC-OPSC*’)	18 January 2002	8 January 2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities[29] (‘*OP-CRPD*’)	3 May 2008	20 September 2009
Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (‘*OP-CAT*’)[30]	22 June 2006	15 December 2017

Australia is not party to two of the nine core international human rights treaties: the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990* and the *International Convention for the Protection of All Persons from Enforced Disappearance 2006*, or their optional protocols.[31] Australia has also not ratified the *Optional Protocol to the Convention on the Rights of the Child*, which establishes an individual complaint mechanism for violations of the *CRC*.

The core international human rights treaties do not exhaustively describe Australia’s human rights treaty obligations. There are a significant number of other multilateral treaties containing provisions relating to human rights to which Australia is a party, including, for example, the

[27] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,* G.A. Res. 263, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (2001) 2173 UNTS 222 (entered into force 12 February 2002).

[28] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,* G.A. Res. 263, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (2001) 2171 UNTS 227 (entered into force 18 January 2002).

[29] *Optional Protocol to the Convention on the Rights of Persons with Disabilities,* G.A. Res. 106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006) 2518 UNTS 283 (entered into force 3 May 2008).

[30] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* G.A. Res. 199, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/199 (2002) 2375 UNTS 237 (entered into force 22 June 2006).

[31] For a full list of the core international human rights treaties and their optional protocols, see: United Nations Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments and their monitoring bodies* <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> .

Convention relating to the Status of Refugees 1951 and the *Rome Statute of the International Criminal Court 1998*. *Appendix B* sets out those treaties.

2.1 Reservations and declarations by Australia to international human rights treaties

A state can make a reservation to a treaty, to the extent that such a reservation is not prohibited by the treaty or otherwise incompatible with the object and purpose of the treaty.[32]

A reservation is a unilateral statement that seeks to exclude or modify the state's obligations under the treaty provisions to the extent described in the reservation.[33] The effectiveness of a reservation as against other state parties to the treaty is subject to principles described in the *Vienna Convention on the Law of Treaties* (*'VCLT'*). [34] While not addressed in the *VCLT*, interpretative 'declarations' by States are unilateral statements purporting to clarify the meaning or scope of a treaty provision to the state making it. Unlike treaty reservations, a true 'declaration' is not intended to modify or exclude the legal effect of a treaty or a particular treaty provision. However, statements described by states as 'declarations' can be interpreted to have effect as reservations on the basis of the intention elicited in the declaration.[35]

In entering into the core international human rights treaties, Australia has made various reservations and declarations.[36] For example, Australia has made reservations to the *ICCPR* to article 10(2)(a) (segregation of convicted from unconvicted detainees); [37] article 10(2)(b) (segregation of juvenile from adult offenders);[38] article 14(6) (compensation of convicted people who have been pardoned);[39] and article 20 (criminalisation of racial hatred).[40]

States can also modify and withdraw reservations to treaties. Australia has done so in respect of some of its initial reservations to core human rights treaties. For example, in December 2018, Australia withdrew a longstanding reservation to *CEDAW* that Australia 'does not accept the

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[32] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art 19.

[33] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Art 2(1)(d).

[34] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 21. The *VCLT* also sets out the principles governing the interpretation of treaties.

[35] See *Belilos v Switzerland* (1988) 132 Eur Court HR (ser A).

[36] A full list of the reservations and declarations that Australia has made to the core international human rights treaties is available here: United Nations Office of the High Commissioner for Human Rights, *The Statues of Ratification: Interactive Dashboard* <http://indicators.ohchr.org/> .

[37] The reservation states that 'the principle of segregation is accepted as an objective to be achieved progressively.'

[38] The reservation states that 'the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.'

[39] The reservation is to the effect that compensation for miscarriage of justice may be by administrative procedures, rather than pursuant to specific legal provision.

[40] The reservation is to the effect that 'Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.'

application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties'.

Australia has made an interpretative declaration to the *ICCPR* to the effect that Australia is a federal constitutional system in which 'legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States' and, as such, Australia's implementation of its treaty obligations is effected by all states, territories and the Commonwealth subject to their 'respective constitutional powers and arrangements concerning their exercise.' This same interpretative statement by Australia applies to *CEDAW*. In effect, this recognises that the implementation of treaty obligations by Australia is the responsibility of various levels of government and the extent to which any level of government may implement those obligations is constrained by Australia's federal constitutional structure.

In response to criticism during its second Universal Periodic Review by the UN Human Rights Council in 2015,[41] a peer-review process by which states' human rights records are considered by fellow UN Member States, Australia undertook to withdraw its reservation to *CEDAW* on the exclusion of women from combat roles, which it has now done.[42] However, Australia reported that it was unable to withdraw any of its other human rights treaty reservations.[43] In a July 2020 submission to Australia's third Universal Periodic Review, the Australian Human Rights Commission recommended that Australia withdraw its interpretative declarations to the CRPD and reservations to human rights treaties.[44]

3. Treaty making in the Australian constitutional system

Turning from the international law implications of Australia's entry into human rights treaties, it is important to understand the national constitutional structure by which Australia assumes treaty obligations to understand how those obligations become justiciable in domestic law.

The Commonwealth Constitution makes no reference to the way in which Australia enters into international treaties. At the time of the Constitution's drafting, it was generally considered that

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[41] UN Human Rights Council, *Report of the Working Group on Universal Periodic Review: Australia*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016) paras 136.5 (on a reservation by Australia to article 4(a) of CERD) and 136.114 (on a reservation by Australia to the CRC).

[42] UN Human Rights Council, *Report of the Working Group on Universal Periodic Review: Australia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14/Add.1 (29 February 2016), para 7.

[43] UN Human Rights Council, *Report of the Working Group on Universal Periodic Review: Australia – Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14/Add.1 (29 February 2016), para 7. It is noted that, in 2005 and 2012, the Committee on the Rights of the Child described the reservation of Australia to article 37(c) concerning the segregation of children and adults in detention as 'unnecessary', given the exceptions contained in the article for consideration of the best interests of the child and the right of the child to maintain contact with their family: *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, UN Doc CRC/C/15/Add.268 para 7 and *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia,* 28 August 2012, UN Doc CRC/C/AUS/CO/4, para 9. Additionally, it is suggested that the remaining reservation to CEDAW relating to maternity leave could be withdrawn, following the introduction of the *Paid Parental Leave Act 2010* (Cth).

[44] Australian Human Rights Commission, *Submission to Australia's Third Universal Periodic Review to the Human Rights Council* (July 2020) [6].

the British Imperial Crown would continue to hold the right to make treaties on behalf of Australia.[45] As Australia gradually assumed full international legal personality, however, it came to be accepted that Australia has independent treaty making capacity.[46]

The High Court has acknowledged that, constitutionally, negotiation and entry into international obligations is an executive power pursuant to section 61 of the Commonwealth *Constitution*.[47] This follows the British tradition in which treaty making is a Crown prerogative. The Commonwealth executive has power under the *Constitution* to enter into international treaties on any subject matter, including human rights.[48] As a matter of constitutional law, it is also generally accepted that the executive does not need the approval of the legislature to ratify a treaty.[49]

Nevertheless, in practice, while the executive directs the drafting and negotiation of treaties, administrative mechanisms for parliamentary scrutiny of executive treaty making have been established, which we discuss in part 4 of this paper.[50] Except in urgent or sensitive cases, before taking action that would bind Australia to a treaty at international law, the executive tables the treaty signed by Australia in Parliament along with a National Interest Analysis.[51] A Joint Standing Committee on Treaties also examines the treaty.

At international law, the constituent states of the Australian federation have no international legal personality and, therefore, no separate treaty-making power to the Commonwealth.[52] However, under the principles of state responsibility at international law, the Commonwealth executive's acceptance of treaty obligations binds Australia in respect of all organs of government, including

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[45] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 428 - 430 (for a history of international law in the Australian Constitutional Conventions); Justin Gleeson SC, 'The Australian Constitution and international law' (2015) 40 *Australian Bar Review* 149, 155.

[46] See Donald R Rothwell, 'Australia', in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009) 120-1.

[47] *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608, 644 (Latham CJ).

[48] Annemarie Devereux and Sarah McCosker, 'International Law and Australian Law', D. R. Rothwell, *International Law in Australia* (Thomson Reuters, 2016), 26 – 27. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) chapter 9.

[49] Annemarie Devereux and Sarah McCosker, 'International Law and Australian Law', D. R. Rothwell, *International Law in Australia* (Thomson Reuters, 2016), 26. But, see Justin Gleeson SC, 'The Australian Constitution and international law' (2015) 40 *Australian Bar Review* 149, 158: 'It seems clear enough that there is power in the parliament to make laws on this subject [the executive treaty-making power]…Treaty-making [given the concerns for representative and responsible government underlined in the *Pape/Williams* line of cases in the High Court], while allocated to the executive under s 61, might be considered to be amenable to control by parliament, even to the level of prohibition or direction.'

[50] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 431 (with reforms to Australia's treaty-making process in 1996). The 'representative monopoly' of the executive and legislative branches of government over the scope and regulation of human rights protections in Australia has been subject to criticism. See Julie Debeljak, 'Does Australia need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Law Book Co., 2013) 37, 38, 59.

[51] For further information on the treaty-making process and parliamentary oversight, see: Australian Government Department of Foreign Affairs and Trade, *Treaty Making Process* <https://dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx> (accessed 10 December 2018).

[52] Lord McNair, *The Law of Treaties* (Clarendon Press, 1961), 37 - 8.

'sub-national governments'. [53] Justin Gleeson SC, former Australian Solicitor General, has observed that this could potentially result in findings under international law that Australia has breached its international obligations through the actions of its constituent states and territories, with Commonwealth liability resulting from those breaches. [54] The principles of state responsibility apply to breaches of obligations, both arising from treaties and general international law,[55] including those human rights principles that are peremptory norms, such as the prohibition on torture and systematic racial discrimination.

3.1 **Treaty implementation in domestic statutes**

Becoming party to a treaty binds Australia to comply with the rights and obligations created by the convention as a matter of international not domestic law. Peace and war treaties, derived from historic prerogative exceptions, are the only type in the Australian constitutional system considered to be self-executing.[56] Otherwise, the executive's ratification of a treaty has no direct legal effect upon Australian domestic law.[57]

Treaties do not have the force of law in Australia absent their valid implementation by statute.[58] As explained by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*, the position in Australia is that 'a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.'[59]

Accordingly, attempts in Australian courts to found causes of action directly on breaches of international human rights treaty provisions have failed.[60] By way of contrast, under the United States Constitution self-executing treaties become domestic law by virtue of their ratification.[61]

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[53] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Art 4(1). For discussion of the potential international legal consequences of non-compliance by one of the Australian states with treaty obligations accepted by Australia under the principles of state responsibility, see: Justin Gleeson SC, 'The Australian Constitution and international law' (2015) 40 *Australian Bar Review* 149, 161.

[54] For discussion of the potential international legal consequences of non-compliance by one of the Australian states with treaty obligations accepted by Australia under the principles of state responsibility, and one threatened claim against the Commonwealth on this basis, see: Justin Gleeson SC, 'The Australian Constitution and international law' (2015) 40 *Australian Bar Review* 149, 161.

[55] International Commission of Jurists, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, arts 12 and 26.

[56] Annemarie Devereux and Sarah McCosker, 'International Law and Australian Law', D. R. Rothwell, *International Law in Australia* (Thomson Reuters, 2016), 27.

[57] *Dietrich v the Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J).

[58] *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ) ('It is trite to say that treaties do not have the force of law unless they are given that effect by statute'.)

[59] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-7; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 224 (Mason J).

[60] See, for example, *Minogue v Williams* (2000) 60 ALD 366 (rejecting an argument by a prisoner relying on alleged breaches of the ICCPR that international human rights treaty obligations are directly enforceable in Australian courts).

[61] *United States Constitution* Art VI § 2 provides that '[t]his Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land'. The United States Supreme Court has interpreted this supremacy clause to mean that treaties are automatically incorporated into United States law and are regarded as equivalent to an act of parliament, except where the treaty cannot be considered as self-executing (for example, a

Broadly, self-executing treaties are considered to be those not related to expenditure or otherwise not requiring the exercise of powers exclusively allocated to Congress by the *Constitution*.[62]

The power to implement international human rights treaty obligations by legislation, or equally to choose not to do so, is constitutionally reserved to the Commonwealth Parliament under the separation of powers.[63] Typically, in implementing treaty obligations, the Parliament relies upon the power to legislate with respect to 'external affairs' in s 51(xxix) of the Commonwealth *Constitution*.[64]

The High Court has held that the external affairs power will be enlivened where treaty provisions are defined with 'sufficient specificity to direct the general course to be taken' and the implementing legislation is reasonably capable of being 'considered to be appropriate and adapted' to fulfilling the treaty obligations.[65] However, section 51(xxix) is not the only legislative head of power relevant to treaty implementation. To the extent that a treaty is on a specific subject matter it may also be supported by another head of power. For example, the *Migration Act 1958* (Cth) - which incorporates provisions reflecting Australia's obligations under the *Convention Relating to the Status of Refugee 1951*[66] - is supported by the aliens power (s51(xix)).

The operation of the Commonwealth's legislative power to implement treaty obligations is also limited by the *Constitution* itself. For example, Parliament cannot legislate to execute treaty provisions in a manner that removes existing constitutional protections for human rights (such as provisions which contravene section 116 on the freedom of religion).

In implementing human rights treaty obligations into legislation, the Parliament has a number of options available. This includes enacting specific legislation implementing the treaty in whole or in part (for example, the *Racial Discrimination Act 1975* (Cth) incorporates Australia's obligations under the *CERD*) or amending existing legislation to incorporate the treaty obligations (for example, the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act*

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treaty requiring action of the United States Congress such as appropriation of funds): Laurence Tribe, *American Constitutional Law* (3rd ed, 2000) vol 1 at 644.

[62] Stephen P Mulligan, 'International Law and Agreements: Their Effect Upon U.S. Law' (Congressional Research Service Report, 19 September 2018) 15 <https://fas.org/sgp/crs/misc/RL32528.pdf> .

[63] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-7. The relationship between this position and the separation of executive and legislative powers in the Australian constitutional structure, as well as discussion of treaty application provisions in the Australian Constitutional Conventions, are discussed in: Glen Cranwell, 'Treaties and Australia Law – Administrative Discretions, Statutes and the Common Law' (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 49, 51 – 52.

[64] See *Commonwealth v Tasmania* (1983) 158 CLR 1 (*'Tasmanian Dam* Case') (the majority holding that the 'external affairs power' grants the Commonwealth the legislative power to incorporate its treaty obligations into Australian law). The High Court has not yet directly considered the issue, but it is arguable that the external affairs power might support implementation of customary international law: Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 444-5. Some members of the High Court have also suggested that the external affairs power would allow the Commonwealth to legislate to criminalise certain offences that are recognised to be under the universal jurisdiction of all nations at international law: *Polyukovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 (Brennan and Toohey JJ).

[65] *Victoria v Commonwealth* (1996) 187 CLR 416, 486 - 487 (*'Industrial Relations Act Case'*).

[66] *Convention Relating to the Statues of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

2010 (Cth) amends the *Criminal Code Act 1995* (Cth) to give effect to certain provisions of the *CAT*).

A further common implementation technique is to impose statutory limitations or requirements upon administrative decision-making by reference to a treaty, without giving full effect to its provisions.[67] The implications of this for administrative decision-making and review are discussed below. While we focus here on the initial implementation of a treaty by legislation, provisions that give effect to treaty obligations may also be subsequently included in sub-statutory instruments (for example, regulations) or administrative measures made under executive power (for example, Ministerial Declarations).

Legislation may also broadly refer to a treaty without specifically implementing its provisions, or describing how the treaty is to be applied in domestic law. This is demonstrated by the *Human Rights Commission Act 1986* (Cth), which describes its purpose as being to make provision in relation to 'human rights'. 'Human rights' are defined as the rights and freedoms recognised in the *ICCPR* and those declared by three international human rights Declarations,[68] which are also annexed to the Act. These types of broad references, without more, do not give those treaties any substantive effect as domestic law.[69]

The executive may also determine that existing legislation or practice gives sufficient effect to its treaty obligations and that new legislation is unnecessary. For example, in all Australian jurisdictions, existing child protection laws may reflect the obligation under article 19 of the *CRC* to protect children from abuse, while not necessarily referring to the *CRC* itself.

The Australian Government has not, to date, implemented all of the international human rights law treaties to which Australia is a party in its domestic law. For example, while the *ICCPR* and *ICESCR* (together with the *CRC*, *CRPD*, *CEDAW* and some of the ILO's Fundamental Conventions) form the basis for the *Sex Discrimination Act 1984* (Cth),[70] the *Disability Discrimination Act 1992* (Cth),[71] and the *Age Discrimination Act 2004* (Cth),[72] they have not been given full effect.[73]

While at international law there is no general obligation that treaties be comprehensively incorporated or accorded any specific status in national law,[74] Charlesworth et al describe Australia's approach to its human rights treaty obligations as 'Janus-faced'.[75] As the authors note,

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[67] Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24, 25.

[68] *Australian Human Rights Commission Act 1986* (Cth), s 3. The three specific Declarations referred to are the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled People.

[69] See, for example, *Kioa v West* (1985) 159 CLR 550, 570-571 (per Gibbs CJ), 629 (per Brennan J) (on reference to the ICCPR and other international human rights instruments in the *Australian Human Rights Commission Act 1985* (Cth).

[70] *Sex Discrimination Act 1984* (Cth) s 3(a).

[71] *Disability Discrimination Act 1992* (Cth) s 12(8).

[72] *Age Discrimination Act 2004* (Cth) s 10(7).

[73] McBeth, Nolan and Rice note that the 'rights guaranteed by the ICCPR have a small and almost random presence in Australian law': Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) 377.

[74] CESCR General Comment No 9, E/C.12/1998/24, 3 December 1998, para 5.

[75] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 436, citing Hilary Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and*

'the international face smiles and accepts obligations, while the domestic-turned face frowns and refrains from giving them legal force.'[76] Charlesworth and others argue that this reaction to international law is evidence of a deeper and politicised anxiety that international law undermines Australian sovereignty and a perception that international law intrudes into a self-contained Australian legal system.[77]

The patchwork national statutory protection of human rights recognised under international treaties in Australia and under the Australian *Constitution* [78] contrasts with comparable jurisdictions. For example, in the United Kingdom, civil and political rights are currently protected by the *Human Rights Act 1998* (UK), which gives effect to the *European Convention of Human Rights 1950*.[79] The United Kingdom Act provides that it is unlawful for a public authority to act in such a way as to contravene Convention rights.[80] A person whose rights have been breached by a public authority can seek relief by bringing proceedings in a British court or tribunal.[81] Australia's national level piece-meal approach to human rights protection could be overcome with the introduction of a constitutional Bill of Rights or national human rights charter.

A different approach to the Australian Commonwealth has been adopted by two state jurisdictions and one territory jurisdiction in Australia with the enactment of comprehensive human rights statutes: the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities 2006* (Vic) and, most recently, the *Human Rights Act 2019* (Qld), which we discuss in research paper 6.

A significant consequence of the Commonwealth's legislative power to implement international treaties is that valid federal legislation will invalidate any inconsistent state legislation, pursuant to section 109 of the Australian *Constitution*.[82] Commonwealth legislation will also override

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Australia (1995) 129. See also Hilary Charlesworth and Gillian Triggs, 'Australia and the International Protection of Human Rights' in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Law Book Co., 3rd ed, 2017) 117.

[76] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 436, citing Hilary Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia* (1995) 129.

[77] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 424.

[78] Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) 5, cited in Melissa Castan, 'The High Court and Human Rights: Contemporary Approaches' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Law Book Co., 2013) 71, 73. As Castan notes, of the patchwork of human rights that are recognised and protected by the High Court, '[s]ome patches are old and worn but strong, others are fragile, some are newly sewn in. Some rights are omitted altogether, leaving gaps for those seeking protection.' McBeth, Nolan and Rice have suggested that 'the "patchwork quilt" approach … pieced together from an unplanned and uncoordinated collection of constitutional provisions, common law, legislation, policies and procedures, and institutions…is emerging as a model of sorts': Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) 372.

[79] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[80] *Human Rights Act 1998* (UK) c 42, s 6(1).

[81] *Human Rights Act 1998* (UK) c 42, ss 7(1) and 8(1).

[82] Section 109 of the *Australian Constitution* provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid.'

Territory legislation pursuant to section 122 of the Constitution. The Commonwealth has used s 109, on occasion, to advance Australia's compliance with its international human rights treaty obligations.

After a finding of the UN Human Rights Committee in *Toonen v Australia* that Tasmanian laws criminalising homosexual sex violated the right to privacy under the *ICCPR*, Tasmania refused to amend the infringing legislation. In response, the Commonwealth enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth) to give domestic effect to the Committee's decision. The Tasmanian Government repealed the state legislation after a High Court case was brought seeking a declaration of inconsistency between the Commonwealth and Tasmanian legislation.[83]

The High Court also found that the *Racial Discrimination Act 1975* (Cth) made Queensland and Western Australian legislation that attempted to extinguish or limit the native title rights of indigenous peoples in those states invalid on the basis of inconsistency.[84]

However, in other circumstances, the power of the Federal Parliament to protect human rights through overriding legislation has not been realised. The Commonwealth Government has declined to enact legislation intervening in key instances 'when a State or Territory law has operated in violation of Australia's human rights obligations (for example, mandatory sentencing laws in Western Australia and the Northern Territory).'[85]

3.2 **Treaty implementation and domestic administrative decision-making**

International treaty obligations that protect human rights may also be relevant to the requirements imposed on administrative decision-makers in the Australian domestic legal system. As Edgar and Thwaites write, when international treaties are incorporated into domestic statute, 'the effect of a statutory formulation on the implementation of an international law norm is often determined by administrative law.'[86]

Although there is scholarly debate as to whether it constitutes a form of incorporation of international law in domestic law,[87] a common form of implementing treaty commitments in Australian law is to qualify the discretion of administrative decision-makers by reference to Australia's treaty obligations.[88] As broadly categorised by Edgar and Thwaites, this can be effected either by confining discretion so that decision-makers must act consistently with treaty obligations, or by structuring the exercise of the discretion, by requiring that decision-makers have regard to or consider Australia's international law obligations.[89] For example, the *Chemical Weapons (Prohibition) Act 1994* (Cth) gives effect to certain obligations of Australia under the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*. Section 95 of the statute provides that powers and functions under the statute are to be exercised only to the extent done consistently with Australia's

[83] See *Croome v Tasmania* (1997) 191 CLR 119 (in which the High Court held that it had original jurisdiction in respect of the case).
[84] *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth* (*Native Title Case*) (1995) 183 CLR 373.
[85] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 347.
[86] Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24, 25.
[87] Ibid, 32.
[88] Ibid, 25 - 26.
[89] Ibid, 33.

obligations under the Convention. It further provides that a decision-maker exercising a power or discretion under the Act must have regard to Australia's obligations under the Convention.

Administrative decision-making is subject to supervision by the courts exercising their powers of review, so international law implemented in this way may potentially provide a litigant an approach by which to challenge an administrative decision.[90] The scope of the power of the court to review decision-making in which international human rights obligations are statutorily engaged will depend on the court's interpretation of the implementation technique used in each statute and the administrative law doctrines involved, which must be assessed on a case-by-case basis.[91]

In a decision that, while landmark at the time, has lost its initial significance, in *Minister for Immigration and Ethnic Affairs v Teoh* ('*Teoh*')[92], a majority of the High Court also accepted that even unincorporated treaties can have enforceable relevance to administrative decision-making, despite having no direct effect in Australian law. The majority held that the ratification by Australia of an international convention, even where not incorporated in a statute, could ground a legitimate expectation that the executive would have regard to those obligations in administrative decision-making.[93]

The effect of the *Teoh* decision was procedural. It required that a decision-maker inform the person affected where intending to act contrary to Australia's treaty obligations and allow them an opportunity to be heard on the issue.[94] In the immediate case, the majority accepted that in making a decision to refuse permanent residency and deport Teoh from Australia on character grounds, the decision-maker was required to invite Teoh to make a submission on the deportation order. This was because the order was contrary to the principle in the CRC that the best interests of the child shall be a primary consideration in all actions concerning children.[95] In not meeting this legitimate expectation, the decision-maker denied Mr Teoh procedural fairness. So, the decision to deport Mr Teoh was invalidated.

The *Teoh* decision created significant political anxiety about the function of international law in the Australian legal system. Commonwealth governments of different political persuasions attempted to repudiate it through issuing Executive Statements, although of uncertain legal effect, providing that executive entry into international treaties would not give rise to a legitimate

[90] Ibid, 25 - 26.

[91] Ibid, 34 and 46 – 49 (for discussion of the standard of review, or remedies, that may apply in determining the enforceability of statutory provisions qualifying administrative discretions by reference to international law, including the particular issue of where there is indeterminacy in the relevant treaty provision).

[92] *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1995) 183 CLR 273.

[93] *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1995) 183 CLR 273, 291-292 (Mason CJ and Deane J), 301-302 (Toohey J).

[94] *Lam v Minister for Immigration and Multicultural Affairs* (2006) 157 FCR 215, 227 [33].

[95] CRC, Art 3(1) ('In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.')

expectation in administrative decision-making.[96] Legislation seeking to nullify the decision was also introduced in the Commonwealth Parliament on three occasions, without passing.[97]

However, as noted above, the decision in *Teoh* has lost its initial significance. As Edgar and Thwaites write, 'the reasoning in *Teoh* and the legal effect of unincorporated treaties are now a marginal phenomenon.'[98] Although *Teoh* has not been overruled, the doctrine of legitimate expectation has been the subject of sustained criticism by the High Court.[99] As the unanimous Court observed in *Minister for Immigration v SZSSJ*:

> it must now be taken to be settled that procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation. The common law principle, sufficiently stated for present purposes, is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme.[100]

This requirement to accord procedural fairness arises presumptively where a person's rights or interests are prejudiced by an administrative decision.[101] Fairness is assessed according to the particular circumstances of the case and would usually encompass an opportunity to be heard. This obligation to ensure a decision is made fairly in the circumstances arises regardless of any 'legitimate expectation' a person might have, including those founded on Australia's ratification of a treaty.

As such, the doctrine of legitimate expectation was described by Kiefel, Bell and Keane JJ in *Minister for Immigration and Border Protection v WZARH* as 'unnecessary and unhelpful'.[102]

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[96] The Executive Statements followed the words used in the judgment of Mason CJ and Deane J in *Teoh* that a legitimate expectation would arise if there were no 'statutory or executive indication[s] to the contrary': (1995) 183 CLR 273, 291. As to uncertainties about the legal effect of those statements, see: Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 450.

[97] See *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1997* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 199*9 (Cth). An Act in similar terms was passed in South Australia: *Administrative Decisions (Effect Of International Instruments) Act 1995* (SA).

[98] See Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24, 25. In a recent review of cases invoking the *Teoh* decision, Edgar and Thwaites were unable to find a case successfully invoking the doctrine of legitimate expectation after the decision of the High Court in *Re Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326: 43.

[99] See *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 31–4 [95]-[102] (McHugh and Gummow J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30].

[100] *Minister for Immigration v SZSSJ* (2016) 259 CLR 180, 205.

[101] *Re Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 334-5 (Kiefel, Bell and Keane JJ); see also: George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013), 32 – 33.

[102] *Re Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30].

Notwithstanding this, *Teoh* has been applied in a number of cases in which Australia's obligations under the CRC are engaged, in the context of migration decisions impacting upon children.[103] This does give rise to a further question, which is whether the doctrine in *Teoh* has any ongoing application to ground a legitimate expectation in Australia's ratification of conventions other than the *CRC*.[104] Ministerial Directions made pursuant to the *Migration Act 1958* (Cth) have made the best interests of the child a mandatory relevant consideration for delegated decision-makers where the Directions apply and a child is affected by a decision about a visa refusal or cancellation on the basis of character grounds.[105] This has lessened the relevance of the concept of legitimate expectation in the factual context in which *Teoh* arose, so that its primary relevance may only be to decisions made personally by the Minister. It is 'well-recognised' that the disappointment of a person's legitimate expectations does not by itself signify a lack of procedural fairness.[106]

4. The Commonwealth human rights parliamentary scrutiny regime

Since 2012, the Commonwealth Parliament has employed an enhanced legislative scrutiny process intended to improve deliberation on legislation potentially impacting upon human rights, and to improve the degree to which legislation respects and protects human rights.[107] The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*'*the *Parliamentary Scrutiny Act'*) was enacted as part of the Commonwealth Government's response to a National Human Rights Consultation process on the protection of human rights in Australia, conducted in 2009.[108]

The regime operates along the lines of a dialogue model between the executive and Parliament. There are two main components of the enhanced scrutiny process. Firstly, each Bill introduced to the Federal Parliament must be tabled with a Statement of Compatibility assessing its

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[103] For example, *Nweke v Minister for Immigration and Citizenship* (2012) 126 ALD 501, 507-8 [16]-[21]; *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 [11] – [15]. See DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1184 [34]-[35], [53], in which Stewart J noted that the position in *Teoh* was expressed more broadly by the court in *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608. Stewart J noted, however, that the reasoning in that case may have relied on a matter conceded and agreed by the parties. See also *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 [64] – [71] (Allsop CJ).

[104] See Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24, 42. Edgar and Thwaites suggest that its scope is 'tightly circumscribed'. Note, however, the decision of *Poroa v Minister for Immigration and Border Protection* (2017) 252 FCR 505, in which Perry J accepted 'that Australia's ratification of the ICCPR gave rise to a legitimate expectation that the right to found a family would be taken into account' in a visa cancellation decision, at 517 [51].

[105] See Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24, 39 – 40, 43.

[106] *Abdel-Hady v Minister for Immigration and Border Protection* [2018] FCA 535 [45] (Wigney J). The best interests of the child are viewed as one primary consideration and will not be determinative. See *Brown v Minister for Immigration and Border Protection* (2015) 235 FCR 88 (Rares, Flick and Perry JJ). See also Marilyn Pittard, 'The Triumph of Practical Fairness over Legitimate Expectation in Australian Administrative Law' (2017) 29 *Singapore Academy of Law Journal* 856.

[107] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 483 and 488.

[108] Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation Report* (2009).

compatibility with 'human rights'.[109] A similar obligation is imposed on rule-makers in respect of disallowable legislative instruments.[110] 'Human rights' are defined within the statute to mean those rights and freedoms recognised by each of the *CERD*, *ICESCR*, *ICCPR*, *CEDAW*, *CAT*, *CRC* and *CRPD*, as they apply to Australia.[111] A potential weakness of this procedure is that failure to table a compatibility statement will not affect the validity of a subsequent Act.[112] However, the lack of legal consequences for failing to table the statement has seemingly not affected compliance with the regime.

An empirical study conducted by Williams and Reynolds in 2015 showed that, from the introduction of the Act in 2011 to 2015, a Statement of Compatibility had been provided in respect of 99.8% of proposed Bills and legislative instruments that were put before Parliament.[113]

The second main component of the *Parliamentary Scrutiny Act* was the creation of a Parliamentary Joint Committee on Human Rights.[114] The Committee's functions are to review Acts, Bills and other legislative instruments before Parliament and to report on their compatibility with human rights to both Houses of Parliament, as well as to inquire and report to Parliament on human rights matters referred to it by the Attorney-General.[115] In performing its functions, the Joint Committee can call witnesses, hold public and private hearings, and call for documents to be produced.[116]

Australia reported to the UN Human Rights Council during its 2015 universal periodic review that the process under the *Parliamentary Scrutiny Act* encourages 'early and ongoing consideration of human rights in policy and legislative development.'[117] However, the regime has a number of weaknesses.

Its effectiveness depends upon the quality of the compatibility analysis provided to Parliament and the timeliness of oversight in respect of draft legislation and disallowable instruments. In its 2016/2017 Annual Report, the Parliamentary Joint Committee on Human Rights stated that ongoing challenges to its capacity to report on draft legislation in a timely manner are both the quality of statements of compatibility being provided with the legislation, and responsiveness to its requests for information on Bills, there being no legal or procedural requirement for proponents of legislation to respond to the Committee's requests within its specified timeframe.[118] The two are connected. In 2015, Williams and Reynolds reported that the Joint

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[109] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s8. Legally, a Statement of Compatibility has no effect, as it is not binding upon any court or tribunal: s 8(4). However, courts may consider a statement of compatibility, or a report of the Parliamentary Joint Committee on Human Rights as relevant extrinsic material in statutory interpretation: section 15AB, *Acts Interpretation Act 1901* (Cth).

[110] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s9.

[111] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s3(1)-(2).

[112] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(5).

[113] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 474.

[114] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.

[115] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

[116] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 474.

[117] UN Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Australia*, 23rd sess, UN Doc A/HRC/WG.6/23/AUS/1 (7 August 2015), para 18.

[118] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2016 – 2017* (2018) 25 – 26 (including statistics showing that in the reporting period, only 30% of responses to

Committee typically sought information from Ministers on Bills where compatibility statements failed to provide sufficient information identifying the human rights engaged by the Bill, or if any limitations on rights were for a legitimate aim, rationally connected and justified.[119]

The effect has been that Bills may be voted upon before the Joint Committee has reported to Parliament on their compatibility with human rights.[120] This undermines the purpose of the scrutiny process in ensuring Parliament has the opportunity to deliberate on and, should it decide it necessary, address human rights issues before legislation is passed.[121] Both the qualitative and quantitative impact of the enhanced scrutiny process on legislative outcomes is difficult to measure. However, overall, others have assessed the impact of the *Parliamentary Scrutiny Act* by 'way of achieving its goals' in human rights dialogue and implementation as 'limited'[122] and 'lacklustre'.[123]

5. International law in statutory interpretation

Principles of statutory construction have developed that enable Australian courts to have recourse to international law. There is, however, a threshold question that must be considered before using international law to assist in statutory interpretation. The High Court has held on a number of occasions that the legislative power of the Commonwealth under section 51 of the

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information requests were provided within the requested time period). Academic studies conducted in 2013 and 2015 also criticised the quality of compatibility statements being provided: George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58, 81; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38 *University of New South Wales Law Journal* 1046, 1070.

[119] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 477 and 484.

[120] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2016 – 2017* (2018) 25. Williams and Reynolds found that, as at 4 January 2016, the Parliamentary Joint Committee had reported 95 instances where legislation or legislative instruments were incompatible with human rights and in 73 per cent of the time, or on 69 occasions, that finding had no impact on the outcome of the legislation; 66 of those 69 occasions were explained by delay where the Committee had not reported on the Bill or legislative instrument before it came to a final vote: George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 490.

[121] National Interest Analysis reports on treaties have been described as 'formulaic, superficial and do little more than repeat generalised statements about the virtue of the treaty under consideration and confirm the diligence with which it has been considered': Matthew Groves, 'International Law, Administrative Powers and Human Rights: The Legacy of *Teoh*' in Matthew Groves et al (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing, 2019) 112-3. Groves suggests that, despite the limited role of the Joint Committee and the superficiality of its output to date, its mere existence serves to undermine arguments against the use of treaties as a touchstone for procedural rights in Australian courts, as in *Teoh*, based on the supposedly 'artificial nature of suggestions that the act of ratification could signal genuine governmental acceptance of a treaty.'

[122] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 498. See also Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018).

[123] Lisa Burton Crawford, 'The Human Rights (Parliamentary Scrutiny Act 2011 (Cth): A Failed Human Rights Experiment?' in Matthew Groves et al (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing, 2019) 143, 145.

Constitution is not bound by international law.[124] The corollary of this is that Australian courts are bound to apply Australian statute law, even in violation of international law, where that legislative intent is clear.[125] Justice Keane articulated this principle in *CPCF v Australia* as follows:

> Australian courts are bound to apply Australian statute law 'even if that law should violate a rule of international law'. International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read 'general words … subject to the established rules of international law' unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation.[126]

In addition to the common law principles of construction discussed below, section 15AB(2) of the *Acts Interpretation Act 1901* (Cth) is also relevant. It provides that, in interpreting a statutory provision, consideration may be given to extrinsic material – including treaties and any other international agreement referred to in the Act – capable of assisting interpretation in order:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

  (i) the provision is ambiguous or obscure; or

  (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

5.1 **Resolving ambiguity in domestic legislation**

Where legislation is ambiguous, the court may use international law, including human rights law, to resolve the ambiguity, to the extent it does not conflict with the legislative intention. While some members of the judiciary have considered that this principle applies only in circumstances where the statute was enacted pursuant to, or in contemplation of, international treaty obligations,[127] other members of the judiciary have treated the principle as applying to statutes in general. For example, in the *Teoh* case, Mason CJ and Deane J stated that:

> [W]here a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party,[128] at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant

[124] See, for example, *Polites v Commonwealth* (1945) 70 CLR 60, 73 (Latham CJ).
[125] See, for example, *CPCF v Minister for Immigration* (2015) 255 CLR 514, 643 – 644 (Keane J).
[126] *CPCF v Minister for Immigration* (2015) 255 CLR 514, 643 – 644 (Keane J).
[127] See, for example, *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24 (Gleeson CJ).
[128] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; *Polites v Commonwealth* (1945) 70 CLR 60, 68–9, 77, 80–1.

> international instrument. That is because parliament, *prima facie*, intends to give effect to Australia's obligations under international law.[129]

This principle of harmonious interpretation was confirmed by the High Court in *Kartinyeri v Commonwealth of Australia,*[130] in which Gummow and Hayne JJ stated that 'it has been accepted that a statute of the Commonwealth or of a state is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.'[131] More recently, North, Mansfield and Gilmour JJ in *Cheedy (on behalf of the Yindjibarndi People) v Western Australia*[132] held that a statutory provision should be construed so as to conform to Australia's international obligations. However, this can only occur in order to resolve ambiguity in the language of the provision.[133]

A seeming limitation upon the operation of this principle of interpretation is that recourse to international law may not be had where international obligations relevant to the statute did not exist, or were not contemplated, at the time that the legislation was enacted. For example, in *Kruger v Commonwealth*, Dawson and Gummow JJ held that the statute in question was not to be read in accordance with an international treaty entered into several decades after the statute was enacted, as the relevant international obligations could not have been in the contemplation of Parliament[134]

A further consideration in the use of international law to assist the resolution of ambiguity may also be whether the international law referred to imposes an obligation that is sufficiently clear, or is merely aspirational and so not of use in construction.

While some ambiguity is required for the court to have regard to international law, Mason CJ and Deane J in *Teoh* proposed that the requisite level of ambiguity should be construed broadly:

> there are strong reasons for rejecting a narrow conception of ambiguity. If the language of legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[135]

5.2 **Explicit reference to international treaties in legislation**

The High Court and the Federal Court have also formulated principles for the interpretation of legislation that gives effect to treaty obligations, either in whole or in part:[136]

i. where the provision of a treaty is transposed into the statute, the language of the statute should carry the same meaning as in the treaty;[137]

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[129] *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1995) 183 CLR 273, 287.
[130] (1998) 195 CLR 337.
[131] *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, 384. See also *Polites v Commonwealth* (1945) 70 CLR 60, 68–9, 77, 80–1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 204.
[132] (2011) 194 FCR 562.
[133] *Cheedy (on behalf of the Yindjibarndi People) v Western Australia* (2011) 194 FCR 562. 583 [108].
[134] (1997) 190 CLR 1, 71 (Dawson J), 159 (Gummow J).
[135] (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
[136] The Hon John von Doussa, 'How universal are international human rights principles?' (Speech delivered at the Administrative Appeals Tribunal National Conference, 21–24 October 2007).
[137] *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1.

ii. primacy should be given to the text of the treaty having regard to the context, objects and purpose of the treaty;[138]
iii. in ascertaining the meaning of a provision in the treaty, the court may apply the international rules for treaty interpretation, namely articles 31 and 32 of the *Vienna Convention on the Law of Treaties 1969.*[139] The court can also seek assistance from the jurisprudence developed by specialist international courts, tribunals and specialist UN Committees;[140]
iv. where the statute is intended to give effect to an international human rights treaty, the statutory provisions should be beneficially construed (that is, as intending to confer a benefit and given a broad construction, rather than a strict one).[141]

The most prominent example of the operation of these principles was in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[142] In that proceeding, the plaintiff challenged the so-called 'Malaysia solution', a political agreement between Australia and Malaysia in which asylum seekers would be sent from Australia to Malaysia for processing of their asylum claims, effected through provisions of the *Migration Act 1958* (Cth).

Provisions of the *Convention relating to the Status of Refugees 1951* are imported into the *Migration Act 1958* (Cth). The plurality characterised the statute as intending to give effect to Australia's protection obligations under the Convention. It followed for the plurality that the statute could not be construed as permitting the Australian Government to remove asylum seekers to any country willing to receive them, but only countries that were legally obliged to provide the same international law protections. As Malaysia is not a party to the Refugee Convention, this invalidated the 'Malaysia solution'.

More recently, in *Minister for Immigration and Border Protection v WZAPN*, the High Court confirmed that Australian courts will construe the Migration Act, if the construction is available, to conform to the *Convention relating to the Status of Refugees 1951*.[143] The Justices surveyed international jurisprudence and writings on the relevant Convention article to ascertain the relevant international human rights standard applying to interpretation of s 91R of the statute, determining that the existence of a 'threat to liberty' enlivening protection obligations required a qualitative assessment of the seriousness of the interference with a person's liberty.[144]

5.3 **The principle of legality**

The High Court has recognised that, at common law, there is a principle that courts will not impute to the legislature an intention to abrogate or curtail fundamental common law rights or freedoms, unless legislative intention is manifested by unmistakable and unambiguous language.[145]

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[138] *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* (2002) 127 FCR 92, 100 [26].
[139] *Minister of Foreign Affairs and Trade v Mango* (1992) 37 FCR 298, 303–305.
[140] *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140 (29 August 2007) [14]–[16].
[141] *IW v City of Perth* (1997) 191 CLR 1, 14, 22–3, 27, 39, 41–2, 58.
[142] (2011) 244 CLR 144.
[143] *Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22.
[144] *Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22 [61]-[65], [68]-[71]; [99] (Gageler J).
[145] *Coco v The Queen* (1994) 179 CLR 427, 436ff (Mason CJ, Brennan, Gaudron and McHugh JJ); *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 589 (French CJ, Kiefel and Bell JJ).

In *Plaintiff S157/2002 v Commonwealth*, Gleeson CJ stated:

> courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[146]

For example, the majority in *North Australian Aboriginal Justice Agency Limited v Northern Territory* emphasised the principle of legality in construing provisions which empowered Territory police to hold an individual in custody for up to four hours after their arrest without warrant before bringing the individual before a magistrate.[147] In the absence of clear words to the contrary, French CJ, Kiefel and Bell JJ construed the provision as requiring that the person be brought before a magistrate as soon as reasonably practicable, rather than allowing police a discretion to hold a person for up to four hours.[148]

Further examples of fundamental rights that the courts have sought to protect under this presumption include the right not to self-incriminate;[149] the right of a person entitled to possession of premises to exclude others from those premises;[150] the right of citizens to access the courts;[151] and the right to legal professional privilege.[152] As discussed below, in these circumstances, human rights, which are recognised in international law and used in the interpretation of domestic law, may assist in elucidating or developing the content of common law rights. The corollary of this principle is, of course, that clear words in legislation affecting fundamental rights will abrogate their application.[153]

5.4 **International law in the development of the common law**

Within the Australian legal system, it is a generally accepted principle that, absent statutory implementation, international human rights norms may serve as an influence on the development

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[146] (2003) 211 CLR 476, 492 (Gleeson CJ). See also *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 581 (French CJ, Kiefel and Bell JJ). See also the useful discussion of the principle and relevant authorities by the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Mohammad Al Masri* (2003) 126 FCR 54, 75ff (Black CJ, Sundberg and Weinberg JJ).

[147] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 587-9 (French CJ, Kiefel and Bell JJ).

[148] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 589, 591 (French CJ, Kiefel and Bell JJ).

[149] *Donovan v Commissioner of Taxation* (1992) 34 FCR 355, 360 (Wilcox J)*; Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, 421 (Kirby J); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 337, 346.

[150] *Coco v The Queen* (1994) 179 CLR 427, 435.

[151] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492–3 (Gleeson CJ).

[152] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 540 (Gaudron J), citing *Baker v Campbell* (1983) 153 CLR 52, 116–17.

[153] *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 [33] (McHugh J finding the words 'too clear to read them as being subject to…an intention not to affect fundamental rights)) and 643 [241] (Hayne J holding that 'legislation is not to be construed as interfering with fundamental rights and freedoms unless the intention to do so is unmistakably clear' but finding that the 'words are, as I have said, intractable').

of the common law. As stated by Brennan J in *Mabo v Queensland (No 2)*, with whose judgment Mason CJ and McHugh J agreed:

> 'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'[154]

However, Brennan J's statement was qualified such that, in declaring the common law, courts 'are not free to adopt contemporary notions of justice and human rights' if 'their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.'[155]

In *Mabo (No 2)*, in which the High Court first recognised indigenous peoples' continuing native title to traditional lands, the role of international human rights conventions was influential in Brennan J's decision:

> Whatever the justification advanced in earlier days for refusing to reognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.[156]

Brennan J continued:

> A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[157]

While the use of international law to assist the development of the common law is reasonably well-accepted by Australian courts,[158] there appears to be no judicial consensus on the circumstances and ways in which it can be used. Further, Brennan J's statement in *Mabo (No 2)* drew no distinction between different sources of international law. Subsequently, while Australian courts have shown willingness to consider the role of international conventions in developing the common law, judges have been more reticent in respect of customary international law. This is, perhaps, a function of the relative indeterminacy of customary rules in contrast with the written provisions of treaties, to which Australia has clearly consented through ratification.

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[154] (1992) 175 CLR 1.

[155] *Mabo (No 2)* 1992 175 CLR 1 at 29, see also 43 (Brennan J, Mason CJ and McHugh J agreeing).

[156] (1992) 175 CLR 1, 43.

[157] (1992) 175 CLR 1, 43.

[158] In addition to the cases discussed below, see also: *Dow Jones and Co, Inc v Gutnick* (2002) 210 CLR 575, 626 – 7 (Kirby J, on developing common law defamation in the context of internet publications consistently with the rights to freedom of expression and reputation in the ICCPR); *Western Australia v Ward* (2002) 213 CLR 1, 389 (Callinan J, on the 'occasional' assistance of international law in determining the content of the common law).

Following *Mabo (No 2)*, in *Dietrich v the Queen*, the applicant sought recognition of a common law right of an accused charged with a serious offence, who cannot afford counsel, to be provided with counsel at public expense.[159] Notwithstanding that it is not part of Australia's domestic law, the applicant proposed that the common law should reflect article 14(3)(d) of the *ICCPR*, which recognises the right of an indigent accused to have legal assistance assigned, without payment, where the interests of justice require it.[160] The applicant submitted that the common law should be developed in a manner reflecting the existence and enforceability of rights provided for in international instruments to which Australia is a party.[161]

While the High Court rejected the proposition that an indigent accused has a right at common law to counsel at public expense,[162] a majority of the Justices accepted a role for the influence of international law in the common law. However, they expressed different views as to how and when international law could be of use.

Mason CJ and McHugh J appeared to support the proposition that the use of international treaties ratified by Australia to develop the common law will only be permissible where the common law is uncertain or ambiguous.[163] They would not extend, as in the case before them, the use of international treaty provisions to 'declare that a right which has hitherto never been recognized should now be taken to exist.'[164] Dawson J expressed caution as to whether the use of international law in circumstances of ambiguity and uncertainty could extend to the common law, in addition to statutory interpretation.[165] However, he found that the application of article 14(3)(d) would not assist to resolve an ambiguity or uncertainty, but rather work a fundamental change to the common law and so this precluded reliance on the article.[166]

Toohey J accepted that an international convention may be used by a court to guide the common law in cases of uncertainty. His Honour referred to (without expressly adopting) English authority that a court may consider implications of treaties where there is a lacuna in the domestic law.[167] However, he did not consider that article 14(3)(d) supported an absolute right to counsel, as the applicant proposed.[168]

Brennan J accepted that article 14(3)(d) of the *ICCPR* reflected contemporary values in relation to justice and human rights, and that the provision was a legitimate influence on the development of the common law.[169] However, he held that the courts could not – independent of the legislative

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[159] (1992) 177 CLR 292, 293.
[160] (1992) 177 CLR 292, 294.
[161] *Dietrich v the Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J).
[162] While the applicant's common law right proposition was unsuccessful, the High Court reiterated that the courts have inherent power to stay proceedings to prevent an unfair trial, and recognised that this would necessarily extend to a case in which representation of the accused is essential to a fair trial, as in most cases where an accused is charged with a serious offence: *Dietrich v the Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
[163] *Dietrich v the Queen* (1992) 177 CLR, 306 (Mason CJ and McHugh J) (in expressing this view, the Justices referred to comments by Kirby P to similar effect in *Jago v Judges of the District Court of N.S.W.* (1988) 12 NSWLR 558, 569).
[164] *Dietrich v the Queen* (1992) 177 CLR, 306 (Mason CJ and McHugh J).
[165] *Dietrich v R* (1992) 177 CLR 292, 348-9 (Dawson J).
[166] *Dietrich v R* (1992) 177 CLR 292, 349 (Dawson J).
[167] *Dietrich v R* (1992) 177 CLR 292, 360 (Toohey J).
[168] *Dietrich v R* (1992) 177 CLR 292, 361 (Toohey J).
[169] *Dietrich v R* (1992) 177 CLR 292, 320-1 (Brennan J).

branch and executive – declare an entitlement to legal aid, in the absence of a preexisting common law right.[170] In his finding, Brennan J referred to the separation of powers as a limitation on judicial development of the common law, reiterating the qualification – articulated in *Mabo (No 2)* – that the development of the common law, in order to be consistent with contemporary values, should not fracture 'the skeleton of principle which gives the body of our laws its shape and internal consistency.'[171]

In *Teoh*, Mason CJ and Deane J in *obiter dicta* restated that international conventions may, especially those declaring universal fundamental rights, be used by courts as a legitimate guide to develop the common law.[172] However, they continued to warn that:

> [J]udicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.[173]

The position is currently somewhat more ambiguous in respect of international customary law.[174] In the case of *Nulyarimma v Thompson*, the Full Federal Court considered whether, absent statutory incorporation, the prohibition on genocide formed part of Australian law, and, in particular, whether genocide was an offence under the common law.[175]

The prevention of genocide is a *jus cogens* norm of customary international law and the international crime of genocide is subject to universal jurisdiction at international law, being a crime that any state may prosecute absent any territorial or national connection to the alleged conduct. The majority held that, absent domestic legislation, customary international law cannot provide a source of jurisdiction for domestic courts.[176] Whitlam J considered that customary international law generally could not ground jurisdiction,[177] while Wilcox J distinguished between the use of customary rules in civil and criminal matters. Wilcox J stated that – for policy reasons – courts should decline to enforce international norms in criminal matters.[178] Merkel J dissented,

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[170] *Dietrich v R* (1992) 177 CLR 292, 321 (Brennan J).
[171] *Dietrich v R* (1992) 177 CLR 292, 320-1 (Brennan J).
[172] *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1995) 183 CLR 273, 288. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J, with whom Mason CJ and McHugh J agreed); *Dietrich v R* (1992) 177 CLR 292, 321 (Brennan J), 360 (Toohey J); *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569 (Kirby P); *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770.
[173] *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1995) 183 CLR 273, 288 (citations omitted).
[174] The issue was considered earlier by the High Court in respect of customary rules on sovereign immunities in *Chow Hung Ching v the King* (1948) 77 CLR 499, 477 (Dixon J stated that, while it is not a part of domestic law, international law is a source of national law) and 462 (Latham CJ stated that a universally recognized principle of international law would be applied by Australian courts).
[175] (1999) 96 FCR 153.
[176] (1999) 96 FCR 153.
[177] (1999) 96 FCR 153, 171-2 (Whitlam J).
[178] (1999) 96 FCR 153, 164 (Wilcox J).

finding that absent inconsistency with domestic law, customary international law may be adopted and received into domestic law without implementing legislation.[179]

5.5 **International law in the exercise of judicial discretion**

International human rights law has been considered in the exercise of judicial discretion in a range of different areas of law.[180] Some examples are outlined below.

5.5.1 *Sentencing*

In *R v Togias*, the *CRC* and other international pronouncements on the rights of children, informed the consideration of Grove J and Einfeld AJ on the probable effects of a sentence on the family and dependents of a person, as required under s 16A(2)(p) of the *Crimes Act 1914* (Cth).[181]

In *R v Hollingshed*,[182] Miles CJ considered whether imprisonment in the circumstances (the defendant was considered to be at risk of sexual assault in prison) would constitute a violation of rights under the *ICCPR*.

However, in *Smith v R*, Bleby J expressed the view that sentencing 'is an important judicial function to be exercised only in accordance with law' (and that did not include consideration of international instruments).[183]

5.5.2 *Granting of bail*

In *Schoenmakers v DPP*, French J used parts of the *Magna Carta* and those parts of the *ICCPR* concerning rights to liberty and to trial within a reasonable time, to identify 'broad community standards' to determine if special circumstances existed to grant bail in the context of extradition proceedings.[184] The applicant had been detained for a period of 11 months.

In *Re Rigoli*, Maxwell P and Charles JA recognised that international human rights guarantees in relation to the treatment of prisoners may be a relevant consideration in determining whether to grant bail to an applicant requiring specific care.[185]

5.5.3 *Excluding confessional evidence*

Section 138(3)(f) of the *Evidence Act 1995* (Cth) confers a judicial discretion to exclude evidence in a trial that is improperly or illegally obtained. In determining whether evidence has been improperly obtained, one of the factors the *Act* requires the court to consider is 'whether the

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[179] (1999) 96 FCR 153, 178-91, 205 (Merkel J).

[180] See, for example, the list of Bell J in *Tomasevic v Travaglini* (2007) 17 VR 100 at [73], footnote 52. See also Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5(1) *Melbourne Journal of International Law* 108.

[181] *R v Togias* (2001) 127 A Crim R 23, [85], [179]. The case involved a review of a custodial sentence of a mother with a young child. A key argument was that the imprisonment would separate the child and mother. In the course of this argument reference was made to international instruments entered into by Australia including rights of children not to be separated from their mother other than in exceptional circumstances, and the value of breastfeeding babies.

[182] (1993) 112 FLR 109, 114.

[183] (1998) 98 A Crim R 442, 448.

[184] (1991) 30 FCR 70, 74–5.

[185] [2005] VSCA 325, [5].

impropriety or contravention [of Australian law] was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*'.[186]

The *ICCPR* and the *Declaration of the Rights of the Child*[187] were also identified as potentially relevant to the admissibility of evidence in *McKellar v Smith*, in which Miles J considered whether to exclude the confessions of two children made to police.[188]

5.5.4 *Restraint of trade*

In *Wickham v Canberra District Rugby League Football Club Ltd*, Miles CJ was required to consider the reasonableness, and therefore the validity, of a club rule that restrained members of a rugby league club from playing for other teams.[189] In addition to precedent, Miles CJ also referred to the right to work enshrined in the *ICESCR*.[190]

5.5.5 *Care and protection orders*

In *Re Tracey,* Spigelman CJ (with whom Beazley JA agreed) accepted the relevance of the CRC to the exercise of judicial discretion to vary or rescind care orders, and the relevance of international law to judicial discretion more generally.[191]

6. Implementation and uses of 'soft' international law in Australian domestic law

In addition to the core human rights treaties identified above and their optional protocols, Australia has also signed a number of instruments constituting 'soft' international law on human rights. These constitute, broadly, declarations of intention, position or support, but contain no legally binding obligations.[192]

These include declarations from international conferences, directive recommendations of international organisations, model rules and codes of conduct or statements of principle. For example:

- *Declaration on the Rights of Indigenous Peoples (2007)*[193]
- *Declaration of the Rights of the Child*;[194]
- *Declaration on the Rights of Mentally Retarded Persons*;[195]

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[186] *Evidence Act 1995* (Cth) s 138(3)(f).

[187] GA Res 1386 (XIV), GAOR, 14th sess, 841st plen mtg, UN Doc A/RES/1386 (XIV) (20 November 1959).

[188] [1982] 2 NSWLR 950.

[189] (1998) ATPR ¶41-664.

[190] Ibid [67]–[68] (Miles CJ):

> administrative decision makers are required to take into account relevant provisions of a treaty to which Australia is a party, notwithstanding that those provisions are not part of Australian domestic law … It is difficult to see why judicial decision makers are not similarly obliged when called upon to exercise discretion or to decide a question of reasonableness.

[191] (2011) 80 NSWLR 261 [33]-[42], [45]-[49].

[192] DJ Harris, *Cases and Materials on International Law* (5th ed, 1998) 65.

[193] Resolution 61/295 adopted by the General Assembly on 13 September 2007. Australia was one of four countries to vote against the adoption of the Declaration in 2007. However, following a change in government, the Commonwealth officially gave its support to the Declaration on 3 April 2009.

[194] General Assembly Resolution 1386 (XIV), A/RES/14/1386 (20 November 1959).

[195] General Assembly Resolution 2856 (XXVI), A/RES/26/2856 (20 December 1971).

- *Declaration on the Rights of Disabled Persons*;[196] and
- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*;[197] and
- General Assembly *Resolution* 60/251 of 15 March 2006,[198] establishing the Human Rights Council.

It has been suggested that soft international law instruments – such as international declarations and resolutions of international organisations and conferences – may be given domestic effect through valid implementation in legislation made under the Commonwealth external affairs power. Following the *Victoria v Commonwealth* ('*Industrial Relations Act Case*'), it appeared that the external affairs power would support implementation of recommendations and resolutions of international organisations to which Australia is a party.[199]

One particular aspect has been subject to repeated consideration by the High Court: the extent to which it encompasses the implementation of other categories of non-binding instruments or recommendations of any international organisation in domestic legislation as 'matters of international concern'.[200] The High Court declined to consider the parameters of 'matters of international concern' in *XYZ v Commonwealth.* [201] The concept arose again in *Pape v Commonwealth*.[202] In that case, the Commonwealth contended in submissions that the global financial crisis of 2008 was a 'matter of international concern' and that the reservations expressed in *XYZ* did not constitute a concluded view.[203] Heydon J considered that the concept was without merit.[204] Earlier judicial statements expressing a view contrary to that in *XYZ* were 'seriously considered dicta, but they could not be described as conforming with long-established authority' and were, on occasion, unhelpful to the Commonwealth's case.[205]

Dicta of Stephen J in *Koowarta*[206] has been referred to in support of the principle that non-binding instruments or recommendations might be sufficient to ground the validity of a provision under the external affairs power as matters of international concern. However, as noted by the NSW Court of Appeal, 'Stephen J's view of "international concern" was *confined* to cases where there was a treaty. It is in the teeth of Stephen J's reasoning to invoke international concern in cases

[196] General Assembly Resolution 3447 (XXX), A/RES/3447 (9 December 1975).
[197] General Assembly Resolution 36/55, A/RES/36/55 (25 November 1981).
[198] General Assembly Resolution 60/251, A/RES/60/251, (15 March 2006).
[199] (1996) 187 CLR 416, 483.
[200] Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co., 2nd ed, 2006) 126.
[201] (2006) 227 CLR 532.
[202] *Pape v Commissioner of Taxation* & *Anor* (2009) 238 CLR 1.
[203] The defendants sought to rely on a statement in the Declaration of the G-20 of agreement to '[c]ontinue our vigorous efforts and take whatever further actions are necessary to stabilize the financial system.' Heydon J stated that the statement was 'far too unspecific' to give constitutional validity to the impugned Act and that, while the Declaration demonstrated that the financial crisis was a matter of international concern, that 'does not render it an "external affair" for s 51(xxix) purposes': *Pape v Commissioner of Taxation* & *Anor* (2009) 238 CLR 1 at [478]. While Heydon J was in dissent in that case, the majority did not consider the argument on matters of international concern.
[204] *Pape v Commissioner of Taxation* & *Anor* (2009) 238 CLR 1 [471]-[473]
[205] *Pape v Commissioner of Taxation* & *Anor* (2009) 238 CLR 1 [473].
[206] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217.

which do not involve a treaty.'[207] Leeming JA concluded that there is no separate "international concern" aspect of the external affairs power, and that to argue otherwise is to use dicta incorrectly in a way that is contrary to their context.[208] It is notable that Basten JA and McCallum J agreed with Leeming JA on this point.[209]

It appears, therefore, that soft international law instruments will not be sufficient validly to invoke the external affairs power as touching on 'matters of international concern'. However, soft law continues to have a role in domestic judicial determinations. Australian courts have considered and referred to soft international law in a number of cases. Courts have shown willingness, for example, to have regard to instruments of soft international law as an indicator of international standards,[210] as well as to clarify the content and application of other international human rights instruments.[211]

7. Constitutional interpretation

The prevailing position in Australia is that the Commonwealth *Constitution* is not to be read as subject to, or conforming to, principles of international law. The High Court has accepted that the legislative power of the Commonwealth under section 51 of the *Constitution* is not bound by international law, so that the Parliament may enact laws that are contrary to international law principles.[212]

More recently, in *Plaintiff S195/2016 v Minister for Immigration and Border Protection*, the High Court seemingly went beyond this to hold unanimously that 'there is no room for doubt that neither the legislative *nor the executive power* of the Commonwealth is constitutionally limited by any need to conform to international law [emphasis added].'[213]

However, the extent to which international law can be used in constitutional interpretation has been subject of sharp divergences of opinion in the High Court, although no majority of the Court to date has accepted a role for international law in informing interpretation of the *Constitution.*

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[207] *Alqudsi v Commonwealth of Australia; Alqudsi v R* (2015) 91 NSWLR 92 ('*Alqudsi*') [136] (Leeming JA). See generally [126]-147]. Significantly, Stephen J's comments in *Koowarta* were made prior to the expansion of the scope of the power in the Tasmanian Dam Case.

[208] *Alqudsi v Commonwealth of Australia; Alqudsi v R* (2015) 91 NSWLR 92 [145]-[147] (Leeming JA). Special leave to appeal was refused by the High Court (S259 of 2015).

[209] *Alqudsi v Commonwealth of Australia; Alqudsi v R* (2015) 91 NSWLR 92, [3] (Basten JA) and [171]-[172] (McCallum J). Mr Alqudsi had unsuccessfully applied to the High Court for a declaration that the section of *the Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) pursuant to which he had been charged with terrorist offences was invalid while his criminal proceedings were still pending, with French CJ finding that the plaintiff had shown insufficient cause for the 'fragmentation' of the pending criminal proceedings on this constitutional question: *Alqudsi v Commonwealth of Australia* (2015) 327 ALR 1 [23].

[210] See, for example, *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 219 (in which Stephen J referred a number of international standards, including UN General Assembly resolutions on human rights) in determining that racial discrimination is a matter falling within the external affairs power); *Tasmanian Dam Case* (1983) 158 CLR 1 (in which Murphy J referred to a UN General Assembly resolution in considering whether the protection of world natural heritage would be a matter of international concern notwithstanding a treaty on the matter).

[211] See, for example, *Wu Yu Fang v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245 (the dissenting judgment of Carr J, referring to the international *Standard Minimum Rules for the Treatment of Prisoners* as a guide for interpretation of Article 10 of the *ICCPR*).

[212] *Polites v Commonwealth* (1945) 70 CLR 60 (on customary international law).

[213] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 [20].

During his tenure on the High Court, Kirby J advocated for the use of international law to resolve ambiguities in the Constitution.[214]

In *Al-Kateb v Godwin*, Kirby J proposed that the High Court and all national constitutional courts have a 'duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.'[215]

McHugh J was of a resoundingly different view that 'desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country.'[216] His Honour continued that the 'doctrine of separation of powers does more than prohibit the Parliament and the Executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the Constitution under the guise of interpretation.'[217]

In a recent article, former High Court Justice Kirby reflects on *Al-Kateb v Godwin* and his attempt to introduce a role for the *Bangalore Principles* in Australian constitutional interpretation, whereby principles and values of universal human rights may influence interpretation in circumstances of ambiguity or uncertainty, where this is compatible with the structure of the Constitution and it is appropriate to do so.[218] He notes that, '[a]ssuming that it would be legitimate for the Federal Parliament to authorise (as other national constitutions and statutes have done) reference to using international law in ascertaining [the Constitution's] meaning, the Australian Parliament has so far held back.'[219] He acknowledges that there are a number of High Court determinations and obiter dicta which appear to be 'hostile' to the interpretation of the Constitution according to the *Bangalore Principles,* but argues that this does not preclude a new interpretative approach.[220]

While not accepting a prescribed role for international law in constitutional interpretation, the High Court has shown its willingness to look to international law and comparative law for insight into how similar problems have been dealt with in other jurisdictions, including in respect of issues of constitutional rights protections.[221] In particular, *proportionality analysis* is of growing importance in applying constitutional limitations protective of human rights. For example, in *McCloy v New South Wales,*[222] the High Court considered whether a law impermissibly infringed

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[214] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657 – 8 (Kirby J) ('Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.')
[215] *Al-Kateb v Godwin* (2004) 219 CLR 562, 624 (Kirby J).
[216] *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J).
[217] *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J). The approach of Kirby J was further criticized by Heydon J in *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–5 [181].
[218] *Al-Kateb v Godwin* (2004) 219 CLR 562, 617-8; Michael Kirby, 'Municipal courts and the international interpretive principle: "*Al-Kateb v Godwin*"' (2020) 43(3) *University of New South Wales Law Journal* 930.
[219] Through recourse to the external affairs power in the Australian case and referring to article 51(c) of the Constitution of India. Michael Kirby, 'Municipal courts and the international interpretive principle: "*Al-Kateb v Godwin*"' (2020) 43(3) *University of New South Wales Law Journal* 930, 940.
[220] Michael Kirby, 'Municipal courts and the international interpretive principle: "*Al-Kateb v Godwin*"' (2020) 43(3) *University of New South Wales Law Journal* 930, 941.
[221] See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013), 108 ('The distinction is between such law as a source of law and as a source of ideas about law.')
[222] (2015) 194 CLR 178.

the implied freedom of political communication. In addressing whether the impugned law was 'appropriate and adapted to advance a legitimate object' in the 'sense of compatible with the maintenance of the constitutionally prescribed system of representative government', the joint Justices applied a three-stage proportionality analysis of whether the law was 'justified as suitable, necessary and adequate in its balance'.[223] The joint judgement drew from 'analogous criteria' developed in the structured proportionality jurisprudence of Europe to balance constitutional and human rights against public interest considerations. The Justices referred to this jurisprudence as 'a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.'[224]

However, as we note in research paper 1 with reference to recent constitutional challenges to COVID-19 restraints, there are divided judicial views amongst members of the High Court as to whether 'structured proportionality' or 'reasonable necessity' are the appropriate tests although in *Palmer*[225] both methodologies led to the same conclusion.

[223] (2015) 194 CLR 178, 193 – 194 (French CJ, Kiefel, Bell and Keane JJ).
[224] (2015) 194 CLR 178, 194 (French CJ, Kiefel, Bell and Keane JJ).
[225] *Palmer v Western Australia* [2021] HCA 5, 95 ALJR 229.