

A PROPOSAL FOR AN AUSTRALIAN BILL OF RIGHTS BASED ON CUSTOMARY INTERNATIONAL LAW

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Recent dicta from the High Court of Australia (HCA) have refocused attention on the lack of an Australian Bill of Human Rights.¹ As a result, an Australian Bill of Human Rights was introduced in the House of Representatives,² although similar bills have been consistently rejected by the Commonwealth Parliament for over sixty years.³ More alarmingly, international agreements and obligations that might have provided some protection to Australians are routinely ignored.⁴ The ongoing constitutionalisation of international law suggests that human rights protection in Australia should focus on harmonization with customary international law (CIL), rather than on adopting a cherry-picking approach to human rights protection, as seen in Australia's subnational instruments, and in proposed Commonwealth legislation.⁵ This proposal is for a Bill that consolidates existing federal human rights instruments, incorporates CIL into domestic law, and allows for the evolution of these protections in parallel with CIL by refraining from any enumeration of protected rights. In practice, the proposed Bill signals the HCA jurisdiction in developing the common law according to CIL. CIL jurisprudence ensures

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¹ *Comcare v Banerji* [2019] HCA 23 (Austl.).

² Australian Bill of Rights Bill 2019 (Cth) (Austl.).

³ See George Williams, *The Federal Parliament and the Protection of Human Rights* (Research Paper No 20, Parliamentary Library, Parliament of Australia, 11 May 1999).

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2017, 8211 (Andrew Wilkie) (Austl.). See also George Williams & Daniel Reynolds, *The Operation and Impact of Australia's Parliamentary Security Regime for Human Rights*, 41 MONASH UNIV. L. REV. 469 (2015); Hilary Charlesworth, *The Australian Reluctance About Rights*, 31 OSGOODE HALL L. J. 195 (1993).

⁵ See, e.g., *Nulyarimma v Thompson* (1999) 96 FCR 153. The majority of the High Court of Australia (HCA) accepted that genocide was a peremptory norm of international law, *id.* at ¶ 36, but still suggested that different customary international law rules require different treatment under the doctrines of transformation and incorporation, *id.* at ¶ 84. The majority rejected genocide as a crime under Australian domestic law, *id.* at ¶ 135. See *Human Rights Act 2004* (ACT) (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Austl.); *Human Rights Act 2019* (Qld) (Austl.); Australian Bill of Rights Bill 2017 (Cth); Australian Bill of Rights Bill 2019 (Cth). See also Dylan Lino, *Are Human Rights Enough (in Australia)*, 41 SYDNEY L. REV. 281 (2019); ANDREW BYRNES ET AL., *BILLS OF RIGHTS IN AUSTRALIA: HISTORY, POLITICS AND LAW* (2009).

guidance for the application of protected rights in Australia. The Bill also allows parliament a “notwithstanding clause” where policy considerations require delaying the protection of specific rights.

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I. INTRODUCTION

In August 2019, the High Court of Australia (HCA) delivered a judgment in the case of Michaela Banerji, a former employee of the Department of Immigration and Citizenship (DIAC).⁶ Banerji’s criticism of the DIAC’s policies on Twitter using a pseudonym handle resulted eventually in the termination of her employment for breaching the Australian Public Servants’ (APS) Code of Conduct.⁷ In the Federal Circuit Court, Banerji failed to obtain an injunction to stop the termination of her employment, as there was no free speech right in Australia.⁸ After termination, her application for workers’ compensation was rejected by Comcare⁹ on the ground that the termination was reasonable pursuant to the Safety, Rehabilitation and Compensation Act.¹⁰ On appeal to

⁶ *Comcare v Banerji* [2019] HCA 23 (Austl.). The DIAC was succeeded by the Department of Immigration and Border Protection in September 2013. The latter has now been subsumed under the Department of Home Affairs.

⁷ See *Public Service Act 1999* pt 3 (Cth) (Austl.). Under this Act, Banerji was required to “at all times behave in a way that upholds the APS Values,” *id.* at s 13(11)(a). Among the APS Values was a declaration of impartiality: “The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence,” *id.* at s 10(5). These sections—collectively the APS Code of Conduct—have subsequently been amended, but the changes are not material.

⁸ *Banerji v Bowles* [2013] FCCA 1052, ¶ 101.

⁹ Comcare is the national work health and safety, and workers’ compensation authority. It was established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

¹⁰ See *Safety, Rehabilitation and Compensation Act 1998* (Cth). The Act sets out Comcare’s functions and powers. Comcare also has functions and responsibilities under the *Work Health and*

the Administrative Appeals Tribunal (AAT), the AAT found that the termination was unreasonable given the nature of the comments made by Banerji on the Twitter account and her role as a public servant.¹¹ The AAT decision was appealed to the Federal Court, and the Commonwealth Attorney-General removed the dispute to the High Court. The HCA upheld the appeal unanimously.¹² In the majority joint judgment, the court reiterated that in Australia there is no ‘personal right’ protecting freedom of speech.¹³

The *Banerji* decision reignited the debate around the necessity of an Australian Bill of Rights. It has been suggested that this is “a matter of national urgency”, given that Australia is “the only Western democracy without some form of charter of rights legislated by Parliament or entrenched in the constitution.”¹⁴ The renewed focus on the protection of rights in Australia led independent Member of Parliament (MP) Andrew Wilkie to introduce the Australian Bill of Rights Bill 2019 into the House of Representatives in September of 2019.¹⁵ This Bill is Wilkie’s second attempt at legislating an Australian Bill of Rights, the first having been defeated in 2017.¹⁶ The 2019 Bill is modelled closely after the Australian Bill of Rights Bill 2001,¹⁷ acting as a codification of human rights entitlements contained in international human rights conventions. The explanatory memorandum explains the purpose of the 2019 Bill in the following terms:

Safety Act 2011 (Cth) and the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth); see also *About Comcare*, AUSTRALIAN GOVERNMENT: COMCARE (Nov. 20, 2019), <https://www.comcare.gov.au/about/about-comcare> (Under this legislation Comcare has a role as the “workers compensation insurer, claims manager and scheme administrator”, and manager of “the Commonwealth’s asbestos-related claims liabilities.”).

¹¹ *Banerji and Comcare (Compensation)* [2018] AATA 892, ¶ 116.

¹² See Kieran Pender, “A Powerful Chill”? *Comcare v Banerji* [2019] HCA 23 and the Political Expression of Public Servants, AUSTRALIAN PUBLIC LAW (Aug. 28, 2019), <https://auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23/> [hereinafter Pender, “A Powerful Chill?”]; see generally Kieran Pender, *Comcare v Banerji: Public Servants and Political Communication*, 41 SYDNEY L. REV. 131 (2019).

¹³ *Comcare v Banerji* [2019] HCA 23 (Austl.).

¹⁴ Gillian Triggs, *Why an Australian Charter of Rights is a Matter of National Urgency*, CONVERSATION (Aug. 13, 2019, 2:12 PM AM), <https://theconversation.com/why-an-australian-charter-of-rights-is-a-matter-of-national-urgency-121411>; see also Binoy Kampmark, *Freedom of Speech: The Powerful Chill of the Banerji High Court Decision*, INDEPENDENT AUSTRALIA (Aug. 13, 2019, 8:00 AM), <https://independentaustralia.net/politics/politics-display/freedom-of-speech-the-powerful-chill-of-the-banerji-high-court-decision,12996>; see also Pender, “A Powerful Chill?”, *supra* note 12.

¹⁵ Australian Bill of Rights Bill 2019 (Cth).

¹⁶ Australian Bill of Rights Bill 2017 (Cth).

¹⁷ Australian Bill of Rights Bill 2001 (Cth).

[This Bill] is ... *intended to give effect to certain provisions* of the International Covenant on Civil and Political Rights,¹⁸ the International Covenant on Economic, Social and Cultural Rights,¹⁹ the Convention on the Rights of the Child²⁰ and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.²¹

The Bill adopts a cherry-picking approach for rights. The explanatory memorandum clarifies which rights it involves in stating:

The bill engages with articles 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23, 24, 25, 26 and 27 of the International Covenant on Civil and Political Rights [ICCPR], articles 1, 6, 7, 9, 11, 13, 15 of the International Covenant on Economic, Social and Cultural Rights [ICESCR], article 18 of the Convention of the Rights of the Child, and articles 3, 10, 11, 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.²²

This approach leaves out important rights, such as the Right to Equality Between Genders (Article 3 of the ICCPR, Article 2 of the ICESCR) and Freedom of Association (Article 22 of the ICCPR).²³ International instruments on the protection of First Nations, in particular the United Nations Declaration on the Rights of Indigenous Peoples,²⁴ are completely ignored.²⁵

¹⁸ G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

¹⁹ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

²⁰ G.A. Res. 44/25 Convention on the Rights of the Child, (Nov. 20, 1989).

²¹ See Explanatory Memorandum, Australian Bill of Rights Bill 2019 (Cth) 2 (emphasis added); G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Dec. 10, 1984).

²² Explanatory Memorandum, Australian Bill of Rights Bill 2019 (Cth) 6.

²³ G.A. Res. 2200 (XXI), *supra* note 18, at 3, 11–12; G.A. Res. 2200A (XXI), *supra* note 19, at 2.

²⁴ G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

²⁵ Explanatory Memorandum, Australian Bill of Rights Bill 2019 (Cth) 4 (instead of adopting international instruments on First Nations, the Bill “draws heavily on ... the rights articulated in the Australian Bill of Rights Bill 2001, such as the rights of indigenous peoples (article 10).”).

On March 24, 2020, the status of the Bill in the House of Representatives was updated as “not proceeding”.²⁶ An earlier version, the Australian Bill of Rights Bill 2017 was also removed on February 27, 2018.²⁷

Not surprisingly, when it comes to having an Australian Bill of Rights, there are still skeptics. The main argument against a Bill of Rights for Australia is that Parliament should be relied on to protect our human rights and not to pass laws that contravene these rights.²⁸ Related arguments suggest that a Bill of Rights would fetter the powers of Parliament to legislate as appropriate, give an undesirable amount of power to the courts, and clog the courts with claims.²⁹

However, in 2016, “the Chief Justice of New South Wales, found fifty-two laws in that state alone that impinge on the presumption of innocence.”³⁰ In December 2018, the Institute of Public Affairs identified 358 laws that infringe four rights: the presumption of innocence, natural justice, the right to silence and the privilege against self-incrimination.³¹ Another recent study found 350 current laws that infringe democratic rights, such as freedom of speech.³² In addition, Parliamentary processes, in regard to human rights, are said to be

²⁶ See Australian Bill of Rights Bill, *supra* note 5 (*The Bill was removed from the Notice Paper in accordance with the Commonwealth Parliament Standing Order (SO) 42 [Removal of business: The Clerk shall remove from the Notice Paper items of private Members’ business and orders of the day relating to committee and delegation reports which have not been called on for eight conservative sitting Mondays].*).

²⁷ Australian Bill of Rights Bill 2017, *supra* note 16.

²⁸ See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, Mar. 2, 1898, at 1761; Bernice Carrick, *Freedom on the Wallaby: A Comparison of Arguments in the Australian Bill of Rights Debate*, 1 W. AUSTRALIAN JURIST 68, 70-95 (2010); GEORGE WILLIAMS, LAW & BILLS DIGEST GROUP, THE FEDERAL PARLIAMENT AND THE PROTECTION OF HUMAN RIGHTS (Research Paper No. 20, May 1999) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20.

²⁹ See GEORGE WILLIAMS, THE CASE FOR AN AUSTRALIAN BILL OF RIGHTS: FREEDOM IN THE WAR ON TERROR (2004); George Williams, *Legislating for a Bill of Rights*, 25 ALT. L.J. 62, 62–64 (2000).

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 Aug. 2017, 8212 (Andrew Wilkie) (Austl.).

³¹ MORGAN BEGG & ANIS REZAE, INSTITUTE OF PUBLIC AFFAIRS, LEGAL RIGHTS AUDIT 2018, (Dec.), at 4, 7.

³² Commonwealth, *Parliamentary Debates*, House of Representatives, 14 Aug. 2017, 8212 (Andrew Wilkie) (Austl.); see GEORGE WILLIAMS & DANIEL REYNOLDS, A CHARTER OF RIGHTS FOR AUSTRALIA (4th ed. 2017); see also George Williams, *The Federal Parliament and the Protection of Human Rights* (L. & Bills Dig. Grp., Research Paper No. 20, 1999).

inefficient,³³ given that “[t]he committees of the House of Representatives are invariably beholden to the government”³⁴ and “Senate committees are normally ignored by the government, because they’re normally not controlled by the government.”³⁵

This Article contributes to this debate by investigating the necessity of an Australian Bill of Rights. While agreeing that there is a ‘national urgency,’³⁶ resolving the underlying issues should not be by introducing an Australian Bill of Rights as seen in the other two great Anglo-American Federations.³⁷ Instead, the debate should be framed in terms of a recognition of Australia’s obligations under Customary International Law (CIL). An efficient approach in which an evolving International Bill of Human Rights (IBHR) forms part of Australia’s domestic law is more in tune with human rights jurisprudence in the 21st century.

This Article proceeds as follows. Section II gives a historical note on prior Bills of Rights in Australia. Section III outlines the current framework for human rights protection, while section IV sketches an alternative to the proposed Bill of Rights, one based on incorporating CIL into Australia’s Common Law. The Article concludes with some suggested extensions of the proposal.

II. A BRIEF HISTORICAL NOTE

Bills of Rights have been proposed in the Commonwealth Parliament for more than sixty years. Attempts to introduce a Bill of Rights in 1944, 1973, 1982, 1984, 1985, 1988, 2000, 2001, 2005, 2008 and 2017 all failed to pass.³⁸

³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 Aug. 2017, 8212 (Andrew Wilkie) (Austl.).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Gillian Triggs, *Why an Australian Charter of Rights is a Matter of National Urgency*, CONVERSATION (Aug. 13, 2019, 12:12 AM) <http://theconversation.com/why-an-australian-charter-of-rights-is-a-matter-of-national-urgency-121411>.

³⁷ U.S CONST. amend. I—X; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

³⁸ The last failed attempt was the Australian Bill of Rights Bill 2019 (Cth). *See generally* Benedict Coyne, *The Time is Ripe for a Bill of Rights*, 128 PRECEDENT 8 (2015); Thomas Flanagan, *Insurance, Human Rights, and Equality Rights in Canada: When is Discrimination “Reasonable?”*, 18 CAN. J. OF POL. SCI. 715 (1985); George Williams, *The Federal Parliament and the Protection of Human Rights* (L. & Bills Dig. Grp., Research Paper No. 20, 1999); Brian Galligan, *Australia’s Rejection of a Bill of Rights*, 28 J. COMMONWEALTH & COMPAR. POL. 344 (1990); Maxwell Cohen & Anne F. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. BAR REV. 265 (1983).

How can this failure to introduce a bill of rights be explained? The analysis should begin at the drafting of the *Australian Constitution* and explore why, given the influence of the *American Constitution* on the *Australian Constitution*, it was decided not to include a Bill of Rights similar to the one adopted in the United States (U.S.) in 1791.

The lack of an Australian Bill of Rights reflects the views expressed by those who framed the Australian Constitution in the 1890s.³⁹ The question of rights protections was championed by Andrew Inglis Clark, the then Tasmanian Attorney-General, who did not propose a U.S.-style Bill of Rights but included several rights protections in the Draft Constitution.⁴⁰ Some delegates shared Clark's concerns as to the protection of rights.⁴¹ Most, however, believed that individual rights were adequately protected by the Common Law and the rule of law.⁴² The result was the establishment of a utilitarian constitutional system that secured the expression of the majority's will.⁴³ The Australian Constitution, which came into force on January 1, 1901,⁴⁴ contained only three provisions that related directly to human rights:⁴⁵ trial by jury for indictable offences (s 80),⁴⁶ freedom of religion (s 116)⁴⁷ and a limitation on discrimination based on state residence (s 117).⁴⁸

At the dawn of the 20th century, the prevailing view was that Australia did not need a bill of rights because basic freedoms were adequately protected

³⁹ Paul Kildea, *The Bill of Rights Debate in Australian Political Culture*, 9 AUSTL. J. HUM. RTS. 65 (2003); see also George Williams, *The Victorian Charter of Human Rights and Responsibilities: Origins and Scope*, 30 MELB. U. L. REV. 880, 883–5 (2006).

⁴⁰ John M. Williams, "With Eyes Open": Andrew Inglis Clark and our Republican Tradition, 23 FED. L. REV. 149, 165-73 (1995); John M. Williams, *Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment,"* 42 AUSTRALIAN J. POL. AND HIST. 10, (1996); Michael Kirby, *Reviving the Memory of Andrew Inglis Clark: An Unfinished Federal Project*, 34 U. TASMANIA L. REV. 92, 96 (2015).

⁴¹ Victoria, *Constitutional Convention Debates*, Australasian Federal Convention, 8 Feb. 1898, 682 (Richard O'Connor) (Austl.).

⁴² See, e.g., Victoria, *Constitutional Convention Debates*, Australasian Federal Convention, 2 Mar. 1898, 1761 (Hackett Trenwith) (Austl.).

⁴³ Robert French, *Protecting Human Rights Without a Bill of Rights*, 43 J. MARSHALL L. REV. 769, 771-72 (2010).

⁴⁴ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12, § 9.

⁴⁵ See Rosalind Dixon, *An Australian (Partial) Bill of Rights*, 14 INT'L J. CONST. L. 80 (2016) (argues that the Australian Constitution contains an extremely narrow bill of rights).

⁴⁶ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12, § 80.

⁴⁷ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12, § 116.

⁴⁸ *Australian Constitution* s 117.

by the common law and the good sense of elected representatives, who were constrained by the doctrine of responsible government.⁴⁹ In contrast, two decades into the 21st century, a Bill of Rights is viewed as necessary to enhance Australian democracy by expressing the core rights of the Australian people, such as the right to freedom of expression.⁵⁰ The merit of this argument is reflected in the relatively recent enactment of a Bill of Rights by nations that had previously relied on the common law tradition, such as New Zealand and the United Kingdom.⁵¹ In fact, one of the main arguments for an Australian Bill of Rights is a comparative one, especially with the other two great Anglo-American federations.⁵² If the United States and Canadian constitutions, which were the most influential on the design of the Australian Constitution, have Bills of Rights, then Australia should have one too. To understand why this reasoning is flawed, we need to understand the idiosyncratic histories of the United States and the Canadian Bills of Rights.

The composition of the United States Congress is similar to that of the Australian Parliament, at least in terms of state representation,⁵³ and yet the American people thought that a Bill of Rights would be required. In Australia, even with the benefit of knowing about the United States Bill of Rights, most of our founding fathers did not observe a similar need.⁵⁴ This was due to the context of the United States Bill of Rights, which was preceded by the War of Independence (1775–1783).⁵⁵ While the 1787 U.S. Draft Constitution did not include a bill of individual rights,⁵⁶ the absence of a Bill of Rights resulted in

⁴⁹ See ROBERT MENZIES, *CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH*, 49–55 (1967). See also Brian Galligan, *Parliamentary Responsible Government and the Protection of Rights*, in *PAPERS ON PARLIAMENT* NO. 18 (1992).

⁵⁰ See, e.g., Ugur Nedim & Sonia Hickey, *COVID-19 Highlights the Need for an Australian Bill of Rights*, SYDNEY CRIMINAL LAWYERS (Apr. 13, 2020), <https://www.sydneycriminallawyers.com.au/blog/covid-19-highlights-the-need-for-an-australian-bill-of-rights/>.

⁵¹ Williams, *supra* note 3.

⁵² See *id.* for a summary of other arguments.

⁵³ Compare Barbara Sinclair, *Coequal Partner: The U.S. Senate*, in *SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD* 32 (Samuel C. Patterson & Anthony Mughan eds., 1999), and U.S. CONST. art. I, with John Uhr, *Generating Divided Government: The Australian Senate*, in *SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD* 93 (Samuel C. Patterson & Anthony Mughan eds., 1999), and *Australian Constitution* s 7–8, and *Representation Act 1983* (Cth) s 3. See generally Daniel Wirls & Stephen Wirls, *THE INVENTION OF THE UNITED STATES SENATE*, 86, 104 (2004) (noting equal representation of the States in the Senate).

⁵⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 Mar. 1898, 1761 (William Trenwith).

⁵⁵ See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995).

⁵⁶ U.S. CONST. art. I–VII.

delays to the Constitution's ratification by the states.⁵⁷ The American people insisted on a set of fundamental rights, such as the freedom of speech, to prevent the possibility of an authoritarian central government reminiscent of the English monarchy.⁵⁸ Notwithstanding the popular sentiment backing the U.S. Bill of Rights and the vivid memories of the War of Independence, the Bill established "principles that guaranteed the most fundamental rights" only in "very general terms."⁵⁹ Only after *Marbury v. Madison*, did the Supreme Court confirm its power to nullify acts of Congress that violated the Constitution, which became the key protection of rights in the United States today.⁶⁰

Similarly, a Canadian version of a Bill of Rights was introduced almost 200 years after the American one. The Canadian context for introducing the Charter began in 1867, when federation helped diffuse the tensions between English-speaking Ontario and French-speaking Quebec.⁶¹ Similar to the situation observed in the United States, Canada's original Constitution, the British North America Act 1867 (Imp), did not have a Bill of Rights.⁶² It was not until 1980, that the Canadian Government set up a special all-party committee to hear what people had to say about a suggested human rights charter that would apply to federal and provincial law alike.⁶³ Today, the Canadian Charter of Rights and Freedoms (*La Charte Canadienne des Droits*

⁵⁷ See generally THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES (Patrick T. Conley & John P. Kaminski eds., 1992).

⁵⁸ For a detailed history of the American Bill of Rights, see THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan ed., 2d ed. 2015); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS (expanded ed., 1992); RICH SMITH, THE BILL OF RIGHTS: DEFINING OUR FREEDOMS (John Hamilton ed., 2008).

⁵⁹ *The Bill of Rights: A Brief History*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Oct. 19, 2020).

⁶⁰ *Marbury v. Madison*, 5 U.S. 137 (1803); see generally, Edward S. Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 MICH. L. REV. 616 (1906); Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12(7) MICH. L. REV. 538 (1914); Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. OF POL. SCI. 285 (1994).

⁶¹ David Cameron, *Quebec and the Canadian Federation*, in CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY 59 (Herman Bakvis & Grace Skogstad eds., 4th ed. 2020).

⁶² British North America Act 1867, 30 & 31 Vict. c. 3 (U.K.); JOSEPH E. MAGNET, *Canadian Charter of Rights and Freedoms*, in CONSTITUTIONAL LAW OF CANADA VOLUME 2, 1–8 (8th ed. 2001).

⁶³ Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1981, S. & HC, Issue No. 57.

et Libertés) forms the first part of the Constitution Act 1982 (U.K.).⁶⁴ The Charter guarantees certain political rights to Canadian citizens and civil rights protections for everyone in Canada from the policies and actions of all areas and levels of the government. However, some of these rights are subject to a notwithstanding clause.⁶⁵ The clause authorized governments to temporarily override the rights and freedoms (listed in Sections 2 and 7–15) for up to five years, subject to renewal. This clause persuaded the provinces to agree to changes to the Canadian Constitution. The plan provided provinces with a means to temporarily avoid some parts of the Charter. The federal government has not invoked the clause, but it has been invoked at the province and territory levels.⁶⁶ The equality rights section of the Charter was delayed until April 17, 1985.⁶⁷ This gave governments time to update laws to meet equality requirements.⁶⁸

International law documents,⁶⁹ such as the 1948 United Nations Universal Declaration of Human Rights (UDHR), had a significant influence on the Charter.⁷⁰ Other international influences included the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁷¹ and the 1966 International Covenant on Civil and Political Rights (ICCPR).⁷²

⁶⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁶⁵ *Id.* at § 33.

⁶⁶ CANADIAN PARLIAMENTARY INFO. & RSCH. SERV., LIBR. OF PARLIAMENT, PUB. NO. BP-194-E, *THE NOTWITHSTANDING CLAUSE OF THE CHARTER* (David Johansen & Philip Rosen eds., 2008); *see also* Adam Dodek, *The Canadian Override: Constitutional Model or Bête Noire of Constitutional Politics?*, 49(1) *ISR. L. REV.* 45, 45–65 (2016); Lorraine E. Weinrib, *The Canadian Charter's Override Clause: Lessons for Israel*, 49(1) *ISR. L. REV.* 67, 67–102 (2016); Peter H. Russell, *Standing Up for Notwithstanding*, 29(2) *ALTA. L. REV.* 293, 293–309 (1991).

⁶⁷ IAN GREENE, *THE CHARTER OF RIGHTS AND FREEDOMS: 30+ YEARS OF DECISIONS THAT SHAPE CANADIAN LIFE* 51 (2014).

⁶⁸ *See id.*; *see generally* CHRISTOPHER MACLENNAN, *TOWARD THE CHARTER: CANADIANS AND THE DEMAND FOR A NATIONAL BILL OF RIGHTS 1929–1960* (2003).

⁶⁹ *See* Maxwell Cohen & Anne F. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61(1) *CAN. BAR REV.* 265 (1983); Gerard V. La Forest, *The Canadian Charter of Rights and Freedoms: An Overview*, 61(1) *CAN. BAR REV.* 19 (1983).

⁷⁰ G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

⁷² G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

In summary, influences like the War of Independence in the United States and the language divide in Canada render an analogy with the proposed Bill of Rights in Australia tenuous.⁷³

III. THE STATUS QUO

The current approach to protection of human rights in Australia is through legislation, which is usually used when there is no written constitution, such as in the United Kingdom.⁷⁴ This approach can be observed in Australia at the federal and state level. At the federal level, there are only five relevant Acts: the Racial Discrimination Act 1975 (Cth);⁷⁵ the Sex Discrimination Act 1984 (Cth);⁷⁶ Human Rights Commission Act 1986 (Cth),⁷⁷ which is about regulating the commission; the Disability Discrimination Act 1992 (Cth);⁷⁸ and the Age Discrimination Act 2004 (Cth).⁷⁹ Therefore, the only legislation in place is that related to age, disability, race or sex.⁸⁰ More recently, the Australian Attorney-General, Christian Porter, began consultations on the new religious discrimination Bill, which introduces provisions to protect people of faith from ‘unfair’ treatment.⁸¹

⁷³ However, there are important similarities between the constitutional instruments of the United States, Canada, and Australia. See Benjamin F. Gussen, *Reflections on La Fata Morgana: Watsonian “Prestige” and Bagehotian “Efficiency,”* 12 J. COMP. L. 80, 91–99 (2017); see also Benjamin F. Gussen, *A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples*, 40 MELB. UNIV. L. REV. 867 (2017); Benjamin F. Gussen, *On the Problem of Scale: Hayek, Kohr, Jacobs and the Reinvention of the Political State*, 24 CONST. POL. ECON. 19 (2013).

⁷⁴ See Human Rights Act 1998, c. 42, §§ 1, 19 (UK).

⁷⁵ *Racial Discrimination Act 1975* (Cth) (Austl.).

⁷⁶ *Sex Discrimination Act 1984* (Cth) (Austl.).

⁷⁷ *Australian Human Rights Commission Act 1986* (Cth) s 46C(4) (Austl.) (the Commissioner “must, as appropriate, have regard to: (a) the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, [and] the International Covenant on Economic, Social and Cultural Rights . . .”).

⁷⁸ *Disability Discrimination Act 1992* (Cth) (Austl.).

⁷⁹ *Age Discrimination Act 2004* (Cth) (Austl.).

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 Aug. 2017, 8211-12 (Andrew Wilkie) (Austl.).

⁸¹ Exposure Draft, Religious Discrimination Bill 2019 (Cth.), House of Representatives, 29 Aug. 2019 (Christian Porter, Attorney-General); see also Mark Fowler, *Religious Bill in the Hands of the Faithful*, WEEKEND AUSTRALIAN (Aug. 31, 2019), <https://www.theaustralian.com.au/inquirer/religious-bill-in-the-hands-of-the-faithful/news-story/660b04f338fb0b633a50db606b044d66>.

At the state level, incorporation is found in three ordinary human rights Acts, in the Australian Capital Territory (ACT), Victoria, and Queensland. All three Acts exhibit convergence on international human rights, albeit only selectively.⁸² These Acts provide weak protections, in that they envisage only a declaration of incompatibility that a statutory provision cannot be interpreted in a way compatible with human rights.⁸³ The Acts allow for scrutiny of new legislation,⁸⁴ although Parliament has the power to override.⁸⁵ The three Acts, however, prohibit public authorities from acting inconsistently with protected rights.⁸⁶

In summary, Australia exhibits a preference to weak instruments that can only provide non-binding guidance of the compatibility of domestic law with international human rights. Moreover, these instruments do not entrench any protections of human rights. The instruments are modelled after international human rights, while allowing the federal and state governments to cherry-pick which rights to protect.

IV. THE PROPOSAL: CUSTOMARY INTERNATIONAL LAW (CIL) AS A CORNERSTONE FOR PROTECTIONS

The proposal is for a Bill that performs three functions: consolidation, incorporation and adaptation. The proposed Bill consolidates all human rights instruments at the federal level. It incorporates CIL human rights into domestic law directly, preventing the cherry-picking approach seen in other designs. Arguably, most importantly, the Bill allows for an adaptation of rights so incorporated by abstaining from any enumeration of said rights.⁸⁷ Essentially, the proposed instrument signals to the HCA its ability to develop Australian Common Law in accordance with CIL, and other sources of international law.

⁸² *Human Rights Act 2004* (ACT) sch 1 (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 2 (Austl.); *Human Rights Act 2019* (Qld) pt 2 (Austl.).

⁸³ *Human Rights Act 2004* (ACT) s 32 (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 33 (Austl.); *Human Rights Act 2019* (Qld) s 53 (Austl.).

⁸⁴ *Human Rights Act 2004* (ACT) ss 37-39 (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 28-30 (Austl.); *Human Rights Act 2019* (Qld) ss 38-42 (Austl.).

⁸⁵ *Human Rights Act 2004* (ACT) ss 40-40D (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31 (Austl.); *Human Rights Act 2019* (Qld) ss 43-47 (Austl.).

⁸⁶ *Human Rights Act 2004* (ACT) s 40B (Austl.); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38-39 (Austl.); *Human Rights Act 2019* (Qld) ss 58-60 (Austl.).

⁸⁷ See Benjamin Gussen, *On the Hardingian Renovation of Legal Transplants*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 84-108 (Vito Breda ed., 2019); Benjamin Franklen Gussen, *Reflections on La Fata Morgana: Watsonian "prestige" and Bagehotian "efficiency,"* 12(1) J. COMPAR. L. 80, 86-94 (2017).

The key argument is that irrespective of Parliament's ability to secure human rights, the strongest guarantees for human rights come from international law. Several scholars argue that a kind of 'world constitution' has been evolving, by which they mean a set of constraints on national governments that are embodied in human rights treaties, the United Nations (UN) Charter and other international legal materials.⁸⁸ The development of global or transnational constitutionalism has created a significant convergence of domestic constitutions and international human rights laws.⁸⁹ This trend is often characterized by the internationalization of constitutional laws and the constitutionalisation of international laws. Although these phrases were only introduced at the beginning of the 21st century, today they are a staple of comparative constitutional law.⁹⁰ The 'constitutionalisation' of international law, whereby international laws enjoy direct effect upon domestic law, including constitutions, is realized through three distinct operations: incorporation through constitutionalisation, legislation and judicial interpretation. The proposal expounded in this Article focuses on the last two operations, legislation and judicial interpretation, but more specifically, on HCA use of CIL, in particular the IBHR, to develop Australian common law. Courts may reference international human rights and decisions by international courts regarding these rights "without any clear constitutional or legislative mandate."⁹¹ These rights do not have to be contained "in treaties

⁸⁸ See generally Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1627 (2010). See, e.g., Anne Peters & Klaus Armingeon, *Introduction—Global Constitutionalism from an Interdisciplinary Perspective*, 16(2) IND. J. OF GLOB. LEGAL STUD. 385 (2009) (arguing human rights have a constitutional status in international law); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3(1) J. INT'L ECON. L. 19 (2000) (arguing human rights have constitutional status in international trade law). But see JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005) (arguing against international governance because it threatens American constitutional values).

⁸⁹ Herman Schwartz, *The Internationalization of Constitutional Law*, 10(2) HUM. RTS. BRIEF, 10 (2003); Albert H.Y. Chen, *International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong*, 4 NAT'L TAIWAN U. L. REV. 237 (2009); Francois Venter, *Globalization of Constitutional Law through comparative Constitution-making*, 41(1) VERFASSUNG UND RECHT IN ÜBERSEE/L. & POL. AFR., ASIA & LAT. AM. 16 (2008).

⁹⁰ Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1168 (Michel Rosenfeld & Andras Sajo eds., 2012).

⁹¹ *Id.*; see, e.g., *State v. Makwanyane* 1995 CCT 3/94 (S. Afr.); *United States v. Burns* [2001] 1 S.C.R. 283 (Can.); *Roper v. Simons*, 543 U.S. 551 (2005); see also *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Roper*, 543 U.S. at 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing international human rights treaties; see Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN STATE INT'L L. REV. 89, 114 n.103 (2008).

to which the state has acceded.”⁹² Moreover, judges “may ground their incorporation of these rights on legal concepts such as the law of nations, generally accepted norms, or principles recognized by civilized nations.”⁹³ For present purposes, the important mechanism is that “[j]udicial incorporation becomes particularly justifiable if those international human rights have [developed] the status of ... customary international law.”⁹⁴ This is the starting point for delineating the proposal in the next section.

The rest of this section illustrates the proposed Australian Bill of Rights, the status of the IBHR as CIL, and the decisive role of the HCA in developing Australia’s common law in parallel with CIL.⁹⁵

A. *The Proposed Bill of Rights*

This subsection sketches the provisions of the proposed Bill. A complete drafting is outside the remit of this article. The purpose here is to explain the general functions of consolidation, incorporation and adaptation. One efficient design approach is to base the backbone for the proposed Bill on the Australian Human Rights Commission Act 1986 (Cth). The Act itself would be repealed, together with all other federal instruments expounding human rights, such as Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), Racial Discrimination Act 1975 (Cth), and Sex Discrimination Act 1984 (Cth).

⁹² Chang & Yeh, *supra* note 90, at 1168.

⁹³ *Id.* (citing the *Paquete Habana*; *The Lola*, 175 U.S. 677 (1900)); *see generally* Knight v. Florida, 528 U.S. 990 (1999) (in analyzing the constitutionality of delays in carrying a prisoner’s execution, the court consulted inter alia the European Court of Human Rights and the Privy Council for the proposition that “[a] growing number of courts outside the United States—courts that accept or assume the lawfulness of the death penalty—have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel” at 462 of 120 S. Ct. 459 (1999)); *see* the Eighth Amendment; *Atkins v. Virginia* 536 U.S. 304 (2002) (the court had to deal with the question of executing mentally retarded offenders. In their dissentient opinion, Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas joined, acknowledges the court’s reference to “the climate of international opinions” to “reinforce a conclusion regarding evolving standards of decency” at 325).

⁹⁴ *See* Chang & Yeh, *supra* note 90, at 1168 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 564 (2006)).

⁹⁵ *See, e.g., Dietrich v. The Queen* (1992) 177 CLR 292, 306 (Mason CJ, and McHugh J), 321 (Brennan J) and 360 (Toohey J) (arguing the relevance of art. 14(3)(d) of the ICCPR in determining whether the accused has a right to counsel at the expense of the Australian taxpayer). However, there is a continuing debate as to whether international law applies within Australia. *See* Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423 (2003). Nevertheless, there remains “reluctance on the part of the judiciary to rely fully on international law, and in particular the decisions of international tribunals, as a source of law.” *See* Christopher Ward, *International Dispute Resolution: The Influence of International Jurisprudence of Domestic Law*, 420–21 (January 2002) (unpublished Ph.D. dissertation, Australian National University) (on file with the Chifley Library, Australian National University).

The proposed Bill is inspired by the Bosnia and Herzegovina Constitution of 1995.⁹⁶ It has the following provisions:

Part I – Preliminary Section 1A: Purpose. The purpose of this Act is to consolidate federal legislation protecting human rights.

Section 1B: Application

The Act applies to all jurisdictions in Australia.

Part IA – Human Rights and Fundamental Freedoms

Section 6B: Human Rights

Australia shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Australia as detailed in Part II, an Aboriginal and Torres Strait Island Social Justice Commissioner as detailed in Part IIA, and a National Children Commissioner as detailed in Part IIAA.

Section 6C: International Standards

The rights and freedoms forming part of customary international law shall apply directly in Australia. These shall have priority over all other law, except as stated in Section 6D.

The rights and freedoms in subsection (1) include the International Bill of Human Rights (IBHR), which consists of three instruments:

the Universal Declaration of Human Rights (UDHR),

the International Covenant on Civil and Political Rights (ICCPR) (and its two optional protocols), and

the International Covenant on Economic, Social and Cultural Rights (ICESCR) (and its optional protocol).

Section 6D: Override Clause

The Commonwealth Parliament may expressly declare in an Act of Parliament that the Act or a provision thereof shall

⁹⁶ See CONSTITUTION OF BOSNIA HERZEGOVINA 1995, Annex 4 of The General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement), signed 14 Dec. 1995.

operate notwithstanding the international standards in Section 6C.

Provisions declared under subsection (1) must be listed in Schedule 1 for the duration of the override.

Section 6E: Jurisdiction of the High Court

The High Court will have jurisdiction to develop the common law in Australia to give effect to the international standards in section 6C.

Section 6F: Non-Discrimination

The enjoyment of the rights and freedoms provided for in this Part shall be secured to all persons in Australia without discrimination on any ground.

Sections 1A and 1B consolidate all human rights law in Australia, to ensure a uniform approach (vertically and horizontally) to rights protection across all jurisdictions, and in unison with international and transnational jurisprudence on international human rights. Section 1B is intended to cover the field of human rights protections in Australia, putting the same outside the legislative powers of State parliaments. Sections 6A and 6B ensure the second function, i.e. the direct incorporation of CIL into Australian common law. The need for direct incorporation is to allow for evolution of these protections in parallel with CIL. Section 6E on HCA jurisdiction (see below) can hence build on existing CIL jurisprudence in transnational and international courts.

Section 6C is critical to the design. The proposed Bill does not cover all international human rights, but only those that have attained the status of CIL. This is critical to ensure Australia can benefit from the application of such rights by international and transnational courts. This point is discussed in more detail in the next subsection. Suffice it to say, at this point, the Act is intended to confirm the HCA's jurisdiction in developing Australia's common law in parallel with CIL. Subsection 6C(2) gives guidance as to the core rights and freedoms of CIL. As explained by the HCA, "Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980. The ICCPR entered into force for Australia pursuant to Art 49(2) on 13 November 1980. The text of the ICCPR appears in Sched 2 to the Australian Human Rights Commission Act [AHRC Act] 1986 (formerly known as the Human Rights and Equal Opportunity Commission Act 1986)."⁹⁷ Australia agreed to be bound by the

⁹⁷ *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1, 209–10 (Austl.); *Australian Human Rights Commission Act 1986* (Cth) (Austl.).

Optional Protocol to the ICCPR on September 25, 1991, and to be bound by the Second Optional Protocol on October 2, 1990.⁹⁸ Similarly, Australia agreed to be bound by the ICESCR on December 10, 1975, although “[t]he ICESCR does not . . . form part of Australia’s domestic law and is not scheduled to, or declared under, the AHRC Act.”⁹⁹ As of January 2020, Australia has not ratified the Optional Protocol to the ICESCR.¹⁰⁰ Notwithstanding, the proposed Section 6C(2) allows for incorporating the ICESCR as part of Australia’s common law by acknowledging its CIL status (see 4.2 below).

Section 6D complements Section 6C by providing an overriding clause, similar to that in Section 33 of the Canadian Charter of Rights and Freedoms.¹⁰¹ In addition to the custom limitation on protections, the overriding clause accommodates any *sui generis* difficulties in the Australian context.¹⁰² Subsection 6D(2) ensures accounting for all exclusions under Schedule 1 of the proposed Bill.

Section 6E makes explicit HCA jurisdiction over developing the common law to protect CIL. The section ensures parliamentary sovereignty objections do not arise, which is reasonable given the customary and the international character of protected rights. For example, Edelman J’s statement in *Banerji*:

In the United States, where “citizens do not surrender their First Amendment rights by accepting public employment”, legislative restrictions of the nature adopted historically in Australia would be struck down as unconstitutional in a heartbeat. But, unlike the United States, *in Australia the boundaries of freedom of speech are generally the province of parliament*; the judiciary can constrain the choices of a parliament only at the outer margins for reasons of systemic protection. The freedom of political communication that is

⁹⁸ AUSTL. HUM. RTS. COMM’N, HUMAN RIGHTS EXPLAINED: FACT SHEET 5: THE INTERNATIONAL BILL OF RIGHTS (2009), https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS5

_International.pdf.

⁹⁹ *Id.*

¹⁰⁰ See *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://indicators.ohchr.org> (last visited Sept. 10, 2020).

¹⁰¹ Canadian Charter of Rights and Freedoms, § 33, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

¹⁰² In essence, the proposed overriding clause functions similar to reservations to treaties. For example, Australia’s reservation to the convention on the rights of the child. See William A. Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUM. RTS. Q. 472, 480, 487 (1996).

implied in the Commonwealth *Constitution* is highly constrained. It is not an individual freedom. It is an implied constraint that operates directly upon legislative power.¹⁰³

The democratic mandate does not influence the proposed HCA jurisdiction; it would, had the protected rights been autochthonous.

Section 6F ensures that the envisaged international human rights protections cover all persons in Australia, even if they were not citizens or even illegally within the country.

The next section fleshes out the envisaged HCA role under Section 6E in developing the common law.

B. HCA development of Australia's common law

There is an inherent difficulty in analyzing the relationship between CIL and common law in Australia, partly because “there have been relatively few cases on this issue, the issue has never been raised directly before the High Court, and it is difficult to draw a clear, consistent position out of the existing cases.”¹⁰⁴ Notwithstanding that difficulty, the accepted view seems to be compatible with the approach in England, where CIL is said to be “a source of English law that the courts may draw upon as required.”¹⁰⁵ For example, in *Dietrich v. R*,¹⁰⁶ counsel for the applicant argued, inter alia, that the ICCPR should be used to develop the common law, in particular the right for legal aid in a serious criminal trial.¹⁰⁷ Mason CJ and McHugh J assumed “without deciding, that Australian courts should adopt” an approach similar to that in England, a “common sense approach.”¹⁰⁸ CIL, therefore, “may have a significant influence, particularly in relation to the development of Australian

¹⁰³ *Comcare v Banerji* [2019] HCA 23, ¶ 164 (Austl.) (quoting *Lane v. Franks*, 573 U.S. 228, 231 (2014)) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)) (first emphasis added).

¹⁰⁴ Annemarie Devereux & Sarah McCosker, *International Law and Australian Law*, in INTERNATIONAL LAW IN AUSTRALIA 23, 33 (Donald R. Rothwell & Emily Crawford eds., 3rd ed., 2016).

¹⁰⁵ Devereux & McCosker, *supra*, note 105; see J. L. Brierly, *International Law in England*, 51 L.Q. REV. 24, 31; *R v. Jones* [2006] UKHL 16, [2007] 1 AC (HL) 136, 155 (U.K.); see also JAMES R. CRAWFORD, BROWNIE'S PRINCIPLES OF INTERNATIONAL LAW 68 (8th ed. 2012).

¹⁰⁶ *Dietrich v R* (1992) 177 CLR 292. (Austl.).

¹⁰⁷ *Id.* at 294 (citing *Jago v District Court New South Wales* [1988] 12 NSWLR 558, at 569); see also *Reg. v. Secretary of State for Home Affairs, Ex parte Phansopkar* [1976] QB 606 (AC) (U.K.); *Attorney-General v. British Broadcasting Corporation* [1981] EWCA (Civ) 303 (U.K.); *Derbyshire County Council v. Times Newspapers Ltd and Others* [1992] 1 QB 770; *Re Jane* (1989) 94 FLR 1, 16–17.

¹⁰⁸ *Dietrich*, (1992) 177 CLR at 306.

common law.”¹⁰⁹ Hence, while the HCA does not accept that CIL can be automatically incorporated into Australian common law,¹¹⁰ it is open to the view CIL forms one of the sources of common law in Australia.¹¹¹ The ‘source’ view was adopted by the Justice Merkel in his dissenting judgment in *Nulyarimma v Thompson*,¹¹² where he proposed six steps that the HCA should consider to determine whether a customary rule should be adopted as part of the common law in Australia.¹¹³ These six steps can be summarized as follows: (1) The CIL rule has to be accepted as a rule of international conduct.¹¹⁴ (2) Where the rule has been “received into, and so becomes a source of English

¹⁰⁹ Annemarie Devereux & Sarah McCosker, *International Law and Australian Law*, in INTERNATIONAL LAW IN AUSTRALIA 23, 32 (Thomson Reuters, 4th ed. 2017); see also GILLIAN D. TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES (LexisNexis Butterworths, 2nd ed. 2011); Hilary Charlesworth et al., Deep Anxieties: Australia and the International Legal Order 25 SYDNEY L. REV. 423, 446 (2003).

¹¹⁰ *Chow Hung Ching v The King* (1948) 77 CLR 449, 477. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (stating that international law provides “an important influence on the development of Australian common law, particularly in relation to human rights.”); *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (warning that “[j]udicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law ... 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 [Australian] domestic law.”); *Western Australia v Commonwealth* (1995) 183 CLR 373, 486 (following the same cautionary approach in *Teoh*, when they stated that “[t]he common law may, it is true, find in international law concepts or values which may advantageously be used in the development of the common law, but the common law of native title is not developed in order to satisfy the obligations of a treaty. . .”).

¹¹¹ *Chow Hung Ching v The King* (1948) 77 CLR 449, 478 (citing J. L. Brierly, *International Law in England*, 51 L.Q. REV. 24 (1935) and SIR WILLIAM S. HOLDSWORTH, *ESSAYS IN LAW AND HISTORY* 267 (A.L. Goodhart & H.G. Hanbury eds., 1946)); see Annemarie Devereux & Sarah McCosker, *International Law and Australian Law*, in INTERNATIONAL LAW IN AUSTRALIA 23, 23-34 (Donald R. Rothwell & Emily Crawford eds., 2017) (noting in *Chow Hung Ching*, Latham CJ and Starke J appeared to hold that CIL could be incorporated automatically into Australian common law).

¹¹² *Nulyarimma v Thompson* [1999] FCA 1192 (1 Sept. 1999) 189; see Andrew D. Mitchell, *Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v Thompson*, 24 MELB. U. L. REV. 15 (2000) (suggesting that the six-step approach is part of the incorporation approach given the HCA does not have discretion where these criteria are met).

¹¹³ *Nulyarimma v Thompson* [1999] FCA 1192 (1 September 1999) 190–91.

¹¹⁴ Justice Merkel explains the first step prerequisite:

“[A]s a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions.”: see *Compania Naviera Vascongado v. SS Cristina* [1938] AC 485 at 497 per Lord Macmillan. Once a rule has been established as having the general acceptance of nation States in the manner stated by Lord Macmillan it will have satisfied the “assent” or “acceptance” of nations criteria of Cockburn CJ in *Keyn* and Lord Atkin in *Chung Chi Cheung* and will be given ‘the force of law within the realm’: see Lord Macmillan at 497.

Nulyarimma, FCA 1192 at 190.

law,”¹¹⁵ this carries further weight for incorporation. (3) The rule is not inconsistent with domestic law.¹¹⁶ (4) If there is inconsistency in step (3), “no effect can be given to it without legislation to change the law by the enactment of the rule of customary international law as law.”¹¹⁷ (5) Once received into domestic law, the customary common law rule has the force of law. A law so received, “once so declared, is applicable to both civil and criminal proceedings in a domestic court.”¹¹⁸ (6) Given the evolutionary nature of CIL, the adoption of the rule “will only be as from the date the particular rule of customary law has been established.”¹¹⁹ Therefore, “once a common law court ‘acknowledges the existence’ of a rule of customary international law, it will be incorporated (or adopted) as a common law rule subject to inconsistent legislation and binding judicial precedent.”¹²⁰ The threshold question, therefore, is has the rule been accepted as a rule of international conduct? Further analysis is to ensure coherence with existing domestic law.

An example of clearing this threshold can be found in *Mabo (No. 2)*, where Justice Brennan, as he then was, looks to the ICCPR in overturning the doctrine of *terra nullius*:

The opening up of 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. 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

¹¹⁵ See William Holdsworth, *Relation of English Law to International Law*, in *ESSAYS IN LAW AND HISTORY* 268 (A.L. Goodhart & H.G. Hanbury eds., 1946); *Chow Hung Ching*, 77 CLR at 477.

¹¹⁶ The rule will be adopted or received into, and so become a source of domestic law, if it is “not inconsistent with rules enacted by statutes or finally declared by [the courts]”. *Nulyarimma*, FCA 1192 at 190 (citing *Chung Chi Cheung v The King* [1939] 26 AC 160 [168] (Atkin J) (appeal taken from H.K.) (UK)). However, according to Justice McHugh, “a strict test of inconsistency could not have been intended. I would accept Sawyer’s observation that inconsistency with the common law (that is, the rules declared by the courts) means ‘inconsistency with the general policies of our law, or lack of logical congruence with its principles’” *Nulyarimma*, FCA 1192 at 190. See G. Sawyer, *Australian Constitutional Law in Relation to International Relations and International Law*, in *INTERNATIONAL LAW IN AUSTRALIA* 50 (Daniel P. O’Connell & J. Varsanyi eds., 1965); Anthony Mason, *International Law as a Source of Domestic Law*, in *INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM* 210, 215 (Brian R. Opeskin & Donald R. Rothwell eds., 1997).

¹¹⁷ *Nulyarimma*, FCA 1192 at 190, (citing *Keyn* at 202–203 and Holdsworth at 270–271).

¹¹⁸ *Id.* at 191.

¹¹⁹ *Id.* (McHugh J, citing *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529).

¹²⁰ STEPHEN HALL, *PRINCIPLES OF INTERNATIONAL LAW* 163 (6th ed. 2019).

when international law declares the existence of universal human rights.¹²¹

In summary, based on existing authority, the better view is that Australia takes a monist approach to CIL,¹²² especially where the rule is a well-established international legal rule¹²³ that declares universal human rights.¹²⁴ Notwithstanding, the proposed Section 6E makes HCA jurisdiction explicit to address Parliamentary sovereignty concerns.¹²⁵

C. *The IBHR as CIL*

This subsection proceeds by explaining the customary nature of the three core instruments, namely, the UDHR, the ICCPR and the ICESCR. First, the CIL nature of the UDHR is examined, then the nature of the two treaties (ICCPR and ICESCR) is explained by reference to that of the UDHR.

Article 38 of the International Court of Justice (ICJ) Statute explains that CIL has two distinct elements: (1) general practice (*usus*), and (2) practice permitted as a matter of legal right or obligation (*opinio juris sive necessitates* or *opinio juris et necessitates*).¹²⁶ The same elements can be found in the United Nations International Law Commission's Draft Conclusions on Identification of Customary International Law (DCICIL).¹²⁷

The United States Supreme Court's (SCOTUS) guidance on the definition of CIL, and hence on the question whether the IBHR is part of CIL, is helpful.

¹²¹ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 42 (Austl.); see also *Dugan v Mirror Newspapers Ltd.* (1978) 142 CLR 583, 606–08 (Murphy J., dissenting) (drawing on the ICCPR to answer the question whether the common law affords a prisoner sentenced to death an action in civil wrong) (Austl.); see also *McInnis v R* (1979) 143 CLR 575, 588–89 (Murphy J., dissenting) (drawing on the ICCPR to answer the question whether a person charged with serious criminal offences had the right to legal assistance at his trial) (Austl.).

¹²² See Hilary Charlesworth, *International Law and Australian Law in the 21st Century*, 6 NEWCASTLE L. REV. 1, 5 (2002) (under the monist approach, consistent with natural law theory, national and international law are part of one legal system. Under this approach, there is a process of automatic incorporation in which international law becomes automatically part of the national law, to the extent that the former does not conflict with national legislation or with settled common law rules.).

¹²³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 559.

¹²⁴ See *Mabo* 175 CLR at 41–2.

¹²⁵ See *supra* Part IV.A; see *Comcare v Banerji* [2019] HCA 23.

¹²⁶ Statute of the International Court of Justice, 1945, 59 Stat. 1055, 1060, T.S. No. 993 art. 38(1).

¹²⁷ Int'l Law Comm'n, Rep. on the Work of the Seventieth Session, ¶ 65, U.N. Doc. A/73/10 (2018) (where the status is determined through ascertaining "whether there is a general practice that is accepted as law (*opinio juris*)").

The general definition is that CIL is law “established by the general consent of mankind,”¹²⁸ and “founded on the common consent as well as the common sense of the world.”¹²⁹ This suggests that the objective (behavioral) element of the definition, i.e., *usus*, requires identifying not only how widespread the practice is, but also “the degree and intensity of general acceptance.”¹³⁰ Moreover, general practice:

[R]ests not merely upon the practice of States as such but ultimately upon the practice of all participants in the international legal process. Thus, a particular nation-state might disagree whether a particular norm is customary and might even violate such a norm, but it would still be bound if the norm is supported by patterns of generally shared legal expectation and conforming behavior extant in the community.¹³¹

As to the subjective (attitudinal) element of the definition, i.e., *opinio juris*, it “is to be gathered from patterns of generally shared legal expectation among humankind, not merely among [States].”¹³² There is no requirement that these expectations be universal.¹³³

Note also that there is a tradeoff between the behavioral and attitudinal dimensions of the CIL definition. Where the former evinces a highly consistent State practice, that “should suffice to establish the existence of *opinio juris*,”¹³⁴ whereas evidence of “a consensus among States about the unacceptability of certain forms of behavior may establish custom, even if State practice is inconsistent.”¹³⁵

¹²⁸ *Ware v. Hylton*, 3 U.S. 199, 227 (1796).

¹²⁹ *The Prize Cases*, 67 U.S. 635, 670 (1862). For a list of relevant cases, see Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT’L L. 59, 59 nn.2-3 (1990).

¹³⁰ Paust, *supra* note 129, at 63.

¹³¹ *Id.* at 64; see also *id.* at 64 n.14 (identifying a minority view arguing that dissenting States should exempt from a new CIL).

¹³² *Id.* at 61; see also *id.* at 61 n.5. (citing SCOTUS cases as well as Blackstone’s Commentaries on the Laws of England).

¹³³ *Id.* at 63.

¹³⁴ OLIVER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 66 (2nd ed. 2014); see Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146 (1987).

¹³⁵ OLIVER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 66 (2nd ed. 2014); see Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. OF INT’L L. 146 (1987); see also John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. OF LEGAL STUD. 85 (1996); see also Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: a*

Based on the CIL definition above, we can ascertain the CIL status of the UDHR using available jurisprudence. Although U.N. declarations are not legally binding as such, they can, like the UDHR, crystallize into customary law based on either the consent or the acquiescence of states. There is evidence that the UDHR “has been implemented, or even sometimes almost literally reproduced, in a large number of bills of rights in the world.”¹³⁶ Similarly, the 1994 report of the International Law Association (ILA) Committee on the Enforcement of Human Rights Law gathered state practices and confirmed the Committee’s view that “there would seem to be little argument that many provisions of the [Universal] Declaration today do reflect customary international law.”¹³⁷ In addition, some of the most highly qualified publicists have already declared the UDHR to have so crystalized. For example, in 1976 Professor John P. Humphrey, who was the first Director of the U.N. Secretariat’s Division of Human Rights, and who played a major role in drafting the UDHR, stated that:

In the more than a quarter of a century since its adoption ... the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter.¹³⁸

Reconciliation, 95 AM. J. OF INT’L L. 757 (2001); see generally Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. OF INT’L L. 82, 102–08 (1992) (discussing an approach that grounds human rights in general principles of international law, under Article 38(1)(c) of the ICJ Statute).

¹³⁶ OLIVER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 67 (2nd ed. 2014); see Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. OF INT’L & COMPAR. L. 287, 351–52 (1995).

¹³⁷ Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, in REPORT OF THE SIXTY-SIXTH CONFERENCE 525, 544 (1994); see Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. OF INT’L & COMPAR. L. 287, 340 (1995) (uncut version of the Committee’s Final Report); see also Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 7-8 (1995).

¹³⁸ John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976) (some publicists even elevate that UDHR to “having the attributes of *jus cogens*,” although it is sufficient for present purposes to find CIL status); see MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 272, 274 (1980).

There is also evidence of state practice confirming the custom status of the UDHR. For example, the *Hostages* case,¹³⁹ and the *Filartiga v. Pena-Irala* case,¹⁴⁰ have been interpreted as authority suggesting that the UDHR is recognized as CIL.¹⁴¹ In the United States, even UDHR rights not listed in the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States,¹⁴² are argued in courts with increasing frequency.¹⁴³

With the UDHR having a CIL status, the next step is to ascertain the status of the two treaties, the ICCPR and the ICESCR. In a nutshell, CIL evolves from a treaty in two ways: (1) the treaty crystalizes CIL already in the process of formation,¹⁴⁴ and (2) the treaty influences international conduct to the extent that a new general practice emerges.¹⁴⁵ Where the right protected by the ICCPR or the ICESCR is identical to the right in the UDHR, there is no difficulty in attributing CIL status to that right, see Article 19 of the UDHR and Article 19 of the ICCPR.¹⁴⁶ The ICCPR explains the UDHR right by making explicit the "special duties and responsibilities" that attach to exercising the right.¹⁴⁷ The restrictions are limited to those necessary for the "respect of the rights or reputations of others," and for the protection of national security, public order, and public health or morals.¹⁴⁸ It is therefore a codification of a CIL right. In summary, where there is overlap between the

¹³⁹ Case concerning United States diplomatic and consular staff in Tehran. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

¹⁴⁰ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (the case arose before the U.S. ratified the ICCPR in 1992, and the issue was whether the plaintiff could rely on the ICCPR as part of CIL). See Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, reprinted in 19 I.L.M. 585 (1980).

¹⁴¹ Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 3-4 (1995-96) (arguing in favor of recent changes in the process of CIL formation).

¹⁴² RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS OF THE UNITED STATES (AM. L. INST., Tentative Draft No. 2, 1974).

¹⁴³ See Lillich, *supra* note 137, at 6-7.

¹⁴⁴ Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc A/73/10, at 143 (2018).

¹⁴⁵ *Id.*; See also North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 72-73 (Feb. 20) (noting three conditions that must be satisfied before a treaty rule can be said to generate a parallel customary law rule: (1) the provision is of a norm-creating character, (2) there is widespread and representative participation by the affected States, and (3) there is extensive and uniform State practice that shows general recognition of the provision as a legal obligation).

¹⁴⁶ GA, *supra* note 70, art. 19; GAOR, *supra* note 72, art. 19. Article 19 of the UDHR and Article 19 of the ICCPR.

¹⁴⁷ GAOR, *supra* note 72, art. 19 ("The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*) or of public health or morals.")

¹⁴⁸ *Id.* art. 19(3)(a)-(b).

UDHR and the treaties, such as the overlap with the ICCPR in relation to freedom of speech, the treaty is interpreted as crystalizing a CIL right that is already in the process of formation.

On the other hand, where the right is not part of the UDHR, for example, the right to self-determination, CIL status has to be evinced by the emergence of a new general practice as a result of ICCPR and ICESCR influence on international conduct.¹⁴⁹ In the *North Sea Continental Shelf* cases (Germany v. Denmark; Germany v. The Netherlands), the ICJ stipulated three conditions that must be met before a treaty rule can be said to have generated a parallel CIL rule.¹⁵⁰ First, that the provision could be regarded as forming the basis for a general rule of law.¹⁵¹ Second, “a very widespread and representative participation” in the treaty,¹⁵² provided “it included that of States whose interests were specially affected.”¹⁵³ Note that the threshold number of signatures, ratifications, or accessions depends “upon the nature of the treaty rule, the subject matter of the treaty, and the extent to which ‘specially affected’ States are among the treaty’s participants.”¹⁵⁴ The third condition is “extensive and virtually uniform” State practice,¹⁵⁵ including “States whose interests are specially affected,”¹⁵⁶ which shows “a general recognition that a rule of law or legal obligation is involved.”¹⁵⁷ The ICJ added that “very widespread and representative participation ... might suffice of itself [to generate rules of CIL], provided it included that of States whose interests were specially affected.”¹⁵⁸ In the more recent *Nicaragua* case,¹⁵⁹ however, the ICJ considered it necessary to have separate evidence of *opinio juris* to crystalize the treaty rule into a CIL

¹⁴⁹ See John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 533–537 (1976) (discussing similarities and differences between the UDHR and the ICCPR and ICESCR).

¹⁵⁰ *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

¹⁵¹ *Id.* at ¶ 72.

¹⁵² *Id.* at ¶ 73.

¹⁵³ *Id.*

¹⁵⁴ Hall, *supra* note 120, at 52.

¹⁵⁵ *North Sea Continental Shelf*, *supra* note 150, at ¶ 74.

¹⁵⁶ *Id.* at ¶ 73.

¹⁵⁷ *Id.* at ¶ 74.

¹⁵⁸ *Id.* at ¶ 73.

¹⁵⁹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27).

rule.¹⁶⁰ Notwithstanding, *Nicaragua* was about the use of force against the territorial integrity or political independence of States, a treaty obligation not quite distinct from international human rights. The better view is that evidence of *opinio juris* would be required only where provisions similar to Article 2(4) of the U.N. Charter are involved.¹⁶¹

It is suggested that with 173 States party to the ICCPR, and 170 States party to the ICESCR, the right of self-determination in these treaties (Article 1 of the ICCPR; Article 1 of the ICESCR) is part of CIL.¹⁶²

In summary, the IBHR is considered part of the CIL, even if the status of some rights will still need to be confirmed through ICJ methodology in identifying the content of CIL.

V. CONCLUSION

The reasons that brought about the United States Bill of Rights in the last decade of the 18th Century, or those that provided impetus to the Canadian counterpart in the late 20th Century, are not part of the Australian story. Australia did not have a war of independence that made it suspicious of the central government, nor a French connection that necessitated our Federation to be a 'holding-together' one.¹⁶³ Today, other forms of signaling are used to indicate commitment to upholding human rights.¹⁶⁴ Today, international law has relevance to all areas of life, including what typically used to be considered far from inter-state relations: "human rights, the protection of the environment, indigenous rights, labour relations, even the regulation of tobacco."¹⁶⁵ The problem is signaling; there is a need to signal commitment to upholding international human rights, rather than designing *sui generis* frameworks of protection.

This Article therefore recommends redefining the debate on an Australian Bill of Rights as one in relation to a direct incorporation of customary international human rights, through a legislative instrument at the federal

¹⁶⁰ *Id.* at ¶ 179-86.

¹⁶¹ *Contra* STEPHEN HALL, PRINCIPLES OF INTERNATIONAL LAW 52 (6th ed. 2019).

¹⁶² International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁶³ Alfred C. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. OF DEMY 19 (1999).

¹⁶⁴ *See generally* David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U.L. REV. 879 (2003); Daniel A. Farber, *Rights as Signals*, 31 J. OF LEGAL STUD. 83.

¹⁶⁵ Hilary Charlesworth, *International Law and Australian Law in the 21st Century*, 6 NEWCASTLE L. REV. 1, 4 (2002).

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level, into Australia's common law. Under this approach the HCA plays a major role in developing human rights protection, while the Human Rights Commission helps with the identification of new CIL.