JUDICIAL DISCRETION AND HUMAN RIGHTS: EXPANDING THE ROLE OF INTERNATIONAL LAW IN THE DOMESTIC SPHERE

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[Australian case law points to the emergence of a new development in the use of international human rights law by judges in the exercise of their discretionary powers. While resort to international law as an aid to the development of the common law, the interpretation of statutes, and the exercise of administrative discretion has been widely considered, the relevance of international standards to judicial discretion has not. In reflecting upon this development in Australian jurisprudence, the decisions of three judges stand out. Justices Kirby (Justice of the High Court of Australia and former President of the New South Wales Court of Appeal), Perry (Justice of the Supreme Court of South Australia), and Miles (former Chief Justice of the Supreme Courts of the Australian Capital Territory and Justice of the New South Wales Supreme Court) have been prominent in this context. However, the potential significance of this development, including its relationship to the principle espoused in Teoh*, and to Chapter III of the* Australian Constitution*, has yet to be fully examined. This article identifies and explores the implications of this development that are likely to bear upon its wider acceptance in Australian domestic law.]*

CONTENTS

I INTRODUCTION

The relevance of international law (and international human rights law in particular) to the exercise of judicial discretion in Australia has received comparatively little attention in analyses of the nexus between international and

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domestic law.[1] This may be attributed to the fact that judicial discretion is provided either under common law or statute, and thus, may be considered as already subject to the accepted means by which Australian courts may use international law to interpret statutes and to develop the common law.[2] However, it is more likely that the lack of substantive commentary is a reflection of the relative absence — at least until recently — of both case law and statutory provisions specifically directed at the issue of judicial discretion and international law.

In recent years, an emerging jurisprudence has become evident in Australia. The courts have begun to consider the role that international legal standards may play when an individual judge exercises judicial discretion.[3] This trend in the case law reflects the growing significance of this method of utilising international human rights law in litigation, the potential of which is likely to be increasingly realised in the coming years.[4] The impetus for this development cannot be linked to one factor alone, but must be viewed as a consequence of many factors and in the context of broader legal and political developments. These factors include: the express statutory acknowledgement of the relevance of international human rights instruments to the exercise of judicial discretion;[5] the judicial consideration of discretion granted under both common law and statute within the framework of accepted methods for utilising international law in Australia;[6] the relevance of the *Teoh* doctrine to judicial decision-making;[7] and the legitimacy of international human rights standards as a reflection of the values adopted and espoused by individual judges in carrying out their judicial functions.[8] In each of these contexts, the significance of international standards to the exercise of judicial discretion is either directly raised (as in the case of statutory provisions such as s 138 of the *Evidence Act 1995* (Cth)) or indirectly raised (as in relation to the possible extension of the *Teoh* principle that made international law relevant to administrative discretion).

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1 But see John Hookey, 'The Prompt Trial Right: Australian Isolationism and International Law' (1994) 1 *Australian Journal of Human Rights* 117, 122; Kate Eastman and Chris Ronalds, 'Using Human Rights Laws in Litigation: A Practitioner's Perspective' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (1998) 319; Ivan Shearer, 'The Relationship between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 34, 61; Sir Gerard Brennan, 'The Role and Rule of Domestic Law in International Relations' (1999) 10 *Public Law Review* 185, 190.

2 See, eg, statements made by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 ('*Teoh*').

3 Eastman and Ronalds, above n 1, 330.

4 Shearer, above n 1, 60.

5 See, eg, *Evidence Act 1995* (Cth) s 138.

6 On the right to a fair trial and the discretion to stay proceedings in serious criminal cases, see *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*'). On the discretion to grant bail, the right to privacy, and the strict statutory construction of a provision making a taped conversation admissible in certain proceedings, see *DPP (NSW) v Serratore* (1995) 38 NSWLR 137 ('*Serratore*').

7 *Wickham v Canberra District Rugby League Football Cub Ltd* [1998] ATPR ¶41-664, 41-401, 41-402 (Miles CJ) ('*Wickham*').

8 See Justice Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 525–6.

A *Defining Judicial Discretion*

Judicial discretion — the result of its exercise is referred to herein as a discretionary decision — is exercised when a judge is granted a power under either statute ('statutory discretion') or common law that requires the judge to choose between several different, but equally valid, courses of action. As de Smith has stated:

> [The] legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem.[9]

Discretionary decisions are those where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case. As Hawkins has observed, discretion is 'the space … between legal rules in which legal actors may exercise choice'.[10]

In speaking of autonomy and choice, however, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles,[11] or by reference to a list of relevant factors to be considered.[12] While discretion permeates both the common law and many, if not most, statutory instruments, discretionary powers are never absolute and must also be exercised within a broader legal and social context.[13] As Schneider has remarked, 'limitations on discretion are as inevitable and abundant as the sources of discretion … discretionary decisions are rarely as unfettered as they look'.[14]

In Australia, judges have also developed principles for the review by appellate courts of discretionary decisions and this indirectly regulates the exercise of discretionary powers. The leading authority in this regard is *House v The King*.[15] This case established that appealable errors committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take

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9 SA de Smith and JM Evans (eds), *De Smith's Judicial Review of Administrative Action* (4th ed, 1980) 278.

10 Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (1992) 11, 11.

11 The tendency for judges to develop guidelines regulating the exercise of discretion was rationalised by Brennan J in *Norbis v Norbis* (1986) 161 CLR 513, 536 ('*Norbis*'): '[While an unfettered discretion is] a versatile means of doing justice in particular cases … unevenness in its exercise diminishes confidence in the legal process'.

12 See, eg, the list of factors set out by Kirby J relevant to the exercise of the discretion to exclude evidence on public policy grounds in *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159, 212–13 ('*Swaffield*').

13 For an analysis of the professional and institutional (eg, non-legal) restraints upon the exercise of discretionary powers by judges, see Hawkins, 'The Use of Legal Discretion', above n 10, 38; Torstein Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence' (1965) 9 *Scandinavian Studies in Law* 9, 33; Lord Hodson, 'Judicial Discretion and Its Exercise' (Presidential Address at the The Holdsworthy Club of the Faculty of Law, The University of Birmingham, Birmingham, UK, 1962), 14–15; Lord McCluskey, *Law, Justice and Democracy* (1987) 9; Carl Schneider, 'Discretion and Rules: A Lawyer's View' in Hawkins, 'The Uses of Discretion', above n 10, 47, 80–1.

14 Schneider, above n 13, 79.

15 (1936) 55 CLR 499.

account of a material consideration.[16] However, it will not be enough that the appellate court would have exercised the discretion differently.[17] Instead, the discretion must involve an error of law which has led to 'an unreasonable or plainly unjust'[18] result, or has involved a 'substantial wrong',[19] before the discretion will be taken to have been improperly exercised by the lower court.[20]

B *Statutory Discretion and International Human Rights Law*

With respect to statutory discretion, the factors or principles that are to guide the exercise of discretion are to be gleaned from the statutory provisions that pertain to the discretion. Where such provisions refer expressly to international law, as is the case under s 138 of the *Evidence Act 1995* (Cth), no theoretical difficulty arises. In this case, the legislature has directly provided that international law is a legitimate guide to the exercise of that discretionary power. More commonly, however, statutes refer to a non-exhaustive list of factors to be taken into account, and common law discretion is usually regulated in a similar fashion. In such instances, the courts have accepted that they may develop guidelines to regulate the exercise of the discretion. As Mason and Deane JJ observed in *Norbis*: 'it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise'.[21]

A separate question arises as to whether, and on what particular legal basis, a judge may refer to international law as a guide in the exercise of discretion. The difficulty arises because the role of international law in the domestic legal system is already the subject of a number of established rules and principles.[22] Several Australian judges have grappled with this question in various cases, and their jurisprudence is set out below. However, it is argued in this article that further consideration must be given to the legal basis upon which international law may be used to guide the exercise of discretionary powers. In doing so, the potential for international standards to significantly influence the exercise of such powers may come to be more fully realised.

The recent decision of the Full Court of the Family Court of Australia in *B & B v Minister for Immigration and Multicultural and Indigenous Affairs*[23] provides a telling example of the potential for international human rights law to influence both the content and the manner in which discretionary powers may be exercised by judges. In that case, the statutory jurisdiction of the Family Court of Australia in relation to the welfare of children — or what has traditionally been known as the *parens patriae* jurisdiction at common law — was held[24] to rest

16 Ibid 504–5 (Dixon, Evatt and McTiernan JJ).
17 Ibid.
18 Ibid 505.
19 Ibid.
20 Ibid.
21 (1986) 161 CLR 513, 519. See also *Ward v James* [1966] 1 QB 273, 295 (Lord Denning MR); *Birkett v James* [1978] AC 297, 325–6 (Lord Salmon), 317 (Lord Diplock).
22 For a recent account of this area see, Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.
23 (2003) 30 Fam LR 181 ('*B & B*').
24 Ibid 222–8 (Nicholson CJ and O'Ryan J).

partially on the external affairs power of the Commonwealth,[25] with specific reference to the *Convention on the Rights of the Child*.[26]

The Full Court determined that the *Family Law Act 1975* (Cth) authorised the making of discretionary orders by the Court in relation to the children of illegal immigrants currently being held in detention centres throughout Australia.[27] In exercising this discretionary power under s 67ZC of the *Family Law Act 1975* (Cth), the Court could have recourse to the articles contained in *CROC*.[28] That section of the *Family Law Act 1975* (Cth) does not refer directly to *CROC*, but its language significantly mirrors its terms. The matter itself was initially remitted for retrial before a single judge of the Family Court,[29] though the Minister was granted a certificate to appeal directly to the High Court of Australia.[30]

A majority of the High Court (Gleeson CJ and McHugh J, Gummow, Hayne and Heydon JJ, Callinan J) decided the case by reference to the jurisdictional limits of the Family Court. The majority rejected that the *Family Law Act 1975* (Cth) conferred a broad welfare jurisdiction upon the Family Court[31] accepting that the jurisdictional limits of the Court's power to issue orders with respect to the welfare of children under s 67ZC was linked to the need for a constitutional 'matter' or justiciable controversy under Chapter III of the *Australian Constitution*.[32] With respect to the application on behalf of the children in detention for an order to be issued against the Minister for Immigration, there was no requisite matter, or immediate right, duty or liability created by the *Family Law Act 1975* (Cth).[33] Effectively the power conferred by s 67ZC was held to be limited to 'the parental responsibilities of the parties to a marriage for a child of the marriage'.[34]

Justice Kirby, on the other hand, determined the matter by looking at the intersection between the *Migration Act 1958* (Cth) and the *Family Law Act 1975* (Cth). His Honour considered that the general provisions of the *Family Law Act 1975* (Cth) could not be interpreted as authorising intrusion into the clear and specific obligations regarding the detention of children set out in the *Migration Act 1958* (Cth).[35] However, unlike the other judges, Kirby J felt it unnecessary to determine the ambit and scope of the

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25 *Australian Constitution* s 51(xxix).

26 Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990) ('*CROC*').

27 *B & B* (2003) 30 Fam LR 181, 246 (Nicholson CJ and O'Ryan J).

28 Ibid 225–228.

29 Ibid 250.

30 High Court of Australia, *High Court Bulletin No 6 of 2003* (2003) <http://www.austlii.edu.au/au/other/hca/bulletin/hcab0306.html> at 1 May 2004.

31 *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Hayne, Heydon, Kirby and Callinan JJ, 29 April 2004), [20] (Gleeson CJ and McHugh J), [70] (Gummow, Hayne and Heydon JJ), [206], [215] (Callinan J).

32 Ibid [6] (Gleeson CJ and McHugh J), [63] (Gummow, Hayne and Heydon JJ).

33 Ibid [53] (Gleeson CJ and McHugh J), [70]–[72] (Gummow, Hayne and Heydon JJ).

34 Ibid [74] (Gummow, Hayne and Heydon JJ), [204] (Callinan J).

35 Ibid [176].

Family Court's welfare jurisdiction.[36] Following the High Court decision in this matter, it must be accepted that the discretionary powers of the Family Court are jurisdictionally limited, and cannot extend to children in detention. However, in matters within its jurisdiction, and given the narrow focus of the High Court's decision, the Full Family Court's decision in *B & B* remains important for highlighting the potential significance of international law upon the exercise of judicial discretion.

C *Judicial Discretion and International Human Rights Law*

It has often been acknowledged that universally accepted human rights norms provide the most obvious standards to which Australian judges may refer,[37] and that point is perhaps even more apt in the context of judicial discretion. In the instances where judges retain specific discretion, their task most often involves weighing up some broader public interest against the interests of the individual. In a functional sense, discretion is often used by both legislators and judges to achieve fairness in procedure as well as in outcome. It enables judges, who are best placed to consider the particular facts of any given case, to identify what fairness may require in the circumstances. Discretion, representing the space between laws, involves instances where the inflexibility of fixed legal rules gives way to powers for exercising personal judgement that enable both flexibility and individualisation within discrete cases. It provides what Bell has termed 'individualized justice'.[38] For human rights advocates, it represents a valuable component of any legal system, and in this sense, has a natural affinity with international human rights standards.

Yet, discretion may also be viewed from another perspective. Inherently, the existence of discretion implies the absence of fixed legal rules and the capacity for individual choices to be made by judges. Thus, it encapsulates the potential for abuse and the exercise of discretion based on the personal or subjective views of particular judges. In this context, the phrase 'where law ends, tyranny begins',[39] would spring to the minds of many lawyers. Yet few discretionary powers are ever absolute and most are subject to stringent guidelines, whether statute prescribed or developed by judges over time. In addition, all exercises of judicial discretion are subject to review by a superior court, albeit on limited grounds.

To the extent that the exercise of discretion should be subject to guidelines and that judges are entitled to develop such guidelines, the role of international law is important in another sense. International standards may lend legitimacy to the values espoused by judges when carrying out their judicial functions, particularly in instances where the law is ambiguous or silent, as with discretion. As Kirby J has stated extra-curially:

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36 Ibid [135].

37 See generally Justice Michael Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25 *University of Western Australia Law Review* 30.

38 John Bell, *Policy Arguments in Judicial Decisions* (1983) 3.

39 John Locke, *Second Treatise on Government: An Essay Concerning the True Origin, Extent and End of Civil Government, and a Letter Concerning Toleration* (first published 1690, 1976 ed) 100.

> A decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community than if they are simply derived from the experience and predilections of a particular judge.[40]

Resort to international law may therefore both add legitimacy to, and guide, the exercise of judicial discretion.

With regard to statutory discretion that is expressly framed by reference to international law, the legislative basis for the resort to international standards is quite clear. However, with respect to other discretionary powers, the legal basis for the law's extension into this area is yet to be fully and adequately considered by the courts, including its relationship to the principle espoused in *Teoh.* That decision established in Australian law that ratification of a treaty may give rise to a legitimate expectation that administrative decision-makers will act in accordance with such a treaty, even if it is not incorporated into Australian law.[41] The effect of the legitimate expectation is to create a procedural fairness requirement, that where a decision would be inconsistent with the terms of the relevant treaty, decision-makers would give an affected individual the opportunity to be heard.[42] *Teoh* was therefore concerned with administrative rather than judicial discretion.

There are a number of approaches that have been adopted by judges in relation to the relevance of international law to judicial discretion. These include approaches that fall within the accepted methods for using international law in the interpretation of statutes and in the development of the common law. In addition, there exists an alternative approach that appears to be based on the decision-making process involved in exercising judicial discretion. This approach derives from the jurisprudence of Miles CJ, who appears to link the relevance of international law to the discretionary nature of judicial decisions. However, the legal basis upon which this approach rests is not entirely clear from the decisions of Miles CJ. Whether it constitutes a separate and independent ground for referring to international law, and whether *Teoh* provides authority for that ground, is yet to be resolved. Indeed, the relevance of the *Teoh* decision to the exercise of judicial discretion is particularly controversial, given the apparent limitation of that doctrine to administrative decision-making, and the broader political and constitutional issues it raises. In addition, the position adopted by the majority in *Teoh* has recently come under attack in the obiter comments of four judges in the High Court decision of *Re Minister for Immigration and Multicultural Affairs, Ex parte Lam*.[43] In the event that the High Court is provided with an opportunity to reopen *Teoh*, the principle established in that case is likely to be overturned.

The case law, therefore, raises a multitude of questions concerning the legal basis for using international human rights law in the exercise of judicial

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40 Kirby, 'The Role of the Judge', above n 8, 526.

41 *Teoh* (1995) 183 CLR 273, 286–8, 290–2 (Mason CJ and Deane J), 298–302 (Toohey J).

42 Ibid 291–2 (Mason CJ and Deane J), 302 (Toohey J).

43 (2003) 195 ALR 502, 523–7 (McHugh and Gummow JJ), 530–1 (Hayne J), 536–9 (Callinan J). For an analysis of this case see Wendy Lacey, 'A Prelude to the Demise of *Teoh*: The High Court Decision in *Lam*' (2004) 26 *Sydney Law Review* 131; Wendy Lacey, 'The End for *Teoh*? *Re Minister for Immigration and Ethnic Affairs, Ex parte Lam*' (Paper presented at the Constitutional Law Conference, Sydney, Australia, 20 February 2004).

discretion, as well as questions regarding its legal parameters and effect. Yet, notwithstanding the uncertainty that surrounds this area of law, there are a number of positive aspects to existing case law from which certain observations may be made. Already, there are discernible trends in the types of cases where international law is more likely to impact on a particular discretion, most notably in the field of criminal law. With respect to the types of discretion considered in case law, it is evident that the relevance of international human rights law is not limited to the exercise of particular discretion or to particular contexts, but is potentially very wide and limited only by the circumstances of each case.

The manner in which international human rights law may be used in relation to the exercise of discretion is also varied, and extends beyond the interpretation or development of existing discretionary powers under statute or common law. Such instances involve interpretation or development of the scope of the discretion itself. Indeed, development of the common law may create an entirely new discretionary power, or extend existing discretion to a new context. This interpretation and development may involve extending the list of matters relevant to the exercise of discretion to include human rights contained in international law. This identification of international law as a matter relevant to the exercise of a particular discretionary power is an example of a more direct relevance of international law to the exercise of judicial discretion. An example of this can be found in the judgment of Kirby J in *Swaffield*.[44] When considering the list of matters relevant to the discretion to exclude evidence on public policy grounds, Kirby J identified the additional matter of whether fundamental human rights — including those contained in the *International Covenant on Civil and Political Rights*[45] — had been breached by the conduct that resulted in the evidence having been obtained.[46]

Another less direct instance of the use of international law in relation to discretion occurs in the strengthening or development of existing common law rights, where those rights have a direct bearing on the exercise of discretion.[47] For example, in *O'Neill*,[48] the common law right to privacy was considered in relation to the discretion to exclude evidence of a confession obtained through improper means. In examining the nature and content of the right to privacy at common law, Fitzgerald P made direct reference to the right in international law.[49] While the international standard did not directly impact upon the exercise of the discretion here, it was used by Fitzgerald P in considering the nature and scope of the common law right which did impact on the exercise of discretion.[50]

The potential relevance, both directly and indirectly, of international human rights standards is therefore quite varied and complex. However, one important

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44 (1997) 192 CLR 159, 212–13.

45 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

46 *Swaffield* (1997) 192 CLR 159, 212–14.

47 See, eg, *R v O'Neill* [1996] 2 Qd R 326 ('*O'Neill*'); *Ousley v The Queen* (1997) 192 CLR 69, 141–4 (Kirby J) ('*Ousley*'); *Allesch v Maunz* (2000) 203 CLR 172, 184–5 ('*Allesch*'); *R v Stringer* (2000) 116 A Crim R 198, 214–18 (Adams J) ('*Stringer*'); *Court of Appeal Registrar v Craven (No 2)* (1995) 120 FLR 464, 468 (Kirby J).

48 [1996] 2 Qd R 326.

49 Ibid 410–15.

50 Ibid 415.

point must be made in respect of the practical effect of using international human rights law in these contexts. The result does not necessarily entail the substantive implementation or recognition of that right under domestic law, unless it involves the development of a particular human right at common law. The right does not become directly protected and enforceable under Australian law, but has an indirect recognition and potential for effective protection through the exercise of judicial discretion. This point is significant, as it ensures consistency with current authority on the role of the judiciary in giving domestic legal effect to international law.

II INTERNATIONAL HUMAN RIGHTS LAW AND THE EXERCISE OF JUDICIAL DISCRETION: RECENT AUSTRALIAN CASE LAW

Both the commentary and case law that deal with the relevance of international human rights law to the exercise of judicial discretionary powers tend to focus on aspects of the criminal justice system. As Garkawe has observed, this fact should come as no surprise

> [a]s the criminal justice system is the most prominent and public means by which a state may deprive any person falling under its jurisdiction of their liberty, issues relating to the criminal justice process are intimately connected with human rights issues.[51]

Consequently, many of the relevant cases deal with such issues as: the right to a fair trial;[52] the privilege against self-incrimination;[53] equality before the law;[54] and various rights which pertain to punishment and sentencing discretion.[55] Cases outside the sphere of criminal law include matters as diverse as: disputes over contractual terms;[56] extradition;[57] contempt;[58] and various family law matters.[59] The human rights argued in these contexts have included: the right to work;[60] the paramountcy principle in cases involving the interests of children;[61] liberty of movement;[62] the right to be present at one's case;[63] family rights;[64] the

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51 Sam Garkawe, 'The Criminal Justice System: International Influences' (1997) 70 *Reform* 5, 7.

52 See, eg, *O'Neill* [1996] 2 Qd R 326; *McInnis v The Queen* (1979) 143 CLR 575, 583–93 (Murphy J) ('*McInnis*').

53 See, eg, *Swaffield* (1998) 192 CLR 159, 213–14 (Kirby J, dissenting); *O'Neill* [1996] 2 Qd R 326, 410–13.

54 See, eg, *Stringer* (2000) 116 A Crim R 198, 215–22; *R v Haughbro* (1997) 135 ACTR 15, 25–6 ('*Haughbro*').

55 See, eg, *R v Hollingshed* (1993) 112 FLR 109 ('*Hollingshed*'); *Walsh v Department of Social Security* (1996) 67 SASR 143 ('*Walsh*'); *Bates v Police* (1997) 70 SASR 66; *Sillery v The Queen* (1981) 180 CLR 353 ('*Sillery*').

56 See, eg, *Wickham* [1998] ATPR ¶41-664, 41-401, 41-402; *National Workforce Pty Ltd v Australian Manufacturing Workers' Union* [1998] 3 VR 265.

57 See, eg, *Wu v A-G (Cth)* (1997) 79 FCR 303 ('*Wu*').

58 See, eg, *Court of Appeal Registrar v Craven (No 2)* (1995) 120 FLR 464, 477.

59 See, eg, *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 737–51; *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640 ('*De L*'); *AMS v AIF* (1999) 199 CLR 160, 217–18, 238–40 ('*AMS*'); *Allesch* (2000) 203 CLR 172, 184–5; *CDJ v VAJ* (1998) 197 CLR 172; *ZP v PS* (1994) 181 CLR 639, 655–60; *In the marriage of Barrios and Sanchez* (1989) 96 FLR 336, 343–4.

60 See, eg, *Wickham* [1998] ATPR ¶41-664, 41-401, 41-402.

61 See, eg, *CDJ v VAJ* (1998) 197 CLR 172, 194–5; *De L* (1996) 187 CLR 640, 660–2, 681–5.

62 See, eg, *Schoenmakers v DPP (WA)* (1991) 30 FCR 70, 75–6 ('*Schoenmakers*'); *AMS* (1999) 199 CLR 160, 217–18, 238–40.

right to strike;[65] and the right to enter and leave one's country freely.[66] Though references to international conventions have not been limited to the *ICCPR*, that instrument is certainly the one most often referred to by litigants, with the only exception being *CROC* in family law matters.

As a consequence of the dominance of criminal law cases in the relevant jurisprudence, the particular discretionary powers which have more often been in issue before the courts are those associated with the criminal process. Thus, the case law has focused on the exercise of discretion in various areas including: the granting of warrants;[67] bail;[68] parole;[69] adjournments in proceedings;[70] stays in proceedings;[71] the determination of sentences, including the length, place and type of imprisonment;[72] and discretion to exclude evidence, both at trial and in preliminary proceedings.[73] However, discretionary powers of the court in cases involving non-criminal matters have arisen in such diverse areas as: the power to declare a contract void on public policy grounds;[74] the power to grant relief from an employment contract;[75] the discretion to grant leave to appeal;[76] the power to reopen a determination of a lower court granting an acquittal;[77] the discretion to grant interlocutory relief to prevent an abuse of process;[78] the discretion to grant parenting orders;[79] the power to order the return of children;[80] the discretion to order delivery of a passport and to prohibit the leaving of the country;[81] and the various grants of statutory discretion granted under the *Family Law Act 1975* (Cth).[82]

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63 See, eg, *Allesch* (2000) 203 CLR 172, 184–5.

64 See, eg, *Walsh* (1996) 67 SASR 143; *Bates v Police* (1997) 70 SASR 66.

65 See, eg, *National Workforce Pty Ltd v Australian Manufacturing Workers' Union* [1998] 3 VR 265, 275–6.

66 See, eg, *Australian Securities and Investment Commission v Ivey* (1998) 29 ACSR 391 ('*Ivey*').

67 *Ousley* (1997) 192 CLR 69, 141–4.

68 *Schoenmakers* (1991) 30 FCR 70, 75–6; *Wu* (1997) 79 FCR 303; *Serratore* (1995) 38 NSWLR 137, 143.

69 *O'Shea v DPP (SA)* (1998) 71 SASR 109, 132–7.

70 *McInnis* (1979) 143 CLR 583, 585–8 (Murphy J).

71 *Stringer* (2000) 116 A Crim R 198, 222–9; *A-G (NSW) v X* (2000) 49 NSWLR 653, 688–95.

72 *Walsh* (1996) 67 SASR 143; *Bates v Police* (1997) 70 SASR 66; *R v Hollingshed* (1993) 112 FLR 109; *Sillery* (1981) 180 CLR 353.

73 *McKellar v Smith* [1982] 2 NSWLR 950, 962; *O'Neill* [1996] 2 Qd R 326. Cases dealing with s 138 of the *Evidence Act 1995* (Cth) include: *R v Truong* (1996) 86 A Crim R 188 ('*Truong*'); *Haughbro* (1997) 135 ACTR 15, 22–8; *R v Malloy* (Unreported, Supreme Court of the Australian Capital Territory, Crispin J, 9 November 1999).

74 *Wickham* [1998] ATPR ¶41-664, 41-401, 41-402.

75 *National Workforce Pty Ltd v Australian Manufacturing Workers' Union* [1998] 3 VR 265, 275–6.

76 See, eg, *Martin v Office of the Public Advocate* (Unreported, Supreme Court of Western Australia, McKechnie J, 26 March 1999).

77 See, eg, *Registrar, Court of Appeal v Craven [No 2]* (1995) 120 FLR 464.

78 See, eg, *Bou-Simon v A-G (Cth)* (Unreported, Federal Court of Australia, Emmett J, 22 June 1998).

79 See, eg, *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676.

80 See, eg, *De L* (1996) 187 CLR 640.

81 See, eg, *Ivey* (1998) 29 ACSR 391.

82 *AMS* (1999) 199 CLR 160.

International human rights instruments have, therefore, influenced the exercise of discretion granted to Australian judges in a variety of different legal contexts. While the majority of examples come from the criminal sphere, the principle that international law may legitimately be used in exercising discretion outside the criminal justice system is evident from the case law. The case law itself is diverse not only in respect of the particular issues involved, but also in terms of the judges and courts that have determined these disputes. Justices Miles (former Chief Justice of the Supreme Courts of the Australian Capital Territory and Justice of the New South Wales Supreme Court), Perry (Justice of the Supreme Court of South Australia), and Kirby (Justice of the High Court of Australia and former President of the New South Wales Court of Appeal) as apparent from recent cases, have risen to prominence in this area.[83] In particular, Kirby J's decisions perhaps reflect the most detailed and complex approach to the issue of international human rights law and judicial discretion. This is not surprising, given Kirby J's extra-curial discussions on the role of international human rights norms in domestic law. Each of the three judges have espoused a different, though not necessarily inconsistent, view on human rights and discretion. Their approaches will, however, be significant for the future development of an articulated legal basis for referring to international human rights standards in the exercise of judicial discretion.

A *Chief Justice Miles*

Chief Justice Miles was the first Australian judge to provide a clear and definitive statement proclaiming the relevance of international legal standards to the exercise of judicial discretion. That statement was given in *McKellar v Smith*, where he stated:

> lawyers should not continue to ignore the provisions of the *Racial Discrimination Act 1975* (Cth) nor to overlook the possibility that courts may take judicial notice of the ratification by this country of the *International Covenant on Civil and Political Rights*, the *Declaration on the Rights of the Child* and other international instruments which contain provisions and establish standards which may be relevant to the exercise of judicial discretion.[84]

Following his appointment as Chief Justice of the Supreme Court of the Australian Capital Territory, Miles CJ reconsidered this principle on a number of occasions,[85] though two cases concerned s 138 of the *Evidence Act 1995* (Cth), which expressly makes the *ICCPR* relevant to the exercise of a discretion.[86] In *Wickham*, his Honour stated that

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[83] This is not to assert that no other judges have actively used international legal standards in the exercise of judicial discretion. Indeed, Murphy J (formerly of the High Court of Australia) did so on several occasions: see, eg, *McInnis* (1979) 143 CLR 575, 593; *Sillery* (1980) 180 CLR 353, 362.

[84] [1982] 2 NSWLR 950, 962.

[85] *Hollingshed* (1993) 112 FLR 109, 115; *Wickham* [1998] ATPR ¶41-664; *Truong* (1996) 86 A Crim R 188; *Haughbro* (1997) 135 ACTR 15.

[86] *Evidence Act 1995* (Cth) s 138 grants a discretion to exclude improperly or unlawfully obtained evidence, and lists a number of relevant matters for the judge to consider when exercising this discretion. Those relevant factors include, at s 138(3)(f) 'whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*'.

> administrative decisions 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.[87]

Later, in *Haughbro*, a case that concerned s 138(3)(f) of the *Evidence Act 1995* (Cth), Miles CJ added the following statement:

> The *International Covenant on Civil and Political Rights* … to which Australia is a party, is not itself part of the domestic law of Australia, but it has indirect effect in Australia through such statutory provisions as para 138(3)(f) and in the exercise of judicial and quasi judicial discretions.[88]

The significance of Miles CJ's contribution to the matter of judicial discretion rests on his analysis of the issue, seemingly unrestrained by accepted methods for the use of international law. Miles CJ appears to see international human rights law as relevant to the exercise of judicial discretion, quite independently of common law development and statutory construction to resolve an ambiguity. His approach is seemingly akin to a *Teoh* doctrine — absent the use of legitimate expectations — applied to judicial decision-making, as distinct from administrative decision-making. Though this approach lacks the detailed and contextual analysis often contained in the judgments of Kirby J, it is unclear whether Miles CJ is in fact advocating a new and independent basis for the use of international law. The lack of detailed reasoning leaves the approach of Miles CJ open to an interpretation that is reasonably consistent with that of Kirby J. Thus, it may well be that Miles CJ's approach is more conventional than is immediately apparent.

This contention is supported to some extent by the decision of Miles CJ given in *Hollingshed*. That case was heard after the High Court had delivered judgments in both *Mabo v Queensland (No 2)*[89] and *Dietrich* in the previous year. In considering the relevance of the *ICCPR* to a sentencing discretion, Miles CJ drew upon those High Court authorities in the following manner:

> to recognise that the *ICCPR* is not directly part of the domestic law of Australia, is not to deny that the courts may pay attention to it. Mason CJ and McHugh J in *Dietrich* said that Australian courts should follow the 'common sense' approach that Kirby J expressed in *Jago v District Court (NSW)* (1988) 12 NSWLR 558 at 569 (and elsewhere) that where the inherited common law is uncertain, regard may be had to an international treaty which Australia has ratified as an aid to the explication and development of the common law.[90]

Here, Miles CJ returns to a more orthodox approach that premises the resort to international law upon the presence of uncertainty in the common law. This orthodoxy was absent, however, from his later judgment in *Haughbro*. In that case, his Honour's comments were not based upon the presence of any ambiguity in relation to the discretion:

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87 *Wickham* [1998] ATPR ¶41-664, 41-401, 41-402 (citations omitted).
88 *Haughbro* (1997) 135 ACTR 15, 25–6.
89 (1992) 175 CLR 1.
90 (1993) 112 FLR 109, 115.

> The *International Covenant on Civil and Political Rights* (the Covenant) to which Australia is a party, is not itself part of the domestic law of Australia, but it has indirect effect in Australia through such statutory provisions as para 138(3)(f) [*Evidence Act 1995* (Cth)] and in the exercise of judicial and quasi-judicial discretions.[91]

Thus, though it predominantly is not predicated on the application of existing principles, namely the precondition of either legislative or common law ambiguity, the approach of Miles CJ is inconsistent. It is therefore reasonable to treat his approach to the subject as involving an independent basis for referring to international standards when exercising a discretionary power. However, it would also be reasonable to say that Miles CJ's approach leaves open the possibility for refinement, or that it is possible that he simply assumes that uncertainty is almost always present in relation to discretionary powers. This may be implicit in his comments on discretion in *Hollingshed*, where he referred to the fact that, in the sentencing process, 'discretionary factors … are numerous and conflicting'.[92] Nonetheless, these observations derive from little more than assumptions that may or may not be implicit in the actual judgments. In acknowledging the almost *Teoh*-like nature of Miles CJ's approach more generally, however, an analysis of that decision in the present context is required.

For a number of reasons, the *Teoh* principle must be accepted as limited to administrative decisions and decision-making at the federal level. The principal reason for this stems from the use of a legitimate expectation arising out of the act of treaty ratification in *Teoh*. That act of becoming formally and legally bound under an instrument in international law is an act of the federal executive through the exercise of a prerogative power under s 60 of the *Australian Constitution*. While the substance of that act of ratification — in the case of human rights treaties — was discussed in *Teoh*, it was actually the combination of ratifying a treaty with the making of a considered statement of government policy[93] that formed the basis upon which the legitimate expectation was held to arise.[94] Thus, notwithstanding the confusion that emerged in the aftermath of *Teoh* regarding the decision's application at the State level,[95] the argument that it can so extend to the States must be rejected upon an analysis of the judgment itself.[96]

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91 *Haughbro* (1997) 135 ACTR 15, 25–6.

92 (1993) 112 FLR 109, 115.

93 This line of reasoning relates to the argument that *Teoh* merely involved an extended application of the principle regarding published statements of policy, identified in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648. For an analysis of the controversy surrounding that claimed extension see: Margaret Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh*'s Case and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204; Kristen Walker and Penelope Mathew, '*Minister for Immigration v Ah Hin Teoh*' (1995) 20 *Melbourne University Law Review* 236; Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 327–8.

94 *Teoh* (1995) 183 CLR 273, 317.

95 The concern regarding its application at the State level led to the adoption of the *Administrative Decisions (Effect of International Instruments) Act 1995* (SA) — the only successfully adopted anti-*Teoh* legislation in Australia.

96 See also Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 204, 224.

Essentially, an act of the federal executive cannot be construed as binding decision-makers at the State level, as the legitimate expectation only arises by virtue of the conduct of the federal government, and that expectation therefore only extends to the decision-making of the federal administration.[97] Similarly, that act of the federal executive which creates the legitimate expectation cannot extend to the judiciary, if not for any other reason than the existence of the doctrine of the separation of powers. Accordingly, the legitimate expectation in *Teoh* can offer little by way of authority for linking international human rights standards to either judicial decision-making or to administrative decision-making at the State level. To conclude otherwise would be to extend the principle articulated by the majority in *Teoh* far beyond what was accepted by those judges.

Thus, Miles CJ's approach does not find support from *Teoh*. Indeed, with the exception of his analysis in *Hollingshed*, the approach of Miles CJ appears to stand at odds with much of the existing case law. Though this creates a particular difficulty in attempting to use his judgments as authority, the lack of detailed reasoning based on existing case law leaves his judgments open to a more orthodox interpretation. The basic problem that underlies the approach of Miles CJ is perhaps better viewed as a tendency to make implicit assumptions about the nature of discretion and a failure to articulate his approach to discretion in relation to accepted principles. What Miles CJ does achieve, however, where other judges have not, is an acknowledgement that discretionary powers have distinct features and should be treated differently from other judicial functions such as statutory interpretation and the development of the common law.

B *Justice Perry*

In addition to Miles CJ, Perry J of the Supreme Court of South Australia has been prominent in Australian jurisprudence on the relevance of international law in the exercise of judicial discretion. Since 1996, Perry J has made several references to the role of international human rights law in the exercise of various judicial discretion.[98] His approach has, however, focused specifically on construing the words in statutes according to accepted principles regarding the use of international law. This is unlike the approach of Miles CJ, which appears to rest on an entirely separate principle.

The principal case of relevance is the decision of *Walsh*. In that case, both parents of three children had been convicted of social security fraud and sentenced to terms of imprisonment. Each of the three children suffered from chronic asthma for which they were regularly hospitalised and whose medication had always been administered by their mother. An appeal was made against the harshness of the custodial terms, and the manner in which the sentencing discretion was exercised. The particular ground of relevance was whether the sentencing magistrate had erred in not considering or inadequately considering whether a conditional release order should be made pursuant to s 20 of the

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97 *Teoh* (1995) 183 CLR 273, 316–17 (McHugh J).

98 See, eg, *Walsh* (1996) 67 SASR 143; *Hillman v Black* (1996) 67 SASR 490 ('*Hillman*'); *Bates v Police* (1997) 70 SASR 66 ('*Bates*'); *O'Shea v DPP* (1998) 71 SASR 109; *Jones v Dodd* (1999) 73 SASR 328; *Police v Abdulla* (1999) 74 SASR 337.

Crimes Act 1914 (Cth). Justice Perry held that each sentence was well within the sentencing discretion.[99] However, his Honour then continued:

> the case has one unusual feature not present in any of the various cases to which counsel made reference during the course of their submissions. That is, that the sentences, both of which were to be served forthwith, would result in three young children, the youngest only just two years of age, being separated from both of their parents during the period of their imprisonment.[100]

After considering the fact that all three children were asthmatic, regularly hospitalised and dependent on their mother for receiving their medication, Perry J continued:

> In this case, it was particularly important that the learned sentencing [m]agistrate have regard to the combined effect of the sentences imposed upon both appellants upon the welfare of their dependent children. Common law principles of sentencing would compel consideration of that consequence. The need to have regard to that factor is referred to expressly in s 16A(2) of the *Crimes Act*, which lists the various matters which the court must take into account in determining the sentence to be passed. One of them (subs (2)(p)) is 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.
>
> Various international instruments which have been entered into by Australia emphasise the protection by the society and the State of the family as the natural and fundamental group unit of society, and preservation of the rights of the children. Although such international instruments do not form part of Australian law, they serve to underscore the importance of provisions such as s 16A(2)(p) of the *Crimes Act*, which where possible, should be construed and applied consistently with them.[101]

Justice Perry considered that, in this case, the provision was clear and unambiguous in its terms, and on the words of the section alone, the sentencing magistrate had clearly erred in exercising the discretion.[102] Thus, resort to international instruments was unnecessary, and the mother's sentence was changed to a conditional release order.

The approach of Perry J in *Walsh* and other decisions[103] is very much premised on the accepted method for using international human rights law in the construction of statutes. In that sense, Perry J's approach may be distinguished from the approach of Miles CJ. The use of international human rights standards in the exercise of judicial discretion under the approach of Miles CJ is not premised on a development of the common law nor upon ambiguity in a statutory provision. What is interesting about Perry J's contributions to the subject is that his judgments relate to both Commonwealth[104] and South Australian[105] statutes, and that he presides in the only jurisdiction in Australia

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99 Ibid 146.
100 Ibid.
101 Ibid 147 (citations omitted).
102 Ibid.
103 See, eg, *Hillman* (1996) 67 SASR 490; *Bates* (1997) 70 SASR 66.
104 See, eg, *Walsh* (1996) 67 SASR 143.
105 See, eg, *Hillman* (1996) 67 SASR 490; *Bates* (1997) 70 SASR 66.

where anti-*Teoh* legislation has been enacted.[106] This latter point is important, in that it may be thought that it is both likely that that legislation's operation influenced the tendency of judges to refer to international law and will inevitably effect the extent to which general developments in the law can be held to apply in South Australia — at least in relation to administrative decisions.

The treatment of discretionary powers by Perry J is framed in reference to two accepted principles regarding the use that may be made by judges of international standards. Those principles are that Australian law should, wherever possible, be construed consistently with Australia's international obligations, and that international law may be referred to by judges in order to resolve any ambiguity in domestic law.[107] What is interesting about the reasoning of Perry J is that the first principle — which is admittedly the more general of the two — is used to link the interpretation of the statutory discretion with international standards. Thus, in his judgment in *Walsh*, Perry J made the following statement:

> Various international instruments … have been entered into by Australia. … Although such international instruments do not form part of Australian law, they serve to underscore the importance of provisions such as s 16A(2)(p) of the *Crimes Act*, which where possible, should be construed and applied consistently with them.[108]

When Perry J came to consider the statutory provision in question against the relevant international standard, it was the absence of any ambiguity that prevented his Honour from having to resort to a consideration of international law.[109] On this analysis, there appears to be two considerations that must be made. The first simply involves the general application of a principle that informs the interpretative process to be carried out. The second, however, represents a potential barrier to any resort to international standards and obviously constitutes the critical consideration to be made by the judge. Whether ambiguity is present or not becomes the crucial question rather than the issue of giving an interpretation that is consistent with Australia's international obligations. Justice Perry's approach gives the impression that the first mentioned principle is insufficient of itself to justify the resort by a judge to international standards in exercising a discretion.

To approach the construction process in the manner reflected in Perry J's judgments is perhaps the preferable method to be adopted by judges. The first principle is expressed in general terms and while it underlies a judicial approach that is sensitive to Australia's broader obligations at international law, the second is more specific in its justification for giving judges a specific role. The presence of ambiguity in the law, whether it be within a statute or under the common law, gives recognition to the principle of parliamentary supremacy and recognises that the judges' role in developing the law is simply to supplement the law where Parliament has either failed to address the subject or has not sought to regulate

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106 *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

107 See, eg, *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ); *Koowarta v Bjelke-Petersen* 153 CLR 168, 204 (Gibbs CJ).

108 (1996) 67 SASR 143, 147 (citations omitted).

109 This occurred in both *Walsh* (1996) 67 SASR 143, 147 and *Bates* (1997) 70 SASR 66, 69–70.

the matter through legislative means. It also recognises that the first principle may itself be limited, by virtue of the fact that it may well be directly premised upon ambiguity within the statute. This sentiment was expressed in the judgment of the present Chief Justice of the High Court of Australia in *Plaintiff S157/2002 v The Commonwealth of Australia*.[110] In considering the relevant principles that apply to the interpretation of statutes, Gleeson CJ conflated the two principles into one, as follows:

> where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.[111]

From this statement, it is clear that Gleeson CJ not only includes the presence of ambiguity as a necessary precondition, but also the fact that the statute must be enacted 'pursuant to, or in contemplation of, the assumption of international obligations under a treaty'.[112] While this could be construed as significantly limiting the number of relevant statutes for which the principle has application, it should be interpreted broadly as referring to all statutory provisions that have been enacted after the ratification of a relevant treaty. A construction in this manner is supported by the decision of Mason CJ and Deane J in *Teoh*, where their Honours referred to Acts 'enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument'.[113] Such an approach finds support in the decision of Gummow J in *Minister for Foreign Affairs and Trade v Magno*.[114] That case, although concerning administrative decision-making rather than judicial decision-making, accepted the requirement of ambiguity in all cases except where the statute specifically referred to a convention in its terms, or where the nomenclature of the treaty had been adopted in anticipation of subsequent ratification on the part of the Australian government.[115] Thus, there exists some dispute as to the appropriate requirements of the principle's application, though it may be said with a degree of certainty that ambiguity is generally required.

C *Justice Kirby*

Of the Australian judges most prominent in the existing jurisprudence dealing with international human rights law and judicial discretion, Kirby J has perhaps adopted the most complex approach. This is undoubtedly reflective of his wider interest in, and understanding of, the nexus between international human rights norms and domestic law. Unlike Miles CJ, who has focused on the link between human rights and the exercise of a particular discretion, Kirby J's approach to discretion is merely one aspect of a much broader application of international human rights standards to the domestic legal setting. In espousing an approach

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110 (2003) 211 CLR 476.

111 Ibid 492. See also *Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

112 *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476, 492.

113 *Teoh* (1995) 183 CLR 273, 287.

114 (1992) 37 FCR 298, 303–5.

115 Ibid.

that accepts the significance of international human rights law in reflecting universally accepted standards and values relevant to the judicial process, Kirby J has acknowledged the relevance of those standards to judicial discretion in a range of contexts. Where Miles CJ has tackled the specific question without fully addressing the legal basis of his approach, Kirby J's judgments offer a detailed legal basis for his general approach without specifically addressing judicial discretion as a separate issue.

Consequently, the means through which Kirby J has justified the relevance of international standards in this context has varied from case to case, yet has remained consistent with accepted methods of using international law in domestic law. Discretion at common law has been developed to include international human rights standards as matters relevant to the exercise of discretion.[116] Statutory provisions have been interpreted in a manner consistent with international human rights instruments, effectively retaining judicial discretion.[117] In some cases, when that right impacts on the manner in which a discretion is exercised, reference to a right protected at common law is strengthened by reference to its protection at international law.[118] Where international human rights law has merely reflected the conflicting values and principles already present in domestic law,[119] or where an internationally recognised right is simply mirrored in the common law,[120] Kirby J has acknowledged that reference to international instruments and jurisprudence will not necessarily assist the judge in the exercise of statutory discretion. Regarding the reference to the reflection of conflicting values in both systems of law, it is interesting to note the distinction between the approach of Kirby J with that of Miles CJ. For Kirby J, the mirroring of conflicting values in both the international instrument and domestic law may indicate that international law can offer little by way of assistance to Australian judges. For Miles CJ, looking only at the decision in *Hollingshed*, the presence of conflicting values or of 'discretionary factors that are numerous and conflicting'[121] may be relevant to identifying uncertainty in the domestic law.

It is submitted that both approaches are persuasive. However, neither acknowledges the relevance of international jurisprudence as something distinct from the international instrument, and as something that may uncover particular approaches to reconciling or addressing the conflict in values or principles. Many international instruments have been interpreted by various treaty bodies, courts and tribunals, at both international and regional levels. The Human Rights Committee ('HRC'), which is responsible for monitoring compliance with the *ICCPR*, issues comments on the various articles of the *ICCPR*, evaluates state reports submitted to the HRC, and also handles individual communications submitted pursuant to the *First Optional Protocol to the ICCPR*.[122] The work of the HRC represents a valuable resource to Australian judges and counsel in

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116 *Swaffield* (1998) 192 CLR 159, 213.
117 *Serratore* [1995] 38 NSWLR 137, 142–3, 148.
118 See, eg, *Registrar Court of Appeal v Craven (No 2)* (1995) 120 FLR 464, 468.
119 See, eg, *AMS* (1999) 199 CLR 160, 218.
120 *Ousley* (1997) 192 CLR 69, 142.
121 *Hollingshed* (1993) 112 FLR 109, 115.
122 Opened for signature 16 December 1966, 99 UNTS 302 (entered into force 23 March 1976).

understanding the application of the international standards set out in the *ICCPR*. Regional bodies such as the European Court of Human Rights monitor compliance with their regional equivalent of the *ICCPR*,[123] and their jurisprudence on articles that mirror the provisions of the *ICCPR* could also prove to be of assistance to Australian judges. Thus, to assert that both the international and domestic law incorporates conflicting values and principles, without considering the substantial commentary and jurisprudence that is available at the international level, is to adopt an almost cursory approach to the international context.

The decision of *AMS* is perhaps the clearest and most general statement offered by Kirby J, in respect of the relevance of international human rights law to the exercise of discretionary powers. There the court was required to consider an argument put by a mother regarding the relevance of international human rights standards to the exercise of a discretionary power under the *Family Law Act 1975* (Cth). That discretionary decision would most certainly have affected the rights of other family members, but it was a discretion where the paramountcy principle was to apply. This principle requires that those making decisions affecting the welfare of a child must give paramount consideration to the child's interests. In considering the mother's argument, Kirby J made the following statements:

> I would certainly hold that a judge, exercising jurisdiction of the kind invoked here, may properly inform himself or herself of the general principles of relevant international law. This is especially so where those principles are stated in international human rights instruments to which Australia is a party. However, the difficulty in the present case is that any such consideration would not take the judge very far … In a sense, the international conventions relevant to this subject merely express the sometimes conflicting principles which are already reflected in Australian law and court decisions.[124]

The jurisprudence of Kirby J assists in the identification, not only of the benefits of framing discretion by reference to relevant international legal standards, but also of the particular limits which may exist in respect of certain types of discretion. Justice Kirby states:

> Knowledge of the principles of international law may be useful where the amendment of Australia's law has occurred in ways to bring it into conformity with international law. Awareness of international law may also sometimes assist a judge to exercise the applicable statutory powers in a way conformable with basic principle, given the high measure of compatibility which usually exists between the common law of Australia and international statements of fundamental human rights. But save to the extent that the international principles invoked by each party help to put their controversies into a conceptual context and express the basic values which must be taken into account, I do not consider that examination of the international instruments or the jurisprudence which has gathered around them, assist to resolve the problems faced here. International law

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123 See further *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), arts 19(b), 49–54.

124 *AMS* (1999) 199 CLR 160, 218.

> merely reflects, and repeats, the considerations which give rise to those problems. In this case, it does not throw much light on how they should be resolved.[125]

Perhaps the only criticism that could be levelled against the approach of Kirby J is his occasional reference to an absence of any requirement of ambiguity before the resort to international law is warranted. However, the basis of this criticism derives more from the fact that such a view has rarely been endorsed by other judges, rather than by virtue of any rejection of the actual proposition itself. The following statement provides an example of this view espoused by Kirby J:

> To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international jurisprudence.[126]

One case which lends support to this view comes from the Full Court of the Family Court's decision in *B and B: Family Law Reform Act 1995*.[127] The decision of Nicholson CJ, Fogarty and Lindenmayer JJ, in considering the relevance of *CROC* to the interpretation of the *Family Law Act 1975* (Cth), commented that 'the existence of [*CROC*] is likely to be a fact or circumstance that the Court thinks is relevant in the absence of any inconsistent statutory provision'.[128]

Earlier in 1995, Kirby P had adopted a more orthodox position in *Serratore*. In his judgment, he made the following comments on the relevance of the *ICCPR* to a discretion to admit certain evidence:

> In the event of uncertainty of the common law or ambiguity of legislation, an Australia [sic] court may have regard to the provisions of the … [*ICCPR*] … to help resolve the uncertainty or ambiguity …[129]

This notion of uncertainty in the common law, or ambiguity in statutes, has been a common theme in relevant High Court authorities. With regard to statutes enacted specifically in contemplation of an international treaty, Kirby J's view has been consistent with judges such as Gummow J in not perceiving any need for ambiguity in such instances.[130]

In the case of *AMS*, Kirby J also touched upon the particular difficulties faced by judges in exercising discretionary powers and considered the benefit that may be gained by referring to fundamental human rights standards:

> Awareness of international law may also sometimes assist a judge to exercise the applicable statutory powers in a way conformable with basic principle, given the high measure of compatibility which usually exists between the common law of Australia and international standards of fundamental human rights.[131]

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125 Ibid. Other relevant decisions of Kirby J include *Ousley* (1997) 192 CLR 69, 142; *Serratore* [1995] 38 NSWLR 137, 142–3, 148; *Allesch* (2000) 203 CLR 172, 184–5; *Swaffield* (1998) 192 CLR 159, 213; *De L* (1996) 187 CLR 640.

126 *AMS* (1999) 199 CLR 160, 218.

127 (1997) 21 Fam LR 676.

128 Ibid 742.

129 *Serratore* [1995] 38 NSWLR 137, 142–3.

130 *AMS* (1999) 199 CLR 160, 218 (Kirby J).

131 Ibid.

In recognising the normative judgment that is regularly involved in the exercise of a discretion, such decisions represent a particularly suitable focus for Kirby J's argument — also made often in extra-curial comments — that a judge would be wise to decide such questions in accordance with universally accepted principles rather than by reference to subjective values or opinion. This perspective has also been endorsed by French J of the Federal Court in the case of *Schoenmakers*. His Honour considered the relevance of art 9 of the *ICCPR*, which deals with unlawful and arbitrary detention, to a bail application pending extradition. On that issue, he offered the following analysis:

> The reference … is not intended to suggest that Mr Schoenmakers' detention has been unlawful but rather serves as an indication of the value placed by Australia, as part of the international community, on the liberty of the individual and the presumption in favour of that liberty. That presumption must, of course, give way to specific statutory provisions, but where those provisions do, as is the case in the *Extradition Act*, allow for normative judgements of the special circumstances under which bail may be granted, then the presumptions arising under the common law and in relevant international instruments may be taken into account.[132]

The aspect of Kirby J's approach, which does not perceive the need for uncertainty and ambiguity before resort to international law is justified, is closely related to his views on how judges should approach normative judgments. The element of subjectivity that characterises such decisions is also found in relation to discretionary powers. Thus, whether Kirby J's view ever finds support from a majority of the High Court or not, both discretionary powers and normative judgments involve uncertainty in the decision-making process and may be treated according to accepted principles that do require the presence of ambiguity.

While Kirby J's view, which does not require the presence of ambiguity, has not received support from other High Court judges to date, there is support for adopting a broad approach in relation to ambiguity. This support for a wide conceptualisation of ambiguity can be found in the decision of Mason CJ and Deane J in *Teoh*:

> Where 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, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.
>
> It is accepted that a statute 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. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this

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[132] Ibid 75.

> context, there are strong reasons for rejecting a narrow conception of ambiguity.[133]

Whatever the position taken in respect of the question concerning ambiguity, the application of accepted principles to the exercise of discretionary powers is clear. If discretion is seen as the absence of fixed rules[134] and as the ability to choose between different courses of action,[135] discretionary powers are of themselves inherently uncertain. Indeed, the very benefit of a discretionary power, unconfined or only partially confined by fixed rules, is to assist the decision-maker in providing 'individualized justice'[136] in different cases. Discretionary powers, therefore, are particularly suited to a construction that favours the consideration of Australia's international obligations.

The more controversial elements of Kirby J's approach to the issue may influence the development of the law in future decisions. However, based on present authority, it would appear that some element of uncertainty or ambiguity must exist as a precondition for resort to international law. In this context, a wide conception of ambiguity, as outlined by Mason CJ and Deane J in *Teoh*, should be favoured. However, the advantage of Kirby J's broader approach to the subject is its capacity to illuminate the subjective nature of certain judicial functions and the benefits to be gained by referring to universally accepted standards.

III CONCLUSIONS FROM THE CASE LAW

As is evident from jurisprudence in the area of international human rights law and judicial discretion, trends have occurred more by accident than through a considered progression of judicial thought and the development of legal principle across jurisdictions. This is largely due to the fact that individual judges have played important roles in the emerging case law. Though they occasionally cite their own previous decisions as authority for their respective approaches, no judicial attempt has yet been made to reconcile the approaches of different judges and courts that have contributed to Australian jurisprudence on the issue. Consequently, there remain a number of unresolved questions concerning the relevance and impact of international human rights law to the many and varied discretionary powers exercised by judges. Most important is the actual legal basis upon which legitimate reference may be made to international standards in this context. It is submitted that the approaches taken by Kirby and Perry JJ, situated within the established framework for the judicial reference to, and use of, international legal standards, represent more acceptable approaches. The decision in *Teoh* cannot sustain an extension of the doctrine articulated in that case to the exercise of judicial discretion. The legitimate expectation generated in that case rested on the actions of the executive in ratifying treaties, and only

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133 *Teoh* (1995) 183 CLR 273, 288 (citations omitted).

134 See, eg, Hawkins, 'The Use of Legal Discretion', above n 10, 11.

135 De Smith and Evans (eds), above n 9, 278; Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (2nd ed, 1990) 1–2; Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia Law Review* 359, 365.

136 Bell, above n 38, 3.

extended to the exercise of administrative discretion by the executive arm of government.[137]

However, the decisions of Miles CJ are significant in that they directly acknowledge the need for articulating principles regarding the relationship between international standards and the exercise of judicial discretion in Australia. Existing principles speak directly of the judge's role in relation to the interpretation of statutes and the development of the common law, as well as to the administrative decision-maker in exercising discretionary powers. Yet, the clear extension of those same principles to the exercise of a judge's discretionary powers has only been done sporadically and largely by individual judges sitting alone in separate jurisdictions. The Australian community generally, and judges specifically, stand to benefit from a clear articulation by the High Court of the relevance of international legal standards to the exercise of judicial discretion. Any such articulation would merely require the extension of existing principles to this context.

In practical terms, the internationally recognised right relevant to the exercise of a discretion will be limited in certain circumstances. As Kirby J acknowledged in cases such as *Ousley*[138] and *AMS*,[139] where international law merely reflects the common law, including instances where rights are numerous and conflicting, international law may be of little assistance to the judge. In addition, the decision of the Family Court in *B and B: Family Law Reform Act 1995* raises a question regarding the degree of acceptance by the international community of various instruments. In that case, the high number of ratifications of *CROC* was significant in considering the role that it plays in domestic law. Consistent with the approach of Kirby J, however, the ratification by Australia of instruments recognising universal human rights norms should provide a sufficient basis for warranting resort to such instruments in appropriate contexts. The number of ratifications lodged in regard to *CROC* merely strengthens that basis.

Finally, the legal principles that apply to the exercise of judicial discretion in Australia, and the grounds upon which such discretion may be subject to review, apply in this context.[140] The fact that only limited grounds for review are available reflects the nature of discretionary powers and the degree of latitude accepted within that judicial function. The significance of the broad legal principles applicable to the exercise of judicial discretion rests on the fact that, irrespective of the legal basis upon which international human rights law is considered relevant to domestic law, there are limits on the extent to which the exercise of discretion can be regulated. While international human rights law may be accepted as a relevant factor to be considered in the exercise of discretion, the weight and priority attached to that factor in a particular case is determined solely by the judge. Simply because a decision would have been decided differently by another judge does not make the exercise of that discretion reviewable at law.[141]

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137 On this point, see the decision of Bleby J in *Smith v R* (1998) 98 A Crim R 442.

138 (1997) 192 CLR 69, 142.

139 (1999) 199 CLR 160, 218.

140 For the fundamental statement of these principles, see *House v The King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).

141 Ibid.

While the legal basis upon which international human rights law may be referred to in the exercise of judicial discretion cannot rest on the authority of *Teoh*, an additional distinction may be made in relation to that decision. The High Court's decision in *Teoh* was not well received by the government, and successive federal governments have made a number of attempts to overturn the decision through both executive statements and statutory proposals.[142] However, none of these attempts at the federal level have been successful. In respect of certain instances of judicial discretion, the ability of the federal Parliament to interfere via statute with the exercise of that discretion may be limited by the *Australian Constitution*. The notion that implied guarantees may be found in the separation of judicial power under Chapter III of the *Australian Constitution* is a notion that is widely adhered to by constitutional lawyers. However, my view on this matter and one which I have considered in detail elsewhere, is that Chapter III of the *Australian Constitution* protects the inherent powers of the federal courts rather than specifically protecting the rights of individuals.[143] These inherent powers relate to the ability of superior courts to protect their own processes, an example of which is the power to stay a trial in cases such as *Dietrich*. Other inherent powers include: the power to dismiss an action for unreasonable delay; the power to punish for contempt of court; the power to stay execution of a judgment; the power to dismiss vexations or frivolous proceedings; and the power to exercise protective powers over children and certain other classes of persons.[144] Thus, while inherent powers are concerned with the courts rather than individuals, they are powers that are exercised to protect the integrity of the courts' processes and that may indirectly benefit and protect the interests of individuals affected by those processes.

What is of particular importance in the present context is that inherent powers are discretionary in nature. Thus, when the courts resort to international human rights law in exercising these discretionary powers and in developing guidelines for their exercise, a constitutional issue emerges. Unlike the situation that arose in relation to *Teoh*, the ability of federal Parliament to pass legislation interfering with the exercise of those discretion will be limited by Chapter III of the *Australian Constitution*. Specifically, the legislative removal of any of the inherent powers is likely to be considered unconstitutional, and the capacity to modify or direct the exercise of those powers would be significantly limited. To the extent that any legislative direction or modification is deemed to require the court to act in a non-judicial manner, the legislation would be invalid. Therefore, the potential relevance of international law in this context is extremely important, as many international human rights are relevant to the exercise of the inherent powers of courts, particularly in criminal and family law matters.

From a detailed consideration of the existing case law, it is clear that the potential significance of international human rights law to the exercise of judicial discretion is yet to be fully realised in Australia. The breadth of cases, discretion and human rights that have already been raised in litigation are an indication of

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142 For a discussion of the political response to *Teoh*, see Wendy Lacey, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29 *Federal Law Review* 219.

143 See Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31 *Federal Law Review* 57.

144 For a list of inherent powers, see ibid 66.

the potential impact of international law in judicial decision-making. The realisation of that potential is more likely to occur, however, if the questions surrounding the nature and basis of this legal development are adequately resolved. In answering these questions, the courts will no doubt benefit from a detailed consideration of the contributions already made in this area by several judges, including Miles CJ and Kirby and Perry JJ.