A DIVERGENT PATH: A COMPARATIVE INVESTIGATION INTO WHY AUSTRALIA IS WITHOUT A BILL OF RIGHTS

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CONSTITUTIONAL LAW—COMPARATIVE LAW—BILL OF RIGHTS—UNITED KINGDOM—CANADA—NEW ZEALAND

ABSTRACT

Australia is distinct among contemporary western nations because it does not have a bill of rights. It is vital to understand why this is the case if there is to be informed discussion on the further development of rights protection in Australia. Any decision to progress with a national rights document would be futile if the barriers to its success are not pinpointed and overcome. This article comparatively investigates Australia and three other Commonwealth countries—the United Kingdom, Canada, and New Zealand. Ultimately, the comparative analysis reveals that while it is possible for Australia to adopt a bill of rights, a proposal will not be successful if it simply replicates a rights model adopted by the nations identified above. A successful bill of rights must cater to the nuances that are unique to Australia's legal system and complex sociopolitical climate.

I INTRODUCTION

The absence of a national bill of rights places Australia on a divergent path from its most legally and politically comparable countries—including Commonwealth nations such as the United Kingdom, Canada and New

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Zealand. This divergence has earned Australia the moniker of being the only Western democracy without a bill of rights. While much focus has been placed on whether Australia should or should not adopt a bill of rights, there is far less foray into the barriers that see proposals fail time and time again. It should be noted that the absence of a bill of rights is certainly not for lack of trying. Several rights bills have been proposed since constitutional framer, Andrew Inglis Clark's first attempt in 1891—all without success.

The methodology used in this article will be quasi-controlled comparisons against three countries that bear very similar legal structures and comparable sociocultural values to Australia—the United Kingdom, Canada, and New Zealand. Each country operates under a common law system, are Commonwealth nations, and all uphold parliamentary sovereignty as a fundamental legal principle. Whilst none of these four nations included a bill of rights with their original Constitutions, all except Australia have subsequently adopted such a bill. This comparative set allows the research to investigate one obvious dissimilarity—the absence of a bill of rights—with relatively limited opportunity for explanations to be attributed to stark contrasts in legal systems or cultural values. The scope of this article will, therefore, be limited to discussion of these four countries.

Part II of this article will provide a brief background to the debate and sets up the question to be resolved. Part III will establish a theoretical framework from which the central argument against a bill of rights is to be understood. Part IV will analyse the viability of implementing various bill of rights models into the Australian legal framework. Part V will investigate the obstacles to a national bill of rights presented by Australia's sociopolitical climate. Part VI will conclude that mere replication of rights models from comparative nations will bring the continued failure of bill of rights proposals in Australia. While a national bill of rights in Australia is possible, it must

cater to the unique nuances of Australia's legal system and sociopolitical climate.

II BACKGROUND

A national bill of rights in Australia is the subject of a seemingly eternal debate, passed down through generations of politicians and academics, advocates and opponents—its origins trace back to discussions amongst the framers regarding its inclusion in the *Australian Constitution*. Andrew Inglis Clark was inspired by the rights tradition in the United States and proposed a draft that reflected that inspiration.[1] A bill of rights was not included in Clark's 1891 constitution proposal, however, it did propose several rights protections—most of which were rejected.[2] Clark's proposal was viewed as an extreme departure from Australia's sense of national identity as being one that is closely associated with British institutions, such as the Westminster model of responsible government.[3]

Academics attribute two reasons to the framers' decision to exclude a bill of rights. The dominant understanding discussed in the literature is the belief that the framers wanted the *Australian Constitution* to act as a blueprint of how Australia would operate, almost exclusively reflecting functionality and utilitarianism, and indicating a strong commitment to British parliamentary sovereignty.[4] The other perspective on the framers' motivations suggests that there was an objective to establish a means of abrogating the rights and interests of particular sections of Australia's community. Specifically, that the framers sought to maintain race-based

1 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 60.
2 Ibid.
3 George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (New South Wales Publishing, New ed, 2017) 47–8.
4 Williams and Hume (n 1) 58–9.

distinctions.[5] Strong rights protection provisions were deemed problematic as they could be applied to the minority population.[6]

These explanations for why the *Australian Constitution* did not include a bill of rights can be accepted, but they naturally lead to the question of why contemporary rights legislation proposals continue to be met with rejection. Framers' motivations as to the inclusion of a bill of rights are either no longer relevant, or, in the case of denying rights to minority groups—they were never excusable. Australia's commitment to the United Kingdom has diminished considerably since Federation. And, increasingly, globalisation and changing economic and strategic alliances have propelled Australia to look beyond the United Kingdom and develop its own national identity. If it was accepted that the United Kingdom example continued to carry the most weight in influencing Australia's legal framework, it would follow that the *Human Rights Act 1998* (UK) ('HRA')[7] should have received a similar level of commitment or mimicry from Australia.

Additionally, the framers' choice to prioritise utilitarianism and pragmatism and exclude a bill of rights from the *Australian Constitution* is now also an untenable explanation as to why Australia is without a bill of rights. A solution to this concern is the statutory rights model, as adopted in the United Kingdom and New Zealand. This is an option that would not affect the pragmatic nature of the *Australian Constitution*, as the rights protection would be a separate document. Thus, if the factors that originally determined the status of a bill of rights in Australia are refutable, why then, is contemporary Australia without a bill of rights?

III THEORETICAL FRAMEWORK

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5 Ibid 60.
6 Ibid.
7 *Human Rights Act 1998* (UK) ('*HRA*').

First, it is important to understand the arguments against Australia adopting a bill of rights if we are to comprehend why bill of rights proposals have failed. In this article, judicial review will refer exclusively to the review of legislation and not decision-making by the executive. Legal academic Jeremy Waldron is an outspoken critic of strong judicial review, which often has a direct connection to a bill of rights. Judicial review is a process by which courts examine the lawfulness of actions and decisions made by the executive and legislative branches of government. Waldron's theory, by extension, is a criticism of bill of rights models that are contingent on the use of strong judicial review. [8] His argument essentially purports that a bill of rights model green lighting the use of strong judicial review would permit excessive judicial power, extending the possibility of judicial activism while undermining parliamentary sovereignty.[9] Waldron's theory is a key argument employed by opponents to a bill of rights in contemporary Australian debate.[10]

An example can illustrate the key difference between 'strong judicial review' and 'weak judicial review' in the context of a bill of rights. In circumstances where ordinary statute contradicts provisions of the bill of rights, strong judicial review allows courts to either refuse the application of the statute; change the effect of a statute so that it no longer breaches the protection of individual rights; or strike down the legislation entirely, though this last avenue is uncommon. [11] By contrast, in a weak judicial review system, the courts' power regarding legislation that violates rights, is limited to an advisory function. [12] Courts may scrutinise the legislation on its adherence to protecting civil rights, but it cannot refuse its application or

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8 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1406.

9 Hilary Charlesworth, 'Who Wins Under a Bill of Rights?' (2006) 25(1) *University of Queensland Law Journal* 39, 39–40.

10 Ibid.

11 Waldron (n 8) 1355.

12 Ibid.

modify the effect of its operation.[13] In some jurisdictions, courts may issue a 'declaration of incompatibility', however, this action is purely advisory and not binding on any parties.[14] In the Australian context, judicial review of legislation in either form is not available to federal courts, as there is no federal bill of rights document that statutes must conform, or attempt to conform, with.[15]

Waldron's critique—often referred to as 'anti-judicial review'—puts forward two key arguments. First, Waldron contends that a bill of rights model allowing unelected judges the power to invalidate certain legislation is democratically illegitimate.[16] Second, Waldron argues that a bill of rights is not required for adequate rights protection because statutes passed in parliament by democratically elected representatives should sufficiently fulfil this role.[17] Waldron argues that democratically elected representatives are entrusted with their legislative powers, and, therefore, an established system that aims to protect the rights of the public already exists.[18] A bill of rights mechanism of protecting rights—particularly one that involves the use of strong judicial review—is, therefore, deemed both undemocratic and unnecessary by Waldron.[19]

Analysing the barriers to an Australian bill of rights through anti-judicial review theory can explain why adopting a national bill of rights in Australia is difficult from both a legal and political standpoint. Regarding issues with the law, understanding Waldron's arguments helps to explain why a constitutionally entrenched bill of rights model is deemed so unlikely to be successful that it has been abandoned as a potential option by many bill of

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13 Ibid 1355–6.
14 Ibid 1355.
15 Charlesworth (n 9) 39.
16 Waldron (n 8) 1406.
17 Ibid 1406.
18 Ibid 1360.
19 Ibid.

rights proponents.[20] Politically, the sentiments of the anti-judicial review theory are revealing as they are often expressed by politicians who have power over the success of the bill in Parliament.[21] This is largely because at the heart of the contemporary case against a bill of rights lies the claim that it threatens democracy by disproportionately empowering the judiciary.

Waldron's critique, however, is still limited in explaining why a national bill of rights remains unsuccessful. For instance, it cannot explain why referenda seeking to introduce additional rights provisions to the *Australian Constitution* have historically failed by a landslide.[22] Nor is Waldron's critique able to account for all the legal and political barriers to a successful bill. Why, for example, is an ordinary statutory bill of rights that would not invoke strong judicial review also unsuccessful in Australia? Clearly, there are numerous factors underpinning why Australia lacks a bill of rights at the federal level. While Waldron's theory may be used to understand the more obvious reasons for its lack of success, it does not account for the smaller, seemingly unrelated factors that come together to create a sociopolitical culture that prevents the adoption of a bill of rights.

IV LEGAL ANALYSIS

A *The United Kingdom Dialogue Model*

Waldron's sentiment of anti-judicial review was highly prevalent in the United Kingdom when discussions were underway regarding the potential for a bill of rights to be enacted.[23] In this regard, concerns over the consequences of a bill of rights observed in the United Kingdom prior to 1998 resonates

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20 Bruce Stone, 'Why Australia Has No National Bill of Rights' (Conference Paper, Australasian Political Studies Association Conference, 30 September 2013) 14.

21 Paul Kildea 'The Bill of Rights Debate in Australian Political Culture' (2003) 9(1) *Australian Journal of Human Rights* 65, 66.

22 Williams and Hume (n 1) 60.

23 Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1008, 1012.

with the type of resistance Australian proponents for a bill of rights still seek to overcome.[24] How, then, was the United Kingdom ultimately successful in introducing a bill of rights, while Australia has struggled for decades to achieve the same outcome?

Analysing the legal factors that led to the adoption of the HRA in the United Kingdom could uncover a potential blueprint for overcoming barriers to a national bill of rights in Australia. Alternatively, it could illuminate any uniqueness in Australia's legal climate that makes the United Kingdom's journey to achieving rights protection impossible to replicate at Australia's national level. While the adoption of the HRA was influenced by certain sociopolitical factors—including the European Convention on Human Rights ('the Convention'), which will be discussed in Part V—first, the United Kingdom's establishment of a rights document will be discussed from a purely legal perspective. Specifically, this discussion will focus on the rights model proposed in the bill, most commonly referred to as the 'dialogue' model, which was key to the HRA's likelihood of success in Parliament.

1 *Features of the United Kingdom 'Dialogue' Model*

Academic Stephen Gardbaum characterises the dialogue model of a bill of rights as a 'new Commonwealth model'.[25] The dialogue model has emerged as an alternative option to the extremes of the spectrum—absolute parliamentary sovereignty and judicial supremacy[26]— and has been adopted by Commonwealth countries Canada,[27] New Zealand,[28] and, most recently, the United Kingdom.[29] The dialogue model's favourability in the United Kingdom arose due to its structural features, which allow the HRA to protect

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24 Stone (n 20) 14.
25 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2nd ed, 2013) 18.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.

rights by empowering the courts without abandoning parliamentary sovereignty.[30] Aileen Kavanagh fittingly describes the legislation as a 'compromise solution'.[31] This compromise is entrenched in the following key sections of the HRA.

Section 2 of the HRA establishes a requirement for courts to consider any decision or advisory opinion made by the European Court of Human Rights in a relevant case where protected rights are concerned, though the courts are not bound by these judgments. Section 3 requires courts to apply an interpretation of legislation that aligns with the rights protected in the Convention wherever possible. When such an interpretation cannot be made, the HRA empowers higher courts to put forth a 'declaration of incompatibility' to Parliament, a feature established under section 4 of the HRA. There is no requirement for courts to exercise this power.[32]

Section 10 of the HRA allows Parliament to respond to courts by establishing the power for a government minister to acknowledge the court's declaration. They may choose to devise a 'remedial order' to adjust the legislation and remedy the incompatibility; however, as observed above, there is no obligation for Parliament to respond to the court.[33] The court's declaration is purely advisory in nature.[34] Therefore, the HRA can be said to offer a form of weak judicial review.

Section 6 is described as 'the most significant provision of the HRA',[35] creating a legal obligation for all public authorities—with the exception of Parliament—to act accordingly with the Convention. Significantly, the Scottish Parliament and the Northern Ireland Assembly are considered public authorities under section 6 of the HRA. Courts are, therefore, empowered to

30 Kavanagh (n 23) 1014.
31 Ibid.
32 HRA (n 7) s 4.
33 Ibid s 10.
34 Ibid.
35 David Feldman, 'Extending the Role of the Courts: The Human Rights Act 1998' (2011) 30(1) *The Parliamentary Yearbook History Trust* 65, 84.

invalidate legislation in these jurisdictions if they do not uphold the Convention's rights. Essentially, this means that while parliamentary sovereignty is protected in the United Kingdom's central Westminster Parliament, a separate system of strong judicial review gives courts greater leverage in the United Kingdom's devolved jurisdictions.

Finally, s 19 of the HRA places an onus on lawmakers to legislate in line with the Convention by requiring the minister introducing the bill to make a statement regarding whether the contents are compatible with the Convention. If the minister is unable to make a statement of compatibility, they need only state that they 'nevertheless wish the house proceeds with the bill'.[36]

2 *Favourability of the Dialogue Model in the United Kingdom and Australia*

The United Kingdom's bill of rights model accurately reflects Kavanagh's 'compromise solution' description.[37] Every provision that grants courts an opportunity to check the legislature's power is curtailed by the non-mandatory nature of Parliament's compliance. The dialogue model's ability to preserve parliamentary sovereignty was, from a legal perspective, the key to its success[38] and relatively positive reception.[39] This lesson from the United Kingdom was considered by bill of rights proponents in Australia, who recognised that a dialogue model that does not interfere with parliamentary sovereignty would draw the least resistance from those sharing Waldron's concerns.[40] For this reason, the dialogue model was labelled the

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36 *HRA* (n 7) s 19.
37 Kavanagh (n 23) 1014.
38 Ibid 1012.
39 Ibid.
40 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 880.

'front running option'[41] for Australia after academics observed its success in the United Kingdom.

Following the first decade after the adoption of the HRA in the United Kingdom, the debate around an Australian bill of rights changed, evidenced by shifting attitudes of receptivity within the community. In 2007, Ron Dyer, a politician who had previously rejected the Australian Bill of Rights Bill 2001 (Cth) at the time it was introduced to Parliament, stated, 'I have had cause to revise my views very substantially…The model I consider most attractive for use in the Australian context is the [HRA].'[42] Seemingly, the legal factors that made a bill of rights successful in the United Kingdom—that is, the use of the dialogue model and its weak form of judicial review—were the same legal elements required to make an Australian bill of rights supported and possible.

It soon appeared even more likely that a national bill of rights in Australia based on the structural features of the HRA would be introduced when the Australian Capital Territory ushered in a state-level bill of rights statute, the *Human Rights Act 2004* (ACT),[43] followed by Victoria two years later, introducing the *Charter of Rights and Responsibilities Act 2006* (Vic).[44] The Australian Capital Territory and Victoria formed consultation committees to investigate the potential of a bill of rights for their territory or state; each concluding that the dialogue model was the most viable option in Australian contexts.[45] Many bill of rights supporters believed that the statutory bill of rights adopted in the Australian Capital Territory and Victoria would lay 'the groundwork for the implementation [of a bill of rights] in the

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41 Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(16) *Australian International Law Journal* 219, 220.

42 Ron Dyer, 'Should Australia have a Bill of Rights?', *Evatt Foundation* (Web Page, 2007) <https://evatt.org.au/papers/should-australia-have-bill-rights.html>.

43 *Human Rights Act 2004* (ACT).

44 *Victorian Charter of Human Rights and Responsibilities 2006* (Vic).

45 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (Report No 03/0068, May 2003).

Australian national government, inspired by approaches developed some years earlier in…Great Britain.'[46]

Ultimately, however, the growing likelihood that the dialogue model had opened a door for a potential bill of rights to be supported and accepted at a national level was, unfortunately, short-lived. The High Court's 2011 decision in *Momcilovic v The Queen* ('*Momcilovic*'),[47] ended the possibility of adopting a dialogic bill of rights model similar to the HRA, or the statutes in the ACT and Victoria.[48] As will be explored, *Momcilovic* confirmed that the dialogue model could not be adopted at a federal level due to its incompatibility with the strict separation of judicial power.[49]

3 *The Legal Incompatibility of the Dialogue Model*

A combination of three High Court precedents, culminating in *Momcilovic*, terminated any chance of the dialogue model being introduced in Australia at a federal level but confirmed its validity in states and territories. These cases were *R v Kirby; Ex parte Boilermakers' Society of Australia ('Boilermakers Case')*;[50] *Kable v Director of Public Prosecutions (NSW)* ('*Kable*');[51] and *Momcilovic*.[52]

The key implications of the *Boilermakers case* can be summarised into two main points. First, the High Court ruled that Commonwealth judicial power, as established in s 71 of the *Australian Constitution*,[53] cannot be exercised by any tribunal other than a court established or authorised by Chapter III of the *Australian Constitution*.[54] A Chapter III court refers to the

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46 Stone (n 20).
47 (2011) 245 CLR 1, 45 [92] ('*Momcilovic*').
48 Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1, 7.
49 Ibid 7.
50 (1956) 94 CLR 254, [489]-[490] ('*Boilermakers Case*').
51 (1996) 189 CLR 51, [35] ('*Kable*').
52 *Momcilovic* (n 47) 45, [92].
53 *Australian Constitution* s 71.
54 Gabrielle J Appleby, 'Imperfection and Inconvenience: Boilermakers' and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265, 268.

High Court of Australia and any other federal courts created by Parliament through the authority of the *Australian Constitution*.[55] The Court also found that Chapter III courts cannot be invested with any non-judicial powers.[56] Therefore, the *Boilermakers case* reaffirmed the separation of powers doctrine, ensuring that the federal judiciary cannot operate beyond the scope of the powers set out in Chapter III of the *Australian Constitution*.[57] Furthermore, the *Boilermakers case* also attests that Parliament cannot confer certain functions on a court if there is no source in the *Australian Constitution* that authorises Parliament to do so.[58] This precedent is significant to the invalidity of the dialogue model because, in 2011, the High Court ruled in *Momcilovic* that the 'declaration of inconsistent interpretation' feature set out in s 36(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was a non-judicial power.[59] Thus, the declaration of incompatibility feature, which establishes the model's namesake 'dialogue', cannot be exercised at the federal level because doing so falls outside the scope of powers established under Chapter III.[60]

Momcilovic, however, did not invalidate the dialogue model at a State level. To understand the reasoning for this, we must first look to *Kable,* where a principle known as 'institutional integrity' was established.[61] *Kable* affirmed that State Parliaments can confer non-judicial powers onto State courts; however, Gaudron J noted that there was a limitation to the type of power that could be conferred upon State courts '…so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth.'[62] As State courts are, at times, repositories of federal judicial power, non-judicial powers bestowed upon State courts must

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55 Ibid.
56 Ibid
57 Ibid.
58 Ibid.
59 *Momcilovic* (n 47) 45, [92].
60 Ibid.
61 Ibid 8.
62 *Kable* (n 51) 51, [35].

not impair the institutional integrity of federal courts. In *Momcilovic*, however, French CJ concluded that while the declaration of inconsistency function is indeed a non-judicial power, it does not compromise the institutional integrity of State courts.[63] Instead, it merely directs Parliament to an incompatibility between legislation and a Charter right, while the ultimate decision regarding the incompatibility still remains within the legislature's responsibility.[64]

This means that together, the *Boilermakers case*, *Kable* and *Momcilovic* confirm that human rights legislation based on the dialogue model is only valid at a State and Territory level in Australia. The most recent state to adopt a dialogue model similar to the United Kingdom's HRA is Queensland, with the *Human Rights Act 2019* (Qld),[65] which commenced on 1 January 2020.

The UK's HRA demonstrates that a bill of rights framework can be implemented without sacrificing parliamentary sovereignty. This compromise solution provided by the dialogue model initially appeared to be very well-received in federal Parliament as a viable rights option. Support for this framework has been reflected at the State level. However, the High Court judgment in *Momcilovic*, [66] in combination with the judgment in the *Boilermakers case*,[67] renders the key characteristic of the dialogue model—the declaration of incompatibility—unconstitutional at a federal level. The dialogue model's legal incompatibility at a federal level thus forces national bill of rights proponents to look elsewhere for a viable rights model to be implemented in Australia.

B *Canada Charter Model*

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63 *Momcilovic* (n 47) [605].
64 Ibid
65 *Human Rights Act 2019* (Qld).
66 *Momcilovic* (n 47) 45, [92].
67 *Boilermakers* (n 50) [489]-[490]

The incompatibility of the dialogue model with the strict separation of powers doctrine in Australia only rules out one model amongst many; it does not explain why Australia has not adopted a national bill of rights in any other form. However, the pervasiveness of Waldron's argument against strong judicial review in Australia makes many other rights protection models unlikely to receive the necessary support to succeed in Parliament. One such model is Canada's *Canadian Charter of Rights and Freedoms 1982* ('Canadian Charter'). The likelihood of Australia adopting a model similar to the Canadian Charter is slim, the reasons for which can be illustrated by first considering the context and features of the Canadian legal system.

1 *Context and Features of the Canadian Charter Model*

Gardbaum describes Canada's rights system as the 'founding member'[68] of the new Commonwealth rights model that sits in the middle of a spectrum between parliamentary sovereignty and judicial supremacy.[69] Prior to the Canadian Charter, Canada had enacted a statutory rights protection known as the *Canadian Bill of Rights* 1960 ('CBOR').[70] This model was widely perceived as an unsuccessful attempt at protecting rights.[71] The main consensus from academics and Canadian citizens alike was that it was 'ineffective'[72] as a result of several court interpretations of the CBOR that counter-intuitively limited the capacity for rights to be protected.[73] One such interpretation—known as the 'frozen concepts principle'—saw the courts interpret s 1 of the CBOR, which refers to 'rights and freedoms [that] have existed and shall continue to exist',[74] to mean that for a right to be protected

68 Gardbaum (n 25) 18.
69 Ibid.
70 *Canadian Bill of Rights*, SC 1960, c 44.
71 Gardbaum (n 25) 18.
72 Ibid.
73 Ibid.
74 *Canadian Bill of Rights*, SC 1960, c 44, s 5.

by the CBOR, it must have already been in existence on the day the statute was enacted.[75]

In 1982, Canada sought to remedy the CBOR's ineffectiveness by replacing it with the Charter. Two critical structural differences set the Charter and the CBOR apart. The first is that the Charter would apply to all of Canada, whereas the CBOR was only binding on the federal government and not the provinces.[76] Secondly, and significantly, the Charter is constitutionally entrenched and, therefore, superior to ordinary legislation.[77] By extension, Canada's rights model involves strong judicial review as the Charter authorises courts to strike down legislation that is inconsistent with rights protected by the Charter.[78] However, s 33 of the Charter attempts to prevent complete judicial supremacy and preserve a level of parliamentary sovereignty.[79]

Section 33 of the Charter is commonly known as the 'notwithstanding' clause; it empowers Canada's Parliament or a provincial legislature to declare that an Act will 'operate notwithstanding a provision included in…this Charter'.[80] Exercise of the notwithstanding clause is limited to a maximum of five years but may be reapplied indefinitely.[81] Like the United Kingdom's HRA, Canada's Charter model attempts to strike a compromise between legislative and judicial power, albeit in wholly different ways. While the United Kingdom's dialogue model leaves parliamentary sovereignty as the default position by placing the burden on the courts to issue a declaration of incompatibility and relying on a remedial response from Parliament; the

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75 Gardbaum (n 25) 19.
76 Ibid 20.
77 Ibid.
78 Ibid.
79 Ibid.
80 *Canadian Charter of Rights and Freedoms,* s 33, Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
81 Ibid.

Canadian constitutional model places the burden on legislatures to immunise an Act from the courts' strong-judicial review.

Canada's original model involved a compromise feature that paved the way for Gardbaum's new Commonwealth model that reflected neither absolute parliamentary sovereignty nor judicial supremacy. Over time, however, the notwithstanding clause has become merely a symbolic gesture of compromise, as the power is largely unused by legislatures for fear of public scrutiny and political embarrassment.[82] Therefore, this model essentially gives courts the 'de facto final word'.[83]

2 *Charter Model in Australia*

The above analysis of the Canadian rights model gives rise to two main legal barriers that may preclude Australia from following in Canada's footsteps. First, the formidable process required for constitutional amendment in Australia. Secondly, the Canadian model authorises the use of strong judicial review. Regarding the first legal barrier, Canada did not need to face an onerous constitutional amendment procedure when it sought to introduce the Charter in 1982. Previously, the *Canadian Constitution* lacked an amendment procedure, and instead, any constitutional changes prior to 1982 were made through Acts passed by Parliament that first required the consent of provincial legislatures.[84] This was the far simpler procedure Canada underwent to adopt the Charter. In fact, the inclusion of the notwithstanding clause in s 33 is attributed to the federal government's attempt to acquire the support of the provinces.[85]

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82 George Egerton, 'Writing the Canadian Bill of Rights: Religion, Politics, and The Challenge of Pluralism 1957–1960' (2004) 19(2) *Canadian Journal of Law and Society* 1, 6.

83 Gardbaum (n 25) 18.

84 Ted Morton, 'Who Guards the Guardians? Institutional Checks on the Power of Judicial Review: Canada in a Comparative Perspective' (Paper presented at the Canadian Institute for the Administration of Justice, Calgary, 2001).

85 Ibid.

By contrast, adopting a rights model through constitutional amendment would be an extremely demanding process for Australia, where a successful referendum is notoriously difficult to achieve. As of 2019, out of 44 nationwide referendums that have been held, only eight have been carried.[86] Various sociopolitical drivers behind the high failure rate of referendums in Australia will be explored further in pt IV, however, the primary legal inhibitor is the onerous procedure for amendment laid out in s 128 of the *Australian Constitution*. The process requires approval from: (1) absolute majorities in both the House of Representatives and the Senate; (2) a majority of electors in a majority of states; and (3) a majority of electors nationwide.[87] These conditions are a 'very strict test of political and public support',[88] which leads to the second legal barrier that severely limits the possibility of a constitutional bill of rights.

The favourability of the HRA model in both the United Kingdom and Australia was, in large part, due to its weak judicial review system that protected parliamentary sovereignty. In contrast, the symbolic nature of the Charter's notwithstanding clause has effectively rendered the Canadian Charter a 'de facto' strong judicial review system. However, irrespective of this, a constitutionally entrenched bill of rights would be too difficult to implement in Australia given the formidable process of constitutional amendment. This, in combination with the pervasiveness of Waldron's strong judicial review criticisms, means a bill of rights framework modelled from the Canadian Charter model is likely to be sharply rejected by legislators and bill of rights opponents in Australia.

C *New Zealand Statutory Model*

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86 Williams and Hume (n 1) 63.
87 Australian Constitution s 128.
88 Stone (n 20).

Of the three Commonwealth countries most routinely discussed in comparison to Australia regarding legal and sociopolitical matters, neither the United Kingdom nor Canada present a rights model that is both legally compatible with the *Australian Constitution* and protects parliamentary sovereignty. Therefore, the attention of this article shifts to New Zealand, and specifically, the *New Zealand Bill of Rights Act 1990* (NZL) ('NZBORA').[89]

In 1985, a White Paper, presented by the Minister of Justice in New Zealand, called for the adoption of an entrenched bill of rights similar to Canada's model.[90] This suggestion was met with resounding opposition from the New Zealand Parliament, with the opinion that New Zealand was 'not yet ready'.[91] However, this was not the first time a potential bill of rights had been debated in New Zealand. The enactment of Canada's first rights model in 1960 inspired discussion in New Zealand, eventually leading to a bill being introduced to the New Zealand Parliament by the National Party in 1963.[92] This bill was met with overwhelming opposition amongst parliamentarians—their main arguments that it was not only unnecessary, but that 'judges do not have democratic legitimacy' [93] and, therefore, 'its enactment would be positively against the public interest'.[94] These reactions to the 1963 proposal reveal that, like the current legal climate in Australia, anti-judicial review sentiment was an issue for New Zealand bill of rights proponents to contend with.[95]

By the 1985 White Paper proposal, however, public attitudes surrounding a bill of rights in New Zealand had shifted, becoming more receptive to the concept.[96] Arguably, this shift can be accounted for by the

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89 *New Zealand Bill of Rights Act 1990* (NZ).
90 Department of Justice (NZ), *A Bill of Rights for New Zealand: A White Paper* (Report, 1985).
91 Kenneth J Keith, 'The New Zealand Bill of Rights Experience: Lessons for Australia' (2003) 9(1) *Australian Journal of Human Rights* 119, 119.
92 Ibid 126.
93 Ibid.
94 *Canadian Bill of Rights*, SC 1960, c 44; Comment, 'Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights' (1965) 3(1) *Australian Journal of Human Rights* 52.
95 Ibid.
96 Ibid.

sociopolitical influences discussed in pt V.[97] Thus, while the Canadian rights model suggested by the White Paper was rejected, this result was primarily due to issues with an entrenched model, not with the idea of a rights bill itself.[98] Consequently, the NZBORA was adopted—paving the way for the United Kingdom's HRA and bill of rights statutes in the ACT, Victoria, and Queensland.[99] The NZBORA was significant to Australia because it demonstrated that a statutory bill of rights need not be simply an interim rights model leading to eventual entrenchment, as it was in Canada, but could be a final product itself. This alternative to a constitutionally entrenched model reinvigorated bill of rights discussions in Australia.[100]

1 *Features of the NZBORA*

So far, the United Kingdom's declaration of incompatibility feature and Canada's de facto strong judicial review have excluded these models as viable candidates for an Australian setting. The absence of a compatible rights model for Australia offers a partial explanation as to why Australia is without a bill of rights. However, the current form of the NZBORA provides the most achievable blueprint for a national bill of rights in Australia. Like the Canadian Charter, the rights protected by the NZBORA are similar, but not identical, to those laid out by the International Covenant on Civil and Political Rights ('ICCPR').[101] The general provisions of the NZBORA, which set out the powers and limitations it places on the courts and Parliament,[102] resembles that of the HRA to an extent.[103]

Section 6 of the NZBORA requires that the interpretation of legislation be consistent with the rights contained in the NZBORA wherever possible, and

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97 Geoffrey Palmer, *Unbridled Power* (Oxford University Press 1979) 30.
98 Keith (n 91).
99 Ibid.
100 Ibid.
101 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 49 UNGA (entered into force 23 March 1976).
102 *New Zealand Bill of Rights Act 1990* (NZ).
103 HRA (n 7).

section 7 states that the Attorney-General must bring to the attention of Parliament any inconsistencies between a bill and protected rights when that bill is introduced to the House of Representatives. Unlike the United Kingdom's model,[104] New Zealand does not explicitly offer a declaration of inconsistency remedy in the statute. Section 4 of the NZBORA outlines that courts have no power to invalidate, repeal, revoke, or deem ineffective a statute that is inconsistent with protected rights. While the HRA also notes that no United Kingdom court may invalidate a Westminster statute,[105] the ability to declare an inconsistency does provide courts in the United Kingdom with a course of action when faced with a breach. Under the NZBORA, however, courts were expected to simply apply the inconsistent legislation. There would be no consequence to a violation of protected rights by other legislation.

In 2018, the New Zealand government approved a move amending the NZBORA to include a declaration of inconsistency feature that would require a response from Parliament.[106] This development has been praised by scholars,[107] government officials,[108] and the United Nations, with the previous system having received heavy criticism for its absence of remedies.[109] New Zealand scholar Andrew Geddis critiqued that, 'the impact of the NZBORA on Parliament's behaviour is so minimal in nature as to be almost irrelevant'.[110] Of course, while this amendment is welcomed in New Zealand, the feature is not feasible at an Australian federal level because, as noted above, this would be an exercise of non-judicial power which the High

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104 Ibid.
105 Ibid s 4.
106 Bill of Rights (Declarations of Inconsistency) Amendment Bill 2018 (NZ).
107 Joshua Ferrer, 'Re-Evaluating Consensus in New Zealand Election Reform' (2019) 72(2) *Political Science* 121, 121–2.
108 Ibid.
109 Ibid.
110 Andrew Geddis, 'Rights Scrutiny in New Zealand's Legislative Processes' (2016) 4(3) *The Theory and Practice of Legislation* 355, 362.

Court has said would be inconsistent with Chapter III of the *Australian Constitution*.[111]

2 *NZBORA in Australian Context*

Of the three Commonwealth models explored, it seems the NZBORA prior to the declaration of inconsistency amendment introduced in 2018 is the most well-suited option for Australia. We can, however, assume it is likely that such a model would receive similar criticism from Australian bill of rights proponents, suggesting the model is weak to the point of ineffectiveness.[112] While the HRA is also classified by scholars as a weak form judicial review model, it is still able to apply pressure on Parliament to not only legislate in line with the Convention, but also to remedy inconsistencies. As of 2015, 29 declarations of inconsistency had been made using the HRA in the United Kingdom; of these, 20 had been remedied by the government.[113] The United Kingdom's dialogue model is considered the more popular model because it fit the 'Goldilocks' principle of being 'just right' in striking the balance between parliamentary sovereignty and judicial supremacy.[114] In contrast, the sans-amendment NZBORA is too protective of parliamentary sovereignty, while the Canadian Charter leans too far towards judicial supremacy.

Despite its rigidity, the NZBORA without the declaration feature would still likely be more successful in attracting supporters than the Canadian Charter model,[115] which has proven too divisive for Australia.[116] Ultimately, the NZBORA is a viable model for Australia to replicate, though not without its issues. The absence of a remedy when there are inconsistencies between laws and protected rights would incite a considerable level of criticism at a national and international level, as it did in New Zealand prior to the 2018

111 Bateman and Stellios (n 48) 7.
112 Ibid.
113 Kavanagh (n 23) 1008.
114 Ibid 1014.
115 Williams and Hume (n 1) 64.
116 Morton (n 84).

amendment.[117] The natural progression of this pressure is what led the New Zealand Parliament to amend the model to introduce the declaration of inconsistency feature.[118] In the Australian context, however, neither the federal judiciary nor the legislature would be able to respond to such criticism with the same solution. Consequently, the NZBORA is not an ideal bill of rights model for Australia either.

V SOCIOPOLITICAL ANALYSIS

Having compared the legal and structural factors that explain why Australia has not embarked upon the same path to a federal bill of rights as its fellow Commonwealth countries, pt V examines some of the sociopolitical explanations for that divergence. Sociopolitical factors in the context of this discussion refer to: the development of international rights culture; shifting public opinion; and the effects of political party support or opposition on the success of a bill of rights proposal. These factors are inherently intertwined; the sway of public opinion cannot be discussed in isolation from policy development, just as the effects of globalisation and the influence of changes in the international community are now deeply embedded in domestic social values and political decisions. This part will begin by examining key sociopolitical factors that contributed to the adoption of rights protection in the comparative countries, followed by an analysis of how these influences have effected bill of rights developments in Australia.

A *The United Kingdom*

The creation of the HRA signalled the end of a long-standing debate over adopting a bill of rights in the United Kingdom, a debate that bore many

117 Ferrer, 'Re-Evaluating Consensus in New Zealand Election Reform' (n 107) 122.
118 Keith (n 91) 122.

similarities to the bill of rights discussion that continues in Australia today.[119] Much of the hesitancy and resistance towards a potential bill of rights in the United Kingdom prior to 1998 stemmed from a fear of granting excessive power to the courts,[120] echoing Waldron's critique of strong judicial review. In 1987, Lord McCluskey, a Supreme Court judge in Scotland, delivered a lecture that captured the viewpoint of many bill of rights objectors at the time, stating '[l]awmaking should be left to lawmakers…that's just the problem with a constitutional Bill of Rights…it turns judges into legislators.'[121] These anti-judicial review sentiments were pervasive amongst parliamentarians, academics, and judges alike.[122]

However, as a member of the Council of Europe, and having ratified the Convention in 1951, pressure to incorporate the Convention into domestic law was just as pervasive as the anti-judicial review sentiment.[123] A prominent judge in the United Kingdom, Sir Leslie Scarman, pointed to the United Kingdom's obligations as a member of the Council of Europe, stating, '[t]he legal system must… ensure that the law… will itself meet the exacting standards of… international instruments to which the United Kingdom is a party.'[124] The key complaint regarding the system prior to 1998 was that breaches of Convention rights by the government had to be taken to the Strasbourg Court in France, as there was no remedial process available domestically.[125] Though this system was quite effective in handing down decisions and protecting rights, the process itself was criticised for its inefficiency.[126] In fact, the Council of Europe stated that the average time they

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119 Williams and Hume (n 1) 61.
120 Michael Zander, 'A Bill of Rights for the United Kingdom' (1997) 32(3) *International Law Journal* 441, 444.
121 Lord McCluskey, *Law, Justice and Democracy: The Reith Lectures* (Sweet and Maxwell, 1987).
122 Waldron (n 8) 1355.
123 Stone (n 20).
124 Ibid.
125 Zander (n 121) 444.
126 Ibid.

required to decide a case was over five years.[127] As such, rights advocates in the United Kingdom argued that the process to remedy a violation of the Convention was inaccessible to the ordinary citizen.[128]

The significance of incorporating the Convention into domestic statute was magnified by the Troubles—a 30-year period of violent conflict in Northern Ireland—which had already seen decades of conflict and violence occur in Northern Ireland by the time these proposals were being discussed.[129] Thus, brutality and human rights abuses were not vague concepts to citizens in the United Kingdom, but a reality that confronted them daily. Accordingly, incorporating rights protections into domestic legislation was widely supported by the public.[130]

Nevertheless, the concept of a bill of rights was initially rejected by both major political parties, largely due to concerns that echo Waldron's views on widening the scope of judicial power.[131] Between 1992 and 1993, the position of the United Kingdom's Labour Party regarding incorporating the Convention into domestic legislation changed dramatically.[132] This shift in party policy is attributed to the change in leadership that saw John Smith become leader of the Labour Party in 1992, and subsequently, championing the idea of a statutory bill of rights.[133] By the time a statutory bill of rights was brought to Parliament, it had attracted political support from parties across the board.[134] As was discussed in pt IV, the favourability of the dialogue model certainly contributed to this shift. It should also be noted that

127 Council of Europe, *Explanatory Report to Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby* (1994) ETS No 155.
128 Stone (n 20) 16.
129 Zander (n 121) 418.
130 Ibid 444.
131 Stone (n 20) 15.
132 Zander (n 121) 419.
133 Ibid.
134 Ibid.

the bill received support from every party in Northern Ireland.[135] The HRA was also overwhelmingly approved by the House of Lords.[136]

B *Canada*

Attitudes in Canada towards a bill of rights, prior to the 1982 Charter, are quite different to the attitudes and sociopolitical climate towards a bill of rights in Australia. Before the Charter was officially adopted, it had already gained overwhelming public support.[137] The July 1980 Gallop Poll revealed that 91 per cent of the population supported the Charter.[138] At the height of its political debate a year later, the model still held 84 per cent of Canada's support,[139] with 63 per cent of this same group identifying themselves as 'strong supporters'. [140] Such a high concentration of Canadian society strongly supporting the Canadian Charter may seem unusual, however, Gardbaum suggests that Canada was most likely the 'pioneer' of the new Commonwealth model because it had been so influenced by the United States' rights-central culture.[141]

Given the Charter's popularity amongst the general population, some scholars suggest that politicians who may not have completely approved of the Charter felt pressure to pledge their support.[142] Though the Canadian provinces expressed their concerns about the Charter's power over their legislative assemblies, [143] Prime Minister Pierre Trudeau offered the notwithstanding clause as a compromise in the hopes of gaining provincial approval.[144] Professor Paul Weiler argues that the provinces' approval of the

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135 Stone (n 20).
136 Zander (n 121) 444.
137 Egerton (n 82).
138 Paul C Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 14(2) *University of Michigan Law Journal* 51, 51.
139 Ibid.
140 Ibid.
141 Gardbaum (n 25) 18.
142 Ibid.
143 Ibid.
144 Weiler (n 140) 51.

Charter was less about the offer of s 33, and more that the Charter was so overwhelmingly favourable with the public and federal politicians—leaving the provincial legislatures to feel that they were 'the final obstacle in the way of the… public's wishes'.[145]

In stark contrast, Australian states' and territories' persistent scepticism of legislation that increases centralised power is one of the main reasons why Australian bill of rights proposals have lacked political support.[146] It is also important to point out that the Canadian Senate, like the United Kingdom's House of Lords, is formed by the executive appointment of members on the recommendations of the Prime Minister.[147] This would considerably limit disagreement and friction in the legislature over proposed bills.[148]

C *New Zealand*

Between the 1963 debates over a New Zealand bill of rights, and the 1985 bill of rights debate following the White Paper proposal, a number of factors influenced a shift in attitude towards the idea of following in Canada's footsteps. Firstly, by the late 1970s, the international rights scene had developed substantially—with both the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the ICCPR coming into effect in 1976. New Zealand was bound by both in 1978, meaning by 1985 there were international obligations and standards that New Zealand had agreed to incorporate into legislation. Even if the treaties were not binding by nature, their pressure and existence fostered dialogue on the possibility of a bill of rights.[149]

Secondly, New Zealand also observed an increased interaction with rights protection in its fellow Commonwealth countries, the United Kingdom

145 Weiler (n 140) 51.
146 Stone (n 20).
147 Weiler (n 140) 51.
148 Stone (n 20) 17.
149 Bateman and Stellios (n 48) 7.

and Canada.[150] With increasing awareness, New Zealand had realised by the White Paper proposal that the international scene was changing, and that perhaps it was time that a bill of rights was given more serious consideration.[151]

Domestically, former New Zealand Prime Minister Geoffrey Palmer was one of several voices that began to raise concerns about growing and increasingly abused executive power in New Zealand. He published a book detailing his opinion on this issue, and, amongst a number of constitutional changes, called for a bill of rights.[152] His suggestions were promoted by the Labour Government in 1984, leading to the 1985 White Paper proposal which, in turn, ignited the discussion and debate that led to the eventual adoption of the NZBORA in 1990.[153]

D *Australia*

The clear three themes that have emerged from the sociopolitical factors that influenced the United Kingdom, Canada, and New Zealand, are: (1) the impact of international rights culture —from the Council of Europe, the United Nations, or neighbouring countries; (2) the level of public support for the bill; and (3) the level of political support generally, and the bipartisan nature of that political support.

Like New Zealand, the influence of international rights development has primarily been Australia's obligations to the ICCPR and ICESCR. Unlike New Zealand, however, attitudes towards the United Nations have been less receptive and, historically, more skeptical.[154] In fact, the United Nations has been characterised by some Australian politicians as a corrupt institution that

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150 Ibid.
151 Keith (n 91) 126.
152 Geoffrey Palmer, *Unbridled Power* (Oxford University Press, Auckland, 1979) 30.
153 Keith (n 91).
154 Kolodizner (n 41) 221.

undermines Australian sovereignty.[155] Moreover, a consistently strong reluctance to co-operate with recommendations from the United Nations regarding Australia's treatment of asylum seekers and its Indigenous population[156]—both issues that could be affected by a national rights document—also suggest that Australia is less receptive to the influence of international rights culture.[157]

Where the Canadian Charter proposal and United Kingdom's HRA were met with overwhelming public support,[158] public support for rights protection in Australia has been unreliable, and often diminished by skepticism toward the Australian Government.[159] Academic Campbell Sharman refers to a referendum in 1988 to explain the lack of public support in Australia.[160] Sharman expounds that the referendum was initially assumed by the government to be uncontroversial and even designed as a means to familiarise the public with constitutional change.[161] Instead, this proposal failed overwhelmingly due to poor communication by the Government regarding the effects of proposal, which was subsequently met by mistrust from the public.[162] This example demonstrates that any attempts to introduce rights to the *Australian Constitution* would likely meet the same fate, due to the demanding procedure for amendment which will never be bypassed if referendum proposals are met with skepticism and mistrust.[163]

While the Australian Labor Party emerged in the 1970s as a supporter of a federal bill of rights, the Liberal National Party has remained staunchly opposed.[164] A lack of bipartisan support disproportionately affects Australia's

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126 Kildea (n 21) 91.
156 Kolodizner (n 41) 220.
157 Ibid.
158 Egerton (n 82); Stone (n 20).
159 William and Hume (n 1) 64.
160 Campbell Sharman, 'The Referendum Results and their Context' In B Galligan and J R Nethercote (eds), *The Constitutional Referendum and the 1988 Referendums* (Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration, Canberra, ACT, 1989) 111.
161 Ibid.
162 Kildea (n 21) 66.
163 Stone (n 20).
164 Stone (n 20) 20.

chances of passing national rights legislation.[165] New Zealand's unicameral legislature, and the upper houses of both the United Kingdom and Canada, are all significantly 'weaker' than Australia's strong bicameral system.[166] The appointment of seats in the House of Lords and Canada's Senate greatly reduces their legislative scrutiny function. For instance, Green and Remillard acknowledge that the composition of the Canadian Senate is often aligned with the governing party.[167]

Paul Kildea noted that while the Federal Labor Party has attempted to introduce a bill of rights bill into Parliament in both 1972 and 1983, both instances failed due to a hostile majority Senate.[168] There is less literature on the Rudd government's decision not to proceed with a bill of rights proposal in 2010, however, George Williams speculates that the Senate majority, formed by the Liberal Party, the National Party, and the Family First Party, was a deterrent to putting forth a proposal.[169] Opposition to a bill of rights from the Australian Liberal Party claims to draw from Waldron's theory of anti-judicial review—a sentiment that was also prominent in the United Kingdom and New Zealand during debates regarding bill of rights legislation, but was quelled by the types of weak judicial review models they ultimately adopted.

Evidently, there a number of sociopolitical factors that have worked in favour of bill of rights' successes in the United Kingdom, Canada, and New Zealand, but have either not had the same impact in Australia, or are simply elements that do not exist in the Australian context, such as: high levels of public support, or bipartisan support for rights proposals. Undoubtedly, a bill of rights model's success is contingent on more than just legal viability. A

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165 Ibid.
166 Ibid.
167 L C Green and Gil Remillard, 'Commentaries: The Entrenchment of a Bill of Rights (Canada)' (1981) 19(3) *Alberta Law Review* 383, 390.
168 Kildea (n 21) 68.
169 Williams (n 40) 880.

compatible rights model must inspire a level of public and political support if there is to be any chance of implementation.

VI CONCLUSION

The objective of this article was to investigate Australia's exceptionalism in its absence of a national bill of rights, despite numerous attempts at establishment throughout the decades. The inability for a rights proposal to be implemented at a federal level indicates that there must be barriers that have prevented its success, and that perhaps these barriers are also unique to Australia, given that it is known as the 'only Western democracy without a bill of rights'.[170] Australia's distinctiveness suggests that somehow, these obstacles have only managed to affect Australia, or, alternatively, Australia is the only Western democracy that is unable to overcome them.

Part IV sought to understand the legal reasons behind Australia's absence of a federal bill of rights. By observing other Commonwealth nations who have a bill of rights, it was understood that Australia's struggle to adopt a national bill of rights is largely attributed to the types of Commonwealth nation-preferred models, each having a characteristic making it unsuitable for Australia. While the New Zealand model was, unlike the United Kingdom model, legally compatible, and maintained parliamentary sovereignty to a greater effect than the Canadian Charter, its lack of an effective remedy can render it an ineffectual rights protection model, as was observed by the criticism in New Zealand.

Part V investigated the sociopolitical factors affecting the success of a bill of rights. It was elucidated that there were three key trends internationally that contribute to the success of a bill of rights. These were a recognition of rights developing internationally, a relatively high level of public support for

[170] William and Hume (n 1) 59.

the bill, and backing by the main political parties. In relation to the first factor, all four countries were observed to have been either influenced or pressured by the changing global landscape of rights protection. However, where the United Kingdom, Canada, and New Zealand have acknowledged these changes and adapted accordingly, Australia has not only remained relatively unaffected by international pressures but has, in some instances, completely rejected the notion of incorporating the ICCPR into domestic law. The latter two sociopolitical factors—public and political support of a rights proposal—go hand in hand. In Australia, it appears that a lack of political support leads to public scepticism of the proposal. Conversely, insufficient public support for a proposal will tend not to attract the interest or energy of politicians who seek to champion bills that will lead to reelection.

Ultimately, we may reach three key conclusions regarding the question as to why Australia has resisted introducing a bill of rights. First, a combination of legal and sociopolitical factors stand in the way of a national bill of rights in Australia. Secondly, comparing Australia's situation to the bill of rights journeys of the United Kingdom, Canada, and New Zealand confirms that Australia's legal and sociopolitical environment has the potential to be conducive to a bill of rights. Thirdly, that while it is definitely possible, a bill of rights proposal will not be successful if it is simply a replica of a rights model from a comparative country. Given Australia's complex legal and sociopolitical climate, a successful bill of rights must cater to the nuances of Australia's legal and sociopolitical climate. Understanding why Australia is without bill of rights brings us one step closer to finding the right model. The process must begin with turning the oft-used phrase 'Australia is the only Western democracy without a bill of rights' into the question, 'How do we create a bill of rights *for Australia*?'