

## Francis Burt Law Education Programme

# JUSTICE AT HOME AND OVERSEAS YEAR 10 TEACHER PRE-VISIT RESOURCE

## 1. SYSTEM OF GOVERNMENT COMPARATIVE STUDY

- a. Using the following table, list five similarities and five differences between the key features of the Australian and Indonesian systems of government.

Australia <sup>1</sup>	Indonesia <sup>2</sup>
<p>Secular Country – based on the Westminster System, Australia is a Federation of six States and three Territories each with their own constitutions, parliaments, governments and laws.</p> <p>Australia is a constitutional monarchy. A monarchy is a country where the position of head of state is inherited. There are three levels of government in Australia: Federal, State and Local government.</p>	<p>Secular Country – political policies not derived from religious teachings however, Indonesian nationals usually belong to one of the religions selected by the government – Islam, Christianity, Hinduism, Buddhism and Confucianism. (atheism is not an option).</p> <p>Indonesia is a presidential representative democratic republic and is divided up into Provinces and Districts.</p>
	<p>Islamic principles have an important role in Indonesia's political decision making – Indonesia has the largest Muslim population in the world. As such, to have a president that is not Muslim would be almost impossible.</p> <p>Regional decision making is impacted by regional religious context. For example, in Muslim regions pork can be banned and women have to wear the headscarf but this does not apply to Christian regions.</p>
<p>The Constitution of Australia outlines the separation of power between three arms of Government:</p> <ul style="list-style-type: none"> <li>• The Legislature (Parliament)</li> <li>• The Executive Government</li> <li>• The Judicature</li> </ul> <p>These three arms of government operate at both the State and Federal levels. Where there is conflict between State and Federal laws, the Federal laws prevail.</p> <p>The Constitution can only be changed by a referendum of the people.</p>	<p>The Constitution is based on five nationalist principles known as the Pancasila. This includes an independent Indonesian state with a limited separation of executive, legislative, and judicial powers. Thus Indonesia's political system has three branches:</p> <ul style="list-style-type: none"> <li>• Executive Branch</li> <li>• Legislative branch</li> <li>• Judicial branch</li> </ul> <p>The Constitution can be set or changed by the People's Consultative Assembly from the Legislative branch of power.</p>

1. Most of the information for this section is taken from Infosheet 20 – The Australian System of Government [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_20\\_-\\_The\\_Australian\\_system\\_of\\_government](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government).

2. The information for this section is taken from Indonesia – Investments <http://www.indonesia-investments.com/culture/politics/general-political-outline/item385>.

Australia <sup>1</sup>	Indonesia <sup>2</sup>
<p>The Legislature is a bicameral parliament consisting of the Queen (represented by the Governor General (GG)) and two houses – the House of Representatives and the Senate. Parliament makes the laws. The two Houses have equal powers. The GG has a role in the legislative process by assenting to Acts of Parliament.</p> <p>Parliament also authorises the Executive Government to spend public money. It also serves as a forum for the debate of public policy.</p>	<p>The Legislative Branch:</p> <p>Majelis Permusyawaratan Rakyat (MPR) – the People’s Consultative Assembly.</p> <p>It has the power to set or change the Constitution and appoints the president.</p> <p>The MPR is a bicameral parliament – Dewan Perwakilan Rakyat (DPR) – the People’s Representative Council and the Dewan Perwakilan Daerah (DPD – The Regional Representative Council.</p>
<p>The House of Representatives is the Lower House of the two houses of Australia’s Commonwealth Parliament. There are 150 representatives elected by the Australian people for three years through a preferential system of voting. The House of Representatives is the House in which government is formed.</p>	<p>DPR – consists of 560 members. They draft and pass laws, produce the annual budget in cooperation with the president and oversee general performance of political affairs. The members of the DPR are elected for five years through proportional representation at general elections.</p>
<p>The Senate is the Upper House of the two houses of the Australia’s Commonwealth Parliament. It consists of 76 senators, twelve from each of the six states and two from each of the mainland territories. Senators are elected for six years through proportional representation. The Senate shares the power to make laws with the other House of the Parliament, the House of Representatives.</p>	<p>DPD – consists of 132 members. They deal with bills, laws and matters related to the regions. Every Indonesian province elects four members to the DPD for a five year term on a non-partisan basis. There are 33 provinces in Indonesia.</p>
<p>Executive Government – Parliament authorises the Executive Government. After a general election the political party or coalition of parties with the support of a majority of members in the House of Representatives becomes the governing party and its leader becomes the Prime Minister. There are no limitations on the number of terms a member can be elected.</p> <p>The Executive consists of the Governor General, the Prime Minister and Cabinet. The Cabinet consists of senior Ministers presided over by the Prime Minister. It is the Government’s pre-eminent policy-making body.</p>	<p>Executive Branch:</p> <p>The president, the vice president and cabinet. The president and vice president are elected by the people for a term of five years and can only serve two terms. They work as an inseparable pair and usually come from different social backgrounds in order to gain a larger proportion of votes. The cabinet is the council of ministers appointed by the president.</p>
<p>The Judiciary:</p> <p>The third arm of government is the Judiciary. It has the power to interpret laws and to judge whether they apply in individual cases – in the High Court and other federal courts. The High Court is established by the Constitution. Other courts are created by legislation of Parliament. Judges are appointed by the GG and can only be removed from office by the GG following a request from both Houses of Parliament.</p> <p>Judges also have the power to make laws but only if there are no parliamentary made laws to address an issue before the court – this is called common law.</p>	<p>The Judiciary:</p> <p>The Independent Supreme Court, The Constitutional Court (Mahkamah Konstitusi), public courts, administrative courts, religious courts and military courts.</p> <p>Komisi Yudisial (a Judicial Commission) oversees the maintenance, dignity and behaviour of Indonesian Judges.</p>

Australia <sup>1</sup>	Indonesia <sup>2</sup>
<p>The High Court:</p> <p>The highest court and the final court of appeal including appeals from the State courts. The major function of the High Court is to interpret the Constitution.</p>	<p>Independent Supreme Court:</p> <p>The highest court and the final court of appeal. It also deals with disputes between the lower courts.</p>
	<p>The Constitutional Court: (established in 2003) monitors MPR decisions to ensure they are in line with the Indonesian Constitution.</p>



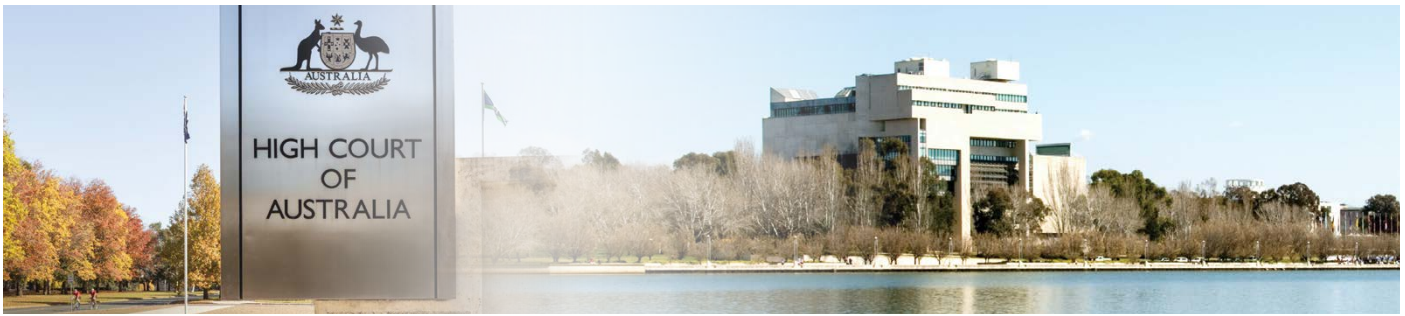
### Similarities and Differences between the Key Features of the Australian and Indonesian Systems of Government

Similarities	Differences
Both are secular countries (a secular country is defined as a country that does not have an established religion)	Australia is a constitutional monarchy and Indonesia is a presidential representative democratic republic
Both have three arms of Government	Australia's Constitution can only be changed by a referendum but Indonesia's Constitution can be changed by the Legislative branch of government
Both have a bicameral parliament	The House of Representatives use a preferential voting system in Australia and the DPR uses a proportional voting system
Both have a High/Supreme Court as a final court of appeal	The term of office for members of parliament are different – 3 years for the House in Australia and 6 years for Senators. Indonesia has a five year term of office
Both are a democracy	The people of Australia vote for a political party to hold office. The Indonesian people vote for a president and vice president
Both parliaments make laws	The Australian Prime Minister can be elected multiple times. The Indonesian president can only serve two terms.

## 2. DISCUSSION QUESTION

- a. Is the difference in the separation of powers between Australia and Indonesia significant or insignificant in your opinion? Why?

**The suggestion of limited separation of powers between the three arms of government in Indonesia seems to be a significant difference in comparison to Australia. The separation of powers is seen as the means by which each arm of government is prevented from having too much authority/power. The suggestion of there being limited separation of powers in Indonesia would seem to indicate the possibility of arbitrary decisions being made by the Executive, Legislature or Judiciary.**



### 3. RESEARCH TASK: THE HIGH COURT

Watch the documentary video from the High Court of Australia [website](#) and answer the following questions.

- a. What is the role of the High Court?

**The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.**

- b. How many Justices comprise the full bench of the High Court? **Seven**

- c. Name five types of laws the Chief Justice lists that are heard in the High Court?

**Criminal, contract, torts, personal injuries, tax, bankruptcy, property, equity.**

- d. What is the function of precedent?

**Decisions of the High Court of Australia must be followed by courts lower in the hierarchy.**

- e. What is the unique role of the High Court?

**The nation's constitutional court outlined in the Federal Constitution.**

- f. In what year did the High Court first sit? **1903**

- g. Which tradition is the history of the High Court based upon?

**Common Law Tradition – not of fixed rules but of legal precedent.**

- h. The High Court is seen to be an arbiter where State and Federal interests may conflict. How is this depicted in the building?

**In the artwork throughout the building.**

- i. Using the links on the High Court [education page](#), write two detailed paragraphs about the history of the High Court and the operation of the High Court.

**History key points:**

- **Established in 1902 by section 71 of the Constitution**
- **First sitting in 1903 after the passing of the Judiciary Act**
- **Sir Samuel Griffith – first Chief Justice**
- **Showed clear authority over the State Supreme Courts**
- **Gained international reputation for judicial excellence**
- **In 1912, the full bench went from being three Justices to five and then to seven in 1913**
- **During World War II the High Court was called upon to determine many issues related to the extent of the Commonwealth's defence powers as prescribed in the Constitution.**
- **Due to increase in demand, a new federal court was established to take on some of the workload**



- Appeals to the Privy Council ended by 1980s
- 1977, Retirement of Judges Act – judges are required to retire at age 70
- High Court of Australia Act 1979
- New building in 1980
- The High Court sits in the various states and since 1989, video link was introduced to save litigants the cost of flying their counsel to Canberra.



#### Operation Key points:

- The High Court is a Court of Appeal
- It hears cases which involve interpretation of the Constitution
- It also hears cases where the Court may be invited to depart from one of its previous decisions
- Subject matters traverses the whole range of Australian law
- Most of the Court's work relates to the hearing of appeals against decisions of other courts
- There is no automatic right to have an appeal heard by the High Court
- Decisions of the High Court on appeals are final
- The Court rarely gives its decision at the end of a hearing but usually reserves the decision and presents the decision at a later time
- It is usual practice for Justices to give written reasons for their decisions
- Decisions of the High Court are binding on all other courts throughout Australia

## 4. ALTERNATIVE DISPUTE RESOLUTION

One of the safeguards that protect Australia's democratic system and society, are the processes by which individuals and groups resolve differences in Australian communities. One of these processes is known as Alternative Dispute Resolution (ADR).



- Using the Resolution Institute [website](#) give a definition for alternative dispute resolution.

**ADR is usually an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.**

- Using the list on the left hand side of the website's home page, what are some ADR methods?

**Arbitration, Expert Determination, Mediation, Conciliation**

- Choose one method of ADR and describe its function.

#### **Arbitration**

**Arbitration is a formal dispute resolution process in which two or more parties refer their dispute to an independent third person (the arbitrator) for determination.**

#### **Expert Determination**

**Expert determination is a flexible alternative procedure for the resolution of disputes based upon the decision of an independent third party: the Expert.**

#### **Mediation**

**Mediation is a confidential process where an independent and neutral third party assists the disputants to negotiate and reach a decision about their dispute.**

#### **Conciliation**

**Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.**



## 5. INTERNATIONAL AGREEMENTS – TREATIES

Useful Terms	
Treaty	A formal written agreement made between two or more independent nations that is binding at international law.
International Law	The body of law which participating nations recognise as binding them in their conduct towards each other.
Binding	The action that obligates the parties to act in a particular manner and the establishment of lawful accountability.
Ratification	The process by which a signatory state to a treaty confirms that it intends to be bound by that treaty.
Multilateral agreement	Involving more than two parties.
Bilateral agreement	Involving two parties.
Intergovernmental organization (IGO)	An entity created by treaty, involving two or more nations, to work in good faith, on issues of common interest. Examples include the United Nations (UN), the World Trade Organization (WTO), the International Monetary Fund (IMF), Association of Southeast Asian Nations (ASEAN), the Commonwealth of Nations and the Asia-Pacific Economic Cooperation (APEC)

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Treaties do not come into force when they are signed and even when a document is agreed between two or more independent countries it will only be a treaty if the countries intended it to be binding at international law. Many treaties will have a clause setting out certain requirements that must be met before the treaty enters into force such as a ratification date or a requirement that it must be ratified by a particular number of parties before it can become law.

There are a number of steps that must be taken before a treaty enters force. In Australia, the process involves negotiating the text of the treaty, signing it, ratifying it and then implementing legislation to give it the full effect. In some other countries, for example the United States of America, ratification alone makes the convention justiciable.

Treaties do not form part of Australian domestic law until the treaty has been specifically incorporated into Commonwealth or State legislation. It is possible that some provisions of a treaty may already exist in our legislation. For example, many of the provisions in the Convention on the Rights of People with Disabilities are mirrored in our law through the *Disability Discrimination Act 1992* (Cth).

3. Butterworths Concise Australian Legal Dictionary (2<sup>nd</sup> edn)

## The Treaty Making Process

We suggest that teachers cut up the typical steps in the treaty making process and the students then work in pairs to put the steps in the correct order.

**Note:** Further details on each step can be accessed online via the reference link in the footer.

### Precursors to the treaty-making process

In certain instances an international organ, faced with a newly emerged or recognized problem as to which international action appears desirable and urgent and as to the general tenor of which a wide consensus appears to exist, will in the first instance adopt a declaration expressing that consensus, making certain recommendations (that in the parlance of international lawyers may be considered as “soft,” or non-binding, law) and perhaps taking the initial steps (described below) towards the formulation of a law-making treaty.

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### Initiating the treaty-making process

Evidently an idea that eventually becomes an international convention originates somewhere in the brain of some person, though in retrospect it may be impossible to identify the author and indeed the creative process may from the very beginning have been a substantially collective one. However, for official purposes a proposal generally enters the consciousness of the international community when it is first advanced, usually in some IGO organ, by the representatives of one or more member states - or possibly by those of a nongovernmental organization (NGO).

- a. *The need that the new instrument evidently is to meet*
- b. *The existing legal regime, including the extent of its applicability to the perceived problem*
- c. *Any relevant legislative efforts in other fore*
- d. *The likelihood of success in developing an instrument, i.e. is it foreseeable that the required measure of agreement can be reached on the solution aimed for?*
- e. *The optimal form for the proposed instrument: treaty, solemn declaration, model law or rule, etc.*
- f. *The likelihood that the proposed instrument will be accepted by a sufficient number of significant states*
- g. *An anticipated time-schedule for the project*
- h. *The expected costs of formulating and adopting the proposed instrument, both to the IGO concerned and to the states participating in the process*
- i. *Particularly in formulating instruments in relation to technical or scientific problems (such as outer space or the environment) it may be necessary to carry out extensive scientific studies or research to determine the parameters of the problem and the lines of potential solutions*

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4. United Nations University Website, *B. Steps in the treaty-making process*, < <http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm> >.  
5. United Nations University Website, *B. Steps in the treaty-making process*, < <http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm> >.

### Formulating multilateral treaties

Once a competent IGO organ decides formally to initiate the process of formulating a multilateral law-making treaty - or, for that matter, some other type of norm-establishing instrument - the second major stage in the international legislative process commences.

- a. *Preliminary studies*
- b. *Preparing an initial draft*
- c. *Negotiation*
- d. *Consultations with governments*
- e. *Consultations with the public*

6



### Adopting multilateral treaties

When it is judged by the competent organ (which may be the one charged with the formulation of the proposed treaty instrument or the plenary organ to which it reports) that the process of treaty formulation is complete or at least that it has progressed as far as it can at that stage, a decision as to its adoption must be taken.

- a. *Choice of forum*
- b. *Tasks of the adopting forum*
- c. *Decision-taking*

7



### Bringing multilateral treaties into force

- a. *General considerations*
- b. *Reservations and options*
- c. *The domestic aspects of ratification*

8



### The process of keeping international legislation up to date

In today's fast-moving world, international law, just as its domestic counterpart, must be kept up to date and that sometimes at almost breakneck speed, as witness the developments concerning the ozone protection regime.

- a. *Simplified treaty-adopting and -amending practices*
- b. *The establishment of new intergovernmental organizations and organs*

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6. United Nations University Website, B. Steps in the treaty-making process, < <http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm> >.

7. Ibid.

8. United Nations University Website, B. Steps in the treaty-making process, < <http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm> >.

9. Ibid.





Other useful resources include: [Treaty Making Process; How Nation States Commit to Human Rights Treaties.](#)

- a. Why is the process to enter into a bilateral international agreement (treaty) so complicated?

**The reality of the world is it is very complicated and things become even more complicated when more than one country is involved in any agreement. The complexity of human society, differences in culture and customs and the existing laws in each country are all significant factors for any country that is going to be a signatory to the convention.**

**Whilst the process does appear complicated it does provide a framework for determining obstacles and identifies issues to be addressed in the drafting of international agreements.**

According to the UN Environment Programme we now have “treaty congestion”. World leaders have signed up to an impressive 500 internationally recognised agreements in the past 50 years, including 61 atmosphere-related; 155 biodiversity-related; 179 related to chemicals, hazardous substances and waste; 46 land conventions; and 196 conventions that are broadly related to issues dealing with water. After trade, environment is now the most common area of global rule-making.<sup>10</sup>

- b. Do you support or are you against global efforts to establish international agreements to address global matters of significance?

**Answers will vary from one student to another, however encourage the students to support their position with logical reasons.**

#### **Possible responses**

**I am against global efforts to establish international agreements to address global matters of significance as the current situation demonstrates that very few countries actually implement international agreement laws in their own countries. Therefore, such international agreements are often barely worth the paper they are written on.**

**OR**

**I support global efforts to establish international agreements to address global matters of significance as such issue require a coordinated response and not a piece meal approach which would be the case if such agreements did not exist.**

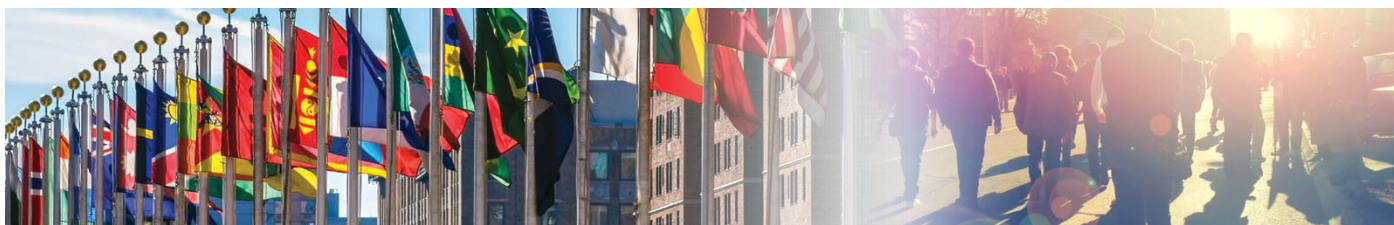
10. The Guardian, *Many treaties to save the earth, but where's the will to implement them?*, <<https://www.theguardian.com/environment/blog/2012/jun/07/earth-treaties-environmental-agreements>>

## Human Rights Treaties

Some of Australia's key international human rights treaties are listed below together with examples of relevant legislation that covers some areas of the treaty. It is important to note that the legislation often does not address all areas of the convention.

International Treaty	Date Ratified	Australian Legislation
<b>International Convention on the Elimination of all forms of Racial Discrimination (CERD)</b> <i>Purpose - Elimination of <u>racial discrimination</u> and the promotion of understanding among all races. Also requires its parties to outlaw <u>hate speech</u> and criminalise membership in racist organisations.</i>	September 1975	<ul style="list-style-type: none"> <li><i>Racial Discrimination Act 1975 (Cth)*</i></li> <li><i>Native Title Act 1993</i></li> <li><i>Racial Hatred Act 1995</i></li> </ul> <p><small>* Although the RDA was introduced in 1975 it was suspended in 2007 when the Northern Intervention took place.</small></p>
<b>Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)</b> <i>Purpose - all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.</i>	July 1983	<i>Sex Discrimination Act 1984 (Cth)</i>
<b>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</b> <i>Purpose - Aims to prevent <u>torture</u> and other acts of <u>cruel, inhuman, or degrading treatment or punishment</u> around the world. The Convention requires states to take effective measures to prevent torture in any <u>territory</u> under their <u>jurisdiction</u>, and forbids states to transport people to any country where there is reason to believe they will be tortured.</i>	August 1989	<i>Crimes (Torture) Act 1988 (Cth)</i>
<b>Convention on the Rights of the Child (CRC)</b> <i>Purpose - The aim is to build a better world for children. It calls on governments to take responsibility for children by addressing specific aspects of child wellbeing and development – such as health, education, protection and participation – and by building better governance for children.</i>	December 1990	<i>Family Law Reform Act 1995</i>
<b>Convention on the Rights of Persons with Disabilities (CRPD)</b> <i>Purpose - Intended to protect the rights and dignity of persons with <u>disabilities</u>. Parties to the Convention are required to promote, protect, and ensure the full enjoyment of <u>human rights</u> by persons with disabilities and ensure that they enjoy full <u>equality under the law</u>.</i>	July 2008	<i>Disability Discrimination Act 1992 (Cth)</i>

<p><b>International Covenant on Civil and Political Rights (ICCPR)</b></p> <p><i>Purpose – it commits parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.</i></p>	<p>August 1980</p>	<ul style="list-style-type: none"> <li>• <i>Human Rights (Sexual Conduct) Act 1994</i></li> <li>• <i>Racial Hatred Act 1995</i></li> <li>• <i>Australian Law Reform Commission Act 1996</i></li> <li>• <i>Human Rights Commission Act 1981</i></li> <li>• <i>Disability Discrimination Act 1992</i></li> </ul>
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- a. Which conventions seem to have been more significant in shaping Australian laws?

**Looking solely at the number of Acts implemented for each convention the ICCPR and the CERD would appear to have been more significant in shaping Australian laws.**

**Looking at the number of Australian Acts enacted that align with those conventions, it seems as though civil and political rights are more valued than economic, social and cultural rights. It would be interesting to discuss this with the students to get their input and feedback as to why this is the case.**

- b. Rate the order in which you would prioritise the conventions in terms of the need to address those issues in Australia.

**Answers will vary, however encourage students to support their priorities with logical reasons.**

**Extension resource: The Conversation website, 28 March 2017**

**Explainer: why the government ‘pulled’ Australia’s extradition treaty with China**

### **Convention on the Rights of the Child**

The Convention on the Rights of the Child has been ratified by more countries than any other human rights treaty. Of the 193 Member States of the United Nations’ only the United States of America has not ratified the treaty.<sup>11</sup>

- a. Why do you think so many countries have ratified this convention?

**Wanting to protect, nurture and provide opportunities for children is a common value and goal of most countries. That shared common value and goal is likely to have positively influenced most countries to ratify this convention.**

- b. Rate the significance of this convention in your opinion.

Unimportant / Medium importance / Very important

Why?

**Answers will differ, however encourage the students to support their ratings with reasons.**

- c. Do you think it is important that the USA is yet to ratify it? Why?

**Answers will differ, however encourage the students to support their ratings with reasons.**

<sup>11</sup>. [https://www.unicef.org/crc/index\\_30229.html](https://www.unicef.org/crc/index_30229.html)

## Possible response

As a world super power it is important that the USA ratify the Convention on the Rights of the Child as it would demonstrate the USA's commitment to children's rights as stated in the convention.

In 2008 President Elect Barrack Obama noted, just prior to his taking office in January 2009, that it was embarrassing that the USA as a global leader had not ratified the Convention on the Rights of the Child. Unfortunately, in 2017 the USA still hasn't ratified the Convention on the Rights of the Child due to concerns that the convention would infringe upon American sovereignty.

Click on the following link for further reading on why the USA has not ratified the Convention on the Rights of the Child: The Economist explains [\*Why won't America ratify the UN convention on children's rights?\*](#)

## 6. THREATS TO DEMOCRACY

The [Rule of Law](#) provides that everyone, regardless of who they are, is subject to the same law and has access to the same legal and judicial processes regardless of whether they are rich or poor, whether they are in an ethnic majority or religious minority or if they are a political ally or opponent of the state.<sup>12</sup>

Read the extract below from the [Australian Law Reform Commission Report No 129 on "Traditional Rights and Freedoms – Encroachments by Commonwealth Laws"](#) published on 12 January 2016.

- "72. Acts of terrorism are a gross violation of fundamental rights to life and safety and the Government has both a right and a duty to take action to protect its citizens.<sup>13</sup> This may require the enactment of legislation that places limits on traditional rights and freedoms. National security is recognised as a legitimate objective of such limitations, at common law and in international human rights law.<sup>14</sup>
73. Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights.
74. In the Report, a range of counter-terrorism and national security laws are identified that interfere with traditional rights and freedoms. These include laws that limit freedom of speech (for example, laws about advocating terrorism and disclosing intelligence operations); freedom of association and assembly (for example, control orders, preventative detention orders, and laws about foreign incursions and recruitment); laws that impose strict or absolute liability (for example, in relation to offences for disclosing certain classified operational information); laws that change fair trial procedures (for example, to protect sensitive information about national security).
75. Some counter-terrorism laws engage multiple rights. For example, the control order and preventative detention order regimes contained in divs 104–105 of the Criminal Code have implications for freedom of speech, freedom of association and freedom of movement.
76. Counter-terrorism and national security laws should be subject to ongoing and careful review, given the extent to which they may interfere with individual rights. While some of these laws have been subject to significant scrutiny, including by parliamentary committees and the Independent National Security Legislation Monitor (INSLM), it has been suggested that many are not proportionate, and would benefit from further consideration and analysis.
77. Ongoing review of these laws falls within the functions of the INSLM<sup>15</sup> and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).<sup>16</sup> INSLM and Intelligence Committee review of legislation is discussed further in Chapter 3."

12. Museum of Australian Democracy <http://explore.moadoph.gov.au/timelines/rule-of-law#milestone=abolition-of-appeal-to-the-privy-council>

13. See, eg, United Nations Security Council, Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, 28 September 2001. This resolution required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts.

14. See, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161. For example, under the ICCPR national security is recognised expressly as a permissible limitation in relation to freedom of movement, freedom of expression, the right to peaceful assembly and freedom of association: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12.3; 19.3; 21; 22.2 respectively.

15. *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B). At 1 November 2015, the Acting INSLM was preparing a report on any impact on journalists in the operation of s 35P of the ASIO Act concerning offences for the disclosure of information relating to a 'special intelligence operation' and was seeking public submissions concerning the adequacy of the safeguards relating to the control order regime provided for by div 104 of the *Criminal Code*.

16. *Intelligence Services Act 2001* (Cth) s 29(1)(bb).





## TASK

- a. Do you consider the new counter-terrorism and national security laws introduced pose any threat to democracy in Australia? Yes / No

**Answers will vary.**

- b. Do you think any of the new counter-terrorism and national security laws are justified? Why?

**Answers will vary, however encourage the students to support their responses with reasons.**

**Possible response**

**I think most of the new counter terrorism and national security laws are justified because of the very real threat of terrorist acts taking place in Australia. Without laws such as those that prevent advocating about terrorism and preventing people from taking part in foreign incursions and recruitment it would be possible for terrorist organisations to establish themselves in Australia.**

**OR**

**I think most of the new counter terrorism and national security laws are not justified because the new laws encroach too much on our hard fought freedoms. In particular, laws that change fair trial procedures and preventative detention orders are very worrying.**

- c. Do you consider the new counter-terrorism and national security laws fit with the principles of the Rule of Law? Explain your views with reasons.

**Answers will vary, however encourage the students to support their responses with reasons.**

**Possible responses**

**The rule of law is a flexible principle which is adapted by many countries according to local circumstances, traditions and customs. I believe that the new counter-terrorism and national security laws do fit within the principles of the rule of law as they ensure that there is appropriate review and oversight of the new measures.**

**OR**

**The new counter-terrorism and national security laws do not fit within the principles of the rule of law as the control order and preventative detention order regimes restrict freedom of speech, movement and association. In addition, the new laws relating to fair trial procedures are particularly worrying as an open court system ensures transparency of the justice system.**



## Helpful Resources:

- [2015 Sir Ronald Wilson Lecture “Protecting the Human Rights of Australians through Anti-Terrorism Laws and their Enforcement” presented by the Winthrop Professor Stephen Smith](#)
- [Rule of Law Institute of Australia](#)
- [Australian Human Rights Commission](#)
- [Article “Australian Counter-Terrorism Legislation and the International Human Rights Framework” by Sarah Joseph](#)
- [Article “Reconciling Human Rights and Counter-Terrorism – A crucial Challenge” by John von Doussa AO, QC](#)



## 7. WHAT DO YOU KNOW ABOUT THE LAW?

Think about the correct answers to the points below and you will review your answers again at a later date.

**Note:** We have created a [Year 10 Kahoot! Quiz](#)

International Treaty	True	False
a. The rule of law is a key feature of Australia's system of government.	<b>True</b>	False
b. Australia is bound implement all conventions approved by the United Nations.  <b>All member states of the UN determine whether to ratify, or implement, international conventions approved by the United Nations. When ratifying an international agreement a member state agrees to incorporate the convention into the member state's law through legislation.</b>	True	<b>False</b>
c. The Federal Court is the highest court in Australia.  <b>The highest court in Australia is the High Court. The jurisdiction of the High Court is cases of special federal significance including interpretation of the Constitution, challenging the validity of laws and to hear appeals where there has been an alleged injustice, from Federal, State and Territory courts. The High Court also hears matters related to international conventions.</b>  <b>The jurisdiction of the Federal Court of Australia covers approximately 150 statutes of the Australian Parliament and includes copyright, fair trading, patents and the recently introduced Fair Work Australia the national workplace relations tribunal.</b>  <b>It is interesting to note that Federal criminal matters are heard by the State and Territory courts, i.e. The Commonwealth Director of Public Prosecutions prosecutes Federal matters in the State and Territory courts.</b>	True	<b>False</b>
d. The United Nations' Human Rights Council's 2015 Universal Periodic Review of Australia's human rights record did not reveal any human rights issues for Australia to address.  <b>The 2015 Universal Periodic Review of Australia's human rights record revealed numerous human rights issues for Australia to address as outlined in 5. INTERNATIONAL AGREEMENTS: AUSTRALIA'S UNIVERSAL PERIODIC REVIEW ON HUMAN RIGHTS of this resource. Further details regarding the review can be accessed online: <a href="#">Australia's Universal Periodic Review on Human Rights</a>.</b>	True	<b>False</b>

e.	<p>You have the right to trial by jury if you are accused of a crime in WA.</p> <p><b>You do have the right to trial by jury if you are accused of a serious crime (an indictable offence heard in the District Court or Supreme Court). However, in the Magistrates Court of WA matters that go to trial are heard by a Magistrate and not a jury.</b></p>	True	<b>False</b>
f.	<p>Everyone must swear an oath on the Bible when giving evidence in WA courts.</p> <p><b>If you are not religious you can make an affirmation; a solemn promise without any religious connection. In addition the courts have the holy book and oath for most recognized religions, e.g. The Koran/Muslim oath, No holy book/Buddhist oath, The Pentateuch/Jewish oath etc.</b></p>	True	<b>False</b>
g.	<p>Everyone is treated equally by the courts and the law in WA.</p> <p><b>An essential element of our legal system is that everyone must be treated equally and that everyone is answerable before the law, the courts and the law in WA must not discriminate.</b></p>	<b>True</b>	False
h.	<p>The government can remove a judge from his/her position at anytime.</p> <p><b>A judge can only be removed from his/her position if s/he breaks the law and a possible sentence is imprisonment. When a judge reaches the age of 70 s/ he must step down. (Section 72 Commonwealth Constitution Act)</b></p> <p><b>This system is referred to as security of tenure for judges. Security of tenure for judges is important as it helps to ensure that they can act without fear or favour in their role.</b></p>	True	<b>False</b>
i.	<p>The verdict of the jury must always be unanimous in WA.</p> <p><b>The verdict of a jury in WA must always be unanimous for murder trials and all Commonwealth matters. For all other criminal matters a judge may accept a majority verdict of 10 out of 12 jurors but only after they have deliberated for at least 3 hours.</b></p>	True	<b>False</b>
j.	<p>The Governor General of Australia is exempt from the law in the Australian states and territories.</p> <p><b>An essential element of our legal system is that everyone must be treated equally and that everyone is answerable before the law, the courts and the law in WA must not discriminate.</b></p>	True	<b>False</b>
k.	<p>If you are questioned by the police you must answer any and all of their questions.</p> <p><b>If you are questioned by the police you must answer three questions: What's your name? What's your address? What's your date of birth? If you refuse to answer these any of these questions you can be charged with an offence. If you provide false information to the police you can also be charged with an offence.</b></p> <p><b>Apart from those questions you do not have to say anything to the police or answer any other questions the police may ask you.</b></p> <p><b>Juveniles have the right for a parent/guardian to be present throughout an interview and everyone accused of a crime in WA has the right to seek legal advice.</b></p> <p><b>It is worth reminding the students that the police are there to serve our community and as such they should be given due respect when dealing with them. Moreover, it is in the students' best interest to be polite and cooperative when interacting with the police.</b></p>	True	<b>False</b>



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