

Francis Burt Law Education Programme

JUSTICE AT HOME AND OVERSEAS YEAR 10 STUDENT 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 ¹	Indonesia ²
<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"> • The Legislature (Parliament) • The Executive Government • The Judicature <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"> • Executive Branch • Legislative branch • Judicial branch <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.

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

Australia ¹	Indonesia ²
<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 ¹	Indonesia ²
<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>

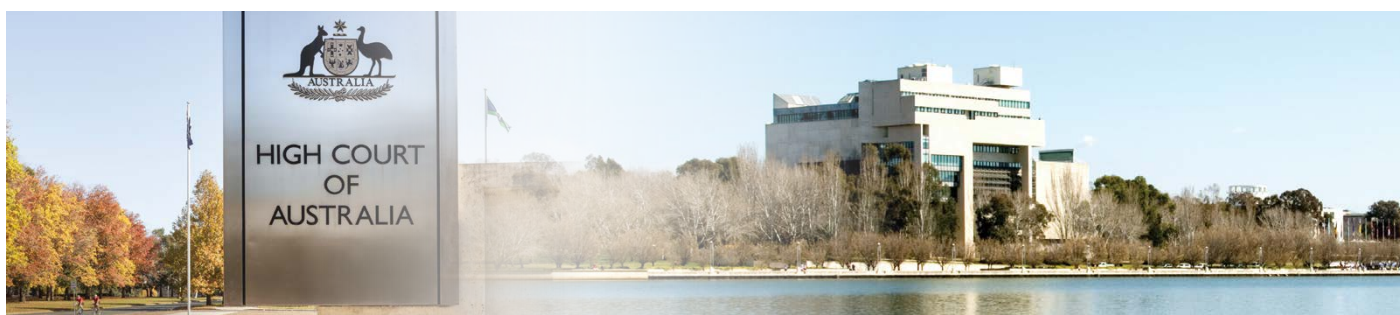


Similarities and Differences between the Key Features of the Australian and Indonesian Systems of Government

Similarities	Differences

2. DISCUSSION QUESTION

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



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?

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

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



d. What is the function of precedent?

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

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

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

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

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).



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

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

- c. Choose one method of ADR and describe its function.

[illegible]



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)

3

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).

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.

4

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*

5

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.

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> >.

- 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.



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

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.¹⁰

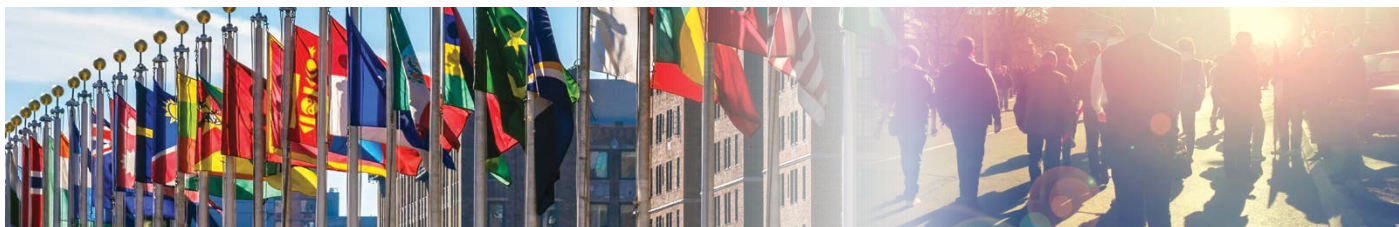
b. Do you support or are you against global efforts to establish international agreements to address global matters of significance?

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
International Convention on the Elimination of all forms of Racial Discrimination (CERD) <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"> • <i>Racial Discrimination Act 1975 (Cth)*</i> • <i>Native Title Act 1993</i> • <i>Racial Hatred Act 1995</i> <p><small>* Although the RDA was introduced in 1975 it was suspended in 2007 when the Northern Intervention took place.</small></p>
Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) <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>
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) <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>
Convention on the Rights of the Child (CRC) <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>
Convention on the Rights of Persons with Disabilities (CRPD) <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>
International Covenant on Civil and Political Rights (ICCPR) <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>	August 1980	<ul style="list-style-type: none"> • <i>Human Rights (Sexual Conduct) Act 1994</i> • <i>Racial Hatred Act 1995</i> • <i>Australian Law Reform Commission Act 1996</i> • <i>Human Rights Commission Act 1981</i> • <i>Disability Discrimination Act 1992</i>



a. Which conventions seem to have been more significant in shaping Australian laws?

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

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.¹¹

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

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

Unimportant / Medium importance / Very important

Why?

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

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?](#)

11. https://www.unicef.org/crc/index_30229.html

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.¹²

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.¹³ 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.¹⁴
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 INSLM¹⁵ and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).¹⁶ 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
- b. Do you think any of the new counter-terrorism and national security laws are justified? Why?

- 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.



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.

International Treaty	True	False
a. The rule of law is a key feature of Australia's system of government.	True	False
b. Australia is bound implement all conventions approved by the United Nations.	True	False
c. The Federal Court is the highest court in Australia.	True	False
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.	True	False
e. You have the right to trial by jury if you are accused of a crime in WA.	True	False
f. Everyone must swear an oath on the Bible when giving evidence in WA courts.	True	False
g. Everyone is treated equally by the courts and the law in WA.	True	False
h. The government can remove a judge from his/her position at anytime.	True	False
i. The verdict of the jury must always be unanimous in WA.	True	False
j. The Governor General of Australia is exempt from the law in the Australian states and territories.	True	False
k. If you are questioned by the police you must answer any and all of their questions.	True	False



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