



Navigating the Intersection of International Law and Government Legal Work

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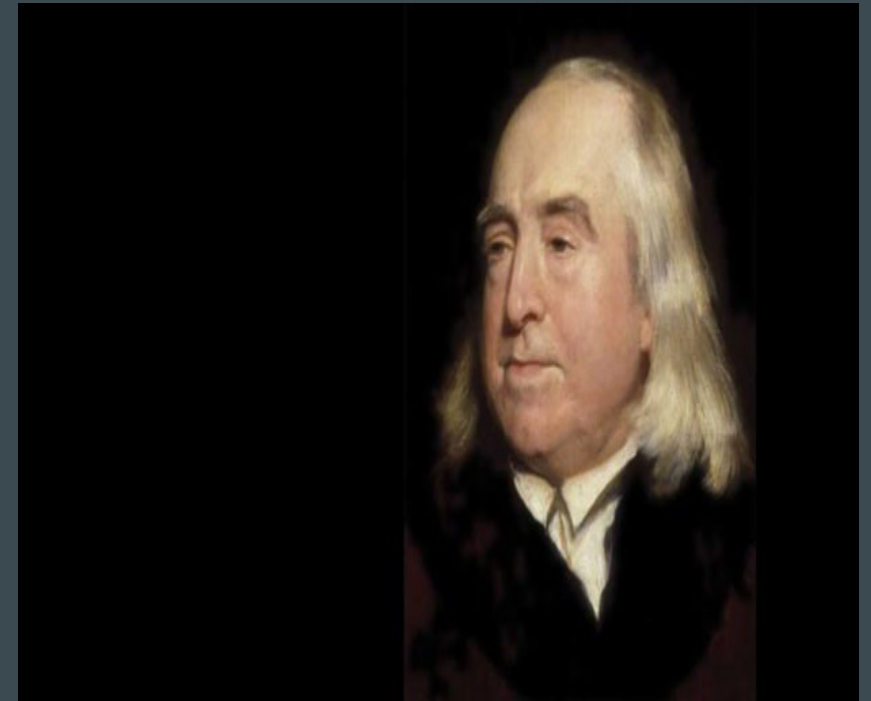
PRINCIPAL
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GOVERNMENT LAW CPD MORNING, THURSDAY 24 OCTOBER

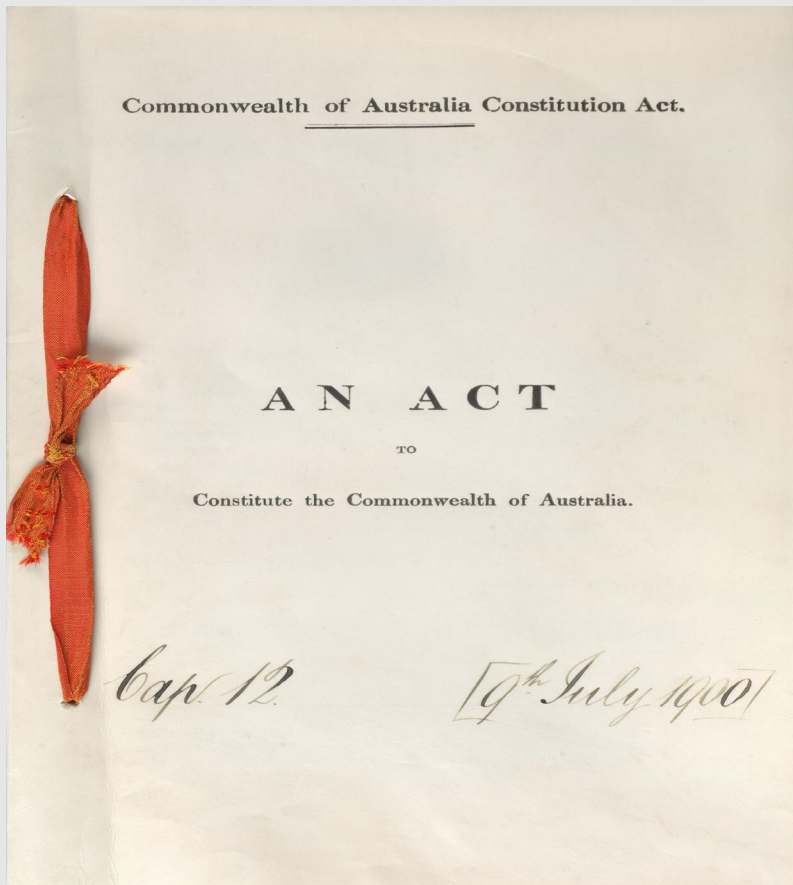
What we will talk about today

- Practical insights into the relationship between international law and Australian law and the role of the government lawyer
- A practical example of international human rights law in action in the ACT

international law, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognised as international actors.



The Australian Constitution

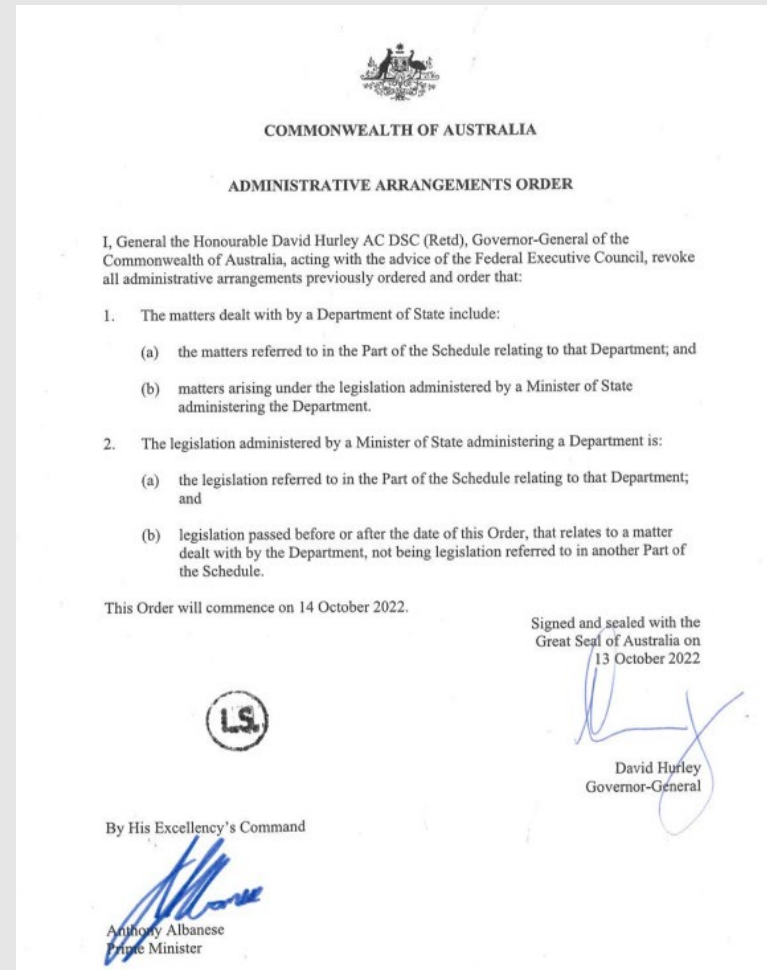


Executive:
Section 61 – the
Executive Power

Parliament:
Section 51 and the
External Affairs
Power

The Administrative Arrangements Order

<https://www.pmc.gov.au/government/administration/administrative-arrangements-orders>



The Attorney-General of Australia

The Office of Legal Services Coordination (OLSC)

<https://www.ag.gov.au/legal-system/office-legal-services-coordination>

The Legal Services Directions 2017

<https://www.ag.gov.au/legal-system/office-legal-services-coordination/legal-services-directions-and-guidance-notes#appendix-e-and-disciplinary-matters>

Appendix A

Public international law work

2 Public international law work of the following kinds is tied to the Attorney-General's Department, AGS and also, in relation to sub-paragraphs (a) to (d), the Department of Foreign Affairs and Trade.

(a) *International litigation and arbitration (ie Government to Government)*

(b) *Advice involving Australia's or another country's obligations under international law*

This work covers requests concerning Australia's or another country's obligations under international law generally or under a particular treaty to which Australia or the country is a party. It also, more indirectly, covers requests for advice under legislation which implements a treaty where the obligations under that treaty are an issue.

(c) *Advice on Treaty negotiation*

(d) *Advice on implementing a treaty (including bilateral agreements)*

This work includes advice on changes to legislation and practice necessary to become a party to a treaty.

(e) *Domestic litigation involving a significant public international law issue*

So, your Department or Agency (on behalf of your Minister) wants to get up some legislation

<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny>

Legislation Handbook

All Bills and disallowable legislative instruments within the meaning of section 42 of the *Legislation Act 2003* must be accompanied by a Statement of Compatibility.

Statement of compatibility with human rights

A Statement of Compatibility is an assessment of whether the Bill or legislative instrument is compatible with the rights and freedoms recognised in the ***seven core international human rights treaties*** to which Australia is a party.


‘the seven core international
human rights treaties to which
Australia is a party’

ACT Human Rights Commission

- 🌀 The Commission promotes rights + welfare
 - 🌀 handles **complaints** (health services, disability, community services, discrimination)
 - 🌀 raises **awareness** of rights + responsibilities of citizens/encourages improvements
 - 🌀 **advice** on human rights obligations
 - 🌀 **advocacy** for children, young people + vulnerable adults
 - 🌀 **supports** victims of crime



HUMAN RIGHTS ACT 2004

 'Human Rights' = universal minimum values of treatment agreed among nation states

 *Inherent* – because we are human

 *Universal* – everyone has them

 *Indivisible* – no hierarchy, interlinked

 Governments have corresponding duties:

i) To respect ii) protect iii) fulfil



8: Equality + non-discrimination

9: Right to life

10: Protection from torture
+ ill treatment etc.

11(1): Protection of family

11(2): Protection of children

12: Privacy + reputation

13: Freedom of movement

14(1): Freedom of thought,
conscience + religion

14(2): No limits on adopting
a religion or belief

15(1): Peaceful assembly

15(2): Freedom of association

16(1): Right to hold opinions

16(2): Freedom of expression

17: Taking part in public life (e.g.
voting)

18(1)-(7): Liberty + security of person

18(8): No detention for breach of
contract

19: Humane treatment while
deprived of liberty

20: Children in the criminal process

21: Fair hearing

22(1): Rights in criminal proceedings

22(2): Minimum guarantees for those
charged

22(3): Rights of child charged

23: Compensation if wrongfully
convicted

24: Right against double
punishment / trial

25: No retrospective criminal laws

26: Freedom from forced work

27(1): Rights of minorities

27(2): Cultural rights of Aboriginal
+ Torres Strait Islander peoples

27A: Right to education

27B: Right to work

27C: Right to healthy environment

(Some) rights may be limited – s 28

- 1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
- 2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - a) the nature of the right affected;
 - b) the importance of the purpose of the limitation;
 - c) the nature and extent of the limitation;
 - d) the relationship between the limitation and its purpose;
 - e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.



Machinery of the Act/Enforcement

- 🌀 **Section 30** ‘So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights’
- 🌀 **Section 31** International law may be referred to in interpretation
- 🌀 **Section 32** Supreme Court may make declaration of incompatibility
- 🌀 **Section 37** Statements of compatibility for government bills
- 🌀 **Section 38** Scrutiny Committee



Enforcement

- 🌀 **Section 40B** Public authorities must act consistently with human rights and properly consider relevant human rights when they are making decisions
- 🌀 **Section 40C** victims may commence a proceeding in the Supreme Court against the public authority or ‘rely on the person’s rights under this Act in other legal proceedings’
- 🌀 Note: initial litigation bar with respect to the right to a healthy environment
- 🌀 **s41D Human Rights Commission Act** – complaints may be made to the Human Rights Commission (as of June 2023)



Exercise based on a recent case study

The Human Rights Commissioner intervened in two recent cases involving presumptions against bail, one of which has been the subject of a declaration of incompatibility (see s18(5) HRA). In ‘special or exceptional circumstances’ favouring the grant of bail, the bar to bail could be lifted and ordinary bail considerations resorted to. ACT has routinely mixed remanded and sentenced prisoners, in contravention of s19 (2) HRA. As counsel for the HRA, what would you submit regarding a human rights consistent application of the presumptions against bail?



Section 41 Review or 'audit' power

- 🌀 **The commission can 'review the effect of territory laws, including the common law on human rights'**
- 🌀 **Previously audits have focussed on correctional facilities**
- 🌀 **If the Commission were to review the impact of territory laws on the right to a healthy environment, what might be key areas to focus upon?**



Questions?

The logo for actlaw society, with 'actlaw' in orange and 'society' in grey, set against a dark grey rounded rectangle.

actlaw
society

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