

Unit 2: How British laws and principles, including the rule of law, were brought to Australia by the First Fleet in 1788 and their impact on Aboriginal and Torres Strait Islander peoples – Year 4 - Civics and Citizenship (C & C) Strand: Laws and Citizens

Topic 4.2: A conflict of laws and perspectives

## What law did the British bring to New South Wales?

When the British arrived in Sydney in 1788, they brought not only physical things, such as their clothes, weapons and belongings, but also unseen things, like disease and laws. Aboriginal people had been living in Australia for many thousands of years with their own complex systems of law. The British imposed their laws, applying them to both colonists and Aboriginal people. But the British did not accept that Aboriginal laws should apply to them – it was a one-way process only.

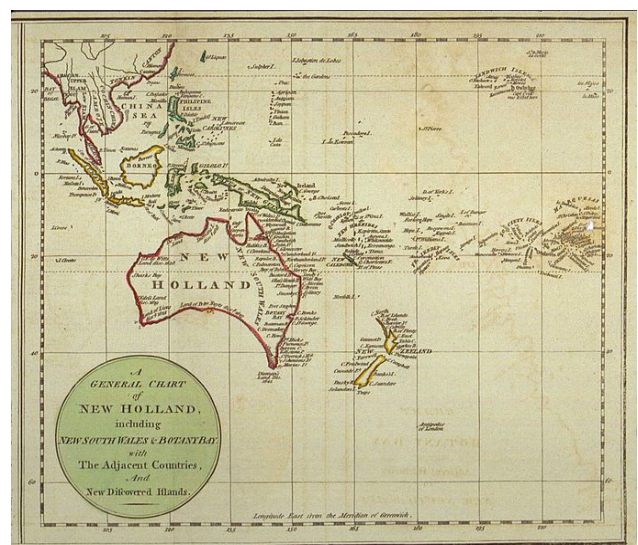
Aboriginal people were not asked and did not consent to British laws applying to them. Did this make any legal difference? In the early 1800s courts in New South Wales decided that British law applied to the colonists and to any interactions they had with Aboriginal people. If there was a dispute, injury or wrong, then the 'principles of equal justice' under British law would apply to all, including Aboriginal people. But if the dispute occurred solely amongst Aboriginal peoples, then sometimes the courts chose not to intervene, leaving the matter for Aboriginal people to determine under their own law. For example, in a case called *R v Ballard* in 1829, the NSW Supreme Court ordered the release of an Aboriginal man who was accused of killing another Aboriginal man, because it thought this should be left to Aboriginal peoples to determine under their own laws. But in later cases the courts decided that colonial laws applied to all people in the colony, even to conflicts within Aboriginal communities.

### The Common Law

There were two types of British laws that applied in the places they colonised. The first is the 'common law'.

This is the law that has been developed by courts over many centuries, rather than by Parliament. The common law is recorded in judgments (i.e. written reasons) given by courts, which then become precedents relied upon by later judges. The more important judgments are published in law reports so that the people, and judges, can know what the law is and predict how it is likely to be applied in the future. Over time, those precedents may be developed, bit by bit, so that they change to meet the times that we live in.

For example, if you were a settler in New South Wales in 1790, and someone entered your property without your permission and took your sheep and ate it, you could sue the person in a court, relying on the common law of trespass, to claim 'damages' (i.e. payment of money) for the loss of your sheep. It was regarded as a 'birthright' of all British people to have the protection of the common law. In theory, but not always practice, the protection of the common law also applied to Aboriginal people living in the colony. It is 'common law' because it applies commonly - to everyone.



General Chart of New Holland including New South Wales and Botany Bay 1786  
Source: Wiki Commons

## Statute Law

The second type of law is 'statute law'. Statutes are laws passed by a 'Parliament' (also known as a 'legislature'). Statutes can also be described as 'Acts of Parliament' or 'legislation'. They set out a precise set of written rules that must be obeyed. Statutes override the common law. So if a statute sets out the law differently from the way the courts have developed the common law, the court must apply the statute instead. This is because the statute is passed by a body that represents the people. Parliament can pass statutes at any time to 'amend' (i.e. change) statutes or to 'repeal' them (i.e. remove them altogether as laws).

British statutes only applied to the colonies if they were suitable to do so. Sometimes it was hard to decide which laws were suitable to the colony or only relevant to Britain. Criminal laws applied to the colony, because it was set up as a place for convicts. But at first there was no need for laws about trade and business. Later, as free settlers arrived and set up businesses, they wanted to be treated by the law in the same way as in Britain, so the types of British laws that were suitable to the colony expanded greatly.

## Dates for the reception of British statutes in the Australian Colonies

Another problem was that British statutes change all the time, and it took a long time for these changes to be made known in the colony, because ships carrying the mail could take 6 months or more to travel to Australia. There needed to be a point of time at which all the relevant British statutes were collected and made part of the law of the colony. So special statutes were made which set the date at which British statutes were 'received' in the colony.

For example, the British Parliament passed the [Australian Courts Act 1828](#). It set 28 July 1828 as the date at which British statutes were received as part of the law of New South Wales and Tasmania (then known as Van Diemen's Land). After that date of reception, new British laws would not apply to the colony, unless they said so or showed they intended to do so. Queensland and Victoria, which were originally part of New South Wales,

also date their reception of British statutes back to 28 July 1828. South Australia, however, uses the date of 28 December 1836, which is its date of settlement. In Western Australia the reception date is 1 June 1829.

## Making laws in New South Wales

In addition to applying the common law and British statutes to New South Wales, it was necessary to make laws to deal with local matters within the colony. Because New South Wales was a penal colony, the Governor was given broad powers to deal with law and order. The Governor could make laws by setting out 'Proclamations' which contained legal rules (even though there was not yet a Parliament to pass legislation). By 1806, a collection of these Proclamations and 'General Orders' was published. One of them said that treating Aboriginal people with 'inhumanity or injustice' was a crime (although violence and mistreatment of Aboriginal people still sometimes occurred). But most of these laws covered ordinary local matters, like licensing butchers and controlling the sale of alcohol.

It was not until 1823 that the first legislature was established to pass laws. It was called the 'Legislative Council' and had five to seven members who were appointed by the Governor (rather than elected). The Governor had the sole right to decide what draft laws (known as 'bills') should be considered by the Legislative Council. Those bills were enacted (i.e. turned into a statute) by the Governor, who was acting upon the advice of a majority of the members of the Legislative Council.

The Governor remained tightly in control of the making of statutes up until 1842 when Britain passed a new law to allow two-thirds of the NSW Legislative Council to be elected, with only one-third appointed. The Governor's powers were reduced as the democratic system developed. This happened first when the legislature became 'representative' (i.e. elected by the people) and later when 'responsible' government was introduced (i.e. the government was formed from a majority of members of the lower House of Parliament). These changes established a democratic system of government in Australia, which was lacking in the early days of colonisation.





## Topic 4.2 Lesson/ Activities Six



AUSTRALIAN  
CONSTITUTION  
CENTRE

# Introducing the law the British brought to the penal colony of New South Wales and the difference between common law and statute law

### Time/Lesson

- 1 hour

### Learning Goal

To introduce the law the British brought to the penal colony of New South Wales and the difference between the common law and statute. To learn that Governor Phillip had the power to make proclamations which contained legal rules. To understand that Indigenous people already had their own laws and system of government.

### Rationale

To appreciate there were two types of British laws that applied in the places they colonised. The first is the 'common law' (developed by courts over many centuries, rather than by Parliament). The second type of laws, statutes, are passed by a Parliament (also known as a legislature).

### Success Criteria

Students relate their understanding of the laws the British colonists brought to New South Wales and acknowledge that Indigenous peoples already had their own laws and system of government.

### Resources

Detailed reading and understanding of TRD 10

### Teaching Reference Document:

[TRD 10 What Law did the British Bring to New South Wales](#)

To introduce the law the British brought to the penal colony of New South Wales and the difference between the common law and statute.

### Tuning In

- Revise previous lessons for this topic on Terra Nullius and Governor Phillip's Commission.

### Teacher Instruction

- Note for teachers: This lesson concerns the very early British settlement around Sydney, which affected Aboriginal peoples, but not yet any Torres Strait Islanders. Hence reference is made to 'Aboriginal peoples', rather than 'Aboriginal and Torres Strait Islander peoples'. Note also that the treatment of Australia by the courts as a 'settled' colony remains contentious and sensitive.
- Student Courts: Role play trials for some of the examples of law breaking in the early colony such as stealing cows or wheat : <https://trove.nla.gov.au/newspaper/article/627131>. (Monitor: Teachers should be cautious to avoid stereotyped representation of Aboriginal people.)
- Governor Phillip: Students to write their own "proclamations" which contain legal rules that need to be made immediately and cannot wait for the British Parliament to pass a statute.
- Students role play the British Parliament passing statute to apply to the colony of NSW at the request of Governor Phillip.

## Group/Independent Learning

Question Posing/Question Responding – pose the following overarching questions to students:

- How do we reconcile the fact that the British wanted their rules and laws to apply to everyone, including convicts, but at the same time they did not recognise the local laws of the Aboriginal peoples they encountered?
- What reasons might account for this?

Students brainstorm a list of reasons that this occurred. Some possible areas to explore:

- Not speaking the same language.
- Racism and a lack of respect for Aboriginal people.
- Difficulty in managing two systems of conflicting laws - which prevailed when they were inconsistent - and the difficulty for the British of understanding the complex unwritten laws of different Aboriginal peoples.
- The practical need, in a new colony, to have land to farm and live on, and to grant land to emancipated convicts.
- Conflicts caused by colonists taking the land that belonged to Aboriginal peoples for over 60,000 years.
- A mistaken belief that Aboriginal people were nomadic and not attached to particular land.

In a presentation students display an application of their understanding of:

- Terra Nullius
- Indigenous law
- British law in the early colony

## Wrapping it up

- Students share their presentations orally – options to share to a partner, small group or whole class.

## Differentiation

### Support

Provide sentence starters and prompts. Possible option to voice record as opposed to writing if this meets learning needs.

### Extension 1

Extension students could reply to the question from the perspective of Governor Philip, drawing on their understanding of the orders he was given at the time, the delay in receiving instructions or laws from Britain and the many challenges of establishing and operating a convict settlement on lands belonging to Aboriginal people.

- In practical terms, how difficult would it be to accommodate not even two systems of law, but many systems of law, as each Aboriginal nation had its own laws?
- How would conflicting laws be dealt with? Which law would apply when a crime was committed?
- Could a person end up being punished twice for the same thing?
- Were the rules about contracts and trade the same in each culture?
- How could there be certainty about the content of a law when it came from an oral culture with no written records?
- What happens when behaviour that is acceptable in one culture is treated as a crime by another culture?
- How do you reconcile a legal system where land can be bought and sold, with a different legal system where people belong to the land for their entire life and the land cannot be sold?

## Extension 2

Students could be asked to compare Aboriginal law with the two types of British laws - common law and statute. What do they have in common? Both the common law and Aboriginal laws have been developed over a very long period of time, by esteemed elders (known in Britain as judges), who build on precedents and adjust the law gradually so that it meets current needs. They are therefore similar types of law. Statutes, however, are quite different, because they are new detailed laws that are agreed upon by a group of chosen representatives of the people and recorded in writing.

### Assessment strategies

The presentation could be used as a part of an assessment portfolio or as summative assessment drawing together all knowledge from the Unit.



	A	B	C	D	E
<b>Knowledge and Understanding</b>	<b>thorough</b> description of the experiences of an individual or group in the past	<b>detailed</b> description of the experiences of an individual or group in the past	<b>description</b> of the experiences of an individual or group in the past	<b>partial</b> description of the experiences of an individual or group in the past	<b>fragmented</b> description of the experiences of an individual or group in the past
<b>Skills – Communication</b>	<b>purposeful</b> presentation of ideas, findings and conclusions in a range of communication forms with <b>considered</b> use of <b>relevant</b> discipline-specific terms and appropriate conventions	<b>informed</b> presentation of ideas, findings and conclusions in a range of communication forms using <b>relevant</b> discipline-specific terms and appropriate conventions	<b>presentation</b> of ideas, findings and conclusions in a range of communication forms using discipline-specific terms and appropriate conventions	<b>partial</b> presentation of ideas, findings and conclusions in a range of communication forms using <b>aspects</b> of discipline-specific terms and appropriate conventions	<b>fragmented</b> presentation of ideas, findings and conclusions in a range of communication forms using <b>everyday language</b>

Oral presentation or oral and written presentation have assessment possibilities within the English Curriculum.

	A	B	C	D	E
<b>Understanding receptive mode</b>	<b>considered</b> demonstration of understanding that texts have different text structures depending on purpose and context	<b>effective</b> demonstration of understanding that texts have different text structures depending	<b>understanding</b> that texts have different text structures depending on purpose and context	<b>partial</b> understanding that texts have different text structures depending on purpose and context	<b>fragmented</b> understanding that texts have different text structures depending on purpose and context
<b>Understanding productive mode</b>	<b>considered</b> use of language features to create coherence and add detail to their texts	<b>effective</b> use of language features to create coherence and add detail to their texts	<b>use of</b> language features to create coherence and add detail to their texts	<b>developing</b> use of language features to create coherence and add detail to their texts	<b>emerging</b> use of language features to create coherence and add detail to their texts
<b>Skills productive mode</b>	creation of <b>purposeful</b> structured texts to explain ideas for different audiences	creation of <b>effective</b> structured texts to explain ideas for different audiences	creation of <b>structured</b> texts to explain ideas for different audiences	<b>partial</b> creation of structured texts to explain ideas for different audiences	<b>fragmented</b> creation of structured texts to explain ideas for different audiences