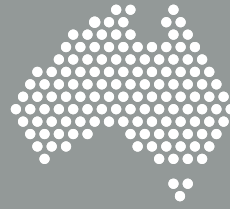




Teacher Reference Document 14



AUSTRALIAN
CONSTITUTION
CENTRE

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 kind of Government did the British impose in NSW?

When the British colonised Australia, they did not recognise the Aboriginal and Torres Strait Islander peoples as the sovereign rulers and owners of the land, even though Indigenous peoples had lived on the continent practising their own laws and customs for tens of thousands of years before the British arrived. The British instead asserted their own sovereignty over the land. While early on, some British Governors allowed Indigenous peoples to continue their own governance, if there was a conflict between the two systems, the British law took priority.

The British brought with them key ideas about how government should work, like the 'rule of law' and the 'separation of powers'. The rule of law means that everyone, including those in Government, must obey the law.

The separation of powers is based upon the fact that it is a very bad idea to give one person or body absolute power. Separating power amongst different bodies ensures that no one has absolute power. This means that the power to make laws ('legislative power'), the power to give effect to laws and policies ('executive power') and the power to judge whether a law is broken and to punish people ('judicial power') are all exercised by separate persons and bodies. Legislative power is exercised by the Parliament. Executive power is exercised by the Government, through Ministers, and given effect by public servants. Judicial power is exercised by courts, through judges.

This was roughly the system that existed in England when the First Fleet set sail for Botany Bay. It is also the system that we have in Australia now.

But when the British first set up their colony in Sydney, they did not immediately establish such a system. This was because they started with a 'penal colony' consisting largely of convicts, sailors, members of the military ('marines'), some officers employed by the British Government and their families.

There were not enough colonists to have a Parliament. But they still needed a court, as the majority of the colonists were convicts who might offend again. So the Governor's Commission allowed courts to be set up to deal with crimes and other legal disputes. In 1823 they were replaced with a more formal and independent Supreme Court of New South Wales. The Governor, however, exercised both the executive and legislative powers of the colony. He was effectively the Governor of a remote outdoor prison, and had full legal power over it. The system of Government in NSW therefore started out as quite different from that in England. But it would become a full system of government with the separation of powers as the colony grew.



Captain Arthur Phillip 1786
|Francis Wheatley
Source: Wiki Commons

Control over convicts

The British wanted to make sure that the Governor and marines maintained full control over the convicts. It must be remembered that the convicts were in a majority, and the settlement was so far away from England that extra help could not be sent if there was a revolution and the convicts took control. In England, the Gordon Riots in 1780, which resulted in many deaths and much looting and burning of houses in London, left a fear of 'the mob' taking over. This fear only increased after the French Revolution in 1789.

To prevent an uprising, the criminal law was applied strictly and punishments were severe. Punishment could include being transported to other areas within Australia, including Norfolk Island, where convicts had to endure hard labour and poor food if they committed new crimes in the colony. They were punished harshly to discourage further crime.

The power to make laws

The Governor's Commission and Instructions did not say that he had the power to make laws. Realistically, however, it was necessary for him to do so by making 'Proclamations'.

Even though the 'common law' and British statutes had been transported to Sydney with the convicts, they had to be adjusted to suit the colony, and new laws were needed too.

Although the First Fleet brought a small printing press to Australia, no one knew how to make it work. It was not until 1795 that a convict worked out how to use it and became the official Government Printer. The press was used to publicise Government orders and regulations – and also to make advertisements for plays (because the printer was also an actor at the Sydney Theatre). In 1806 a small book was published which contained all the laws made in the Colony. But even then, there were practical problems. There was not enough paper in the colony, so if anyone wanted a copy of this book, they had to provide their own paper to the printer.

Some people disagreed about whether the Governor had any constitutional power to make laws. In 1803, the famous philosopher, Jeremy Bentham, criticised the Governor's acts of proclaiming laws in New South Wales. Bentham argued the Governor had been sent out without the British Parliament giving him the 'smallest particle of legislative power'.

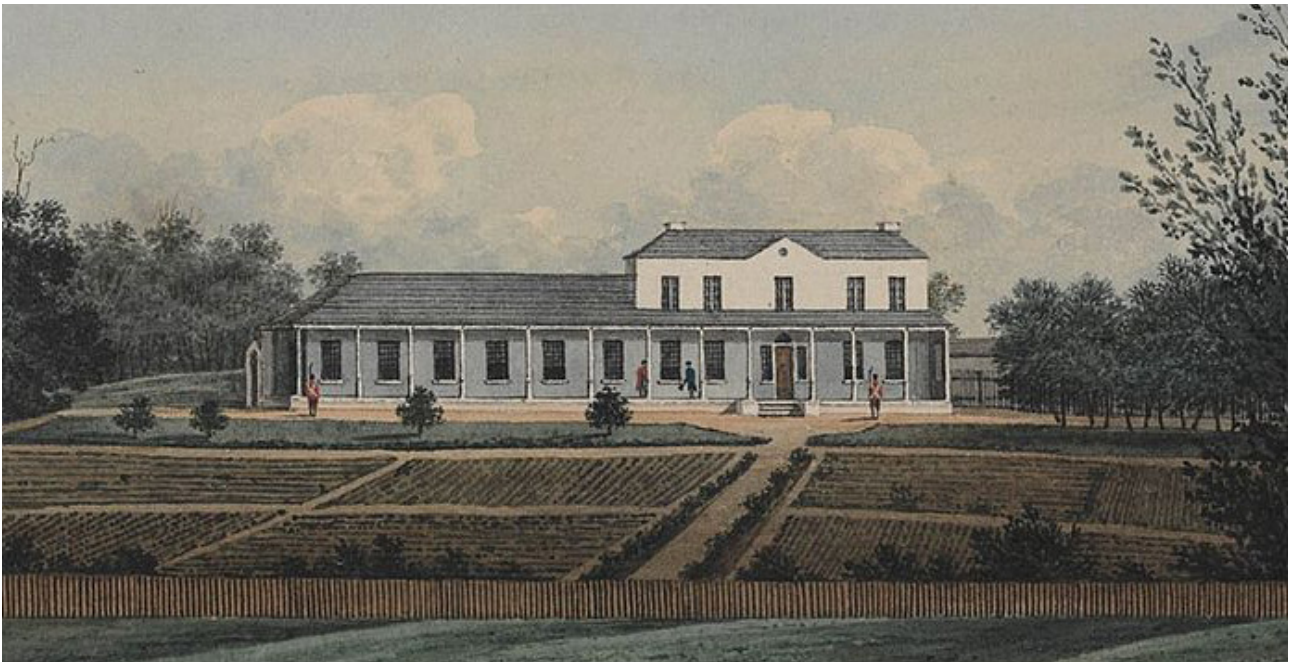


A Private of the Royal Marines who arrived on the First Fleet
Source: Wiki Commons

It was not practical, however, to rely on the British Parliament to make new laws for the colony when they were needed, because it took 6 months to send a letter to London and 6 months to receive a reply. So Governors simply proclaimed laws and expected them to be obeyed.

What about special types of laws, like taxes? The courts in England had long ago decided that only Parliament could make people pay a tax – not the Government. This led to doubts about whether taxes on alcohol that were imposed in NSW were legal. Due to this uncertainty, the British Parliament had to pass a law to protect Governor Macquarie and other officers from being sued for illegally collecting taxes.

One problem with giving a Governor great powers was that they might be abused. While Governor Phillip largely exercised his powers with restraint, when he left he was temporarily replaced with military officers from the 'New South Wales Corps'. They tended to make laws and exercise powers to their own advantage, including taking large land grants, better rations and control over certain types of trade so they could make lots of money. They did not respect the 'rule of law'.



The next two Governors sent from England had great trouble undoing this special treatment, resulting in the Rum Rebellion against Governor Bligh in 1808.

Government House, Sydney
1796-1809 by J W Lewin
Source: State Library of NSW

When Governor Macquarie arrived in 1809 he exercised his powers in a gentler way, favouring the rehabilitation of convicts and supporting those who had served their time and were now free.

The establishment of the institutions of government

The civilian colonial population of NSW eventually grew, with shopkeepers, farmers and traders creating a new society. They expected to be ruled in the same way as in Britain, and to have rights of representation. Gradually, those rights were established along with the institutions of government.

A Legislative Council was established in 1823 by a British Act of Parliament, but it was comprised of officials appointed by the Governor, not elected representatives. Legislation could then be formally passed, but it needed both the support of a majority of the Legislative Council and the Governor. While not an elected body, it was a start.

From there grew the fully elected Parliament with two Houses that forms part of the democratic system of government that we have today.



Topic 4.2: Lesson/ Activities Nine



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What kind of Government did
the British impose in NSW?

Goal

Students will understand two key ideas the British Government brought with them to the penal settlement of New South Wales (NSW) being the rule of law and the separation of powers and why these ideas were hard to implement in a penal colony. They learn about early laws that were made and think about why such laws might have been needed.

Rationale

Understanding the history of how the rule of law and the separation of powers were developed in Australia will give them a stronger foundation for understanding the operation of government today.

Success Criteria

Students understand that the first Governors of NSW and the military officers from the NSW Corps maintained full control over the convicts and the laws of the colony and declared these laws through proclamations.

Teaching Reference Document

- TRD 14: What kind of Government did the British impose in New South Wales?

Tuning In

Remind students of the explanations given in TRD 10: 'What law did the British Bring to NSW?' about the common law, statute and how laws were made by the Governor by way of Proclamation in the early days of the colony of New South Wales.

Teacher Instruction

- The class works through several questions posed from the TRD 14, such as what is a proclamation? Why didn't the British Parliament make the new laws for the colony? Why couldn't the rule of law or the separation of powers initially work in the new colony? What were some examples of rules and laws the colonial Governors would have to make and why?
- Students explore some of the laws that were made in NSW before 1806 using the list of laws extracted from the 'New South Wales Pocket Almanack and Colonial Remembrancer 1806' set out below. Students note unfamiliar words and seek their meaning.

Group Independent Learning

Break students into groups and ask them to brainstorm:

- Why it might have been necessary to make such a law?
- What was the problem the law was trying to address?
- Is there likely to be a similar law in existence today? Why or why not?
- What has changed to make the law unsuitable today, or what has remained the same, to make the law still useful today?

Laws extracted from New South Wales Pocket Almanack and Colonial Remembrancer 1806

1. Persons beating prisoners assigned to them are to forfeit their right to receive prisoners in the future (1803)
2. Arms and ammunition may not be landed in the colony without a permit. (1802)
3. Boats are forbidden to be in Cockle Bay or Farm Cove either ashore or afloat after sunset. (1803)
4. No person is to be employed unless he produces his certificate, if a freeman, or his ticket of leave, if a prisoner. (1804)
5. Convicts may not employ others to do their work. (1800)
6. Convicts are not to strike or be struck by free persons. (1802)
7. Masters are to clothe convict servants, give them rations equal to those issued by the Government and provide them a sheltered lodging. (1804)
8. No person is to burn stubble in their field until his neighbours are warned and prepared, and no one shall make fires near hay stacks. (1805)
9. Foreigners are not permitted to settle or reside in the colony without permission (1804)
10. Idlers loitering about the wharfs are to be sent to hard labour, and if it is after sunset, are to be imprisoned. (1804)
11. Natives are not to be treated with inhumanity or injustice. (1802)
12. Provisions, including wheat, flour, bread and meat are not to be sent on board vessels except with a permit. (1802)

Extension Activity

- Sometimes proclamations were read by Town Criers so that people knew that a new law had been made.
- Students research whether local councils today employ Town Criers who read proclamations.
- Compare the role of town criers, during times when people were illiterate or did not have access to written material, to social media and the wide range of new sources available today.
- Students study Resource 1:
Even though news of the death of Queen Elizabeth II in 2022 was conveyed across the world by social media and news bulletins, a special accession proclamation was read to the public from St James Palace and in other places in the United Kingdom. Proclamations were also read in the State capitals in Australia. The Proclamations of Accession following the news of Her Majesty Queen Elizabeth II's death at Balmoral Castle Scotland, Thursday September 8 2022, and the advice that King Charles III became King.
- Teachers can guide students in developing their own proclamation for a community, school or national event they consider significant.



Resource 1

The following Proclamation of Accession was read in London on 10 September 2022 at St James's Palace:

"Whereas it has pleased Almighty God to call to His Mercy our late Sovereign Lady Queen Elizabeth the Second of Blessed and Glorious memory, by whose Decease the Crown of the United Kingdom of Great Britain and Northern Ireland is solely and rightfully come to The Prince Charles Philip Arthur George:

We, therefore, the Lords Spiritual and Temporal of this Realm and Members of the House of Commons, together with other members of Her late Majesty's Privy Council and representatives of the Realms and Territories, Aldermen, and Citizens of London, and others, do now hereby with one voice and Consent of Tongue and Heart publish and proclaim that The Prince Charles Philip Arthur George is now, by the Death of our late Sovereign of Happy Memory, become our only lawful and rightful Liege Lord Charles the Third, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of his other Realms and Territories, King, Head of the Commonwealth, Defender of the Faith, to whom we do acknowledge all Faith and Obedience with humble Affection; beseeching God by whom Kings and Queens do reign to bless His Majesty with long and happy Years to reign over us.

Given at St James's Palace this tenth day of September in the year of Our Lord two thousand and twenty-two. GOD SAVE THE KING

A video of the reading of the Australian proclamation by the Governor-General in Canberra is here: <https://www.youtube.com/watch?v=7ZG-9wCAimU>.