10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

THE AUSTRALIAN LEGAL SYSTEM

PART 1: HISTORY

Acknowledgement of Country

We acknowledge the traditional owners of the land on which Tranby stands, the Gadigal people of the Eora nation. We pay our respects to their Elders both past and present, who remain the traditional knowledge holders of this land.

TRANBY NATIONAL INDIGENOUS ADULT EDUCATION & TRAINING SINCE 1957

We proudly extend this respect to all current and emerging leaders around Australia, for they hold the memories, the traditions, the culture and the future of their people.

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- The Australian Legal System is based on the British Legal system which was automatically adopted upon colonisation.

- This is due to what is known as the Doctrine of Reception.

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- Why did this happen?

- Generally speaking the law of the colony depended on whether it was:

➢A conquered colony; or

➢A settled colony (*terra nullius – empty land*); or

➢A cession where the colonists and the indigenous people enter into a treaty

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- If conquered the original indigenous laws would stay until they were changed by the new sovereign, for example in South Africa and Sri Lanka; or

- If *terra nullius* then English would bring their own laws with them (the doctrine of reception); or

- If English arrived in an occupied country they could enter into a treaty to determine which laws applied to which people and where.

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- NSW was ‘settled’ on the 26th January 1788 but it is not clear from the official documents in which manner it was settled.
- Why is this?

- Because when the English came it was clear the land was not empty. It was full of people with their own legal systems
- Nor was there any declaration of war against aboriginal people in Australia
- Finally no official treaties had ever been entered into
- So it was hard to say what sort of colony it was and which laws would apply

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➢What were relationships like with the indigenous people?

- The original instructions given to Governor Philip and the settlers was not to disturb indigenous people. This quickly became impossible. There was lots of interactions and eventually there were lots of disturbances.
- Early decisions recognised the existence of Aboriginal Law but English law was applied in disputes between the settlers and aboriginal people out of necessity and in an effort to minimise violence

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- However in R v Burrell and Bummaree (1836) the NSW Supreme Court changed its view and said the aboriginal people did not have laws because they were ‘not civilised’.
- Later in R v Bonjon (1841) one NSW Supreme Court judge was prepared to recognise indigenous law and property rights but his decision was ignored and forgotten until it was rediscovered in 1998.
- It was not until Mabo case in 1992 that the High Court recognised the land rights of indigenous people. However this case does not recognise the sovereignty of indigenous people which requires a treaty.

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- As the Australian economy developed, there was a move from the penal colony into a more civilian economy and this required more civilian laws.
- By 1824 a new Supreme Court was established.
- Professional judges were now in place and making decisions for the New South Wales people.
- Judges had the same jurisdictional authority to make decisions as they did in England.

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- By the middle of the 19th century, New South Wales had been split further into different colonies.
- There were now six colonies including New South Wales, Western Australia, South Australia, Victoria, Tasmania and Queensland.
- Each colony was given its own constitution and had the power to make its own laws, but all of these colonies were subject to British law and it was possible for the Imperial Parliament to override any changes that they made.

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- In 1865, the British Empire decided to give more independence to the colonies.
- It did this via the Colonial Laws Validity Act, and this Act gave the colonies the power to write and amend their own constitutions and to make changes to British law.
- The only exception to this were laws that the British Empire wanted to apply with paramount force. So there would be Acts which expressly applied to the colony or ones which had to apply through a necessary implication.
- Say, for example, if there was a law concerning British registered ships and one of those ships was in Sydney Harbor, the British law would apply to that ship not the New South Wales law.

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- As the 19th century progressed, economic and social movements put pressure on the colonies to come together and to federate.
- Eventually this gave birth to the Federation Movement, and the British Parliament passed an act (the *Australian Constitution*) in 1900 to create a new federal body called the Commonwealth of Australia.
- This Act became in force on the 1st of January 1901, created a new federal government and Parliament, and that Parliament had the power to make decisions according to a written constitution where a list of powers was set out (s 51).

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- Exclusive powers could belong to the Commonwealth (e.g. defence, currency, foreign affairs), but there would also be powers that could be shared with the States, which we call concurrent powers (e.g. education, environment, health).
- Outside of those powers expressly stated in the constitution the Commonwealth would have no role to play so anything left behind belonged to the States (residual powers e.g. public transport, police, roads).
- If there's any inconsistency between a federal law and a state law, the federal law overrides the state law to the extent of that inconsistency (s 109).

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- In 1942, the Australian Government finally adopted the *Statute of Westminster.* So it accepted that Britain should not have the power to amend or repeal Australian laws, however there was a loophole.
- The loophole was that the *Statute of Westminster Adoption Act* only applied to the Commonwealth and there was the possibility of British laws still applying to the States.
- This loophole was changed and closed in 1986. Both the UK government and the Australian government passed the *Australia Acts* in 1986, and that completely removed any vestiges of British power.
- The UK government had no longer any power to make laws with regards to the Commonwealth of Australia nor to the States of Australia.
- So the *Australia Acts* represent the final stage in Australian legal independence.

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- Some major questions still remain though and most of these relate to the treatment of indigenous people.
- One of the questions is the issue of whether Australia will enter into a treaty with indigenous peoples?
- Will the States enter into such treaties?
- And how would those treaties work?
- What is the place of indigenous law now in the Australian legal system?

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- The Uluru Statement from the Heart
- The statement is a document that aboriginal people from all over Australia agreed upon. In it they express that they are a sovereign people and what they want all Australians to do is recognize and support this sovereignty.
- Its key elements are:
- 1. **Sovereignty:** Acknowledgement that Aboriginal tribes were the first sovereign nations of Australian continent, that sovereignty was never ceded and that it co-exists with the sovereignty of the Crown.

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- 2. **Constitutional Reform:** The ‘establishment of a First Nations Voice enshrined in the Constitution’. Such a body would sit alongside Parliament to provide non-binding advice on legal and policy matters affecting Aboriginal and Torres Strait Islander peoples and would empower Aboriginal people to manage their own affairs and righten the current skewed statistics for e.g. incarceration and suicide.
- 3. **A ‘Makarrata’ Commission** to supervise a process of agreement-making between governments and First Nations and truth-telling ‘about our history’ leading to a treaty process.