Legal Developments Handout

65,000BC: The Aboriginal peoples of Australia start developing a complex system of law governing behaviour and obligations to others. Offences under **traditional lore** include homicide, incest, adultery, abducting women, assault, theft and failing to share food.

1788: English law arrives with the establishment of a penal colony in New South Wales. The colony operates under **military law**, with the Court of Criminal Jurisdiction (comprised of a Judge-Advocate and jury of 6 military officers) hearing all cases.

1823: Following agitation by emancipated convicts, free settlers and the colonial born for reform of the colonial court system, Britain passes the *Act for the Administration of Justice in New South Wales and Van Diemen's Land*. This legislation enables the existing and later Australian colonies to establish a **three-tiered court system**. Courts of Petty Sessions were responsible for hearing minor civil and criminal matters (such as public drunkenness or vagrancy), and for determining whether there was sufficient evidence to commit those accused of more serious crimes for trial. The Petty Sessions Courts (alternatively known as Police, Magistrates or Local Courts) did not have jury trials, instead being head by a magistrate or bench of magistrates (historically often simply prominent citizens or those with experience in government service). Most towns or suburbs had such courts. An intermediate court level – which did not always operate in each colony/state depending on the level of demand on their justice system – heard matters of greater seriousness by jury, and were called Courts of Quarter Sessions (alternatively Courts of General Sessions or District Courts). These courts only existed in large towns or central locations within administrative districts. Finally, each colony established a Supreme Court to deal with the most serious criminal and civil matters. Most Supreme Courts were based in the capital, but some colonies established a practice of sending judges of the Supreme Court on an annual circuit to hear serious cases in regional areas; this was referred to as the Circuit Court.

1828: On 25 July, Britain passes the *Australian Courts Act*, which states that all the laws and statutes in force in England at that date would be considered applicable in the Australian colonies, but after that date the colonies would be responsible for passing their own laws. The Act also gave the colonial powers the right to determine their own policies regarding jury trials. The courts had to this point continued to operate with military juries, but the Emancipist section of colonial society had been campaigning for civilian juries. Between 1829 and 1839, the use of **civilian juries** is gradually extended and enacted into colonial law.

1841: An **appellate court** comprised of the full bench of the Supreme Court is established in NSW under the *Advancement of Justice Act*. Other jurisdictions follow suit in making a full sitting of the Supreme Court justices the avenue for legal appeals (Queensland 1859; Victoria, 1883; WA, 1886). Initially these appellate bodies could only try matters of law; they were later empowered to try appeals as to matters of fact as well (New South Wales, 1912; Queensland, 1913; Victoria, 1914; South Australia, 1924; Tasmania, 1924; Western Australia, 1935). Following Federation, the High Court of Australia was established in 1901 as an appeal body above the state courts. Both prior and after this, the English Privy Council remained the ultimate appellate jurisdiction in Australian cases, until its powers in such matters were limited in 1968 and finally abolished entirely under the 1986 *Australia Act*.

1843: In 1839, the colony of New South Wales attempted to pass allowing **Aboriginal Australians** to be admitted to courts as competent **witnesses** (at least where their evidence was corroborated by European testimony), but the British government refused to assent to the Act on the grounds that persons without a Christian understanding of the afterlife could not be sworn in appropriately. After further petitioning by other colonial jurisdictions, in 1843

the British Parliament passed the *Colonial Evidence Act*, which enabled colonial legislatures to pass acts to allow Indigenous inhabitants to give unsworn testimony in court.

1864: Victoria passes the *Neglected and Criminal Children Act*, which allows **children convicted** of criminal offences – as well as those deemed neglected by their families – to be sentenced to industrial schools or juvenile reformatories, rather than adult prisons. Other jurisdictions quickly enact similar legislation (Queensland, 1865; New South Wales, 1866; South Australia, 1866; Tasmania, 1867; Western Australia, 1874).

1882: South Australia becomes the first place in the British Empire to allow **defendants to testify** in their own defence with the *Accused Persons Evidence Act*. Other colonies followed suit (New South Wales, 1891; Victoria, 1891; Queensland, 1892; Western Australia, 1899; Tasmania, 1910). These Acts also enabled spouses of defendants to testify on their behalf for the first time.

1887: Queensland and South Australia both pass legislation that allows first-time offenders to receive **suspended sentences** and be placed on **probation**, with other jurisdictions soon introducing similar first offenders probation bills (Victoria, 1890; Western Australia, 1892; New South Wales, 1894; Tasmania, 1898). Suspended sentences start to be applied more generally from the 1920s.

1893: In *Makin v Attorney General for New South Wales*, the Privy Council in England heard an appeal as to whether evidence had been rightly admitted in the case of John and Sarah Makin, baby-farmers who had been convicted with of murdering an infant and burying it in their backyard. The evidence in question was the discovery of a twelve other infant bodies in the backyards of residences previously inhabited by the Makins. The Privy Council decided that evidence about these bodies had been rightly admitted, determining modern common law in relation to **similar fact evidence** – namely the rule that evidence of similar crimes by defendants can only be admitted if it is both relevant and its probative value outweighs any prejudicial effect.

1895: South Australia was the first Australian jurisdiction to formally establish a separate **children's court** under the *State Children's Act*. Children's Courts are thereafter established in New South Wales (1905), Tasmania (1905), Victoria (1906) and Queensland (1907).

1899: Queensland passes the first **Criminal Code**, developed by Sir Samuel Griffith, which incorporates common law and statutory offences into one piece of legislation. Similar Codes are enacted in Western Australia (1902), Tasmania (1922) and the Northern Territory (1983).

1905: New South Wales introduces the *Habitual Criminals Act* allowing for the **indefinite detention** of those deemed habitual offenders by the courts. Other jurisdictions follow (Tasmania, 1907; Victoria, 1907; South Australia, 1907; Western Australia, 1913; Queensland, 1914).

1922: Queensland abolishes the **death penalty**. All jurisdictions eventually follow (Tasmania, 1968; Commonwealth, 1973; Victoria, 1975; South Australia, 1976; Western Australia, 1984; New South Wales, 1985).

1923: Queensland removes the property qualification from **jury service** to extend eligibility to all men on the electoral roll (South Australia, 1927; New South Wales, 1947; Victoria, 1956; Tasmania, 1957; Western Australia, 1957), and also allows **women** to sit **on juries** (Tasmania, 1939; New South Wales, 1947; Western Australia, 1957; Victoria, 1964; South Australia, 1965).