TRANSCRIPT OF PROCEEDINGS

Phone: 1300 502 819
Email: clientservices@sparkandcannon.com.au
Web: www.sparkandcannon.com.au

Adelaide | Brisbane | Canberra | Darwin | Hobart | Melbourne | Perth | Sydney

---

Copyright in this document is reserved to the Australian Capital Territory. Reproduction of this document (or part thereof, in any format) except with the prior written consent of the attorney-general is prohibited. Please note that under section 43 of the Copyright Act 1968 copyright is not infringed by anything reproduced for the purposes of a judicial proceeding or of a report of a judicial proceeding.

SUPREME COURT OF THE
AUSTRALIAN CAPITAL TERRITORY

THE HONOURABLE CHIEF JUSTICE MURRELL
THE HONOURABLE JUSTICE REFSHAUGE
THE HONOURABLE JUSTICE PENFOLD
THE HONOURABLE JUSTICE BURNS
THE HONOURABLE JUSTICE WIGNEY
THE HONOURABLE ACTING JUSTICE ROBINSON
THE HONOURABLE JOHN GALLOP AM QC RFD
THE HONOURABLE DAVID HARPER OAM

CC No 1 of 00

CEREMONIAL SITTING TO MARK THE 800TH ANNIVERSARY OF THE SEALING OF THE MAGNA CARTA

CANBERRA

9.31 AM, MONDAY, 15 JUNE 2015

MURRELL CJ: Ceremonial sitting to mark the 800th anniversary of the sealing of the Magna Carta. Distinguished guests, fellow lawyers and other friends of the court, on this day, 800 years ago, it was probably crisp and sunny here as it is today. This was a peaceful land cared for by self-sufficient people. Today, we acknowledge the traditional custodians of this land we pay our respects to their elders past and present.

But in a distant land, all was not well. The king was demanding huge taxes to fight losing wars. There was a civil rebellion. The rebellion resulted in a short-lived peace treaty, what we know as Magna Carta. Despite its very short active life, lawyers and others throughout the democratic world still revere the Magna Carta as the genesis of two enduring concepts: first, that individuals have certain basic rights, what we now call human rights. Second, that everyone, however powerful, should be subject to the same laws. This we call the rule of law. There is a related concept that the law should be administered not in an arbitrary fashion but impartially without fear or favour by those who are learned in the law. Justice Richard Refshauge will now speak on behalf of the judges.

REFSHAUGE J: Thank you, Chief Justice. I, too, acknowledge the traditional custodians of the land on which we are meeting and pay my respects to their elders past and present, and the continuing contribution they make to our culture.

Eight hundred years ago today King John of England affixed his seal to a large document of parchment beside a sodden Thames River at Runnymede. Thanks to years of unsuccessful foreign policies and heavy taxation, the King was facing a rebellion by the country’s powerful barons. In short, the barons had had it. They threatened King John with war and captured London in May 1215.

King John, like most politicians, decided that negotiation was the idea of the day. He broke at a political compromise with a band of rebellious barons and entered into the treaty with them "in good faith and perpetuity." This parchment treaty became known by its Latin name as the Magna Carta because of its size, not its significance, and to distinguish it from the shorter Charter of the Forest.

That description of what happened shows the falsity of one of the few jokes about Magna Carta, all very weak. Question, "Where was Magna Carta signed?" Answer, "At the bottom." It was, of course, not signed but sealed by the King's great seal.

Despite our octocentenarian celebrations, the Magna Carta did not actually last

very long. On 24 August, Pope Innocent III, at King John's urging, declared the Charter null and void on a basis that would be entirely unexceptional to a modern lawyer, namely that it was entered into under duress (*Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46).

That led to war and the war of the Barons lasted from 1215 to 1217.

God, however, did not smile on King John and he died just over a year later on 19 October 1216.

The annulment of the Magna Carta and the death of King John did not, however, see the end of the agreement or the ideas enshrined in it and John's eldest son, Henry, then nine years old, re-issued the Charter on 12 November 1216 as an affirmation of the new King's future good government. On this occasion, it was sponsored by a Papal Legate so acquiring explicit Papal approval. The text, however, had been significantly modified to remove, in particular, the chapters that most directly challenged royal sovereignty.

In 1225, Henry III confirmed the Charter but this version differed even more from the original, reducing the sixty-three chapters down to just thirty-seven. The 1225 edition was re-issued from time to time. It was re-issued in all forty-four times in the next 200 years. Most significantly it was re-issued in 1297 when it was the first to be copied on to the official "Statute Roll" thereby making it a statute and its thirty-seven chapters the definitive text under English law.

Edward I, who affixed his royal seal to that latest version on 12 October 1297, made it an integral part of the law. Having affixed his seal, copies were distributed throughout the land and by Letters Patent he directed his justices to administer the Charter as common law. No judgements were to be given henceforth that were contrary to the Charter and so Magna Carta, whether as common law or as statute, entered the law of the land as part of the law of England from that time forward and became part of the law of all those Imperial colonies and possessions to which English law was carried. Despite the manifold references to the 1215 original, it is the 1297 edition which is the real statutory power in force in the UK and more widely in the Empire that England created.

As a result, it became Australian law inherited from the United Kingdom. What remains of the 1297 edition is now part of Australian Capital Territory law and can be seen on our Legislation Register.

Gradually over time, provisions of the Magna Carta, were repealed or fell into

disuse. By 1965, only nine chapters remained in force in the UK as to which five were not applicable in Australia, four were obsolete or superseded leaving one, chapter 29 (originally chapter 39) as part of the law of Australia. By 2015, only three remained in force, in the UK itself, two not being applicable to Australia, the third being chapter 29.

In 1973, the then Law Reform Commission of the Australian Capital Territory considered that this chapter, alone of the provisions of the Magna Carta, should be preserved. It commented that "its value is ... said to be 'chiefly sentimental', but this may be an exaggeration; does not the Crown's promise not to 'defer' justice or right to any man, make unlawful and unreasonable delay by the executive in rendering his due to his subjects? Whether that is so or not, we think that this provision should remain in force, and should not be restated in modern terms".

By a rather convoluted legislative history, then, in our statute law, Magna Carta, 1297 now appears with the sole provision which, relevantly, provides in words that have been quoted many times over the years:

> No free man shall be taken or imprisoned, or disseised of his freehold, liberties or free customs, or be outlawed or exiled or in any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgement of his peers or by the law of the land.
>
> We will sell to no man, and we will not deny or defer to any man, either justice or right.

That, however, is by no means the sum total of Magna Carta. It is, as one commentator has it, a brand and, as such it is not just the sum of its parts. It is about rights, freedoms and the rule of law, even though a textual analysis would not support that.

It is interesting that our celebrations this year are about an Act which deals with human rights. In recent history, the only other Act which has been celebrated in such a way was when, last year, we celebrated the tenth anniversary of the passing of the *Human Rights Act 2004* (ACT). Even when we celebrated the Centenary of Federation, the focus was on the creation of the Commonwealth and the coming together of the colonies rather than the Constitution.

This has, perhaps, much to say about the resonance of rights and liberties in the civic consciousness that these should be statutes which we specially acknowledge.

It is to the Magna Carta, and its influence, that I then turn.

It is a daunting task. I am conscious of the implications of what Lord Sumption, of the UK Supreme Court, said earlier this year when he commented

> It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently.

As his Lordship continued, "You must not expect any startling new line from me, at least of all in a centenary year to which something portentous is said about Magna Carta every day". That is indeed applicable to what I will say.

It seems to me that the most important thing about Magna Carta is a word that came into our lexicon of legal descriptions in 1997 with that fine docudrama "The Castle". That is to say, "The Vibe".

The continuing significance is not so much the text itself but what Sir Gerard Brennan called the "beneficial misinterpretations – indeed the myth" with which the Charter has been invested down the years. We Australians, with our no-nonsense and iconoclastic approach to life and, perhaps, the law, probably prefer "the vibe" to "the myth." So Magna Carta came to stand for the rule of law, limits on authoritarian rule, government subject to law and the rights and liberties of citizens.

Textually, the document was not a democratic document; indeed, in some ways it could be called reactionary. It was certainly thoroughly feudal.

Thus, from its heartfelt plea for "standard measures" of wine and ale "throughout the kingdom" (perhaps not too alien a plea to Australians) to its ruminations on what should happen to a man's fortune should he die while in debt to the Jews, the medievalism of the document sings through its 63 chapters.

It had, however, an unintended genius. For all its medieval quirkiness, the Magna Carta had a universalist heart that still beats today.

The principal effect was that it limited the sovereign's power and this, more than perhaps anything else, has given rise to the enduring attributions to the Magna Carta as the source, at least in the underlying principles, of those subsequent institutions which have limited executive power: parliament, the writ of habeas corpus, trial by jury, freedom from summary arrest and imprisonment. It started the process of carving out space for what would become civil society. It may also be said to have begun the effort of codifying

the law in a rational way.

It became a major influence on the making of the Bill of Rights 1689 which guaranteed freedom of speech, a free press, freedom from excessive bail and freedom from cruel and unusual punishments.

We owe much to one man for this, the judge and politician Sir Edward Coke who became Chief Justice of the Court of King's Bench in the early 17th Century. Despite his prodigious learning, he had a rather irascible disposition and fell out with King James the First as a result of that king's interference in the workings of the courts. He became an implacable opponent of the Stuart kings and their supposed Divine Right to Rule. Indeed, Lord Coke was dismissed in November 1616. Nevertheless, he is said to have transformed Magna Carta from a somewhat technical catalogue of feudal regulations into the foundation document of the English Constitution which status it has since then largely enjoyed. He even regarded it as the source of those bulwarks that protect the citizenry from governmental autocratic oppression, namely the writ of habeas corpus and the right to trial by jury. That, historically, neither of these claims can be substantiated, does not dilute the importance of such mechanisms and to which a mere reference to "Magna Carta" is sufficient to establish. Thus, Lord Coke defined in the words of Magna Carta three enduring fictions:

1. He took the provisions which protected a man's "liberties", which actually meant his privileges and immunities, and treated them as referring to the liberty of the subject which, according to him, resulted in all invasions of personal liberty by the Crown being unlawful.

2. He suggested that Magna Carta was the origin of parliamentary sovereignty, although no parliament existed for half a century after it was sealed.

3. He asserted that Magna Carta prevented the exaction of money by the Crown without consent although the only chapters dealing with taxation in the Charter had been removed by 1297.

Similarly, it has been said to have affirmed the right to trial by jury when that did not then exist and trial by battle or ordeal was the order of the day.

Again, it has been said to be the source of habeas corpus, a writ, however, which did not exist for another 200 years.

Lord Coke would not have found much jurisprudential comity with the originalist school of constitutional interpretation so ably represented in the

US Supreme Court of which Justice Scalia is so robust and effective a proponent.

Perhaps, overarchingly, the Charter legitimately did stand for the supremacy of the law over the Crown and, therefore, the other organs of government and, in this sense, it was a very important vibe.

There is no doubt that Magna Carta has had wide influence. Indeed, it has been called the foundation of human rights, the father of all constitutions, the basis of the civil liberties of a free and democratic society, the bedrock of democracy.

If that shows some signs of hubris, it accurately depicts the strength of the vibe that it has generated.

Even school children are infected by its vibe, though not always as accurately as we would perceive it. As one examinee explained "Magna Carta said that no man should be hanged twice for the same offence". This is an interesting interpretation of the doctrine of double jeopardy, also apparently sourced to Magna Carta without a textual basis, but, no doubt, the same vibe.

Certainly, its tenor is well able to be seen internationally. It was the inspiration for the French Declaration of the Rights of Man and Citizen (1789). It was used by the founding fathers of the United States of America in drafting the constitution of that great nation and, in particular, its Bill or Rights (1791). It was influential in the creation of the Universal Declaration of Human Rights (1948). It was a basis on which was created the European Convention on Human Rights (1950). It has been seen as an important fundamental source of the Basic Law of Hong Kong (199).

Nelson Mandela referred to it from the dock during the Rivonia trial of 1964 and German-born composer, Kurt Weill based a cantata on it. In Tianamen Square, some of the pro-democracy protesters sourced it as one of the western pillars of democratic freedoms.

Australia is, of course, fortunate to have a copy of one of the sealed copies of the Charter of Edward I, the one apparently intended for the County of Surrey. It is now to be found in Parliament House. On 12 October 1997, the 700th anniversary of that document, the commonwealth named Magna Carta Place, Langton Crescent in this city as another expression of the debt we owe to the principles attributed to and generated by Magna Carta.

If the politician who said that some of the people now born were to live to 150 years old is to be believed and if I am one of those people, I will be present in my last year at the celebration of the 800th anniversary of that document.

5 It remains a living document. Indeed, so far as the researches of the Chief Justice's associate have managed to uncover, it has been referred to in ten decisions of this Court since 1997 including as justifying a right not to be held or punished except according to law, a right to a fair trial, the powers of a sheriff and the right to due process, a fair hearing and a fair trial. One of the 10 first of these references was made by Justice Gallop in *Paramasivan v Flynn* [1998] ACTSC 10 and I am delighted that the Honourable John Gallop has joined us for this ceremony today.

In none of those decisions was the reference to Magna Carta determinative, 15 however, and it seems to me unlikely that it would be a sure foundation for many decisions for which, in any event, the common law and other statutes now would provide more definitive authority. This is not dissimilar to the experience in the United Kingdom where, since 1900, Magna Carta has been cited in nearly one hundred and seventy judgments but, in almost every case, it 20 has been largely rhetorical and, Lord Sumption commented, "On the rare occasions when the court has been presented with a case in which it might actually make a difference, the judges have shied away".

It has been referred to in the High Court of Australia a number of times, but in 25 none that I could discover was it used to decide a point in contention, mostly being used for historical purposes and to set out the kind of principles to which I refer below.

In America, however, perhaps because of the circumstances of its birth as a 30 nation and the influence Magna Carta clearly had on that country's Constitution and Bill of Rights, it has had much greater effect. The due process clause of the fifth and fourteenth amendments are based on the surviving article as interpreted by Lord Coke. In 1991, it was calculated that Magna Carta had been cited in more than nine hundred decisions of State and 35 Federal Courts to that date and in more than sixty Supreme Court decisions in the previous half century. I am not sure whether the originalists have contributed to this or not.

Nevertheless, it is the vibe which is so important. It is a catchcry for the 40 protections that the law has given citizens from arbitrary oppression that attempts to stay the hands of overzealous politicians and governments rather than the actual provisions which are now better and effectively enshrined in more manageable legislation such as the *Human Rights Act 2004* (ACT).

There can be no doubt that its influence has been the source of much common law and the incentive for many of the statutes that protect our human rights.

As Lord Bingham of Cornhill observed, when eschewing the possibility of enforcing a medieval statute in modern times

> The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.

Thus, it is important as an inspiration for a whole range of principles such as the supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, the separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

It is, therefore, appropriate that today marks also the start of Refugee Week where we pay attention to those who, by definition, have had the rights that we enjoy, stripped away, and who seek the protection of those nations that respect liberty, tolerance, democracy and the recognition of the dignity of each human being.

It seems to me that Sir Gerard Brennan when speaking at the naming of Magna Carta Place in Canberra on 12 October 1997, summed up in words that I could not better, the influence of Magna Carta. His Honour, said

> Above all, Magna Carta has lived in the hearts and minds of our people. It is an incantation of the spirit of liberty. Whatever its text or meaning, it has become the talisman of a society in which tolerance and democracy reside, a society in which each man and woman has and is accorded his or her unique dignity, a society in which power and privilege do not produce tyranny and oppression. It matters not that this is the myth of Magna Carta for the myth is the reality that continues to infuse the deepest aspirations of the Australian people. Those aspirations are our surest guarantee of a free and confident society.

It is appropriate that, with clear eyesight about what we now celebrate we should be ever grateful that we have a lodestar by which to ensure the health of our society by the vibe of a document which allows us to protect our freedoms, limit improper incursions on them, enshrine the rule of law in our thinking and our actions and to ensure that the rights of individuals are celebrated and nurtured.

We should, however, bear a warning amidst the excitement of our celebrations, for the rights and freedoms we celebrate are not necessarily secure. They

require constant protection and support. As the eminent jurist, Sir William Blackstone, commented centuries ago, “the body of the charter has unfortunately been gnawn by rats” We must not let our fears, our alienation, our selfishness, our xenophobia, or our smugness allow our leaders to take up
5 the task that the rats left unfinished.

It is entirely appropriate that this Court should celebrate and honour that for which Magna Carta stands. It is that for which this Court stands and which all of its judicial officers past and present have sought to deliver as day by day
10 they toil in the provision of justice according to law.

I am honoured to have been a part of this important ceremony.

MURRELL CJ: Mr Attorney.

15

MR CORBELL MLA: May it please the court. Magna Carta is rightly viewed as the preeminent legal document in the development of constitutional and parliamentary democracy. As a statute of the realm from 1297, it officially became part of English law to be referred to, interpreted and quoted in the
20 courts and parliaments of England and of its empire, including Australia.

Echoes of Magna Carta can also be found within the American constitution and its influence can be seen in modern documents, such as the Universal Declaration of Human Rights. In Australia, the ACT, Victoria, Queensland
25 and New South Wales have all legislated to take in selected imperial legislation, including chapter 29 of Magna Carta. In the ACT, this chapter can be found on our legislation register. Magna Carta acknowledges that no-one in society is above the law, not the king nor his subjects, not the government or the governed. As an affirmation, that authority should be subject to law arising
30 from the community itself. It is a crucial foundation stone of constitutional and parliamentary democracy.

The legacy of Magna Carta is evident in the ideals of the rule of law, due process, freedom of speech, the right to justice and to a fair trial.
35 Eleanor Roosevelt, in referring to human rights, noted that the Universal Declaration of Human Rights may well become the international Magna Carta. In that context, our own ACT Human Rights Act demonstrates the vitality of the principles outlined in this 800-year-old document and their subsequent evolution. We can all recall last year that we celebrated the first decade of
40 operation of our own Human Rights Act, the first statutory bill of rights to exist in the Commonwealth.

While Magna Carta itself covers many matters related to the feudal system that existed in 13th century England, the charter enshrines two crucial legal

principles which continue to underpin the operation of our criminal justice system. The first can be characterised is the principle of justice and the second as the principle of proportionality. Magna Carta promised that no freeman shall be taken or imprisoned, or dispossessed, or outlawed, or banished, or in any way destroyed, except by the legal judgment of his peers or by the law of the land. This principle of justice has been applied to our criminal justice system ever since, from arrest through trial, to sentence and to sentence administration.

It is supported by the further undertaking in the charter that no-one will be subject to the law without faithful witness in evidence. An accusation alone is not sufficient; there must be reliable evidence to support that accusation. These two statements create the framework upon which our criminal justice system is built and are, in somewhat more modern language, reflected in the Territory's Human Rights Act.

Section 21 of that Act contains the right to a fair trial. The right includes that any criminal charges must be decided by a competent independent and impartial court or tribunal after a fair and public hearing. Section 22 contains the right to be presumed innocent until proven guilty according to law and it includes the right to examine witnesses. It is hard, therefore, to imagine a criminal trial where these principles will not be followed. They have become so ingrained in our way of life that we accept them almost without question. They are the principles which must be considered the fundamental threshold to be applied before freemen, free citizens are banished or punished.

In recent times, proposals to strip the status of citizenship from those whom a member of the executive government considers in their own discretion should not be entitled to that citizenship, without the right to examine witnesses, indeed without a conviction for any criminal act and with limited, if any, judicial review can only be seen as an abandonment of this principle. These proposals are an abandonment of the commitment from those who govern us that we live in a society governed by the rule of law. They are a violation of the compact between those who govern and the governed, that the executive government will not act arbitrarily to deprive citizens of their fundamental rights. We must not forget, as the philosopher Hannah Arendt surmised, "Citizenship is the right to have rights." It is incumbent upon all in our society to act and uphold these principles. It is particularly incumbent on those who hold offices such as mine, not only of the Commonwealth but of all the States and Territories, to be advocates of this bedrock of democratic society, to not be silent at such a critical time.

The second principle, that of proportionality, comes from the promise that, for a trivial offence, a freeman shall be fined only in proportion to the degree of his

offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. The penalty should reflect the seriousness of the crime. It would be unthinkable for all offences, however minor, to result in incarceration, but, equally, it would be out of question for a murderer to simply be fined. Proportionality is a fundamental principle of the law. In this court, as in all others, it is applied on a daily basis, to seek to reflect both the gravity of the offending and all the other factors that must be considered relevant to the sentence.

800 years after its signing, we are celebrating a document that remains in this current day the foundation stone of the rule of law. In the words of a former Lord Chancellor of England, its terms continue to underpin key constitutional doctrines, its flame continue continues to burn in the torches of modern human rights instruments, and its spirit continues to resonate throughout the law. I would add that in the current day we must continue to act to ensure that this flame is not diminished by political expediency, nor by the overreach of the executive government. May it please the Court.

MURRELL CJ: Mr Hockridge, president of the ACT Law Society.

MR HOCKRIDGE: May it please the court. I, too, acknowledge that we're meeting today on the lands of the Ngunnawal people, the traditional owners of this land. Theirs is a rich and enduring cultural heritage. I pay my respects to their elders past and present.

I plan to be short. I'm aware, as most of us are, we're keen to hear from Prof Triggs.

One commentator refers to Magna Carta on its 800th anniversary as "that ancient illegible writing on the skin of a dead sheep where just about everything we are told about it makes no sense." The comment goes on:

> Quite how, in 1215, a grumble of greedy barons and the worst king in English history could, by arguing in French, create a Latin document that is the foundation of our rights in the English-speaking world is difficult to explain.

Much has been written about the charter's true history, especially in the years leading up to the last centenary in 1915. Prof Jenks famously wrote in 1904 of the myth of the Magna Carta. Other academics have drawn similar conclusions. The Pope certainly didn't like it, as Refshauge J has outlined, and John quickly repudiated it. Certainly the versions of 1225 issued under Henry III and 1297 under Edward I have proven to be more significant. So there may be a healthy dose of rear vision romanticism going on.

Yet, Magna Carta matters.

Some documents take on a symbolic significance quite distinct from any actual principle they contain. Again, as Refshauge J pointed out, Sir Edward Coke, who was Chief Justice of the King's Bench and politician in the time of James I, 400 years after Magna Carta, had an extraordinary influence over the world's perception of what it stands for.

In large part, it is through his interpretation that the Great Charter is accepted as representing, and if I can drop in my own Latin, inter alia, the beginning of the separation of powers and an independent judiciary, the basis upon which the rule of law has been developed, an inspiration for international human rights law and acknowledgment that nobody, including king or government, is above the law.

We applaud Magna Carta as the foundation of the right to be considered equal before the law, to have a fair trial, for people to have their dispute settled fairly and for those disputes to be settled without delay. Yes, I am going to say something about delay, but never fear I wish to congratulate the government on the announcement that there is funding for a fifth judge for this honourable court; a very welcome development.

It is right we celebrate this occasion, if for no other reason than, without it, many counsel seated in this court would not be able to use the proposition in a submission, "Your Honours, it can be traced back to the time of the Great Charter". The core concepts of giving concrete meaning and constitutional frameworks around the world and independent courts have ensured accountability to the law such that no person no matter how high is above the law.

Keane J of the High Court makes a very sound case for Magna Carta not only representing the beginning of an independent judiciary but as being "the birth notice of the legal profession"; an acknowledgement of the importance of trained lawyers ensuring that a case is properly put forward. The principles that have derived from Magna Carta are important for the community generally, but specifically for lawyers. Lawyers, as officers of the court, must ensure that our legal profession contributes to law reform debate and to advance those concepts, including concepts that underpin the notion of access to justice.

Access to justice is a critical issue in the modern democratic society. The topic has recently been the subject of an Australian Productivity Commission report, a very important report that no doubt will be considered by Federal, State and

Territory governments this year and in years to come. There are many important issues raised in that report, too many to canvass in what I have promised to be short remarks. The legal profession will respond to the various recommendations that have been made, and we should do so bearing in mind always the principles we can attribute to Magna Carta seeking to ensure that those tenants are not diminished.

Perhaps one issue deserving attention is court fees. The productivity commission report noted that court fees very widely across courts and jurisdictions are not set with reference to a common framework. A more systematic approach is required for determining fees. Parties can derive significant private benefit from using the court system. These benefits need to be reflected in court charges, which in many cases should be increased. Well, the problem is that fees, particularly higher fees, impinge on the ability of those least able to afford additional expense to participate in court proceedings.

That is a very significant access to justice concern. Yes, legal assistance services are critical, and, again, we applaud the ACT government recently announcing increased funding to the Legal Aid Commission, but the Law Society does not agree that there is any place for increasing court fees across the board on the basis that litigants are able to achieve benefit. Recourse to the courts should not be seen as a service, something that a person wants to do, but rather as a right.

In this regard, if we go back to the 1215 document, clause 40 says, "To no-one will we sell. To no-one will we refuse or delay right or justice." Celebration of Magna Carta is as much about the future as the past. Whether there is a myth of the Magna Carta or not, we should strive to apply the principles we attributed to that document to expand where necessary and to guard against any restriction. The audience here today is predominantly drawn from the legal profession, and our profession has a leading role to play in maintaining and strengthening the rule of law so our descendants will commemorate Magna Carta 800 years hence and beyond. May it please the court.

MURRELL CJ: We welcome our special guest speaker, Prof Gillian Triggs, President of the Australian Human Rights Commission.

PROF TRIGGS: May it please the court, and may I also acknowledge the traditional owners of the land in which we meet and respect, their elders past and present. I can think of no more appropriate place than the ACT Supreme Court to celebrate the 800th anniversary of the sealing of the Magna Carta on 15 June, 1215, on the river meadows of the Runnymede in England. One of the many demands made of King John on that historic day was that lawsuits were not to follow the royal entourage around the country, as

had been customary.

Rather, regular courts were to be held in a place where citizens could seek justice in their region or county. Courts were to be held four times a year and to comprise two justices and four knights from the district. In short, the idea of a fixed court with fixed sessions and a defined jurisdiction was of sufficient importance to warrant inclusion in the Great Charter itself. I do of course agree with Refshauge J's point that it's very hard to say anything new about the Magna Carta, but I do agree that it bears repeating and repeating again because of its contemporary relevance today, but I, like my fellow speakers, would also start at the beginning with the Charter of Liberties or Magna Carta as it later became known.

It was drafted by Stephen Langton, the Archbishop of Canterbury, in an effort to avoid civil war between the King and his rebel barons. It was 4000 words long and it filled a whole parchment of skin. Notably, King John was probably illiterate and he didn't sign the document, rather he attached his royal seal to it. Both the King and his barons then swore oaths before a crowd of hundreds, the Kind to abide by the terms of Magna Carta and the barons to give fealty to the King. Within nine weeks of the sealing of the Magna Carta, it was annulled by Pope Innocent III. The fragile peace soon broke down, and by the following year the King was dead.

How was it that this Latin inscribed document became anything more than a minor footnote in English history? Why is Magna Carta today recognised as the foundational document of English constitutional law and a symbol of liberty and freedom throughout the English speaking world? Magna Carta was not written by idealists, legal academics or constitutional theorists, it was a practical document to solve practical problems of inheritance, wardship and marriage, and to stop King John's arbitrary money grabbing.

I believe Magna Carta has potency today because of two seminal ideas that underlie it. The first is that the sovereign, or, in today's modern parlance, executive government, is subject to the law. It was the written articulation of the idea that the King was, like his barons, also bound by the law of the land that explains the enduring power of Magna Carta. The second important idea was the clause in the 1215 document in which the King agreed that in order to raise taxes he would obtain the common counsel of the kingdom:

> We will cause to be summoned the archbishops, bishops, abbots, earls and greater barons … all those who hold us of in chief, for a fixed date, namely, after the expiry of 40 days and to a fixed place. When the summons has been made, the business shall proceed.

Within days a committee of 25 was set up to oversee compliance with the charter, and that clause was later struck out, but the damage was done. In short, Magna Carta was a revolution. It was described in the earliest contemporary account in the Chronicle of Melrose Abbey as follows:

> A new state of things has begun in England; such a strange affair as had never before heard; for the body wished to rule the head, and the people desired to be masters over the king.

While parliaments as we know it took many centuries to evolve, the idea of a common counsel to advise the King was sewn. I would like to speak to you today about the vital role that our parliaments and courts play whether state, territory or federal in protecting our ancient democratic liberties and rights. Over the last three years as President of the Australian Human Rights Commission, I have become increasingly concerned about the decline in the effectiveness of parliament and the diminution of the judiciary and the corresponding increase in executive discretion that is all too often exercised without independent scrutiny.

I suggest that these three great institutions: executive, parliament and the courts, with their separation of powers doctrine, has become distorted. While we rightly celebrate Magna Carta, the reality is that our freedoms are constantly threatened 800 years later. Under our constitutional system, any government that controls parliament can assume significant unchecked powers. Democracy requires that the majority should be constrained from abusing the rights of the minorities. Power should be exercised according to the rule of law. Indeed, the danger of unchecked power is that governments are increasingly likely to assume that they are the law, paying lip-service only to the wider idea of the rule of law. The maximum that I learnt at law school remains very true today; 'the price of liberty is eternal vigilance.'

Very few of the Magna Carta liberties remain on the statute books today, and it has been used and indeed abused by lawyers, politicians and activists ever since to support every side of an argument. As our Chief Justice, Robert French, remarked somewhat wryly, "Magna Carta has given many a plaintiff false hope in litigation before the courts." (2015)

But it is also true that, after the historical revisionists had done their worst, Magna Carta means much more than it says, the vibe, of course. It has become a universal acknowledgement of these two key ideas that remain fundamental to modern democracy: the sovereign or executive government is not above the law and parliament itself is sovereign. Other legacies have been mentioned this morning of the Magna Carta, and they include:

- the right to a fair trial and access to justice;

- the idea that punishment should fit the crime;
- that laws should be written and made public;
- that widows should have their inheritance on the death of their husbands and not be forced to remarry; and
- that the measure of a glass of wine or ale or the breadth of a piece of cloth should meet an agreed standard.

So it is not the technical provisions of Magna Carta that are the most important today. The detail is often inaccurate by today's assessment, for Magna Carta did not establish trial by jury or the writ of *habeas corpus*. Rather it is Magna Carta's iconic protection of the fundamental freedoms of life, liberty and property that inform my concern that the supremacy of the law over the executive is under threat.

I would like this morning to take just one example of where I believe there is a failure by modern parliaments to protect our ancient liberties, for over recent years parliaments, respected parliaments, have granted to the executive excessive and unsupervised powers to detain people indefinitely without charge or trial.

I will repeat, as many of us have this morning, the most enduring clauses of the Magna Carta that:

> No free man shall be taken or imprisonment or stripped of his rights or possessions or exiled or deprived of his standing in any way except by the lawful judgment of his equals or by the law of the land.

These words are the defining statements of the rule of law, setting the limits of arbitrary power. They ring through the centuries and are the bedrock for the principles of justice we struggle to protect in the 21st century.

The parliament has given ministers power to detain indefinitely various classes of individuals, including refugees and asylum seekers, those with infectious diseases, those subject to mandatory admission to drug and alcohol rehabilitation facilities, and the mentally ill. Some state parliaments have passed laws for “preventative detention” for certain “high-risk” violent or sexual offenders. Few of those detained have meaningful access to judicial review.

Australian jurisprudence on the validity of executive detention was developed by the High Court in *Lim's case* more than 20 years ago. If detention is for a legitimate, non-punitive and essentially administrative purpose it would be valid, so detention of those unfit to plead because of mental illness, of accused persons before their trial, or of aliens prior to deportation or the grant of a visa,

can be valid so long as the aim is neither penal nor punitive.

In a recent complaint, the Australian Human Rights Commission found that four Aboriginal men with intellectual and cognitive disabilities had been held for many years in a maximum security prison in an Australian gaol. Each complainant had been found unfit to stand trial or found not guilty by reason of insanity. In respect of two of these men, had they been duly convicted of a crime they would have been subject to a maximum sentence of 12 months, instead they were in effect imprisoned for four and a half years and six years respectively.

The Commission found that the failure by the Commonwealth was a violation of the right not to be detained arbitrarily under Article 9 of the International Covenant of Civil and Political Rights, a provision of course very much in the spirit of the Magna Carta. This case is but one of scores of such instances across Australia of detention in prisons of those with intellectual disabilities for lengthy periods without releasing them into more appropriate facilities and in the absence of regular review by an independent tribunal.

Sadly, such detention disproportionally impacts the Aboriginal and Torres Strait Islanders of Australia. It is a problem exacerbated by the recent Northern Territory paperless arrest powers introduced to permit detention for four hours without being brought to a court, for offences that in many cases do not attract the sanction of imprisonment. Such detentions have dramatically increased the rate of detention of Aboriginal and Torres Strait Islander Australians, and deaths in custody continue as recently as last week, 25 years after the Royal Commission's report into Aboriginal deaths in custody.

Detention powers of the executive have also been expanded to detain asylum seekers and refugees indefinitely, powers that were found to be valid by the High Court of Australia in *Al-Kateb* in 2007.

Most egregiously, those with ASIO adverse security assessments are detained indefinitely, many including children, for some years without meaningful access to legal advice or independent review. Today about 2000, including 127 children, remain in closed detention in Australia, and about 1000 males remain on Manus Island, and 700 on Naru, including 95 children. Most have been held for well over a year, many for several years, and these conditions and circumstances have been criticised by the United Nations as breaching the Torture Convention. As punitive detention is for the courts alone, I suggest that the prolonged and indefinite detention of refugees and asylum seekers has become punitive and may be beyond par.

These are just a few examples of the executive overreach enabled by our

parliaments. And there are several more in the pipeline, including counter-terrorism laws, restrictions on freedom of speech and association, invasions of privacy and even punitive sanctions for those receiving welfare benefits.

The proliferation of new laws that diminish our liberties and expand executive powers suggest that respected parliaments have failed to exercise their traditional self-restraint in protecting democratic rights, rather the volume of laws that currently infringe our democratic freedoms, and Prof George Williams estimates that over 350 such laws are on the books at present, most introduced over the last 14 or 15 years, suggest prioritising government power has become a routine part of the legislative process. As he observes, the enactment of anti-democratic laws has become so accepted that they elicit little community or media response.

Parliamentary restraint is particularly important in Australia where we have an exceptionalist approach to the protection of human rights. While Australia has played an active role in negotiating human rights treaties, those treaties have typically not been introduced into Australian law by parliament. Key agreements, such as the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child are not directly applicable by our courts, so that the Magna Carta prohibition on arbitrary detention is not technically part of our law.

Our constitution protects the freedom of religion, the right to compensation for the acquisition of property and the right to vote, and implies a right to political communication, but very little more. As is well known, unlike every other common law country in the world, Australia has no Bill of Rights. Compounding our isolation from international jurisprudence, the Asia Pacific has no regional human rights treaty and no regional court to develop human rights law or to build a regional consensus. We have very little human rights legislation in Australia other than the laws administered by the Human Rights Commission dealing with discrimination on the grounds of race, sex, disability and age.

It might be thought that we can at last rely on our courts to protect our common law freedoms. Laws passed by parliament are not to be construed as abrogating fundamental common law rights, privileges and immunities in the absence of clear words. Our courts have, where possible, employed the principle of 'legality' to adopt a restrictive interpretation of legislation to protect these freedoms. But in practice, sadly, this has not proved to be as effective a protection as one might have hoped as laws today are drafted with such precision or so frequently amended that ambiguities are increasingly hard to find.

In the *Malaysian Solution case*, for example, the High Court found that under the *Migration Act* the Minister could not send asylum seekers to Malaysia as that nation had not ratified the Refugees Convention. The Government returned to Parliament and deleted that offending clause. If the language of a statute is unambiguous, the courts cannot apply common law presumptions about freedoms or the presumption that parliament intends to comply with Australia's international obligations.

Over the last 800 years, judges have continued to assert the rule of law against the executive. Time and again, our courts have limited executive discretion by reference to the principle of legality. Time and again, governments of the day have been successful in asking Parliament to tighten up legislation to permit what was hitherto illegal. But there have been two particularly encouraging decisions of the High Court indicating that it will use common law principles of statutory interpretation wherever it properly can.

In *Plaintiff S4* last year, the High Court decided unanimously that the executive discretion to detain was limited to two purposes: deportation or a decision whether to allow the plaintiff to apply for a visa. The court qualified the power to detain, finding that the *Migration Act* does not authorise the detention of an asylum seeker ‘at the unconstrained discretion’ of the Minister. It found an alien is not an outlaw and that the Minister must make a decision one way or the other, as soon as is practicable.

It remains to be seen how this decision is implemented in practice, but it was followed shortly after by another High Court Writ of Mandamus issued by the Chief Justice, a rare phenomenon under Australian law. Last year, again, in *Plaintiff S297*, the High Court unanimously confirmed the issue of the Writ of Mandamus and ordered the Minister to comply with his statutory obligations by deciding whether to grant a visa to a refugee held in closed detention for over three years or to deport him.

What, then, is to be done to protect democratic rights and freedoms in Australia? Celebrations of Magna Carta this year could reignite calls for some form of legislated Bill of Rights, at the Commonwealth level, of course. Had we such an articulation of rights, even in legislated form, it would give greater scope for the courts to assess the validity of legislation against human rights benchmarks. It will be possible to challenge the indefinite detention of refugees and the mentally ill, to challenge the overreach of counter-terrorism laws, and to challenge disproportionate restrictions on speech and association, but a Bill of Rights remains highly improbable in the current environment.

Other options are to strengthen scrutiny by the Joint Parliamentary Committee on Human Rights, a Committee that while remarkably achieving consensus

reports along and across party lines has not actually had a significant effect on the willingness of Parliament to pass bills along party lines or with the agreement of both major parties.

5 I suggest that the most effective, if long-term, solution is to improve our education of young Australians, so that they better understand the value of our core constitutional protections for democracy and the rule of law. Our liberties depend on an informed and committed community. The idea of a 'fair go' is understood by most Australians and, indeed, it's probably as close to a Bill of
10 Rights as we're going to get. I place my trust in the Australian people to ensure that this quintessentially Australian idea of a fair go is guaranteed to all of us.

May I finish, then, by paraphrasing a poem by Marriott Edgar.

15 It's through that there Magna Charter,
As were signed by the Barons of old,
That in … [Australia] to-day we can do what we like,
So long as we do what we're told.

20 MURRELL CJ: Thank you Professor. Mr Gill, president of the ACT Bar Association.

MR GILL: We've been fortunate today to hear from Refshauge J setting out the importance that Magna Carta holds for us in its vibe and in a myth that
25 permeates our whole understanding of government in the judiciary, that Magna Carta is something which has a universalist heart, being the limitation of a Sovereign's power in the way that we think and comprehend liberty in our society. We've been fortunate also in hearing from our attorney, who clearly also regards Magna Carta as a crucial foundation stone for our government in
30 noting that it bears for us a current vitality in seeing its application in those everyday notions that arrest and trial, and sentence, and sentence administration, in the requirements for reliable evidence and in considerations of proportionality.

35 His place, the Attorney's place, as expressed today, is an unequivocal position that it's no place of government to derogate from these fundamentals. We've been fortunate also to hear from Martin Hockridge, the president of the Law Society in making the important point that Magna Carta is significant, even to our considerations of what is meant by access to justice and that as we consider
40 what we value in terms of access to justice, what we value in terms of coming to the courts, or value in terms of legal aid, ought not stand independent from the vibe as we perceive it that's symbolised by Magna Carta, and the point that he makes that it's a celebration as much today about our future as about the past, and that Magna Carta is something that ought to still shape our future.

In hearing from Prof Triggs, the role that she points out in protecting human rights is one that parliament bears as well. Her identification that freedom is constantly in threat and that the price of liberty is eternal vigilance, and noting in that context detention without trial by the executive clashes in an ugly fashion, an ugly fashion because it tears at the lives of those that it touches, the mentally ill, the indigenous, the refugees. A detention without trial clashes in an ugly fashion with that which would take Magna Carta to establish for us unequivocally.

Key to the place that we give Magna Carta is the notion that power ought never be exercised in an unbridled fashion. That's because power is always susceptible to abuse and the unbridled use of power renders all vulnerable to its abuse. While as we look back we could see Magna Carta and think of it as the bridle; in truth, the bridling of power came from those who are willing to force the issue, not only at the risk of their reputations, at their professional livelihoods, but at the risk of all they had and their lives themselves.

As we look back to the history of Magna Carta, it ought not be thought, either, that it is always the role of the underdog to apply the bridle to those who wield the power, because while we see the bridle applied by the barons in 1215 upon John and while we see it applied again in 1217 upon Henry III, by 1297 the tables have turned and it was Edward I who defeated the barons and, promptly after defeating the barons, the power bearer applied the bridle to himself and re-enacted Magna Carta and introduced it into the formal statute books.

The question Magna Carta asks of us today, 800 years later, then is: who here holds the power and who here will wield the bridle. There are four categories of people I would principally address today, all of whom are well represented here, and all of whom both hold power and all of whom hold the bridle to power. Those four categories are the legislative and executive government, the judiciary, the press and the legal profession, both the solicitor's branch and the members of the independent referral bar.

For the legislative and executive government, we understand that it is both empowered and restricted by the democratic process. Your power, Attorney, is obvious to us, but you hold the bridle upon that power being turned into mob rule or populism. Mob rule and populism has the potential to constitute abusive power unless it is bridled and to constitute abusive power in the same way that any despotic king might.

The hard task for the executive and legislative government in applying that bridle is in exercising leadership to restrain and not succumb to the risks that populism pose to the vulnerable. The judiciary whose role, amongst others, is

to restrain the coercive powers of the State as they are arrayed against the individual. You bear a hard task in holding the bridle, to fiercely resist the use of improper means, to jealously guard against unfair prejudice, even when that is for the unlovely, for the alleged sex offenders, for those who are alleged
5 themselves to have preyed upon the vulnerable but who are vulnerable in your hands.

For the press, you bear the power to illuminate or, in many cases, to consign to darkness, and your power to shape thought is unparalleled. You bear the hard
10 task of holding a bridle to yourselves in exercising choices, in reporting on the vulnerable individual in a manner that penetrates and illuminates, and reveals both sides of the story.

To my brothers and sisters in the legal profession, we, especially members of
15 the independent referral bar, have the power to speak and the bridle applied to us is arduous, and it's to stand for the protection of the individual having the protection of the rule of law every time we speak, no matter who we represent, no matter who we appear before, no matter the opposition, no matter how distasteful or unsympathetic or repulsive is the subject matter.
20

To the question: who here holds the power? The answer is: you all do. And who here holds the bridle? The answer is exactly the same: you all do. If 800 years of Magna Carta can teach or inspire us to anything, it is that the hard and necessary role is to hold these bridles, both those that restrain ourselves in the
25 exercise of our powers and those that restrain others. May it please the Court.

MURRELL CJ: Thank you to all our speakers, on behalf of the Court, and thank you to everyone who has attended this important celebration. We are hoping that you can all now join us for morning tea, which will be served in the
30 foyer. The Court will now adjourn.

MATTER ADJOURNED AT 10.33 AM ACCORDINGLY