

Magna Carta Lecture

Delivered by HE the Hon Alexander Downer
Australian High Commissioner to the United Kingdom

Wednesday 1 June 2016

- It is both an honour and a pleasure to be invited by Lord Cormack to give this year's Magna Carta lecture.
- I follow in the footsteps of some very eminent and distinguished speakers, in what has become a fifteen-year tradition, including:
 - Professor Lord Norton of Louth
 - Lord Phillips, First President of the Supreme Court
 - Professor Nicholas Vincent, and
 - Lord Judge, former Lord Chief Justice.
- As we all take in our beautiful surroundings, I must start my lecture by acknowledging the historical significance of Lincoln Cathedral—our host for this evening.
- It has been said that '*in a sense, Lincoln is where Magna Carta starts and ends.*'
- Indeed, Lincolnshire's Cardinal Archbishop Stephen Langton, who studied at the schools of Lincoln Cathedral, is credited with influencing the terms of Magna Carta.

Delighted
to be in
Lincoln

Matthew
Fisher

Both Stephen Langton and the Bishop of Lincoln, Hugh of Wells, were present at Runnymede.

- Now, 800 years later, Lincoln Cathedral has one of only four surviving copies of the original 1215 Magna Carta, which I understand is now securely displayed at Lincoln Castle. Two are held at the British Library and the other, at Salisbury Cathedral.
- This leads me to reflect on how Australia came to own a 1297 version of Magna Carta—it is an extraordinary story.
- In 1936, after 639 years, our version was discovered by a schoolmaster in a desk at King's School in Somerset.
- Fortunately for Australia, the governors of the school decided to sell it, to raise much-needed funds.
- The British Museum could not meet the asking price and only offered to pay 2000 pounds.
- The school's preference was for it to be passed on to a British dominion —so Australia had a 'head start' over American interests.
- We understand that it was offered to our National Library's London Office, via Sotheby's.
- Our then Prime Minister, Robert Menzies supported the purchase, and even agreed to seek funds from prominent friends of the Library in London, such as Howard Florey and Lord Baillieu, via Sir Leslie Boyce, the Australian-born lord mayor of London.

- However, due to the quick timing of the purchase, Menzies decided to seek government funding.
- On 19 August, Menzies told parliament that it was *'the most important [purchase] yet made by an Australian library'*.
- Australia paid 12,500 pounds for Magna Carta, which at the time was considered a high price.
- I think you would all agree it was one of Australia's best investments.
- Opposition Leader H.V. Evatt described Magna Carta as a priceless possession *'which means, and must always mean in our democracies, first the rule of liberty.'*
- Australia's copy has been proudly on display at King's Hall, Parliament House, occasionally since 1952 and permanently since 1961—where several million people have had the privilege of viewing it.
- In 2004, the National Library Council formally transferred Magna Carta to the Australian Parliament.
- Lincoln Cathedral and the Australian Parliament share a unique bond in being custodians of two of the few remaining copies of Magna Carta in the world.
- We are entrusted with its preservation.
- Not only its physical preservation— Australia's Commonwealth Scientific and Industrial Research Organisation has seen to that—but we have a

responsibility to recall its place in history and legacy for future generations.

- I will now move on to that legacy...
- Magna Carta began as a document sealed over 800 years ago at Runnymede by the most despised King of England, King John.
- Its intent was to end the rebellion of a group of barons.
- It promised a lot...
- Failed as a peace treaty....
- But, became one of England's most venerated documents, with influence beyond its drafters' comprehension.
- So much has been said on Magna Carta, particularly during its Octocentury anniversary, it is difficult to derive an original thought.....
- So much so, I can't even claim that view as only my own—Lord Sumption and a long list of others have already pointed this out.
- Consequently, I wish to explore Magna Carta's significance and legacy for Australia. Although, I readily admit it is not possible to do so without considering its impact on the common law tradition we inherited and the development of international law—of which I expect my learned British audience will have strong views.

Influence on the common law

- Frederic Maitland, seen as the father of modern legal history, differentiated the use of history by historians from its use by lawyers:

'For lawyers, the latest authoritative interpretation of a statute is more valuable than earlier, and possibly historically more accurate, interpretations.'

- When we consider Magna Carta's influence on Australia and other countries that inherited England's common law tradition, we can not only look to the document sealed 800 years ago.
- We must also look to the series of charters since, and how they have been interpreted and applied.
- Sir James Holt, a medieval historian, summarised this point beautifully, when he said:

*'The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking.'*¹

- Some historians will argue that Magna Carta merely restored rights that were understood to have existed for all time—or that Magna Carta was not unique and merely one charter in a 'generation of charters'.

¹ Sir J C Holt, Magna Carta (Cambridge University Press, 2nd ed, 1992) 18.

- However, acceptance of this history does not distract from its symbolic power or its constitutional significance for Australia.
- While most people have never read Magna Carta or know the precise contents of its 63 chapters, it is widely viewed as the foundation stone of the rule of law in countries that share our common law heritage.
- Generations of Britons and their decedents distilled the rule of law and individual rights from it.
- Let us not distract ourselves by focusing on whether Sir Edward Coke, Thomas Jefferson and James Madison were building on an accurate and honest interpretation of Magna Carta.
- It is also beside the point whether the ideas and principles that Magna Carta represents today would have been conceivable to Geoffrey de Mandeville, Stephen Langton and the barons of 1215.
- What we must remember for future generations: is that Magna Carta provided a platform on which they—Coke, Jefferson and Madison—and later generations, built a modern concept of the rule of law and human rights.

Rule of Law

- Frederic William Maitland, said:

*'it is never enough to refer to Magna Carta without saying which edition you mean.'*²

² F.W. Maitland, the Constitutional History of England Cambridge Uni Press, Cambridge 1908 p15

- After John's death in 1216, the charter was re-issued in 1216 and 1217, during the infancy of his son, Henry III.
- Importantly, Chapters 39 and 40 survived, and successive reissues of the charter culminated in the charter of 1225, in which Chapters 39 and 40 were merged as Chapter 29.
- This form of the charter was 'confirmed' by Kings about 50 times—well into the fifteenth century—including by Edward I in 1297, when it was entered into the Statute Book and assumed statutory force.
- Chapter 29 of the 1297 restatement, invoked by lawyers during the 17th Century, including Coke, reads:

'No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.'

- Importantly, this Chapter contained constitutional words:
 - 'Liberties'
 - 'Customs'
 - 'Right'
 - 'Justice'
 - 'Lawful judgment', and
 - 'The law of the land.'
- When colonists settled the 'New Worlds' they carried with them the principles of Magna Carta.

- Their constitutional ideas were founded on Magna Carta.
- In 1925, the former Australian High Court Chief Justice Sir Isaac Isaac famously said:

*'It is essential, however, even at this advanced stage of our political development, and perhaps none the less because of that development, to bear constantly in mind certain fundamental principles which form the base of social structure of every British Community... The principles themselves cannot be found in express terms in any written Constitution of Australia, but they are inscribed in that great confirmatory instrument, seven hundred years old which is the groundwork of all our Constitutions – Magna Carta.'*³

- The authors of Magna Carta saw the rule of law as protecting the subject from the power of the king. It has since been invoked —by philosophers, such as John Locke and the founders of the American republic— to protect the citizen from the tyranny of the majority.
- In 1791, the United States' Constitution embedded the rule of law in the Fifth Amendment:

'No person.... shall be deprived of life, liberty or property, without the due process of the law....'

- It is important to note that the United States Constitution and Australia's Constitution were framed in very different circumstances.

³ Ex Parte Walsh; Ex Parte Johnson; In re Yates (1925) 37 CLR 36.

- The United States' Constitution was framed in the aftermath of a war against a perceived authoritarian regime.
- The United States' Constitution limited parliamentary sovereignty but at the same time asserted rights from Magna Carta.
- It is interesting that the constitutional arrangements of Britain and the United States are very different, despite being inspired by the same source.
- In contrast, our founding fathers saw no need to limit the power of a democratically elected parliament. Colonists who were proud of their British heritage framed Australia's constitution, in peacetime.
- In the words of James Bryce, who helped frame Australia's Constitution:

*'Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.'*⁴

- James Bryce was a British academic, jurist, historian and Liberal politician. Importantly, his book *The American Commonwealth* was influential in framing Australian's Constitution.

⁴ Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms of Australia* (1997) Federal Law Review 211 at: 218 citing J Bryce, *Studies of History and Jurisprudence* at 502-3.

- While we have no bill of rights or 5th Amendment, our system of government has been built on the foundations of Magna Carta and the guarantees it represented, including the rule of law.
- Australia is one of the world's oldest democracies, and the rule of law is central to our democracy. We are often referred to as a 'liberal democracy', due to our commitment to the rule of law.
- Our Constitution is built on responsible government—derived from the British constitutional tradition—and separation of powers derived from the United States.
- There is an agreed division and limitation of powers between the legislature, executive and judiciary.
- The Constitution is the source of law-making authority and laws made in Australia must be consistent with the Constitution.
- We empower the majority through elections, and at the same time we constrain it through the rule of law.
- The High Court Case—*Australian Communist Party [and] Commonwealth*⁵—of 1951—often referred to as the Communist Party Case—provides a perfect example of how judicial review of legislative action and the rule of law, operates in Australia.
- The case involved a piece of legislation passed by the Federal Parliament during the Cold War.

⁵ Australian Communist Party v Commonwealth [1951] HCA 5; (1951) 83 CLR 1.

- The legislation sought to dissolve the Australian Communist Party and enable the Executive Government to dissolve other associations.
- The Federal Parliament did not have the power to make laws in regard to unincorporated associations because this power rested (and still does) with the States.....
- And so the Parliament sought to use the Naval and Military defence power.
- Relevantly, the legislation included a preamble setting out the reasons why Parliament thought that the law was necessary for defence.
- The Majority of the High Court found that the explanation by Parliament in the preamble was not determinative.
- Parliament could not judge the extent of its own power.
- It found that to proceed on this basis, would be inconsistent with the division of powers in the Constitution, under which judicial power rested with the Court.
- Enabling Parliament to determine the extent of its own power would also be inconsistent with the rule of law.
- The High Court held the legislation invalid.
- At the heart of the rule of law, is the principle that all authority is subject to, and constrained by, law.

- This outcome may have constrained the will of the majority, however the people of Australia did have the final word—albeit through the ballot box.
- Australians were given the option of a constitutional amendment, which they ultimately rejected.

Balance between security and rule of law

- Getting the balance right between security and liberty is not an easy task and it can shift over time. For example, countries attempting to defeat terrorism can have very different views on what measures achieve the appropriate balance.

- Thomas Jefferson observed in 1810 that:

‘To lose our country by scrupulous adherence to written law, would be to lose the law itself.’

- However, thirty-five years early, Benjamin Franklin famously wrote:

‘Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.’

- During the darkest days of World War II, the then Australian Prime Minister, Robert Menzies heeded a warning to the House of Representatives, when he introduced a *National Security Bill* giving extensive powers to the Government to assist the war effort:

‘The greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.’

- Still today, we wrestle with this very difficult balance between preserving individual liberties and protecting society.
- It is important for us to acknowledge that human rights are rarely absolute, and must be balanced with other rights, including the public and national security.
- Indeed, the security and safety of citizens is just as much a human right as other civil liberties.
- It is clear that we need to adapt and evolve in order to anticipate security threats.
- The changes in the threats we face and the evolution of digital technology—in particular—has made this very challenging.
- Every nation faces the political tension between order and freedom..... and achieving the appropriate balance is never easy.
- We need to be constantly evaluating whether we have the balance right.
- This is why our national security intelligence service—the Australian Security Intelligence Organisation—is subject to the rule of law.
- It operates under a strict legislative regime, with comprehensive oversight and accountability regimes.
- Its security intelligence functions are clearly defined in legislation.

- It is accountable directly to Parliament, reports to the National Security Committee of Cabinet, and must comply with strict guidelines issued by the Attorney-General.
- The Inspector-General of Intelligence and Security also provides independent oversight, with powers equivalent to a standing royal commission.
- In the words of our former Director-General of Security, David Irvine:

'Australia's approach maintains a clear focus on lawfulness, proportionality, ministerial accountability, and independent oversight.'

Human Rights

- In 2014, Lord Judge described Magna Carta as
'the most important single document in the development of constitutional and legal freedom and adherence to the rule of law in the common law world.'
- Magna Carta has been described as a thread in the development of common law values.
- Common law lawyers found inspiration in Magna Carta for the development of more substantial individual rights.
- Rights, freedoms and liberties in Magna Carta that are still relevant today include:
 - the right to a fair trial and access to justice
 - due process
 - habeas corpus

- the idea that ‘punishment should fit the crime’,
and
- protection of the individual from arbitrary power.
- Magna Carta’s spirit of legality can also be seen in Australia’s rules of statutory interpretation.
- In Australia, statutory provisions are ‘*not to be construed as abrogating important or fundamental common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.*’⁶
- The Honorable Robert French, Chief Justice of the High Court of Australia, summed this up well, when has said:

‘Many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms. We do so against the backdrop of the supremacy of Parliament which can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights and freedoms except to the extent that they may be protected by the Constitution.’

International Law

- Magna Carta’s influence on the development of human rights law is perhaps its most important contribution to international law.

⁶ *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92, 108 [21] (French CJ and Crennan JJ).

- Eleanor Roosevelt, in addressing the General Assembly of the United Nations in support of the Universal Declaration of Human Rights, said:

'We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere.'

- Sir Christopher Greenwood, Judge of the International Court of Justice identified three ways Magna Carta may have influenced the development of international human rights law.

- Firstly, in rejecting the idea of absolute sovereignty of the King over its people, Magna Carta may have helped steer common law countries towards a similar rejection of absolute sovereignty in international law.

- Article 60 of Magna Carta provides –

'All these aforesaid customs and liberties which we have granted to be held in our realm as far as it pertains to us towards our men, shall be observed by our realm, both clerk and lay, as far as it pertains to them, towards their own men.'

- Accordingly, both King and baron were bound to afford the same customs and liberties.
- Secondly, Magna Carta contained provisions, which had elements of rights now recognised in human rights treaties. Magna Carta helped to inspire the idea of individual rights.

- And finally, Magna Carta deserves some credit for not just inspiring the development of rights, but for placing importance on the remedies to give effect to them.

Australia's HR Council Candidacy

- Last year, Australia launched its inaugural candidacy for the United Nations Human Rights Council for the term 2018 to 2020.
- Australia's candidacy reflects our commitment to promoting and protecting human rights inspired by Magna Carta, both in Australia and around the world.
- Australia is an open, free, liberal democracy committed to the rule of law and human rights. Our society is built on the values of inclusiveness, diversity and tolerance.
- We bring these values to the Council.
- In the aftermath of World War II, Australia played an active role in drawing up the UN Charter, drafting the Universal Declaration of Human Rights, and establishing the UN Security Council.
- We have remained committed ever since.
- Our record is strong.
- Australia's campaign for a seat on the Council is built around five pillars.
- Freedom of expression and of religion; good governance; gender equality and the empowerment of women; the right of indigenous peoples; and strong

national human rights institutions and capacity building.

- Australia will bring the same committed, principled and pragmatic approach that we brought to our distinguished term on the UN Security Council in 2013 to 14.

Conclusion

- In my concluding remarks, I return to Magna Carta's legacy.
- There are two common misconceptions about Magna Carta, which are often repeated by self-represented litigants in Courts across Australia:

Firstly, that Magna Carta can not be repealed; and

Secondly, that a law is not valid if inconsistent with it.

- Indeed – many view Magna Carta as having constitutional force.
- In law, there is nothing protecting it from repeal.
- In England, almost every chapter has been repealed and this is also the case in Australian jurisdictions that have enacted *Imperial Acts Application Acts*.
- The belief in its inviolability has carried through the ages and still holds fast in Australia, due to its symbolic value and because it played a part in our constitutional heritage.

- Today, those who invoke Magna Carta, interpret it, and reimagine it, are not just lawyers, historians and politicians—but the general population—citizens.
- The barons would find it hard to believe that their document would remain relevant and inspirational eight centuries later —holding an emblematic place in the collective consciousness of not only Britain, but Australia and the rest of the world.