

Magna Carta: Enduring Values for Modern Australia

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2015 is a year rich with important centennial anniversaries. It is, of course, the centenary of Gallipoli. It is the bicentenary of Waterloo and 25 October marked the 600th anniversary of another great English victory at the expense of the French: the Battle of Agincourt. It is also the 250th anniversary of William Blackstone's *Commentaries on the Laws of England*, a seminal treatise on the common law of England.

This morning, we gather to mark the 800th anniversary of an event which has attained mythical status in the centuries since: the genesis of Magna Carta.

As we celebrate this symbolic charter, we reflect upon how far modern society, in particular Australia, has come since the rather unremarkable day when King John affixed his seal to the Magna Carta in Runnymede, England, on 19 June 1215.

In the eight hundred years that have passed, Magna Carta has provided inspiration and support for progressive developments in democratic governance worldwide. It has been looked to symbolically as a guarantor of freedom and a regulator of arbitrary executive power:

- it was invoked through the constitutional struggles in Britain in the seventeenth century between the Crown and parliament culminating in the Bill of Rights of 1689 and the Act of Settlement of 1701
- it influenced the American Constitution and Bill of Rights in the eighteenth century, and
- it was reasserted in the twentieth century in the Universal Declaration of Human Rights and Covenant on Civil and Political Rights.

In 1948, Eleanor Roosevelt, chair of the Human Rights Commission responsible for drafting the Universal Declaration, proclaimed:

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 of all men everywhere.¹

1 Eleanor Roosevelt, 'Statement to the United Nations' General Assembly on the Universal Declaration of Human Rights', 9 December 1948, The Eleanor Roosevelt Papers Project, www.gwu.edu/~erpapers/documents/displaydoc.cfm?_t=speeches&_docid=spc057137.

Australia has inherited the traditions which have evolved through constitutional struggles abroad and has been a leader in the advancement of human rights in the modern day. Following the aftermath of World War II, Australia played a key role in the development of the United Nations. Australia's President of the UN General Assembly, H.V. Evatt, played a major role in drafting the Universal Declaration of Human Rights.

As we celebrate the 70th anniversary of the United Nations and prepare for our upcoming appearance for Australia's second Universal Periodic Review, we reflect upon Australia's strong engagement with the UN system. We are lucky to be a liberal democracy founded on the rule of law, but not all countries share this experience. This is why Australia is seeking a seat on the UN Human Rights Council for the 2018–20 term: to strengthen our global leadership role and to share the benefit of our strong liberal democratic traditions.

We have long been a leader for global abolition of the death penalty, and would seek to use a seat on the Council to further this work. We would also play a leadership role on five other key themes:

- freedom of expression
- good governance
- gender equality
- rights of indigenous peoples, and
- strong national human rights institutions and capacity building.

And so, as we commemorate the anniversary of Magna Carta and the United Nations, we also celebrate the liberal democratic principles and values that underpin our modern society—the separation of powers, representative and responsible government, the rule of law, individual liberties and the independence of the judiciary.

Just as these common values are enshrined in the UN Charter and the Universal Declaration of Human Rights, so are they in Magna Carta.

How, then, did a single event in English history so long ago, come to be so influential? We must begin with the story of the events of that day, on 15 June 1215, when a group of aggrieved English barons rode to meet King John on a grassy stretch of meadow beside the River Thames. King John was desperate to put an end to the rebellion that had seen the city of London fall to rebel barons. The barons, in turn, hoped to extract concessions from the king on a host of issues.

The document we call Magna Carta today is considered to be both a restatement of the old laws of the English past and a treaty of peace between these rebel barons, the church, and the king.

Magna Carta was heavily influenced by the Coronation Charter confirmed by Henry I in 1100. The Coronation Charter was an earlier peace treaty which set a strong precedent for further royal concessions and set a course towards modern constitutional democracy.

The original Magna Carta was over 3,500 words and 63 clauses long. The first clause granted liberties to the church and subsequent clauses granted liberties to ‘free men’, referring to a limited class of powerful elite, barons and subjects of the church at the time. While the class of ‘free men’ may appear narrow by today’s standards, the liberties granted to them nonetheless represented a significant restriction on the power of the monarchy.

While not the only formal charter of liberties granted by a medieval monarch, Magna Carta is the most detailed and long-lasting of all such documents.

Lord Denning, one of the most influential judicial minds of the twentieth century, and a favourite of all law students the world over, has said that it was ‘the greatest constitutional document of all time’.²

More recently, 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’.³

Our own former Chief Justice of Australia, Murray Gleeson, has described it as a defining document in a ‘long history’ of legal constraint upon ‘law-making capacity’.⁴

Important though Magna Carta is, it has also been the victim of many exaggerated claims. In reality, Magna Carta was a failed treaty. Barely nine weeks after it was confirmed, at Runnymede, King John had it quashed by Pope Innocent III. It was reissued on King John’s death in 1216, then 1217, again in 1225 and was finally made into statute law in 1297.

As one of the great fathers of English legal history, Frederic Maitland, famously said, ‘it is never enough to refer to Magna Carta without saying which edition you mean’.⁵

Indeed, it was named the ‘Great Charter’, several years after the initial 1215 settlement, not in recognition of its importance, but because it was long.

2 *The Times* (London), 9 June 1965, p. 13.

3 Lord Judge, ‘Magna Carta: some reflections’, Sir Robert Rede’s Lecture, University of Cambridge, 10 February 2014, p. 3.

4 Murray Gleeson, ‘Legality—spirit and principle’, Second Magna Carta Lecture, NSW Parliament House, Sydney, 20 November 2003, www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_20nov.html.

5 F.W. Maitland, *The Constitutional History of England*, Cambridge University Press, Cambridge, 1908, p. 15.

Irrespective of historical contests and differing interpretations of the significance of Magna Carta, its continuing status as a symbol of individual liberty and the supremacy of the law is a testament to its continued contemporary relevance.

And so, what is the continuing importance of Magna Carta for us here in Australia in 2015?

Magna Carta continues to be considered by the Australian courts in cases concerning issues ranging from bankruptcy, criminal matters, and native title. While there has been some judicial disagreement as to the contemporary relevance of Magna Carta in Australia, there can be no disagreement with Justice Isaacs' observation in the High Court of Australia in 1925, when he proclaimed Magna Carta to be 'the groundwork of all our Constitutions'.⁶

Magna Carta's enduring relevance to Western democracy can be explained in large part by our shared constitutional heritage. From England, we have inherited history, constitutional forms and traditions and political values. And with them, a system of democratic government, the rule of law and the principle of legality.

Unlike other nations, our Constitution was not drafted in the context of rebellion and revolt, but we share common roots in Magna Carta. It is some of these legacies which I would like to reflect on now.

It is said that Magna Carta represented a grant of liberties to 'all free men' of the kingdom.⁷ While some have been hasty to point out that the term 'free men' carried a very different meaning in 1215, its mere existence was evidence of an early conception of the principle of the rule of law—the principle that all authority is subject to, and constrained by, law.

The most oft-cited clause of the charter, clause 39, is said to embody this principle:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Magna Carta asserted that the powers of even a king ruling by divine right were still subject to some limitation and—to use a modern word—some form of accountability.

And, in doing so, it marked a fundamental change in attitudes to the Crown which, over subsequent centuries, would develop into limitations on government more broadly.

6 *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 79.

7 Clause 1, 1215 Magna Carta.

In modern day Australia, this principle of accountability applies to the executive arm of government. To quote Robert Menzies:

to ignore the Constitution, to treat its structure and the limitations it imposes upon the powers of the Commonwealth Parliament as of no account, to endeavour by clamour to prevent recourse to the courts for its interpretation, is to violate the whole conception of the rule of law.⁸

In Australia, executive accountability is guaranteed in part by the diffusion of power through:

- separate arms of government,
- parliamentary scrutiny mechanisms, and, importantly,
- scrutiny by the Australian people, through the right to engage in vigorous debate and the right to vote.

Indeed, Australia was one of the first countries to implement secret ballots for elections—a system that is at the core of the democratic process and system, which can be traced back to the principles embodied in Magna Carta.

The legacy of Magna Carta has also been inherited by Australia through the common law and the principle of legality.

The time of Magna Carta was marked by tyranny and rebellion, in which individual rights, in particular rights against the state, were not well understood. Magna Carta was pivotal to the establishment of these rights.

During the seventeenth century, perceptions of Magna Carta evolved from being a compact between the monarchy and rebel barons to an affirmation of individual liberty.

Perhaps the most famous parliamentarian of the period who espoused this interpretation of the charter was Sir Edward Coke. As Attorney-General in the front line of the conflict between parliament and James I, in the early seventeenth century, Coke argued that the imposition of constraints on the king's power was consistent with notions of personal liberty.

The rights and freedoms implied and inspired by Magna Carta—due process, fair trial, the presumption of innocence and equality before the law—are now firmly entrenched in our Constitution and common law. The principles of precedence and legality have provided strong protections for common law rights and freedoms 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.

8 Robert Menzies, *The Forgotten People*, Angus & Robertson, Sydney, 1943, p. 167.

While we are fortunate to live in times where individual liberties are well protected, this anniversary serves as a reminder that we must hold firm to these rights and freedoms, which were conceived long before Australia came to be.

This year, as we celebrate the 40th anniversary of the Australian Law Reform Commission, the commission is reviewing the Commonwealth statute book for consistency with traditional rights and freedoms. In keeping with the spirit of Magna Carta, this review will seek to prevent any improper curtailment of these fundamental rights and freedoms.

As the Prime Minister recently noted, it may seem paradoxical that we celebrate the 800th anniversary of Magna Carta at a time when laws are being adjusted, sometimes controversially, to ensure the security of our nation.

But it is in these challenging times, as it has been throughout the course of history, that it is most important to look to enduring values and principles: those of Magna Carta.

It is incumbent upon all of us to ensure that its values and its vision are preserved for the next generation, and for every generation thereafter.