BAR BULLETIN

THE AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

FEBRUARY 2015
EDITION

PRESIDENT'S MESSAGE

EDITOR'S MESSAGE

COMMENCEMENT OF THE LEGAL YEAR

SPEECH DELIVERED BY THE HON CHIEF JUSTICE HELEN MURRELL

RESTORATIVE JUSTICE

AWARD RECIPIENTS

CPD MINI CONFERENCE

SATURDAY 7 MARCH

BAR

MAGNA CARTA 800th

2015 CPD Mini-Conference

Saturday, 7 March 2015
Venue: Legal Aid Office (ACT)
Allsop Street, Canberra City (opposite City West Carpark)

8.15 am	REGISTRATION - Tea and Coffee
8.30 am	*Welcome* – Shane Gill, President ACT Bar Association
8.35 am	*Family Law Update (Title TBC)* - George Brzostowski SC
9.30 am	*Swift and Certain Sanctions: Is it time for Australia to bring some HOPE into the criminal justice system?* - Dr Lorana Bartels
10.30 am	*Analysis of the ACT Bushfire Appeal Decision (current principles of the law of negligence, particularly for government authorities).*- Chris Erskine SC, Barrister
11.30 am	MORNING TEA
11.45 pm	*The Criminal in the Mirror* - John Masters, Barrister
12.45 pm	LUNCH
1.45pm	*Making the Argument Visual: Persuasive Addresses* - Gabrielle Gazal and Nicholas Frost, Directors of Open Door Productions
3.15 pm	AFTERNOON TEA
3.30 pm	*Unconscious Bias* Speaker T.B.C.
4.30 pm	*Magna Carta 800 years* Mr Barry Yorke, Historian
5.30 pm	*Ethics Hypothetical* The Hon Justice John Burns
6.30pm	CONCLUSION OF CONFERENCE

Attendance at the conference will accumulate 10 CPD Points in all four strands

Each CPD Year barristers must obtain 10 CPD points to renew their practising certificate. CPD year commences 1 April and ends 31 March.

Conference Contact:
Svetlana Todoroski, CEO
ACT Bar Association
tel: (02) 6257 1437
email: ceo@actbar.com.au

President’s Message

It is well recognized that a properly functioning justice system will provide a set of conditions whereby just decisions can consistently be made, where individuals can, in a practical sense access the system and where relief will be provided in a timely fashion.

Of these three conditions, key amongst them is the requirement that the decisions be just. The other two qualities gain importance because of the fact that they are connected to this key quality. Access to a system that provides less than fair decisions in a timely manner does not result in a system that is two thirds of the way to being a good justice system. What is held most closely by the community is that it is a system that provides justice.

Where law reform is undertaken in respect of process, it must be measured against all 3 criteria, but with a particular weighting toward the question of what impact it has on fair.

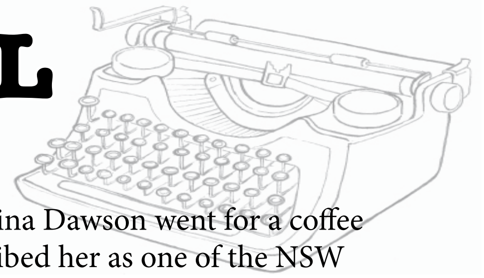
Where a change increases the cost then such a change ought be resisted unless it is justified by improvement in the quality of justice being administered. Where a change decreases the resources available to access the system (see for example the real terms decrease in legal aid availability) such a change ought be resisted and exposed.

If a change provides greater timeliness, but renders access more costly, that trade off ought be recognized and ameliorated.

Where a change is proposed, it must be measured to consider whether it decreases a litigant’s ability to present his or her case, or to test the opposing case. If it does, particularly if it does so in a significant manner, then it is a change that ought not be made, because such a change undermines the fairness of the system.

The Association continues to be involved in and to contribute to law reform processes, identifying such justice effects where they arise. It is able to do so because collectively the members of this Association value a system that embodies these 3 qualities.

EDITORIAL



The Lindt Café seige/massacre reminds us all of the fragility of life. Katrina Dawson went for a coffee and now is part of a sad Australian memorial. Jane Needham SC described her as one of the NSW Bar's "best and brightest". Her husband and children have been denied a life's companion.

Chief Justice Murrell at the opening of the law term remarked that the tragedy was only one or two degrees of separation removed from some of us and that is indeed true. My niece, who is at the NSW Bar, frequented that café, but on that morning was moving into a new apartment at Cremorne. Undoubtedly, there are many such stories.

The impending execution of Andrew Chan and Myuran Sukumaran has the Australian Bar Association restating its opposition to the death penalty in any jurisdiction. The imprisonment and recent release of Peter Greste demonstrates again the whimsical twist of fate in terms of being in the wrong place at the wrong time whilst simply discharging normal professional duties, as indeed does the Japanese surfer at Ballina show that indulging in the simple pleasures of life can end in a grisly death.

Well, Glenn Keys gave an inspirational speech to launch the 2015 law year. He correctly urged us all to give more pro bono time as lawyers, promising that we will benefit as individuals as well as providing an important adjunct to the administration of justice.

Mr Keys is an inaugural member of the National Disability Insurance Agency and has worked with the ACT Government to offer home ownership options for people with disability through Project Independence.

Finally, I wish all members a safe, healthy and rewarding 2015. It is inevitable that the coming year will present us all with unexpected challenges.

FJ PURNELL SC

Commencement of the Legal Year 2015

Speech by The Hon Chief Justice Helen Murrell
2 February 2015

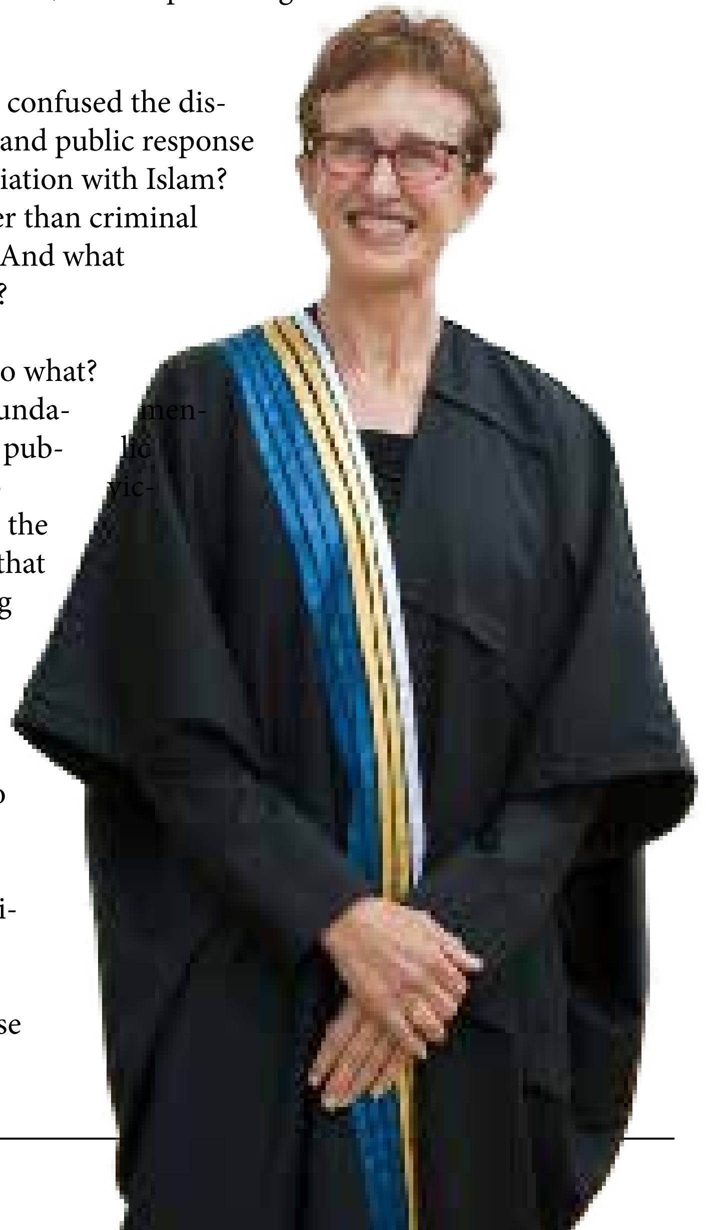
I acknowledge the traditional custodians of this land and pay my respects to their elders, past and present. I welcome all practitioners to the first opening of the law year held in the Supreme Court – and (we hope) the last to be held in this courtroom.

2014 was challenging for all of us. It was my first full year as Chief Justice. I recognise that both the profession and the government worked closely with the Court to implement change.

But the challenges that we faced in the ACT paled in comparison to those faced by our sister state. 2014 ended tragically with the Lindt Cafe siege which struck at the heart of Sydney's legal precinct and resulted in the death of two victims, one of whom was a fellow barrister, and a week of chaos in the courts. Many of us were only one or two degrees removed from that tragedy. Our sons and daughters frequented the Lindt Cafe, our friends shared chambers with the victim.

Then the New Year brought the Charlie Hebdo massacre and the "Je suis Charlie" phenomenon. We had pause to reflect on the significance of these events for us, both as practising lawyers and as citizens in a democratic society.

The emotions aroused by the events sometimes clouded and confused the discourse about what are important issues. Would the political and public response have been the same if the perpetrators had claimed no association with Islam? Why do we call the violent acts of Muslims "terrorism" rather than criminal acts carried out by people who may be mentally disturbed? And what were people saying when they asserted that "Je suis Charlie"?



Undoubtedly, it was a statement of defiance, but in relation to what? Members of the fourth estate were saying "Free speech is a fundamental value that we will courageously defend". Members of the public may have been saying "I sympathise with the Charlie Hebdo victims". Some were certainly saying "The pen is mightier than the sword" (although it may have been more appropriate to say that the hashtag is mightier than the sword). Many were asserting that "our democratic system will not be cowed by random acts of politically motivated violence". What about the politicians who marched in apparent solidarity with the victims and the public? Some of those politicians represented nations with a poor human rights record and no Bill of Rights to facilitate the enforcement of rights by an independent judiciary. Some could hardly have been marching in support of free speech, let alone the right to ridicule religion.

Most represented nations that have legislated to exclude those labelled "terrorists" from some of the rights to which other members of their communities are entitled. They have been

waging a “war on terror” in which normal civil rights have been suspended during the period of warfare. The cynical lawyer might suggest that waging a “war on terror” is about as helpful as waging a “war on drugs”.

I suggest that for lawyers the key message from both tragic events was the importance of the rule of law. We need to separate that issue from ‘hashtag’ enthusiasm and the politics of convenience. From the events and their aftermath a lawyer may see the need to proclaim the resilience of our criminal justice processes and their established capacity to deal with such events, rather than glorifying criminal conduct as “terrorism”, or labelling it in that way to excuse the abandonment of due process. The lawyer may compare the extent of the carnage in Martin Place or Paris with the daily extent of oppression, injury and death through domestic violence, both nationally and globally.

This year we celebrate the 800th anniversary of Magna Carta. It was in 1215 that King John I was forced by his barons to sign the “Great Charter” in Runnymede near Windsor, laying the constitutional foundations for government under the rule of law.

No (freeperson) shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

Today, as we reflect on these matters and look forward to a new year practising law in the ACT, we lawyers may choose to consider our role as advocates for the rule of law; the need to ensure that our justice system is independent and quarantined from the politics of government; and the opportunities that we in the ACT have to uphold human rights through the Human Rights Act.

At a more prosaic level, for the Supreme Court this will be a year of consolidation, focussed on improving processes for litigants and practitioners, and improving the governance of the Court itself. We look forward to working with the profession to achieve a better justice system for the ACT community.

We hope that 2015 will be a year in which all members of the ACT legal community not only contribute to strengthening the rule of law, but also enjoy the camaraderie of their colleagues and relish their practice of the law.

Rolfe Classic BMW - Phillip

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Legal Profession to gather in silence for MyuranSukumaran and Andrew Chan

8AM, Wednesday 18 February, in front of the Plaza between the reserve bank building, city police and the Supreme Court of the ACT

The Legal Profession of the Australian Capital Territory will gather tomorrow morning in the front Plaza of the Supreme Court of the ACT, together with the Victorian Bar Association and other National Bar Associations to observe a National one minute's silence for Andrew Chan and Myuran Sukumaran, two Australians facing the death penalty in Indonesia.

The President of the ACT Bar Association, Mr Shane Gill will briefly address the gathering before the minute's silence.

"We urge all our colleagues to join us to support these two young Australian men. The death penalty is not an appropriate penalty", said Mr Gill.

The vigil is supported by the ACT Law Society, the law faculties of the The Australian National University and University of Canberra, Civil Liberties of Australia and the Australian Bar Association with President Fiona McLeod SC attending the Victorian vigil.

Australian Human Rights Commission

The Forgotten Children

National Inquiry into Children in Immigration Detention

2014

Australia currently holds about 800 children in mandatory closed immigration detention for indefinite periods, with no pathway to protection or settlement. This includes 186 children detained on Nauru.

Children and their families have been held on the mainland and on Christmas Island for, on average, one year and two months. Over 167 babies have been born in detention within the last 24 months. This Report gives a voice to these children.

It provides compelling first-hand evidence of the negative impact that prolonged immigration detention is having on their mental and physical health. The evidence given by the children and their families is fully supported by psychiatrists, paediatricians and academic research. The evidence shows that immigration detention is a dangerous place for children. Data from the Department of Immigration and Border Protection describes numerous incidents of assault, sexual assault and self-harm in detention environments.

Importantly, the Government recognises that the fact of detention contributes significantly to mental illness among detainees.

The aims of the Inquiry have been to:

- Assess the impact of prolonged immigration detention on children's health, wellbeing and development by collecting the evidence of children and their families, scholarly research, Department of Immigration and Border Protection data and the views of medical experts and the Australian community
- Promote compliance with Australia's international obligations to act in the best interests of children.

There is nothing new in the finding that mandatory immigration detention is contrary to Australia's international obligations. The Australian Human Rights Commission and respective Presidents and Commissioners over the last 25 years have been unanimous in reporting that such detention, especially of children, breaches the right not to be detained arbitrarily. The aim of this Inquiry was not to revisit the Commission's settled view of the law, but rather to assess the evidence of the impact of prolonged detention on children.

As the medical evidence has mounted over the last eight months of the Inquiry, it has become increasingly difficult to understand the policy of both Labor and Coalition Governments. Both the Hon Chris Bowen MP, as a former Minister for Immigration, and the Hon Scott Morrison MP, the current Minister for Immigration, agreed on oath before the Inquiry that holding children in detention does not deter either asylum seekers or people smugglers. No satisfactory rationale for the prolonged detention of children seeking asylum in Australia has been offered.

Australia is unique in its treatment of asylum seeker children. No other country mandates the closed and indefinite detention of children when they arrive on our shores. Unlike all other common law countries, Australia has no constitutional or legislative Bill of Rights to enable our courts to protect children. The Convention on the Rights of the Child is not part of Australian law, although Australia is a party. The Convention is, however, part of the mandate of the Australian Human Rights Commission to hold the Government to account for compliance with human rights. This Convention accordingly informs the findings and recommendations made by the Inquiry.

This Report is fundamentally different from previous reports by the Commission as it focuses in both a qualitative and quantitative way, on the impact of immigration detention on children as reported by children and their parents. The Commission conducted interviews with 1129 children and parents in detention, providing a much needed foundation for objective research

findings. Standard questions were used in all interviews so that the reported impacts are measurable. The evidence documented in this Report demonstrates unequivocally that prolonged detention of children leads to serious negative impacts on their mental and emotional health and development. This is supported by robust academic literature.

It is also clear that the laws, policies and practices of Labor and Coalition Governments are in serious breach of the rights guaranteed by the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. The United Nations High Commissioner for Human Rights also suggests in his opening address to the Human Rights Council that Australia's policy of offshore processing and boat turn backs is 'leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries'.

Asylum seeker policy in context
Australia's policy of prolonged and indefinite detention of asylum seeker children should be understood in context. Last year saw tumultuous global and regional conflict and persecution, leading to an unprecedented flow of boat arrivals in Australia. The Australian community has been shocked by the tragic deaths of over a thousand asylum seekers taking the perilous voyage by sea, including at least 15 children between 2008 and 2013. In an attempt to stop illegal people smuggling and drowning at sea, the Labor Government reintroduced offshore transfers to Nauru and Manus Island. As from 13 August 2012, that Government froze the assessment of claims to refugee status under the 'no advantage' principle, leaving about 31,000 asylum seeker families and children in a legal black hole in which their rights and dignity have been denied, in some cases for years. The current Government has maintained this policy.

The Commission acknowledges that the surge in asylum seekers arriving in Australia by boat in 2013 placed considerable pressures on the Department of Immigration and its resources, especially on Christmas Island. The Government's policy, 'Operation Sovereign Borders', under which Australian authorities use force to intercept and turn back boats, has prevented asylum seekers from reaching our shores. The consequence is that it has become possible to focus on those 5,514 asylum seekers who are currently detained in Australia and on Nauru and Manus Island (as of 30 September 2014).
Commission decision to conduct an Inquiry by July 2013, the number of children detained reached 1,992.

As the federal election was imminent, I decided to await the outcome of the election, and any government changes in asylum seeker policy, before considering launching an Inquiry. By February this year, it became apparent that there had been a slowing down of the release of children. Over the first six months of the new Coalition Government the numbers of children in detention remained relatively constant. Not only were over 1000 children held in detention by February 2014, but also they were being held for longer periods than in the past, with no pathway to resettlement.

In these circumstances, I decided to exercise the Commission's powers under the Australian Human Rights Commission Act 1986 (Cth) to hold a National Inquiry into Children in Immigration Detention.

Methodology

The Inquiry, conducted over eight months from February to October 2014, has adopted a rigorous methodology, both qualitative and quantitative, to ensure that our statistics and findings stand up to scrutiny as accurate, fair and balanced.

Commission teams, including the President, the Children's Commissioner and the Commissioner for Human Rights visited 11 detention centres, including two visits to Christmas Island.

We asked children and their families to answer a standardised questionnaire about the health impacts of detention, providing data from 1129 participants. Five public hearings were held, with 41 witnesses, including the Hon Chris Bowen MP and the Hon Scott Morrison MP. A total of 239 submissions were received from schools, medical service providers and NGOs, including the Refugee Advice and Casework Service, ChilOut and Amnesty International. Focus groups have been held with young adults who, as children, were detained, and can attest to the continuing impact of their detention. Vital to this Report has been the inclusion of internationally recognised medical experts in all detention centre visits. A range of different child psychiatrists, paediatricians, and health professionals

assisted the Commission throughout the Inquiry. One paediatrician concluded that 'almost all the children on Christmas Island are sick'. Further advice was provided by International Health and Medical Services, a global company contracted by the Government to provide services to the detention centres. The medical evidence, some subsequently reported in the Australian Medical Journal, provides an authoritative basis for many of the findings in this Report and amply confirms the data collected by the Commission from the children themselves.

As the impact of detention varies depending on the child's age and stage of life, this Report contains separate chapters on babies, preschoolers, primary school aged children and teenagers. Separate chapters are also allocated to unaccompanied children, children detained indefinitely, and children detained on Nauru. Chapter 5 sets out the applicable international law and chapter 2 contains a table linking specific findings with the relevant breach of treaty obligations. Direct quotes from children have been included in this Report. As the names of the children are confidential, citations are confined to the date, age of the child and location of the source.

While the Commission cannot exercise its powers in Nauru, a sovereign country, we retain jurisdiction to consider the legality of Commonwealth activities on the island as they affect the 186 children currently held there. We have relied on the expert evidence of service providers, medical professionals and communications from detainees to make findings about the impact of detention on the children.

This Report owes a considerable debt to the many people who assisted the Inquiry, including medical experts, lawyers, NGOs, student interns and the wider Australian community. The Commission is deeply grateful for their generous contributions over the last eight months.

Inquiry findings

The evidence collected in this Report is powerful. The overarching finding of the Inquiry is that the prolonged, mandatory detention of asylum seeker children causes them significant mental and physical illness and developmental delays, in breach of Australia's international obligations.

The following is a snapshot of the findings:

- Children in immigration detention have significantly higher rates of mental health disorders than children in the Australian community.
- Both the former and current Ministers for Immigration agreed that holding children for prolonged periods in remote detention centres, does not deter people smugglers or asylum seekers. There appears to be no rational explanation for the prolonged detention of children.
- The right of all children to education was denied for over a year to those held on Christmas Island.
- The Minister for Immigration and Border Protection, as the guardian of unaccompanied children, has failed in his responsibility to act in their best interests.
- The Commonwealth's decision to use force to transfer children on Christmas Island to a different centre breached their human rights.
- The numerous reported incidents of assaults, sexual assaults and self-harm involving children indicate the danger of the detention environment.
- At least 12 children born in immigration detention are stateless, and may be denied their right to nationality and protection.
- Dozens of children with physical and mental disabilities are detained for prolonged periods.
- Some children of parents assessed as security risks have been detained for over two years without hope of release.
- Children detained indefinitely on Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress.

Changes in law and Government policy since the Inquiry was launched. Since the Inquiry was announced, changes have been made in Government policy and practice, along with decisions of the High Court, that affect asylum seeker children in detention:

- A few days before being invited to give evidence to the Inquiry, the Minister for Immigration and Border Protection announced his decision to release before the end of the year, all children under 10 years of age, who arrived before 19 July 2013. This new policy may lead to the release of about 150 children, but hundreds will remain in detention.
- Over the period February to September 2014, the Minister released about 220 children, including unaccompanied children, into

community detention or the community on bridging visas.

- In July 2014, the Department of Immigration and Border Protection provided funds to the Western Australian Catholic Education Office to establish a school on Christmas Island, improving the access by asylum seeker children to education.
- Some asylum seeker children with physical and mental illness have been brought to the Australian mainland and given medical care, or have been released into the community on humanitarian grounds.
- The High Court has ruled that the Minister may not impose a cap on protection visas and must make a decision whether to deport or allow an asylum seeker to apply for a protection visa 'as soon as is reasonably practicable'.

The Commission is pleased to recognise these changes as being in the best interests of many asylum seeker children.

Recommendations

It is recommended that:

- All children and their families be released into community detention or the community on bridging visas with a right to work.
- Legislation be enacted to ensure that children may be detained under the Migration Act for only so long as is necessary for health, identity and security checks.
- Assessment of refugee status be commenced immediately according to the rule of law.
- No child be sent offshore for processing unless it is clear that their human rights will be respected.
- An independent guardian be appointed for unaccompanied children seeking asylum in Australia.
- An independent review be conducted into the decision to approve the use of force to transfer unaccompanied children on Christmas Island on 24 March 2014.
- All detention centres be equipped with sufficient CCTV or other cameras to capture significant incidents in detention.
- ASIO review the case of each parent with an adverse security assessment in order to identify whether their family can be moved into the community.
- Alternative community detention be available for children of families assessed as security risks.
- Children in immigration detention be assessed regularly using the HoNOSCA mental health assessment tool.
- Children currently or previously detained at any time since 1992 have access to government funded mental health support.
- Children in detention who were denied education on Christmas Island for a year be assessed to determine what educational support they require.
- Children and families in immigration detention receive information about the provision of free legal advice and access to phones and computers.
- Legislation be enacted to give direct effect to the Convention on the Rights of the Child under Australian law.
- A royal commission be set up to examine the continued use of the 1992 policy of mandatory detention, the use of force by the Commonwealth against children in detention and allegations of sexual assault against these children and to consider remedies for breach of the Commonwealth's duty of care to detained children.
- An independent review of the implementation of these recommendations be conducted in 12 months.

It is troubling that members of the Government and Parliament and Departmental officials are either uninformed, or choose to ignore, the human rights treaties to which Australia is a party.

The High Court of Australia in *Teoh* has confirmed that, when making decisions that affect children, government officials should take account of the rights guaranteed by the Convention on the Rights of the Child.

My hope is that the evidence detailed in this Report will prompt fair-minded Australians, Members of Parliament and the Federal Government to reconsider our asylum seeker policies and to release all children and their families immediately, or as soon as practical.

It is of profound concern that the Government has recently introduced amendments to the Migration Act to redefine the definition of 'refugee' to meet government policy rather than international law. It is also proposed that people may be removed from Australia under the Act even if this does not comply with Australia's international non-refoulement obligations. If passed, this will be a rare and internationally embarrassing instance in which Australia has explicitly declared that its laws remain valid, even if they violate international law.

RESTORATIVE JUSTICE UNIT 10 YEAR ANNIVERSARY

Restorative Justice places the actual people affected by crime at the centre of a justice process. Close up, they explore the fuller context around a crime and see their shared humanity. In this way, meaningful collective resolutions are achieved.

With well over 1,000 conferences that have already taken place, the Restorative Justice Unit has assisted thousands of Canberrans to participate in their own conflict. Convenors in the unit have had the opportunity to hone their skills running conferences that are in keeping with international principles and human rights guidelines. With satisfaction levels consistently over 90%, ordinary citizens are embracing and benefiting from, the ACT's restorative justice scheme.

The efforts of those who furthered and were active early in the formation of the Restorative Justice scheme and assisted its operational success were acknowledged by the Attorney General Simon Corbell at a ceremony held at the Legislative Assembly on 4 February 2015.

Those acknowledged were:

PROFESSOR JOHN BRAITHWAITE who is often referred to as 'the father of restorative justice'. Professor Braithwaite and his dedicated group of researchers continue to do exciting work to expand the applications of restorative practices in the ACT.

CHIEF OF ACT POLICING, MR RUDI LAMMERS was one of the first police officers to participate in the early Restorative justice pilot, where he saw first hand that there

was a desperate need for a different kind of justice, one that better expressed the pain that victims went through. He continues to spread the word about the benefits and success of restorative justice.

THE HON JUSTICE RICHARD REFSHAUGE was part of the original sub committee of the ACT Sentencing Review to progress the establishment of restorative justice legislation and an operational unit. As the former Director of Public Prosecutions, he was a strong believer in the power of restorative justice to help deliver the kind of outcomes to victims and offenders that the formal justice system was unable to provide on its own. This demonstrated a commitment to more flexible and holistic interpretations of what the public interest in justice options might consist of.

CHIEF MAGISTRATE LORRAINE WALKER has often expressed her strong support for restorative justice options in the ACT stating that at its best restorative justice can be cathartic and life changing. Among her duties, the Chief Magistrate has responsibility for the good order of the Childrens Court and encourages young people in her court to have a voice, to confer respect and dignity while maintaining a strong focus on young peoples' accountability to victims and the community.

DR JOHN BOERSIG, CEO of Legal Aid ACT, has written extensively about alternative sentencing options for indigenous populations and his work reminds us that to be truly effective, restorative justice must move Aboriginal and Torres Strait Islander young people and their community from the justice margins to the centre where indigenous definitions of morality, ethics and shared values can be voiced and understood.

DEREK JORY, former director of Justice, Planning and Programs in JACS's Legislation and Policy Branch, chair of the Restorative Justice Sub-Committee of the ACT Sentencing Review, guided critical consultations and the efforts of hardworking and skilled policy officers who worked on the Restorative Justice legislation and together with his staff they crafted the most comprehensive and flexible Restorative Justice legislation in Australia which laid the solid foundation for the unit's ongoing credibility and success.

MR JOHN HINCHEY became the Restorative Justice Unit's inaugural manager and deftly steered the unit through its teething years to make it a successful and credible scheme in reality. Now the current Victims of Crime Commissioner, he takes every opportunity to remind others of the value of restorative justice to victims in our community.

DR NOVA INKPEN The Restorative Justice Unit's first senior convenor was also heavily involved as a researcher in the early ReIntegrative Shaming Experiments and completed her PhD in the area of Restorative Justice at the ANU.

DYMPHNA LOWREY carried an innate sense of justice and concern for others into her role as a convenor. Later as the Senior Convenor, she managed highly complex cases and provided solid support for the rest of the team. Leading the team as manager for over a year before accepting the Commonwealth's call to help set up restorative responses for the Defence Abuse Response Taskforce.

MS TRACEY BLUNDELL, is the current Senior Convenor at the Restorative Justice Unit and is a strong community minded woman who has filled every position at the Unit including a 12 mth stint as the acting Manager, with an unwavering diligence and capability. She has shown a boundless capacity to relate to victims, young people and their supporters and guide their safe participation through many challenging conferences to achieve positive outcomes.

THE BLOOD OF THE MARTYRS

On 7 January 2015, 2 Muslim gunman entered the offices of Charlie Hebdo in Paris and murdered 12 people. The murders were a response to cartoons published by Charlie Hebdo ridiculing the prophet Mohammed. Amongst those murdered were 2 policeman who were guarding the premises, one a Muslim who apparently pleaded for his life in vain. On the same day a siege at a Kosher Grocery in Paris resulted in 4 Jewish hostages being killed. It subsequently emerged that a Muslim man had acted heroically to save many other lives.

Out of these tragedies arose one of the largest demonstration or "unity" marches in French history, led by world leaders and intended as a demonstration that the people would not buckle in the face of terrorism. "Je Suis Charlie" became the catchcry of demonstrators and supporters. It was a catchcry intended to support freedom of the press. But how many were aware of the nature of the cartoons published by Charlie Hebdo which included depictions of Mohammed engaged in sexual acts and a person with a qijab shoved up his backside?

It has been claimed, by none other than Human Rights "Freedom" Commissioner Tim Wilson, that such cartoons could not have been published without sanction in Australia because of Section 18c of the Racial Discrimination Act which makes it illegal to offend, insult or humiliate based on racial grounds. How does Mr Wilson not know that Section 18c does not apply to religious discrimination??

If Christ had been substituted for Mohammed in the cartoons, Christians would have been outraged but unlikely to have retaliated with murder. Rupert Murdoch entered the fray by tweeting that maybe most Muslims are peaceful but until they "recognise and destroy their growing Jihadist cancer they must be held responsible". Celebrity author J.K. Rowling responded by saying "I was born Christian. If that makes Rupert Murdoch my responsibility, I'll auto-excommunicate".

On 14 January 2015 in the Canberra Times, Jack Waterford noted that amongst those expressing "Solidarity" with the murder victims were representatives of many countries with records for opposing both freedom of speech and religion, namely, Saudi Arabia, Bahrain, Kuwait, Tunisia, Palestine and Egypt. As he says, "our allies are as beastly and cruel as our enemies".

Terrorism of any kind is to be condemned. As George Bernard Shaw said "assassination is the extreme form of censorship". Freedom of speech is an important right. One recalls the famous words of Voltaire: I disapprove of what you say, but I will defend to the death your right to say it". [It was the same wise man who when asked on his deathbed by a Catholic Priest whether he renounced the devil and all his works, famously replied, "Come Sir, now is not the time to make new enemies:".] Despite freedom of speech being an important right, in Australia at least the Racial Discrimination Act imposes some important and appropriate boundaries on that freedom.

We live in a frighting world where children are murdered and a child as young as 10 has detonated a suicide bomb, blowing up himself and a number of innocent victims. The best way to cope in the face of such atrocities may be by going about our everyday business, perhaps fearful of what could and might happen, but at least determined not to give in to our fears.

In the meantime the situation in France is to say the least precarious. As I write this, Charlie Hebdo is planning a 3 million edition with more cartoons depicting the prophet Mohammed. This is hardly likely to calm the troubled waters in this country.

It remains to be seen whether, in the words of ENJOLRAS in "Les Miserables," the blood of the martyrs will indeed water the fields of France.

GA STRETTON SC

800 YEARS OF THE FIRST GREAT CHARTER

by Shane Drumgold

On 15 June 2015, the first Magna Carta, the Great Charter will celebrate its 800th birthday, and it seems appropriate to get to know the grand old charter better. Firstly, you will note that I said the "first" Magna Carta, because there have been several. Indeed the 63 clause document, which was about the length of this paper agreed by King John on 15 June 1215 in the meadows of Runnymede was dead and buried within 3 months, and was not even called Magna Carta. The 1215 document was retrospectively called Magna Carta on its second reissue in the form of a new reduced 47 clause document granted by the appointed Regent for the next King in 1217.

Rather than seeking truth, we have a tendency to cram events into the romantic history we would like, and next to the bible, the Magna Carta is probably the historic document most cited out of context. It has been used to support every argument from the right to riot, to the right to execute rioters. Its conflicts include the right to liberty (such as slaves), against the right to not be dispossessed of your property (such as slave masters) and virtually everything in between. It is impossible to understand the 1215 Magna Carta without understanding the social structure that existed at the time, the language of the day, and the political situation that led to its signing. Most importantly, the continued re-issue of various versions of Magna Carta over the years that followed, and its romanticisation by Sir Edward Coke 400 years after the original document as cleaver emotional argument in support of his proposed Petition of Rights.

Social Structure

In 1215 the population of the British Isles was about 3.5 million people, and its capital, London was a gated city of about 50,000 people. Under the feudal system, the King was head of state who granted land and occasionally removed it (known as a fiefdom) to about 100 Barons who were in complete control of their fiefdom and its laws, and in return were required to provide the King with military forces and income.

To provide military forces the Barons would in turn grant land or a Manor to Knights in exchange for military services to the King. The kingdom was broken into the same Shires as today, and each shire had a King appointed Sheriff who was responsible for collecting the King's taxes, and they were very much despised in medieval times.

There were about 200 Freeman who had small land holdings in their own rights and would farm and hunt on their own land, and would occasionally be extorted by everyone, all the King's men, Baron's and Knights. The Barons were the wealthiest people in the kingdom, and behind them were the Knights. Under the Baron's and Knights came the Villeins or Serfs, who were not freemen, rather were beholden to their particular Baron and Knight. Villeins were leased small parcels of land by the Knights and Barons in exchange for financial dues, free labour, food and services whenever they demanded it. Best estimates suggest that Villeins made up all but 50-100 thousand of the 3.5 million population.

Land not owned by a Baron, Knight or Freeman was free land however would often be declared as Forrest and thereafter regulated by the King (through his Sheriffs and Bailiffs). The free land was very important, particularly to the Freemen and Villein who relied on it for gathering fire wood and hunting for food, the two most important commodities that existed to the common man so declaring land as Forrest meant it belonged to the King and hunting or foraging on the Kings land carried harsh punishment (often mutilation).

The single most important commercial commodity was the wool produced by the Barons and Knights using the Villein labour, which was used for clothing and blankets and there was an insatiable commercial appetite. This was the oil of the day, and England's rich farm land made it the Middle East of the 13th century.

The social structure is vitally important to understanding the goal of the Magna Carta, as it in no way involved Freemen or Villeins (at least until the 1217 Charter of the Forest) or even Knights, except to the extent of who had the right to extract money from them. In a nation of 3.5 million people, the 1215 Charter was an agreement exclusively between 100 or so Barons and the King.

This was a treaty between the wealthiest of the wealthy on how they divided up the significant top end concentration of wealth amongst themselves. In a contemporary setting, it was more like an agreement on mining licences and business taxes between the government and mining magnates than an accord setting out the salaries, income tax and working conditions of miners.

Language

The language used in the Magna Carta was significantly different to that used today. For example it uses the term "fine" which we understand to mean a penalty for a breach of the law, but in 1215 simply meant any fee payable to the King for any regulated conduct such as hunting or foraging for timber in the Forrest or inheriting your father's estate.

Political situation

King Richard I, "Richard the Lionheart" successfully ruled the kingdom from 6 July 1189 - 6 April 1199. Richard the Lionheart held significant land in France including Normandy that his great great grandfather, William the Conquer ruled over, but also had land to the south of France and had decisive victories in Sicily and Cyprus. At this stage, King Richard I actually held more land in France than the King of France. He was by all accounts a formidable ruler, 6' 5" tall and a skilled combatant until his death on 6 April 1199 from septicaemia, after being shot in the neck with an arrow.

This delivered his younger, more inept brother King John the kingdom. John by all accounts was a 5' 5" spoiled brat with no real combative skills, leading to him being labelled Richard the Lionhearts "softsword" brother. In a crushing defeat, King John lost Normandy in a battle that lasted 1202-1204. Losing such territories in the medieval feudal era was politically crushing. First of all it meant the loss of income and Knights from those areas, amounting to a significant reduction of military might and tax income. This was compounded by the corresponding increase in both income and the military might of one's enemies, in this case the French and created a significant threat of further losses of territory in France and on the British Isles. Accordingly, King John started increasing taxes and fines to replace the lost income in the hope of rebuilding his lost military might and continued his military campaign on French soil without the consent of the Barons who were effectively funding it.

This created a significant dispute between the King and his 100 or so Barons. It has to be noted that the impact on Barons of a French invasion in 1215 would be similar to a change of government to a mining magnate. Their bargaining power remains high because they produce the bulk of the monarchies income.

A final and significant dynamic was the application of the law to the King; in short, it did not apply to him. It was thought at that time that the King ruled by divine right, that is god placed him there. This meant that any decision made by a King was effectively a decision of God and was beyond man made laws. This created a situation where a King could do whatever he wished, and it was both legally and morally right by virtue of the action itself. This was the power upon which King John drew to significantly increase taxes.

The Barons on the other hand, had seen the significant decline in the kingdom and the increase in taxes as a function of the inadequacy of

King John and by late 1214 there was a major standoff. This led to a meeting of a counsel of Barons in Oxford in January 1215. Again, a change in King was more akin to a change in government, and the Baron's were considering options that included rulers from other European kingdoms and were actively looking for both military and political alliances. By February 1215 the Barons had torn up their oaths of allegiance to the King which resulted in a full blown civil war, and in May 1215 the Baron's had captured the city of London and made it clear the gates were open to enemies of the King as a strategic base for an assault on the rest of the kingdom.

Magna Carta 1215

Against this backdrop a very reluctant King John decided to entertain, what was essentially the terms of a peace treaty to regain the support of his Barons. It followed a process of what we would today call shuttle diplomacy by the Archbishop of Canterbury Stephen Langton between 10-15 June 1215. There are some relics from some early discarded drafts of the proposed document, and when set against the final document, it reveals the King was a harsh negotiator. An example is an earlier draft that required the money from all fines imposed by the King to be returned, however the final version of clause 55 limited this to all fines retrospectively rendered illegal.

Eventually the negotiations produced the Articles of the Barons 1215 and concluded in the Meadows of Runnymede as it was geographically half way between the King at Windsor Castle and the Barons at Stains, with the agreement of Magna Carta on 15 June 1215.

The main focus of Magna Cart dealt with curbing abuses of the feudal system (in fact, about two thirds of the document dealt with these abuses).

Three things are apparent from reading the entire 63 clauses together;

1) The document was openly discriminative;

2) King John was abusing his absolute power to make laws that effectively extorted extra taxes from his subjects;

3) This document concerned itself with property and taxes rather than personal rights.

Clause 10 and 11 prevented Jews from claiming interest on debt, or seizing the dower of a wife in satisfaction of her husband's debt.

Clause 54 prevented anyone being arrested or imprisoned on the evidence of a woman (other than in the death of her husband).

Clause 26 was a telling remedy, and expressed that if a Villein died with a debt to their Baron, and the Baron could prove they were indebted to them, the Baron rather than the King held the rights to their property. This is one of a number of clauses that made it clear Villeins were considered little more than property of the Baron.

Clause 28 prevented the King's Constables and Bailiffs simply taking corn or other provisions, and clause 30 prevented them from taking horses and carts as was the practice at the time. Such seizures would have had an impact on the Villein's ability to pay their Baron his dues.

Clause 29 prevented the King from extracting money from a Knight for the King's men to perform guard duty over his property when he could do this himself.

Clause 7 demanded a widow should have her marriage portion of her husband inheritance (rather than the King) which would have been essential to the stable fiefdom.

Clause 9 prohibited the King from seizing land or rent, if the debtor had chattels to satisfy the debt. This effectively meant that if a Villein had a debt, the King would take the possessions of the Villein rather than seize land effectively owned by the Baron causing a loss to the Baron.

Clause 47 halted the increasing amount of land being declared forest (thereafter regulated by the King) and ordered all the land declared forest by King John "shall forthwith be disaforested".

Clause 50 ordered the removal of named King's revenue seizing stooges from their positions (bailiwicks).

Against this backdrop, the main objective from a justice perspective of Magna Cart is shown by a number of clauses.

Clause 20 prevented "freemen" being hit with harsh financial or physical penalties for minor offences, and further prevented Vil-

lein from being charged and penalised without evidence. This stopped the practice of charges being trumped up as a means of raising taxes disguised and legal penalties.

Clause 38 prevented prosecution without credible witnesses.

Then we have the two most enduring clauses, 39 and 40 we know today as habeas corpus and the right to fair trial;

39. No freeman shall be taken or imprisoned or disseised or exiled or in anyway destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

40. To no one will we sell, to no one will we refuse or delay, right or justice.

The Magna Carta of 1215 was very short lived. The document was primarily an assault on the King's absolute god given right to rule, the effect of which was to place everyone under man made law. This was not just a problem for the King, but a problem for the Catholic religion that dominated Britain at the time and saw its clergy as also being above man made law. The King who had previously been excommunicated by Pope Innocent III petitioned him on the basis of their common interest in striking down the document, and Pope Innocent III annulled Magna Carta 1215 three months after it was agreed and it was effectively struck from the history books, and the civil war between the King and the Barons kicked off again.

The idea of signing a document promising to change your ways as a bargaining chip did not however die, and was used by successive Kings over the years to come, which is why we came to know the documents we now call Magna Carta.

Magna Carta 1216

A year after Pope Innocent III annulled the first Magna Carta and the civil war raged on, King John I died of dysentery and was replaced by his then eight year old son King Henry III. William Marshall, 1st Earl of Pembroke who had served under King Henry II, King Richard the Lionheart, King John I and now King Henry III was appointed Regent to manage the affairs of the kingdom until the King reached the age of 18. King Henry III inherited more than the monarchy; he inherited a civil war with no apparent end. Given he was only eight years of age, the kingdom was under probably its greatest threat in history so on 12 November 1216, 15 days after his coronation the King's Regent on behalf of eight year old King Henry III reissued a highly edited version of the 1215 Magna Carta, reduced from its original 63 clauses to just 42 clauses and presented it to the Barons, this time not as a treaty but a Royal decree.

Magna Carta 1217

To end of the first Barons war, the Kings Regent and the Barons signed the Peace treaty of Lambeth, which was an expanded 47 clause version. This document for the first time had elements that affected the rights of the common man, albeit the common freeman rather than Villeins, in the form of the Charter of the Forest. This saw things such as the abolition of mutilation and the death penalty for stealing venison. This was the first document to use the term Magna Carta not only to this document but retrospectively to the 1215 and 1216 versions.

Magna Carta 1225

King Henry III reigned between 19 October 1216 and his death on 16 November 1272. By 1225 King Henry III had reached the age of 18, his Regent William Marshall died in 1219 and the young King now reigned in his own right. King Henry III issued a new Magna Carta, 10 clauses lighter than the 1217 charter and the first one of his reign that bore his own seal.

In 1227 King Henry III declared that only edicts and charters bearing his own seal were legal, effectively invalidating the 1215, 1216 and 1217 charters. Following 20 years at discontent at this, it was undone by edict in 1237 when a Carta Parva was issued granting perpetuity to all previous charters, including the 1215 charter.

Magna Carta 1297

King Henry III died on 16 November 1272, and was succeeded by his son King Edward I. King Edward I was involved in yet another campaign overseas, this time in Flanders, where Belgium, France and the Netherlands are today. This was combined with domestic financial worries, as Pope Boniface VIII had issued edicts forbidding his clergy from paying taxes to a secular ruler. This created a huge fiscal hole so to raise additional fund for his foreign campaign, King Edward I applied heavy taxes on English wool, which at a time before synthetic substances, a steel or oil industry was Europe's single most valuable

commodity.

This of course angered the Barons of the time and they again raised arms against the King. Just as his father, and his grandfather before him, King Edward I dug out the largely forgotten Magna Carta and introduced the Magna Carta Act 1297 to pacify the angry nobility and prevent revolution and civil war. In exchange for the passing of the Magna Carta Act 1297, the nobility agreed to the significant tax hike that funded the ongoing campaign in Flanders.

The Magna Carta Act 1297 contains just one provision, which combined clauses 39 and 40 we know as habeas corpus and the right to fair trial. Interestingly in the ACT, Schedule 1 of the Legislation Act 2001 preserves this Act in ACT Law.

Post Magna Carta

Fast forward half a century to the reign of King Edward III (reign 25/1/1327 – 21/6/1377) who passed what became known as the Six Statutes that clarified Magna Carta and abolished anything that ran contrary to it, and applied it to all men throughout the kingdom regardless of their position or lot in life.

Three pieces of legislation introduced by King Edward III at this time remain in force in the ACT by virtue of schedule 1 Legislations Act 2001.

-Criminal and Civil Justice Act 1351
-Due Process of Law Act 1354
-Due Process of Law Act 1368

Each generation of English citizen that followed sought their King to reconfirm they would abide by Magna Carta, and it was reconfirmed at least 32 times, the last of which by King Henry VI in 1423.

Magna Carta's practical obscurity and romanisation

The Magna Carta fell into practical obscurity during the Tudor period with the rise of the powers of Parliament and the checks and balances this imposed on the King, and Magna Carta lost all apparent social relevance. In 1535 Sir Thomas More, Lord Chancellor to Henry VIII cited clause 1 (freedom of the church) in his defence for treason, yet in the mid 1590's Shakesperian play, King John, Magna Carta does not feature a single mention, suggesting the subject of Magna Carta remained the exclusive domain of the ruling elite.

That was until the early 17th century and the appearance of the Right Honourable Sir Edward Coke. Sir Edward Coke (1/2/1552-3/9/1634) is arguably the most influential legal figure of the last thousand years. He was Solicitor General and Speaker under Queen Elizabeth I, who died on 24 March 1603 and was succeeded by King James I.

Sir Edward was appointed to the bench, and eventually served as Chief Justice of the Court of Common Pleas. As Chief Justice of the Court of Common Pleas he decided Dr Bonham's Case which made the judges interpretation of the law superior to the statute itself, saying "in many cases, the common law will control Acts of Parliament". The granting of such power of course displeased King James I who thought he was too uncontrollable to be let loose on common pleas, so on 25 October 1613 moved him to the Court of the King's Bench, which protected the rights of the King rather than granted rights to commoners. This did not go well for the King, as on 25 April 1614 he decided Peacham's Case ruling the King could not himself act contrary to the law. On 16 November 1616 Sir Edward Coke was removed from the King's Bench also.

In 1620 Coke successfully entered politics and set about pursuing his agenda of limiting the King's power, one held since at least Dr Bonham's case, from within the parliamentary chamber. On 27 March 1625 King James I died and was succeeded by his son King Charles I. King Charles I was notably tyrannical, and indeed was subsequently beheaded for tyranny. King Charles I raised loans without Parliament's sanction and imprisoned those that did not pay without trial. The judges of the Court of Common Pleas and the King's Bench both declared this illegal and Chief Justice Sir Ranulph Crewe (the prosecutor in Peacham's case) was dismissed and the remaining judges succumbed to the King's pressure.

Sir Edward Coke undertook the central role of framing and writing a Petition of Right and convinced the Lords to meet with the Commons in April 1628 to discuss the petition. As is occasionally done today, Sir Edward glossed up history, sprinkled it with a little romantic emotion and dragged out the 413 year old Magna Carta of 1215 with powerful force.

Rather than being the document imposed by force, limiting King John's ability to extract tax revenue otherwise belonging to his Barons

to fight a losing battle in France, Magna Carta suddenly became an inspirational declaratory document of personal rights and liberties. It ignored the negative practical effect of Magna Carta limiting commoners ability to appeal to the King for review of the decisions of their baron. This resulted in a power shift downwards to the barons sitting directly above the Knights, Freeman and Villeins, and removed most of the checks and balances governing those barons.

Sir Edward instead argued Magna Carta of 1215 did not grant new rights at all, rather declared existing rights. Much of the more troublesome aspects of this argument such as when these rights actually arose was missing. Since before William the Conqueror, the King's divine right to rule was demonstrated by whatever god granted victory delivered him to the throne. The King's prerogative power to rule and make whatever rules he saw fit was derived from his might rather than the mandate of the people of the land he defeated.

In fact the land and property rights the Baron's were demanding at Magna Carta in 1215 had itself been arbitrarily seized from the previous ruling English elite 150 years earlier in 1066 by King John's great great grandfather, William the Conqueror and given to his own nobility who were the 1215 Barons Norman ancestors. Despite its many holes, with this argument the Commons sent the Lords the Petition of Rights who approved it on 17 May 1628, 6 years prior to Cokes death at 82 years of age.

Thereafter, Magna Carta became a myth aligned with basic Human Rights rather than a document dealing with the distribution of Baronial wealth. Following the execution of King Charles I, after a brief monarchical hiatus he was eventually succeeded by his son King Charles II who started executing those responsible for the execution of his father. When this lost public favour, he started simply imprisoning people on the Isle of Man without trial, and Magna Carta 1215 and the Petition of Rights 1628 joined forces to produce the Habeas Corpus Act 1679. These three documents all again joined forces to become the Bill of Rights 1688, this time to clip the taxation wings of King Charles II son and successor King James II.

It should be noted that the numbered clauses we are familiar with today were not present in any of the versions of Magna Carta which all consisted of one long unbroken text. The numbering was added by Sir William Blackstone in 1759 to enable the documents to be analysed.

The Magna Carta today

The United Kingdom is one of 3 countries I know without a written constitution, the other two being New Zealand and Israel, and one would think Magna Carta the closest thing they have to such a document. Notwithstanding this there was a raft of repealing legislation in the 19th and 20th centuries such that by 1969 only 3 clauses remained in effect in the UK. Clause 1, the freedom of the English Church, clause 9, the ancient liberties of the City of London (power to have its own Mayor) and clause 29, the right to due process (citizens not be imprisoned without judgment and trial by jury).

In the ACT, the Magna Carta Act 1297 remains preserved by schedule 1 Legislations Act 2001, as does three of the six statutes of Edward III, the Petition of Rights 1637 of Sir Edward Coke, and the Bill of Rights 1688 limiting the taxation power of King James II.

History shows that from the 16th century, the British Empire rapidly expanded to new lands in the Americas, Africa, Asia and the Pacific and the fundamental rights of Magna Carta certainly were not granted to the owners of those lands at the time of the Empires arrival. On the other hand, as late as 2006 the Habeas Corpus Act 1679 was used by the US Supreme Court to make illegal the Guantanamo Bay detention of Osama Bin Ladin's driver in the case of Hamden v Rumsfeld 548 US 557 (2006). In Australia and Canada however, Magna Carta was of no assistance at all to protecting the rights of the indigenous populations at European arrival or during the century long stolen generations, and as of its 800th anniversary, Magna Carta offers no assistance to almost 4000 refugees held in indefinite detention contrary to international law.

I imagine two parallel universes, one in which the Magna Carta of 1215 was granted and one where it was not, and imagine what difference may exist. Magna Carta as a law, really only settled a political crisis and made 100 or so barons wealthier in the process. Magna Carta the myth however, without doubt has provided an aspirational vision that has fundamentally affected the decisions of law makers over the past 800 years. The reverse

side of this however, is that it becomes less beneficial the less your interests align with the particular law maker.

The cynic in me would say that on its 800th anniversary, Magna Carta is like a famous friend you name drop when you need to add some credibility to your story. The omnipresent aspiration of due process and equality before the law should never be taken for granted however, nor should the influence holding such aspirations must have on the decisions of law makers past, present and future, and Magna Carta the myth keeps us connected with aspirations we appear at constant risk of losing, yet must continue to hold precious.

Shane Drumgold

Magna Carta on display at Parliament House

http://www.magnacarta.senate.gov.au/wp-content/gallery/on_display/exhibition02.jpg

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