

Magna Carta Speaking Notes Eddie Cubillo

SPEECH: The Magna Carta: what does its rights and guarantees mean for Aboriginal and Torres Strait Islander peoples:

The Magna Carta speaks to us from Medieval England, acknowledging, in writing, that no one in society is above the law: not the King nor his subjects, not the government nor the governed.

As an affirmation that authority should be subject to law arising from the community itself, Magna Carta is a foundation stone of constitutional and parliamentary government.

As an Aboriginal man from the Northern Territory it makes me warm and fuzzy inside.... I spoke with my brother the other day who resides on our homelands located in the Northern Territory and is a about 100km southwest of Darwin.

I asked him what his opinion of the Magna Carta was – he said he liked the **Salted Caramel Magnum** the most??? (About how much thought Indigenous Australians put in about the Magna Carta. But after some discussion my brother pointed to some clear issues that he says shows that the principles of the Magna Carta is not inclusive of Indigenous Australians.

I want to talk about 2 issues to show that equality and fairness before the law remains a problem in this country for Indigenous Australians.

1st – Racial Discrimination Act (RDA)

2nd – Criminal Justice System

The Suspension of the RDA has happened on 3 occasions.

1. To amend the Native Title Act 1993 (Cth) (which removed existing guarantees of rights to Indigenous people)
2. When enacting the Hindmarsh Island Bridge Act 1997 (Cth) and;
3. The Northern Territory National Emergency Response (also referred to as "the intervention")

Key amongst these issues is **The Intervention and its legacy:**

- Since the Intervention discrimination has been felt in a number of ways, perhaps most starkly when Aboriginal people access basic services such as shops, or otherwise are subject to measures that apply only to them and demonise them as alcoholics or pedophiles.
- Consider what our older people would have thought when they saw the convoy of army vehicles rolling in. One comment I heard was that 'this isn't a country at war'. Not surprisingly, people in remote locations did not understand why the military was in their communities. (Many of our elderly people had experienced the bombing of the top end)

- The most humiliating was the signs that were erected outside of our communities and they were subject to the confusion of income management which in time they found required them to line up in a separate queues in supermarkets to use a basics card. This brought back old and painful memories of segregation.

The **Kartinyeri** case decided that the Australian Constitution authorises the Commonwealth to pass racially discriminatory legislation.

Suspending the Race Discrimination Act under s51 (xxvi) – to allow the ‘Intervention’ took the retrograde step of **suspending essential Anti-Discrimination laws in this country and included laws and policies which discriminate against people who are Aboriginal because they are Aboriginal.** This legitimized the views of those who believe that it is OK to treat people differently because of their race.

The ability of the government to act discriminatorily against Aboriginal and Torres Strait Islander **under constitutional powers is an affront to the rule of law and the right of all to be treated equally under the law.**

Discrimination continues to be felt across a number of other key areas from land rights under native title to criminal justice. In keeping with the theme of the next session I want to raise a number of issues about Aboriginal and Torres Strait Islander people within in the criminal justice system.

2. Criminal Justice System

Firstly, it is clear that the Criminal Justice system continues to fail Aboriginal and Torres Strait Islander people, with ever increasingly dire consequences. The issue that this represents is most clearly illustrated by the fact that there has been an 88% increase in the number of Aboriginal and Torres Strait Islander people imprisoned between 2004 and 2014.

Discrimination remains a significant issue both in the law and its application.

I want to highlight a particular area of concern:

Paperless Arrests:

- The Northern Territory's "paperless arrest" laws introduced late last year, give police the power to lock someone up for four hours for minor offences like making undue noise; swearing in public; or keeping a front yard untidy.
- A person locked up under these powers has no effective opportunity to challenge their detention or to ask a court to release them. The police essentially act as both judge and jury.
- The Northern Territory's Attorney-General said that the new paperless arrest laws make it simpler for police to "catch and release people". Police have a tough job and every reasonable effort should be made to make their job easier, but efficiency is not the be-all and end-all and it is argued that the **law is in conflict with the principle that no person should be deprived of their liberty arbitrarily.**

- It is clear that the laws are having a disproportionate impact on Aboriginal and Torres Strait Islander people. Of the 700 times that the law was used in the first three months of its operation, more than 75 per cent have been Aboriginal.
- Recently a respected Aboriginal elder passed away whilst in police custody. He had been arrested and detained under a paperless arrest. He died the most inhuman of deaths: without family around, on a cold, concrete floor of a police cell.
- As a nation, we should be unified in an unwavering commitment to stop Aboriginal deaths in custody. **All governments' laws, policies and practices should support rather than undermine this end.**
- **This law, which is in flagrant disregard for the rule of law, must be repealed to ensure further tragedies do not occur.**

Mandatory Sentencing:

- Eliminates the judiciary's ability to consider appropriate mitigating factors so as to arrive at the most appropriate sentencing outcome.
- It is an arbitrary contravention of the principles of proportionality and necessity.
- Has a discriminatory effect on Aboriginal and Torres Strait Islander offenders.
 - According to the Western Australian Department of Justice's Review of the three-strikes laws over 81% of juveniles sentenced under the laws were Aboriginal.
 - From 2000 to 2005 approximately 87% of all children sentenced under the mandatory sentencing laws were Aboriginal.

I would also give mention:

- **Overpolicing** - For example, police targeting of Aboriginal and Torres Strait Islander people for behavior in public spaces and/or minor offending; many of Aboriginal and Torres Strait Islander Legal Services (ATSILS) clients occupy public spaces in a more visible way than non-Indigenous people, due to high rates of homelessness and overcrowding.
- **Bail** - An increasingly rigid approach to bail which has had a particularly discriminatory effect on Aboriginal and Torres Strait Islander young people, causing an increase in the number of Aboriginal and Torres Strait Islander young people on remand ; The unnecessary imprisonment of Aboriginal and Torres Strait Islander peoples in regional and remote areas due to a lack of appropriate bail addresses; this is particularly concerning in relation to juveniles.
- **Fines enforcement** - The system of fines enforcement in Western Australia which is skewed against persons who are disadvantaged and vulnerable.

None of this is to deride the idea of the rule of law and its traditions – it is to say that it has not been applied equally to Aboriginal and Torres Strait Islander people - from the loss of our lands that precedes our current imprisonment rates, to current racially discriminatory laws.

Conclusion:

The Magna Carta continues as a symbol of liberty and freedom today. However, while this affirmation of fundamental freedoms is important, it should also be noted that the Magna Carta and its legacy is problematic - it can too easily be seen as providing affirmation of this country's past and traditions, while ignoring that the rights and freedoms it contains have certainly not applied equally to all. The law has been complicit in some of the worst atrocities committed against Aboriginal and Torres Strait Islander people and continuing today. We cannot let the fine spirit and principles of this document, **let us ignore this past**.

There won't be a single bullet that cures all areas of disadvantage faced by Aboriginal and Torres Strait Islander people, but **real constitution** reform would have important symbolic significance to ensure that our foundational document removes the **racist elements** that still pervade our Aboriginal and Torres Strait Islander people and their communities.

APPENDIX:

a) Text:

a) *Fair trial and the right to not to be unjustly imprisoned:*

(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

(39) 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.

(40) To no one will we sell, to no one deny or delay right or justice.

b) *Right not to be unjustly deprived of possession or lands.*

(39) 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.

52) To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgment of his equals, we will at once restore these....

Rule of Law:

Lord Irvine of Lairg: "Magna Carta can be truly appreciated as the foundation stone of the rule of law. Its terms continue to underpin key constitutional doctrines; its flame continues to burn in the torches of modern human rights instruments; and its spirit continues to resonate throughout the law."

Rule of Law requires:

- The law be applied equally so that no one is above the law (including government). This means Government action cannot proceed arbitrarily and without lawful authority.
- Separation of powers between legislative, executive and judiciary.

Right to a fair and public hearing before competent, independent and impartial court established by law.