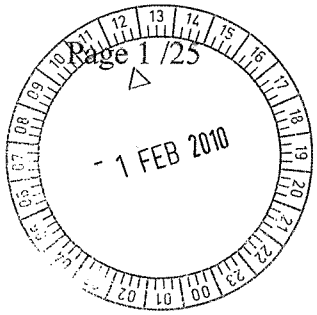
Submission to LC Committee on Criminal Investigation Amendment Bill 2009



The Chair
Legislative Council Committee
c/o Parliament House of Western Australia
Perth, Western Australia

PUBLIC

Dear Chair

I am writing to the Committee regarding a proposed Bill which is before Her Majesty's parliament, entitled *Criminal Investigation Amendment Bill 2009 (or CIA Bill)*.

PREFACE

I am a natural-born Subject of Her Majesty Queen Elizabeth the Second by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories (including Australia) Queen of the Commonwealth, Defender of the Faith. This territory of the Realm was established by the Proclamation of Governor James Stirling and confirmed in the *Act of Settlement 1700*, both State and Commonwealth constitutions, and reconfirmed by the Queen at her Coronation (please see Appendices for development of this thesis).

At the aforementioned Coronation, Her Majesty swore to uphold all of her subjects rights and these are enumerated in the various Imperial Acts which pertain to this territory, such as *Magna Carta 1215 - 1297*, *Liberty of the Subject (1354)*, *Observance of due process of law (1368)*, *Confirmation of Liberties (1400, 1405)*, and the *Bill of Rights 1689* (please see Appendices).

The *CIA Bill* is unlawful on a number of basic grounds; breaching the entrenched natural, common law and statutorily recognised (as listed above) rights of all people living in this territory. As the parliament of Western Australia comprises the Queen, Legislative Council and Assembly, it is incumbent that the parliament acts in accord with the Royal duty; it is your duty to reject this Bill on the above very grave grounds. Her Majesty may not be deceived in Her grants, nor can the Royal Crown be deprived of its prerogatives, by Her ministers; it is tantamount to treason.

ANALYSIS OF THE BILL

The CIA Bill begins with the premise that the people it is meant to address are pre-judged as criminals; this is inherent in the title (and that of the Act it amends). Thus, the most basic right of presumption of innocence is breached by the Bill. It also dispenses with natural justice, breaches the separation of government power, introduces an arbitrary (as opposed to due process) aspect to the powers of sworn officers of the Royal Crown (police), and leads to entrapment.

This Bill purports to give the Police Commissioner a legislative power, in that the Commissioner may summarily cause an area to be "controlled", and the individual police officer a judicial ability, in that they may arbitrarily judge anyone to be guilty simply by their judgment and pronouncement of the same. The Bill purportedly gives the police arbitrary power to not only decide that a particular area is to be "controlled" but also arbitrary power to decide which members of the public may or may not enter or be searched at the whim of the individual officer. This Bill allows for the formation of the "Star Chamber on the beat" – it is draconian to that degree – and if it were enacted it would be an unlawful statute and constitutionally unsound.

In this measure, the "separation of powers" inherent in our constitutional arrangements is breached. This separation of powers is based on *Commonwealth of Australia Constitution Act 1900 (CACA 1900)*, to which the *Constitution Act 1889* (*CA 1889)* is subject. The *CA 1889* is already unlawfully impaired by the enactment of the invalid *Australia Act 1986* (see appendices below).

Section 70A of the *CIA Bill* is otiose as no current member of the Police Force has a lawful warrant card, that being a warrant card with the Royal coat of arms; this goes "hand-in-hand" with the oath of office ("Engagement") for an officer of the Royal Crown contained in the *Police Act 1892 (s.10)*. Added to which, the High Court case *George v Rockett* reinforced the need for officers seeking a warrant to provide a narrow set of criteria for the search and a high standard of evidence to be provided to allow the warrant to be given. This proposed Bill flies in the face of the parameters set by the High Court and is contemptuous of this High Court decision by ostensibly allowing officers to search without a warrant or reasonable suspicion. This purportedly allows officers to perpetrate two breaches of common law – trespass to the person, and trespass to chattels.

I can positively state from personal experience that such a Bill if enacted would make me, as a private citizen, feel extremely uneasy about my interactions with police, as I have encountered an already arrogant constabulary. I will now give just two examples from this experience.

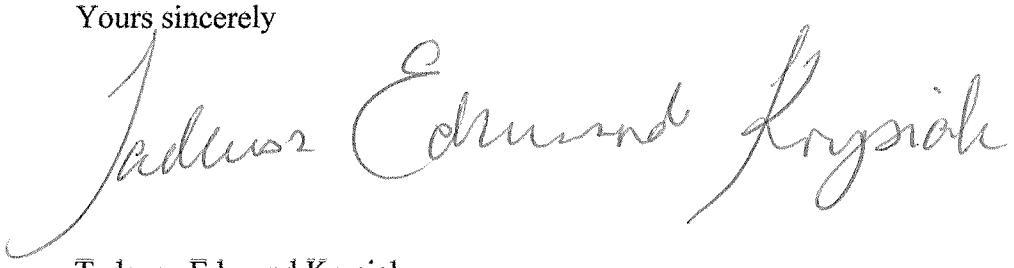
> Some time in 2008, I was parked in my car in a bay in the city one night, waiting for a friend to come down from a hotel room. A passing police car stopped and an officer enquired as to why I was there. The interaction with the officer led to him asking to search my car, but not until I had vigorously objected to the invasion of my privacy and rights. Senior Constable Stoddard's reply was the following: "The Criminal Investigation Act allows us to do whatever we want." I was flabbergasted by this and, seeing as he was armed, I allowed the search, but not before informing him he was trespassing to my chattels. After the search, my travelling companion, an Asian woman, was interrogated by the officers and led away for further questioning.
>
> I discovered that, unbeknown to me, the officers had taken a file from my car. I then went to the Curtain House police station and asked to speak to SC Stoddard and he produced the file, saying they had taken it accidentally; I was not convinced this was the case, as the contents of the file had been rearranged as if taken for the purpose of photocopying, for example.
>
> During my time at the station, I witnessed a man (by the name of Nathan) being evicted from the station while protesting about his alleged treatment at the hands of the officers. During this altercation Nathan several times talked about his rights being breached. I waited for him to eventually leave and struck up a conversation with him about his encounter. Essentially, it involved Nathan being given a "move-on order". He told me he was a law student, and, due to our mutual interest in the law, we exchanged contact details. Nathan was then subsequently charged with breaching the "move-on order" as a result of our conversation! I appeared for Nathan as a witness and, as a result of my testimony, the magistrate dismissed the case. My observation of the police attitudes throughout was that they falsified evidence to suit their prosecution and seemed determined to make an example of Nathan at all costs.
>
> [There is at least one other example of police behaviour and attitudes I can relate, but will leave this to my verbal submission.]

Thus, the *CIA Bill* breaches the common law precept of "liberty of the subject", as it allegedly allows an officer to either search someone or to remove them from a "declared area". All subjects have liberty to travel any part of the Realm at their liberty (in peace and dignity), unless they have, or are reasonably suspected to have, committed a crime; at this point an officer has a lawful right to search and or detain the subject, following due process of law. This is highlighted in *Light & Coke v City of Chicago* [1952] NE 2d 777, 781, *State v Stroud* [1899] 52 SW 697: "Under the common law a public highway was a 'way common and free to all the king's subjects to pass and repass at liberty'", or as Sir William Blackstone stated "the power of locomotion, of changing situation, or of moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due process of law" 1 Bl. Comm.134, *Joseph v Randolph* [1882] 71 Ala 499.

So, it is MY WILL that you do not enact this Bill into law and furthermore that you repeal any legislation to which the CIA Bill relates. In so doing, may it be a reminder to all members of parliament of their responsibility to act as Ministers of the Royal Crown and uphold their Oaths of Office and promises to uphold the "law of the land"; also to actively support Her Majesty, Queen Elizabeth the Second in Her promise to uphold the Common law of the United Kingdom and the attendant ancient "Rights, Liberties and Immunities" of the Subject. May I suggest that any statute which stands in contradiction to the aforesaid rights is anathema to good government (and therefore repugnant to the *Constitution Act 1889* (*CA 1889*) and the *Commonwealth of Australia Constitution Act 1900 (CACA 1900),* to which the *CA 1889* is subject.

I would like to appear before the Committee to present these facts orally.

Yours sincerely



Tadeusz Edmund Krysiak

A Subject of Her Majesty Queen Elizabeth the Second by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories (including Australia) Queen of the Commonwealth, Defender of the Faith.

22nd day of the 1st month in the Year of Our Lord 2010

Sojourning in Her Royal Majesty's Crown territory of Western Australia.

APPENDICES

1. Constitutional Acts

The constitutional acts of the United Kingdom were brought in by the unrepealed *Proclamation of Western Australia* read out by Governor James Stirling in 1829. The Proclamation states: "Whereas his Majesty having been pleased to Command that a Settlement should forthwith be formed within the Territory of "Western Australia" ... I do hereby make the same known to all Persons whom it may concern, ... And whereas the Establishment of His Majesty's Authority in the Territory aforesaid, the Laws of the United Kingdom ... do therein immediately prevail and become Security for the Rights, Privileges and Immunities of all His Majesty's Subjects found or residing in such Territory."

These "Rights" were entrenched Crown statutes, *Magna Carta, 1 Eliz. c.1 (1558), Petition of Right 1627, Habeas Corpus Act 1640, Coronation Oath Act (1688),* the *Bill of Rights 1689*, and the *Act of Settlement, 1701,* which contained oaths of allegiance for all ministers of the crown in all the Realm, including the Sovereign's dominions, colonies and other territories. [Listed under "Constitutional Law" in table of contents, *Halsbury's Statutes of England and Wales,* 4th Ed., Vol 10 (2007)]

Magna Carta and the *Bill of Rights 1689*, were written as two complete documents which cannot be amended and they declare that they are to apply "for all times to come" and for all the

officers, judges and ministers of the royal Crown to adhere to and defend to their utmost ability. *Magna Carta* has had many reconfirmations, both Royal and parliamentary, ultimately being incorporated in the Coronation Oath of the Queen along with the other constitutional documents of the United Kingdom.

In the 1760's, William Blackstone described the fundamental laws in his book *Commentaries on the Laws of England* "as the absolute rights of every Englishman ... Magna Carta ...Petition of Right ... 1689 English Bill of Rights ... the Act of Settlement of 1701", among other enactments.

In the 1774 pamphlet *American Claim of Rights*, South Carolina's Chief Justice William Drayton wrote "That the American being descended from the same ancestors with the people of England, and owing fealty to the same Crown, are therefore equally with them, entitled to the common law of England formed by their ancestors; and to all and singular the benefits, rights, liberties and claims specified in Magna Charta, in the petition of Rights, in the Bill of Rights, and in the Act of Settlement. They being no more than principally declaratory of the grounds of the fundamental laws of England."

In 2004, the Joint Committee (House of Commons and House of Lords)into the *Civil Contingencies Bill* "published its first report, in which, amongst other things, it suggested ... that the bill should be modified to preclude changes to the following Acts, which, it suggested, formed 'the fundamental parts of constitutional law' of the United Kingdom: ... Magna Carta 1215, Bill of Rights 1689, ... Act of Settlement 1701" (Wikipedia – *Fundamental Laws of England*).

Joseph Chitty, in his opus *A Treatise of the Law on the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (1820), wrote (page 7): 'The duties arising from the relation of sovereign and subject are reciprocal. ... his Majesty is under, and not above, the laws. This doctrine is laid down by several writers; *(b)* and is expressly ratified by the coronation oath, wherein the King swears to govern according to law, to execute judgment in mercy ... and by the statute 12 and 13 W.3 c.2 which declares that "the laws of *England* are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm, ought to administer the government of the same, according to the said laws: and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm ... the rights and liberties of the people thereof ... are ratified accordingly."'

The Constitutional Yearbook 1885, reprinted in 1970, by Robert James, states:

> (p.30): 'The term "The English Constitution," is commonly so used as to include both the form of public Government ... and the constitutional rights and privileges of private citizens ... although it results, in some measure, from the decisions of judges, and the provisions of statutes such as Magna Charta, the Petition of Right, or the Bill of Rights, such decisions and statutes are avowedly merely declaratory of the pre-existing law. ...
>
> (p.31): 'The old Constitutional maxim, that "the King can do no wrong," is now literally true, for his acts are really the acts of his Ministers; and his Ministers are responsible to the House ... not merely as of old for any breach of the law, but for the general form of their policy ... or else, in conformity with a Constitutional usage, practically as binding as a legal enactment, the Ministers are bound to resign office. ...
>
> (p.190): 'In the British Empire the central state is the United Kingdom, which includes ... the dependent States or provinces ... the following:- ... 4. The group of Australian Colonies, ...'
>
> (p191): 'As regards their government, ... dependencies of the Empire may be divided into three classes. *First,* those colonies ... which have what is technically known as "responsible" government. Of these the more free are in all but name independent of the central Power; for example, they even negotiate their own customs treaties with other nations. In each of these colonies there is a governor appointed by the Crown, who nominally has a veto on legislation; but his power is small, and the Executive is independent of him. The real governmental power lies in the Parliament ... in this group fall ... Australia (except Western Australia) ... *Secondly* – Certain colonies and possessions which have "representative" institutions, but in which the Executive is controlled by the home Government: they may be considered as in a state of transition ... to "responsible" government. This class includes Western Australia ...'

The Western Australian volume, *Statutes of the Realm* (1896), by J.C.H. James, on "Adopted Imperial Statutes", states at the beginning that "all the Statutes of the Realm of a general nature in force in England on 1st June, 1829, take effect in Western Australia ... This present volume deals with none of these, but contains such Statutes of the Realm as have from time to time adopted ..."

In *R v Kidman* (1915) 20 CLR 425, Griffith CJ [435] said: "The laws ... brought to Australia undoubtedly included all the common law ... It did not, however, become disintegrated, into six separate political entities".

Even the *Balfour Report* (1926), which produced the *Statute of Westminster*, says [14]: "We refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, ... though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."*

In *Skelton v Collins* (1966) 115 CLR 94, Windeyer J [134] stated: "Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they became the common law of Australia."

In the case *Mabo v Queensland (No.2)* (1992) 175 CLR 1, Brennan J [35] said, "English colonists were, in the eye of the common law, entitled to live under the common law of England which Blackstone described as their 'birthright' ... [37] In a settled colony in inhabited territory, the law of England was not only the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally."

In the High Court case known as *The Engineers Case* (1920) 28 CLR 129, 152, Knox CJ states: "The Constitution was established by the Imperial Act 63 & 64 Vict c 12. ... to unite in one indissoluble Federal Commonwealth under the Crown ... 'The Crown', as that recital recognizes, is one and indivisible throughout the Empire."

Under that royal Crown, the fundamental laws of England form a constitutional backbone on which our State and Federal Constitutions sit, as recognised by various authorities, such as Laws J in *Thoburn v Sunderland City Council* [2002] EWHC 195, to wit "In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental ... The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689"

The Spirit of Magna Carta Continues to Resonate in Modern Law: The Legacy of Magna Carta: A Joint Commitment to the Rule of Law, 119 LQR 227 [2003], by Lord Irvine of Lairg, Lord Chancellor, the inaugural "Magna Carta Lecture", delivered in the Parliament Building, Canberra, Oct 14, 2002:

> Magna Carta was re-issued four times ... and ... confirmed by Parliament on almost 50 further occasions. ... By accompanying words of confirmation, also still on the statute book, it is said that the Charter of Liberties "made by common assent of all the realm ... shall be kept in every point without breach", and that the Charter shall be taken to be the common law. ...
>
> Magna Carta ... represents ... the rule of law[11]. This legacy forms a central part of the shared constitutional heritage of Britain and Australia. ...
>
> [11] It is important to recognise, as Coke himself emphasised, that Magna Carta also provided a measure against which the acts of Parliament were to be judged. Coke stated a "good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law and not the uncertain and crooked cord of discretion" and castigated parliamentary conduct that failed to observe the promises enshrined in Magna Carta.
>
> ... In a time when most law was orally proclaimed, Magna Carta not only became "the great precedent for putting legislation into writing", but also an awesome record of the terms on which power was to be exercised; intended, as its terms read, to be observed "in perpetuity". The process of Federation meant that Magna Carta was given concrete legal effect in Australian jurisdictions ... in ... Western Australia, Magna Carta was received by Imperial law reception statutes ... all the provisions of Magna Carta ... still in force. ...
>
> The legacy of Magna Carta has also been inherited by Australia through the common law. Today, it can be seen to resonate most clearly through the fundamental common law doctrine of legality, and the right of access to justice....
>
> Michael Kirby in *Jago [v District Court]*, as President of the New South Wales Court of Appeal, considered that Magna Carta was sufficiently secured in Australian law.

This confirms the 1994 report (No.75) of The Law Reform Commission of Western Australia (LRCWA), entitled *Report on United Kingdom Statutes in Force in Western Australia*, stating:

> (p.6): "statutes still in force... still an important part of the law of Western Australia."
>
> (p.11): Some statutes are in force in Western Australia by express words or necessary

intendment and by virtue of the paramount force legislative power of the United Kingdom Parliament. These statutes are those which are expressed to have effect outside the United Kingdom, or must necessarily be read in that sense. ...

The executive summary (p.200, 201) of the above report, reproduced in the LRCWA's *30th Anniversary Reform Implementation Report (2002)*, stated:

> "Under a well-established common law rule, at the time of the settlement of Western Australia in 1829, all statutes in force in the United Kingdom ... automatically became part of the law of Western Australia. ... Eleven UK statutes, including the *Magna Carta* and the *Bill of Rights 1688* should be preserved".

The Speaker of the House of Commons, UK parliament (in *Hansard*, 21 July 1993): "... the *Bill of Rights* will be required to be fully respected by all those appearing before the Courts."

Even if the West Australian parliament, subordinate to the UK parliament, has or had ability to repeal Imperial statutes, the savings clause (s.37) of the *Interpretation Act 1984* disallows any repeal to:

> "(c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
> (d) affect any duty, ... burden of proof imposed, created, or incurred prior to the repeal; ...
> (f) affect any ... remedy in respect of such a right, ... status, ... duty, ... burden of proof, ...and any such ... remedy may be instituted, continued, or enforced, ... as if the repealing written law had not been passed or made."

In 2003 the Hon Murray Gleeson AC, Chief Justice of Australia stated in "The Second Magna Carta Lecture", *Legality, Spirit and Principle* (NSW Parliament House, Sydney):

> Lord Irvine of Lairg referred to the shared constitutional heritage of Britain and Australia ... 'the fundamental common law doctrine of legality' ...
>
> *Marbury v Madison* was known to, and the principle for which it stood was taken for granted by, the framers of the Australian Constitution. The decision was 100 years old when the High Court of Australia was established. ... Sir Owen Dixon said:
>
> "To the framers of the Commonwealth Constitution the thesis of *Marbury v Madison* was obvious. ... simply because there were to be legislatures of limited powers, there must be a question of ultra vires for the courts." Thus, the common law principle of legality, in its application to judicial review of legislative action, reached Australia both directly from the United Kingdom, and indirectly through the precedent of federalism set by former British colonies in North America....

The framers of the Australian Constitution regarded themselves as British. As shown in the *Annotated Constitution of the Commonwealth of Australia,* by Quick & Garran, to wit:

> *Covering Clause 1* (page 318): "OUTLINES OF THE BRITISH CONSTITUTION. ... Contained in various charters, and Acts of Parliament assented to by the Crown from the earliest period of English history, including Magna Carta (1215); the Petition of Rights (1627) ...; the Habeas Corpus Act (1640) ... ; the Bill of Rights 1688 ... ; and the Act of Settlement (1700) ... The Bill of Rights is of special interest as declaring that certain recited rights are "the true, ancient and indubitable rights and liberties of the people [to] be firmly and strictly holden and observed in all times to come."
>
> *Covering Clause 5*, (page 348): "In Low v Routledge, LR 1 Ch 42 (1865), ... Lord Justice Turner said ... rights acquired under an Imperial Act in force throughout the Empire could not be affected by a law of a colony inconsistent herewith" (p. 356) "The laws of the State will comprise:– (i.) Imperial Acts relating to the Constitution and government of the colonies when they become States: ... (iii.) The Common law".
>
> (p.349): "Court of Appeal [*Smiles v Belford* (1877) 1 Ont. Appeals 436], the judges were unanimous ... the Federal Parliament had no authority to pass any law opposed to statutes which the Imperial Parliament had made applicable to the whole Empire."

The *Constitution of the Commonwealth of Australia Act 1900* (IMP), states: Section 108: "108 ***(r)*** Every law in force in a colony which has become or becomes a state, ... shall, subject to this constitution, continue in force in the state ...

> ***"(r)*** As colonies originally founded by British subjects, the common law of England is also the common law of the Australian colonies, and so to a considerable extent the statute law of England ... in 1828 ... by virtue of s.24 of the Australian Courts Act, 1828 ... enacting that :– All laws and statutes in force within the realm of England at the time of

the passing of this act ... shall be applied in the administration of justice in the courts"
Section 118: "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State."

In Metwally's case [1984] 158 CLR447, Deane J stated: "the Australian federation ... is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called the Commonwealth and States derive their authority."

In an article on Thomson Reuters, <http://legalonline.thomson.com.au/> about Australian constitutional independence: "When the self-governing colonies federated into the Commonwealth of Australia in 1901, the new Commonwealth itself became another colony, self-governing but lacking ... constitutional independence" a "legal and constitutional fact".

Again, on Thomson Reuters, Professor Cheryl Saunders (TLA [19.1.74]) writes "The Constitution has been characterised as a compact ... between the colonies that formed the Commonwealth".

In the *Hansard* for the Legislative Council of Western Australia, 13 December 2001, 2.17pm, Hon. Derek Tomlinson stated: "Our Constitution is not merely the *Constitution Act* and the *Constitution Acts Amendment Act*; it is an aggregation of statutes and documents. In the Commission on Government Report No 5, dated August 1996, the commissioners try to explain the nature of the Constitution as follows –

'There is no single document containing all the constitutional laws of the State. Our primary constitutional documents are the *Constitution Act 1889* ... and the *Constitution Acts Amendment Act 1899* ... there are a number of possible sources of State constitutional law: ... Commonwealth Constitution; ... United Kingdom statutes such as the *Bill of Rights 1688*; common law ...' ...

"... an immutable document protecting the rights and privileges of the citizens of Western Australia."

In the *Constitution Act 1889*, the United Kingdom is not a foreign power as it states in section 59: "exported from the United Kingdom ... or any of the Colonies ... or any Foreign Country ..."

Looking at the *Interpretation Act 1984,* s.13 (2), (3) gives us a point of reference when it comes to the rights of Her Majesty's subjects living in the territory of Australia. Section 13(3) states: "Where a rule of law applies to or in relation to, or has effect with respect to A British subject, that rule of law applies to, or in relation to, or has effect with respect to an Australian citizen ... as if that Australian citizen were a British subject."

The *Evidence Act 1906* (WA) s.3 recognises that all Western Australia was an "Australasian colony" and is now a "British possession ... within Her Majesty's possessions in Australasia." Even the *Constitution Act 1889, s60-s63,* refers to "the Colony of Western Australia." and the Schedule E includes an oath of allegiance to Her Majesty for members of parliament.

It is particularly interesting to note that an ACT Judge Higgins (now the Chief Justice) in the Supreme Court of the ACT case, *Michael Anthony Ryan v Registrar of Motor Vehicles, Anor* [1997] 129 ACTSC 4, both affirmed and used the Imperial constitutional laws (such as *Magna Carta*) in his decision to uphold the appeal.

It is also my contention that, in connection with a State's inability to legislate with repugnancy to Imperial legislation and rights, the *Australia Act* 1986 is invalid and this proposition will be covered in the appendices (below).

My rights existed before governments, courts and police were created (by the people) and have precedence over all three; this is the foundation of natural justice and Rule of Law! "Upon these two foundations, the law of nature and the law of revelations, depend all human laws; that is to say, no human laws should be suffered to contradict these. ...Human laws are only declaratory of, and in subordination to, divine and natural laws; and should human law allow or enjoin us to do what divine law has prohibited, we are bound to transgress that human law. ...Laws and decrees that are contrary to Divine law or justice, or oppress the rights of persons, are repugnant and void." Sir William Blackstone (1 Bl. Comm. 42-43)

All Imperial Acts which pertain to the Constitution (whether State or Commonwealth) or to the Subjects rights are active and in force; any laws made by the parliament of Western Australia which are repugnant to these Acts – whether proclaimed or assented to or not – are null, void, ultra vires and invalid ab initio. Such invalid laws do not require obedience, in any shape or form, by

any Subject living in Her Majesty's territory of Western Australia; in fact obedience to them by a Subject would be aiding and abetting such laws and would be seditious and tantamount to treason!!

2. The Crown and Justice

Her Majesty, Queen Elizabeth the Second is Crown Head of the Government, as per Her Coronation oath, of Australia and the individual States (originally Colonies). The *Coronation Oath Act 1688* provided that Her Majesty swore "a solemne oath ... to maintaine the statutes laws and customs of the said realme and all the people and inhabitants thereof in their spirituall and civill rights and properties". The *Act of Settlement* provides that "the crown and regal government of the Kingdoms of England, France, and Ireland, and the **dominions thereunto belonging** ... should [protect the] good subjects, who were restored to the full and free possession and enjoyment of their religion, rights, and liberties".

Pursuant to that Act, ministers and officers of the Crown are meant to take the oath: "I, A.B., do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties ... I do declare that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority within this realm. So help me God.". A king or queen cannot remove (either by proclamation or assent to an Act) that paramount force from the constitutional Acts of the Realm, as they would then be breaking their constitutional oath.

A previous Western Australian parliament enacted the purportedly valid *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003*, which purports to alter part of the constitutional arrangements of Western Australia. By replacing (in a multitude of Acts) "references" to Her Majesty with the Governor, and "references" to the Crown with an entity nominally called "The State of Western Australia", the effect was to alter the office and the functions of Governor considerably (who now acts where the Queen would otherwise have); it was not done with the authority of the people, by holding a referendum, as per the manner and form requirements of the *Constitution Act 1889* s.73(2)(a),(e) and (g).

It also resulted in a perversion of the original oath of allegiance which qualified judicial officers as officers of Her Majesty – now they are public officers of the commercial entity "State Government of Western Australia: ABN 66 012 878 629" and employees of the "Department of Attorney-General: ABN 70 598 519 443". The proof of the latter contention is found in the Professional Employment advertisements placed in the West Australian newspaper.

The Governor of Western Australia, Her Majesty's representative in this territory has no ABN and has sworn an oath of allegiance, to wit "I, Kenneth Comninos Michael, swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law. So help me God." Peace Officers (what we call "police") also swear to "promise that I will well and truly serve our Sovereign Lady the Queen ...; that I will see and cause **Her Majesty's peace to be kept and preserved**, and I will prevent, to the best of my power, all offences against the same". (However, these same officers also serve a commercial entity called "WA Police", and this is both a conflict of interest and tantamount to treason).

The *Interpretation Act 1984* (s.5) defines "**Her Majesty" ... "the Queen", ... "the Crown**" as the Sovereign of the United Kingdom, and *Halsbury's Statutes of England and Wales, Fourth Edition, Volume 10 [2007] Reissue* (under heading**"CONSTITUTIONAL LAW: Part 2")** identifies the Sovereign as **"The Crown ...** The present royal style and titles in the United Kingdom, which were announced by proclamation dated 28 May 1953, are 'Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen of the Commonwealth, Defender of the Faith'," where Australia (and separately, Western Australia) comes under "Realms and Territories".

The Archbishop of York, in the House of Lords (*Hansard*, 13 March 2007, 12.36pm) stated: 'No one serves in your Lordships' House or the House of Commons until they have taken their oath of allegiance to the Queen. L. Blake, barrister at law, in his book, *The Royal Law,* locates for the reader where our freedom really lies. ... few people realise how important for our civil liberties are the words of the coronation service ... embedded in ... the Coronation Oath Act 1689.

> 'Blake says: "The Coronation Service is where the Divine Law is placed before the law of the State, acknowledged and reverenced. ... the source of all our law, in truth and in justice. We should not forget the words in which are conveyed the truth which inspires our

> Common Law." As a 13th-century lawyer, Bracton, rightly said, the king or queen, "must not be under man but under God and the law, for the law makes the king." ...

'The Lords Spiritual remind the Parliament of the Queen's coronation oath and of that occasion when the divine law was acknowledged as the source of all law. ... Ours is a sacred trust – to remind your Lordships' House of the common law of the nation, in which true religion, virtue, morals and law are always intermingled; they have never been separated.'

In a 2006 paper for the journal *Upholding the Australian Constitution*, volume 18, Professor David Flint wrote (page 185): "**The Crown as the fountain of justice** ... No less an authority as Blackstone ... explains that 'justice is not derived from the king ... but he is the steward of the public ... the reservoir ...' ...The Crown has acted as the fountain of justice in Australia from the time of the first settlement in 1788. ... judges ... enjoy tenure during good behaviour ... the fact they are appointed by the Crown, assures their independence. ... they are Her Majesty's Judges."

The Constitutional Yearbook 1885, reprinted in 1970, by Robert James, states:

> (p.32): 'The maintenance of what is called "the liberty of the subject" forms a valuable part of the English Constitution. Its chief safeguards, independently of the mode of making laws, are (1), the administration of justice on the trial of accused persons ...
>
> (p.34): 'Yet even now the power and prerogative of the Crown and its duties also are considerable. The Queen ... is the fountain of justice, of order, and of honour.'

An unsworn (in oath of allegiance, to the Crown) officer, minister or judicial officer has no lawful standing in Her Majesty Queen Elizabeth the Second's territory of Western Australia. Only magistrates and judges sworn with the proper oath (of allegiance) and given a writ of commission under the Royal Sign Manual and Royal Signet can preside over criminal matters concerning Her Majesty's subjects in Her Majesty's territory of Western Australia; as I understand it, this is currently not the case, thus denying Her Majesty's subjects the justice they deserve.

The *Commonwealth of Australia Constitution Act 1900* already contains the most important link to the definition of the term "the Crown" (in the preamble) which we are all under, and, due to Section 109 of the Constitution, this takes precedence over any State definition or law.

The current "State" judicial oath is not an oath of allegiance to Her Majesty. The oath of allegiance is required of all judicial officers of the Crown, and ties such officers to recognising the Imperial Acts, such as listed above. These Imperial laws are the law of the land in the dominion of Australia (and the territory of Western Australia) and a subject's rights are to be judicially noticed by both judicial officers and police officers when they are dealing with Her Majesty's subjects.

3. Star Chamber

In the *Habeas Corpus Act*, the Star Chamber or any like entity was forbidden to be at any time reconstituted in the Realm: "Whereas by the **Great Charter many times confirmed** in Parliament It is Enacted That no Freeman shall be taken or ... or disseised of his Freehold or Liberties ... and that the King will not passe upon him or condemn him but by lawfull Judgement of his Peers ... **no Man shall be attached by any accusation nor fore judged** ... against the forme of the Great Charter and the Law of the Land ... and **if any thing be done to the contrary it shall be void in Law and holden for error** ...

"That the said Court commonly called the Star Chamber ... cleerely and absolutely dissolved taken away and ... repealed and absolutely revoked and made void ... The like Jurisdiction being exercised there shall ... be alsoe repealed and absolutely revoked and made void Any Law prescription custome or Usage ... **And that from henceforth no Court Council or place of Judicature shall be erected ordained constituted or appointed within this Realme** ... which shall have use or exercise the same or the like Jurisdiction as is or hath beene used practised or exercised in the said **Court of Star Chamber**.

"And every person so offending shall likewise forfeit and loose unto the Party grieved by any thing done contrary to ... this Law his trebble damages".

4. Invalidity of Australia Act et al

A parliament can only repeal or amend the legislation it has created itself. Otherwise what is the boundary of what one parliament can do to another parliament's statures. An Act of a subordinate (colonial) parliament must not only conform to its own manner and form but also the

manner and form of the constitutional acts of a superior (or sovereign) parliament; thus any such Act attempting to usurp this would have no force or effect and be null and be void *ab initio*; it would require no obedience from any subject of the Sovereign. From these basic premises I will develop my argument and show that various State Acts are invalid from a constitutional and/or manner and form aspect.

To start with, my first contention is that the *Statute of Westminster* is invalid to the extent that it purportedly removes the *Colonial Laws Validity Act* 1865. If the Act was really removed, then all Australian laws enacted since the *Statute of Westminster,* which are in conflict with the Australian Constitution (part of an Imperial Act), would be invalid since the date of the Statute's reception. As the *Colonial Laws Validity Act* did not establish the paramount force of Imperial Acts, it was only a confirmation and restriction of that principle; its removal widens the scope again to before 1865.

The *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) (AARCLP Act) purports to alter certain terminology without purportedly changing any constitutional aspects, but I will demonstrate that neither can this be the case nor can it be valid. Every legal word, especially those connected with constitutional concepts, has an import, and a change from one "word" to another in that sphere can be a fundamental change in concepts and can have fundamental, far-reaching ramifications.

In *Glew v The Governor of Western Australia* [2009] WASC 14 (p18 at 74), Hasluck J stated: " the critical question is whether the 2003 AARCLP Act complained of effects any alteration in the Constitution. If it does not effect any substantive change, but effects only a change of terminology, then ... the manner and form provisions prescribed by s73 of the *Constitution Act* do not apply."

Judge Hasluck then goes on to follow that line of thinking. However, with respect, this is a faulty line of legal thinking, as in law, a whole case can be debated and hinge on one word. Legally speaking, each word is carefully defined (hence the need for legal dictionaries) and is carefully used to avoid the wrong interpretation. The best example of this aspect of legal wording is Quick and Garran's *Annotated Constitution of the Commonwealth of Australia,* where each word and phrase of the Constitution is analysed, sometimes at length, to properly define the context and meaning intended.

With respect to the learned Judge, for Justice Hasluck to simply, with a metaphorical wave of his "judicial hand", dismiss such a fundamental difference between the phrases "Crown" and "State" on one hand, and "Queen" and "Governor" on the other, and to suggest that it makes no difference, is to dismiss the role of the Queen as sovereign as opposed to the Governor, her representative, and ignore the difference between the Crown of England and the State of Western Australia. It would be like saying there is no difference between the learned Judge and his associate, or a court attendant.

The office of Governor, as defined in the *Constitution Act 1889* (Part IIIA) has been altered (as noted in the Act), additional to the mere reference changes in various State acts, purportedly by the *Australia Act 1986.* This is a fundamental, explicit change to the office of Governor as per the wording of s.73 (2)(a)& (e), which completely falls within the ambit of that section; yet it is being denied by Judge Hasluck who refers to many cases and references but avoids the nub of the issue.

My contention is also that the *Australia Act (Request) Act* (No65 of 1985) (WA) is invalid as per s.73 of the *Constitution Act* (and consequently, the other *Australia Acts*). Added to this, the placitum (s.51 xxxviii) of the Australian Constitution, ostensibly used to validate the *Australia Act 1986,* is of highly dubious value and hence the basis for that Act is invalid. There are very few authorities which comment on the placitum and very few cases that even refer to it.

Quick and Garran dismiss it as being a with little prospect of any meaning, "It is difficult, therefore, to see what power can be conferred ... by these words" (p.651); to them it is a "gap-filler" in case anything has been left out of s 51 (xxxvii) and it would be in "conflict with the *Colonial Laws Validity Act*, which does not seem to be contemplated". The other (very few) commentators find it difficult to ascribe any value to the placitum, varying from agreement with Quick and Garran's assessment to extreme doubt and caution as to the value and scope of such a purported power. In a court of law, this would be far short of the "reasonable doubt" criteria used in criminal cases.

Professor R D Lumb, in "Section 51, pl (xxxviii) of the Commonwealth Constitution" in *The Australian Law Journal* (vol.55) stated that (p328) "there is no doubt that the placitum is an

obscure one", and (p331) "it does not extend to the repeal of *general* Acts of paramount force which applied to the colonies and possessions (whether federated or unified)", concluding that (p.332) "It can be seen that there is sufficient uncertainty about the nature of the power as to raise questions whether a direct approach to Westminster may be a more legally effective method."

Sir Arnold Bennett QC wrote an article in the July 1982 edition of *The Australian Law Journal* (vol.56) where he states (p358) that the placitum can be readily read quite literally as "enabling the federal Parliament, with the consents of the Parliaments of all the States, to repeal the Constitution altogether ... It is of course reasonable to argue that s.51 (38) cannot be read so literally because the consequences are too far-reaching."

On page 360 he continues, by "Summarising the views of those who support constitutional amendment by the use of pl (xxxviii)" relying "upon the assumption of exclusive power in the United Kingdom Parliament." His purpose "is to submit, with respect, that this argument is quite unsound and should be dropped forever" because "(1) placitum (xxxviii) is not a medium for moving outside the Constitution, (2) the exclusiveness of United Kingdom power ... was non-existent 'at the establishment of this Constitution' ... no parliament amends or can amend or repeal the Act of any other parliament"

At p361 he writes that Commonwealth powers "are territorially confined. This is of course, by use of the well-know formula 'power to make laws for the peace, order and good government' of the Commonwealth", quoting 51 (xxxviii) "within the Commonwealth". He summarises, referring to the Constitution, "Reading the Act as a whole ..., therefore, it seems reasonably clear that the intention of the whole Act is to prevent the Commonwealth Parliament rising above the Constitution and becoming an equal power with the United Kingdom Parliament".

In her contribution to the *Monash University Law Review* [vol.23, No.2 '97], entitled "State Constitutions in an Australian Republic", Professor Anne Twomey opines (p316) that "s.51 (xxxviii) may not extend to allow the Commonwealth to repeal State manner and form provisions, because the Parliament of the United Kingdom was not the *only* body which could perform this function at the time of federation ... and s.106 of the Constitution preserves the existence of State Constitutions, subject to the Commonwealth Constitution, 'until altered in accordance with the Constitution of the State'." Then, referring to the *Port MacDonnell* High Court case (1989) 168 CLR 338, 381, dealing with 51 (xxxviii), she cautions that "it should be noted that Port MacDonnell did not deal specifically with the preservation of the manner and form restrictions of State Constitutions, so the matter has not been finally settled."

Even if the *Australia Act* 1986 could be valid, it states (about the "law of England") at s3(2), "the powers of the Parliament of a State shall include the power to repeal or amend any such Act ... in so far as it is part of the law of the State." What the "law of the State" doesn't include is those Imperial Acts which are part of the Royal Crown of the United Kingdom, such as *Magna Carta* and the *Bill of Rights 1689*, as these laws are constitutional and are sworn to be upheld by Her Majesty in the Coronation Oath (and the Royal Crown is central to our state constitution).

Regarding s.51 (xxxviii), used as the purported constitutional basis for the *Australia Acts*, the argument that the placitum legitimately allowed governments to enact the *Australia Acts* is a superficial and politically-motivated one. It goes against the few authorities available on the subject which either express doubt as to its usefulness, or severe reservations as to its application. The Federal Government of the time used this placitum as the purported basis for a purportedly significant constitutional change, yet was unable to demonstrate a concrete unequivocal reason for its legal efficacy. In fact, a jury would probably dismiss a case, based as it is, purely on the government's assertions, albeit written into the Acts themselves – it is well below the standard of proof of "beyond reasonable doubt".

Government is required, by constitutional principles, to craft legislation that demonstrates it has the power and the valid head of that power (not by mere assertion), so that it's legislation is valid and beyond reproach. In Quick and Garran's *Annotated Constitution* (p.794), it is emphasised that "The Constitution of the Commonwealth is a Federal Constitution; it establishes a government of limited and enumerated powers. The Federal Parliament is not, like the British Parliament, sovereign; it is not even, like the Parliament of the colonies before Federation, invested with powers which, within its territorial jurisdiction, are practically sovereign; its authority is limited to specific subjects."

At p. 795, using the words of eminent US judge Marshall, "Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the

burden of proof lies on those assert its existence ... The search for the power will be conducted in a spirit of strict exactitude."; (p.792) "The Constitution ... is enacted as an Act of the Imperial Parliament, and is to be construed in accordance with the rules which regulate the construction of these Acts (see Maxwell, Interpretation of Statutes; Hardcastle, Construction of Statutes.)

In any case, it is extremely unlikely that the Imperial parliament would have allowed the Australian Constitution to pass with a provision – with the alleged power of s51(xxxviii) – effectively giving it the same power (even if it required the conferral of all the States) as the Imperial parliament itself. Those were not the times for such potentially upstart colonial behaviour to be condoned, even if conditionally.

The intention of the drafters of the Australian Constitution is overwhelmingly in favour of the proposition that the only means of constitutional change lay in section 128, and no other; the instrument itself was overall carefully drafted and worded to prevent a revolutionary act such as the *Australia Acts* from being perpetrated without the approval required by s.128 – to put it out of the reach of political opportunists, especially republicans. Yet these same political opportunists have, due to modern ignorance of the constitution, seemed prima facie to have achieved what then seemed not only implausible but impossible. It has never fully been tested judicially and I believe it is high time that it were, not only for the sake of Her Majesty's loyal Australian subjects and their inherent rights, but also for the sake of constitutional integrity.

Additionally, I contend the *Australia Acts Request Act 1985* (WA) is invalid for 2 reasons:

1. It seeks to alter the *Colonial Laws Validity Act* 1865, the *Constitution Act 1889*, and the *Statute of Westminster*, and therefore is repugnant to Imperial Law.
2. It seeks to alter the Office of Governor in the *Constitution Act* 1889 and is therefore contrary (and repugnant) to the manner and form provisions of s.73(2)(a), (e) & (g) of that Act, as no referendum was held.

As a consequence, the *Australia Act 1986* (Cth) is also invalid, as valid consent was not effectively received from the State of Western Australia. Aside from this, if the Commonwealth really did possess the power it claimed is contained in s51 (xxxviii) it would not have needed to request the United Kingdom Parliament to enact its own version of the *Australia Act*s (the Queen is, of course, sovereign in and for both parliaments).

Even if the *Australia Act*s were actually valid, they do not alter the Commonwealth Constitution and therefore do not alter the constitutional relationship between Commonwealth and the States. The statement at the beginning of the *Australia Act*s is also legally untrue, to wit "the status of the Commonwealth of Australia as a sovereign, independent and federal nation", as there is no legal document that can be relied upon to demonstrate Australia's sovereignty and/or independence from the UK (and none is put forward – it is merely a political assertion).

The author P H Lane in his book *Lane's Commentary on The Australian Constitution* (1986), has this to say about the placitum's purported power (p.256): "But this grant, as another wide grant in s.51 (xxix), is given in a context viz the express and implied prohibitions in the enveloping document, and is given subject to the pervasive method of altering the Constitution laid down in s 128. Besides, the literally minded can observe that s 51 (xxxviii) is prefaced by the limitation 'subject to this Constitution', eg. ss 92, 116, as well as s 128."

In the article "Manner and Form in the Australian States" (*Melbourne University Law Review*, vol.16, December '87), (p403) Jeffrey Goldsworthy writes that the "article will examine the constitutional foundations for restrictive procedures ... which, if binding, *must* – not may – be followed for valid legislation to result."

At p424, he states that "Cooke J of the New Zealand Court of Appeal has suggested ... that Parliament may not be able to override fundamental common law rights." Also, in a 1986 case in the New South Wales Court of Appeal (7 NSWLR 372), Street CJ said:

> "For my own part, I prefer to look at the constitutional constraints of 'peace, welfare, and good government' as the source of power in the Courts to exercise an ultimate authority to protect our ... democracy, not only against tyrannous excesses ... but also ... limiting the power of Parliament. ... I repeat ... laws inimical to ... peace, welfare, and good government ... will be struck down by the courts as unconstitutional."

"In *Sillery v R* [(1981) 35 ALR 227,234], Murphy J said that a law authorizing the infliction of cruel and unusual punishment would transgress the limits of power expressed in the words 'peace, order and good government'." (It is worth noting that the phrase "cruel and unusual punishment" are to be found in the *Bill of Rights 1689*.)

Later (p426), "In *The State of Western Australia and Others v Wilsmore* [(1981) 33 ALR 13]

Burt CJ ... decided that: 'Section 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.' ... Burt CJ has been taken to have meant that s106 constitutes a ground for holding restrictive procedures to be binding. ... the Western Australian Supreme Court ... held that s.106 makes effective restrictive procedures 'at least as expressed in the Constitution Acts of the Australian States'."

In summary, the existence of the *Australia Act*s should be considered *de facto* rather than *de jure*, as they have no valid constitutional basis. Therefore, the *Australia Act 1986* and the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) are both *ultra vires* and contravene of Sections 73.2(a) & (g) of the *Constitution Act 1889* (WA), and so the purportedly valid *Magistrates Court Act 2004* and *Criminal Procedure Act 2004* are also invalid, and their jurisdiction invalid (and not over me).

5. Due process requirements

Criminal "due process" is a principle of law that has been developed, and observed by the courts over centuries in England, but has been departed from here in recent years. It is recognised in many watershed cases such as: *Dr Bonham's Case* [1607] 8 Co. Rep.113B, *The Earl of Oxford's Case* [1615] 21 ER 485, *Huckle v Money* [1763], *Entick v Carrington* [1765] EWHC KB J98, *Wilkes v Wood* [1763] and *Day v Savage* [1871] 80 ER 235.

"**Due process**" is defined as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. ... 'The words, "due process", were ... intended to convey the same meaning as ... "by the law of the land", in Magna Charta', *Murray's Lessee v Hoboken Land & Improvement Co.*, 59 US 272, 276 [1856] (Curtis J)" (*Black's, 7th ed.*)

The Imperial Constitutional Acts have long guarded against perversion of due process. *Magna Carta* has always stated the following: "**We will not appoint justices, constables, sheriffs or bailiffs save of such as *know the law of the kingdom and intend to observe it properly*;** All fines which were made by us unjustly and contrary to the law of the land, and all amercements imposed unjustly and contrary to the law of the land, *shall be entirely annulled* ... neither We nor our Heirs shall procure or do any thing whereby the Liberties in this Charter contained shall be infringed or broken. And if any thing be procured by any person contrary to these premises, it shall be had of no force nor effect."

Liberty of the Subject (1354): "the Great Charter ... be kept and maintained in all points ... That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, ... nor put to death, without being brought in answer by due process of the law."

Observance of due process of law (1368): "... it is assented and accorded, for the good governance of the commons. That no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land. (3) and if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error."

The *Bill of Rights 1689*: **"That all grants and promises of fines and forfeitures of particular persons before conviction *are illegal and void*"**

These were all upheld in the ACT case, *Michael Anthony Ryan v Registrar of Motor Vehicles and the Chief Police Officer, Australian Federal Police* [1997] 129 ACTSC 4, where the Judge stated: "The law has traditionally afforded great significance to the proposition that no person should be subjected to penalties without an allegation of prohibited conduct being proved according to law. ..... that result is consistent with the principle that if guilt of an offence is not proved against a person, no penalty should be imposed ... It would be inconsistent with the presumed intent of the legislature to afford due process. ... it follows that the appeal must be upheld".

Please bear in mind once again, that our rights existed before governments, courts and police were created (by the people) and have precedence over all three; this is the foundation of natural justice and Rule of Law! "Upon these two foundations, the law of nature and the law of revelations, depend all human laws; that is to say, no human laws should be suffered to contradict these. ...Human laws are only declaratory of, and in subordination to, divine and natural laws; and

should human law allow or enjoin us to do what divine law has prohibited, we are bound to transgress that human law. ... Laws and decrees that are contrary to Divine law or justice, or oppress the rights of persons, are repugnant and void." Sir William Blackstone (1 Bl. Comm. 42-43)

Lord Edward Coke (former Chief Justice of England) "declared that 'Common Law doth control Acts of Parliament and adjudge them when against common right to be void'". (extract from *The Government of England* by W E Hearn).

Even if the Western Australian Parliament had the power to repeal any constitutional Imperial Acts or modify common law (which it really doesn't, as the Imperial Parliament is a sovereign entity, common law cannot be legislated, and the people's rights cannot be repealed) the Savings Provision of the Interpretation Act would prevent any inherent rights from being removed and from being denied to the people.

6. Various extracts

(i) Magna Carta (1215, 1297)

"[1] **We have also granted to all free men of our kingdom, for ourselves and our heirs *for ever, all the liberties written below, to be had and held by them and their heirs* of us and ours**; [24] No sheriff, constable, coroners, or others of our officials, shall hold pleas of our crown.; [38] In future no official shall put anyone to trial merely upon his own testimony, without reliable witnesses produced for this purpose.; [39] No free man shall be ... in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers and by the law of the land; [40] **To no one will we sell, to no one will we refuse or delay right or justice.;** [45] **We will not appoint justices, constables, sheriffs or bailiffs save of such as *know the law of the kingdom and intend to observe it properly*;** [55] **All fines which were made by us unjustly and contrary to the law of the land, and all amercements imposed unjustly and contrary to the law of the land, *shall be entirely annulled* ...;**
[61] ... neither We nor our Heirs shall procure or do any thing whereby the Liberties in this Charter contained shall be infringed or broken. And if any thing be procured by any person contrary to these premises, it shall be had of no force nor effect; [63] Wherefore we wish and firmly order that ... the men in our kingdom shall have and hold all the aforesaid liberties, rights and concessions well and peacefully, freely and quietly, fully and completely, for themselves and their heirs from us and our heirs, in all matters and in all places for ever, ... An oath, moreover, has been taken, as well on our part ..., that **all these things aforesaid shall be observed in good faith and *without evil any disposition.***"

(ii) Liberty of the Subject (1354)

"That the Great Charter ... be kept and maintained in all points ... That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."

(iii) Observance of due process of law (1368)

"... it is assented and accorded, for the good governance of the commons. That no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land. (3) and if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error."

(iv) Confirmation of liberties

(1400):
This statute provides that people may freely and peaceably come to the courts to pursue the laws or to defend the same without disturbance or impediment of any other person and that full justice and right should be done as well to the poor as to the rich in the courts.

(1405):
"And that the peace within the realm be holden and kept, so that all the King's liege people and subjects may from henceforth safely and peaceably go, come, and abide, according to the laws and usages of the realm ... And that good justice and even right be done to every person; saving to the same our lord the King his regalty and prerogative."

(v) 1 Eliz. c.1 (1558)

"AND to thintent that all usurped and forreine Power and Authoritee Spirituall and Temporall may for ever bee clerely extinguished and never to be used nor obeied within this Realme or any other [of] your Majesty's Dominions or Countries: Maye yt please your Highnes that it may be further enacted ... That no forreine Prynce Person Prelate State or Potentate Spirituall or Temporall shall at any tyme ... use enjoy or exercise any manner of Power Jurisdiction Superioritee Authoritee Preheminence or Privilege ... within this Realm or within any [of] your Majesty's Dominions or Countries that now be or hereafter shalbee ... for ever... Any Statute Ordinance Custome Constitutions or any other Mater or Cause whatsoever to the contrary in any wise notwithstanding. ...

"AND for the better Observation and Maintenance of this Act, maye it please your Highnes that it maye be further enacted ... all and every Temporall Judge Justiciar Mayor and other Laye or Temporall Officer and Minister, and every other pson having your Highnes Fee or Wagys withing this Realm, or any [of] your Dominions, shall make take and receyve a corporall Oath upon the Evangelist, before suche pson or psons as shall please your Highnes your Heirs or Successoures under the Great Seal of Englande to assigne and name taccepte and take the same..., that is to say: I A. B. do utterly testifie and declare in my Conscience, that the Queen Highnes is thonelye supreme Governor of this Realme and of all other her Highnes Dominions and Countreis, aswell in all Spirituall ... or Causes as Temporall, and that no forreine Prynce Person Prelate State or Potentate hathe or oughte to have any Jurisdiction Power Superioritee Preheminence or Authoritee Ecclesiasticall or Spirituall within this Realme, and therefore I doo utterly renounce and forsake all forraine Jurisdictions Powers Superiorities and Authorities, and doo promise that fromhensforthe I shall beare Faithe and true Allegiance to the Quenes Highnes her Heirs and lawfull Successoures, and to my power shall assist and defende all Jurisdictions Preheminences Privileges and Authorities granted or belonging to the Quenes Highnes her Heirs and Successoures ... of this Realme: So helpe me God"

(vi) Petition of Right 1627

"The Petition to His Majestie ... concning divers Rights and Liberties of the Subjects: with the Kings Majesties Royall Aunswere in full Parliament. ...

"All which they most humbly pray of your most excellent Majestie as their rights and liberties according to the lawes and statutes of this realme, and that your Majestie would alsoe vouchsafe to declare that the awards doings and [proceedings] to the [prejudice] of your people in any of the [premises] shall not be drawen hereafter into consequence or example. And that your Majestie would be alsoe graciouslie pleased for the future comfort and safetie of your people to declare your royall will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the lawes and statutes of this realme as they tender the honor of your Majestie and the

prosperitie of this kingdome. ... Ro. Soit droit fait come est desire."

(vii) Habeas Corpus (1640) 16° Car. I. c. 10.

"Whereas by the Great Charter many times confirmed in Parliament It is Enacted That no Freeman shall be taken or imprisoned or disseised of his Freehold or Liberties ... and that the King will not passe upon him or condemn him but by lawfull Judgement of his Peers ... no Man shall be attached by any accusation nor fore judged ... against the forme of the Great Charter and the Law of the Land ... and if any thing be done to the contrary it shall be void in Law and holden for error ... That the said Court commonly called the Star Chamber ... cleerely and absolutely dissolved taken away and ... repealed and absolutely revoked and made void ... The like Jurisdiction being exercised there shall ... be alsoe repealed and absolutely revoked and made void Any Law prescription custome or Usage ... And that from henceforth no Court Council or place of Judicature shall be erected ordained constituted or appointed within this Realme ... which shall have use or exercise the same or the like Jurisdiction as is or hath beene used practised or exercised in the said Court of Star Chamber. ...

"And every person so offending shall likewise forfeit and loose unto the Party grieved by any thing done contrary to ... this Law his trebble damages"

(viii) Coronation Oath Act 1688

"Whereas by the law and ancient usage of this realme the Kings and Queens thereof have taken a solemne oath upon the Evangelists at their respective coronations to maintaine the statutes laws and customs of the said realme and all the people and inhabitants thereof in their spirituall and civill rights and properties ... with relation to ancient laws and constitutions ... one uniform oath may be in all times to come taken by the Kings and Queens of this realme and to them respectively administred at the times of their and of every coronation. ...

"Will you solemnely promise and sweare to governe the people of this kingdome of England and the dominions thereto belonging according to the statutes in Parlyament agreed on and the laws and customs of the same? ...

"Will you to the utmost of your power maintaine the laws of God ...

"4 Oath to be administered to all future Kings and Queens ... "

(ix) Bill of Rights 1689

The *Bill of Rights 1689* (**An Act Declaring the Rights and Liberties of the Subject** and Settling the Succession of the Crown) states: "**That all grants and promises of fines and forfeitures of particular persons before conviction *are illegal and void***; And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties, and that **no declarations, judgments, doings or proceedings to the prejudice of the people of the said premises ought in any wise to be drawn hereafter into consequence or example**; ... to which demand of their rights they are particularly encouraged ... being the only means for obtaining a full redress and remedy therein.... and we will still preserve them from the violation of their rights which they have here asserted, **and from all other attempts upon their religion, rights and liberties;** ... And that the oaths hereafter mentioned be taken by all persons of whom oaths of allegiance and supremacy might be required by law ...

... I, A.B., do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary. ... And I do declare that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority within this realm. So help me God.
Upon which their said Majesties did accept the Crown and Royal dignity of the kingdoms of England, France and Ireland, and the dominions thereunto belonging, ...[to] make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger of being subverted, ... [and] for the ratifying, confirming and establishing the said declaration and ... **that it may be declared and enacted that all and singular the rights and liberties asserted and claimed in the said declaration are the *true, ancient and indubitable rights and liberties* of the people of this kingdom**, and so shall be esteemed, allowed, adjudged, deemed and taken to be; and that **all and every the particulars aforesaid shall be *firmly and strictly holden and observed* as they are expressed in the said declaration, and *all officers and ministers whatsoever* shall serve their Majesties and their successors according to the same *in all times to come.*** ... and the said Crown and government shall from time to time descend to and be enjoyed by such person or persons being Protestants ... and that every King and Queen of this Realm who at any time hereafter shall come to and succeed in the Imperial Crown of this Kingdom shall ... taking the said oath ... make, subscribe and audibly repeat the declaration ... and pleased **shall be declared, enacted and established by authority of this present Parliament, and shall stand, remain and *be the law of this realm for ever.***"

(x) Act of Settlement, 1701

The *Act of Settlement*, 1701 states: "an Act of Parliament was made, entitled 'An Act for declaring the rights and liberties of the subject, and for settling the succession of the crown', wherein it was enacted, established, and declared that **the crown and regal government of the Kingdoms of England, France, and Ireland, and the dominions thereunto belonging ... should be and remain to the heirs of the body of the said late Queen ...: Your Majesty's good subjects, who were restored to the full and free possession and enjoyment of their religion, rights, and liberties**, ...and it being absolutely necessary for the safety, peace, and quiet of this realm, ... by reason of any pretended title to the Crown, and to maintain a certainty in the succession thereof, to which your subjects may safely have recourse for their protection, ... that it may be enacted and declared, ... by the King's most excellent majesty, ... the Crown and regal government of the said Kingdoms of England, France, and Ireland, and of the dominions thereunto belonging, ... and all honours, styles, titles, regalities, prerogatives, powers, jurisdictions and authorities, to the same belonging and appertaining, shall be, remain, and continue to the said ... heirs ... and thereunto the said Lords Spiritual and Temporal, and Commons, shall and will in the name of all the people of this Realm, most humbly and faithfully submit themselves, their heirs and posterities: and do faithfully promise ... to stand to, maintain, and defend ... the heirs ... to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary. ... IV. **And whereas the laws of England are the birth-right of the people thereof, and all the Kings and Queens, who shall ascend the throne of this Realm, *ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same*:** the said Lords Spiritual and Temporal, and Commons, do therefore further humbly pray, **That all the laws and statutes of this Realm for securing the ... *rights and liberties of the people thereof, and all other laws and statutes of the same now in force*,** ... and the same are by His Majesty ... and by the authority of the same, ratified and confirmed accordingly."

(xi) 38 Geo. 3, c.52 (1798)

"Whereas there at present exists, in the counties of cities ... an exclusive right that all causes and offences which arise within their particular limits should be tried by a jury of persons residing

within the limits of the county of each city ... [an] ancient privilege".

(xii) Proclamation (1829)

The Proclamation of Governor James Stirling states: "Whereas his Majesty having been pleased to Command that a Settlement should forthwith be formed within the Territory of "Western Australia" ... I do hereby make the same known to all Persons whom it may concern, ... And whereas the Establishment of His Majesty's Authority in the Territory aforesaid, **the Laws of the United Kingdom ... do therein immediately prevail and become *Security for the Rights, Privileges and Immunities* of all His Majesty's Subjects** found or residing in such Territory."

(xiii) Constitution Act 1889

Section 73. (1) Subject to the succeeding provisions of this section, ...
(2) A Bill that –
(a) expressly or impliedly provides for the abolition of or alteration in the office of Governor; ...
shall not be presented for assent by or in the name of the Queen unless – ...
(g) the Bill has also prior to such presentation been approved by the electors in accordance with this section;
and a Bill assented to consequent upon its presentation in contravention of this subsection *shall be of no effect as an Act.*"

(xiv) Constitution of the Commonwealth of Australia Act 1900 (IMP)

Section 108: "108 *(r)*Every law in force in a colony which has become or becomes a state, ... shall, subject to this constitution, continue in force in the state ... *(r)* As colonies originally founded by British subjects, the common law of England is also the common law of the Australian colonies, and so to a considerable extent the statute law of England, as it existed in 1828 ... by virtue of s.24 of the Australian Courts Act, 1828 ... enacting that :– All laws and statutes in force within the realm of England at the time of the passing of this act ... shall be applied in the administration of justice in the courts"

Section 118: "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State."

(xv) *Annotated Constitution of the Commonwealth of Australia* (Act) (by Quick & Garran)

Covering Clause 1 (page 318): "OUTLINES OF THE BRITISH CONSTITUTION. ... Contained in various charters, and Acts of Parliament assented to by the Crown from the earliest period of English history, including Magna Carta (1215); the Petition of Rights (1627) ...; the Habeas Corpus Act (1640) ... ; the Bill of Rights 1688 ... ; and the Act of Settlement (1700) ... The Bill of Rights is of special interest as declaring that certain recited rights are "the true, ancient and indubitable rights and liberties of the people [to ...] be firmly and strictly holden and observed [...] in all times to come."

Covering Clause 5 (page 345): "5. This Act and all the laws made by Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth"

Covering Clause 5 (page 346): "**Not all enactments purporting to be laws made by the Parliament are binding**; but laws made under, in pursuance of, and within the authority conferred by the Constitution, and those only, are binding on the courts, judges and people. A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection. (*Norton v Shelby County*, 118 US 425) ... What is not so granted is either reserved to the States, ... or remains vested ... in the people of the Commonwealth."

Covering Clause 5 (page 347): "**The legal duty therefore of every judge ... is clear. He is bound to treat as void every legislative act ... which is inconsistent with the Constitution.**"

Covering Clause 5 (page 348): "In Low v Routledge, LR 1 Ch 42 (1865), ... Lord Justice Turner said ... **rights acquired under an Imperial Act in force throughout the Empire could not be affected by a law of a colony inconsistent herewith.** ... The Secretary of State for the Colonies afterwards drew attention to the fact that it was beyond the competence of a colonial Legislature to repeal an Imperial Act applicable to the colonies. (Hearn's 'Government of England' 2nd ed, p597)"

Covering Clause 5 (page 356): "The laws of the State will comprise the following ... (i) Imperial Acts relating to the Constitution and government of the colonies when they became States: ... (iii) The Common law so far as applicable"

Section 76 (page 795): "Now the doctrines laid out by Chief Justice Marchall, and on which the courts have constantly since proceeded, may be summed up ... : 1. **Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted ... *the burden of proof lies on those who assert its existence*".**

(xvi) Evidence Act 1906

Section 3.: "In this Act, unless context or subject matter otherwise indicates or requires, – ... 'legal proceeding' or 'proceeding' includes any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration;"

Section 4.: "All the provisions of this Act, except where the contrary intention appears, shall apply to every legal proceeding."

Section 53.: "All courts and persons acting judicially shall take judicial notice –

(a) of the Commonwealth and the States and of every Australian colony, and the extent of their respective territories; and

(b) of all Acts of the Parliament of the United Kingdom and of the Commonwealth and of very State, and of any Australasian colony, passed before or after the commencement of this Act."

(xvii) Coronation Oath

The Coronation Oath of Queen Elizabeth the Second states: "I solemnly promise and swear to govern the peoples of the United Kingdom of Great Britain, ... Australia, ...and of my Possessions and the other Territories to any of them according to their respective laws and customs. ... I will to the utmost of my power maintain the Laws of God. ... The things which I have here before promised, I will perform and keep. So help me God."

(xviii) Oath of Governor of Western Australia

The Governor of Western Australia has sworn: "I, Kenneth Comninos Michael, swear by Almighty

God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law. So help me God."

(xix) Oath of Police Officer (from *Police Act 1892, section 10*)

No person shall be capable of holding any office, until he shall have subscribed ...: "I, A.B., engage and **promise that I will well and truly serve our Sovereign Lady the Queen**, in the office of [name of office], without favour or affection, malice, or ill will, until I am legally discharged; that I will **see and cause Her Majesty's peace to be kept and preserved, and I will prevent, to the best of my power, *all offences against the same***; and that, while I shall continue to hold the said office, I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully **according to law.**"

7. Court Cases to illustrate Due Process

(i) Huckle v Money [1763] 2 Wils KB 206:

"the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant ... to procure evidence, is worse than the Spanish Inquisition;... it was the most daring attack upon the liberty of the subject. I thought the 29th chapter of Magna Charta, Nullus liber homo ...&c. which is pointed against arbitrary power, was violated."

(ii) Pepper v Hart [1993] AC 593:

"Parliament does not regard the reference to Parliamentary debates in court proceedings as inconsistent with article 9 of the Bill of Rights1689. ...

"As the New Zealand Law Commission also observed, ... this does not involve the impeaching or questioning of the proceedings in Parliament, in breach of article 9 of the Bill of Rights 1689. ...

"Article 9 of the Bill of Rights 1689 provides "that the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." ...

"For the origin of article 9 of the Bill of Rights 1689 see *United States v Johnson* (1966) 383 US 169."

(iii) Michael Anthony Ryan v Registrar of Motor Vehicles and the Chief Police Officer, AFP [1997] 129 ACTSC 4:

"SUPREME COURT OF THE ACT...
"HIGGINS J ...

"Practice and procedure – jurisdiction of the Magistrates Court to entertain an application ... proposition that an allegation of prohibited conduct be proved according to law before a person is subject to an penalty. ...

"The law has traditionally afforded great significance to the proposition that no person

should be subjected to penalties without an allegation of prohibited conduct being proved according to law. Whatever the standard of proof or mode of trial, this principle has been affirmed as fundamental throughout the history of the common law. ...
"The Great Charter (Magna Carta) ... A freeman shall only be amerced [punished by the infliction of fines or like penalties], ... by the oaths of good men from the neighbourhood. ...
"No freeman shall be... desseised of his... liberties or free customs, or be outlawed ... or in any way destroyed; nor will We pass upon him nor condemn him, but by lawful judgment of his peers or by the law of the land. ...

"25 Edw.3, St.5, c4 (1351) ... none be deprived of his franchises ... unless he be duly brought into answer, and forejudged of the same by the course of the law; ...

"2 Hen.4, c1, s5 ... Full justice and right be done, as well to the poor as to the rich, in his [The King's] courts aforesaid. ...

"The power of officials to impose penalties was the subject of complaint in Article 2 of The Petition of Right – 3 Chas.1 c.1 (1627) ...

"Bill of Rights (1688) ... Article 12 declared that all such 'grants and promises of fines and forfeitures of particular persons before conviction are illegal and void...
"Those laws were applied to New South Wales and Van Dieman's Land by the Australian Courts Act, 1828 (UK) ...

"It follows that the provisions of the MTA dealing with traffic infringements should be interpreted consistently with the long standing requirement that no person should be penalised for an offence unless due process of law has been observed. ... that result is consistent with the principle that if guilt of an offence is not proved against a person, no penalty should be imposed ... It would be inconsistent with the presumed intent of the legislature to afford due process. ... it follows that the appeal must be upheld".

(iv) Metwally's case [1984] 158 CLR447, Deane J stated:

"the Australian federation was and is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called the Commonwealth and States derive their authority."

(v) Yick Wo v Hopkins (1886) 118 US 356

"It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the fourteenth amendment ..." [due process]

"When we consider the nature and the theory of our institutions of government ... they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law ... sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. ... But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law ... under the reign of just and equal laws, so that ... the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the **essence of slavery itself."**

8. Other texts of relevance

Halsbury's Statutes of England and Wales, Fourth Edition, Volume 10 [2007] Reissue, heading: "**CONSTITUTIONAL LAW**:

> **"Part 2: The Crown ...**
>
> The present royal style and titles in the United Kingdom, which were announced by proclamation dated 28 May 1953, are "Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen of the Commonwealth, Defender of the Faith

Commentaries on The Laws of England, by Sir William Blackstone (1829):

> **I.** That the king can do no wrong, is a necessary and fundamental principle of the English constitution; meaning only, as has formerly been observed; that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people; and secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever, therefore, it happens that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved. ...
>
> The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right ... 2. By *monstrans de droit*, manifestation or plea of right ...
>
> For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury. ...
>
> And by the bill of rights at the Revolution 1 W. & M. st. 2, c. 2, it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction ... are illegal and void.

United Kingdom *Hansard* (21 July 1993): Speaker of the House of Commons:

> The case of *Pepper v Hart* was referred to in the UK parliament in1993 and caused the Speaker to issue a reminder to the courts and all other officials of their **duty to take judicial notice of the *Bill of Rights***, confirming that it is an operative statute. She said: "This case has exposed our proceedings to possible questioning in a way that was previously thought to be impossible. There has of course been no amendment of the *Bill of Rights* ... I am sure that the House is entitled to expect that the *Bill of Rights* will be required to be fully respected by

all those appearing before the Courts."

United Kingdom *Hansard* (12 June 1997, 8.44pm): Baroness Symons of Vernham Dean:

> "As the noble and learned Lord, Lord Denning, once said:
>
> 'Be you ever so high, the law is above you.'
>
> "The rule of law means that the government and each individual is equal before the law. It protects individuals against arbitrary interference by the government; ... against corruption; and against abuses of power. It means impartial judges and an independent prosecution service. ...
>
> "The rule of law is the ultimate protection of the fundamental rights and freedoms of the individual."

"The Common Law as an Ultimate Constitutional Foundation" [*Jesting Pilate* (1965)] by Sir Owen Dixon stated:

> ... an Australian judge sitting in the original jurisdiction of the High Court proceeds to administer the common law as an entire system. ...
>
> We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may ... to recognise that it is one system which should receive a uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where common law runs.

The Spirit of Magna Carta Continues to Resonate in Modern Law: The Legacy of Magna Carta: A Joint Commitment to the Rule of Law, 119 LQR 227 [2003], by Lord Irvine of Lairg, Lord Chancellor, based on the inaugural "Magna Carta Lecture", delivered in the Parliament Building in Canberra on October 14, 2002:

> Magna Carta was re-issued four times ... and is now thought to have been confirmed by Parliament on almost 50 further occasions. ... By accompanying words of confirmation, also still on the statute book, it is said that the Charter of Liberties "made by common assent of all the realm ... shall be kept in every point without breach", and that the Charter shall be taken to be the common law. ...
>
> Magna Carta ... represents a joint commitment by monarchs, parliamentarians and the courts, to the rule of law[11]. This legacy forms a central part of the shared constitutional heritage of Britain and Australia. ...
>
> [11] It is important to recognise, as Coke himself emphasised, that Magna Carta also provided a measure against which the acts of Parliament were to be judged. Coke stated that a "good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law and not the uncertain and crooked cord of discretion" and castigated parliamentary conduct that failed to observe the promises enshrined in Magna Carta.
>
> ... In a time when most law was orally proclaimed, Magna Carta not only became "the great precedent for putting legislation into writing", but also an awesome record of the terms on which power was to be exercised; intended, as its terms read, to be observed "in perpetuity".

... 1216 brought the child King Henry III to the throne ... the Charter was re-issued three times ... out of recognition that the continued legitimacy of government depended on the observance of certain principles of good administration, respect for the liberties of the subject and adherence to the law. When Henry confirmed the Charter voluntarily and in full majority in1237 its constitutional importance was secured. ... the author H.G. Wells, who had visited Canberra in the 1930's ... sparked public debate ... [56]

[56] In The Rights of Man – Or What are we Fighting for? (1940) Wells wrote:
"... a declaration of the fundamental principles ... done to check the encroachments of the Crown in Magna Carta. The Petition of Right made in 1628 repeated this expedient. It was done again in the Declaration of Right and the Bill of Rights ... Magna Carta and the Bill of Rights are an integral part of American law."

President Roosevelt himself appealed to Magna Carta and the heritage of freedom ... in a broadcast to the United States after the conclusion of the war, Winston Churchill spoke of the "great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence." ...

The process of Federation meant that Magna Carta was given concrete legal effect in Australian jurisdictions ... in ... Western Australia, Magna Carta was received by Imperial law reception statutes ... almost all the provisions of Magna Carta ... still in force. ...

The legacy of Magna Carta has also been inherited by Australia through the common law. Today, it can be seen to resonate most clearly through the fundamental common law doctrine of legality, and the right of access to justice....

Michael Kirby in *Jago [v District Court]*, as President of the New South Wales Court of Appeal, considered that Magna Carta was sufficiently secured in Australian law.

In 2003 the Hon Murray Gleeson AC, Chief Justice of Australia, stated in "The Second Magna Carta Lecture", *Legality, Spirit and Principle* (NSW Parliament House, Sydney)

Lord Irvine of Lairg referred to the shared constitutional heritage of Britain and Australia ... 'the fundamental common law doctrine of legality' ...

Marbury v Madison was known to, and the principle for which it stood was taken for granted by, the framers of the Australian Constitution. The decision was 100 years old when the High Court of Australia was established. ... Sir Owen Dixon said:

"To the framers of the Commonwealth Constitution the thesis of *Marbury v Madison* was obvious. ... simply because there were to be legislatures of limited powers, there must be a question of ultra vires for the courts." Thus, the common law principle of legality, in its application to judicial review of legislative action, reached Australia both directly from the United Kingdom, and indirectly through the precedent of federalism set by former British colonies in North America....

... human rights and freedoms, have been found in the Constitution. They include ... the separation of powers[29]; the conferral of federal judicial power[30] ... the rule of law[31], which has been said to involve a minimum capacity for judicial review of administrative action[32], a right to a fair trial[33], ... "the doctrine of legal equality"[35] ...

The framers of the Australian Constitution regarded themselves as British ... In a 1998

decision of the House of Lords, Lord Steyn referred to the "spirit" and the "principle" of legality in describing long-established rules of common law that protect substantive rights and procedural fairness. ...

... the principle was explained by Lord Hoffman in *Reg v Home Secretary; ex parte Simms* [(1998) AC 539]:

> "Parliament must squarely confront what it is doing and accept ... Fundamental rights cannot be overridden by general or ambiguous words. ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."...

Finally, legality involves courts in the exercise of a capacity to declare and enforce limits on government, and legislative, authority. ...

[[29]*Polyukhovich v The Commonwealth* (1991) 172 CLR 501; [30] *Kable v DPP NSW* (1996) ALJR 813, [31] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; [32] *Church of Scientology v Woodward* (1982) 154 CLR 25; [33] *Kingswell v The Queen* (1985) 159 CLR 264; [35] *Leeth v The Commonwealth* (1992) 174 CLR 455 per Deane and Toohey JJ; and *Potter v Minihan* (1908)]

The Tom Olsen Lecture, delivered by Justice Popplewell (21 October 1997):

There is no greater threat to spiritual or physical freedom ... than the Arrogance of Power. ... During the course of the civil proceedings [in 1941] for wrongful arrest ... all the lower courts held that the phrase 'If the Secretary of State has reasonable cause' means 'if the Secretary of State thinks he has reasonable cause'.

Lord Aitken went on: "In this country amid the clash of arms, the laws are not silent.... It has always been one of the pillars of freedom, one of the principles of liberty ... that the judges are no respectors of persons and stand between the subject and any attempted encroachments on his liberty by the executive ... King's Bench in the time of Charles I [Star Chamber]".

"I know of only one authority", said Lord Aitken, "which might justify the suggested method of construction.

> "When I use a word", Humpty Dumpty said, in rather scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is", said Alice, "whether you can make words mean so many different things". "The question is", said Humpty Dumpty, "which is to be the master, that's all".

"After all this long discussion", said Lord Aitken, "the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I have the opinion that they cannot and the case should be decided accordingly. ...

"In 1977 ... Lord Denning started his judgment as follows:

> 'On the Saturday before last an ordinary citizen came to this court ... asked us to make an order ... We made the order ... in the very words of the statute of the realm. ...Yet the Attorney General came before us ... and rebuked us. ... our constitution has I believe provided a remedy. ... To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago "Be you ever so high the law is above you".' ...

"John Stuart Mill in his essay *On Liberty* said: 'With himself over his own body and mind the individual is sovereign'."