JUDICIAL INTERVENTION IN PRISONS

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INTRODUCTION

There is a crisis in Australian prisons today.[1] Part of the crisis is related to the conditions in which prisoners are kept and the deprivation of rights beyond the loss of liberty. A thoroughgoing review of this aspect of the crisis would raise many interesting and complex issues: the politicisation of prisons,[2] sentencing policy, internal grievance procedures, Royal Commission reports and legislative/executive response to them and other non-judicial modes of prison-related law reform proposals (such as recommendations as to minimum standard conditions for prisons in Australia[3]) to name but a few.

However it is not within the province of this article to discuss any of these except insofar as they arise peripherally in relation to its central concern which is the narrow issue of judicial intervention in response to prisoner-initiated litigation regarding prisoners' rights. Issues such as past judicial response, present judicial posture and predictions of prospective judicial attitudes in this area will be examined as well as related themes concerning the factors which may enhance or retard judicial intervention.

Before approaching the question of judicial intervention, it may be helpful to clarify some sub-issues. Judicial intervention is understood in a positive sense from the perspective of the prisoner litigant. In other words, what will be examined is the extent to which judges actively intervene either directly by proclaiming in favour of a "right" sought by a prisoner litigant, this being the central issue involved, or, indirectly, by pronouncing upon the desirability of such a "right" in the course of proceedings in which such right is not directly in issue. It will be apparent that the discussion will be limited to a consideration of the interventions of this kind in the course of court proceedings. While in one sense it has been perhaps the most dramatic judicial intervention (loosely speaking) into

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1 "Riots", "sit-ins", "strikes" and the like by prisoners are an increasingly common occurrence. Prison officers regularly stage mass strikes. Official inquiries proliferate.

2 This would need to be done from the perspective of prisoners, prison action groups, prison officer unions and official governmental responses.

3 See C. R. Bevan (ed.), *Minimum Standard Guidelines for Australian Prisons* (Canberra, Aust. Inst. of Criminology, 1978).

prison conditions in New South Wales, it is not proposed, however, to discuss the Report of the Royal Commission into Prisons in N.S.W.[4] (hereafter the "Nagle Report"), or its aftermath, in any detail.[5] A number of judicial references to the Report will, however, be considered below.

What is meant by prisoners' "rights"? It should be noted that the notion of a right is an inexact one and that, in many respects, it is more accurate to talk in terms of challenges by prisoners to illegal restraints. It is here intended to focus on two species of rights. First, the so-called civil rights which supposedly obtain in the community at large and secondly, those rights which specifically relate to the prison context. In *both* cases it is intended to limit the discussion to *legally enforceable* rights. This qualification, of course, in one sense begs the central issue inasmuch as legal enforceability will depend in peripheral cases on judicial intervention of the kind described earlier.

Further, it should be observed that there are, indeed, few legally enforceable rights of the first kind. The ordinary citizen cannot, by and large, directly assert a legally enforceable right to freedom of speech, assembly, association and so forth, despite the commonplace rhetoric associated with such matters. It would be more accurate to describe the situation as a complex of residual rights. That is, to the extent that supervening restrictions are not imposed by law[6] a citizen may speak, assemble and associate freely. There are, of course, remedies which can be pursued in the courts for infringement or attempted infringement of these rights. Thus, for example, an *improper* exercise of the power conferred on an authority to restrict a person's rights to free speech or movement may be justiciable. Thus, in the present context, there must be an examination of the restrictions imposed on prisoners and the extent to which such restrictions exceed those generally in operation.

The second kind of "rights" mentioned, those specifically related to the prison context (such as rights associated with the review of internal disciplinary measures), are in a different category. Here, what could be called due process rights (natural justice concepts such as notification, fair and impartial hearing, self or third-party representation before the adjudicating agency, calling of witnesses etc.) which are generally available are assimilated (or not, as the case may be) to particular procedures which arise specifically *because of* the prison context.

[4] Delivered by Mr Justice Nagle of the New South Wales Supreme Court in March, 1978.

[5] This is because (a) it is beyond the scope of this article, (b) though there is an increasing tendency to appoint judges to Royal Commissions of Inquiry (itself a very interesting phenomenon) it is not inherent in the functions of the Royal Commissioner that he or she be a judicial appointee. So, with some reluctance, the politics of Royal Commissions in general and the Nagle Commission in particular, are set aside.

[6] And the restrictions are numerous; e.g. defamation laws, censorship laws, immigration laws etc.

It is intended to examine the process of judicial intervention in relation to both categories. Do the courts approach these rights in the same way and, if not, is it possible to isolate reasons for different responses?

BACKGROUND

Generally speaking, until the last decade or so, in Australia at least, prisoners have largely been invisible, silent at the public level. Certainly there has been no organised political pressure brought to bear on prison administrations and governments either by prisoners or their external supporters. There have always been bandaid reform groups in the Howard tradition.[7] The prison, as the ultimate sanction in the criminal justice system was hermetically sealed, a human scrap heap, where rights, however defined, were largely irrelevant. The prevailing themes related rather to duties (and their enforcement) and privileges (and their withdrawal). That such a situation spawned untrammelled power and concomitant fear, hatred and violence should come as no surprise. It was a climate in which the authority of prison administrations in the exercise of day-to-day functions was largely unquestioned. The assumption was that difficult problems which arose would be handled with integrity. Flexibility and autonomy were key features of the style in which prison administrations conducted themselves. Prison authorities alone were responsible for the disposition of prisoners in the post-sentence phase. Judges did not know about prisons in general (let alone their detailed day-to-day administration)[8] and regarded any intrusion as an incursion on the executive function. Separation of powers reigned supreme. In these circumstances, the attitude of Dixon J. (as he then was) in *Flynn* v. *The King*[9] is entirely understandable. The applicant in that case claimed entitlement to release from detention on the basis that he had earned certain remissions pursuant to regulations made under the *Prisons Act* 1903-1918 (W.A.). The High Court (Latham C.J., Rich, McTiernan and Dixon JJ.) refused the application on the basis that the relevant regulations did not confer any enforceable rights:

> "It is pointed out in the case of *Horwitz* v. *Connor*[10] that if prisoners could resort to legal remedies to enforce gaol regulations responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes

[7] That is, penal reform groups espousing the aims of the English penal reformer, John Howard. Primarily, these groups are concerned with marginal improvements to conditions of imprisonment rather than any structural changes in the prison system.

[8] It is still the case that relatively few judges exercise their statutory right to visit prisons under s. 11 *Prisons Act* 1952 (N.S.W.). Whether the right conferred is for inspection, self-education or other purposes is not clear. See G. Souter, "The Judges Who Don't Visit Jail", *Sydney Morning Herald*, 25th November, 1976.

[9] (1949) 79 C.L.R. 1.

[10] (1908) 6 C.L.R. 38. This High Court case is occasionally cited as an early decision reflecting a non-interventionist stance. True it is that the Chief Justice Sir Samuel

> dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to the courts by prisoners for legal remedies addressed either to the Crown or to the gaolers in whose custody they remain. Such a construction of the regulation-making power was plainly never intended by the legislature and should be avoided."[11]

This is a classical formulation of the non-interventionist stance.

The remarks of Dixon J. are, however, but a pale reflection of those to be found in the decision of the Full Court of the Supreme Court of New South Wales in *Gibson* v. *Young*.[12] The Court upheld a demurrer by the nominal defendant to a claim by the plaintiff prisoner for injuries sustained due to the negligence of prison officials. The Court was unanimously of the view that such an action should not be maintainable at common law on the grounds of public policy. The detailed reasons given for this conclusion included fear of many frivolous actions, fear of juries unduly extending sympathy to injured prisoner plaintiffs and the undermining of the authority of (and therefore the proper performance of duties by) prison officers. The potential risk of injustice to prisoners by the denial of legal remedies was lightly dismissed, first, because prisons are managed on humane principles and accordingly there would be little ground for remedies for negligence. Further, even if, by some oversight, a prisoner did sustain injury adequate compensation would doubtless be arranged on an ex gratia basis by the government. Although the decision is largely academic in New South Wales because of the terms of s. 46 *Prisons Act* 1952 (N.S.W.)[13] it may still be important in other States. It was considered by the Full Court of the Victorian Supreme Court in *Quinn* v. *Hill*[14] in which case a female prisoner in Pentridge Gaol sued for damages for personal injuries sustained due to the alleged negligence of a wardress. On appeal, the Full Court overturned the County Court's verdict in favour of the plaintiff on the basis that she had not succeeded in establishing that the wardress was negligent. Herring C.J. and Gavan Duffy J. found it unnecessary to express any opinion on *Gibson* v. *Young* because they took the view that there was no breach of duty owed by the defendant to the plaintiff. However, Smith J. analysed the decision at length, criticised its reasoning[15] and decided it should not be followed. The simple fact remains

Griffith, in the reported interchange with counsel, implies that the administration of gaols should be left with gaol officials. However, in view of the very brief and unsatisfactory report of the case, it is suggested that too much reliance should not be placed on it to support an non-interventionist posture.

[11] (1949) 79 C.L.R. 1, 8.
[12] (1899) 21 L.R. N.S.W. 7.
[13] The terms of s. 46 are set out below in fn. 85. See also the discussion below as to the ambit of this provision at infra p. 320.
[14] [1957] V.R. 439.
[15] Some of the reasons advanced by Mr Justice Smith for rejecting the conclusion in *Gibson* v. *Young* are almost as remarkable as those relied on by the Full Court in *Gibson's* case. In particular, note paragraph 1 on page 449.

that there are a number of authorities which may debar a prisoner plaintiff from recovering for injuries sustained at the hands of negligent prison officials.

CHANGING JUDICIAL ATTITUDES?

Recently, however, there has been discernible pressure for judicial intervention through the efforts of prison litigants. The extent to which judges will acquiesce is, accordingly, worthy of investigation. But first let us consider the background to the issue of judicial intervention in prison conditions.[16] Why is it a relevant question to ask today?

I would like to examine that question by briefly referring to what I term the "rule of law" myths.[17] A cornerstone of every criminal justice system in western advanced capitalist industrialised nations is the notion of due process. Central to the idea of due process is the myth of impartiality of the law. That is, the law is politically neutral, the courts are neutral umpires presiding over disputes between individuals (or individuals and the State) and the police force and prisons carry out ancillary mechanical functions which are mere corollaries of the neutral mediation of these other agencies. People are equal *before* the law, have equal access *to* the law and are treated equally *by* the law. These are some of the powerful myths in question. To state them baldly, as I have done, exposes them as unmitigated nonsense. But the matter cannot rest here for they are powerful symbols to which the criminal justice system aspires. Indeed, I would argue, it is ideologically imperative for the perpetuation of the criminal justice system as we know it that the myths be sustained at least in a modified, if not pristine, state.

One fundamental respect in which this is achieved is by severing the nexus between so-called civil rights (due process rights) and political, social and economic rights. Thus the much vaunted institutions of jury trials, rights of representation and the like relate to *procedural* rights and assume, indeed legitimise, the political content of the substantive matter in issue. For example, the definition of crime is not called into question.[18] The significance of these notions of due process to the prison context is that, by and large, to date, they have been regarded as irrelevant.

[16] The materials examined are largely drawn from N.S.W. It is not intended in this article to survey all Australian cases in the area.

[17] See generally G. Zdenkowski, "Rule of Law Myths in Prison" in *Proceedings of the Australian Crime Prevention Council Conference* August, 1977. The following comments largely draw on that paper.

[18] Moreover, the machinery and symbols of the courtroom are involved in the further assumption that the criminal process has been initiated in a neutral even-handed manner. It is not, however, within the scope of this article to discuss the substantive and process bias of the criminal justice system against the working class. See generally (1979) 3(2) *Alternative Criminology J.* which reproduces in full Part I of the Prisoners' Action Group Submission to the Royal Commission into Prisons in N.S.W.

This is now changing. There is, relatively speaking, a higher profile on prisons, a consciousness generated in N.S.W. largely as a result of the recent Royal Commission into Prisons. In Victoria, maltreatment of prisoners at Pentridge Gaol has been amply documented in the Jenkinson Report.[19] But the Jenkinson Enquiry and the Nagle Royal Commission did not just happen upon the scene at this particular historical conjuncture. They were specific responses to mounting pressure and turmoil from both within and without prison walls. The anger, frustration and despair of prisoners which Mr Justice Nagle found to be fully justified, eventually erupted in the substantial destruction by fire of Bathurst Gaol, a maximum security institution. The institutionalised violence of prison officers, ultimately admitted by them during the Royal Commission proceedings,[20] was a longstanding and major grievance. The prison action groups who had for some time attempted to draw public attention to this and other destructive and inhumane aspects of the prison system were vindicated in the findings of the Royal Commission. Accordingly, an ostrich-like posture is somewhat more difficult to adopt in the face of the carefully sifted evidence.

Another key factor which may lead to a re-assessment of the role of the judiciary in litigation concerning prison conditions is the demise of the rehabilitation ethic. The complete interment of this philosophy involves the abandonment of therapeutic and kindred programmes with not unattractive cost savings.[21] This removal of the window-dressing of the rehabilitation philosophy has led to a need for correctional administrators to find a more pleasant rationale than a nakedly punitive one.

The "justice model"[22] appears to be gaining increasing acceptance. It exhibits the due process features which I have been discussing. The fact that prisons do not rehabilitate or deter is substantially conceded. The emphasis is on mere deprivation of liberty. One permutation of this model seems to have found favour with Nagle J.: "It is wrong to say that one purpose for which offenders are sent to prison is to rehabilitate them or to cure them. They are sent to prison by Courts on behalf of society for the simple purpose of punishment. . . . The better view in criminology is that the deterrent effects of punishment are limited. . . ." His Honour felt that ". . . while in prison, the inmate should lose only his liberty and such

[19] K. Jenkinson, Q.C., *Report of the Board of Inquiry into Allegations of Brutality and Ill Treatment at H.M. Prison, Pentridge* (Melb., Government Printer, 1973-74).

[20] See below p. 310.

[21] The cost argument was certainly a weighty consideration in the United States where the rehabilitation ethic reached its high water mark.

[22] It would be more accurate to say "justice models". There are a number of divergent schools of thought within different political traditions which are united in their concern for certainty, openness, fairness, removal of discretionary power, an end to coercive or paternalistic treatment/therapy/rehabilitation etc. See D. H. Clarke, *Marxism, Justice and the Justice Model* (1978) 2 *Contemporary Crises* 27.

rights as expressly or by necessary implication result from that loss of liberty".[23] Thus, it is argued, imprisonment should involve *only* mere deprivation of freedom and of such rights as inexorably flow from this.

The due process advocates have leapt the prison wall in response to a crisis in the prison system. The rhetoric of prisoners' rights (which originated in the prisoners' movements) is now adopted and adapted. However, the administrators and criminologists espousing the formulae do not generally acknowledge the rupture which is involved in divorcing the demands from their original context. The prisoners' movement is not accorded any political status. Thus, there is no recognition of a right in prisoners to organise, unionise and negotiate directly. Rather the content of some of their demands is extracted, refashioned, diluted and offered to them *by* the administration. The result appears to be the outcome of enlightened reassessment by the authorities rather than hard-won political gains by prisoners.

Broadly speaking, assimilating the justice model to the prison context involves framing generalised standards of fairness which, it is proposed, should be integrated into the administration of prisons. Regulatory mechanisms are the means by which such goals are likely to be achieved. Internal disciplinary tribunals, parole boards and the like will come to function in a manner more akin to the normal courts of law and the "rule of law" will begin to penetrate the former legal wasteland.

But is is important to recognise the reason for this trend. The justice model is not, ultimately, about prisoners' rights, nor does it propose any fundamental structural changes in the prison system. Rather, its advocates recognise that there is an increased consciousness by both prisoners and the community of the exercise of naked untrammelled power in prisons. The response is, then, to assimilate the prison system, at least in piecemeal fashion, to the legal system as a whole and to introduce procedural rules designed to curb abuses of power and to ensure equality of treatment and fairness. The attraction of such a model to desperate correctional administrators and conscience-stricken criminologists should, by now, be apparent.

Finally, there has been an increase in resort to the courts by prisoners. Though the developments have not been nearly as dramatic as the flood of litigation from "jailhouse lawyers" in the United States, there is a growing body of prisoners (for example, The Prisoners' Legal Co-operative in New South Wales prisons) which is becoming relatively sophisticated in their knowledge of and manipulation of the legal system for the purpose of securing such limited rights as they have. Let it be clear however that prisoner litigants contemplating resort to the courts in relation to prison conditions must overcome a few threshold obstacles. The N.S.W. Department of Corrective Services certainly has in the past resorted to censorship

[23] Op. cit. 41.

of mail, transfers, false disciplinary charges and the prohibition of embryonic activist groups. Thus, on occasions, mail addressed to the Prisoners' Legal Co-operative has been returned on the basis that no such organisation exists! This attitude is illustrated by the case of a prisoner (Ian Fraser) who is characterised in the Departmental submission to the Royal Commission as a trouble-maker cum-revolutionary because of his various complaints and legal actions. It was only as a result of the determination of Mr Fraser, despite a departmental campaign against him, that he was able to show finally[24] that prisoners do have a right of appeal from visiting justices, a right which had been consistently refused to prisoners. Also prison officers have played an increasingly significant role in dictating policy (by threat of strike action) as to the institution at which activist prisoners will be detained.[25]

THE UNITED STATES SITUATION

It is instructive to pause briefly to examine parallel developments in the United States. Until the mid-1960s the prevailing attitude of United States courts to legal challenges by prisoners against conditions in prisons could be characterised as a "hands-off" policy. Basically, this meant that courts ceded to the executive arm of government the internal administration of prisons.[26] The hands-off approach is based on the assumption that judicial review of actions carried out by prison administrations would undermine prison discipline and that there is a need for a wide-ranging discretionary power in prison officials for the effective performance of their functions.

More recently, U.S. Federal courts have abandoned this self-restraint and have intervened on the basis that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights".[27]

However, even this apparent shift to judicial intervention requires careful scrutiny. Various commentators in the post-1975 era have critically drawn attention to the self-imposed limits on the degree of intervention by the U.S. Supreme Court. Thus:

> "While reiterating the principle that the Constitution protects prisoners, the Court has given the principle little substance. Its resolution of

[24] *R.* v. *Fraser* [1977] 2 N.S.W.L.R. 867.

[25] Thus, for example, well-known prison activist Bernie Matthews was rejected recently by prison officers at the minimum security Silverwater Work Release Centre. The Department, intimidated by threatened industrial action, withdrew him from this institution, thereby jeopardising his opportunity of establishing a good record there.

[26] See M. S. Feldberg, "Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform" (1977) 12 *Harvard C.R. C.L. L.R.* 367.

[27] *Procunier* v. *Martinez* 416 U.S. 396, 405-406 (1974). See also *Wolff* v. *McDonnell* 418 U.S. 539, 555-556 (1974): "But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain between the constitution and the prisons of this country."

constitutional issues raised by prisoners usually entails extreme deference to the decisions of prison officials accused of violating the constitutional rights of inmates. Through such deference, the Court has achieved a result that it could much more easily and candidly have achieved had it simply declared that prisoners are not entitled to constitutional protection. The Court has continued to profess, however, that the Constitution does protect prisoners, and under cover of that assertion, has permitted a hardy weed, the 'hands-off' approach, to creep back into the prison yard from which it ostensibly had been banished."[28]

If this accurately summarises the trends in that jurisdiction it is a disturbing development indeed. For, to follow the logic implicit in the above commentary, it is more difficult than ever to assert that a court is denying a prisoner rights if the court assumes jurisdiction to consider the issue but almost invariably rejects the demands made by reference to the exigencies of the situation and the difficult circumstances in which administrators find themselves. Such lip-service is a pitfall to be avoided at all costs and a major lesson which can be drawn from the U.S. experience is to acknowledge the possibility of such a hollow compromise developing locally. This has particular relevance when one has regard to the discretionary nature of the remedies which are likely to be called in aid by prisoners in Australian courts—injunctions, declarations, mandamus.

The evaluation of the approach of the U.S. courts in this area is of particular interest to observers of the Australian prison scene. It is suggested that Australian courts will shortly be obliged to resolve their attitude on this question because of the increasing momentum of the Australian prisoners' movement and the resort by prisoners (sometimes with external support) to the courts to seek redress for their grievances.[29]

Let us turn then, against this background, to an examination of the attitudes of the Courts. Mr Justice Staples has said:

"Our aim should be to decarcerate the prisoners: in this work the lawyers will have a critical role to play. I doubt it will be decisive . . .; the judges of this State . . . are reluctant in the extreme to challenge the administrative arrangements of the prison officials who function under the Prisons Act. The reluctance of the courts to interfere in the prisons reflects broader social attitudes about incarceration.

To the extent then that the courts retreat from the prison, they create a legal vacuum. . . . Ultimately . . . gaols function on the premise that the confinees are utterly outlaws, enjoying no rights under the law, and certainly no protection from the courts."[30]

28 E. Calhoun, "The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal" (1977) 4 *Hastings Constitutional L.Q.* 219, 220.

29 In N.S.W. there is both internal (e.g. Prisoners' Legal Cooperative) and external (Prisoners' Action Group, Redfern Legal Centre, Council for Civil Liberties) support for prisoner litigation. This is true both in relation to cases of general significance (for example, the *Fraser* case concerning appeals from visiting justices, supra fn. 24) and to cases of individual importance (for example, defence of a disciplinary charge).

30 (1975) 1 *Alternative Criminology J.* 11. (This article was based on a paper delivered

To what extent are these words uttered in May, 1975, still true today? Historically, a "hands-off" policy has been pursued. The classic formulation by Dixon J. in *Flynn's* case has already been referred to. The enthusiasm with which lawyers might seek to challenge such an approach in the litigation of prisoners' rights may well be dampened by a number of features of the local scene which do not parallel the North American experience. Judicial intervention in the U.S. has been largely based on constitutional provisions[31] either in the state or federal sphere. No Australian jurisdiction has general constitutional[32] (or indeed ordinary statutory) protective provisions of this kind through which legislative or executive action curtailing a prisoner's rights (beyond the deprivation of freedom) could be challenged.

Further, the statutes applicable to the administration of prisons in the Australian jurisdictions and the rules and regulations made pursuant to such statutes provide little comfort for the prisoner seeking to ensure compliance by the prison administration with basic standards pertaining to what might be described as "dignity in confinement".[33]

All Australian States do, however, have Ombudsmen who are empowered to investigate administrative actions by Departments of Corrective Services. Although they do not have powers to enforce their decisions, Ombudsmen can make recommendations and do report to Parliament. The scope of the jurisdiction enjoyed by Ombudsmen has been tested on a number of occasions, principally in Victoria.[34]

The lack of legal footholds upon which prisoners might rely is, of course, a fundamental problem. It is arguable that the very lack of

to a conference organised by the Prisoners' Action Group, held at the University of New South Wales in May, 1975.)

[31] For example, the cruel and unusual punishment, due process and equal protection provisions.

[32] A possible exception would be s. 116 of the Commonwealth Constitution relating to a prohibition on the establishment of, imposition of any observance of or restricting the free exercise of, a religion. But the effect of this section is fairly limited. It only applies to the Commonwealth and would accordingly only operate to invalidate laws of the Commonwealth passed under a specific head of power if such law infringed the terms of s. 116. Moreover, the section has been restrictively interpreted in the *Jehovah's Witnesses* case (1943) 67 C.L.R. 116.

[33] This may seem a somewhat paradoxical expression. It is not intended to suggest by this phrase that any confinement in any Australian prison could be regarded as "dignified". It is rather intended to be descriptive of the condition in which the prisoner ought to find him/herself following the mere deprivation of liberty argument.

[34] It appears that the Victorian Ombudsman (a) cannot investigate a *mere* assault by a prison officer on a prisoner but can investigate such an assault if the circumstances concerned the broader issue of the proper conduct of complaint hearings *Booth* v. *Dillon* (No. 1) [1976] V.R. 291; (b) cannot investigate policy matters such as the funding of new sleeping accommodation for prisoners *Booth* v. *Dillon* (No. 2) [1976] V.R. 434; (c) can investigate disciplinary proceedings by a prison governor (as distinct from a visiting justice) *Booth* v. *Dillon* (No. 3) [1977] V.R. 143. The scope of the term "administrative action" has received further consideration in *Glenister* v. *Dillon* [1976] V.R. 550 and *Glenister* v. *Dillon* (No. 2) [1977] V.R. 151.

protection imposes a special responsibility on the judiciary to protect prisoners from the arbitrary exercise of power. Orthodox legal analysis would, however, be likely to deflect judicial activism in this area.

It is my contention that the prevailing judicial policy is not merely a "hands-off" policy but rather a mixture of conflicting approaches. Occasionally it is possible to discern a *retreat* from intervention. A growing number of judicial pronouncements are erecting obstacles to prospective litigation. Occasionally such remarks have been gratuitous inasmuch as the relevant statements could be regarded as *obiter dicta* and were not directed to the resolution of the issue before the court.

THE NEGATIVE TREND

There are a number of recent examples of a non-interventionist stance by the courts. The High Court of Australia in the case of *Hass* v. *The Queen*[35] took a particularly narrow construction of s. 78 of the *Judiciary Act* 1903 (Cth.) provisions relating to the right of a party to appear in person before the High Court (being a "Court exercising federal jurisdiction"). The section provides:

> "In every Court exercising federal jurisdiction the parties *may appear personally* or by such barristers or solicitors as by the laws and rules regulating the practice of these Courts respectively are permitted to appear therein." (Emphasis added.)

It was held per Barwick C.J., Stephen, Mason and Jacobs JJ. that an applicant for leave or special leave to appeal is not a party to proceedings. McTiernan J. reached the same result on the basis that a construction of s. 78 does not give a party an absolute right to appear personally.

The whole court took the view that the High Court was, in cases other than ordinary proceedings *inter partes*, master of its own practice and procedure. Accordingly, an applicant for special leave to appeal in a criminal case is not entitled to make such application for special leave in person.[36]

The decision totally ignores the particularly vulnerable condition of a person in custody. The difficulties of a person in custody represented by counsel are well recognised. How much more difficult is the situation for an unrepresented accused? It is submitted that the real reason behind the court's off-hand treatment of this very important case (the ultimate decision was substantially based on the interpretation of the word "party")

[35] (1976) 50 A.L.J.R. 400.

[36] It is permissible to present argument to the Court by submissions in writing. Hass did this and was refused special leave (see the unreported decision *Hass* v. *The Queen* noted in (1976) 50 A.L.J.R. 404). At the Adelaide Legal Convention (1979) Barwick C.J. reported that if the Court thinks the matter requires oral argument "the prisoner . . . would be likely to be legally aided for that oral argument . . . an advance on what has now been decided to be the position". See (1979) No. 16 *Reform* 85.

lay in the spectre of multiple applications by prisoners seeking to represent themselves. This, in itself, in my view, is not an adequate reason for so responding. Realistically of course the Court has ample powers to deal with frivolous or vexatious appeals if they genuinely fall in this category. If they do not there is no reason why they should not be dealt with on their merits.

In *Stratton* v. *Parn*[37] the applicant prisoner sought to appeal from decisions in the courts below which held that the procedural provisions of the *Justices Act* 1902 (W.A.) (as to appeals) did not govern the discharge by Magistrates or Justices of their function in hearing and determining a complaint against a prisoner charged with an aggravated prison offence under the *Prisons Act* 1903-1971 (W.A.). The Full High Court (Barwick C.J., Stephen, Jacobs, Murphy and Aickin JJ.) allowed the appeal holding that the process was of a judicial nature given the terms of the legislation. However, an insight into the attitude of at least the Chief Justice to judicial intervention into internal disciplinary proceedings against prisoners is given in the following remarks made in the course of delivering the leading judgment in the case:

> "Apart from argument founded on specific expressions used in the text of the *Prisons Act*, the principal argument for the respondents was that the *Prisons Act* constituted a code for the control and discipline of prisons and that the maintenance of discipline and peaceful order in prisons required prompt response to prison offences, a promptitude which was unlikely to be attained through the appellate procedures of the judicial system. *With that view I have much sympathy and would expect it to commend itself to the legislature, even in these times.* But, though such a consideration might be powerful in the resolution of statutory ambiguity, it can scarcely prevail in the face of unambiguous language of a statute."[38] (Emphasis added.)

It is interesting to contrast this reluctant concession of the right to review and the unsolicited advice to the legislature with the total silence of the Chief Justice as to legislative intervention in the *Dugan* case.[39] In

[37] *Stratton* v. *Parn and Others* (1978) 52 A.L.J.R. 330.

[38] Ibid. 332.

[39] *Dugan* v. *Mirror Newspapers Limited* (1979) 53 A.L.J.R. 166. The extent to which the disability highlighted by *Dugan's* case will be a problem appears to depend upon the attitude of the person against whom the "disabled" party takes action. Thus, in *Smith* v. *The Commissioner for Corrective Services* [1978] 1 N.S.W.L.R. 317 the Commissioner declined to take the point. Hutley J.A. was of the view that

> "If it went to jurisdiction the court would be bound to take it itself. However, the judgment of Yeldham J. which was unreservedly approved by the Court of Appeal shows that the issue was raised by a plea in bar or in abatement (following Bullen and Leake: Precedents of Pleadings, 3rd ed. 565), and so would not be one which the court is bound to raise itself."

Nothing in the High Court judgment in *Dugan* appears to the contrary. Observers have noted a certain irony in the fact that Bill Meares (to whom Darcy Dugan was an accomplice in 1950) recently succeeded in a personal injuries claim only because the defendant Government Insurance Office did not take the point. The trial judge in the *Meares* case, Mr Justice Yeldham (who dealt with the *Dugan* case at first instance) was hardly unaware of the existence of the potential defence.

this case, the Full High Court upheld (by a majority of six to one—Barwick C.J., Gibbs, Stephen, Mason, Jacobs and Aickin JJ., Murphy J. dissenting) the defendant newspaper's argument that the appellant was deprived of status to sue (for damages for defamation) under a common law principle that prevented a prisoner serving a life sentence for a capital felony suing for a wrong done to him during the currency of that sentence. Barwick C.J. said:

> "If the Court decides that the common law of England, properly understood, did deny a prisoner in the situation of the applicant the right to sue during the currency of the sentence and that that law was introduced into and became part of the law of the colony, there is no authority in the Court to change that law as inappropriate in the opinion of the Court to more recent times during which capital felony remained. If that were a proper conclusion (a matter on which I express no opinion), it is clearly a question for the legislature whether a change should be made in the law: such a change cannot properly be effected by the Court."[40]

To take it a step further, consider the attitude of Barwick C.J. in *Viro's* case[41] in relation to the question whether the High Court is bound by decisions of the Privy Council. The Chief Justice indicated agreement with the views of Gibbs J. in the same case. Gibbs J. said this:

> "Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment. It would be an impediment to the proper performance of that duty, and inconsistent with the court's new function, if we were bound to defer, without question, to every judgment of the Privy Council, no matter where the litigation in which that judgment was pronounced had originated, and even if we considered that the decision was inappropriate to Australian conditions or out of harmony with the law as it had been developed, and was being satisfactorily applied, in Australia."[42]

In *Dugan* the Court (apart from Murphy J.) is tentative, acquiescent to tenuously based feudal relics and restrictive of prisoners' rights. Agonising dilemmas over conflicting Privy Council decisions simply did not arise. In *Viro* the Court is vigorous in asserting its autonomy and flexibility, *notwithstanding* a long-standing tradition of subservience to the Privy Council. Not only is there a hands-off approach in relation to the potential creation or recognition of rights but, at times, an attempt to undermine the fledgling rights which prisoners do have.

[40] Ibid. 167.
[41] *Viro* v. *R.* (1978) 18 A.L.R. 257.
[42] Ibid. 282.

THE POSITIVE TRENDS

(a) Direct Intervention

It would be unfair to assert that the Australian traffic is all one way. Glimmers of light in the gloom can be perceived in a couple of recent judicial statements. In the case of *Collins* v. *Macrae & Ors.*[43] Mr Justice Sheppard granted the declarations sought and ordered that several sentences of 28 days solitary confinement imposed on the plaintiff by the visiting magistrate at Maitland Gaol, Mr Gordon Macrae, be set aside. Forfeited remission of 134 days was also ordered to be restored. The disciplinary proceedings arose as a result of an attempt by the plaintiff prisoner to write a letter to the Legal Aid Manager of the Law Society of New South Wales. Four charges were laid against him three days later—two of making a false statement, one of being a nuisance and one of disobeying an order. During the hearing Mr Justice Sheppard remarked:

> "To charge him with committing a nuisance because he wrote a letter to the Manager of the Legal Aid Department of the Law Society I think is really something that leaves me gasping."[44]

The initiated would not have been quite so breathless. The bringing of spurious charges such as "false complaint" are well documented in the Nagle Report.[45] During the hearing of the charges before the Visiting Justice the plaintiff had not been allowed to make a proper defence. He was refused permission to call witnesses and address the magistrate on law and his cross-examination of prison staff was peremptorily curtailed. He was not present when his sentence was imposed. The cavalier disregard of basic rules of natural justice by Visiting Justices is also amply borne out by the evidence put to the Nagle Royal Commission.[46] This decision has gone some way to redressing the balance.[47] It will put pressure on correctional authorities to introduce safeguards. Meanwhile, prisoners whose rights have been similarly abused may seek relief.

Another encouraging statement is to be found in Murphy J.'s courageous dissent in *Dugan's* case.[48] His Honour grasped the nettle and resolved an ambiguous situation in favour of the prisoner, relying, inter alia, on sources

[43] An unreported decision of the New South Wales Supreme Court. Mr Justice Sheppard, 16/11/1979. The other defendants were the Commission for Corrective Service and Mr Avery, a depositions clerk.
[44] Transcript pp. 75-76.
[45] Report p. 300.
[46] See, for example, the evidence of D. Dugan and J. F. Murray to that Commissio
[47] In *R.* v. *Chappell; Ex parte Rushton* an unreported decision of the Full Court of the West Australian Supreme Court (29/11/1979 No. 1857/79) it was held that proceedings before a visitor under the *Prisons Act* 1903-1978 (W.A.) upon a complaint charging a prisoner with the commission of a minor prison offence are of a kind amenable to control by prerogative writ and the power and duty under s. 33 to "hear the complaint" requires that they be conducted in a way which does not offend the rules of natural justice.
[48] (1979) 53 A.L.J.R. 166, 175.

not traditionally regarded as of great weight in Australian courts—namely, decisions of courts in the U.S.; decisions of the European Court of Human Rights (in particular, *Golder* v. *United Kingdom*)[49] and declarations of principle in international conventions and treaties[50] not incorporated into Australian municipal law relating to minimum acceptable standards in relation to the rights of prisoners. Of course the judicial utterances in this category carry no more than the persuasive weight of any judicial statement advocating change. It is not suggested that such calls will be immediately heeded. What is significant however is that such calls are now being made at all and that such documents are even being referred to with apparent approval by at least one justice of the High Court of Australia.

(b) Indirect Intervention

Another relatively recent mode of intervention in prison conditions by the judiciary in N.S.W. has been for the judges to express opinions about prison conditions during the course of proceedings relating to other issues.

Perhaps the most significant recent case of this kind was that of *Veen*,[51] a High Court appeal concerning the sentencing of the appellant, Veen, who had been convicted of manslaughter. The alternative verdict of manslaughter had been brought in on a murder charge because the jury had found that Veen's actions were affected by diminished responsibility, under the provisions of s. 23A of the *Crimes Act* 1900 (N.S.W.). In sentencing Veen, the trial judge, Rath J., effectively ignored the diminished responsibility finding by imposing the maximum permissible sentence for manslaughter namely life imprisonment. Theoretically, of course, the judge did not transgress the boundaries of sentencing as far as manslaughter is concerned. By a majority (Stephen, Jacobs and Murphy JJ.) the High Court reduced the sentence to twelve years.[52] For present purposes, the significant point in issue is that the High Court recognised that prison conditions, and, in this particular case, psychiatric services within prisons were relevant in determining an appropriate sentence for this particular prisoner. Jacobs J. went further and made extensive reference to the terms of the recommendations made by Mr Justice Nagle in the Report of the Royal Commission into Prisons in N.S.W. Thus, at least in a marginal way, some of the recommendations of the Nagle Royal Commission came to be judicially taken into consideration even if the legislative arm of government has not implemented them specifically. It is of course not

[49] Eur. Court H.R. 21 February, 1975, Series A, No. 18.
[50] Namely, the International Bill of Human Rights (incorporating the Universal Declaration of Human Rights), the International Covenant on Civil and Political Rights and the European Convention on Human Rights.
[51] *Veen* v. *R.* (1979) 23 A.L.R. 281.
[52] The minority Mason and Aickin JJ. preferred to remit this matter to the Supreme Court for the Court to hear further evidence and then pass sentence.

without significance that the terms of the recommendations of Mr Justice Nagle have reached the rarefied atmosphere of the High Court.[53]

In another recent case, *R.* v. *Penberthy*,[54] the Royal Commission recommendations, this time in relation to medical conditions at Mulawa Women's Prison, fell to be judicially considered. On this occasion, Roden J. of the N.S.W. Supreme Court was hearing evidence from Dr Houston, a medical officer at the Long Bay Complex at Malabar. Dr Houston also has medical responsibility for Mulawa Women's Prison at Silverwater. Under cross-examination by counsel for the accused, Dr Houston conceded that the inadequate medical conditions at the Women's Prison (outlined in the Nagle Report) had not changed at all despite fairly significant recommendations in this regard by Mr Justice Nagle some eighteen months earlier. Roden J. was led to express concern at the lack of adequate medical facilities at Mulawa and took this deficiency into account in imposing the minimum non-parole period for the female accused who required sustained medical treatment for an angina condition.

These two brief illustrations indicate the potential for an indirect attack on prison conditions through the court system. Judges, it is suggested, will be less reluctant to comment on the more blatant inadequacies of the penal system if they are not simultaneously driven to making a declaration or order which would compel a change for which they are not prepared to assume responsibility.

So, it could be argued, there are signs of encouragement for imaginative counsel. In a hearing on sentence, counsel is able to put submissions to the court based on evidence appropriately adduced. In relation to the question of penalty, the custodial option could be regarded as custody within the realms of the existing alternatives. If it is determined that all of these are entirely inappropriate it must follow that a custodial penalty is inappropriate, given the existing system. And of course the various permutations on this theme could be imagined.[55]

[53] Murphy J. referred to the Nagle Report in his judgment in *Dugan's* case (1979) 53 A.L.J.R. 166, 175.

[54] An unreported decision of the Supreme Court of N.S.W. (Roden J.) in August, 1979.

[55] The tendency to sentence people *in abstracto* is partially due to a policy of maximising the discretion available to prison authorities in the ultimate disposition of the prisoner. However, it is suggested that it is also at least partially due to a lack of specific information about the institutions to which the prisoner is globally committed. Arguably that dearth of information no longer exists following the Nagle Report. Accordingly an argument could be mounted that prison conditions are relevant to the sentence imposed and that judges could conclude (i) that no custodial option is suitable, (ii) that a custodial option is only suitable if a specified security level is not exceeded—i.e. a ceiling is imposed, (iii) that a specified institution was the only suitable option. Under present arrangements options (ii) and (iii) are not possible as judges have no legal power to make binding orders as to the nature of custodial treatment (subject to a limited number of exceptions such as periodic detention). Strong recommendations are, however, permissible. The recent decision of the New South Wales Court of Criminal Appeal in *R.* v.

Another area in which there has been indirect judicial intervention in relation to prison conditions in N.S.W. is that of the local industrial courts. This has come about as a result of the industrial initiatives taken by the Prison Officers' Association. Although strikes by prison officers are not a new phenomenon, traditionally they related to the particular working conditions of those officers. More recently, there have been a number of significant strikes relating to the particular conditions in prisons under which prisoners should, according to the prison officers, be detained. It is suggested that the politicisation of the prison officers in this regard has been at least an indirect result of the Royal Commission into Prisons in N.S.W. It will be recalled that in the report of Mr Justice Nagle, the activities of prison officers at various institutions in N.S.W. were roundly condemned. The levels of infraction his Honour found certainly transcended a series of individual incidents and it seems clear from the evidence that institutionalised violence was certainly the norm at a number of institutions such as the so-called intractable section at Grafton Gaol. After considerable vacillation during the course of the inquiry, counsel representing the prison officers finally made a number of formal admissions in the following terms:[56]

(a) In relation to Bathurst Gaol:

> "In October, 1970, following a sit-in at Bathurst Gaol, some prison officers participated in a systematic flogging of a large number, if not all, of the prisoners in the gaol. Such flogging was carried out under the leadership and control of the Superintendent . . . and was regarded by the officers as representing official policy."

(b) In relation to Grafton Gaol:

> ". . . upon first admission to the gaol, intractable prisoners were the subject of a 'reception biff', which consisted of a physical beating of the prisoner about the buttocks, shoulders, legs and arms by two or three officers using rubber batons."[57]

It should be noted that these admissions fell considerably short of the ultimate findings of Nagle J. For example, in relation to Grafton His Honour found that over a period of 33 years, since the opening of the "intractable" section at Grafton Gaol, prison officers inflicted "brutal, savage and sometimes sadistic violence" on the prisoners there. Moreover, this was not a series of isolated acts but an institutionalised regime of horror condoned throughout this time by prison officers and the Department.[58]

Vachalec (Unreported, 5/10/1979) is, however, a setback as far as this potential line of reasoning is concerned.

[56] *Royal Commission into Prisons in New South Wales*, March 1978, p. 55.
[57] Ibid. 108-109.
[58] Ibid. 108-119.

Ever since that time and the subsequent publicity relating to the findings of Nagle J., it is arguable that prison officers in N.S.W. have been on the back foot. However, it now seems clear that the New South Wales Government does not propose to take any action in relation to these matters (despite a formal reference of at least some of them to the Crown Solicitor's Office) and, as time flows by, prison officers have gained new confidence that this will be the situation.

Since the release of the Royal Commission Report, the prison officers have been on the attack. Perhaps it is the best form of defence. In particular, prison officers vigorously opposed the "Close Katingal Campaign" which was mounted following the release of the Nagle Report and have recently been successful in forcing the government to re-open the "electronic zoo"[59] despite the resounding condemnation of it in the Royal Commission Report.

Another recent illustration of the expanded role adopted by the Prison Officers' Association relates to their response to the case of James Murray. Murray was an inmate at the Long Bay Complex at Malabar, N.S.W. and was charged with assaulting a prison officer. The case against Murray was weak. The prosecution witnesses had considerable difficulty in identifying Murray as the person concerned and the presiding magistrate described the evidence as "not on a very elevated plane". Notwithstanding this, the magistrate committed Murray for trial.

An application was lodged with the Attorney-General for a *nolle prosequi*. In due course, a no bill was found by the Attorney-General. In an unprecedented step the outraged Prison Officers' Association went on strike demanding a review of this decision. The Attorney-General succumbed to this pressure and ordered a review. In the event, the original decision was adhered to.

During the course of the strikes relating to both of the above illustrations the matters came to be considered at various stages by the N.S.W. Industrial Commission. The basic issue before this tribunal related to the working conditions of the Prison Officers' Association. Their argument is that security is a pervasive theme—it relates to all aspects of their job. Accordingly, the Association felt entitled to comment upon and indeed demand changes which it said would enhance the security situation. Inevitably, this trenches upon the conditions under which prisoners are detained. Any decision by the industrial tribunal, whether particularly directed to the issue or not, is clearly capable of having correlative consequences for prisoners' conditions.

The obsession of prison officers is essentially with security. My own view is that the physical and psychological conditions which obtain in N.S.W. prisons brutalise both prisoners and prison officers. There is a perfectly

[59] The term used by Nagle J. to describe Katingal in the Royal Commission Report.

legitimate argument, it seems to me, which could be advanced before industrial tribunals by prison officers. It goes something like this. It has been thoroughly documented in the Nagle Report that many of the prisons in N.S.W. are antiquated, unacceptable and in some cases draconian. The immediate closure of a number was recommended, for example, Grafton "Tracs", Katingal and the O.B.S. Section of the Long Bay complex. Disparaging remarks were made about most of the so-called maximum security centres—Central Industrial Prison, Bathurst, Parramatta, etc. Conditions such as these will inevitably produce unrest and frustration amongst prisoners and prison officers alike. In a cyclical manner this tension will increase and, from time to time, erupt with the real possibility of damage both to person and property. Over the last decade this has been graphically illustrated at Bathurst (several times), Maitland, Goulburn and the Long Bay complex, to name but a few. If the situation is to be improved, some of these institutions must be closed and conditions dramatically improved in those which remain. If clear steps, in the appropriate direction are not taken then the only alternative will be industrial action. Thus, theoretically, there is a scenario which would involve concerted action by both prison officers and prisoners through strike action to secure the implementation of the Nagle Report recommendations. The prison officers have a strong union which is clearly capable (as has been shown on many occasions) of inconveniencing the criminal justice system. The prisoners have less solidarity and no immediate capacity to organise—they have never been allowed to do so. At the moment it would be fair to say that such a coalition of interests directing its energy at the N.S.W. Government in order to secure the implementation of the Nagle Report recommendations is hopelessly remote.[60]

THE SCOPE FOR INTERVENTION

Thus, despite a negative history and a number of contemporary judicial affirmations of a "hands-off" policy, there is some evidence of direct and indirect intervention by judges to improve prison conditions. I would argue that the judiciary has a limited but potentially vital role to play in ensuring that prison administrations comply with minimum standards for prisoners in Australia. This is so for two important reasons: (a) The admitted paucity of constitutional and legislative protection for prisoners and (b) the physical nature of penal institutions for the foreseeable future. Both factors militate strongly against (if not prevent) efficacious public scrutiny of executive action. Legislative intervention in this sphere has been very tardy and marginal.[61] It has often been said that the walls of

[60] If anything the current climate has a distinctly law and order flavour. The frequent strikes by prison officers have largely been "anti-prisoner".

[61] See generally the comments of Nagle J. in relation to the failure to implement prison reform proposals.

the prisons not only keep the prisoners in but the public out. The law of the land in as much as it confers rights on any person should not stop short at the prison gates.

Accordingly, judicial activism within the conventionally permissible limits on judicial creativity should enable some amelioration of the conditions within prisons. Adherence to a "hands-off policy" (let alone an activist *obstructive* approach) is likely to give the following recent pronouncement of the Chief Justice of New South Wales, Sir Laurence Street, a hollow ring:

> "The circumstances in which an individual can be permitted to take the law into his own hands are limited. There is to be observed, moreover, a developing tendency to limit yet further what might be described as self help by physical assertion of legal rights. . . . It is a clear policy of the law that legal rights should ordinarily be enforced and protected by due process and not by taking a physical initiative. To accept it as reasonable that every individual can intervene physically to hinder or prevent a breach or to procure observance of civil law would involve dangerous overtones capable of leading to oppression and coercion, if not to actual disorder. The law enforcement agencies of the community, both civil and criminal, have the responsibility on its behalf of seeing to the observance of the law."[62]

That the solution of these problems is not the exclusive province of the judiciary goes without saying. The extent of involvement will ultimately be limited by the normal constraints within which judges operate. An avowed legal vacuum as far as the rights of prisoners are concerned such as the restriction on prisoners to sue the authorities civilly for damages by virtue of s. 46 *Prisons Act* 1952 (N.S.W.) or an unambiguous statutory curtailment of prisoners' rights such as limits on the right to vote[63] leave a court with little option and remedies must be sought elsewhere. The thesis is indeed a very moderate one: that because of the peculiarly vulnerable position of prisoners in society as to the de jure *and* de facto deprivation of rights which go far beyond the minimum consequences of custodial punishment (viz. the deprivation of freedom) the courts have a correlative peculiar responsibility to ensure compliance with the vestigial rights in prisons. This task can be achieved by favourable interpretation of ambiguous statutory provisions for example by holding where possible that statutes creating "privileges" infer substantive rights. Thus, for example, internal transfers within the prison system could be made the subject of due process requirements as to notice, furnishing of reasons and review procedures. Similarly common law rules restricting prisoners' rights such as that under consideration in *Dugan's* case should be given the narrowest possible ambit (on the assumption that they could not have been avoided).[64]

[62] *R.* v. *Bacon and Others* [1977] 2 N.S.W.L.R. 507, 513.
[63] See generally J. Disney, "N.S.W. Prisoners' Voting Rights" (1976) 2 *Leg. S.B.* 24.
[64] Thus, on the most conservative view, the majority judges in *Dugan* could easily have expressly limited themselves to cases of capital felony instead of leaving the position as to prisoners serving sentences for non-capital felonies in limbo.

Courts could firmly reject the reasoning in *Gibson* v. *Young*. In the context of disciplinary proceedings before visiting justices, the courts could allow legal representation[65] and public access by fully assimilating the statutory provisions relating to ordinary courts of petty sessions. Further, it will be important to ensure that appropriate remedies are available to sanction breach of such rights. For example, by narrowly reading s. 46 *Prisons Act* 1952 (N.S.W.) so as *not* to preclude remedies of a non-compensatory nature such as mandamus, declaration and injunction.[66]

A corollary of this approach would, of course, be the necessity of avoiding the introduction of (or acquiescence in the continued use of) threshold impediments to the plaintiff prisoner litigant. Thus the ancillary devices—locus standi, jurisdiction, discretion to refuse availability of a remedy such as injunction, declaration or order in the nature of mandamus should not be resorted to as an oblique way of ensuring a "hands-off" approach.

The long-standing tradition of interpreting penal statutes strictly in favour of the prisoner[67] requires little distortion to embrace a similar approach in the context of legislation seeking to limit the liberty of the subject in custody, and, accordingly, hardly strains orthodoxy. However, more enterprising judges may well draw comfort from international developments in admittedly different frameworks such as the *Golder* case and other cases in the European Court of Human Rights.[68]

REMEDIES

Of the various remedies on which prisoners are likely to place reliance, the declaration is perhaps the most potent weapon—at least in theory. Provided that the prisoner plaintiff can establish a legal toe-hold on the basis of some prescription of right or standard or some prohibition, statutory or otherwise (and this could, in practice prove to be a major obstacle), a declaratory order can be sought with respect to alleged infractions. It is

[65] I would wholeheartedly endorse the remarks of H. Whitmore and M. Aronson in *Judicial Review of Administrative Action* (Sydney, Law Book Co., 1978) 108. The authors trenchantly criticise the failure of the courts to rule that prisoners are entitled to legal representation. After referring to *R.* v. *Visiting Justice at H.M. Prison Pentridge; Ex parte Walker* [1975] V.R. 883; *Fraser* v. *Mudge* [1975] 1 W.L.R. 1132; *Maynard* v. *Osmond* [1976] 3 W.L.R. 711 they say:

> "Such decisions make a mockery of natural justice. The courts have traditionally asserted that to accord prisoners justice is to weaken prison discipline. This is morally repugnant and factually based upon the patently absurd premise that prison officers are always right and prisoners never."

[66] See the approach of Taylor J. in *Vezitis* v. *McGeechan* [1974] 1 N.S.W.L.R. 718 (discussed below).

[67] See Maxwell, *Interpretation of Statutes* (11th ed.) 253-278. This approach did not, however, avail counsel for the applicant in *Flynn* v. *The King* (1949) 79 C.L.R. 1.

[68] See generally the discussion by G. Triggs, "Prisoners' Rights to Legal Advice, and Access to the Courts: The Golder Decision by the European Court of Human Rights" (1976) 50 *A.L.J.* 229.

proposed to examine a number of decisions in which reliance has been placed on this remedy.

Various attempts to use the declaratory remedy were recently considered by the N.S.W. Court of Appeal in *Smith* v. *Commissioner of Corrective Services*.[69] It is a potentially significant decision in the area of prisoners' rights. The Court of Appeal heard together a number of appeals relating to different aspects of the appellant's confinement at Katingal (a super-maximum security institution within the Long Bay complex at Malabar, N.S.W.). Declaratory relief was sought in relation to several matters. It is intended to examine the Court's decision on these matters in some detail.

The first and major case to be considered concerned the nature of the "right" of a person in custody at Katingal to confer confidentially with his legal advisers, the issue being whether any such right extends to require that such an interview be conducted in circumstances insuring real confidentiality rather than mere "apparent" confidentiality.[70] In this institution legal visits took place in a room which contained listening devices. The prison authorities maintained that the devices were not switched on during legal visits. A further and directly related issue was: Could the prison authorities be compelled by order of the Court to ensure "real" confidentiality and to carry out any structural or other modifications in procedure which such a situation would entail *viz.* removal of the relevant listening device or construction of a special room for legal visits.

The attitude of the Court, highlighted in the leading judgment of Hutley J.A., was resoundingly negative except perhaps in relation to one aspect—the extent to which the discretionary powers of criminal courts to ensure a fair trial can be extended to cure, or rather ameliorate, the inherently disadvantageous position of an unconvicted person in custody awaiting trial. This matter will be discussed below.

But first let us consider the court's attitude to the prospect of declaratory relief. The orders sought were, in substance, declarations that the visiting facilities at Katingal Special Security Unit, Long Bay, were inadequate to enable proper consultation between the plaintiff and his legal representatives, that the plaintiff was entitled to have such visits in surroundings which do not have facilities for overhearing and recording attached to them by the prison authorities and that the inadequacies referred to have deprived the plaintiff of a right to proper representation.

The following background facts about the circumstances in which legal interviews at Katingal super-maximum security institution take place, are taken from the judgment of Hutley J.A.:

[69] [1978] 1 N.S.W.L.R. 317.

[70] The appellant had no evidence that "real" confidentiality was breached: the question was, should facilities be such as not to give rise to a reasonable belief that the conversation was being overheard.

"The room in which the appellant is permitted to see his legal advisers is known as 'the visitors' room'. It is a room divided by a glass partition to desk height, and below that there is a solid wall. There is a wire device through which conversation can be held between persons separated by the partition. The room is the same room as is used for persons visiting prisoners for any permitted purpose. The prison regulations place restrictions on the nature of communications on such occasions, and there is admittedly installed a listening device which enables prison officers to listen to conversations of prisoners and hence to terminate the visit if its limitations are exceeded. It is not suggested that the use of the devices for this purpose is in breach of any regulation or right.

When a prisoner is interviewed by his legal adviser some different arrangements are made. The listening device is switched off and the plug removed and the lawyer is shown this. As, however, the switch and the plug are out of sight of the prisoner and lawyer, it would be possible for the plug to be re-inserted and the switch be turned on, and for this to be done without the knowledge of the prisoner or his legal adviser. There is no evidence that this has occurred in any past interview with the appellant, and his counsel does not suggest that, in fact, any conversations between the appellant and his legal adviser have been heard by any prison officer. The appellant has deposed that his suspicion that the listening device may be used during his conversation with his legal adviser inhibits his capacity to communicate with him freely."[71]

The appellant sought to derive a substantive right of a private confidential relationship with his counsel and solicitors which was enforceable against the Commissioner of Corrective Services. The statutory provisions upon which reliance was placed were s. 402 of the *Crimes Act* 1900 (N.S.W.) and s. 36(3) of the *Justices Act* 1902 (N.S.W.). Essentially both provisions relate to the rights of an accused person to have counsel appear on his or her behalf.

Counsel for the appellant drew upon several American authorities. The response of Hutley J.A. was in these terms:

"These cases are concerned with the construction of the various State constitutions in which language similar to the above provisions is used, e.g., the constitution of the State of California considered in *Ex parte Rider* [(1920) 195 P. Rep. 965]. The principle which he sought to invoke is most clearly stated in a passage from *Ex parte Rider* . . . quoting from *State (of Oklahoma) ex rel. Tucker* v. *Davis* [(1913) 130 P. Rep. 962, at pp. 963, 964].

'It would be a cheap subterfuge of and a shameless mockery upon justice for the state to put a man on trial in its courts, charged with an offense which involved his life, liberty or character, and then place him in such a position that he could not prepare to make his defense. . . . It therefore necessarily follows that it is the absolute right of parties charged with crime to consult privately with their attorneys, and that it is an illegal abridgment of this right for a sheriff, jailer, or other officer to deny to a defendant the right to consult his attorneys,

[71] [1978] 1 N.S.W.L.R. 317, 323-324.

> except in the presence of such officer. . . . It is the duty of officers having the custody of persons charged with crime to afford them a reasonable opportunity to privately consult with their attorneys without having other persons present, taking such precautions as may be necessary, according to the circumstances of each case, to prevent the escape of such prisoner.' "[72]

The American decisions were distinguished by His Honour because: (1) constitutional provisions are "radically different" from ordinary statutes; (2) words in an American State Constitution are a dubious guide to construction of a local statute and (3) unlike the American constitutional provision, the local statutory provisions under consideration did not bind the person having custody of the prisoner.

After an historical analysis of the source of s. 402 *Crimes Act* 1900 (N.S.W.) and s. 36(3) *Justices Act* 1902 (N.S.W.) his Honour concluded that:

> "The rights given are rights to have counsel appear on the accused person's behalf. They are, therefore, by their very nature, rights to be vindicated in or in connection with, the particular proceeding. They are not rights such as are given by the American state constitution directly against those who have custody of the prisoner. It is, as the American cases emphasise, essential that counsel should have opportunities to confer with the accused prior to the proceedings, and counsel cannot conduct a case without this being made available, but it does not follow from this that the accused person has a direct right against the person, whoever he may be, who is detaining him, to have him accorded these opportunities. If he is bound by regulations, as is the Governor of Long Bay gaol, he cannot depart from them."[73]

His Honour went on to say that the accused person's remedy is to apply to the presiding judge or magistrate to "obtain assistance in the provision of proper facilities",[74] the sanctions being granting of bail or, theoretically, discharge of the accused "if the authorities had so misconducted themselves as to prevent a proper presentation of a defence".[75]

An alternative submission advanced by counsel for the appellant was that a substantive right to privacy could be derived from a consideration of the reasons behind the legal professional privilege relating to the prohibition on disclosure of communications between client and legal adviser, examined in the context of the right to counsel. Hutley J.A. conceded that a right of non-disclosure was undoubted and essential to the effective preparation of any defence. However, an accused could not ensure that this abstract right was a real and effective right in a prison context by requiring prison authorities to provide facilities which ensured

[72] Ibid. 324-325.
[73] Ibid. 326.
[74] Ibid.
[75] Ibid. 327.

that admittedly confidential communications do not reach third parties. In the words of His Honour:

> "The privilege is a right to make confidential communications to legal advisers, it is not a right to require other persons to provide all the facilities necessary to enable such communications to be kept secret. It certainly does not extend to requiring jailers and others to provide facilities for communications which cannot arouse any suspicion in the mind of the accused that he is being overheard or his conversations are bugged. This would put an impossible burden upon any prison authorities and subject them to the vagaries of the often paranoiac suspicions of accused persons."[76]

Thus, the first submission foundered on the historical origins of the right to counsel and consequential statutory interpretations which limited its scope. The rejection of the second argument was interesting. Although for the purpose of deciding the case it was only necessary to decide that there was no right to guaranteed privacy of communication, free from any suspicion of overhearing, the court also squarely rejected the possibility of ensuring the provision of *actual* privacy of communication. Thus, even if there *had been* evidence of overhearing by the prison authorities the court would not have interfered on this basis.

Hutley J.A., in the course of his judgment on the other appeal in *Smith's* case,[77] canvassed a number of issues of general importance to prisoners in N.S.W. and their ability to institute legal proceedings in relation to their prison conditions.

First, His Honour examined a number of provisions in the *Prisons Act* 1952 (N.S.W.): s. 18 relating to return of property upon release, s. 22 dealing with segregation under specified conditions and s. 15 providing that there shall be no enforced association of convicted and unconvicted prisoners. His Honour then casts cold water (and, with respect, some confusion) onto prospective litigation in this area.

In speaking of s. 18(1) (which was not in issue in the case), His Honour indicates that the prisoner has a remedy: "In certain circumstances it is *clear* that private rights are given".[78] However, the situation in relation to s. 22 is somewhat more doubtful. "Whether any segregation of a prisoner not authorised by s. 22 implies rights to a civil remedy sounding in damages does not arise in this case, because we are of opinion there was in fact no segregation".[79] And finally in relation to s. 15:

> "If this reasoning is correct it would also seem that the failure to separate different classes of prisoners in accordance with the regulations would

[76] Ibid.
[77] This arose out of a summons seeking relief in respect of allegedly unlawful forced association with convicted criminals and subsequent allegedly improper segregation of the appellant: see s. 15 and s. 22 respectively of the *Prisons Act* 1952 (N.S.W.) as amended.
[78] [1978] 1 N.S.W.L.R. 317, 327-328 (emphasis added).
[79] Ibid. 328.

also give rise to civil right of action. . . . [W]e doubt whether the failure to comply with s. 15 gives rise to any civil right of action. It is a provision no doubt for the welfare of prisoners, but is merely a direction as to how their administration is to be carried out."[80]

The generally accepted test for the interpretation of statutes purportedly creating private rights of action is then referred to: "The question whether an Act of parliament gives rise to a private right of action is a question of intention on the part of the legislature. . . ."[81] And, indeed, this is the time-honoured formula for cloaking the various policy decisions in this area. The punch-line comes in the immediately following passage: "and the uniform construction of provisions relating to the administration of prisons has been to deny to the prisoners a right of action if there has been any breach".[82] His Honour relies principally on the passage quoted above from the judgment of Dixon J. in *Flynn* v. *The King*.[83]

This classical non-interventionist formulation appears to be unquestioningly endorsed by the unanimous decision of the N.S.W. Court of Appeal. *Smith's* case neatly illustrates the problems confronting the prisoner litigant and the various modes of judicial non-intervention. First (leaving aside issues such as *locus standi*), very real problems are encountered in establishing the right sought to be relied upon. The non-interventionist judicial policies of the past are merged in the quest for the legislative intent necessary to establish such rights. The intent is discovered in the case of s. 18[84] (property rights reign supreme subject to *Dugan* and s. 46)[85] but not in the case of s. 15.[86] The position regarding s. 22[87] is left in doubt.

[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] (1949) 79 C.L.R. 1, 8.
[84] S. 18 provides:
(1) Every prisoner upon his reception into prison shall surrender to the governor of the prison all property in his possession. The governor of the prison may require a prisoner to send away or to cause to be sent away from the prison any or all of his property surrendered as aforesaid. The property of a prisoner not sent away as aforesaid shall be retained by the governor of the prison and returned to the prisoner immediately prior to his release from prison.
(2) A record shall be kept of all such property surrendered as aforesaid and sent away as aforesaid and in respect of property retained as aforesaid the prisoner may deal with such property only in such manner as is prescribed.
[85] S. 46 provides:
No action or claim for damages shall lie against any person for or on account of anything done or commanded to be done by him and purporting to be done for the purpose of carrying out the provisions of this Act, unless it is proved that such act was done or commanded to be done maliciously and without reasonable and probable cause.
[86] S. 15 provides:
To the fullest extent reasonably practicable, convicted prisoners shall be separated from other prisoners, and different classes of convicted prisoners and different classes of other prisoners shall be separated as prescribed.
[87] S. 22 provides:
(1) Where the Commissioner, or the governor of a prison, is of the opinion that the continued association of a prisoner with other prisoners constitutes a threat to

Then, even if a right can be asserted, the restrictions on the remedies available are dramatic. Section 46 emasculates the damages remedy (at least) severely. Thus, assuming that a prisoner litigant can escape the *Dugan* formula, a damages remedy is only available where the prison authorities can be demonstrated to have acted with malice or without reasonable or probable cause.[88] As far as ancillary relief is concerned—injunctions, declarations, orders in the nature of mandamus, the courts clearly face a choice. The ambiguity is capable of resolution in favour of prisoner litigants as a matter of statutory construction. The opening words "No action or claim for damages . . ." are capable of being broadly construed to include proceedings seeking declarations, injunctions and the like. Alternatively, the word "action" could be regarded as qualified by the words "for damages". It is submitted that, in view of the decision of Taylor J. in *Vezitis* v. *McGeechan*[89] the narrow construction of s. 46 will be favoured and that, provided a relevant enforceable right can be asserted, these remedies can be called in aid. Taylor J. held that:

> "In my opinion when s. 46 is examined in the context of this Act, it is clear that it is concerned with actions for damages against persons who are carrying out or purporting to carry out the provisions of this Act."[90]

Thus, imagine the case of a prisoner who had suffered assaults at the hands of prison officers[91] who sued not for damages but for an injunction

> the personal safety of any other prisoner or of a prison officer, or to the security of the prison, or to the preservation of good order and discipline within the prison, he may direct the segregation of such first mentioned prisoner, whereupon such prisoner shall be detained away from association with other prisoners or, where the Commissioner so approves, in association only with such other prisoners as the Commissioner may determine.
> (2) Where the governor of a prison gives a direction pursuant to subsection (1) he shall immediately report the fact in writing to the Commissioner. A prisoner segregated pursuant to the direction of the governor of a prison shall not be so segregated for a longer period than two weeks unless the Commissioner otherwise directs.
> (3) During any period of segregation, the prisoner so segregated shall not suffer reduction of diet, nor shall he be deprived of any rights or privileges other than those which may be determined by the Commissioner either generally or in any particular case.
> (4) No prisoner shall continue in segregation pursuant to this section for a period exceeding three months without further direction by the Commissioner and no continuous period of such segregation shall exceed six months without the sanction of the Minister.

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88 Even in states where there are not statutory restrictions to be overcome the problems in *Gibson* v. *Young* (1899) 21 L.R. N.S.W. 7 remain. Note the criticism of the reasoning in that case by Smith J. in *Quinn* v. *Hill* [1957] V.R. 439.

89 [1974] 1 N.S.W.L.R. 718 a case concerned with the right claimed by a prisoner to be held in accordance with the times specified in schedules in the Prison Regulations.

90 Ibid. 720.

91 The *Report of the Royal Commission into Prisons in New South Wales* by Mr Justice Nagle, March 1978, documents numerous instances of such assaults and also contains general admissions by the Prison Officers' Association as to regular organised brutality at particular institutions, for example, Grafton Gaol. See also the Jenkinson Report, supra fn. 19.

to restrain the authorities from further allowing the institution to be conducted in the manner alleged. Leaving aside the merits of the injunction in the circumstances of the particular case, the court would need to face squarely the issue whether s. 46 would constitute a *threshold bar* to such a claim. It is submitted (in view of *Vezitis'* case supra) it should not be. Indeed this should be the case in relation to all actions other than claims for damages. It could still be argued that this would lead to a construction of "action" which was tautologous and that Taylor J. was wrong.

However, it is submitted that this will not happen because the non-interventionist objective can be obtained in a more subtle way. This is precisely the result reached in the *Vezitis* case where, having rejected the claim that s. 46 constituted a bar, His Honour held that the specified schedules did not afford prisoners enforceable rights. They were subject to variation on "security grounds".[92] Similarly, it is submitted that there will be an increasing tendency in the courts to acknowledge jurisdiction to entertain applications for declarations, injunctions etc. but to refuse relief on the merits. This is illustrated by *Smith's* case. For, the Court of Appeal in *Smith's* case (per Hutley J.A.) has held that s. 46 of the *Prisons Act* 1952 (N.S.W.) is a relevant consideration in deciding whether a court "will entertain the claim for a declaration by a prisoner against prison authorities in respect of acts done or not done in a prison". Thus, although jurisdiction to entertain applications for declaratory relief appears to be acknowledged, a firm view is expressed that relief is likely to be refused by the court in the exercise of its discretion to entertain the claim. Arguably, this response extends to other forms of discretionary relief.

It is submitted that it is too late to argue (independently of the s. 46 construction argument) that declarations are not available as a potential remedy in respect of the assertion of rights relating to prison conditions. Street J. (as he then was) made declarations in *Cheetham* v. *McGeechan*.[93] His Honour was there considering the true construction of regulation 110(a) of the *Prison Regulations* 1968 (N.S.W.) relating to remissions. In *Kennedy* v. *McGeechan*[94] a decision relating to the validity of the interposition of a physical glass and wire barrier between a lawyer and his or her client during legal visits, Sheppard J. proceeded on the assumption that declaratory relief was available. No argument as to the threshold point was advanced by the defendant Commissioner, nor was there argument as to the exercise of the Court's discretion to grant relief even if such relief was available. Waddell J. in *Henke* v. *Commissioner of*

[92] In the event, the prison authorities *did* vary the hours in question (that is reduce the time for which the plaintiff and other prisoners were locked in their cells) before the reserved judgment indicating that such a response was not legally necessary.

[93] [1971] 2 N.S.W.L.R. 222.

[94] An unreported decision of Sheppard J., 7 June 1974.

Corrective Services,[95] a decision relating to the construction of the remission provisions of the Regulations made under the *Prisons Act* 1952 (N.S.W.), also assumed that he could grant a declaration. Again, it was not an issue of substance before the court.

It is arguable that in *Cheetham's* case the declaration was made only because of the acquiescence of the then Commissioner of Corrective Services in such a course. It is not altogether clear that the decision of Street J. was made on this basis:

> "I concur, after some initial hesitation, in the plaintiff's assertion and the defendant's acquiescence that this is a proper case for declaratory relief. The parties wish to have the contest determined. There is no specific court or tribunal by statute or by course of practice marked out as having jurisdiction appropriate for the determination of this dispute upon the meaning of the Regulations. The contest is on a pure question of construction of the Act and Regulations."[96]

A cogent argument can be advanced that this is an initiative consistent with the court's normal declaratory powers and that the absence of appropriate alternative judicial or quasi-judicial procedures reinforced the decision of Street J. to resort to its use.

THE WRONG FORUM ARGUMENT IN SMITH

The reluctance of the court to intervene (at least in a pre-trial situation) is well illustrated by another approach taken in *Smith's* case—namely that the appellant should have sought relief from the trial court. Moffitt P. was the major protagonist of this view although Hutley J.A. did advert to it and Glass J.A., in endorsing the judgment of Hutley J.A. must also be taken as having approved their comments. Moffitt P. expressed his disapproval of the practice of accused persons interrupting

> "the course of criminal committal proceedings by seeking to have the Supreme Court in its civil jurisdiction exercise its declaratory powers, so as thereby to remove from the forum of the criminal courts questions which the procedures of the inquiring magistrate and the criminal courts are designed and adequate to determine. . . . [I]t is usually inappropriate that the discretionary civil jurisdictions of this Court be resorted to or exercised".[97]

The suggestion is that, generally speaking, the Court of Appeal should not be troubled by litigation of this kind. There is a clear hint that the court regards them as nuisance value only. Moffitt P. went on to say:

> "In many of the cases . . . there exists some suspicion that in bringing proceedings which interrupt or delay criminal trial, there are ulterior motives such as delaying tactics or, as in the present case, distraction from an unpalatable issue, namely the trial, to some side issue for the

[95] An unreported decision of Waddell J., N.S.W. Supreme Court, September 1975.
[96] [1971] 2 N.S.W.L.R. 222, 224.
[97] [1978] 1 N.S.W.L.R. 317, 321.

purpose of notoriety or for some other reason. . . . Criminal procedures should not be interrupted, except in exceptional cases."[98]

His Honour suggests that this should be so despite "[t]he circumstance that the declaratory power is a wide one and 'unfettered', as stated by Gibbs J. in *Forster* v. *Jododex Australia Pty Ltd* [(1972) 127 C.L.R. 421 at p. 437]. . . ."[99]

The solution, according to His Honour, is for criminal courts "to determine questions which arise before them in accordance with their own procedures".[100] His Honour was of the opinion that the powers and discretions of judges presiding at a criminal trial or magistrates trying a criminal case are more ample. The keynote of this argument is that all necessary adjustments, to accord a person being tried due process, can be dealt with by the trial judge.

"Thus the judge who exercises criminal jurisdiction, prior to or at the trial, has the *overriding duty to ensure that the accused has a fair trial.* The practice and procedures of the criminal courts are designed to this end, but in many respects both in the evidentiary and procedural field, the exercise is not limited to according to an accused person strict and defined rights. The judge has some overriding powers which impose on him a discretion, and indeed a duty, to do that which is fair to the accused. To ensure that the trial is fair to the accused, it is necessary that he be given a fair and reasonable opportunity to consult with and instruct his legal advisers, and to obtain their legal advice in relation to charges against him. It is to be expected that, when an accused is confined prior to the trial, the authorities responsible for his custody will accord him this opportunity without the need for intervention by the judge or magistrate."[101]

It is perhaps understandable that His Honour is not fully informed on the day-to-day administration of prisons in N.S.W. or elsewhere. It is also possible that he genuinely entertains the belief that prison authorities are sensitive to the reasonable demands of prisoners, whether they are awaiting trial or not. However any realistic evaluation of the situation involves a rejection of his premise. The very case in which these remarks were made illustrates, of course, that they are at least occasionally inapposite. The important matter to emphasise is that one is not dealing with occasional lapses but a day-to-day problem where "security" is invoked as an umbrella notion to cover many different contingencies. Where a conflict arises between "security" and a "right" which a prisoner may have, *in abstracto*, the latter invariably collapses, albeit temporarily. This is not to imply malevolence on the part of the authorities. Such an approach seems rather to be the result of long-standing practices and

[98] Ibid. 322.
[99] Ibid.
[100] Ibid.
[101] Ibid. 320 (emphasis added).

traditions within the prison system which are doubtless founded on sincerely held (but, it is suggested, misconceived) beliefs.

But even proceeding on His Honour's assumption that there are but occasional instances where the authorities do not behave, what is the appropriate response? According to His Honour:

> "If, however, they fail to do so, or if the accused or his legal advisers consider they have so failed, there are ample opportunities for them to seek the intervention of the criminal courts in exercise of the various powers of those courts. If the Court intervenes and gives a direction as to what is to occur prior to the trial, there are *ample sanctions* if those charged with the custody were minded to disregard or neglect to obey the direction."[102]

In substance the subsequent discussion refers only to granting of bail, adjournment or discharge as possible sanctions. It is suggested that the latter would be used very sparingly indeed and that adjournments have a limited scope for operation—particularly given the speedy trial imperative that His Honour discusses elsewhere in the judgment. The grant of bail has not been used to assist a prisoner in preparation of his case though clearly release on bail, as a consequence of applying the traditional criteria, will have that incidental beneficial effect.[103] In short, the trial judge is impotent to grant the prisoner certain and effective relief.

This is, of course, the pessimistic version of this aspect of the judgment. It is, I hope, completely wrong. The alternative optimistic version is that trial lawyers in criminal proceedings now have virtually carte blanche to ensure due process in the fullest sense of the word for their client. Applications will, perhaps, rain upon criminal courts, invoking the words of Moffitt P.

That the latter possibility should be treated with at least respectable scepticism is somewhat reinforced by the ensuing portion of His Honour's judgment:

> "In practice it is not necessary to resort to these sanctions. Upon a complaint being made it has been traditional for the judge or magistrate, at or prior to a trial or other proceeding, to give directions and at times merely to make suggestions which will ensure that the accused person has adequate opportunities to communicate with his legal advisers and, in other ways, that the conduct of his defence is facilitated, subject to any reasonable requirements concerning security. It is a discretion

[102] Ibid. (emphasis added).

[103] See, for example, *Re Lawless* (Unreported Full Court of Victoria, 14th December 1977) in which the prisoner, a convicted murderer, sought bail pending appeal on the ground that it was impossible for him to confer with his lawyer. What the Court did eventually was to call the jailer in, put him in the witness box and indicate that it would be most concerned if certain facilities were not provided. This case illustrates the somewhat cumbersome method of using various criminal procedures to achieve a particular purpose and of course clearly shows that ultimately the Court is impotent as far as enforcement of its "suggestion" is concerned.

exercised, not according to strict right but in relation to the particular problems that may face an accused person, so matters such as psychiatric problems, language difficulties and the extensive nature of the evidence or documents are matters taken into consideration in determining what facilities ought to be afforded to the particular accused and his legal advisers. It has been the practice of the authorities to obey such directions or implement such suggestions without question or the need to resort to sanctions."[104]

Unfortunately as has already been mentioned, in practice the authorities may not be quite as malleable—in the hands of persuasive but unbinding directions of judges—as His Honour suggests. Indeed, I would argue that (and the American experience suggests) even if a court were to assume jurisdiction and make the relevant declaration that a real problem of enforcement would still exist. This would be so because of restricted budgetary allocations in politically unpopular directions. Moreover, the recent spate of industrial reaction by the prison officers' association clearly signal practical problems for enforcement of any measure considered unacceptable by them.[105]

In any event, the clear thrust of the decision in *Smith* reflects the well-established practice in the Anglo-Saxon legal world of taking a single incident orientation. This case is not concerned with general problem solving. The satisfaction that the individual trial judge can cope with the peccadillos which may arise in each individual case (and the reluctance to afford declaratory relief) is based, inter alia, on this premise.

It should, of course, be realised that even if one accepted the analysis offered by Moffitt P., no remedy was available to the present appellant. The prison authorities had no intention of disconnecting facilities which potentially allowed them to listen in to lawyer/client conversations and nothing the Court of Appeal said produced any change. It is difficult to imagine how the trial judge could have achieved a better result. The prisoner in question was in a particularly vulnerable position as an unconvicted prisoner in an institution which has since been condemned as "an electronic zoo" and for its potentially damaging psychological impact.[106]

One possible argument is that this case neither advances nor retards the progress of pressure for declaratory relief in litigating prison conditions because it concerned the pre-trial custody of the appellant and accordingly dealt with an issue arising out of the trial process rather than custodial conditions generally. In the face of the strong remarks of Hutley J.A. on the reluctance of the Court of Appeal to grant declaratory relief, adopted by the rest of the Court, this is a difficult task. It becomes a matter of

104 [1978] 1 N.S.W.L.R. 317, 321.
105 It may be that an as yet unexplored potential area of prison litigation will lie in restraining prison officers from unlawfully interfering with such enforcement.
106 See *Report of the Royal Commission into Prisons in N.S.W.*, op. cit., 213.

invoking the wide declaratory jurisdiction the Court has taken to itself generally over the last decade or so and insisting that (at least in relation to litigation by prisoners as to post-sentence prison conditions, for example, as to the scope of some right or limitation imposed by the *Prisons Act* 1952 (N.S.W.) or Regulations) the remarks of the Court of Appeal are only *obiter dicta.*

AN ENGLISH FOOTNOTE

It is interesting to compare a recent English decision and note the approaches there taken. That the different remedy of certiorari was there in issue is not material to the present discussion. The case of *R.* v. *Hull Prison Board of Visitors*[107] concerned a riot at Hull Prison. The applicants were charged with disciplinary offences and their cases were heard by the board of visitors, an internal tribunal similar to our visiting justice system. The board made various disciplinary awards against the applicants, including loss of remission. The applicants sought to quash the board's decision, seeking orders of certiorari from the Divisional Court on the basis that the board had failed to observe the rules of natural justice.[108]

The Divisional Court decided that although the board of visitors is in the nature of a judicial body under a duty to act judicially and prima facie subject to review by way of certiorari that jurisdiction did not extend to disciplinary proceedings in a closed body which enjoyed its own form of discipline and rules and where there was power to impose sanctions within the scope of those rules given as part of the formation of the body itself. Since the board was sitting as part of the disciplinary machinery of the prison it was not subject to control by way of certiorari. Set out below are some brief extracts from the reasoning of the Lord Justices.

Lord Widgery cites[109] with approval Lord Denning when he said:[110]

> "If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action."[111]

Cumming-Bruce L.J. stated:

> "Throughout my lifetime I have derived a growing delight as I have observed the rule of law extended to control institutions and individuals

[107] [1978] 2 All E.R. 198.

[108] In N.S.W. the alternative remedy of appealing to the District Court from the decision of the visiting justice is now available: see *R.* v. *Fraser* [1977] 2 N.S.W.L.R. 867.

[109] [1978] 2 All E.R. 198, 205.

[110] [1972] 2 All E.R. 676, 682.

[111] This passage was also cited with apparent approval by Hutley J.A. in *Smith* v. *The Commissioner of Corrective Services* [1978] 1 N.S.W.L.R. 317, 330-331, Moffitt P. and Glass J.A. agreed with the judgment of Hutley J.A.

exercising public powers by the great writ of certiorari, the use of which has been steadily extending . . . I have no hesitation in recognising the activities of a board of visitors such as is disclosed in these papers as being activities of a judicial character leading, as they do, to an adjudication, a word used in the Prison Rules 1964 themselves.

But . . . it gradually became clearer and clearer to me that as a matter of *common sense* there would be very grave public disadvantages in allowing the writ to go either to a prison governor or to a board of visitors when exercising disciplinary functions.

A prison is an organisation wherein the officers under the governor's command seek to control the inmates, a body of men who are not there voluntarily and who, *thanks to defects of character or the frustrations of life in confinement*, are liable to acts of indiscipline and resentment of authority. Those responsible for controlling penal institutions have a task that no one readily envies."[112]

The crucial feature to acknowledge is that the proceedings sought to be reviewed were unanimously conceded to be within the traditional ambit of the relevant remedy—certiorari—without placing any strain on its use. It was thus not a borderline decision (as far as this court was concerned) at the "legalistic" level. Accordingly the court was compelled to rule that there were countervailing and superior considerations for rendering the internal disciplinary proceedings inviolable. They were to be hermetically sealed from judicial scrutiny because of "common sense" (according to Cumming-Bruce L.J.). This was an unusually overt acknowledgment of a value judgment in favour of the prison authorities and their agents. The rhetoric about "very grave public disadvantage" arising if such review were to be allowed only thinly veiled the direct reference by all judges[113] to the problems that such a right of review might cause for prison governors.

There is no attempt to canvass the reasons for the original disturbances at Hull Prison or indeed why such incidents seem to be an inevitable concomitant of penal institutions. Strictly speaking, according to orthodox convention, indeed, law, such an enquiry would be beyond power. This does not prevent Cumming-Bruce L.J. from making a remarkable throw-away line that "acts of indiscipline and resentment of authority" are likely to occur "thanks to defects of character or the frustrations of life in confinement". The judicial utterances as to "defects of character" lend credence to widely condemned criminological theory. The alternative explanation tacitly acquiesces in currently existing prison conditions (however deplorable they might be).

The decision was reviewed on appeal,[114] the Court of Appeal holding that the Divisional Court had been in error in refusing to accept jurisdiction.

[112] [1978] 2 All E.R. 198, 205 (emphasis added). Park J. agreed with the reasons for both judgments.

[113] Directly by Widgery L.C.J. and Cumming-Bruce L.J. Park J. agreed with both judgments.

[114] *R.* v. *Hull Prison Board of Visitors ex parte St. Germain and Others* [1979] 1 All E.R. 701.

Certiorari could be granted because the board of visitors when sitting to hear disciplinary charges *were* exercising judicial functions and were not merely engaged in day-to-day administration of the prison. According to the majority, the unreviewable "on the spot discretions" involved in the day-to-day administration of prisons included decisions of the governor.[115]

However, Megaw and Waller L.JJ. were of opinion that although proceedings of boards of visitors in respect of disciplinary offences are exposed to judicial scrutiny, such interference will only be justified if there has been some failure to act fairly, having regard to all relevant circumstances, and such unfairness can reasonably be regarded as having caused a substantial as distinct from a trivial or merely technical, injustice which is capable of remedy.

FROM JURISDICTION TO MERITS?

The upshot, then, was that the English Court of Appeal removed the jurisdictional bar but allowed plenty of room to manoeuvre on the merits. This accords with trends in the American and at least some Australian cases.

If this is so the new battleground for prisoner litigants may well be the exercise of the court's discretion in granting the relief sought rather than the surmounting of a threshold hurdle (assuming all the while that there is some right capable of being enforced!).

The remarks of Shaw L.J. in the *Hull* case are interesting:

> "Thus despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. Now the rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attentuated those rights and liberties may be as the result of some punitive or other process. . . . Once it is acknowledged that such rights exist the courts have function and jurisdiction."[116]

It was irrelevant, for example, that redress, partial or otherwise, was available elsewhere. In this particular case, reference had been made to the ability to petition the Secretary of State pursuant to the rules made under the *Prison Act* 1952 (U.K.). "Indeed all the arguments advanced

[115] Whether the disciplinary actions of a governor were reviewable was expressly left open by Waller L.J. The qualification he imposed, however, points to a very limited jurisdiction: "Nevertheless I find it hard to visualise any circumstances in which certiorari would lie against the governor." Ibid. 722. Further authority against the proposition that a prison governor's decision is reviewable is to be found in: *Daemar* v. *Hall* an unreported decision of the New Zealand Supreme Court (McMullin J.) and *Martineau and Butters* v. *Matsqui Institution Inmate Disciplinary Board* (1977) 74 D.L.R. (3d) 1. Both of these decisions were relied on by Megaw L.J. in the *Hull* case.

[116] [1979] 1 All E.R. 701, 716.

in opposing their appeals appeared to me to go to discretion and not jurisdiction."[117] Again the shift from threshold bar to the merits question is clearly articulated. Due process rights are accorded and pyrrhic victories are in the offing.

CONCLUSION

Non-intervention was clearly the past attitude of the courts. This largely reflected the philosophy that the prison administration should have the flexibility to resolve day-to-day problems. Such wide discretionary power has led to scope for considerable abuse by officials and, indeed, actual abuse at an institutional level. This has been thoroughly documented, for example, in the Nagle Report.

More recently there have been several factors which have prompted judicial scrutiny of the activities of prison administrators at the instigation of prisoner litigants. First, more information about the actually prevailing circumstances in prisons and particularly relating to sustained institutional abuse of power referred to above. Secondly, organised political pressure by prisoners and their external supporters such as prison action groups. Thirdly, a demise in the rehabilitation ethic and a search for an alternative rationale by correctional administrators which is not nakedly punitive, has led to adoption of the "justice model"/"due process" formulae. Due process features accompanying the criminal process such as rights of judicial review of administrative action are being assimilated to the prison context. Generalised standards of fairness are being, albeit slowly, embodied in the prison context.

It is not intended to suggest that litigation by prisoners is the most effective way to cure the ills of the present prison system. Nor is it expected that, if there were to be a positive approach by the court favouring prisoner plaintiffs, an avalanche of litigation would flow to the courts. It is simply submitted that such an approach would constitute a constructive ancillary mechanism to ensure a modicum of fairness behind prison walls and thus assist in reducing the frustration and discontent which very legitimately exists at present.

Judicial intervention is taking place in two forms—direct and indirect. Direct intervention has involved the grant of declaratory relief to prisoner litigants. Indirect intervention has taken place in the context of judicial expressions of opinion about prison conditions in court proceedings concerning other issues.

The current attitudes of the courts reflect conflicting trends. This is epitomised by differing opinions in the High Court. Some expressions of opinion by Barwick C.J. amount to a retreat from intervention rather

[117] Ibid. 717.

than mere non-intervention. On the other hand, Murphy J. has indicated that he favours a positive and creative approach to intervention relying, where appropriate, on international standards to resolve ambiguity. It seems that, on balance, courts in Australia, England and the U.S. are acknowledging that jurisdictional bars should be lifted and that the merits of the case should be considered. The danger of courts appearing to intervene by this change of policy whilst effectively refusing relief on the merits in the majority of cases has been noted. This is particularly a problem in Australia given that the remedies which prisoners are likely to rely on will largely be discretionary and capable of rejection by reason of, for example, impracticality of court supervision, theoretical availability of alternative remedies (e.g. ombudsman) and costs of implementation. Further limiting factors specifically arise in the Australian context:

(a) the absence of constitutionally entrenched rights.

(b) the paucity of other rights (statutory or common law) and the unwillingness of the courts to give the fullest possible effect to such rights as exist.

(c) lack of appropriate legal aid services for prisoners.[118]

(d) official resistance to such court orders as are made—that is, enforcement problems (i) economic arguments, (ii) industrial action.[119]

Despite these severe limitations it is suggested that judges have a restricted but potentially vital role to play. Because of the documented abuse of executive power, the tardiness of legislative response and the peculiar vulnerability of the prisoner litigants, judges have a particularly onerous responsibility before them. It remains for them fully to assume such responsibility and, within the well-recognised limits permissible for such activity, to exercise it creatively and positively in favour of prisoner litigants.

[118] It is significant indeed that Australian developments have been largely dependent on the initiatives of prisoners either alone or aided by the voluntary provision of legal service by barristers, solicitors, law students and others. Needless to say, this ad hoc system of aid is not conducive to the provision of a systematic and fully effective legal service to the community of prisoners for the purpose of securing their rights in prison.

[119] This problem is clearly acknowledged by Hutley J.A. during argument in *Smith's* case (supra) where his Honour said at p. 7 of the transcript: "I have known of a case where a public body disregarded a declaration and this directed at the Commissioner for Corrective Services. It may involve great difficulties; the prison warders may refuse to carry out any such direction; how then would this court possibly enforce it? The limits of what can be done by a declaration are very real." Counsel's response to this was that injunctions are available in aid of a declaration and the supervision question went to the merits rather than jurisdiction to grant relief.