ADMINISTRATIVE SEGREGATION OF PRISONERS: POWERS, PRINCIPLES OF REVIEW AND REMEDIES

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[This paper examines the administrative segregation of prisoners. The author explains the statutory powers used by gaol officials to place prisoners into administrative segregation. After a background discussion on the attitude of the common law to the idea that prisoners might possess some level of residual liberty which is enforceable against gaolers, the author considers the various avenues by which a prisoner placed in administrative segregation may seek a judicial remedy. The article considers the general principles by which judicial review applications are resolved and also specific grounds of review, such as the failure to meet procedural requirements and unreasonableness. The author concludes that prisoners have little prospect of obtaining relief via judicial review.]

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I INTRODUCTION

Whilst they are physically removed from society, prisoners are undoubtedly not outside the protection of the law. It is well established that 'a convicted prisoner, in spite of his [*sic*] imprisonment, retains all civil rights which are not taken away [by statute] expressly or by necessary implication'.[1] When prisoners are subject to unlawful treatment they may seek relief like any other person who is aggrieved by the action of a public official. An immediate example is prison discipline. In this area courts have repeatedly stated that when a prisoner is charged with a prison offence, the statutory procedures laid down for the resolution of offences must be adhered to strictly and the rules of procedural fairness must be observed by prison administrators. Any failure to do so will form a sufficient basis upon which a prisoner may be granted a remedy by way of an application for judicial review.[2] Not every aspect of prison administration is necessarily amenable to judicial scrutiny. Many recent decisions have declared that whilst the administrative actions of prison managers might be *prima facie* open to review, courts will normally decline to entertain applications that involve questioning managerial decisions. So long as such decisions of a non-disciplinary character, like decisions in relation to transfers and classification, appear *intra vires*, courts are extremely reluctant to query the exercise of these administrative discretions.[3]

Administrative segregation is a form of treatment which cannot be easily categorised as either disciplinary or administrative in nature. The many adverse or punitive qualities of administrative segregation enable it to be viewed as a form of punishment. Administrative segregation involves removing prisoners from the general prison population and placing them under a special regime which involves great hardships. Prisoners are normally placed in a separate wing and their contact with the general prison population is either prohibited or greatly restricted. There are often further restrictions on association between individual prisoners or categories of prisoners within administrative segregation. These physical restrictions placed upon prisoners are an important aspect of administrative segregation. Prisoners are, in addition, subject to a regime in which they are systematically denied, either wholly or partially, various forms of favourable

[1] *Raymond v Honey* [1983] 1 AC 1, 10 (Lord Wilberforce).

[2] See, eg, *Kuczynski v R* (1994) 72 A Crim R 568, 589 (Owen J): '[n]atural justice must be afforded to prisoners accused of breaches of prison offences. The courts will not hesitate to intervene to protect the right of a prisoner where he [*sic*] has been denied a hearing according to law under accepted principles'. See also *Ex parte Napier v Executive Director of Corrective Services* (WA Supreme Court (Full Court), Seaman, Anderson and Scott JJ, 15 August 1994) 7 ('*Napier*'): '[i]t can now not be disputed but that in general terms proceedings ... under the *Prisons Act* can be subject to prerogative writ.' See also *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 ('*Leech*'), 562 (Lord Bridge), 578 (Lord Oliver); *R v Deputy Governor of Parkhurst Prison; ex parte Hague; Weldon v Home Office* ('*Hague & Weldon*') [1992] 1 AC 58, 155 (Lord Bridge, with whom the other Lords agreed).

[3] *McEvoy v Lobban* [1990] 2 Qd R 235 ('*McEvoy*'), 236-7 (Macrossan CJ), 241 (Thomas J). In that case an exercise of managerial powers for purposes of security and good order of prison or safety of inmates and staff was generally not reviewable even though the exercise of the power might affect the living conditions of prisoners by removing or altering their privileges. Provided that the power was exercised for a proper purpose the Court would not intervene. See also *Gray v Hamburger* [1993] 1 Qd R 595 ('*Gray*').

treatment. They are normally denied those privileges which necessarily involve the company of the general prison population (such as team activities and working with others), and spend more of their time either locked in their cells or confined to small areas, and have less access to visitors, phone calls, recreational activities, work opportunities and educational programs.

There are, however, some features that distinguish administrative segregation from punishment. The two forms of treatment are executed through the exercise of different statutory powers. Another important difference is that a disciplinary penalty may normally be inflicted upon a prisoner only upon completion of the legislative procedures for the hearing and resolution of disciplinary charges. The statutory requirements which attend the exercise of disciplinary powers are usually very detailed and contain many procedural protections for the benefit of prisoners, whereas the statutory powers to place a prisoner in administrative segregation contain no such requirements. Penalties for disciplinary offences may only be imposed after a prisoner has been convicted of an offence. Administrative segregation, by contrast, may be enforced without proof of any disciplinary infraction by a prisoner. The most common type of disciplinary penalty is the removal, subject to a statutory maximum period, of one or more of a prisoner's privileges.[4] Other penalties may include fines,[5] reprimands[6] or some form of restitution.[7] Administrative segregation, by contrast, is characterised by a combination of physical restrictions and the systematic restriction of privileges. The power to place a prisoner in administrative segregation is also normally subject to time limits, which are detailed below, but the segregation can be renewed using the same facts which formed the basis of the original order. Disciplinary penalties are subject to strict time limits and, in the absence of a new offence, cannot be renewed or supplemented upon expiry.

Prison managers often assert that administrative segregation is not a punishment even though prisoners under administrative segregation are often treated in a fashion very similar to those under disciplinary segregation. The acceptance of this assertion by the courts has been to the detriment of prisoners. When segregation is viewed as an administrative action rather than a disciplinary penalty, prisoners have found it very difficult to persuade courts to entertain applications for judicial review of their placement in segregation. The decisions on administrative segregation have not insisted upon the rigid adherence to procedural requirements that is required in disciplinary proceedings. Accordingly, prisoners have had little success when seeking to query the grounds upon which a segregation decision was made. This allows an important area of prison life, in which prisoners face very severe treatment, to go largely unexamined by judicial review.

The aim of this article is to broadly examine the law surrounding the review of the administrative segregation of prisoners in Australia. It looks at the nature of the powers that are used to segregate prisoners on administrative grounds, how

[4] See, eg, Prisons (General) Regulation 1995 (NSW) reg 170.
[5] See, eg, Prisons Act 1981-1995 (WA) s 79(a)(ii).
[6] See, eg, Corrective Services Act 1988-1994 (Qld) s 98(3).
[7] See, eg, Prisons Act 1981-1995 (WA) s 78(1)(e).

courts categorise those powers and the effect they have upon prisoners, whether courts view potential grounds for remedy broadly or narrowly, the principles upon which applications are considered and in what instances relief can be granted. The focus will be on those applications that seek relief via judicial review.[8]

II LEGAL AUTHORITY FOR SEGREGATION AND SEPARATE TREATMENT

A *The Source of Power to Order Segregation*

In most Australian jurisdictions the power to order segregation of prisoners is a power conferred by statute or subordinate legislation on prison governors and/or the head of the prison system. The circumstances in which the power is exercisable in each of the states is expressed in very general terms.

Victoria has a relatively simple regulation whereby a prisoner may be separated from others upon order by the Director-General of Corrections.[9] In New South Wales, the Governor of a prison or the Commissioner of Corrective Services may order the segregation of a prisoner.[10] Tasmania's legislation also allows for the 'separate treatment or separate restraint' of prisoners by the superintendent of a prison.[11] The Northern Territory legislation contains no express power to segregate prisoners, but the general power of the Director of Correctional Services to take whatever precautions he or she thinks fit to maintain the security and good order of a prisoner, prison or police prison is sufficient to enable segregation.[12] In Western Australia, the Chief Executive Officer of Corrective Services is empowered to order segregation,[13] as is South Australia's Chief Executive Officer of Correctional Services.[14] In Queensland, the General

[8] The emphasis of the discussion on judicial remedies is not intended to suggest that there are no other means by which prisoners may pursue grievances in relation to administrative segregation. In all Australian jurisdictions the Ombudsman provides a useful means by which prisoners can raise complaints about their treatment. It is not proposed to pursue this avenue here, mainly because of the lack of availability of information about the individual cases investigated by Ombudsmen. Furthermore, an examination of the annual reports of most Ombudsmen reveals that they undertake a style of review of complaints regarding administrative segregation that differs greatly from the judicial decisions which form the basis of this article. A proper examination of the role of the Ombudsman in this area requires detailed empirical study, which is beyond the scope of this work. Compensatory remedies are also excluded from the discussion, though on a more pragmatic basis. In the great number of judicial decisions, articles, official reports I have read, and discussions I have had with correctional officials working in this area, I have never heard of an attempted application for compensation by an improperly segregated prisoner.

[9] Corrections Regulations 1988 (Vic) reg 53.

[10] Prisons Act 1952 (NSW) s 22(1).

[11] Prison Regulations 1985 (Tas) reg 33.

[12] Prisons (Correctional Services) Act 1980 (NT) s 60. It is clear that the widely framed powers of management contained in correctional statutes confer a great deal of discretion upon the officer vested with the power. This power can support the administration of adverse treatment upon a prisoner, as long as the treatment is consistent with the general administrative duties incumbent upon the officer: *Binse v Governor, HM Prison Barwon* (1995) 8 VAR 508 ('*Binse*').

[13] Prisons Act 1981-1995 (WA) s 43(1).

[14] Correctional Services Act 1982 (SA) s 24(2).

Manager of a prison may order the segregation of a prisoner, but any periods extending beyond a week must be approved by the Corrective Services Commission.[15]

Commonwealth prisoners are not subject to separate legislation but are instead subject to the provisions, including those relating to segregation, of the state in which they are imprisoned. This arrangement is made possible by section 120 of the Australian Constitution which provides that each state 'shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences'. This provision may be read as empowering, but not obliging, the Commonwealth to devise a separate set of rules for Commonwealth prisoners.[16] The Commonwealth could also create its own prisons, through the exercise of its executive and incidental powers, but it has chosen to use state prisons rather than establish a parallel federal prison system. Consequently, Commonwealth offenders may legitimately be subjected to the differing prison regimes and practices of the states. The Commonwealth's use of state prisons is different to its investing state courts with federal jurisdiction, in that as part of the 'bargain' the Commonwealth may, but is not obliged to, simply take state institutions as it finds them.[17] Constitutional considerations aside, such an arrangement is preferable because it avoids the potential resentment and confusion in management that would be generated by enforcing two different regimes within one prison for similar classes of prisoners.[18]

[15] Corrective Services Act 1988-1994 (Qld) s 39(2)(5). The English provision is similar, but limits Governors to authorising periods of three days before a higher approval is required: Prison Rules 1964 (Eng) cl 43.

[16] The Commonwealth Parliament has no specific power to legislate for the creation of either federal offences or the treatment of federal offenders. The power of the Commonwealth, in this regard, arises from the incidental power to make laws with respect to its enumerated powers: *Leeth v Commonwealth* (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ) ('*Leeth*'). It is submitted that federal power to create a separate system of management regulations for federal offenders held in State prisons would flow from both the executive and incidental powers in the Australian Constitution, ss 51(39), 61, and the inherent powers that arise by virtue of the Commonwealth's status as a mature and sovereign nation. See generally Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) chh 2, 3.

[17] *Leeth* (1992) 174 CLR 455, 466-9 (Mason CJ, Dawson and McHugh JJ). Justices Deane and Toohey, who dissented, also felt that s 120 envisaged that the conditions of confinement of a person imprisoned could vary between the States. Their Honours felt that the doctrine of legal equality, which might otherwise preclude such disparity of treatment, would permit some difference in the treatment of federal offenders as a 'necessary concomitant of the use of State prisons to punish Commonwealth offenders': (1992) 174 CLR 455, 490. Chief Justice Mason, Dawson and McHugh JJ contrasted this arrangement with the Commonwealth's investiture of State courts with federal jurisdiction: (1992) 174 CLR 455, 469. Their Honours noted that in that arrangement the Commonwealth is bound to take state courts as it finds them, notwithstanding any variations between the States: *Le Mesurier v Connor* (1929) 42 CLR 481; *Kostis v Kostis* (1970) 122 CLR 69, 88, 109; *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 64; *Harris v Caldine* (1991) 172 CLR 84, 92, 109, 117, 138, 158. However, it is submitted that the only decision which provides *clear* support for the proposition of Mason CJ, Dawson and McHugh JJ is *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 64 (Mason J) where his Honour stated 'It has frequently been said that the Commonwealth must take the organization of the State court as it is found.'

[18] In the *Leeth* decision, a majority of the High Court was mindful of the problems that would be created if state and federal prisoners held in the same gaol were subject to different regimes of treatment, particularly in relation to the calculation of release dates, on the basis of whether they

B *The General Purposes for Which Prisoners May be Segregated*

The legislative schemes of South Australia and Tasmania do not provide any criteria by which the segregation of prisoners may be ordered. The South Australian Act confers an 'absolute discretion' upon the Chief Executive Officer of the Department of Correctional Services to place any prisoner or class of prisoners in whatever part of a prison or under any regime or day to day activity as he or she deems expedient.[19] Such a provision is unusual in its description of the discretion as absolute and it presents an obstacle to any legal challenge to the place or mode of confinement within a prison.[20] Most states provide criteria which, although worded in slightly different language, appear very similar. The Queensland statute allows segregation to be administered for either the 'security or good order' of the prison or for the safety of the prisoner concerned.[21] The Victorian legislation allows segregation on the grounds that the Director-General of Corrections deems it to be desirable or necessary for the safety of the prisoner or others, or for the security, good order or management of the prison.[22] The Western Australian legislation states that prisoners may be segregated for the 'purpose of maintaining good government, good order or security in a prison'.[23] The power in the Northern Territory legislation is expressed to be exercisable in order to maintain the security and good order of a prisoner or prison.[24] New South Wales has recently amended the Prisons Act 1952 (NSW) to provide extensive legislative guidance on the exercise of the power to segregate and clear procedural requirements. The power to order the segregation of a prisoner is expressed in wide terms. A Governor of a prison or the Commissioner of Corrective Services ('Commissioner') may place a prisoner in segregation if he or she believes the safety of that prisoner, or any other prisoner, or a guard, or any other staff member, or the security or good order of the prison is threatened.[25] These criteria, like those of other jurisdictions, could cover almost any situation.

C *Specific Grounds for Segregation*

At this point it should be stressed that there are also other powers to order segregation for specific reasons, such as medical isolation. This allows for the

were state or federal offenders: *Leeth* (1992) 174 CLR 455, 466 (Mason CJ, Dawson and McHugh JJ), 472 (Brennan J). Justice Gaudron, who dissented, was also mindful of the need to avoid disharmony amongst prisoners: (1992) 174 CLR 455, 499.

19 Correctional Services Act 1982 (SA) s 24(2).

20 *Fricker v Dawes* (1992) 57 SASR 494, 504 (Mullighan J) ('*Fricker*'). The broad rule of judicial review refusing to overturn decisions merely because the Court would have decided otherwise had it been vested with the relevant power is part of a wider refusal to review factual merits rather than legal regularity. Justice Mullighan felt the creation of a discretion described as 'absolute', conferred upon a single senior administrator, strengthened this presumption.

21 Corrective Services Act 1988-1994 (Qld) s 39(2).

22 Corrections Regulations 1988 (Vic) reg 53(1)(a).

23 Prisons Act 1981-1995 (WA) s 43(1).

24 Prisons (Correctional Services) Act 1980 (NT) s 60.

25 Prisons Act 1952 (NSW) s 22(1). This provision was amended in 1993 as part of a package of amendments to the segregation provisions.

separation of prisoners, usually when they are suffering from an infectious or contagious condition which may endanger or be transmitted to others.[26] Other powers are expressed in a more general manner, but may clearly be read to support isolation on health grounds.[27] Sometimes states use these broad powers to segregate Human Immunodeficiency Virus ('HIV') positive prisoners as a matter of practice rather than discretion.[28] Tasmania creates a specific power to segregate HIV positive prisoners and subjects them to special treatment regimes. This power is in addition to a more general power to segregate on medical grounds.[29] The precise limits of permissible treatment for HIV positive prisoners have not been considered in any judicial review application. However, there have been some equal opportunity cases which have decided that the provision of many amenities in prison, such as access to recreational facilities and work programs, are clearly 'services' for the purposes of anti-discrimination legislation.[30] It follows that any attempt to enforce an unnecessary punitive or restrictive regime on prisoners segregated due to their HIV status will certainly contravene anti-discrimination legislation.[31] However, this does not necessarily prohibit the separation of HIV positive prisoners provided they suffer no loss of privileges or lesser access to services than that enjoyed by other prisoners.

[26] See, eg, Prisons (Administration) Regulation 1989 (NSW) reg 19. However, NSW has ended the compulsory testing of prisoners for HIV: reg 14A of the Prisons (Administration) Regulation 1989 (NSW). The explanatory note attached to that amendment confirms that compulsory testing is to end in NSW. The renumbered version of that provision in Prisons (Administration) Regulation 1995 (NSW) reg 10(1)(b) provides for testing on a voluntary basis.

[27] Prisons (Correctional Services) Act 1980 (NT) s 72 (Director shall comply with directions of medical officer on health of prisoner which could include a direction for separation); Prisons Regulations 1982 (WA) reg 54C (permanent head may confine unspecified categories of prisoners to separate parts of prison with special regime as necessary for reasons of management, control or security); Correctional Services Act 1982 (SA) s 36(b)(c) (CEO may segregate a prisoner in the interests of the safety or welfare of that prisoner or in the interests of protecting other prisoners); Corrections Regulations 1988 (Vic) reg 53(1)(a) (Director-General can separate prisoners for their own safety or that of others, or for the security, good order or management of the prison).

[28] John Godwin *et al*, *Australian HIV/AIDS Legal Guide* (2nd ed, 1993) 272 lists WA and the NT as the only jurisdictions which compulsorily segregate HIV positive prisoners. NSW, SA and Tasmania integrate such prisoners into the mainstream prison population, while SA and Victoria enforce a routine of partial integration. The 'partial integration' practiced in Victoria involves housing HIV positive prisoners in separate units but providing them with full access to the normal range or activities and programs available at that location: Victoria, Department of Justice, *Prison Profiles* (1994) 37. On testing for and segregation of prisoners with HIV, see, eg, Ian Malkin, 'Tort Law's Role in Preventing Prisoners' Exposure to HIV Infection While in Her Majesty's Custody' (1995) 20 *Melbourne University Law Review* 423, 456-9.

[29] Prison Act 1977 (Tas) s 17C(a) allows the Director to isolate or keep HIV positive prisoners in restricted access after their compulsory testing under s 17A.

[30] *Jolly v Director-General of Corrections (Vic)* (1985) EOC ¶ 92-124 (entry into prison by visitor falls within scope of 'access to services'); *Clarkson v Governor of Metropolitan Reception Prison* (1986) EOC ¶ 92-153 (the Director-General of Corrections provides 'services' to prisoners for the purposes of equal opportunity legislation).

[31] *Hoddy v Executive Director, Department of Corrective Services* (1992) EOC ¶ 92-397. The Western Australian Equal Opportunity Tribunal ruled that if the prison statute allows certain benefits such as work opportunities and recreational facilities to be accorded to prisoners and, as a matter of practice, this happens then they are services for the purposes of equal opportunity and cannot be removed or reduced on a ground contrary to discrimination legislation. Furthermore, if a state attempts to waive anti-discrimination provisions in this area, federal prohibitions against discrimination on the basis of HIV status will still apply.

There are also powers which permit segregation for punitive reasons. New South Wales legislation allows for prisoners to be confined to their cells for up to 28 days as a disciplinary penalty for certain offences brought before a visiting justice.[32] Queensland legislation permits disciplinary segregation for up to seven days as a penalty for some major breaches of prison discipline.[33] Western Australian legislation allows a visiting justice to order segregation on disciplinary grounds for up to seven days for various minor breaches of prison discipline subject to an overall limit of 21 days.[34] Victorian legislation confers no express power authorising segregation for disciplinary reasons, but the wide language of the general segregation power could be seen as authorising disciplinary segregation. Likewise, Tasmania does not seem to create an express power to order disciplinary segregation, but elsewhere there are provisions dealing with the transfer, from one part of a prison to another, of prisoners who are undergoing punishment.[35] Neither South Australia nor the Northern Territory's legislation clearly authorise disciplinary segregation, but one disciplinary penalty permitted by both jurisdictions is the removal of prisoners from working in association with others for short periods.[36]

D *Statutory Procedures Which Must be Followed*

The Western Australian legislation specifies that all segregation orders must be made in writing and must specify the duration of segregation.[37] When the Chief Executive Officer makes an order, he or she is bound to inform the Minister for Corrective Services.[38] The Queensland legislation also requires that all segregation orders be made in the form of an instrument which must specify the conditions under which the prisoner is to be kept.[39] In New South Wales all segregation orders must be in writing and must state the grounds on which the decision is made.[40] When a prison governor makes an order, the Commissioner must be

32 Prisons Act 1952 (NSW) s 26B(1)(c)

33 Corrective Services Act 1988-1994 (Qld) s 101(6)(c).

34 Prisons Act 1981-1995 (WA) s 78(1)(a)-(c), (2).

35 Prison Regulations 1985 (Tas) reg 34.

36 Prisons (Correctional Services) Act 1980 (NT) s 31(c) (Director can order prisoner not work in association with others for up to 14 days as a disciplinary penalty); Correctional Services Act 1982 (SA) s 42A(2)(c) (up to seven days for minor breaches of regulations heard by manager in a summary fashion), s43(2)(c) (up to 14 days for minor breach of regulations decided by prison manager after inquiry), 44(2)(e) (up to 28 days for matters heard by visiting tribunal).

37 Prisons Act 1981-1995 (WA) s 43(1).

38 Ibid s 43(2).

39 Corrective Services Act 1988-1994 (Qld) s 39(3).

40 Prisons Act 1952 (NSW) s 22(7). In one sense this provision is not a radical reform because prisoners are often told why they have been segregated, but most of the cases show that these reasons are very brief, often to the point that a sensible explanation for the decision cannot be gleaned. Normally, a more detailed explanation is provided upon lodgment of an application for judicial review. The NSW requirement may provoke a change in the style and content of the reasons given for segregation decisions because a statutory requirement to provide reasons normally generates a better standard of reasons compared to instances where no such obligation exists but cursory ones are nonetheless given. As one commentator has noted '[T]he statutory imposition on decision-makers of an obligation to provide reasons for their decision has been a great fillip to modern judicial review': Peter Bayne, 'Reasons, evidence and internal review' (1991) 65 *Australian Law Journal* 101. Cases concerning the requirement to provide reasons for

notified immediately, and when the Commissioner extends an order which totals more than six months, the Minister must be notified as soon as practicable.[41] Whenever a prisoner is segregated, the Governor must ensure, as soon as practicable, that the prisoner is provided with information about his or her statutory rights of review concerning any decision made by the Commissioner to extend the segregation.[42] The statutes of the remaining jurisdictions contain no specific procedural requirements governing the making of segregation orders.

E *Time Limits on Segregation*

The legislation in the Northern Territory, South Australia, Tasmania and Victoria does not place any time limits on the period for which a prisoner may be placed in segregation. Western Australia's legislation allows segregation for periods of up to 30 days but does not prevent renewal of segregation orders.[43] Queensland's legislation allows the general manager of a prison to order segregation, entitled 'special treatment', for periods of up to seven days.[44] There is no express limit on the length of any additional periods, but any additional periods must be approved by the Corrective Services Commission.[45] The New South Wales legislation directs that segregation orders be made for a standard period of not more than two weeks.[46] This period may be extended to three months by an express order and there is no express restriction on the renewal of such orders.[47]

F *Standards to be Observed*

The conditions that may be lawfully imposed in segregation units are equally variable. South Australian legislation allows almost any form of separate treatment to be developed and administered, with no guiding criteria.[48] The Western Australian legislation does not outline minimum standards of treatment for the general prison population but requires at least one hour of daily exercise

decisions under s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) demonstrate the courts will interpret such provisions liberally. See, eg, *Ho v King* (1994) 34 ALD 510. See also *Allen Allen & Hemsley v Australian Securities Commission* (1992) 27 ALD 296, 304 (Ryan J) where his Honour said that a statement of reasons must include not simply the facts upon which the decision was based but also an indication of how those facts were considered in the process of reasoning. A similar attitude has been adopted with respect to the statutory right to reasons under the Administrative Law Act 1978 (Vic) s 8: *Masters v McCubbery* (1995) 9 VAR 164. See also the general obligation to provide reasons for administrative decisions under Judicial Review Act 1991-1995 (Qld) ss 31-4.

41 Prisons Act 1952 (NSW) s 22(2), (A)(1).

42 Prisons (General) Regulation 1995 (NSW) reg 27.

43 Prisons Act 1981-1995 (WA) s 43(1). Provision for the separation of classes of prisoners may be made: Prisons Regulations 1982 (WA) reg 54C.

44 Corrective Services Act 1988 (Qld) s 39(1), (5).

45 Ibid s 39(5). There is, however, an administrative practice to review the case of prisoners held in segregation 'every two months or so': *Kranz v Krikorian & Qld Corrective Services Commission* (Queensland Supreme Court, Byrne J, 4 March 1995) 5.

46 Prisons Act 1952 (NSW) s 22(2).

47 Ibid s 22(4), (5), (6).

48 Correctional Services Act 1982 (SA) s 24(2)(b) allows for the regulation of 'work, recreation, contact with other prisoners or any other aspect of the day-to-day life of prisoners.'

and fresh air for prisoners in segregation, and a cell of sufficient lighting and ventilation so that a prisoner may be confined 'without injury.'[49] Tasmanian legislation only mandates that daily exercise be provided; all other features of segregation may be determined by the relevant prison superintendent, though no statutory guidance is given.[50] Victoria does not establish a clear regime for segregation, but the statutory charter of prisoners' rights mandates that visits, and the sending and receipt of mail, should continue in all cases, as should the proper provision of food, clothing, health care etc.[51] The *Australian Guidelines* do not define an appropriate regime or minimum standards for segregation but do establish a list of qualities unacceptable for all punishments. Those relevant to segregation are: prolonged solitary confinement; sensory deprivation; placement in a darkened cell; and anything cruel, inhuman or degrading.[52]

Both Queensland and New South Wales legislation specify, in non-mandatory terms, that prisoners who are segregated should not undergo any further derogation from the statutory minimum standards and normal regimes and privileges than is necessary to achieve and maintain segregation.[53] In Queensland, the conditions of a prisoner in segregation can be monitored by inspectors whose statutory powers give them unrestricted access to all parts of prisons and all prisoners being held.[54] However, those officers have no powers to determine the conditions under which prisoners are kept. New South Wales legislation attempts to enforce the non-derogation of conditions for segregated prisoners by prohibiting the use of restraints for punitive purposes, solitary confinement, torture, any

49 Prisons Act 1981-1995 (WA) s 43(3). A similar provision applies in respect of prisoners who are confined as punishment: s 82. A prisoner in punitive confinement may only be detained in a cell that has been certified by the Director to be 'fit for that purpose': Prisons Regulations 1982 (WA) reg 68. However, the Regulations contain no information on the meaning of this phrase. In respect of prisoners held in administrative segregation, the Regulations simply state that prisoners will be 'subject to the regimen set down in the order' of segregation: reg 72. The location of this regulation in the part which deals with punitive segregation implies that punishment cells certified under reg 68 will also be used to hold prisoners in administrative segregation. The Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2nd ed, 1994) ('*Australian Guidelines*') 5.25-6 are similarly vague.

50 Prison Regulations 1985 (Tas) regs 34-5. This is in keeping with the habit of that state's scheme to express most of the provisions about the treatment of prisoners in language that emphasises managerial power over the issue, rather than establishing any clear or mandatory standards. Regulation 14 is representative of such an approach, specifying that '[a] prisoner ... shall at all times during the day be properly dressed in such clothes as the superintendent may direct'.

51 Most of the other rights listed in s 47 of the Corrections Act 1986 (Vic) have no direct bearing on conditions applicable to segregation.

52 *Australian Guidelines*, above n 49, 5.33. The international documents upon which the *Australian Guidelines* are based have been litigated in the context of regimes using torture and/or political punishment rather than the situations typically encountered in Australia: Nigel Rodley, *The Treatment of Prisoners Under International Law* (1987) 71-95. Such basic differences mean that international law cases and the attendant academic discussion have little practical guidance to offer for the interpretation of the *Australian Guidelines*.

53 Prisons Act 1952 (NSW) s 22(3) (no deprivation of any rights or privileges except those determined by the Commission generally, or in particular cases). This power was exercised to greatly reduce privileges in the (now closed) high security unit at Goulburn Correctional Centre: NSW Ombudsman (1991/2), *Seventeenth Annual Report*, 128-31; Corrective Services Act 1988-1994 (Qld) s 39(4) (no forfeiture of privileges if practicable, but, under s 96(2), the Commission has a power to make rules about the forfeiture of privileges by prisoners in segregation).

54 Corrective Services Act 1988-1994 (Qld) s 29(1)(a)(b). The office and functions of inspectors is created in Division 4 of that Act.

treatment that is cruel inhuman or degrading, and any form of treatment that could reasonably be seen as likely to adversely affect a prisoner's mental or physical health.[55] Whilst this provision is applicable to the treatment of all prisoners at all times, it may also be seen to set minimum guidelines for segregation. Governors are also obliged to keep records of any segregated prisoner who is deprived of any right or privilege.[56]

The extensive New South Wales regulations, which prohibit many forms of treatment in segregation, can be explained by historical examples of the misuse of segregation in that state. A good example arose several years ago in the high security wing of Goulburn Correctional Centre.[57] That wing was a standard segregation unit until, by Ministerial order, privileges were drastically reduced in pursuit of a three stage behavioural modification program for 'troublesome' prisoners. Limited association between prisoners was allowed but otherwise they endured segregation with no visits, few letter or phone call rights, no magazines, journals or television, greatly restricted personal property rights and almost no exercise periods. There was supposed to be a system of gradually increased amenities (to reward prisoners for behavioural improvements) but, in practice, the stages were hard to differentiate. Any incentive for prisoners to cooperate and move through the stages was thus removed. There was little effort to articulate a working philosophy for the program, beyond glib platitudes, or to train staff to implement the aims of the unit, which were, in any event, undefined. In effect the regime was a sanitised label for a pointless and harsh system of punitive detention that was enforced on prisoners without proof of specific disciplinary infractions or any regard to the formal time limits on segregation. After a scathing review of the system by the Ombudsman, the findings of which the Commissioner did not substantially contest, the wing was closed.[58]

G *Administrative Review of Segregation Orders*

The Northern Territory, South Australian, Tasmanian and Victorian statutes contain no provisions for any administrative review of segregation orders. However, the Northern Territory statute expressly subjects the Director of Correctional Services to Ministerial directions. This means a prisoner could simply write to the Minister seeking a reconsideration of his or her segregation.[59] In the absence of any statutory appeal provision, the Minister would not be obliged to entertain an application for review, but if the Minister did consider an application, he or she could instruct the Director to release the prisoner from segregation.[60]

[55] Prisons (General) Regulation 1995 (NSW) reg 171(1). Any reduction to the diet of a segregated prisoner is expressly prohibited: Prisons Act 1952 (NSW) s 22.

[56] Prisons (Administration) Regulation 1995 (NSW) reg 8.

[57] The facts are drawn from the NSW Ombudsman (1991/2), above n 53, ch 4.

[58] Ibid 128-31.

[59] Prisons (Correctional Services) Act 1980 (NT) s 6(2).

[60] There is some authority suggesting that when a Minister is conferred with an express statutory power to give directions to an administrator, an exercise of that power will be very difficult to query on any grounds except on the grounds of narrow *ultra vires* in respect of the subject mat-

In Queensland, any prisoner segregated for longer than three days can request that the official visitor review the order. The official visitor is obliged to entertain such requests.[61] Furthermore the official visitor must examine any period of segregation that extends beyond one month.[62] The official visitor may recommend to the Corrective Services Commission that the order be confirmed, varied or set aside.[63] However, that recommendation has no binding force. It is simply forwarded to the Commission which has an unfettered power to accept, revoke or vary the initial order.[64] Although the Western Australian legislation requires the Minister for Corrective Services be informed when any segregation order is made, there is no provision for appeal against any such order.[65]

In New South Wales, a prisoner may apply for review of any order that lasts longer than two weeks,[66] and there is a general obligation upon the Serious Offenders Review Council to hear all such applications.[67] The Council is empowered to determine the correctness of an order and must consider whether the order was made in accordance with criteria similar to those for initial exercise of the power, whether statutory procedural requirements were followed, whether the decision was reasonable in the circumstances and whether it was 'in the interests of the public'.[68]

There are detailed provisions governing the procedures of the Council. One clause states that the Council is not bound by the rules of evidence and may inform itself as it thinks appropriate.[69] This type of provision is commonly included in statutes that establish administrative tribunals. It enables those tribunals to receive evidence that may not be admissible under the rules of

ter of the power of direction: Margaret Allars, *Introduction to Australian Administrative Law* (1990) 203-4 citing *Aboriginal Development Commission v Hand* (1988) 15 ALD 410. *Contra* Edward Sykes, David Lanham and Richard Tracey, *General Principles of Administrative Law* (3rd ed, 1989) 91 where authorities are cited in support of the view that a statutory power of direction will not necessarily permit the officer empowered to issue directions to dictate to the exercise of a power reposed in an administrator. It is submitted that, for present purposes, a correctional administrator would not decline to follow a Ministerial direction. However, it is also most unlikely that a Minister would issue a direction to release a prisoner from segregation against the wishes of the administrative head of a corrections department.

61 Corrective Services Act 1988-1994 (Qld) s 39(6).

62 Ibid s 39(7).

63 Ibid s 39(8)(a).

64 Ibid s 39(9).

65 Prisons Act 1981-1995 (WA) s 43(2).

66 Prisons Act 1952 (NSW) s 22C(1).

67 Ibid s 22C(3). But under s 22C(4) the Council may decline to review an order if it finds the application fails to state substantial grounds for review, or it has previously reviewed the prisoner's case and feels there has been no substantial change since then, or if the order was made upon the prisoner's request. In the past the Ombudsman informally performed a similar function. In 1990/1, 1991/2, 1992/3 and 1993/4 he received 37, 31, 20 and 15 complaints about unreasonable segregation respectively: NSW Ombudsman (1991/2), above n 53, 117; (1992/3), *Eighteenth Annual Report* 125; (1993/4), *Nineteenth Annual Report* 95.

68 Prisons Act 1952 (NSW) s 22F. The Ministerial review power outlined in s 22B is not subject to these criteria but it is submitted that the Minister would be obliged to follow the same criteria, because they are expressed as guiding the initial power and articulating the reasons that lie behind the scope and purpose of segregation powers.

69 Ibid s 22E(1). Schedule 5, s 12(3)(b) directs that proceedings are not to be conducted in an adversarial manner, and s 12(3)(c) directs that hearings be conducted with as little formality as possible.

evidence.[70] There is also an innovative provision which allows the Council to receive 'information' by electronic means.[71] This enables the Council to hear evidence from prisoners held in gaols other than the one at which the hearing is being held. It also provides an effective means to prevent the transfer of prisoners simply to make it impossible for them to present oral evidence.[72] Furthermore, the Council must give notice of a hearing to the applicant prisoner and allow him or her the option to attend, to be heard and to be represented by a lawyer or other person of their choice.[73] The chairperson of the Council is also empowered to direct the suspension of a segregation order or the transfer of a prisoner to another gaol, between receiving and hearing an application for review.[74] The only potential difficulties in this provision for procedural fairness are that the seven member Council is appointed by the executive branch of government, and that two of the seven are officers of the Department of Corrective Services.[75] This may not automatically compromise the Council's independence but the traditional reluctance of governments to appoint potential critics to delicate positions means the executive is unlikely to appoint radically inclined persons or prisoners' rights advocates.[76] On the other hand, the inclusion of two judicial members should at least ensure a strict adherence to procedural regularity.

Under the New South Wales legislation the Council is not the only body which has jurisdiction to review segregation orders. The Minister for Corrective Services may, at any time, review any direction for the extension of a segregation order. This power of review expressly includes directions given by the Commis-

70 A widely cited principle for the application of the equivalent provision for the Administrative Appeals Tribunal is that the evidence must nonetheless be 'logically probative': *Re Pochi & Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, 41. It has also been held, in regard to the equivalent AAT provision, that the power of the body to inform itself as it thinks fit is subject to the rules of natural justice: *Collins v Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 198, 201. On these provisions, see generally Allars, above n 60, 269-70 and Enid Campbell, 'Principles of Evidence and Administrative Tribunals' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried* (1982) 36-87.

71 Prisons Act 1952 (NSW) s 22E(2).

72 If one prisoner cannot be produced as a witness to assist the case of another in a disciplinary hearing, this may be a denial of natural justice if the potential witness is crucial and it is within the prison administrators power to produce them. It does not matter that the witness is segregated and his or her production would be impractical and inconvenient. Remedy lies in judicial review: *Napier* (WA Supreme Court (Full Court), 15 August 1994) 11-12. Clearly the NSW provision for receiving evidence provides a quick and sensible alternative to Supreme Court review.

73 Prisons Act 1952 (NSW) s 22E(3), (4). The similarly extensive Canadian provisions also create a general right of appearance at a review unless the prisoner declines, seriously disrupts the hearing or is a threat to the safety of another person present. But there is no right to counsel: Corrections and Conditional Release Act 1992 (Can) s 33(2).

74 Prisons Act 1952 (NSW) s 22D(1), (2). Sub-section (3) allows for fresh segregation after suspension by a new order even though, under sub-s (5), a suspension does not revoke the initial order.

75 Ibid s 61.

76 David Brown, 'Putting the Value Back Into Punishment' (1990) 15 *Legal Service Bulletin* 239, 240-1 where the author notes the current NSW government's removal of aboriginal and church representatives from the Council's predecessor, the Serious Offenders Review Board, and their replacement by a former Corrective Services official and a former policeman with ties to a conservative law and order organisation, as part of a clear practice of appointing apparently reactionary persons to positions in the state's expanding prison system whilst also engaging in what seems to be a purge of progressively minded appointees.

sioner or the Council, and the Minister's own directions. The Minister has power to vary, revoke or confirm a segregation order.[77] This function has no apparent restrictions. The powers of the Minister, unlike those of the Council, are neither structured nor subject to any of the favourable procedural provisions that prisoners can expect of the hearings conducted by the Council. It is not entirely clear whether the review power vested in the Minister attracts the rules of procedural fairness. The lack of any language indicating that the Minister is obliged to entertain applications from prisoners, the extraordinary width of the power, the lack of any express statutory criteria to condition its exercise or any requirement to give reasons, the sensitive nature of such a review power and its placement in ministerial hands, and the availability of a clear right of statutory appeal to the Council,[78] all indicate that a very stringent attitude may be taken towards any attempts to seek judicial review of ministerial decisions, or to force any detailed requirements of procedural fairness upon the Minister. On the other hand, the absence of any type of privative clause and the origins of the provisions as an attempt to curtail misuse of segregation powers indicate that judicial review is not meant to be excluded.[79] Whilst a prisoner may not realistically expect any form of personal appearance, at the very least, written representations could still be made to the Minister through solicitors.

Even though voluntary segregation is practised in every jurisdiction, New South Wales is the only state that provides clear statutory procedures for voluntary requests for segregation. The power to make voluntary and other segregation orders is conferred upon both Governors and the Commission.[80] Although voluntary requests are subject to the same time limitations and scrutiny by both the Minister and the Council, they are subject to less stringent procedural safeguards for review and renewal.[81] Unlike general segregation orders, a written request by the prisoner to end their voluntary segregation compels the Commis-

77 Prisons Act 1952 (NSW) s 22B. The initial draft of the segregation amendments sought to remove the Minister's role of scrutiny over decisions. A report by the Deputy Ombudsman into the first Prisons (Segregation) Amendment Bill 1992 (NSW) emphasised the need to include some form of Ministerial oversight, which the Deputy Ombudsman saw as an important form of accountability for the Commission: NSW Deputy Ombudsman, *Report Concerning the Prisons (Segregation) Amendment Bill 1992* (Special Report to Parliament pursuant to section 31 of the Ombudsman Act 1974 (NSW), 4 May 1992) 7-8.

78 The availability of an alternative right of appeal that is convenient and effective is a ground upon which a court can decline to grant relief by way of judicial review: *McBeatty v Gorman* [1976] 2 NSWLR 560, 567 (Samuels JA); *R v Secretary of State for the Home Department; ex parte Swati* [1986] 1 All ER 717, 724 (Donaldson MR, with whom the rest of the Court agreed).

79 The Ombudsman, who played a crucial role in developing the new provisions, stressed the need to include some form of control over the segregation power. The influence of the Ombudsman was acknowledged in the Minister's second reading of the Bill. The Attorney-General stated that the first draft of the Bill was withdrawn largely due to the Ombudsman's strong criticism of the lack of safeguards on the exercise of segregation power: New South Wales, *Parliamentary Debates*, Legislative Council, 28 October 1993, 4621-2. Despite initial doubts by prisoners (see, eg, Brett Collins, 'Ombudsmen: Knights or Knaves?' (1979) 4 *Legal Service Bulletin* 130) the Ombudsman has become a formidable protector of prisoners' rights in NSW.

80 Prisons Act 1952 (NSW) s 22(1A).

81 For example, the Commissioner does not have to provide the Minister with reports as soon as possible after a voluntary segregation begins: Prisons Act 1952 (NSW) s 22A(4); and the Review Council may use the voluntariness of segregation as a ground to refuse review: s 22C(4)(c).

sioner to revoke the order.[82] This is the only unequivocal and mandatory statutory avenue by which a prisoner can be released from segregation in Australia.

These changes are a dramatic break with traditional segregation provisions but it is unlikely that they indicate the future direction for the rest of Australia. The amendments were enacted after much political controversy over, and vigorous academic criticism of the use, and apparent misuse, of administrative segregation in New South Wales.[83] Much of the impetus for change came from the State Ombudsman who had long been a critic of the use of segregation in New South Wales prisons. The Ombudsman had investigated many cases of improper segregation. When revisions to the State's segregation provisions were mooted, the Ombudsman was able to provide a compelling argument against the first draft of the Prisons (Segregation) Amendment Bill 1992 (NSW) which appeared to derogate significantly from the planned strengthening of the procedural rights of prisoners.[84] The Ombudsman argued that his experience revealed that segregation decisions were routinely based on inadequate factual material. Furthermore, the investigation by the Ombudsman of many complaints established that segregation had been used as a means of informal discipline, meaning prisoners were subjected to harsh regimes without any disciplinary offence having been proved against them. The Ombudsman's office thought that the way to achieve sound administrative decision-making in this area was to incorporate clear criteria for the initial making of a segregation order in the legislation. The Ombudsman suggested 'reasonable grounds' and a clear system of review procedures to assess the correctness of initial orders and any renewal decisions. The work of the State Ombudsman's office in this area earned so much respect that its criticisms were instrumental in forcing the withdrawal of the first Bill and the introduction of another Bill.

H *Summary*

Each state's power to segregate is expressed slightly differently but all contain similar criteria, namely to prevent threats to the safety of prisoners, or other people within the prison and to preserve the peace and good order of the prison itself. Another common feature of the Australian legislation, the innovative New South Wales provisions aside, is that it does not contain procedural provisions that operate for the benefit of prisoners. Most administrative lawyers would be

[82] Prisons Act 1952 (NSW) s 22(8). Note, however, that nothing could prevent the Commissioner from invoking s 22(1) if he or she felt this was warranted.

[83] NSW Ombudsman (1991/2), above n 53, 137 and (1988/9), *Fourteenth Annual Report*, 215-8. Furthermore, the Independent Commission Against Corruption, *Report on Investigation into the Use of Informers* (2 vols) (1993), though not dealing specifically with the use of segregation, uncovered a wide variety of questionable decisions and dubious administrative practices, which seriously undermined the management credibility of NSW prison administrators in the public arena. Many of these problems occurred in segregation wings. However, NSW prisons were also subject to sustained criticisms on other grounds: see, eg, David Grant, *Prisons: The Continuing Crisis in NSW* (1992) 105-44; Brown, 'Putting the Value Back Into Punishment', above n 76 and David Brown, 'How *not* to run a prison system' (December 1990) *Australian Society* 28.

[84] See generally NSW Deputy Ombudsman, *Report Concerning the Prisons (Segregation) Amendment Bill 1992*, above n 77.

alarmed at this slanted arrangement but it is consistent with the long standing perception that segregation powers are intended to exist and function as a tool of managerial convenience. If segregation is seen as a legitimate form of control over difficult prisoners then it is clearly no accident that the relevant statutory powers are bereft of safeguards. Furthermore, this intentional lack of procedural fairness would be compromised, or even defeated, if the judiciary, in its scrutiny of administrative segregation, attempted to curtail the width of administrative powers by subjecting their exercise to extensive procedural requirements, or by stopping the granting of relief to aggrieved prisoners in anything less than the most exceptional cases. It will be argued below that this reasoning explains the apparently harsh judicial attitudes displayed in applications that seek to query segregation.

III CAN THE BILL OF RIGHTS[85] (1688) BE INVOKED TO REVIEW STATUTORY POWERS TO ORDER SEGREGATION?

A *The Modern Standing of the Bill of Rights*

Attempts have been made by prisoners to argue that the conditions of their custody, including segregation, should be subject to the provisions of the Bill of Rights, particularly article 10 which prohibits cruel and unusual punishment.[86] The Bill has either been re-enacted by Australian states or is presumed to still be in force.[87] It may clearly still be invoked by citizens in Australia[88] and other common law jurisdictions such as New Zealand[89] and England.[90] However, only New South Wales goes some way to re-enacting the general thrust of the Bill in a

85 1 Wil and Mary sess 2, c 2 (1688). It begins 'An Act Declaring the Rights and Liberties of the Subjects'.

86 Article 10 provides '[t]hat excessive baile ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted.'

87 Victoria preserves the Bill's force by the Imperial Acts Application Act 1980 (Vic) pt 2 div 3, as do the similarly titled enactments of NSW 1969 s 6(b)(ii), and schedule 2, pt 1, and Queensland 1984 s 5 and schedule 1. The Bill is in force in Tasmania through Australian Courts Act 1828 (UK) s 24. It was part of the law received upon settlement in Western Australia in 1829, and South Australia in 1836: *Clayton v Ralphs & Manos* (1987) 26 A Crim R 43, 105 (Olsson J). See also South Australian Law Reform Commission, *Inherited Imperial Law and Constitutional Statutes*, Report No 96 (1985) 8. In the Northern Territory it was part of the law received via South Australia. See also *Commonwealth & Central Wool Committee v Colonial Combing Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 434 (Isaacs J); *Sankey v Whitlam* (1978) 142 CLR 1, 35 (Gibbs ACJ); *R v Murphy* (1986) 5 NSWLR 18, 24-6 (Hunt J).

88 See, eg, *La Trobe University v Robinson & Pola* [1973] VR 682, 691 where the Court rejected an attack on the indefinite committal of a contemner to prison, using the Bill, for technical reasons but did not doubt availability of Bill in suitable cases. In *Criminal Justice Commission v Nationwide News Pty Ltd* (1994) 74 A Crim R 569, the Queensland Court of Appeal accepted that art 9 of the Bill could still prevail to prevent the 'impeaching or questioning' of Parliamentary debates, but it was not to be invoked in this case.

89 *Fitzgerald v Muldoon* [1976] 2 NZLR 615. In that case a Prime Ministerial announcement abolishing a superannuation scheme for teachers was insufficient authority for administrators wind up scheme. Trustees had to be instructed in accordance with the scheme's parent statute. An attempt by the Prime Minister to circumvent these procedures was a 'pretended power of suspending laws' which was strictly prohibited by art 1 of the Bill of Rights.

90 Article 4 will strike down an attempt to raise revenue without clear parliamentary sanction: *Congreve v Home Office* [1976] 1 All ER 697, 710.

modern form that is directly relevant to prisoners. Prison regulations expressly prohibit gaolers enforcing treatment, administering solitary confinement, corporal punishment, torture, or any other punishment that is cruel, inhuman or degrading, or which might reasonably be expected to adversely affect a prisoner's physical or mental health.[91] The *Australian Guidelines* contain a similar prohibition against the use of prolonged solitary confinement, corporal punishment, punitive dietary reductions, any sensory deprivations or placement into darkened cells and any other form of cruel, inhuman or degrading punishment.[92] This prohibition is clearly expressed to apply to disciplinary segregation but it is unclear whether it extends to administrative segregation. The *Australian Guidelines* do not provide clear guidance on administrative segregation. They do, however, accept that there may be justified uses of segregation, for both disciplinary and other administrative purposes which may possess qualities that aggravate the suffering inherent in the use of imprisonment.[93] Regardless of how the *Australian Guidelines* apply to administrative segregation, it is clear that, unlike the prohibitions contained in the Bill, these rules have no binding force.

B *The Nature of the Prohibition*

The prohibition of cruel and unusual punishment goes to the *nature* of punishment. The Bill of Rights does not limit the legislative powers of parliaments. Thus, parliaments can enact legislation which authorises cruel and unusual punishment. The Bill may, however, control or affect the interpretation of statutory powers. Therefore it does not restrict a gaoler's authority to imprison someone but it controls how they perform that task. The scope of article 10 is not limited to treatment which is intended to be punitive. It will operate to provide a standard to judge the conditions under which a prisoner is kept. This is true even if those conditions lack any openly punitive intent but nonetheless have consequences akin to punishment. The cases discussed below establish that judicial review on the grounds of narrow *ultra vires* will focus on the intention of the prison administrator in segregating the prisoner rather than the effect of the conditions in which they are housed.

In *Williams v Home Office (No 2)*,[94] which is discussed in detail below, the Bill of Rights was raised during argument on the legality of the harsh regime of treatment in issue. Justice Tudor Evans indicated his acceptance of a conjunctive interpretation of the prohibition on cruel and unusual punishment. The plaintiff

[91] Prisons (General) Regulation 1995 (NSW) reg 171(1).

[92] *Australian Guidelines*, above n 49, 5.33. Although these restrictions refer only to punitive segregation, it is submitted that the prohibition would also apply to administrative segregation because the rules elsewhere exclude the imposition of any punishments except other than by proper charge, hearing and according to applicable regulations: *Australian Guidelines*, above n 49, 5.35-8.

[93] Ibid 1.2. The rule does not actually specify the types of segregation, and mentions only 'justifiable segregation'. Given the frequent use of both punitive and administrative segregation, it is submitted that this language should be read to refer to both forms of segregation. A document drawn up by Correctional Ministers is most unlikely to have intended to exclude the use of administrative segregation by implication alone.

[94] [1981] 1 All ER 1211 ('*Control Units*').

submitted that this interpretation should be rejected because it necessarily entailed acceptance of the control units, despite their obvious cruelties, because they were not unusual — an interpretation which was surely not permissible. Justice Tudor Evans held that the units were not cruel.[95] He also asserted, though not convincingly, that an acceptance of a conjunctive interpretation of article 10 did not necessarily mean that cruel but not unusual punishments would be permitted.[96] Some commentators have argued that the *Control Units* decision effectively rendered the Bill inapplicable for English prisoners who had a grievance about their treatment.[97] No subsequent English case has clearly addressed this issue so the decision of Tudor Evans J must be acknowledged as the prevailing judicial approach in England.[98] He declined an express invitation to equate article 10 of the Bill with its modern international law counterparts but implied that the similar phrasing of these modern provisions meant they could add little to their older equivalent.[99] That sentiment seems to have been borne out in the interpretation by the European Commission of Human Rights of the equivalent phrase in the European Convention on Human Rights. Though not expressly adopting the conjunctive approach favoured by Tudor Evans J, that body has not used the equivalent European prohibition to widen the scope of review in applications that have alleged harsh prison conditions.[100] Attempts by

95 Ibid 1246. On the facts of this case, which are detailed below, this finding is difficult to accept. One reason given for the finding that the units were not cruel was that the units were not out of step with United States practices of the same time. For complex reasons of societal violence, drug abuse, and public attitudes to prison funding and punishment, there is a tolerance/ignorance of gross human rights abuses in United States prisons despite formal constitutional arrangements to the contrary. One example is the placing of entire gaols on routines similar to the control units. For these reasons it is submitted the American prison system is unique, problematic and rarely an appropriate indicator of acceptable prison practices for other nations. This proposition was accepted by Kirby P in *Cekan v Haines* (1990) 21 NSWLR 296, 299.

96 *Control Units* [1981] 1 All ER 1211, 1243.

97 See, eg, Alf Dubs, 'Prisoners' Rights' (1982) 47 *Prison Service Journal* 9, 10. Dubs was a British MP who attempted to introduce, by a private members' Bill, a Bill of Rights for prisoners in March 1981. One of his main motivations was that he felt the *Control Units* case had placed prisoners beyond basic protections of law. He felt that stricter procedures for segregation, enforceable by an action for damages if breached, were necessary. The Bill did not pass.

98 A similar 'Bill of Rights' argument was raised in *R v Secretary for the Home Department; ex parte Herbage (No 2)* [1987] QB 1077, 1096-7 but the Court did not deal with the issue because insufficient evidence was presented on the point. There is Canadian authority supporting both interpretations. In *R v Miller & Cockriell* (1975) 63 DLR (3d) 193 a majority of the Court favoured the conjunctive interpretation. However, McIntyre J dissented on this point: (1975) 63 DLR (3d) 193, 256-7. A short time later in *McCann v R* (1975) 29 CCC (2d) 337, 363-4 (Heald J), Justice McIntyre's view was expressly preferred. In *Miller & Cockriell* [1987] 2 SCR 680, 688 (Laskin CJC), the Supreme Court subsequently held that 'cruel and unusual' should be interpreted as the 'compendious expression of a norm'. This view has since been adopted in *Smith v R* [1987] 1 SCR 10, 26 (Lamer J) in respect of the equivalent provision under the *Charter of Rights* (Can) s 12.

99 [1981] 1 All ER 1211, 1244-5. The other provisions were the United Nations Standard Minimum Rules rule 31 (approved by ESC Res 663 C (XXIV)) and the European Community Convention on Human Rights art 3.

100 Article 3 of the European Community Convention on Human Rights prohibits inhuman or degrading treatment or punishment. This has been interpreted to proscribe a particular (somewhat undefinable) level of humiliation or debasement in penal treatment which is to be ascertained by examining the nature and context of a punishment and the method of its execution. It is not exactly clear how this concept applies to prison regimes but the European Commission of Human Rights requires a minimum level of severity before treatment can rightly be

English prisoners to challenge segregation practices have therefore floundered in European human rights forums.[101]

The Australian position is unclear. There is one recent South Australian case in which the conjunctive reading was accepted by both parties, and another in which the presiding judge thought that the matter was not yet settled.[102] The main problem with the conjunctive reading is obvious: it requires that a punishment must be both cruel *and* unusual. This implies that a practice may be cruel, but will not contravene the Bill if it is not uncommon. Not surprisingly, advocates of the conjunctive interpretation hesitate to accept this implication, but they have failed to explain how it may logically be avoided. It is submitted that the disjunctive interpretation is preferable, mainly because it is difficult to accept that the Bill intended to permit a punishment that is cruel but not uncommon.[103] 'Cruel' and 'unusual' are best viewed as prescriptive terms of a general prohibition against shocking or inhumane forms of punishment. This interpretation reflects the intention behind the article more closely than the literal test that flows from the conjunctive approach. It is submitted that if the words of article 10 are seen as prescribing a *general* standard, rather than a literal test, they will provide a more constructive standard by which the lawfulness of the conditions of segregation may be judged.

C *Use of the Bill of Rights in Segregation Cases*

Two South Australian cases have examined article 10 and concluded that it is theoretically applicable to prison conditions. In practice, however, the article has provided little qualification to the actions of gaolers. In *Fricker v Dawes*,[104] a prisoner challenged his administrative segregation under a harsh regime permitting very few privileges and almost no free movement. The prison managers denied that Fricker's placement had a punitive purpose, even though its practical

called 'inhuman' and form the basis of an admissible complaint: *Lockwood v UK* (1993) 15 EHRR CD 48. In that case the negligently slow diagnosis of a tumour, which was then correctly treated, was insufficient. Corporal punishment in any form is certainly prohibited: *Tyrer v UK* (1978) 2 EHRR 1, 9-11.

101 The most notable example was *Brady v UK* (1979) 3 EHRR 297. Brady had been segregated for five years within the space of a decade, and much of the segregation was actually solitary confinement. The European Community Commission of Human Rights characterised the procedure by which he was so located as classification, a process it deemed to be an administrative decision which did not involve any determination of his rights. The Commission did not entertain any notion that if segregation continued for long enough it might breach the prohibition against inhuman and degrading treatment irrespective of the process by which the prisoner was placed there.

102 In *Holden v South Australia* (1992) 62 A Crim R 308, 317 ('*Holden*'), counsel for a prisoner seeking to invoke the Bill conceded the conjunctive approach was appropriate, at least in cases where a challenge went to the conditions of confinement. But in *Fricker* (1992) 57 SASR 494, 505 Mullighan J felt the issue was not settled and did not cite *Holden*.

103 This view was endorsed by the Constitutional Commission, which recommended that the Constitution be altered to include a clause stating that '[E]veryone has the right not to be subjected to cruel, degrading or inhuman treatment or punishment.' The Commission felt that if a treatment or punishment was cruel then it should be prohibited irrespective of whether it was also found to be unusual: Commonwealth of Australia, *Final Report of the Constitutional Commission Volume 1* (1988) paras 9.490-536.

104 (1992) 57 SASR 494.

consequences bore many traits of a punishment. This meant Fricker could not enforce the mandatory hearing and procedural provisions contained in the statutory procedures for the resolution of disciplinary matters. Instead he sought to attack the manner of his holding outright by claiming the regime was not a valid administrative measure but a punishment, and that the level of deprivations rendered it cruel and unusual. This submission was rejected for two reasons: first, although the regime was admittedly very harsh, it was not at all unusual (prisoners were regularly detained under this sort of treatment by administrators who deemed this to be a necessary management response); and second, the regime did not fall below an undefined minimum standard that society had accepted in dealing with difficult prisoners.[105] The Court did not articulate this minimum standard or explain how it reached its decision without so doing. In *Holden v South Australia*,[106] article 10 was relied upon to challenge similar conditions of administrative segregation. Justice Legoe held that the conditions were consistent with a normal high security division, and that such a regime 'totally failed' to establish the qualities of cruel and unusual punishment.[107] Therefore the prisoner could not invoke the Bill of Rights.

The strict judicial attitudes expressed toward granting relief under the Bill suggest that only grossly improper conditions might form a sufficient factual foundation upon which it could be invoked. Ironically, however, a case of grotesque mistreatment would also be likely to contain a specific instance of unlawful administrative action which could found an action by the prisoner through the normal avenues of judicial review. The prohibition against cruel and unusual punishment expresses a fundamental notion of civilisation, so it is unlikely that any judicial officer would expressly assert that its antiquity might be equated with obsolescence. However, it is noteworthy that despite spiralling levels of imprisonment and continuing poor conditions in England, there has not been a single application where the Bill has been seriously argued since the *Control Units* case. In Australia no prisoner has ever managed to gain relief through the Bill of Rights.

IV THE COMMON LAW RIGHT OF PRISONERS TO FREEDOM AND STATUTORY AUTHORITY FOR DETENTION

Before considering what light decisions on judicial review applications have shed on the area of segregation, it is useful to make some general observations about judicial attitudes towards cases in which prisoners query their confinement in a manner that either asserts or implies that they possess some type of right to liberty whilst in prison. These cases raise issues similar in some ways to those dealt with in judicial review of segregation. They also indicate why the tort of false imprisonment can apparently serve no useful remedial function for prisoners in relation to segregation.

[105] Ibid 504-5.
[106] (1992) 62 A Crim R 308.
[107] Ibid 318.

The English decisions provide a good starting point. The leading modern authority is *Raymond v Honey*[108] in which the House of Lords upheld the conviction of a prison governor for contempt of court. The prisoner had originally sent a letter to his solicitors which made an allegation of theft against a Deputy Governor. The Governor invoked a statutory rule relating to the regulation of mail and stopped the letter. In a subsequent letter the prisoner made an application to the High Court which sought to cite the Governor for contempt for stopping the first letter. The House of Lords held that stopping the first letter was an *intra vires* exercise of the power to regulate prisoners' correspondence but the second letter, being a plea for judicial intervention, ought to be viewed differently. The Lords felt that an appropriately worded statutory provision might allow a Governor to halt letters of this type,[109] but the statutory power in question was not capable of authorising the Governor's action. They did not accept that the statutory power to imprison a person necessarily contained an implied power to curtail that person's right of access to the courts because, as a general rule, a prisoner retained all civil rights which were not taken away by statute expressly or by necessary implication.[110] Unimpeded access to the courts was such a right, and one which the Lords felt was so precious that it could be abrogated or limited only by very clear statutory authority. At first glance, this decision seemed to signal a breakthrough for prisoners because it suggested that, unless a restriction of their liberty was authorised by a clear statutory provision, that measure would be unlawful. However, the decision has had no practical effect in regard to segregation because freedom of movement is one right that has been held to be necessarily removed by imprisonment.

The first important English case which was directly concerned with administrative segregation was the *Control Units* case.[111] The decision in that case also considered the potential utility of the tort of false imprisonment as a remedy for unlawful segregation. In that case a prisoner sought to challenge, by an action in

[108] [1983] 1 AC 1, 10 (Lord Wilberforce). This is actually a paraphrasing (without citation) from *Coffin v Reichard* 143 F 2d 443 (1944), 445: 'A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.' Despite this relatively early judicial assertion of civil rights, the general consensus is that American courts denied this statement any effectiveness, at least until the final advances of the Warren Court in the late 1960s: James Robertson, 'Judicial Review of Prison Discipline in the United States and England: A Comparative Study of Due Process and Natural Justice' (1989) 26 *American Criminal Law Review* 1323, 1331-3.

[109] It has since become clear that European law will not permit such limitations. Any attempt to block a prisoner's access to judicial forums will be struck down, even those limits which only require the exhaustion of bureaucratic remedies before a prisoner may commence legal action: *Silver v UK* (1983) 5 EHRR 347, 371-84; *McCallum v UK* (1991) 13 EHRR 597, 609-10; *Campbell v UK* (1993) 15 EHRR 137, 147-51. English courts have accepted this proposition: *R v Secretary of State for the Home Department; ex parte Leech* [1993] 4 All ER 539.

[110] Similar sentiments were endorsed in *R v Visiting Justices of Yatala Labour Prison; ex parte Robinson* (1981) 28 SASR 276, 280 (Zelling J) ('*Robinson*') and *Kuczynski v R* (1994) 72 A Crim R 568, 583 (Wallwork J), 589 (Owen J). However, both cases stressed the particular considerations related to disciplinary offences and the presumption that statutory procedures for their hearing and resolution must be followed.

[111] [1981] 1 All ER 1211. The Court of Appeal subsequently refused Williams leave to amend his statement of claim on technical grounds: [1982] 2 All ER 564, 568-9 (Cumming-Bruce LJ, with whom the rest of the Court agreed).

damages for false imprisonment, the legality of his detention in one of the notorious 'control units' used during the turmoil and violence experienced in English prisons in the early 1970s.[112] Those units were used to subject the most difficult prisoners to a regime under which they were strictly segregated, denied any company or association and allowed very few privileges. The standard 'treatment period' was 180 days and was started afresh for any deviation from the required code of conduct. In some cases the regime was enforced for up to two years without interruption. The philosophy of the program was to break the spirit of prisoners, forcing them to behave in a compliant fashion.[113] Williams was detained for 180 days because he was deemed to be a 'dedicated troublemaker' who needed behavioural correction.[114] When released from prison several years later, Williams sued over his placement in the unit, arguing that it was a false imprisonment. The action failed but there was lengthy consideration of exactly what the segregation power authorised gaolers to do and whether it was subject to any implied restrictions.

Justice Tudor Evans accepted the Home Office's submission that the sentencing order and the statutory powers to detain and locate convicted prisoners combined to confer considerable power upon gaol managers. The relevant statutory provision was interpreted very widely. When a prisoner was brought within its operation by a sentencing order the provision would *always* provide a defence for gaolers to an action in false imprisonment by a prisoner.[115] The sentence justified the fact of imprisonment, that is, placing someone in gaol, and the statutory power to then hold them in a prison justified their placement in any prison under any regime of treatment. Not only did this reasoning endorse the Home Office's argument that it could place prisoners in whichever gaol it chose, it also precluded any possible objection by prisoners to their placement within any part of a gaol.[116]

[112] Joe Sim, *Medical Power in Prisons* (1990) 105-9 details extremely high levels of violence in English prisons around this period.

[113] The full regime and its history is described at [1981] 1 All ER 1211, 1215-17, and it is compared with similar regimes of that time in W Lucas, 'Solitary Confinement: Isolation as Coercion to Conform' (1979) 9 *Australian and New Zealand Journal of Criminology* 153. A wholly different style of managing problematic prisoners, which emphasises cooperative behavioural management, is now used in Britain. See generally Ron Walmsley (ed), *Managing Difficult Prisoners: The Parkhurst Special Unit* (Home Office Research Study No 122) (1991).

[114] The phrase comes from Lord Denning MR, who exuded considerable venom towards Michael Williams (of the *Control Units* case) in a case concerning disclosure of documents related to this action: *Home Office v Harman* [1981] QB 534, 551.

[115] The power is located in s 12(1) of the Prison Act 1952 (Eng). Australian statutes tend to create a presumption placing anyone subject to a sentence of imprisonment in the legal custody of, and subject to the directions of, the head of the corrections department. That person is normally also given a power to locate and transfer prisoners as he or she thinks fit. The net effect is the same as the English arrangement: Prison Act 1977 (Tas) ss 12, 20(1); Prisons (Correctional Services) Act 1980 (NT) ss 6(2), 58(b); Prisons Act 1981-1995 (WA) ss 16-17, 21-8; Correctional Services Act 1982 (SA) ss 24-7; Corrections Act 1986 (Vic) ss 4(1), 56(2); Corrective Services Act 1988-1994 (Qld) ss 32, 69. Prisons Act 1952 (NSW) s 39(1) confers custody of prisoners on Governors, and s 27 confers the Commissioner with the power of transfer.

[116] [1981] 1 All ER 1211, 1240-1. In a remarkably similar Canadian case, a challenge to segregation practices using the Bill of Rights (1688) was upheld, but another objection arguing a breach of the rules of natural justice was dismissed along lines similar to those used by Tudor Evans J: *McCann v R* (1976) 29 CCC (2d) 337.

This reasoning was used to distinguish several older cases that had allowed prisoners to sue gaolers for false imprisonment for being placed in the wrong wing or subjected to inappropriate conditions. Those actions had occurred at a time when there were particular prisons or types of prisons designed for certain kinds of detention, each with its own legal foundation and standard of care which could not be lawfully applied to someone committed to another regime.[117] In modern times there are no such distinctions: commitment is standardised and differential placement or treatment is authorised by powers vested in gaolers, rather than determined by the orders of sentencing courts.[118]

Therefore, under English law, prisoners possess no express or residual right of liberty, in the form of freedom of movement, that is enforceable against gaolers. This means that imprisonment may vary in levels of confinement, restrictions and privileges, and that any changes cannot be contested by a prisoner on the basis that they possess some kind of right to a minimum level of freedom or absence of restraint. Prisoners are not regarded as possessing a right to be in any particular prison or part thereof.[119] English courts have also staunchly denied that intolerable conditions of confinement in a prison renders the detention unlawful.[120] In practice, this means that if a prisoner is improperly segregated or otherwise detained under a regime that is unnecessarily restrictive, he or she cannot sue the gaolers for false imprisonment because he or she has little, if any, freedom of movement to protect and none which can support an action for damages against gaolers.[121]

[117] For example, a debtor had to be sent to either a special debtor's prison or the debtor's wing of a normal prison. A debtor who was placed in a criminal wing and subjected to penal treatments such as hard labour, had a right of action in false imprisonment against the gaoler. Cases cited in support of this rule were: *Scavage* v *Tateham* (1601) 78 ER 1056; *Yorke v Chapman* (1839) 113 ER 80; *Cobbett v Grey* (1850) 154 ER 1409; *Osborne v Milman* (1886) 17 QBD 514. Justice Tudor Evans' distinguishing of the nineteenth century cases was approved by the Court of Appeal in *Middleweek v Chief Constable of the Merseyside Police* [1990] 3 All ER 662, 666-7.

[118] [1981] 1 All ER 1211, 1224-7.

[119] *R v Deputy Governor of Parkurst Prison; ex parte Hague* [1992] 1 AC 58, 162-6 (Lord Bridge, with whom the other Lords concurred), 173, 176 (Lord Jauncey, with whom the other Lords also concurred). At common law the fact that a prisoner lacked a right of any kind of freedom whilst they were imprisoned also precluded the issue of *mandamus* to compel a prisoner's release from segregation because that writ required applicants to demonstrate they had a 'legal specific right' to protect: Allars, above n 60, 286. Mark Aronson and Nicola Franklin, *Review of Administrative Action* (1987) 503 note that justiciability is another prerequisite to the issue of *mandamus*. This point has also been an obstacle to judicial review of the confinement of prisoners.

[120] *Control Units* [1981] 1 All ER 1211, 1227, 1242-6 (Tudor Evans J); *R v Board of Visitors of Gartree Prison; ex parte Sears* (1985) TLR, March 20; *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1992] 1 AC 58, 164-6 (Lord Bridge), 176-7 (Lord Jauncey) (disapproving *dicta* to the contrary in *Middleweek v Chief Constable of the Merseyside Police* [1990] 3 All ER 662, 668 and *R v Commissioner of Police of the Metropolis; ex parte Nahar* (1983) TLR 28 May.)

[121] *Control Units* [1981] 1 All ER 1211, 1227, 1241 (Tudor Evans J). This position has since been expressly approved by the House of Lords: *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1992] 1 AC 58, 163-6 (Lord Bridge), 173-6, 178 (Lord Jauncey). Both cases emphasised that prisoners did not possess any remedy against their gaolers by way of false imprisonment. However, it was accepted that if one prisoner was improperly confined by another then he or she would be able to pursue an action in false imprisonment against the confiner. This was because the statutory authority to confine prisoners could not be invoked by a prisoner.

A refusal to accept that prisoners may possess any enforceable quantum of freedom of movement or right to an absence of restraint stems mainly from the belief that this freedom must be absolute; the only form of legally enforceable liberty is total freedom.[122] That idea appears consistent with the way prison laws are phrased. No Australian correctional statute or regulation states or implies that prisoners may possess any sort of freedom whilst they are held in gaol. Such legislative schemes are therefore incapable of supporting a right of action for breach of statutory duty. So, if prisoners are segregated or otherwise placed in a high security division, both of which can severely restrict their movement and increase the harshness of their life, they will not have any grounds to commence a private law action against their gaolers, no matter how factually or legally flawed the relevant decision might be.[123]

The Australian position is yet to be authoritatively determined. It is clear that where a prisoner is detained after the expiration of their head sentence or when their head sentence has not ended but they are nonetheless eligible for release (normally through parole), they have a clear right of action in false imprisonment based on this wrongful detention.[124] This principle is of little direct value to prisoners who attempt to challenge their segregation because those cases have all involved prisoners who have not been entitled to be released from prison. Such prisoners, according to the English cases, are not wrongfully detained for the purposes of the tort of false imprisonment.

Early Australian cases that have touched on the use of a private action to enforce an asserted right to intra-prison freedom of movement have neither decisively accepted nor rejected the idea that a prisoner may possess some such residual right.[125] More recent cases have, however, moved towards the English position. For instance, in *Re Walker*[126] a prisoner sought a declaration that his transfer from a low security division to a higher one was unlawful. The Queen-

122 This 'all or nothing' assumption was first made by Tudor Evans J in *Control Units* [1981] 1 All ER 1211, 1242. Its application is not limited to segregation: see, eg, *Re Walker* [1993] 2 Qd R 345, 350 (a transfer case which is discussed below).

123 This also supports the logic that denies any remedy by way of false imprisonment for an incorrect segregation. To allow that remedy has been held to relabel what is essentially an action for breach of statutory duty in circumstances where an action for that tort could not otherwise succeed: *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1992] 1 AC 58, 163 (Lord Bridge).

124 *Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714, 719 (McHugh JA) ('*Cowell*'). In *Fritz v Queensland Corrective Services Commission* (Queensland Supreme Court, Derrington J, 11 April 1995) 6-7 the Court noted that *Cowell* and many 19th century English cases which allowed a prisoner to sue their gaolers for false imprisonment all involved plaintiffs who were entitled to be released, whereas the modern cases involve segregated prisoners who were not entitled to be released. Justice Derrington felt this was a 'serious distinction'.

125 In *Bromley v Dawes* (1983) 34 SASR 100, 110-12 Legoe J considered that a claim against gaolers was not precluded by the (now repealed) Criminal Law Consolidation Act 1936 (SA) Pt X, which greatly limited a prisoner's ability to sue. The segregation was upheld, denying a basis for an action in false imprisonment, but it was not rejected in principle. In *Collins v Downs* (NSW Supreme Court, Roden J, 14 December 1982) noted by Ivan Potas, (1983) 7 *Criminal Law Journal* 229, a prisoner, alleging that he had been improperly segregated, sought to sue the gaolers for both false imprisonment and breach of statutory duty. The latter was dismissed because the legislative scheme was held not to indicate the required intention to confer such a right of action. The former, however, was not struck out.

126 [1993] 2 Qd R 345, 349-51 (Williams J).

sland Supreme Court held that, as a general rule, prisoners lose their right to liberty upon sentence. Once a person was imprisoned they had no right to be placed in a particular prison or in a particular part of any prison in which they were located. It followed that a prisoner had no entitlement to spend the remainder of their sentence in any particular prison or under any particular regime of treatment. This meant that if a prisoner was placed in a liberal wing under a routine of relative freedom in which they possessed many privileges, and those conditions were subsequently removed and replaced with a more restrictive and austere regime, the prisoner would not be able to identify any right or interest that had been affected if they sought to impugn the transfer decision. The prisoner might be able to query the procedure by which their transfer was made (depending on the structure of the statutory power in question) but not on the basis that their 'rights' had been affected.[127]

In *Prisoners A to XX Inclusive v New South Wales*,[128] the New South Wales Court of Appeal gave a tentative indication that it might be prepared to break with the current English position and accept the idea that a prisoner could possess some residual liberty whilst in prison. The facts of the case were as follows. Several dozen prisoners commenced an action which sought to force the New South Wales government to reverse its long standing policy of opposing the supply of condoms in prisons. The prisoners sought to amend their statement of claim to include a claim for the issue of *habeas corpus*. There was no doubt that all of the prisoners were subject to valid sentences of imprisonment but they were not seeking relief in the form of release. Instead the prisoners sought issue of the writ to challenge the conditions under which they were confined. The finer details of the case are not presently relevant but the technique by which they presented their case is of importance. The prisoners relied upon several recent Canadian cases which have accepted the idea that a prisoner may possess some right of residual liberty whilst in prison, and that *habeas corpus* may issue to correct an unlawful interference with this liberty. The position of the Canadian Supreme Court has enabled prisoners in that country who have been unlawfully placed into segregation to gain the issue of *habeas corpus*. In *Prisoners A to XX*, Sheller JA, who delivered the leading judgment, undertook a detailed consideration of the English and Canadian authorities on the question of whether prisoners may possess any residual liberty. Towards the end of his judgment his Honour stated that:

> In the present case it is unnecessary to consider whether a prisoner enjoys a right of "residual liberty" vis-a-vis the State ... The Supreme Court of Canada provides powerful authority in support of that proposition.[129]

[127] *Modica v Commissioner of Corrective Services* (1994) 77 A Crim R 82. In that case an appeal against a transfer order removing a prisoner from the protection section was rejected. The Court held that whilst decisions about individual prisoners are subject to judicial review a prisoner had no right to enter a protection program or remain within one. This prisoner failed to meet criteria for location in the Special Purposes Centre because he was no longer providing assistance or acting as a Crown witness.

[128] (1995) 79 A Crim R 377 ('*Prisoners A to XX*').

[129] Ibid 387.

The Court of Appeal, however, did not directly rule upon the issue. Therefore, whilst the judgment of Sheller JA indicates that the law of Australia in this area may be amenable to change, at present prisoners do not possess any residual liberty.

V JUDICIAL REVIEW OF SEGREGATION ORDERS

A *Introduction: Judicial Review in Prison Administration*

The modern era of judicial review of administrative action has witnessed the expansion of the rights of persons who are adversely affected by the exercise of public law powers to review and challenge decisions. Prior to this expansion prisoners had no realistic hope of successfully seeking relief against the administrative decisions of gaolers because of the orthodox position that correctional statutes, regulations and rules were neither intended nor capable of conferring enforceable rights upon prisoners.[130] The main rationale for this position was the fear that judicial intervention of any type into prison administration would cause chaos by unduly interfering with functions of prison managers.[131] This position allowed courts to refuse to entertain private law claims by prisoners against gaolers for breach of statutory duty and applications seeking relief against disciplinary decisions. Furthermore, in the past, the rules of natural justice were interwoven with the possession of some sort of legal right or interest by the party who sought to invoke those rules.[132] The inability of prisoners to point to any such right or interest precluded them from invoking the rules of natural justice[133] or obtaining relief through the grant of prerogative writs.[134]

Another obstacle to prisoners, or rather a false hope, came in the form of the 'legitimate expectation'. The concept assumed importance in the 1970s when English and Australian courts began to accept that a right to natural justice could arise in relation to interests which fell short of legal rights. The expectation most often arose where a regular course adopted by a decision-maker was affected by a change of policy, or where the decision-maker had made express or implied

130 *Arbon v Anderson* [1943] KB 252, 254; *Flynn v R* (1949) 79 CLR 1, 5-6 (Chief Justice Latham, with whom Rich J agreed), 8 (Dixon J), 9 (McTiernan J); *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317, 328-9 (Hutley JA).

131 *Flynn v R* (1949) 79 CLR 1, 8 (Dixon J).

132 Two often cited decisions indicating the (now discarded) inextricable link between the implication of natural justice and the possession of a property-based right or the like by the applicant are *Cooper v The Board of Works for the Wandsworth District* (1863) 14 CB(NS) 180, 189 (Erle CJ) and *Durayappah v Fernando* [1967] 2 AC 337, 349 (Lord Upjohn). See also William Wade and Christopher Forsyth, *Administrative Law* (7th ed, 1994) 497-503.

133 See, eg, *R v Classification Committee; ex parte Finnerty* [1980] VR 561, 566-70. Kaye J, the sole judge, rejected argument that the rules of natural justice could be implied to apply to the classification procedures which were silent on this issue. The Court held that the regulations did not confer on prisoners any interest, right or expectation to which the rule of natural justice could attach. The Committee was not obliged to accord the prisoner a hearing before making an adverse decision, and if a hearing was held, the prisoner was not entitled to be represented.

134 For instance, *certiorari* and *prohibition* issues in cases involve the determination of the *rights* of subjects: Aronson and Franklin, above n 119, 579-82. Prisoners clearly fail this test.

assurances concerning the exercise of a power to the person affected.[135] The concept has never performed a useful function for prisoners despite its use in the development of the implication of the rules of procedural fairness.[136]

The case of *R v Board of Visitors of Hull Prison; ex parte St Germain*[137] represented a significant change in judicial attitudes towards decisions made in the course of prison administration. In that case the English Court of Appeal held that the procedures of a board of visitors in the conduct of an internal prison disciplinary hearing were amenable to review in the exercise of the court's supervisory jurisdiction. The Court of Appeal held that, in the discharge of its functions, the board of visitors was subject to the rules of natural justice. A decision in breach of those rules would be quashed. The Court of Appeal had regard to the severe consequences of the charges of riot and the potential penalties amounting to the loss of hundreds of days of remission. The Court held that if a prisoner's rights and liberties were in jeopardy as a result of a judicial or quasi-judicial process then the Court had a discretion to intervene to secure fairness within that process, irrespective of the status of the person in question and however curtailed their rights might be.[138] That rule was used to support intervention in this instance but, at the same time, the Court sought to limit the potential scope of judicial supervision of prison management by holding that a wide class of administrative decisions, such as transfers, classification and involuntary segregation should remain beyond judicial review. The Court

135 Pamela Tate, 'The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice' (1988) 14 *Monash University Law Review* 15, 48-9. These criteria are difficult for prisoners. Prison administrators never made representations to prisoners about the manner in which powers would be exercised (eg promising that prisoners would be given a hearing before any adverse decision would be made). These criteria also precluded prisoners seeking to invoke the legitimate expectation concept in respect of a change of policy. Administrative policies were normally unfavourable to prisoners, therefore a prisoner had no right, interest, or expectation in or upon any change of policy.

136 See, eg, *Re Walker* [1993] 2 Qd R 345, 349-50 where it was found that, since a prisoner has no entitlement or legitimate expectation that he or she would be placed in a particular prison, a transfer does not affect any interest. A similar attitude was adopted towards the grant of privileges in *Gray* [1993] 1 Qd R 595, 602 (Byrne J), his Honour stating that 'In Queensland prisons today's favour is not yet tomorrow's duty.' The influence of Lord Denning in the development of the legitimate expectation was also important: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 310-11 where McHugh J points out that the concept was 'invented' by Lord Denning MR in *Schmidt v Secretary of State for the Home Affairs* [1969] 2 Ch 149, 170-1. Lord Denning displayed extraordinary hostility to any claim brought by a prisoner which sought administrative review against the decision of a gaoler: see, eg, *Becker v Home Office* [1972] 2 QB 407, 418 (referring to actions commenced by 'disgruntled prisoners'); *Fraser v Mudge* [1975] 3 All ER 78, 79 (denying that prisoners had a right to representation in disciplinary hearings); *Guilfoyle v Home Office* [1981] 1 QB 309, 315-19. Lord Denning never sat in a case in which the cause of prisoners was advanced. It is submitted that the antipathy displayed by the creator of the legitimate expectation toward prisoners partly explains why it never assisted prisoners.

137 [1979] 1 QB 425 ('*St Germain (No 1)*'). The decision was approved by the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237, 274 (Lord Diplock, with whom the other Lords concurred), and finally conceded by the Home Office to be correct: *Leech* [1988] AC 533, 556-7 (Lord Bridge). The *St Germain (No 1)* decision has been approved in Australia: *R v Chappell; ex parte Rushton* (WA Supreme Court (Full Court), 29 November 1979); *Ex parte Smith* (WA Court of Criminal Appeal, Wallace, Kennedy and Pidgeon JJ, 11 September 1989); *McEvoy* [1990] 2 Qd R 235, 240-1 (Thomas J); *Napier* (WA Supreme Court (Full Court), 15 August 1994) 7.

138 [1979] 1 QB 425, 455 (Shaw LJ particularly emphasised this point).

considered that the sensitive nature of these decisions and their great importance to the good management of a prison rendered them inappropriate for review.[139]

At first this distinction between disciplinary and other action was accepted without serious question. Consequently, the expansion of the scope of judicial review over prison related decisions centred on serious disciplinary matters heard by external bodies such as visiting justices or magistrates or boards of visitors.[140] Significant advances regarding the content of the rules of natural justice were achieved in this limited territory. The rules of natural justice formed the basis of a finding by one court that a board of visitors possessed a discretion to allow a prisoner to be represented. In the hearing of very serious disciplinary charges, the Court held that a board of visitors had a duty to carefully consider whether a favourable exercise of this discretion was necessary in order for a prisoner to be accorded a fair hearing.[141] Fairness was also the basis upon which other procedures could be required, such as allowing prisoners to call important witnesses,[142] adjourning so that an important witness could be called,[143] cross-examining adverse witnesses,[144] and prohibiting the use of clearly erroneous evidentiary practices such as a reversal of the onus of proof or the use of hearsay.[145]

As the scope of supervisory review over the hearing of serious disciplinary matters expanded, pressure developed to extend the scope of review to include the hearings conducted by prison governors and senior officers into less serious disciplinary matters. Initially there was a widely accepted belief that any potential benefit that might be provided by an expansion of the scope of review would be outweighed by the negative impact that review would have upon the proper and efficient administration of prisons. This justification was, for a time, thought to limit the scope of judicial intervention into prison administration. In time,

139 Ibid 466 where Waller LJ gave an unreviewable decision the circular definition: 'an administrative decision with serious consequences but one which could not be reviewed by the Court'.

140 In Australia many cases concerned appeal rights and whether matters heard by visiting justices were subject to the normal appeal rights for such decisions. These cases were mainly exercises in the construction of specific statutes (with no substantial reference to natural justice) and most are not of great importance today because this area is now governed almost entirely by statute. The cases do, however, demonstrate the vigour with which even the smallest advances by prisoners were resisted: see generally George Zdenkowski, 'Review of Disciplinary Proceedings in Australian Prisons' (1983) 7 *Criminal Law Journal* 3.

141 *R v Secretary of State for the Home Department; ex parte Tarrant* [1984] 1 All ER 799, 815-17; *Ex parte Johns* [1984] 1 Qd R 450, 457-9 (acknowledging the existence of the discretion but declining to accept that a case had been made for its exercise).

142 *R v Hull Board of Visitors; ex parte St Germain (No 2)* [1979] 3 All ER 545, 555 ('*St Germain (No 2)*'); *Napier* (WA Supreme Court (Full Court), 15 August 1994) 11-12; *Kuczynski v R* (1994) 72 A Crim R 568 where the Court refused to issue relief requiring the calling of a particular witness because the prisoner had not established the witness might provide useful evidence, but did not doubt that relief would issue in an appropriate case. See also *Daemar v Hall* [1978] 2 NZLR 594 which predates the decision in *St Germain (No 1)*.

143 *Ex parte Ord* (WA Supreme Court (Full Court), Wallwork J, Owen and Franklyn JJ agreeing, 15 February 1994) 9-10.

144 *Robinson* (1981) 28 SASR 276, 282 (Zelling J).

145 Ibid 279-84 (Zelling J). See also *St Germain (No 2)* [1979] 3 All ER 545. There the procedural discretion of the board to admit hearsay evidence was subject to an overriding obligation to accord the prisoner a fair chance to defend the charge. Admission of hearsay could warrant either a chance for prisoner to cross examine the source or, where this was not practicable, refusal to admit the evidence.

however, it proved an unsteady foundation upon which to exclude less serious disciplinary hearings from review because it became apparent that the only substantial distinction between the two was one of scale which, in itself, would have been an insufficient reason to limit the scope of judicial review.[146] The House of Lords frankly admitted that:

> [I]n a matter of jurisdiction it cannot be right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain.[147]

It is becoming increasingly clear that the distinction between 'administrative' or 'managerial' decisions on the one hand and 'disciplinary' or 'adjudicative' decisions on the other is not a sound basis upon which to decide the appropriateness of a matter for review.[148] Instead, the general principles of review, particularly those regarding the requirements of procedural fairness, are accepted as providing appropriate criteria for a court to determine whether a decision of prison administrators should be reviewed. There is now a well established link between procedural fairness and the nature of the interest possessed by the person who stands to be affected by the exercise of the power in question. Whenever a statute confers a power upon a public official to affect or prejudice a person's rights, interests or legitimate expectations, the rules of procedural fairness apply unless plainly excluded.[149] The benefit provided by these principles is procedural rather than substantive in nature. When a review court intervenes in order to ensure the observance of the rules of procedural fairness, it will issue orders which are designed to control the way in which the decision-maker exercises a power rather than the content of the decision. However, there is no doubt that supervisory review of administrative procedures is a substantial form of control.[150]

Whilst these principles provide a coherent theoretical foundation upon which judicial supervision of prison administration could be justified, some additional factors in support of an expansive approach to review (which tends to favour

[146] This accords with the prevailing view in Australian administrative law that it is the nature of the decision-maker's power rather than the character of the proceeding in which it is exercised which should determine the quality of the duty to act fairly: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Annetts v McCann* (1990) 170 CLR 596, 608 (Brennan J) ('*Annetts*').

[147] *Leech* [1988] AC 533, 566 (Lord Bridge, with whom the other Lords concurred).

[148] *Bromley v McGowan* (SA Supreme Court, Perry J, 4 August 1994) 12; *McEvoy* [1990] 2 Qd R 235, 242 (Thomas J) stating that the *Leech* decision and Australian developments in natural justice require a reconsideration of earlier Australian cases suggesting that decisions of a purely administrative nature made in prisons cannot be reviewed.

[149] *Annetts* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

[150] Dennis Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 *Oxford Journal of Legal Studies* 257, 274 where the author states that 'it is a mistake to see the development of judicial review in terms of direct control of the substantive policy choices made by administrative officials. Activism in this direction is likely to breed conflict and controversy. The more suitable, and not less effective, course is to develop the general notion of process, which may itself generate certain kinds of substantive constraints on discretionary power.'

prisoners) have been identified: the vulnerable position in which the physical and social isolation of gaol places prisoners;[151] the rule that incarceration does not remove all of a person's civil rights;[152] the essential role that courts play in the protection of the rights of citizens;[153] the general public interest in the correct administration of prisons;[154] and the belief that supervisory review will improve the quality of decision-making.[155]

Whilst these principles provide a strong foundation upon which a wider scope of review of prison administration may be developed, a similar convergence of general public law principles and considerations specific to the nature of prisons have provided grounds upon which a restrictive approach to review can be maintained. A fundamental part of the modern view of procedural fairness is that the particular features necessary to discharge the requirements of fairness are to be adapted to the circumstances of the individual case at hand.[156] The need to craft principles of review so as to take into account the nature of the matter in question, an ever present issue in administrative law, is seen to be especially compelling in prison administration. Strong reasons against an expansive approach to the scope of review or the grant of relief have been identified, the most pressing of which is the need to avoid an intrusive style of review that could compromise proper and efficient prison administration.[157] The other main factor is the frequent admission by courts that they lack the personal and professional experience upon which many prison related decisions are necessarily based. They have strained to avoid any form of review that would involve second-guessing the professional judgment of prison managers, especially those decisions which require quick and decisive action,[158] given the difficult environment in which they work.[159]

[151] *Kuczynski v R* (1994) 72 A Crim R 568, 583-4 (Wallwork J), 589 (Owen J); *Binse* (1995) 8 VAR 508, 509, 515 (Byrne J).

[152] *Raymond v Honey* [1983] 1 AC 1, 10 (Lord Wilberforce); *McEvoy v Lobban* (1988) 35 A Crim R 68, 71 (Carter J); *Kuczynski v R* (1994) 72 A Crim R 568, 583 (Wallwork J), 589 (Owen J). A hesitant endorsement of this view was given in *Bromley v South Australia* (1990) 53 SASR 403, 413 where Olsson J stated that '[e]ven prisoners have some basic rights'.

[153] *Binse* (1995) 8 VAR 508, 516 (Byrne J). There is ample authority that a prime function of judicial review is to protect individual rights and liberties: see, eg, *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J): '[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly'.

[154] *Kuczynski v R* (1994) 72 A Crim R 568, 589 (Owen J).

[155] In *Leech* [1988] AC 533, 557, Lord Bridge accepted that this had been one side effect of opening the adjudications of Boards of Visitors to supervisory review.

[156] This point has been repeatedly made in the High Court: *Kioa v West* (1985) 159 CLR 550, 584-5 (Mason J); *South Australia v O'Shea* (1986) 163 CLR 378, 400 (Wilson and Toohey JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 58 (Dawson J); *Annetts* (1990) 170 CLR 596, 617 (Toohey J).

[157] *Daemar v Hall* [1978] 2 NZLR 594, 603-4 (McMullin J).

[158] *Maybury v Osborne and Corrective Services Commission of New South Wales* [1984] 1 NSWLR 579 ('*Maybury v Osborne*'), 589 (Lee J); *McEvoy* [1990] 2 Qd R 235, 237 (Macrossan CJ).

[159] *McEvoy* [1990] 2 Qd R 235, 237 (Macrossan CJ), 241 (Thomas J); *Maggs v Director-General of Corrective Services (NSW)* (NSW Supreme Court, Carruthers J, 23 August 1991) 15-16; *Bromley v McGowan* (SA Supreme Court, Perry J, 4 August 1994) 14-15.

In a passage that illustrates the ongoing tension between these issues, the House of Lords finally acknowledged the legitimacy of supervisory judicial review over prison administration but nonetheless admitted its continued uncertainty by declaring this jurisdiction to be a:

> beneficial and necessary jurisdiction which cannot properly be circumscribed by considerations of policy or expediency ... [but] those considerations only come into play when the court has to consider, as a matter of discretion, how the jurisdiction should be exercised.[160]

The effect of these conflicting principles is that superior courts may adopt one of two approaches to an application from a prisoner who seeks relief against an administrative decision made by a prison manager. Both approaches may constitute a significant obstacle to prisoners gaining a grant of relief.[161] The first approach is one in which the court accepts, in principle, the justiciability of the subject matter of the prisoner's grievance but states the permissible scope of review in restrictive terms. For instance, courts have often held that review is available only on the grounds of bad faith or improper purposes,[162] or that the prisoner must clearly prove that the administrative process of which they complain is objectively unfair in order to gain relief.[163] The second approach emphasises the factors governing the exercise of the discretion to grant relief. Examples given in individual cases include that the 'balance of convenience' was not in favour of relief,[164] or that the issue was too trivial to warrant intervention.[165]

Whether the reluctance to grant relief in favour of prisoners is little more than a relocation of the hurdle previously faced in the guise of justiciability is an issue which cannot be resolved by an examination of the segregation cases alone, although the decisions discussed below do provide some evidence for an af-

[160] *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1991] 1 AC 58, 155 (Lord Bridge, with whom the other Lords concurred). These sentiments have received clear endorsement in Australia: *Holden* (1992) 62 A Crim R 308, 317-8. See also *McEvoy* [1990] 2 Qd R 235, 242 (Thomas J).

[161] Another important obstacle is the continued inability of prisoners in many jurisdictions to obtain reasons for decisions, refer to n 40 above. Even where courts adopt a more liberal doctrinal approach to review applications, prisoners will still face the significant obstacle of proving those facts necessary to establish the claim for review. On the importance of reasons in an application for judicial review see, eg, Paul Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 283-5.

[162] This formulation means that once the decision is shown to be *intra vires* it is virtually immune from review: *McEvoy* [1990] 2 Qd R 235, 240-1 (Thomas J); *Gray* [1993] 1 Qd R 595, 601 (Byrne J); *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82, 87-8 (Dunford J). This view has been subject to doubt: *Binse* (1995) 8 VAR 508, 516 (Byrne J). The latter case is consistent with general developments in administrative law from the early 1980s under which courts have rejected the notion that decisions are immune from review on 'extended' or 'broad' *ultra vires*. Justice Brennan has stated that '[i]n Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power': *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.

[163] *R v Secretary of State for the Home Department; ex parte Doody* [1994] 1 AC 531, 560-1 (Lord Mustill).

[164] *Gray* [1993] 1 Qd R 595, 602 (Byrne J).

[165] *Maybury v Osborne* [1984] 1 NSWLR 579, 588 (Lee J).

firmative answer. Whilst there is some uncertainty surrounding the principles by which prisoners can gain relief against administrative decisions, it is clear that decisions taken in the course of prison administration are generally amenable to review for a denial of natural justice and some on the grounds of *ultra vires*. Judicial scrutiny of the exercise of powers relating to the administration of prisons has the potential to counteract the traditional problems faced by prisoners who attempt to assert any legal rights, not because it may lead to the creation of rights but because the principles applied by courts in determining the validity or legality of the decisions of prison administrators could have a substantial effect on the way decisions are made. That itself will represent a significant advance for prisoners. The next issue is to determine in what circumstances judicial review of adverse confinement will be available, and exactly how far it will go, and whether judicial review has led to meaningful remedies.

B *Informal Discipline*

A useful starting point for the examination of the cases concerning judicial review of segregation is those cases in which prisoners sought to query the lawfulness of their segregation on the ground that, although it was effected through the exercise of administrative powers, the action was in truth a punishment. In several of the earlier cases, prisoners sought to equate segregation with formal disciplinary penalties and thereby invited courts to extend the rules of natural justice, which were fast enveloping prison discipline, to administrative segregation. The courts, however, have managed to distinguish between the two forms of treatment despite their apparent similarity and have, thereby, given prison managers a relatively free hand to place a prisoner in administrative segregation.

A central point of dispute in the *Control Units* case was the intention that lay behind the establishment and administration of the units. Williams, the prisoner, argued that the scheme was really a disciplinary penalty which, under the governing legislation, could only be imposed after adherence to the statutory procedures for the hearing, determination and sentencing of prison offences. Although the Home Office had removed all overt references to punishment and discipline in the scheme, Williams submitted that the control units bore so many qualities of punishment that a punitive motive clearly underpinned the program. The features of the regimes raised in support of this argument were: total isolation for the first month; no association or outside exercise periods for 90 days; a lack of any visual or auditory relief, including long periods of silence; no possible remissions; constant surveillance and strip searching even though the environment was closed; dull and repetitious work; constant threats to restart the program for any deviation; lack of differentiation between stages; and a lack of personal possessions. There was conflicting expert evidence as to whether these features made the control units sufficiently punitive that they could be equated with punitive segregation. Justice Tudor Evans dismissed the adverse features of the control units as either no different from normal conditions for segregated prisoners (which he did not regard as a form of punishment) or actions that were

clearly authorised by the legislative scheme. Statutory authority aside, Tudor Evans J held that the descriptions of the units given to the Court were not sufficient to conclude they were a form of punishment.[166]

At no stage was the adverse effect that the harsh conditions had upon Williams accepted as evidence to establish a punitive intention. Instead Tudor Evans J found that the mild symptoms of neurosis experienced by Williams were unrelated to his extended detention in the units.[167] It is submitted that this reasoning was not a logical basis upon which to decide whether the control units were a form of punishment. An eminent forensic psychiatrist has stated, in a paper that argued that solitary confinement was a kind of torture, that the form of treatment can vary greatly in its particular traits, method of application, variation of intensity, individual reactions and level of discernible after-effects. Not all individuals are crushed by its use; some may be gravely affected by segregation and harsh living conditions, while others may not.[168] Attributing the adverse reaction of some prisoners to a 'flaw' in their psyche rather than to the nature of the regime in which they are placed removes attention from the features of the regime and the behaviour and motives of prison administrators, and focuses instead on the personal qualities of the prisoners.

A less extreme set of facts was presented in *Bromley v Dawes*,[169] the first major judicial consideration of segregation reported in Australia.[170] The prison in which Bromley was held had experienced a major riot and fire which caused extensive damage and left many cells uninhabitable. Some inmates from these cells were moved to the disciplinary wing and subjected to the restrictive regime of close confinement and restricted privileges that was usually enforced in that wing. Bromley argued that, as this was a disciplinary punishment imposed

166 [1981] 1 All ER 1211, 1235-40. Despite expert evidence to the contrary led by the Home Office, it is hard to believe that many of the features of the scheme were not a clear attempt at sensory deprivation which is contrary to the European Convention on Human Rights. In Canada, similar practices were used as a matter of routine administrative control for difficult prisoners, with the added feature of constant lighting which is a hallmark of sensory deprivation. Many prisoners were isolated for over a year at a time and the regime was totally devoid of any rehabilitative pretensions. This treatment was declared to be a cruel and unusual punishment: *McCann v R* (1976) 29 CCC (2d) 337, 368. This form of punishment is specifically prohibited under the *Australian Guidelines*, above n 49, 5.33, and it would also contravene the more general prohibition against any form of punishment that aggravated the deprivations of imprisonment: 1.2.

167 [1981] 1 All ER 1211, 1239. Though the issue was never expressly pursued, the tone of Tudor Evans J's language seemed to hint that he felt Williams was to blame for his own condition.

168 Stuart Grassian, 'Psychopathological Effects of Solitary Confinement' (1983) 140 *American Journal of Psychiatry* 1450. Grassian notes that the only report indicating solitary confinement has no adverse consequences was a study of subjects who volunteered for confinement and so had a dramatically altered perception of their experience; W Lucas, above n 113, 153.

169 (1983) 34 SASR 73 (White J); (1983) 34 SASR 100 (Full Court).

170 Segregation was touched upon in earlier cases: *Vezitis v McGeechan* [1974] 1 NSWLR 718 where a prisoner challenged a restrictive regime of treatment imposed on several difficult prisoners. Although conditions had similarities to segregation, no such order was issued so the lawfulness of the regime was considered under other powers. Ultimately the action failed because the treatment was held to be an *intra vires* exercise of managerial powers. See also *Collins v Downs* (NSW Supreme Court, Roden J, 14 December 1982) where a prisoner alleged unlawful segregation and sued gaolers for false imprisonment and breach of statutory duty. The action failed because it was taken to require private rights arising from statutory provisions regarding segregation.

without proof of an offence, and so unlawful, the court should order its immediate revocation. Dawes, the South Australian CEO, replied that he had a general administrative power enabling him to place Bromley in solitary confinement, and that the placement was an appropriate action given Bromley's active role in the riot.[171]

The decision at first instance and on appeal turned mainly on the precise scope of the power to segregate to prevent 'contamination arising from the association of prisoners'.[172] Justice White, at first instance, held that a logical reading of the provision must limit its application to preventing the transmission of disease in order to preserve the physical health of prisoners. He held that the provision did not authorise segregation for reasons of administrative convenience which was precisely the motivation White J found to be the basis of Dawes' decision. Justice White further held that the disciplinary provisions were not only more appropriate to deal with a suspected rioter, but that their language was framed in a manner which accorded them a mandatory application.[173] The procedural requirements governing exercise of the power of discipline were so clear that a prisoner could force their observance as a prerequisite to the valid imposition of any disciplinary penalty. This was exactly the restriction Bromley's treatment had evaded. Attempting to isolate Bromley to remove his influence on other prisoners and control his misbehaviour was, therefore, beyond the scope of the segregation power.[174] In the course of an application for further orders, Dawes conceded the disciplinary element of his action but reiterated his belief that this was justified in the aftermath of the fire. Bromley faced charges too serious to be dealt with internally so they had been referred to the police. Several guards were seriously assaulted in the riot and there was a high risk of escape by Bromley and his co-offenders. During all this commotion he had to be separated from potential prosecution witnesses to prevent their possible intimidation, but at the same time many cells had been rendered uninhabitable.[175] Justice White rejected these reasons and issued an order that Bromley be transferred back to his former division and placed on a regime of standard treatment.

[171] Bromley was charged under the now repealed Prisons Act 1936 (SA) s 40(1) which read: 'In order to prevent the contamination arising from the association of prisoners, any prisoner may, by order of the Director, with the concurrence of a visiting justice, be separately confined during the whole or any part of his [*sic*] imprisonment.' Separation under that provision was deemed not to be solitary confinement: s 40(2). Thus, confinement under s 40(1) was exempt from the statutory time limits imposed on solitary confinement. A similar presumption is made in Prisons (General) Regulation 1995 (NSW) reg 171(2) which states that administrative segregation, punitive cellular confinement or medical isolation do not fall within the prohibition against solitary confinement of reg 171(1)(b)(i).

[172] Prisons Act 1936 (SA) s 40(1).

[173] Prisons Regulations 1961 (SA) reg 221. The requirements of this regulation were held to be so clear as to counteract the lack of the normal presumption in favour of the citizen that prisoners face when attempting to invoke beneficial interpretations of such provisions: (1983) 34 SASR 73, 88-9 (White J). A swift amendment was made to allow for the segregation or placing of prisoners in any part of a prison for management purposes, and the concurrent use of differing regimes of treatment for transferees. As this was not retrospective, relief was nonetheless granted to Bromley: (1983) 34 SASR 73, 99 (White J).

[174] (1983) 34 SASR 73, 78-82.

[175] Ibid 96.

The Full Court of the South Australian Supreme Court subsequently disagreed. It held that, historically, the administrative segregation provisions were intended to include prevention of moral, psychological and spiritual contamination between prisoners.[176] This had not been substantially altered in the replications of the provisions in subsequent statutory schemes so 'contamination' retained its originally wide scope. This interpretation may seem overly literal but it is supported by historical accounts of the intended scope and purpose of such powers.[177] Acting Chief Justice Mitchell stressed that the provision gave a narrow power to segregate for legitimate administrative purposes and that any attempt to use it for disguised punitive transfers or other removals without observance of the statutory procedures for disciplinary adjudications would be clearly *ultra vires* and amenable to prerogative relief.[178] The practical scope of this qualification was greatly undercut by the need for prisoners to prove an ulterior motive by administrators in a challenge.[179] Not only would it be difficult for a prisoner to lead proof to contradict the justifications offered by the Director, but if ulterior motives did exist they are highly unlikely to be uncovered by a judicial review application.[180]

In *McEvoy v Lobban*[181] the problem of hidden disciplinary motives arose in a different context. There, an informant led prison managers to suspect that a riot was planned for Australia Day in 1988. McEvoy was strongly suspected to be a ring-leader of any potential trouble but the information was not capable of supporting a specific disciplinary charge. He was nonetheless segregated for four days around Australia Day in order, according to the Governor, to head off any possible riot. McEvoy was not treated identically to other prisoners in the segregation wing in that he still received some of his normal privileges. He challenged the action on the ground that it involved the imposition of a discipli-

176 (1983) 34 SASR 100, 105 (Mitchell ACJ, with whom Mohr J agreed). Justice Legoe expressed agreement with Mitchell ACJ on several issues, but did not address this point: (1983) 34 SASR 100, 109.

177 See, eg, Henry Mayhew and John Binny, *The Criminal Prisons of London* (1st published 1862, 1968) 80, and U Henriques, 'The Rise and Decline of the Separate System of Prison Discipline' (1972) 54 *Past & Present* 61, 66-7, 77. The latter notes that early gaols emphasised the spiritual regeneration of prisoners, and sought to prevent the 'moral contamination' of the more innocent new-comers by the seasoned criminals through classification and segregation. In *L v Commonwealth* (1976) 10 ALR 269, 276 it was held that rules for the segregation of remand and convicted prisoners in the NT were designed to prevent the physical *and* moral contamination of remandees by convicts.

178 (1983) 34 SASR 100, 105-8. However, she felt this should not be applied too literally; directors could transfer prisoners to more restrictive divisions without infringing their limitations. Were this not the case, adverse reclassification would only be possible through disciplinary avenues and this was clearly not intended by the statute.

179 This was the problem faced by the prisoner in *Fricker* (1992) 57 SASR 494. In that case the prisoner submitted that he was placed in segregation, in part, because his gaolers wished to punish him but without using the formal disciplinary system. The prisoner, however, was unable to lead any clear evidence of this claim so the CEO had little trouble countering the submission.

180 A plea of public interest immunity for such information would fail. However, if a decision was made to deliberately segregate a prisoner contrary to correct procedures or for improper quasi-disciplinary motives, it is unlikely administrators would admit this or hesitate to create a different set of reasons for use in court.

181 (1988) 35 A Crim R 68 (Carter J); [1990] 2 Qd R 235 (Full Court). The events occurred while the Prisons Act 1958-1974 (Qld) was still in force.

nary penalty without proof of any offence and without any reference to the statutory provisions relating to disciplinary offences. Although this segregation was much shorter than all others examined in this article, the application was probably made in order to prevent any future uses of segregation for preventive reasons.

Justice Carter, at first instance, acknowledged the tension between judicial acceptance that prisoners are not necessarily stripped of all their civil rights upon incarceration, and the peculiar nature of prisons which created a need to maintain order in ways that would elsewhere be regarded as unacceptable because of their apparent punitive effect.[182] Certainly the nature of a prison environment would necessitate decisions with punitive consequences in order to maintain the stability of the prison. However, the line between harsh treatment which was necessary and that which was not was hard to draw. His Honour said:

> [I]n the light of modern authority there is a fine line to be drawn between a punishment imposed on the prisoner for breach of discipline and an executive decision which may be seen as being punitive in character but which is taken in respect of a prisoner in the interests of ensuring as far as possible the good order and proper government of the prison.[183]

Justice Carter held that this decision fell on the acceptable side of that hazy line. The Full Court upheld that conclusion by reference to the motives behind the decision. The Court stressed that whilst the duty to act fairly would normally require that the prisoner be given notice of the information held, a chance to state their case and the use of great caution in the decision-making, these procedural rights would not always be appropriate. The Court felt that when administrators sought to head off trouble they were attempting to perform the legitimate function of preventing a breach of the peace within the gaol. The need to protect the weak from the strong and the peaceful from the riotous were sound reasons upon which to base an exercise of the power. Chief Justice Macrossan indicated that when examining such explanations, great deference would be paid to the judgment of prison administrators so long as the restrictions imposed on the prisoner were a reasonable and necessary exercise of the power in issue.[184] Justice Thomas expressly declined to limit the scope of potential judicial intervention. The only clear ground of review he was prepared to canvass was bad faith. He gave the

[182] The conflict between these often countervailing forces was also acknowledged in *Binse* (1995) 8 VAR 508. That case concerned the use of physical restraints on a difficult prisoner who had a long history of escaping from custody (and many failed attempts) as well as violent behaviour. After a final escape attempt from Victoria's maximum security prison he was segregated and when taken from his cell for an hour of daily exercise kept in leg and handcuffs. The prisoner sought review of the Governor's decision to apply the physical restraints. Justice Byrne felt the balance between the need to allow prison managers to make administrative decisions in order to maintain the order of a prison and the need to respect and protect the rights of prisoners was often irreconcilable. He admitted that the former frequently entailed harsh consequences for prisoners, which were often similar to a punishment, but that the management imperatives present in a prison often required such decisions: *Binse* (1995) 8 VAR 508, 515 (Byrne J).

[183] (1988) 35 A Crim R 68, 71 (Carter J).

[184] [1990] 2 Qd R 235, 236-7.

example of where a prison officer attempted to victimise a prisoner through the use of administrative powers.[185]

The *McEvoy* case was expressly approved in *Bromley v McGowan*[186] which dealt with a transfer made to prevent trouble but the logic is equally applicable to segregation. Justice Perry stressed that even the unfettered South Australian power to locate prisoners could not support a decision made for an improper purpose.[187] He held that it was nonsensical to expect administrators not to act upon information suggesting a riot was imminent until the trouble actually occurred. If they acted solely to prevent the potential trouble and preserve the good order of the prison, that would be a *bona fide* exercise of their statutory powers.[188] However, if there was a hidden purpose, such as punishment for an offence that could not be proven, then the deference normally accorded to a *bona fide* decision would not prevail.

It is submitted that this focus on the labels rather than the underlying qualities of segregation prevents a proper consideration of its punitive nature. Punishments are normally identified by the fact that they inflict adverse consequences; segregation clearly meets this test.[189] There is also ample evidence from prisoners who have been placed in administrative segregation for extended periods that its features and effects are normally almost indistinguishable from punitive or solitary confinement.[190] It is easy to accept the idea that when many of the administrative powers held by prison managers are exercised they can have a detrimental effect on the prisoner which may appear little different from a punishment. Furthermore, prison management would become extremely cumbersome if the exercise of every such power were conditioned upon the observance

185 Ibid 241 (Macrossan CJ, with whom Lee J agreed). This part of the decision could be read as suggesting that a submission by a prisoner that their segregation was made for hidden disciplinary motives necessarily involves an allegation of bad faith or improper purposes. Some cases seem to make this equation, though the matter has never been fully explored. Cf *Stewart v Lewis* [1996] 1 Qd R 451 (Macrossan CJ, Pincus and Davies JJA) where Pincus JA expressly rejected the idea that such a submission required the prisoner to make a case of bad faith or improper purposes: [1996] 1 Qd R 451, 461.

186 (SA Supreme Court, Perry J, 22 July 1994) 8, 15-17.

187 There is exhaustive authority for this proposition, both this and the *McEvoy* case cited Mason J's judgment in *Kioa v West* (1985) 159 CLR 550.

188 See also *Re Walker* [1993] 2 Qd R 345. In that case a prisoner was transferred to a higher security prison due to his difficult behaviour and disruptive influence over others even though no specific disciplinary offence was proven against the prisoner. The Court held that it was permissible for the prison governor to exercise his administrative powers in such circumstances to maintain order within the prison. The Court also accepted that the requirements of prison order might sometimes necessitate that the Governor exercise these powers in a preventative fashion: [1993] 2 Qd R 345, 347-9. See also *McEvoy* [1990] 2 Qd R 235, 236-7 (Macrossan CJ).

189 H L A Hart, *Punishment and Responsibility* (1968) 4-5. One necessary element of that author's widely accepted definition of punishment is that the penalty must involve pain or other consequences that are normally considered unpleasant. Purists might argue that punishment must necessarily be administered in an *ex post facto* way whereas segregation is often administered in a preventative fashion. It is submitted this should not be the decisive characteristic of punishment.

190 Extensive curial testimony and personal accounts from Canadian prisoners who have spent long periods in solitary confinement are collected in Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983) 64-80.

of the careful procedural requirements present in disciplinary schemes.[191] But administrative segregation is not the same as the withdrawal of minor privileges for a short period. During the expansion of the scope of supervisory judicial review of the disciplinary powers of prison governors it was accepted that the characterisation of a power as 'administrative' or 'managerial', as opposed to 'disciplinary' or 'punitive', was not necessarily a sound way of determining whether a decision should be amenable to review. The nature and quality of the decision has been held to be more instructive.[192] It is submitted that the same principles should apply to segregation decisions. It is absurd to allow a prisoner to be subjected to a regime of treatment that differs little from formal punishment without the limitations that are normally placed upon the imposition of disciplinary penalties or the length for which they may subsist, on the basis that one form of the treatment is motivated by different intentions on the part of administrators. If the character of segregation is to be fully assessed, its effect, from the standpoint of the prisoner who endures the treatment, should not be entirely irrelevant.

C *General Considerations in Judicial Review of Segregation*

The failure of prisoners to persuade courts that placement into administrative segregation should be accorded the same procedural protections as disciplinary matters has not excluded the possibility of review. Decisions have instead focused on the nature of segregation to develop principles for review that are specific to this area.

In *Sandery v South Australia*,[193] the very wide South Australian power to order segregation was used in a case involving a difficult prisoner with a history of indiscipline and involvement in rebellious incidents.[194] Sandery was declared an unmanageable prisoner on account of a long history of trouble making (even though no specific disciplinary infraction occurred immediately prior to this decision) and was separated from the general prison population. Since the disciplinary wing already contained most of the other ringleaders, he was placed in effective solitary confinement for eight months. His cell was very small and had no natural light or ventilation. He was allowed three short solitary periods of daily exercise. Great effort was taken to ensure his absolute isolation from other prisoners. Sandery made an application for judicial review. He argued that he had

[191] This point was forcefully made in *Gray* [1993] 1 Qd R 595, 602 (Byrne J).

[192] *Leech* [1988] AC 533, 578 (Lord Oliver); *McEvoy* [1990] 2 Qd R 235, 240-2 (Thomas J); *Binse* (1995) 8 VAR 508, 515-16 (Byrne J).

[193] (1987) 48 SASR 500 ('*Sandery*'). This case involved the Correctional Services Act 1982 (SA), ss 19, 22, 23, 25, 36, which were enacted after *Bromley v Dawes* (1983) 34 SASR 73. Sandery's action was the next reported incident arising from protracted and systematic disobedience by prisoners at Yatala Labour Prison, which led to several Supreme Court hearings, many legislative amendments to counteract the effect of these decisions, and a successful civil action for assault by a prisoner regarding the conduct of anti-riot squads: *R v Koolmatrie* (1990) 52 SASR 482. Sandery's involvement in some of those matters is noted in Greg Mead, 'Can the law protect prisoners?' (1990) 15 *Legal Service Bulletin* 197.

[194] Several prisoners were tried on assault charges arising out of a riot which was part of the ongoing problems against which Sandery's segregation occurred. The trial ended in a hung jury and the Crown then sought to retry them, through an *ex officio* indictment, on riot charges. This was successfully challenged as an abuse of the process: *R v Koolmatrie* (1990) 52 SASR 482.

been placed in a disciplinary regime without first having been dealt with under the formal disciplinary provisions. He sought a declaration that his transfer and confinement in this regime was without any legislative authorisation.

Extensive examination of the South Australian power to segregate prisoners by Olsson J in *Sandery* revealed a regime of custody and control that vested in the responsible Minister the overall control of the prison system. The Minister's power had been delegated to the permanent head of the prison service.[195] The legislation permitted segregation only in very specific cases. The more restrictive forms, akin to solitary confinement, were only allowed in a few situations and were subject to stringent controls.[196] Any power to order solitary confinement had long since ended and its return would have to be authorised by nothing less than a clear and express power.[197] It seems, therefore, that any attempt to practise solitary confinement will be viewed with great judicial disfavour.[198] A submission that some type of residual management power existed, allowing prisoners to be adversely dealt with in situations outside the specific provisions was rejected. Justice Olsson held that this submission suggested an implied power to deal with prisoners in a manner other than that permitted under the legislation could be invoked 'from time to time at will'[199] regardless of other provisions in the relevant Act. Whilst he conceded that some kind of implied power, emanating from the general Ministerial control over prisoners,[200] may exist, he could not accept that a shadowy undefined power could operate to circumvent the clear procedures and detailed requirements established for specific situations.[201]

Justice Olsson accepted that Sandery was a formidable trouble maker and that administrators had segregated him in a *bona fide* attempt to limit his influence over other prisoners. However, this goal could not be pursued to the extent of

195 The then s 22(1) of the Correctional Services Act 1982 (SA) allowed the permanent head to imprison sentenced prisoners in 'such correctional institution' as he or she determined, and to any 'designated part' of the institution.

196 Correctional Services Act 1982 (SA) s 36 allowed a permanent head to segregate prisoners: sub-s (1) in the interests of 'the proper administration of justice' while an alleged offence was investigated; sub-s (2) exercisable once only over a single incident and not exceeding 30 days; sub-s (3) or to separate prisoners to prevent harassment or injury of another, or for a prisoner's welfare; all of which were limited to seven days and revocable by the permanent head, but extendable to a month with the Visiting Tribunal's approval: sub-ss (4)-(7). In *Fricker* (1992) 57 SASR 494, 503-4 Mullighan J endorsed Olsson J's presumption against solitary confinement in *Sandery* (1987) 48 SASR 500.

197 Solitary confinement, corporal punishment and dietary reductions were abolished in South Australia by the Corporal Punishment Abolition Act 1971 (SA), though until 1983, reg 221 of the Prisons Regulations 1961 (SA) empowered a gaoler to keep a refractory prisoner in 'separate confinement' pending the next visit of the Director or a visiting justice, thereby enabling the charge against the prisoner to be heard.

198 In *Fricker* (1992) 57 SASR 494, the prisoner was isolated for most of the day and allowed exercise that was usually, but not always, solitary. This limited association was held sufficient to rebut the presumption of solitary confinement: (1992) 57 SASR 494, 503.

199 *Sandery* (1987) 48 SASR 500, 512 (Olsson J).

200 The Minister has general control over all correctional institutions established by the statutory scheme: Correctional Services Act 1982 (SA) s 19.

201 (1987) 48 SASR 500, 512-13. Justice Olsson had made a similar point in *Bromley v South Australia* (1990) 53 SASR 403, 408, 414. In that case the CEO of prisons sought to justify his refusal to make payments for prisoners' work, which were required by regulation, on the basis of the residual prerogative argument. Though not ruling on the issue Olsson J said if such a power did exist it could not be exercised to contravene or circumvent clear legislative procedures.

permitting what was clearly not authorised, nor could it justify dealing with a prisoner contrary to the statute which regulated his or her imprisonment. Like every other citizen, a prisoner had the right to be dealt with according to law and to have the benefit of judicial review.[202] In this instance relief was issued in the form of a declaration that Sandery be returned to the wing from which he was removed prior to his segregation.[203]

In *Fricker*,[204] a prisoner who was involved in ongoing factional disputes in Yatala Labour Prison was segregated. Fricker had been involved in numerous disciplinary incidents,[205] including a serious riot in which guards were taken hostage. Prior to his segregation, Fricker was charged, after a long and difficult investigation, with involvement in a prison murder. He was placed in a wing which was reserved for difficult inmates, such as intravenous drug users, escapees and those with behavioural problems. The cells in this wing were much smaller that those in the rest of the prison. Confinement in them involved less freedom of movement, more observation, restricted visitation privileges, frequent strip searches and less recreational and work activities. Fricker argued this was punitive detention and that the statutory procedures for such treatment had not been followed.[206] Dawes argued that Fricker's segregation was necessary to ensure that the murder investigation was not compromised. This was a realistic possibility given Fricker's history.

During the several months of his segregation, the relevant statutory provisions were significantly amended to confer an 'absolute discretion' upon the CEO (Dawes) to place a prisoner in whatever prison or part thereof that seemed expedient, to establish regimes for particular prisoners or classes of prisoners, and to regulate all conditions of this treatment.[207] Segregation was subject to a single 30 day time limit but the CEO's power to place and treat prisoners was not. The same criteria for segregation remained but the CEO was vested with another power to separate prisoners. Ministerial review replaced scrutiny of orders by the Visiting Tribunal. Prisoners were required to be informed only of the order made, not the reasons for the decision, and had no opportunity to make representations. Although the discretion was unstructured, Mullighan J held it

202 (1987) 48 SASR 500, 513. The report does not indicate the form of relief granted, but it would most likely have been a declaration.

203 The report does not include the arguments relating to relief nor the nature of the order issued. This information is taken from Mead, above n 193. Interestingly, the possible application of the Bill of Rights (1688) was not canvassed. It is difficult to imagine a more punitive regime, short of outright systematic violence, than the one revealed in this case. Had there not been a clear absence of statutory authority for Sandery's segregation the conditions under which he was held would surely have tempted use of the Bill.

204 (1992) 57 SASR 494.

205 Fricker once pleaded guilty to assaulting a guard, and received a two year cumulative sentence: *Higgins v Fricker* (1992) 59 A Crim R 1.

206 It was also argued that conditions in the wing breached article 10 of the Bill of Rights (1688) as a cruel and unusual punishment, as discussed in section III.

207 Correctional Services Act 1982 (SA) s 24(2). A level of differential treatment, consequential upon individual segregation, was allowed before the changes, but the extent of this was unclear: *Forrest v Shaw & Robinson* (1989) 40 A Crim R 425, 428 (Legoe J) ('*Forrest*'). The great width of the new power would support any level of disparity that did not have an improper purpose or breach the rules against circumventing other parts of the Act.

must be exercised by reference to the scope and purpose of the statute.[208] In deciding where to locate a prisoner the CEO should consider all the circumstances of each case and the need to provide appropriate correctional treatment to a prisoner. The same reference to the nature and purpose of the statute also supported considerable deference to the CEO's decisions. The declared 'absolute' nature of the power, its sensitive subject matter and its conferral upon a single senior decision-maker all justified great caution in judicial scrutiny of the power's use. Justice Mullighan concluded that a normal exercise of the power would be difficult to query by way of judicial review. Relief would only be granted in the case of brazen legal irregularity, such as bad faith or the use of the power in a manner at odds with the clear requirements of other provisions.[209] This was an unexceptional case; the facts raised no evidence of a disguised punishment, which would have been an instance of bad faith at odds with the disciplinary procedures of the statute, so relief was denied.

The decision demonstrated that the issue of most concern to a court is the lawfulness of the prisoner's current treatment which means that correctness of their preceding treatment is of secondary importance. Justice Mullighan noted that the segregation had begun before the new discretion was enacted so for some part of this period Fricker's treatment was completely unsupported by statutory authority. The new power was not retrospective but the fact that Fricker had been unlawfully treated for a period of a few weeks was effectively dismissed.[210]

In *Holden*,[211] a prisoner placed in the same division as Fricker also sought review of his segregation. Holden was put into the high security division for two days after he made threats against a prison officer. However, soon after his release from the division, Holden voluntarily requested to return to the restrictive regime for protective custody. He was eventually sent to a new protection wing intended to relieve the crowded conditions in the other wing. The new wing was only partially built so transferees were given consent forms warning them of harsh conditions though it was envisaged that improvements would occur quickly. Movement of prisoners was tightly monitored and accompanied by cautionary handcuffing. There were regular strip searches, cellular confinement for at least 18 hours per day and few work or leisure opportunities. Holden lodged an application for judicial review seeking a declaration that his segregation and the conditions under which it was enforced were unlawful, an injunction restraining the CEO and his delegates from continuing the segregation and an

[208] The same point was made before the power underwent its last legislative revision: *Forrest* (1989) 40 A Crim R 425, 426 (Legoe J).

[209] Justice Mullighan stated that even review on these grounds will only 'perhaps' become open: (1992) 57 SASR 494, 503. It is submitted that ousting of these grounds of review could be done only by very clear language, not by the creation of an absolute discretion alone.

[210] A similar scenario arose for two NSW prisoners who were segregated for over a year without the ministerial approval required for periods over six months. When the error was discovered the Corrective Services Commissioner rescinded the orders but would not authorise any form of compensation or redress. Both were federal prisoners, so Commonwealth authorities expedited their eligibility for release on licence as compensation for their hardships: NSW Ombudsman (1991/2), above n 53, 139-40.

[211] (1992) 62 A Crim R 308.

order in the nature of *mandamus* to require the CEO to detain Holden according to law.

Counsel for Holden argued that, despite the CEO's wide discretion to place prisoners where and how he saw fit, the procedural precautions in the Correctional Services Act 1982 (SA) against harsh treatment supported an inference that prisoners should be able to live as normal a life as possible subject only to the 'necessary concomitants'[212] of prison life. Conditions in the protection wing were submitted to have breached this standard.[213] Justice Legoe held that the idea that the powers of administration should be read subject to limitations on the harshness of the treatment that could be authorised, illustrated a great problem in this area of judicial review. When applications exposed an *ultra vires* disciplinary decision made by a Governor or an adjudicatory tribunal, there was a clear tension between the need to correct decisions and the desirability of minimising any external usurpation of discipline and order within prisons. It was different when general issues concerning the nature of treatment were raised. These were best resolved by a private law action for damages against the decision-maker.[214] As this case raised only general issues, relief was refused.

This is dubious logic. Certainly, many applications for review of disciplinary decisions create the possibility of compromising management authority through external interference in administration. However, those cases have emphasised that the seriousness of the potential consequences faced by prisoners through the statutory penalties for disciplinary offences, are an appropriate reason to view disciplinary powers strictly and any procedural requirements as mandatory. In some instances, the penal consequences faced by the prisoner are sufficiently serious to invoke the supervisory jurisdiction of superior courts and courts have not hesitated to intervene.[215] However, as the seriousness of the charge and penalty decrease, there comes a point where intervention ceases to have a substantial protective function and the intrusion upon management becomes unacceptably high. In these cases, intervention will be refused.[216]

The same parallel may be drawn with segregation. Clearly intervention in everyday aspects of treatment, such as small alterations in privileges upon transfer to a different gaol, would seriously and unacceptably compromise

[212] Ibid 316.

[213] Counsel for Holden cited *Raymond v Honey* [1983] 1 AC 1 and *St Germain (No 1)* [1979] 1 QB 425. It is submitted that neither case contains *dicta* to support the argument. A similar argument was attempted in *Binse* (1995) 8 VAR 508 where one ground upon which the routine use of hand and leg cuffs imposed upon a prisoner was challenged was that the Governor had not adequately examined other, less restrictive, means of achieving high security confinement. The submission was rejected because the Court felt it invited a second-guessing of the Governor's view of issues that were *intra vires* to the discretion.

[214] Justice Legoe cited Lord Bridge in *Hague & Weldon* [1992] 1 AC 58, 155 and *Leech* [1988] AC 533, 566.

[215] See, eg, *Dimozantos v Governor of Barwon Prison* (Victorian Supreme Court, Ashley J, 21 June 1993) noted in (1994) 18 *Criminal Law Journal* 233; *Napier* (WA Supreme Court (Full Court), 15 August 1994) 11 (Scott J, with whom Seaman and Anderson JJ agreed).

[216] *Maybury v Osborne* [1984] 1 NSWLR 579, 588-9 (Lee J); *Ex parte Johns* [1984] 1 Qd R 450, 453-5 (Derrington J).

effective management.[217] But review of very restrictive regimes of segregation that have been applied for several months, or even years, raises serious questions about the scope and purpose of the power and the correctness of its exercise. Such cases involve more than mere issues of routine administration. The High Court has declared that the better focus in determining the appropriate scope of natural justice in review of administrative action is the nature of the power rather than the form by which it is exercised.[218] In keeping with this logic, the focus in review of segregation should be the serious nature of this power and the great effect it may have in the prison environment. Segregation can determine *all* of a prisoner's living conditions. Whilst this is also true of every form of imprisonment, segregation is much more serious because the control which gaolers exert over the living conditions of prisoners is used to enforce very spartan conditions. When coupled with the possibility of open-ended periods of confinement, the important nature of this power over the lives of the individuals affected by it is obvious.

Furthermore, it is difficult to accept Legoe J's suggestion that *Holden's* case could be resolved by a private law action. This remark follows a trend in the English cases which began a worrying habit of refusing public law relief but pointing to private law options that are theoretically available, especially the tort of breach of statutory duty. That tort requires proof of an action or decision made contrary to a legal duty. However, it is difficult to imagine a set of circumstances that would satisfy this test but fail the requirements for a grant of relief through judicial review. Breach of statutory duty is often suggested by judges, during the dismissal of a judicial review application brought by a prisoner, as an alternative means by which prisoners may seek redress against the actions of gaolers. Given the unlikelihood that a prisoner could succeed in an action for breach of statutory duty if the action was based on facts which failed to secure relief by way of judicial review, it is difficult to understand why judges believe the tort could perform a useful role in this area. Perhaps it is preferable to some judges, when dismissing a judicial review application in which the evidence has disclosed that a prisoner has been subjected to very harsh treatment, to suggest an improbable cause of action rather than to admit that the law cannot provide any effective remedy to the prisoner.

D *The Enforceability of Procedural Requirements*

One important part of the *Control Units* decision concerned the statutory procedures for placing and maintaining a prisoner in segregation. Justice Tudor Evans applied the rule that prison regulations did not give rise to any rights enforceable by a prisoner and so could not be used as a basis to seek review of

[217] As was held by Byrne J in *Gray* [1993] 1 Qd R 595, 602. However, his Honour did accept that a systematic denial of privileges could be a ground for judicial review for bad faith or other improper purposes even if no specific legislative entitlement had been created: [1993] 1 Qd R 595, 601.

[218] *Annetts* (1990) 170 CLR 596, 608 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ).

the actions of gaolers.[219] He thought that the principle was applicable in this case because the segregation power was placed solely in the hands of Governors. Ironically, this did not prevent Tudor Evans J from endorsing the practice whereby the Home Secretary often intervened and advised individual Governors on the exercise of this power because he felt this was consistent with the Home Secretary's role as the ultimate controller of English prisons.[220] Justice Tudor Evans saw no place within this interaction for Williams to offer his views or argue against either the individual decisions or the formation of general policy that affected him. Clearly the required monthly renewals demanded that the events of the preceding month be examined and weighed in the re-exercise of the power. In practice, this did not happen; the scheme imposed segregation for six monthly periods with no chance of variation. How could this practice, which was clearly in breach of the legislative procedure, be lawful? Justice Tudor Evans held the scope of the power to hold and locate prisoners was so wide that any irregularity in the procedure by which a prisoner was kept in segregation could not affect the legality of any particular placement of a prisoner.[221] His Honour's finding did not preclude Williams from challenging the decision on the various grounds of *ultra vires*. A prisoner may, therefore, be better advised to seek relief against a segregation decision by seeking to impugn the grounds upon which the decision was based rather than the procedure by which it was made.

Bromley returned to the fray in *Bromley v South Australia*.[222] He was segregated for allegedly inciting a riot by threatening a walk out of prisoners from their assigned work if he was transferred.[223] The reasons for the decision, not given to Bromley at the time he was segregated, were simply a brief assertion of his apparent role in inciting trouble. Subsequent reviews by a departmental review committee, which affirmed the decision, did little more than repeat this statement and recite the legislative criteria for segregation. The argument in the application for judicial review focused on whether these facts were sufficient to

219 This widely cited principle is from *Arbon v Anderson* [1943] 1 KB 252. The principle was approved by the High Court in *Flynn v R* (1949) 79 CLR 1. The principle had drastic consequences. An eminent commentator once stated that much of the Prison Act 1952 (Eng) and *all* of the Prison Rules 1964 (Eng) were directory: William Wade, *Administrative Law* (5th ed, 1982) 219. This drastic view has been superseded by the developments discussed above in Section V Part A.

220 [1981] 1 All ER 1211, 1228-9. Justice Tudor Evans did not attempt to characterise the Home Secretary's role as a type of review, nor was he troubled by the fact that the Home Secretary's supervisory role over prisons was not amenable to judicial review.

221 Ibid 1247. An example of a similar disdain for performing a proper factual assessment in the exercise of a discretion arose in NSW where the Executive Director of Prisons Operations admitted to the Ombudsman that he never actually read the segregation orders he approved. They arrived on his desk in batches, up to 50 at once, which he gladly signed in the belief that preceding clerical assessments of their correctness were reliable: NSW Ombudsman (1991/2), above n 53, 139.

222 (1990) 55 SASR 309.

223 Section 36 of the Correctional Services Act 1982 (SA) was repealed in 1990 and replaced. The new s 36(2) allows segregation in the interests of a prisoner's safety or welfare, or to prevent a prisoner harassing or injuring another, or because the prisoner in some way constituted a threat to the 'security or good order' of a prison. The same review structure remained, with an added requirement to deliver a written statement of reasons to the prisoner within 24 hours of the decision: s 36(7).

justify the decision and whether the reasons met the statutory requirement that the grounds of segregation be specified in the order.

Justice Duggan held that the clear and detailed structure of the segregation procedure reflected the serious nature of the issue. The legislature had inserted the strict provisions on notice, the review mechanisms and the requirement to provide reasons as important safeguards to ensure a serious issue was decided 'carefully and justifiably'.[224] These precautions were not mere administrative guidelines, but clear prerequisites to a valid exercise of the power.[225] Justice Duggan held that the reasons given in this case were so vague and potentially ambiguous that they gave no explanation of the basis of the decision and clearly failed to satisfy the statutory requirement to give reasons which were adequate and intelligible.[226] Inexact reasons deprived the provision for notice of any force because they denied the prisoner or review authorities any ability to clearly ascertain the grounds for the decision and, thereby, measure the worth of the original reasons or the effect of subsequent events. The lack of proper notice to Bromley further reinforced this failing. Relief was issued in the form of a declaration that the decision to segregate Bromley and his consequential location in the segregation wing were unlawful.

In regard to the enforceability of procedural requirements, the attitudes demonstrated towards administrative segregation are in stark contrast to those shown in disciplinary cases. In the latter area courts are prepared to enforce procedural requirements carefully.[227] The decision in *Bromley v South Australia* suggests that relief will at least be issued to correct clear non-compliance with mandatory procedures, but anything less may not suffice.

E *Unreasonableness*

The ground of unreasonableness warrants discussion in the context of the review of segregation, firstly, to highlight the potential utility of this ground of review, and secondly, to explain why this promise has not materialised for prisoners. The prevailing expression of the ground of reasonableness, which comes from the *Wednesbury* case,[228] is whether the decision in question is so unreasonable that no reasonable decision-maker could have made it. The test has

224 (1990) 55 SASR 309, 310.

225 Ibid.

226 The authority for this proposition was *Westminster City Council v Great Portland Estates* [1985] AC 661, 673 (Lord Scarman).

227 See, eg, *Kuczynski v R* (1994) 72 A Crim R 568, 589 (Owen J) and *Hartigan v Qld Corrective Services Commission & Brand* (Queensland Supreme Court, Helman J, 2 March 1995). There is some indication this strictness may extend to those provisions contained in administrative directives and guidelines framed in mandatory language: *Dimozantos v Governor of Barwon Prison* (Victorian Supreme Court, Ashley J, 21 June 1993) 9. Some courts have adopted a similarly strict attitude in related issues, such as requiring the calling of specific witnesses so as to discharge the requirements of natural justice: *Napier* (WA Supreme Court (Full Court), 15 August 1994) 11 (Scott J, with whom Seaman and Anderson JJ agreed).

228 *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223, 229-30 (Lord Greene MR, with whom the rest of the Court agreed). There are many other important decisions associated with unreasonableness but the *Wednesbury* decision is so commonly cited in this context that it has become the 'nickname' for the ground: Wade and Forsyth, above n 132, 390.

been variously criticised as circular or lacking in any clear standard by which it may be applied, but attempts to expand or clarify the test have not found favour.[229] Many academic commentators have concluded that unreasonableness is, in fact, a very difficult ground of review to establish. Many of the cases in which unreasonableness has been found would also have succeeded on other grounds.[230] Other commentators have suggested that, although the *Wednesbury* criteria clearly connotes some level of absurdity or extremity in the decision, many judicial decisions have found the ground established in circumstances indicating that this notion of extremity is not always rigorously required.[231] Whilst there have been many judicial and academic warnings that courts should refrain from an expansive application of the ground lest they begin an irreversible descent into merits review,[232] the potential scope of review provided by the ground of unreasonableness cannot be denied.

Prison administration, however, is one area where courts have had little trouble enforcing self restraint of the strictest level in respect of the *Wednesbury* principles. Normally they approach an argument based on unreasonableness by first ascertaining the scope and purpose of the power in question, and then considering whether the decision in issue can be justified by reference to the considerations by which the power must be exercised.[233] The decisions often carefully

229 Allars, above n 60, 186-8; cf Paul Walker, 'What's Wrong With Irrationality?' [1995] *Public Law* 556. Walker considers the possible variations of 'irrationality', a term which Lord Diplock has explained in terms of *Wednesbury* unreasonableness: *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, 410-11. Walker explains Lord Diplock's view of irrationality to mean not simply an illogical decision, but one which is so outrageous that no sensible person applying their mind to the question to be decided could have arrived at the decision. At first glance this view appears to add nothing to the *Wednesbury* test. It is, however, submitted that Walker's emphasis on the need for a submission of unreasonableness to establish an identifiable (and substantial) failing of logic of some sort could provide clarity to the ground.

230 See, eg, the statistics cited on the success rate of applications based upon unreasonableness under the Administrative Decisions (Judicial Review) Act 1977 (Cth) in Roger Douglas and Melinda Jones, *Administrative Law — Commentary and Materials* (2nd ed, 1996) 450. Allars, above n 60, 192 is also sceptical about the value of an application on the ground of unreasonableness. She states that unreasonableness is 'frequently ... raised as a ground of review along with several others but is never strongly contended for'.

231 Wade and Forsyth, above n 132, 387-436 use various synonyms for the ground, such as capricious, absurd and irrational but acknowledge that many of the cases adopt a less stringent approach than any of these words suggest. Walker, above n 229, 565 supports an entirely different approach. He asserts that strict logic is an inherently limited concept, and may therefore be inappropriate for some decisions, thus some level of illogicality on the part of administrators should be tolerated by courts.

232 See, eg, Aronson and Franklin, above n 119, 69; Wade and Forsyth, above n 132, 399. Justice Brennan issued a caution on this point in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36-7 where his Honour cites William Wade, *Administrative* Law (6th ed, 1988). Cf Tim McEvoy, 'New Flesh on Old Bones: Recent Developments in Jurisprudence Relating to Wednesbury Unreasonableness' (1995) 3 *Australian Journal of Administrative Law* 36 who rejects the assertion that the trend towards an expansive application of the *Wednesbury* principles is bringing courts closer to merits review.

233 As was done in *Binse* (1995) 8 VAR 508 where a prisoner sought judicial review of a Governor's decision to place him in leg and hand cuffs whenever he was out of his cell. The Court first engaged in an exercise of statutory interpretation to decide whether the Governor had power to place a prison in physical restraints in the facts presented. This question was answered in the affirmative. In the following part of the judgment the Court considered several grounds of challenge to the decision, including unreasonableness. The prisoner had a long history of violent and escape related behaviour. Justice Byrne held that this evidence made it impossible to say that no

stress that the function of a review court does not extend to any direct or indirect usurpation of the discretionary functions which are conferred upon prison administrators.[234] Instead, courts seem to adopt an approach which involves ascertaining whether there is some sort of justification for the decision in question. If this requirement is met, the reluctance to second-guess the judgment of a prison governor is expressed in no uncertain terms.[235] This approach is reinforced by the phrasing of the *Wednesbury* test in terms such as 'whether the decision was such that no reasonable governor properly exercising his [*sic*] statutory discretion could have made it'.[236] Such an approach allows courts to avoid the weighing of evidence which many applications involving unreasonableness seem to tacitly involve. The refusal to engage in such an exercise has the practical effect of according administrators a large measure of discretion.

Forrest v Shaw & Robinson[237] is an example of the difficulties that a prisoner may face when seeking to make out a case of unreasonableness in respect of a segregation decision. In that case a prisoner sought judicial review of a visiting justice's decision to uphold a decision to keep him in segregation. Forrest was placed in segregation after the Governor had received a letter from another inmate alleging that he was preparing to escape. The decision was strongly influenced by Forrest's history of poor behaviour and the temporary disruption of the prison's security due to substantial building works. Much of the court's decision centred on issues of statutory construction under the Correctional Services Act 1982 (SA)[238] but counsel for Forrest also attempted to establish a case of unreasonableness in respect of the decision. It was submitted that many other inmates were effectively in the same position as Forrest (that is, had a history of difficult behaviour), yet had not been placed in segregation for several months. This submission was rejected largely on the basis that the decision was clearly justifiable on the basis of Forrest's history of poor behaviour and the information regarding a possible escape attempt.[239]

'reasonable governor' would have placed the prisoner in physical restraints: (1995) 8 VAR 508, 519.

234 See, eg, *Ex parte Smith* (WA Court of Criminal Appeal, Wallace, Kennedy and Pidgeon JJ 11 September 1989) 7 (Wallace J).

235 The reluctance to inquire into the reasonableness of a decision is even more marked if it is one of policy. See, eg, *Prisoners A to XX inclusive v NSW* (1994) 75 A Crim R 205, 210-11 where Dunford J held that policy decisions of the NSW Corrective Services Commissioner and/or the Department about the introduction of condoms into prisons was not reviewable on the *Wednesbury* principles.

236 This formulation of the test was used in *Binse* (1995) 8 VAR 508, 519 (Byrne J).

237 (1989) 40 A Crim R 425. For a similar case see, eg, the very brief decision of *Garrett v Krikorian & Qld Corrective Services Commission* (Queensland Supreme Court, Byrne J, 3 March 1995).

238 The principal issue was whether the officer who made the decision to place Forrest in segregation could lawfully do so in the absence of an express instrument of delegation. This argument was eventually rejected but the language of sections 7 and 36 (the delegation and segregation provisions) were not entirely clear: (1989) 40 A Crim R 425, 426-7 (Legoe J). In 1990 a new version of s 36 was inserted into the Correctional Services Act 1982 (SA). The provision does not interpolate any other decision-maker in the CEO's power to order segregation and the CEO may delegate this function without ministerial approval: s 7(2)(a).

239 (1989) 40 A Crim R 425, 428-9. Allars, above n 60, 188-90 categorises decisions involving unreasonableness into three paradigms, the second of which involves discrimination without

The potential utility of unreasonableness as a ground of challenge was hinted at in *Fricker*,[240] the facts of which are noted above. The segregation of the prisoner Fricker was held to be lawful because it was accepted by the Court to be a *bona fide* action which was amply justified by his poor behavioural history. At the conclusion of his judgment Mullighan J pointed out that whilst the segregation was justified and lawful on the facts presented to the court, the same facts would not support Fricker's segregation indefinitely. Justice Mullighan held that if Fricker's behaviour changed and he showed a continued desire to re-enter the general population in a constructive way, then a time might come when his continued segregation would 'not be regarded as appropriate in the exercise of the discretion'.[241] In other words, the power could not authorise a confinement that was no longer factually supportable. Logically, a segregation that ran for so long that it outlived any justification would move outside the 'normal' class of unreviewable decisions.[242] Though his Honour did not name the ground upon which this finding could be made, it is submitted that it would have been unreasonableness.

This last decision in particular illustrates that unreasonableness may provide a solid foundation for applications that meet a very literal reading of the *Wednesbury* rule. This approach would enable the ground of unreasonableness to provide relief against a recalcitrant decision-maker who refused to terminate a prisoner's segregation in circumstances where that refusal was clearly an abuse of power. This would be the case where, for instance, there had been a significant change of circumstances or a very substantial lapse of time. Outside such extreme examples, however, unreasonableness appears to have no substantial role to play.

F *Summary*

The first obstacle prisoners face in mounting a challenge to their segregation is the width of the statutory powers in question. Almost all of the cases examined demonstrate that judges will resile from imposing any significant structure upon those powers and, furthermore, that they are also prepared to accord considerable deference to the explanations provided by administrators regarding their exercise and the factual assessments upon which those reasons are based. The *McEvoy*

justification. She feels many cases are explicable on the basis that unreasonableness can be demonstrated if a benefit or detriment is distributed unevenly between members of a similar class. The argument implies that where like cases are treated differently a reason must be provided. This sort of argument failed on the facts in the *Forrest* case and it is not difficult to imagine administrators defeating the argument by demonstrating that any two cases were insufficiently alike to support this argument.

240 (1992) 57 SASR 494.

241 Ibid 505.

242 The reason for this was explained by Deane J in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366-7. His Honour pointed out, in relation to determining the content of procedural fairness, that it would be illogical for the Court to limit its supervisory review to the 'surface formalities' of fairness because that would allow a decision that was in substance illogical, irrational or arbitrary to stand so long as fair procedures were used to reach that decision. Chief Justice Mason was less enthusiastic about what he described as the 'no sufficient evidence test': (1990) 170 CLR 321, 356-7, and elsewhere he sounded a cautionary note on judicial review entering disputes upon findings of fact: (1990) 170 CLR 321, 341.

case illustrates that whilst review will always be available against decisions allegedly made in bad faith, courts are unsure where to draw the line between this ground and the wide parameters accorded to legitimate managerial objectives. Furthermore, when facing this problem, courts will pay considerable heed to the opinions of administrators. There would be few other areas of public law where such deference is displayed towards decision-makers.

Prisoners face another obstacle because of this unusual attitude towards the grant of relief. It is trite law that the issue of relief in a judicial review application is normally discretionary and that the exercise of that discretion is often decided, or strongly influenced, by the availability of other forms of redress. In practice, however, discretion with respect to administrative review remedies is almost invariably exercised in favour of the applicant if the grounds are made out. In so far as this does not occur in the segregation cases, this can be seen as representing a departure from normal administrative law conventions.

The common sense explanations for the discretionary nature of relief in administrative review cases need not be canvassed here, but the potential problems that may accompany its exercise in segregation cases were highlighted by Mulligan J in *Fricker* when his Honour suggested that a different view would be taken of the prisoner's application, by virtue of the lapse of time, if he continued to behave well but administrators refused to release him from segregation.[243] The offering of a theoretically available, but practically dubious, avenue of relief is in keeping with the general tendency of courts in judicial review applications to hint at the availability of relief but deny redress in all but the most blatantly unjustified cases of segregation.[244] It is noteworthy that in the only two cases where relief was granted, *Bromley v South Australia* and *Sandery*, it was done so on the grounds of clear non-compliance with statutory requirements. However, the subsequent amendments to the South Australian scheme broaden the CEO's powers over the placement and treatment of prisoners so widely that it is unlikely there will be more successful applications, as was demonstrated by the *Fricker* case. The paucity of applications for judicial review of segregation in other states demonstrates that prisoners hold little store in this avenue of redress.

[243] (1992) 57 SASR 494, 505-6. A similar point may be made about the assertion in *McEvoy* [1990] 2 Qd R 235, 241 (Thomas J) where it was suggested that the Court's reluctance to intervene in administrative segregation decisions would not prevail where a prison officer 'by some cynical pretence abuses his [*sic*] powers to victimise a prisoner under the guise of ordinary management.' This remark appears to temper the reluctance of courts to intervene in administrative segregation by assuring prisoners that prison officials will be prevented from using their powers in a dishonest fashion. With respect, how could a prisoner ever establish that an official had behaved with such a motive?

[244] A similar conclusion can be drawn from the cases examined in the discussion of the Bill of Rights. A common feature of those cases is that they do not seek to challenge a single unlawful action by an identifiable member(s) of prison staff, such as an *ultra vires* decision or an assault, both of which may be attacked by public law remedies, private actions, or even criminal prosecutions. But the latter two forms of relief are unsuited to complaints of more systemic mistreatment which may not necessarily contain a single incident of unlawful behaviour upon which relief may be able to fasten. This is the characterisation of the English cases by Greg Treverton-Jones, *Imprisonment: The Legal Status and Rights of Prisoners* (1989) 26-7. The examination of the judicial review cases demonstrates that this avenue of relief appears to be similarly unsuited to providing relief to prisoners subjected to systematic mistreatment.

VI CONCLUSION

There have been many judicial statements asserting that it is desirable, even necessary, that judicial review be available as a means by which the legality of decisions taken under correctional legislation may be questioned, and that this jurisdiction may not be circumscribed by considerations of policy or expediency.[245] The cases examined in this article belie that sentiment. The current approach to the review of decisions relating to the administrative segregation of prisoners accords great deference and immunity from legal scrutiny to gaolers and it does so entirely at the expense of prisoners. It appears that as long as prison administrators in Australia do not use patently illegal punishments or make unlawful decisions in the transfer to, or running of, segregation units, they face little prospect of scrutiny through judicial review. This position is, in my opinion, unduly restrictive towards prisoners.

None of the applications by which prisoners have sought review of segregation decisions have directly challenged the legality of their actual sentence or the imprisonment that flows from it. Instead they have questioned the way in which that detention is carried out. What the prisoners have asserted is that the statutory powers used to classify, locate and segregate them contain express or implied limitations on the exercise of those powers. The cases examined in this article demonstrate that prisoners face great difficulty when they attempt to construct some kind of substantive or procedural benefit from segregation provisions. The language of the statutory powers in question always appears to be incapable of supporting such an argument.

Prisoners seeking relief against segregation decisions also face difficulties of a more conceptual nature. The assumption that prisoners should have no enforceable right to liberty within a prison forms a significant obstacle to prisoners. If it was accepted that prisoners have a right to some residual level of intra-prison freedom (whether this was expressed as a right not to be segregated without good reason and proper process, or a right to endure as few restrictions as were reasonably necessary to carry out imprisonment) a balance could be struck between administrative needs and individual liberty. Prisoners would not possess a right to absolute release and administrators would not possess an absolute discretion over segregation.

The most important issue in respect of the review of administrative segregation and one which, in my view, requires fundamental reconsideration, is the refusal of both judicial officers and prison administrators to acknowledge that administrative segregation is a form of punishment. Administrative segregation clearly contains the basic ingredients of punishment. All regimes of administrative segregation involve a significant array of hardships and adverse living conditions. The prisoners placed in administrative segregation invariably have an ongoing history of disciplinary breaches and other problems with prison authorities. Judges seem content to accept that if prisoners are subject to some form of adverse treatment, like administrative segregation, the adverse treatment is not

[245] See, eg, above n 2.

'punishment' unless a specific disciplinary infraction has been alleged and formal disciplinary procedures invoked. Prison managers no doubt welcome the consequences that flow from the refusal of courts to characterise administrative segregation as a form of punishment. For instance, decisions about administrative segregation are not subject to any of the problems that can arise from the procedural protections which attend most disciplinary powers. Another consequence of characterising segregation as an administrative rather than punitive measure is that the Bill of Rights is effectively rendered useless because the operation of that statute is limited to instances concerning the infliction of punishment.

One final point which can be made about the consequences of the current inability of prisoners to seek any effective form of judicial redress against administrative segregation decisions provides a compelling reason for a change of judicial attitudes. When prisoners are denied any effective form of review of decisions which seriously affect their lives, it is natural to expect that they will develop a sense of grievance and injustice. These feelings are likely to be well established in prisoners who are placed in administrative segregation because they normally have a history of conflict with administrative officials. The placement of such prisoners in segregation, coupled with the almost hopeless prospect of securing judicial relief against this form of confinement, can only serve to inflame prisoners' existing feelings of frustration and powerlessness. Prisoners who possess such attitudes and beliefs are far less likely to adopt socially acceptable ways of coping with their incarceration or to acquire the skills necessary for successful reintegration into society upon their release. Yet the prisoners who are placed in administrative segregation are often those who are most in need of such skills.