

SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION
On Protections for Prisoners' Rights in Australian Administrative Law

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'It is perhaps gratuitous to assert that those who have been convicted of breaking the law are most in need of having respect for the law demonstrated to them.'

– Hans W. Mattick¹

1. Introduction

This submission inquires into how the human rights of prisoners² are currently protected in Australian administrative law, and how these protections could be improved. I argue for a federal statutory Bill of Rights as a vital step towards closing the outstanding gaps in the availability of administrative remedies for prisoners through judicial review. The first part of my submission highlights the inadequacies of existing court-based avenues for protecting prisoners' rights, including habeas corpus, fundamental common law rights, and natural justice. This submission focuses on how judicial review meets prisoners' rights. I will address other major issues affecting prisoners' rights, namely prison privatisation,³ and restricted access to information and resources inhibiting prisoners' curial preparation,⁴ only insofar as they arise in this investigation. The latter part of my submission proposes that a Charter of Rights would address the deficiencies in prisoners' rights protection by widening judicial review jurisdiction and remedies.

2. The Human Rights of Prisoners

The fundamental rights relevant to prisoners include legal process rights, as well as those rights affected by prison rules and administrative decisions while in state

¹ In Gordon Hawkins, *The Prison: Policy and Practice* (1976) at 159.

² This submission relates specifically to prisoners in pre-charge detention, custody before trial, detention on remand, or court-ordered correctional detention. Some of the prisoners' rights issues discussed here are relevant to people held in executive detention, including for immigration or quarantine purposes.

³ See John Rynne, 'Protection of Prisoners' Rights in Australian Private Prisons' in David Brown & Meredith Wilkie (eds) *Prisoners as Citizens: Human Rights in Australian Prisons* (2002); Richard Harding, *Private Prisons and Public Accountability* (1997).

⁴ On freedom of information laws and access to lawyers as practical barriers to judicial review faced by prisoners, see: Richard Edney, 'Importance of Administrative Transparency in the Correctional Context: Knowing the Rules' (2005) 12 *AJAL* 163; Kathy Bagot, 'Administrative Accountability in Prisons' (2002) 9 *AJAL* 143 at 157-8; Chris Butler & Paulette Dupuy, 'Denying Administrative Justice to Prisoners in Queensland' (2007) 32(2) *Alt LJ* 101.

custody. A person deprived of their liberty by law has the right to be free from arbitrary arrest or detention.⁵ This broad right includes the right to be informed of the reasons of arrest or detention, the right not to be subjected to indefinite detention without charge, and the right to legal counsel before questioning when arrested. Incarcerated people are particularly vulnerable to torture, or cruel, inhuman or degrading treatment,⁶ and must be treated with 'humanity and with respect for the inherent dignity of the human person'.⁷ Other rights affected by detention conditions include the right to privacy⁸ and freedom of expression.⁹ The detainees most susceptible to losing these fundamental rights include terror suspects, forensic patients and non-citizens in immigration detention.

3. Judicial Attitudes to Prisoners' Rights

The existence of these human rights cannot be taken for granted. The judiciary has traditionally taken a 'hands-off' approach to prison administration, in keeping with its reluctance to interfere with political matters, and due to a concern that allowing for litigation by prisoners against administrators would undermine the security and management of the correctional institution.¹⁰ This approach was reiterated in Australia by Justice Dixon in *Flynn*.¹¹ The hands-off doctrine is a manifestation of 'judicial deference' to the expertise and authority of prison administrators, privileged over the rights of inmates.¹²

The hands-off approach has since been superseded by the view, affirmed in most common law jurisdictions internationally and in Australia, that prisoners have rights which prison authorities must respect to some extent. The 'doctrine of retained rights' was first expressed in the United States (US): 'a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976) (hereafter *ICCPR*). The *ICCPR* rights are given effect in the existing Australian rights charters, namely: *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) (hereafter *Victorian Charter*); and *Human Rights Act 2004* (ACT) (hereafter *ACT HRA*).

⁶ *ICCPR*, art 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (hereafter *CAT*).

⁷ *ICCPR*, art 10; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37 (entered into force 2 September 1990) (hereafter *CRC*).

⁸ *ICCPR*, art 17.

⁹ *ICCPR*, art 19.

¹⁰ See Hawkins, above n1.

¹¹ *Flynn v King* (1949) 79 CLR 1 at 8; followed in NSW in *Vezitis v McGeechan* (1974) 1 NSWLR 718 at 721 (Taylor J); *Smith v Commissioner of Corrective Services* (1978) 1 NSWLR 317 at 328 (Hutley J).

¹² Richard Edney, 'Judicial Deference to the Expertise of Correctional Administrators: The Implications for Prisoners Rights' (2001) 7(1) *AJHR* 91.

him [sic] by law'.¹³ It has since become accepted principle in Australia that the convicted offender retains all rights owed to citizens, with the notable exception that rights may be limited where necessary for the administration of the correctional institution.¹⁴ The US courts took the approach that mere 'administrative inconvenience' was not enough to permit an authority to deny a prisoner's residual rights.¹⁵ Similarly, Justice Dixon's restrictive view of prisoners' curial relief has diminished in influence with the development and expansion of Australian administrative law. Nonetheless, as we will see, it seems that the court's historically unsympathetic approach to prisoners' rights subsists.¹⁶

4. Existing Protections for Prisoners' Rights in Judicial Review

In current administrative law, people whose rights are violated in the course of their arrest, detention or trial may apply to a tribunal with merits review jurisdiction over their case,¹⁷ or make a complaint to the state Ombudsman. Outside of the administrative remedies offered in merits review, a prisoner can seek common law remedies, notably the writ of habeas corpus, as well as the equitable remedies of declaration or injunction, through judicial review.

It is apparent that the availability of judicial review and court-based administrative remedies are being progressively narrowed in Australia. This trend manifests, for example, in the *Craig* decision to maintain a distinction between jurisdictional errors and remediable non-jurisdictional errors that 'appear on the face of the record', in contrast to the commonsense English interpretation of errors of law.¹⁸ The receding grounds of judicial review expose a void where government and administrative officials are not accountable to the courts. In this void, as Justice Kirby argued, there is a 'residual' category of grounds, not covered by the existing grounds, which requires the extension of judicial review to address extreme administrative

¹³ *Coffin v Reichard*, 143 F 2d 443 (6th Cir, 1944) at 445; reiterated in the UK in *R v Board of Visitors of Hull Prison, Ex p St Germain* [1979] QB 425 at 455; *Raymond v Honey* [1982] 1 All ER 756 at 759.

¹⁴ See *McEvoy v Lobban* (1988) 35 A Crim R 68 at 71 (Carter J); *Kuczynski v R* (1994) 72 A Crim R 568 at 583 (Wallwork J).

¹⁵ Hawkins, above n1 at 135.

¹⁶ Matthew Groves, 'International Law and Australian Prisoners' (2001) 24 UNSWLJ 17. See especially *Binse v Williams* [1998] 1 VR 381; *McEvoy*, above n14; *Gray v Hamburger* [1993] 1 Qd R 595; *Fricker v Dawes* (1992) 57 SASR 494.

¹⁷ In NSW, the Administrative Decisions Tribunal (ADT) has merits review jurisdiction over administrative decisions under state enactments; for example, the decision to retain information about a former inmate on a Department of Corrective Services database, in conflict with his privacy rights: *FH v Commissioner, New South Wales Department of Corrective Services* [2003] NSWADT 72.

¹⁸ *Craig v South Australia* (1995) 184 CLR 163. Note that the effect of this decision was limited by the legislature through the *Supreme Court Act 1970* (NSW), s69(4), which included the reasons for a decision in the definition of the 'record'.

injustice.¹⁹ This submission makes the case that a Bill of Rights would begin to close this gap with respect to prisoners' justice. The discussion below identifies how existing mechanisms in administrative law fall short of protecting the rights of prisoners.

4.1. *Habeas Corpus*

The royal prerogative writ of habeas corpus is a revered and fundamental safeguard against interference with personal liberty. Habeas corpus challenges the legality of detention, by public authorities or private persons. Detention, as the deprivation of liberty, is *prima facie* unlawful; the onus is on the respondent to justify the detention.²⁰ The scope of this procedural remedy is extremely broad. It effectively allows for open standing; that is, anyone who is aware that a person is wrongfully imprisoned can file the writ.²¹ For these reasons, habeas corpus is a favourable avenue within the common law for seeking protection against unlawful imprisonment.

However, habeas corpus does not test the quality of detention conditions. There are limited circumstances in which habeas corpus looks to other conditions of incarceration that breach human rights. Conditions may be relevant if they further restrict the liberty of the detainee, such that an otherwise lawful detention becomes unlawful.²² Also, the writ may address cruel, degrading or inhumane treatment that would render the detention *wholly* unlawful. A claim that one element of detention is unlawful is usually insufficient to invalidate the authorisation of detention as a whole.²³ Australian courts have even recoiled from issuing the writ to declare detention unlawful by virtue of 'intolerable conditions'.²⁴ Thus, habeas corpus could exclude cases where an otherwise lawful detention severely undermines other fundamental rights of the detainee.

¹⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [161], [169]–[170].

²⁰ *Hicks v Ruddock* (2007) 156 FCR 574; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

²¹ However, standing may be refused by the court on discretionary grounds: *Ruddock v Vadarlis* (2001) 110 FCR 491.

²² The writ may remedy the infringement of 'residual liberty', meaning 'freedom of movement within a prison': *Prisoners A-XX Inclusive v State of New South Wales* (1995) 38 NSWLR 622 at 630. See also Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) at 873–877.

²³ *Prisoners A-XX Inclusive*, *ibid.*

²⁴ *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 (Gleeson CJ), 542–543 (Hayne J), 559–561 (Callinan J). The ruling in *Behrooz* allowed for the harsh and inhumane treatment of people in immigration detention.

A Charter of Rights would change the legal landscape, bringing the totality of a prisoner's rights into view. For example, revisiting *Potier's* case,²⁵ the court could consider the full effect of continued detention on the prisoner's right to a fair hearing. It is thus unsurprising that litigants in English courts prefer to test the legality of detention through human rights claims pursuant to the *Human Rights Act*, instead of relying on habeas corpus.²⁶

4.2. *Statutory Interpretation and Common Law Rights*

It may be argued that Australia has a 'common law Bill of Rights'.²⁷ There are indeed well-established rights underlying the common law that are upheld through judicial review.²⁸ The court will not impute to the legislature an intention to abrogate fundamental rights, nor 'values' implied by the rule of law, unless a contrary intention is expressed in 'unmistakeable and unambiguous language'.²⁹ The 'principle of legality' assumes that the legislature intends that the law is interpreted and implemented consistently with or subject to common law rights and values, and lawful authority must be clearly established before fundamental rights are overridden.³⁰ The High Court has robustly applied this rule of law principle in its interpretation of federal privative clauses, finding that the legislature could not

²⁵ *Potier v Ruddock & MRRC* [2008] NSWSC 153; *Potier v General Manager/Governor MRRC* [2007] NSWSC 1031 (case concerning a prisoner who represented himself at trial and was sentenced to imprisonment, who sought temporary release for the purposes of preparing appeals; his application for habeas corpus was refused on the grounds that he was not challenging the lawfulness of his detention, and in any case it was deemed lawful, since his conviction was ordered by a competent court).

²⁶ See, for example, *R (Al-Jedda) v Secretary of State for Defence* [2007] QB 621 at 655. In this case concerning a control order, the House of Lords ruled that, since the human rights legislation covers the freedom from unlawful detention, an additional claim under habeas corpus was unnecessary. See Aronson, above n22 at 862–863.

²⁷ See Chief Justice James Spigelman, 'The Common Law Bill of Rights' (Lecture presented at 2008 McPherson Lectures: *Statutory Interpretation and Human Rights*, University of Queensland, Brisbane, 10 March 2008): <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches#CJ> (9 April 2009); Kent Roach, 'Common Law Bills of Rights as Dialogue Between Courts and Legislatures' (2005) 55 *U of T LJ* 734.

²⁸ See, for example, *Entick v Carrington* (1765) 19 St Tr 1030 (limitation on executive search and arrest warrants); *Cooper v Wandsworth Board of Works* (1863) 143 ER 414 (statutory powers are subject to the principles of natural justice, including the right to a fair and unbiased hearing).

²⁹ *Coco v R* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron & McHugh JJ). See also *R v Secretary of State for the Home Department; Ex parte Simms* [1999] 3 All ER 400 at 131 (Lord Hoffman); followed in Australia in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 at 443–444; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492.

³⁰ The silence of the legislature implies the right to sue for the breach of these rights: *Entick*, above n28.

exclude judicial review of jurisdictional errors.³¹ Even according to the narrow interpretation of the principle of legality, judicial review jurisdiction is regarded as extending to policy considerations beyond the law, insofar as they are fundamental to upholding the rule of law.³² In this respect, administrative law converges with human rights law.³³

Yet, the possibility of pursuing human rights through this rule of law principle is fundamentally restricted. It can only protect established common law rights, and does not cover the breadth of human rights that are recognised in charters of rights around the world. The principle of legality does not create new rights, nor an independent ground of judicial review. Also, it is unclear when a statute will be 'sufficiently ambiguous to trigger the application of the principle',³⁴ as demonstrated by the split High Court decision in *Al-Kateb*.³⁵ In contrast to *Teoh*,³⁶ the majority in *Al-Kateb* preferred a narrow construction of ambiguity. Their conclusion that it was lawful for the executive to detain a non-citizen indefinitely suggests that common law principles cannot be relied upon to guarantee fundamental liberties. Since the legislature had not endorsed a Bill of Rights, the court declined to read down statutes as subject to implied rights.³⁷

The authority of international law was not sufficient to bring human rights within statutory interpretation, except in Justice Kirby's minority opinion in *Al-Kateb*.³⁸ The rights owed to people in detention are recognised in multiple international human rights treaties ratified by Australia.³⁹ However, since the relevant provisions of the *ICCPR* have not been directly implemented in domestic legislation, they are not binding in Australian law.⁴⁰ Other relevant international instruments setting prison

³¹ *Plaintiff S157/2002*, above n29 at 492. While *Plaintiff S157/2002* reaffirms rule of law principles in the interpretation of a federal privative clause, state law have not conclusively this case with respect to state privative clauses: Duncan Kerr, 'Privative Clauses and the Courts: Why and How Australian Courts Have Resisted Attempts to Remove the Citizen's Right to Judicial Review of Unlawful Executive Action' (2007) 5(2) *QUTLJ* 195.

³² See *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57 at 154–155 (Heydon J).

³³ Ben Saul, 'Australian Administrative Law: The Human Rights Dimension' in Matthew Groves & H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) at 50–76.

³⁴ *Id* at 62.

³⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562.

³⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

³⁷ As Justice McHugh, from the majority, insinuated: *Al-Kateb*, above n35 at [73].

³⁸ *Id* at [179]–[183].

³⁹ *ICCPR*; *CAT*; *CRC*, art 37. See Camille Giffard, 'International Human Rights Law Applicable to Prisoners' in David Brown & Meredith Wilkie (eds) *Prisoners as Citizens: Human Rights in Australian Prisons* (2002) at 177–195.

⁴⁰ *Chow Hung Ching v The King* (1948) 77 CLR 449. However, where statutory construction is ambiguous, the court may interpret the statute consistent with Australia's international obligations under ratified treaties: *Chu Kheng Lim*, above n20 at 38; *Teoh*, above n36. Also, international treaty

standards⁴¹ have been used to create 'Australian Guidelines'⁴² on prison management, but these also lack the force of legislation.⁴³ As a first step, Australia should enact a Bill of Rights to implement the broad *ICCPR* rights. This would build pressure to take the second step of enacting the Australian Guidelines, and the third step of administrators acting consistently with these standards.

4.3. *Principles of Natural Justice*

The common law presently defends a narrow conception of natural justice, embodied in the procedural fairness principles: the fair hearing rule and the rule against bias. These principles provide a basis for the protection of certain rights, particularly the right to a fair trial. The High Court in *Dietrich*⁴⁴ ruled that, where an indigent defendant charged with a serious criminal offence has no legal representation, an appellate court must quash any conviction from the trial, if it was unfair due to the lack of representation.⁴⁵ State courts have upheld the right to a fair hearing when a prisoner is denied the opportunity to confront material adverse to a remission application.⁴⁶ The rule against bias has particular relevance to prison law, considering the privatisation of correctional operations. In Australian law, if a decision-maker holds a relevant pecuniary interest, they are likely to fail the test of apprehended bias.⁴⁷ It seems that the commercial interests of private prison operators would influence their impartiality in prison disciplinary hearings; however, this issue is as yet untested before the High Court.⁴⁸

Although the natural justice doctrine has been extended since the *Kioa* principle of 'legitimate expectations',⁴⁹ it may still fail to reach prisoners because the *content* of

obligations may influence the development of the common law: *Dietrich v R* (1992) 177 CLR 292 at 306, 321, 360; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.

⁴¹ See *United Nations Standard Minimum Rules for the Treatment of Prisoners*, ESC Res. 663C, 24 UN ESCOR Supp. (No. 1), UN Doc E/3048 (1955); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res. 40/33, UN GAOR Supp. (No. 53), UN Doc A/40/53 (1985).

⁴² Corrective Services Ministers' Conference, *Standard Guidelines for Corrections in Australia* (2004).

⁴³ See generally Groves, above n16.

⁴⁴ *Dietrich*, above n40.

⁴⁵ Note that this right does not imply that government has a positive duty to provide legal representation: *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 56–57 (Deane J); id at 330 (Deane J).

⁴⁶ See, for example, *R v Queensland Corrective Services Commission; Ex parte Fritz* (1992) 59 A Crim R 132; *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490.

⁴⁷ *Ebner v Official Trustee* (2000) 205 CLR 337. Compare the stricter US position, which suggests that administrators conducting hearings must have absolutely no pecuniary interest: *Withrow v Larkin* 421 US 35 at 42 (1975).

⁴⁸ Paul Moyle, *Profiting from Punishment: Private Prisons in Australia: Reform or Regression?* (2000) at 169.

⁴⁹ *Kioa v West* (1985) 150 CLR 550.

procedural fairness is strictly interpreted.⁵⁰ The accessibility of these procedural rights is limited further by judicial attitudes to the custodial context. Reviving the hands-off approach, the judge in *Rainsford* commented that ‘the court should be slow to second-guess trained and (in this case) senior prison officers’ in determining whether a disciplinary hearing was fair.⁵¹ Thus, in practice, common law natural justice does not always safeguard procedural fairness for prisoners. In comparison, the UK and New Zealand have enshrined the absolute right to a fair trial in human rights legislation.⁵²

5. The Effect of an Australian Charter of Rights

A federal charter has the potential to fundamentally reshape administrative law in all Australian jurisdictions, by extending the common law grounds of judicial review and the corresponding remedies. This submission advocates the *UK HRA* as the strongest existing statutory model for rights protection. The rights protections in Victoria and the ACT⁵³ follow the UK model, but their impact is limited since the common law operates as a unified legal system.

5.1. Extension of the Grounds of Review

As discussed in the first part of this submission, the availability of judicial review is inadequate for meeting prisoners’ rights claims and, even where grounds are available, they are limited by judicial attitudes favouring prison administrators. The proposed national Bill of Rights would open judicial scrutiny to new grounds, or at least extend existing grounds of review, as per the developments in the UK, ACT and Victoria.

5.1.1. The Unlawfulness of Breaching Human Rights

A UK-style Charter of Rights introduces a new ground of review: that a statutory rule or administrative action is unlawful if it is incompatible with human rights.⁵⁴ Courts are required to interpret legislation ‘consistent with human rights . . . as far as

⁵⁰ See Bronwyn Naylor, ‘Prison Disciplinary Systems: Process and Proof’ (Paper presented at *International Institute of Forensic Studies Conference*, Prato, 2–5 July 2002): <<http://www.law.monash.edu.au/castancentre/publications/naylor-prato-prison-paper.pdf>> (5 April 2009).

⁵¹ *Rainsford v Governor of Her Majesty’s Prison at Ararat* [2000] VSC 141 at 10 (Eames J).

⁵² *Human Rights Act 1998* (UK) (hereafter *UK HRA*) s1(3), sched 1, art 6; *Bill of Rights Act 1990* (NZ), s25(a); see also *R v Ru* (2001) 19 CRNZ 447. Sections 24(c) and (f), providing the right to legal assistance, create a ‘passive’ duty on government to refrain from violating this right; similar to Australia, there is no active duty to provide representation: *R v Condon* [2007] 1 NZLR 300 at [76]–[77].

⁵³ The Australian models closely resemble one another, since the original *ACT HRA* was amended by the *Human Rights Amendment Act 2008* (ACT).

⁵⁴ *Victorian Charter* s38(1); *ACT HRA* s40B(1)(a).

it is possible' given the legislative purpose, unless there is an express provision or necessary implication to the contrary.⁵⁵ In this way, the judicial interpretative duty is used to 'narrow the scope of statutory authority'.⁵⁶ In the UK, it has been used to uphold prisoners' freedom of expression,⁵⁷ and privacy rights.⁵⁸ An Australian Charter could oversee the treatment of rights by both public and private prison administrators, if 'public authority' is defined in functional terms.⁵⁹ The existing charters specify that operation of detention centres constitutes a public function.⁶⁰

5.1.2. *Relevant Considerations*

A Bill of Rights could compel administrators to pay regard to prisoners' rights as 'relevant considerations' in decision-making, even if this is not directly required in the delegating legislation. At present, the common law permits judicial review over a decision that fails to consider a relevant matter in the exercise of power, where the failure 'materially affected' the decision.⁶¹ This test does not look at the weight given to considerations;⁶² Australian courts refrain from directing a decision-maker to exercise a power in a particular way in the interests of maintaining the legality/merits distinction.⁶³ However, an administrator is bound to consider some relevant matters, which may be expressly contained in an objective 'checklist' in the statute, or may be implied by its 'subject matter, scope and purpose'.⁶⁴

In the absence of a Bill of Rights, a court is unlikely to invalidate a decision that is made with total disregard for implied rights. Yet, the existing Australian charters explicitly establish that it is unlawful for an authority to 'fail to give proper

⁵⁵ *Victorian Charter* s32(1); *ACT HRA* s30(1). See also *UK HRA* s3(1); *Bill of Rights Act 1990* (NZ) s6.

⁵⁶ Simon Evans & Carolyn Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) at [4.53].

⁵⁷ *Simms*, above n32 (case concerning a prohibition on prison visits by journalists seeking to publish interviews with prisoners, constraining prisoners' access to justice).

⁵⁸ *R v Secretary of State For The Home Department, Ex Parte Daly* [2001] 3 All ER 433 (case concerning a policy for the searching of prison cells).

⁵⁹ See *Victorian Charter* s4(1)(c); *ACT HRA* s40(1)(g).

⁶⁰ *Victorian Charter* s4(2)(b); *ACT HRA* s40A(3)(a).

⁶¹ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at [15] (Mason J).

⁶² Unless a consideration is given so much or so little weight that it constitutes *Wednesbury* unreasonableness: *ibid*. The irrationality ground of review is discussed below at 5.1.3.

⁶³ Peter Cane & Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008) at 108.

⁶⁴ *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49–50; approved in *Peko-Wallsend*, above n61.

consideration to a relevant human right'.⁶⁵ This provision constructs a novel ground of review, distinct from the narrow common law ground of relevant considerations, and instead opens the way to proportionality.⁶⁶ The ground of proper consideration is particularly valuable in the prison context, where prison authorities tend to have a broad, unstructured, subjective discretion. The statutory rules which regulate prison conditions in NSW grant the Commissioner a wide, discretionary power over administrative decisions such as inmate classification.⁶⁷ Similarly, an administrative decision to refuse condoms to prisoners, influenced by Ministerial policy, was beyond the scope of judicial review since the statutory source provided for a broad discretion 'subject to' the Minister's direction.⁶⁸

At minimum, a Charter of Rights would bring rights considerations into decision-making by changing the way that the debate is framed. It would increase government accountability and transparency, for example, in the process of balancing national security interests against the civil rights and liberties of terror suspects in the making and enforcement of counter-terrorism legislation.⁶⁹ A Charter could mean that 'future counter-terrorism laws are assessed within a human rights framework',⁷⁰ as demonstrated by the ACT's rights-conscious response to terrorism.⁷¹ Another example is the NSW law on forensic patients before the recent amendment.⁷² The Minister of Health was granted executive discretion to release persons who were

⁶⁵ *Victorian Charter* s38(1); *ACT HRA* s40B(1)(b). Distinguish the *UK HRA*, which does not compel decision-makers to take human rights per se into account as a 'relevant consideration': *R (on application of SB) v Headteacher and Governors of Denbigh High School* [2005] 2 All ER 396.

⁶⁶ Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria' (Conference paper presented at *Australian Bills of Rights: The ACT and Beyond Conference*, Australian National University, 21 June 2006) at 13. The proportionality standard is discussed below at 5.1.3.

⁶⁷ It would be regarded as a 'subjective' discretion because the statute specifies that classification depends on 'the opinion of' the Commissioner of the Department of Corrective Services: *Crimes (Administration of Sentences) Regulation 2008* (NSW), ss22–29. See also *Prisoners (Interstate Transfer) Regulation 2004* (NSW).

⁶⁸ *Prisoners A-XX Inclusive*, above n23.

⁶⁹ Identified in a positive effect of the *UK HRA*: United Kingdom Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) at [4].

⁷⁰ Australian Human Rights Commission, *A Human Rights Guide To Australia's Counter-Terrorism Laws* (2008): <http://www.hreoc.gov.au/legal/publications/counter_terrorism_laws.html> (28 April 2009).

⁷¹ The ACT's anti-terrorism measures have special safeguards for young suspects, following the children's rights enshrined in the *ACT HRA*: Andrew Byrnes & Gabrielle McKinnon, 'The ACT Human Rights Act 2004 and the Commonwealth Anti-Terrorism Act (No 2) 2005: A Triumph for Federalism or a Federal Triumph?' in Miriam Gani & Pene Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (2008): <http://epress.anu.edu.au/war_terror/pdf/ch16.pdf> at 361–377 (28 April 2009).

⁷² *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* (NSW) amended the *Mental Health (Forensic Provisions) Act 1990* (NSW) in November 2008.

deemed not guilty of criminal offences due to mental illness. The Minister was able to ignore the Mental Health Review Tribunal's recommendations regarding release, with the result that patients could be held in detention indefinitely, in violation of their human rights.⁷³ A Bill of Rights would add pressure to consider rights in the process of government decision-making, potentially enforced by the courts through administrative remedies for improper exercise of power.

5.1.3. Irrationality and Proportionality

A Charter of Rights could lower the unreasonableness standard for judicial review in Australian law. The irrationality ground of review is a modest avenue for curbing the abuse of administrative power. 'Wednesbury unreasonableness'⁷⁴ is a high threshold for prisoners to reach before the court is willing to engage in review.⁷⁵ Even if irrationality is established, it may have a restricted application in the prison context. For instance, prior to the enactment of the *Victorian Charter*, a Victorian court held that judicial review of a prison governor's decision on the ground of unreasonableness should be determined by reference to 'the reasonable prison governor', rather than the reasonable person.⁷⁶

Australian courts have maintained this high standard of unreasonableness for judicial review, resisting the push in similar jurisdictions towards 'proportionality'. The High Court has used the language of proportionality only on the question of whether delegated legislation is proportionate to its enabling purpose.⁷⁷ Also, the court has severely undermined the test of necessity in reviewing statutes. In relation to laws allowing for indefinite immigration detention in *Al-Kateb* and *Al Khafaji*,⁷⁸ the court suggested that, as long as the laws pursued a purpose covered by the Constitutional head of power, it did not matter whether they were 'unjust or contrary to basic human rights' (Justice McHugh), infringed the fundamental common law right to liberty (Justice Callinan), or contravened the ICCPR (Justice Hayne). Consequently, the High Court concluded that indefinite and arbitrary executive detention is lawful in Australia.

⁷³ See Carol Berry & Robin Banks, *Time for Change: Response to the Consultation Paper: Review of the Forensic Provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedure) Act 1990* (2007): <<http://www.piac.asn.au/publications/pubs/Forensic%20Review.pdf>> at 13–15 (3 May 2009).

⁷⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.

⁷⁵ In the early English cases, delegated legislation was found to be invalid only if it was so 'oppressive', 'capricious' or 'gratuitous' in its interference with rights that it could not be justified: *Slattery v Naylor* [1888] AC 446 at 452; *Kruse v Johnson* [1898] 2 QB 91 at 99–100; approved in Australia in *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 154 (Dixon J).

⁷⁶ *Binse v Williams* [1998] 1 VR 381.

⁷⁷ *South Australia v Tanner* (1989) 166 CLR 161 at 165 (Wilson, Dawson, Toohey & Gaudron JJ).

⁷⁸ *Al-Kateb*, above n35; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

It is likely that a federal Bill of Rights would change this outcome, by changing the court's approach to legislative intention where human rights are at stake. Since the *UK HRA*, it is now established principle in English law that limitations on human rights must be proportionate to the legislative objective.⁷⁹ The result is a wider field of judicial review. The proportionality test represents a shift from the traditional, defensive standard of *Wednesbury* unreasonableness towards the rights-oriented European approach.⁸⁰ The proportionality standard applies to all cases under the *UK HRA*.⁸¹ For claims concerning fundamental rights that are not brought under this Act, English courts vary the 'intensity' at which it applies standards of judicial review, such as *Wednesbury* unreasonableness.⁸² New Zealand is similarly moving towards variable intensity, away from a single unreasonableness standard.⁸³

It has been acknowledged that the Australian application of the traditional test of *Wednesbury* unreasonableness will 'always be a matter of degree',⁸⁴ but otherwise Australian courts have not followed the trend in the UK and New Zealand towards variable intensity.⁸⁵ There is a strong argument that, if we are convinced that *Wednesbury* unreasonableness is a flawed standard, a Bill of Rights is required to introduce the proportionality standard of review.⁸⁶ A Bill of Rights would at least lower the standard to 'anxious scrutiny' of executive decisions interfering with rights when applying an objective test of necessity.⁸⁷ This approach would yield a different result in the immigration detention cases. Taking the example of *Lim*,⁸⁸ the detention of Lim for four years would be unlawful because it was not 'necessary in all the

⁷⁹ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80 (Lord Clyde).

⁸⁰ See especially *Daly*, above n58 at [27] (Lord Steyn). For a comparison of the English and European approaches, see Julian Rivers, 'Proportionality and Variable Intensity of Review' [2006] 65 *CLJ* 174. See generally Lord Justice Stephen Sedley, 'The Last 10 Years' Development of English Public Law' (2004) 12 *AJAL* 9.

⁸¹ Aronson, above n22 at 179.

⁸² *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514 at 531; *Simms*, above n29 at 130, 144.

⁸³ *Powerco Ltd v Commerce Commission* [2006] NZHC 662 at [23]–[24].

⁸⁴ *SHJB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 43 at 50.

⁸⁵ Aronson, above n22 at 179–180.

⁸⁶ *Id* at 180.

⁸⁷ *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at 857. See *Daly*, above n58 at [25].

⁸⁸ *Chu Kheng Lim*, above n20.

circumstances of the case', nor proportionate to the purpose of deciding his refugee status.⁸⁹

5.2. *Expansion of Judicial Review Remedies*

As a Charter of Rights expands the grounds of review, it would thereby increase the availability of existing remedies, such as common law writs.⁹⁰ In addition, a Charter could offer new forms of relief. The *UK HRA*, distinct from the Australian Acts, includes a new right to damages.⁹¹ Under Charters modelled on the *UK HRA*, the court can issue declarations of 'incompatibility' against primary legislation that cannot be interpreted consistent with rights.⁹² The declaratory remedial power is in lieu of judicial power to invalidate legislation.⁹³ Even so, the UK experience suggests that Parliament is compelled to act on the court's declaration in most cases.⁹⁴ Even if the inconsistent provision remains, the court can limit its effect by quashing or prohibiting action pursuant to it through existing writs. In this way, a Charter could strike a balance between giving force to the judicial review of human rights claims, and preserving parliamentary supremacy.

5.3 *Meeting Possible Objections*

I now turn to the four strongest arguments challenging the case for a Bill of Rights as posed in this submission. Firstly, I submit that a statutory Human Rights Act, as distinct from constitutional Charters of Rights,⁹⁵ would maintain Parliamentary supremacy, and allay concerns that judicial review would extend too far into the territory of merits review, especially if proportionality is introduced. I have already addressed the argument that fundamental rights are adequately protected through a

⁸⁹ This reasoning was followed by the United Nations Human Rights Committee, in finding a breach of the *ICCPR*, art 9 in *A v Australia*, Human Rights Committee, Views of 30 April 1997, No 560/1993 at [9.2].

⁹⁰ The court could then choose among available remedies at its discretion: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

⁹¹ *UK HRA* s8(3). Contrast *ACT HRA* s40C(4); *Victorian Charter* s39(3). The Australian statutes still allow for human rights claimants to rely on rights to damages in other proceedings: *ACT HRA* s40C(2)(b); *Victorian Charter* s39(4).

⁹² *ACT HRA* s32; *Victorian Charter* s36; *UK HRA* s4.

⁹³ *Victorian Charter* s36(5)(a); *ACT HRA* s32(3)(a); *UK HRA* s4(6)(a); *Human Rights Act 1993* (NZ) ss92J and 92K.

⁹⁴ A fast-track legislative amendment procedure is available following a declaration of incompatibility: Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (6th ed, 2009) at 193. See, for example, the Parliament's response to *H v Mental Health Review Tribunal, N & E London Region* [2001] 3 WLR 512 (concerning the release of forensic patients in detention).

⁹⁵ Such as the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, Schedule B to the *Canada Act 1982* (UK) c 11.

'common law Bill of Rights'.⁹⁶ There is a converse objection that a legislative Bill of Rights would put too much power in the hands of the unelected, unaccountable judiciary. It is argued that it is better left to Parliament to enact targeted laws,⁹⁷ such as the Australian Guidelines on detention conditions, and to internally review legislative rights protections, for example, through the Senate Scrutiny of Bills Committee or NSW Legislative Review Committee.

This contention conflicts with the separation of powers doctrine, the basic presumption underlying our legal system that we require an independent judicature to oversee statutory authority and the exercise of power. Administrative accountability is crucial, particularly in light of the privatisation of prisons. If we accept that fundamental rights are justified legal limits on government power, then it follows that human rights considerations should be admitted to the review jurisdiction of the courts. We cannot rely on the development of the common law nor ad hoc enactments to bring human rights to the forefront of judicial review. As I have argued through the case study of prisoners' rights, the most effective avenue for enhancing review is a Charter of Rights for Australia.

Secondly, it is asserted that Charter rights are abstract and lack specificity, and hence leave too much interpretative power in the hands of the judiciary. Irving makes this objection with the qualification that certain judicial process rights are sufficiently specific.⁹⁸ It is true that other *ICCPR* rights invoked by prisoners, such as 'freedom of expression', are expressed in broad terms. However, I contend that the lack of specificity is deliberate: firstly, to ensure that authorities take human rights into account in the full range of circumstances, and secondly, to allow the judiciary to interpret legislation consistent with human rights as far as possible. These dual purposes may appear contradictory, but in fact they produce a productive tension that is necessary for maintaining a balanced separation of powers.

Thirdly, a UK-style national Charter of Rights faces the criticism that declarations of incompatibility are mere 'advisory opinions',⁹⁹ beyond judicial functions, which thus conflict with the Australian Constitution. The debate on the constitutionality of declarations remains unresolved.¹⁰⁰ Leaving this debate aside, a Charter of Rights

⁹⁶ See 4.2 above.

⁹⁷ See, for example, Patrick Parkinson, *National Human Rights Consultation* (2009): <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Publicsubmissions_Submissions-Charterofrights-humanrightsact-humanrightslegislation> at 6–7 (19 April 2009).

⁹⁸ Helen Irving, *Submission to the National Human Rights Consultation* (2009): <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Publicsubmissions_Submissions-Other> at 20 (19 April 2009).

⁹⁹ Defined in *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289 at 303 (Mason CJ, Dean, Dawson, Gaudron and McHugh JJ).

¹⁰⁰ For a defence of declarations of incompatibility, see Dominique Dalla-Pozza & George Williams 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1; Jim South, 'The Campaign for a National Bill of Rights:

without declaratory relief still presents an improvement on prisoners' rights protections, by extending existing administrative remedies.

Finally, it seems undesirable to leave the protection of prisoners' rights to the courts, given the practical impediments to accessing justice through litigation. We have seen how judicial attitudes towards prisoners, combined with the wide, subjective discretion afforded to prison officials, precludes the full rigour of judicial review in detention cases.¹⁰¹ The attitudes of the Australian judiciary often compound the practical obstacles to prisoners pursuing justice through litigation.¹⁰² A federal Bill of Rights would not supplant the hands-off approach 'overnight', but it would progressively reverse the presumption that authorities can impose on prisoners' rights. Moreover, it would reduce the need for court proceedings, by emphasising rights concerns in *all* layers of government decision-making, from law-making in Parliament to policy development in executive government, and public service delivery by public and private authorities.

6. Conclusion

This submission has presented the case for an Australian Bill of Rights, on the grounds that it is vital for the protection of prisoners' rights in administrative law. I have argued that the openings for bringing rights claims under judicial review, including habeas corpus, common law rights and natural justice, have been significantly narrowed to the exclusion of certain prisoners' rights claims. A human rights statute promises to transform administrative law, by expanding the grounds of review and availability of remedies. Most importantly, it would challenge the presumption that decision-makers can encroach on the other fundamental rights of people who are deprived of liberty by law. An Australian Charter of Rights would radically change the landscape for securing prisoners' rights, while strengthening the common law tradition of upholding fundamental rights. Consistent with the principles underpinning the separation of powers, an Australian Charter would add the important dimension of human rights to the judiciary's independent scrutiny of executive power.

Would "Declarations of Incompatibility" be Compatible with the Constitution?' (2007) 10(1) *CLPR* 2. For critical arguments, see Justice Michael McHugh 'A Human Rights Act, the Courts and the Constitution' (Speech delivered at the Australian Human Rights Commission, Sydney, 5 March 2009): <http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html> (29 April 2009); Helen Irving, 'Advisory Opinions, the Rule of Law and the Separation of Powers' (2004) 4 *MqLJ* 105; Justice Robert French, 'Declarations: Homer Simpson's Remedy: Is There Anything They Cannot Do?' (Speech delivered at the University of Western Australia, Perth, 30 November 2007): <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj27.html> (29 April 2009).

¹⁰¹ Especially in relation to prison management decisions such as administrative segregation: see Mathew Groves 'Administrative Segregation of Prisoners: Powers, Principles of Review and Remedies' (1996) 20 *MULR* 639.

¹⁰² See Hugh de Kretser, 'Prison Litigation: Barriers to Justice' (2007) 81 *Precedent* 29.

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