Breaking The "Prison Syllogism"

When the Law Stops Short of the Prison Gate are we Serving the Public Interest?

NAME: Brenda Hogg

STUDENT NUMBER:

DATE: 3 March 2000

SUPERVISOR: Mr Neil Morgan

Supervisor Endorsement:

This proposal outlines a suitable topic for an Honours dissertation and I have agreed to supervise it.
SYNOPSIS:

The Western Australian Ministry of Justice has recognised that the Prisons Act 1981 (WA) can no longer provide an adequate basis for prison and prisoner management and that new legislation is necessary to reflect contemporary best prison practice. To that end it has conducted a Review of the Prisons Act (completed in April 1998) which outlines numerous proposals for reform to be incorporated into a new Act. The Review argues, inter alia, that the new legislation should prescribe the outcomes that imprisonment is directed to achieve and has specified recidivism reduction as one of those outcomes. It has also proposed that the guiding principles of the new Act recognise “sentenced prisoners are sent to prison as punishment, not for punishment” and that “prisoners retain the rights of a member of society, except those that are necessarily removed or restricted by the fact of imprisonment”.

A custodial sentence necessarily involves the loss of certain rights, the most obvious being the loss of liberty. But what other rights are taken away from a citizen serving a custodial sentence? Neither legislation nor common law explicitly states the entirety of rights lost by convicted prisoners. A leading statement by the courts on the subject is that of Lord Wilberforce in Raymond v Honey [1983] 1 AC 1 at 10 where he said that a prisoner “retains all civil rights which are not taken away expressly or by necessary implication”. Australian courts have accepted this proposition in principle. However, questions remain as to the exact nature of citizens’ rights in this country. Further, the phrase “by necessary implication” is open to a broad range of interpretations.

Ostensibly, the law in Australia no longer accepts that a person serving a custodial sentence is subject to the ancient doctrine of “civil death” - a concept that led to automatic extinction of civil rights and capacities. However prisoners are still a discredited group, some of whose rights are explicitly curtailed by statute but whose residual rights are also subtly undermined by an unwritten doctrine of “less eligibility”. It would seem that a number of legal and social disabilities imposed on prisoners lack any formal legislative base, but are, in effect, de facto limits founded in the belief that prisoners are of less account morally, politically, and legally.

Commentators have argued that prisoners should have a legally enforceable Charter of Rights in recognition of their special vulnerability to abuse within the prison environment. This thesis will argue that a Charter of Rights could be as precarious to prisoners as their current status of uncertainty. One of the central tenets of our criminal justice system is the notion that people are equal before the law, have equal access to the law, and are treated equally by the law. For the ordinary citizen, protection does not derive through an explicit statement giving legal force to specified rights, but rather through unfettered access to the law when restrictions placed upon a citizen’s rights are purported to be unreasonable. This should be the same for prisoners. A precise legislative statement as to what rights are lost as a consequence of serving a custodial sentence should be formulated. Outside of this statement, prisoners should retain the right to challenge, through the courts, management actions and practices that impinge on their non-forfeited rights.
In defending the thesis proposition, the argument that prisoners are “less eligible” to the protection of the law will be examined. Under the current *Prisons Act* in Western Australia all prisoner entitlements are made subservient to the requirements of the “good order and security” of prisons. The Review has recommended that this broad discretionary power remain under new legislation. However, the management actions and practices of prison authorities made in the name of “good order and security” are often not contestable nor subject to the examination of administrative or judicial review to the same extent as administrative processes carried out by other public bodies. A summary examination of Australian case law would suggest that, when legal challenges have been made, prisoners come up against a considered policy of judicial non-intervention in such matters.

The thesis will explore the extent to which both the prison authorities and the judiciary (albeit to differing degrees) see some justification for this policy of non-intervention in what may be termed the “Prison Syllogism”:

- Whatever is in the interests of the “good order and security” of prisons is in the public interest.
- Denying prisoners the protection of the law is in the interests of the “good order and security” of prisons.
- Therefore, *denying prisoners the protection of the law is in the public interest.*

The consequence of prisoners being denied any effective form of review of decisions that seriously affect their lives, is that they will develop a sense of grievance and injustice. 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. A judicial policy decision of non-intervention represents, in itself, a significant obstacle to prisoners wishing to uphold their rights. Of added concern is the Review’s recommendation that, in the contentious area of prison discipline, prisoners’ access to judicial review be explicitly denied in new legislation. It is likely that this combination will work against the recidivism reduction outcome specified for a new *Prisons Act* in Western Australia.
RESEARCH METHODOLOGY:

To gain an historical perspective on this area of the law a brief summary of English and Australian case law during the past fifty years will be undertaken together with an examination of the Western Australian Hansard reports relevant to the enactment of the current legislation. Discussion papers issued in the context of the 1998 Review will also be relevant.

The current legislative framework (with a particular emphasis on Western Australia) regulating prisoners and the prison environment will be examined and an attempt will be made to determine, from both legislation and statutory interpretation by the courts, the rights lost by a person serving a custodial sentence. Changes in judicial attitudes towards prisoners’ rights since the enactment of the current legislation will be tracked through case law. Reference will also need to be made, where applicable, to Western Australia’s compliance with relevant provisions of International Covenants and Standard Guidelines for Corrections in Australian Prisons.

A critique will be given on the Charters of Prisoners’ Rights that have been legislated in Victoria and Canada, the background to their creation, the academic papers advocating similar legislation in Australia, and the difficulties and shortcomings of this approach.

In the specific context of prisoners’ access to appeal mechanisms and judicial review to challenge prison management and practices, problems have been identified in Government, Law Reform Commission, and Royal Commission reports in a number of jurisdictions and in various academic papers. Research will focus on Australian, English, and Canadian experiences. Although a detailed comparison between Western Australia and the law in other jurisdictions is not envisaged, the paper will, where necessary, make reference to any relevant legislation, case law, or published reports. An analysis of the alternative complaint mechanisms that are provided for in legislation (for example, complaints to the Ombudsman) will also be necessary to investigate the effectiveness and limitations of these avenues of review.

A Justice of the Peace currently acting as a Visiting Justice in a Western Australian prison has agreed to be interviewed, as have two senior prison officers and an ex-prisoner all of whom are personally known to the writer. These interviews will be used to gain additional perspectives on the issues.

A critical analysis of the proposals recommended by the Review (with a focus on the prison disciplinary system and administrative methods of control) will be outlined. Problems identified will be examined in the context of recent judicial decisions, the impact of recent legislative changes (for example, the abolition of remission in Western Australia), and the outcomes directed to be achieved under a new Act and its “guiding principles”.
PROPOSED TABLE OF CONTENTS:

INTRODUCTION

THE STATUS OF A PRISONER IN WESTERN AUSTRALIA

- An Historical Perspective
- The Current Status in Statute
- The Current Status in Common Law
- The Judiciary’s Current Approach to Prisoners’ Rights

THE CONCEPT OF THE “GOOD ORDER AND SECURITY” OF PRISO NS

- The Administration’s Arguments and Practices
- The Prisoners’ Perspective
- The Judiciary’s Position on Intervention
- Does a Doctrine of “Less Eligibility” Prevail?

BREAKING THE SYLLOGISM

- What is in the Administration’s Interest?
- What is in the Public Interest?
- Why a Charter of Rights is Not the Answer
- Extending the Protection of The Law to Prisoners

A CRITIQUE OF THE REVIEW OF THE PRISONS ACT

- The Steps Forward
- The Steps Backward
- The Way Forward

CONCLUSION
BIBLIOGRAPHY

Cases - Western Australia:

*Bekink v R* [1999] WASCA 160

*Brincat v McCall, Director General Ministry of Justice*, WA (unreported. Supreme Court of WA, 16 August 1996)

*Ex parte Buckley* (unreported. Supreme Court of WA, 2 September 1991)

*Ex parte Napier v Executive Director Corrective Services* (unreported. Full Court of the Supreme Court of WA, 15 August 1994)

*Ex parte Rushton* (unreported. Full Court of the Supreme Court of WA, 29 November 1979)

*Klavins v Director General, Ministry of Justice* (unreported. Supreme Court of WA, 21 April 1995)

*Kuczynski* (1994) 72 A Crim R 568

*Nada v Knight* (1990) ATR 81-032

*Re Fawcett: Ex parte Graham Edward Ord* (unreported. Full Court of the Supreme Court of WA, 15 February 1994)

*Re Purdee: Ex parte Kennedy* [1999] WASC 1


Cases - High Court:

*Dugan v Mirror Newspapers Ltd* (1979) 53 ALJR 166

*Hass v The Queen* (1976) 50 ALJR 400

*Flynn v The King* (1949) 79 CLR 1

*Stratton v Parn* (1978) 138 CLR 182

Cases - Other Australian Jurisdictions:

*Binse v Governor of HM Prison Barwon* (1995) 8 VAR 508

*Bromley v South Australia* (1990) 53 SASR 403

*Bromley v Dawes* (1983) 10 A Crim R 98


*Fricker v Dawes* (1992) 57 SASR 494

*Gray* (1990) 45 A Crim R 364
McEvoy v Lobban [1990] 2 Qd R 235

Modica v Commissioner of Corrective Services (1994) 77 A Crim R 82

R v Fraser [1977] NSWLR 867

Re Walker [1993] 2 Qd R 345

Sandery v South Australia (1987) 48 SASR 500

Smith v Commissioner of Corrective Services [1978] 1 NSWLR 317

Stewart v Lewis (1993) 70 A Crim R 88

V'ezitis v McGeechan (1974) 1 NSWLR 718

Cases - United Kingdom:

Arbon v Anderson [1943] 1 KB 252

Becker v Home Office [1972] 2 All ER 676

Board of Visitors of Hull Prison: Ex parte St Germain [1979] QB 425

Deputy Governor of Parkhurst Prison: Ex parte Hague [1991] 3 All ER 733

Leech v Deputy Governor of Parkhurst Prison [1988] AC 533


Government, Law Reform Commission and Royal Commission Reports:


Report of the Royal Commission into Prisons in NSW, March 1978 (the Nagle Report)


Royal Commission into Aboriginal Deaths in Custody - National Report, Volumes 3 and 5 (1991)


Legislation, Covenants, Guidelines, etc:


Canadian Corrections and Conditional Release Act

Canadian Charter of Rights and Freedoms

Corrective Services Act 1987 (Vic)

International Covenant on Civil and Political Rights

Justices Act 1902 (WA)

Parliamentary Commissioner Act 1971 (WA)

Prisons Act 1981 (WA)

Prisons Regulations 1982 (WA)

Sentencing Act 1995 (WA)

Articles:


Books:


