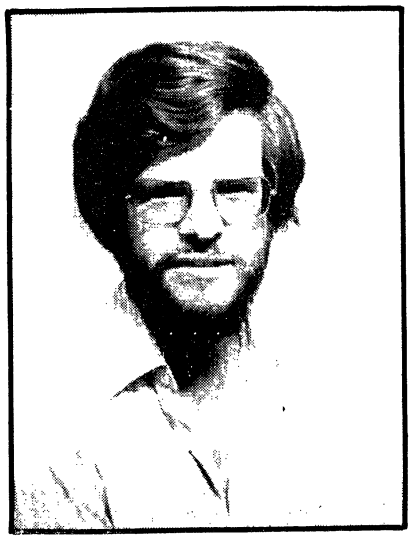

PRISONERS' RIGHTS

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INTRODUCTION

Prisons and prisoners form an emotive topic and "rights" is an emotive word. I do not pretend to be free of the strong emotions a discussion of these matters can raise in anyone. In addition I should add that my discussion will concentrate on that jurisdiction with which I am most familiar, namely N.S.W.

The title of this paper gives rise to some serious problems of definition. A rational approach would be to ask,

"What rights do free citizens have?"

"What restrictions must be imposed in rendering a free person a prisoner?"

"What additional restrictions should be imposed in the order to further the primary goals of imprisonment, such as punishment, rehabilitation, or general deterrence?"

If I state the questions in that form, I think you will perceive the problems. First, we need to overcome the difficulties inherent in defining the general rights we are all meant to enjoy. Then we must identify legitimate restrictions on those rights. Which restrictions are legitimate will depend on one's concept of imprisonment and the goals it is designed to further. I intend to restrict myself to the "deprivation of liberty" model. This espouses the idea that imprisonment should result in a minimal set of restrictions, consistent with depriving someone of their liberty for a specified time in the name of punishment. However, even within this model there are degrees of deprivation of liberty. A person can be confined 24 hours a day in a tiny cell, or can have freedom to walk in a small yard, or can go anyway within the gaol walls; or the gaol may be a farm, or the prisoner may be released to go to work or to play sport far from the perimeter of the gaol. Every situation is one of legal imprisonment, from which escape is a serious crime.

You may conclude that the topic is so dependent on one's basic theory of imprisonment, that this discussion should be left in suspension until we have all agreed on an acceptable theoretical position. My view is that such an approach would not simply be impractical, but that an examination of specific rights can actually assist us formulate a theoretical position.

A further problem raised by the definition of "prisoners' rights" suggested above is that it amounts to a "negative definition": it looks purely at *restrictions* placed on prisoners. I wish to include a "positive" element in the definition. My argument is this: when the state deprives people of basic liberties by incarcerating them, it also takes on special obligations towards them. For example, if we deprive someone of the freedom to obtain food, we must provide that food. If we stop them going to their own doctors or hospitals, we must provide medical facilities.

In part because of these problems, I am not happy with the phrase "prisoners' rights". It tends to be used as a euphemism for "lack of rights". The word "prisoner" connotes a legal status less than full citizenship. The state asserts that someone has such a status and the onus passes to the prisoner to assert his or her residual rights. The process is reminiscent of the conclusion of "civil death" which followed being branded a "felon". Let us rather adopt an "assumption of liberty" and require the state to justify each restriction placed on the citizen as part of his or her punishment.[1]

A CLASSIFICATION OF "RIGHTS"

I hope I will not be thought flippant if I start by asking whether prisoners have a right to such fundamental requirements as food, light, fresh air, exercise, shelter, medical treatment and physical safety. Those are all primary prerequisites of life. Nevertheless, in N.S.W., these are matters that one finds are expressly dealt with in the relevant legislation and regulations.

Secondly, there are a set of important concomitants of every day life which most of us enjoy, and perhaps need, which seem quite compatible with prison security. These include work, entertainment and social communication.

Thirdly, there are a set of what I rather vaguely classify as "political rights". These include voting, freedom of speech, access to the courts, freedom from cruel and unusual punishment and freedom of association.

Let me start with some of the basic rights. It may seem unnecessary to refer to the basic life support systems at all, but in fact the Prisons Act specifically mentions a right to exercise (s.12), clothing (s.13), food (s.14 and Regulation 28) and medical attention (s.16). Even so, a legislative direction that prisoners "shall be supplied with" this or that, does not automatically give rise to a legally enforceable entitlement. We presume that no-one dies nowadays through lack of food, air or shelter. Nevertheless, it was some 3 years ago in N.S.W. that prisoners in Katingal Special Security Unit (since closed) were subjected to systematic gassing in their locked, air-conditioned steel and concrete cells.

In November 1980, less than a year ago, Dr. Tony Vinson, writing as Chairman of the N.S.W. Corrective Services Commission, stated in a letter to two women concerned about

conditions at Mulawa Women's prison:

> "The Commission was appalled to find that recently one inmate had been totally confined within doors for several weeks without a break for outdoor exercise . . . I have written to all Superintendents expressing concern of the Commission at this disgraceful situation and the need to observe the United Nations Minimum Standard Rules."

The Nagle Report said of the medical services available in N.S.W. prisons that they were "demonstrably inadequate". Unlike some of the other "basic rights" referred to above, the provision of medical services is specifically referred to in section 16 of the N.S.W. Prisons Act. *Four years ago*, the N.S.W. Court of Criminal Appeal noted of persons in prison:

> Clearly enough they are not free to seek medical advice of their own choosing or at their own will. This imports upon the prison authorities the obligation of ensuring that adequate medical advice and treatment is made available. Proper care of the health of inmates in the prison system is a significant part of the responsibilities of the prison authorities.[2]

These views were reiterated by the same court in 1979.

> "The Corrective Services Department, as the Crown's administrative body, has a clear obligation to ensure that adequate and proper medical and dental treatment is provided for persons in custody, equally as it has a clear obligation to provide food, clothing and shelter. These are basic human needs, and the government must ensure that they are available . . . a person deprived of his liberty is, in consequence, deprived of the ability to look after himself; this confers on him *an entitlement* to have his basic human needs met by the prison authorities."[3]

The other basic right which should be noted is *safety*. When a person is compelled to live in a state institution the state should bear a special responsibility for his or her physical safety. To take an extreme case, the prison authorities must take all reasonable steps to prevent deaths occurring in gaols. The recent deaths of Steve Shipley and Stephen Rhind, the latter a remand prisoner in Parramatta gaol, were given great play in the press and especially the sensational press. Equally horrific, though less widely reported, was the burning of Hal Missingham. Terrible as those incidents were, they should have served to highlight the tension and brutality inherent in our prison system; they should have given the lie to the myth of "our pampered prisoners"; they should have been put in the context of continual low-level violence and repression. Instead, they were used to confirm the "crims are animals" image.

I suppose it is trite to continue to point out that in an age of relative prosperity and T.V.-induced expectations, material wealth and images of freedom, the level of authoritarian control of even 20 years ago will no longer be acceptable. One writer noted in 1979 the then current English Home Office view that "the more formal and authoritarian the climate of the regime, the greater chance there is of the prisoner simply being confirmed more strongly than ever in his hostility to, and suspicion of, authority". On the other hand, the immediate result of any relaxation of control within such a system will often be sporadic increases in beatings and disobedience of orders. Transition periods are never easy — but in the long run prisoners' (and warders') physical safety will surely be improved by lessened repression. Mention was made this morning of the regime of the prisoners' social system and its sanctions. Now ironically the Lord Chief Justice of England said at the recent Australian Legal Convention in Hobart that English gaols were "run by courtesy of the prisoners". We should look at the *institution* before nailing the people who live in it. We should not talk about prisoner brutality in one breath and the need for *smaller* gaols in the next, as if the two issues are totally unrelated.

VOTING RIGHTS

In this area there are two categories of problem; first, prisoners have a lawful right to vote if their prison sentence is for less than 12 months (s.21, Parliamentary Electorates and Elections Act, 1912 [N.S.W.].)

In the past, such prisoners have been prevented from exercising this right because there have been no polling booths in prisons and prisoners have neither been allowed to cast postal votes, nor escorted to "outside" polling booths. It appears neither the N.S.W. Corrective Services Commission nor the Electoral Commissioner intend to make any change in these practices in the forthcoming election. This denial of the right to vote stems from unjust and wrong administration. There is no legal barrier, nor justification arising from administrative convenience or prison security (particularly when one considers the fundamental importance of the right to vote) to establishing voting booths in each prison.

Statistics show that, at any particular time, about 20% of prisoners are serving sentences of less than 12 months and another 13% are unconvicted prisoners awaiting trial. This means that, except for those prisoners who may not be on the electoral rolls, 33% of N.S.W. prisoners (totalling about 1,200 people) are entitled by law to vote at the forthcoming elections. To this number of potential voters must be added the substantial number of prison staff for whom a prison polling booth would be the most convenient one at which to cast their votes.

Polling booths in prisons raise no significant problem of prison security. Prisoners could be searched prior to entering the polling booth and could be kept under reasonable surveillance by prison authorities throughout the voting procedure. The surveillance necessary for prison security purposes does not conflict with the principle of secret voting. If necessary, the Electoral Commissioner could appoint appropriate warders as polling staff. Arrangements could be made to ensure that at any given time there was no more than one prisoner in the booth.

Of course, an alternative to the establishment of prison polling booths is for the prison authorities to escort prisoners to "outside" polling booths. This might be especially appropriate for prisons with relatively few eligible voters. It must be borne in mind that the ineligibility of medium-term and long term prisoners substantially reduces the security risks involved.

In New Zealand arrangements are made to permit eligible prisoners to exercise their right to vote. In the United States the Supreme Court has held that refusal to provide eligible prisoners with application forms for postal voting or to establish polling booths in prison was an unjustified denial of the prisoners' fundamental right to vote.

In N.S.W. nothing has been done since the issue was raised several years ago by the Council for Civil Liberties.[5] W.A. it seems is actually attempting to move backwards on this issue. The continuing saga of Peter Wilsmore and his right to vote has produced a leading decision in the area of constitutional law. Included among the controversial 1979 amendments to the *Electoral Act* (W.A.) was a provision that sought to disqualify from voting (and consequently from eligibility to stand for election) persons detained in custody 'at the Governor's pleasure', having been found not guilty by reason of unsoundness of mind. Wilsmore, who stood to lose his right to vote, challenged the amendment on the basis that it affected the constitution of the legislature and hence ought to have been passed by absolute majorities in each house, as required by s.73 of the *Constitution Act* (W.A.). His challenge was sustained in the Full Court of the Supreme Court.[6]

THE "LEGAL VACUUM"[7]

If the authority of prison officers and administrators is to

be other than absolute in practice, they must be subject to the law; those who allege breach of the law must have access to the courts or to other equally or more effective machinery to safeguard and enforce the duties and restrictions placed on the gaolers. It is hard enough to tell powerless citizens to respect the law when those with power over them and responsibility for enforcing the law break it; it is even harder to instil respect for the law when there is no machinery available to impose sanctions for breaches by the law enforcers.

In recent years, the courts have been edging away from their traditional "hands-off" approach to prisons, towards a "due process" model. The due process model has three basic strands. First, it insists on providing legal remedies to enforce substantive prisoners' rights, secondly, it requires that legal sanctions be imposed on prison staff for breach of obligations and, thirdly, it requires the enforcement of procedural rights in relation to disciplinary charges laid against prisoners. Traditionally, the only substantive right accepted by the courts has been the right to be released on completion of sentence. The procedure in this situation is to be found in the historic writ of habeas corpus. However, even in this area a claim to earned remissions due under W.A. prison regulations was held not to be legally enforceable by the High Court in the 1949 decision, *Flynn* v. *The King.*[8] Yet perhaps the most extraordinary decision was that of the N.S.W. Supreme Court in *Gibson* v. *Young.*[9] On public policy grounds and admittedly at the turn of the century, the court held that a plaintiff's claim for damages for personal injuries inflicted by the negligence of prison officers was not maintainable at law. The N.S.W. Prisons Act, 1952, actually extends this principle. Section 46 protects anyone purporting to carry out the provisions of that Act from any action or claim for damages, unless the harm was done malicisouly. If, for example, you or I were injured while visiting a gaol, the responsible officer would have the protection of that section. Why should prison officers be above the civil law as it applies to other citizens? And why should the state evade responsibility for the negligence of its own employees?

The attitude that prisoners do not have rights under statute or regulations is supplemented by laws denying them the right to enforce such legal rights as they do enjoy. Thus prisoners convicted of felonies in N.S.W. have had the long shadow of the common law rule of "civil death", as stated in *Dugan's Case* hanging over them.[10] That rule allowed the sensational press unlimited reign to defame persons convicted of a felony with no regard to truth, accuracy or the laws of libel, secure in the knowledge that their victims could not sue. When Violet Roberts came out of gaol, freed on licence, but still under life sentence for murder, her lawyers were concerned that she could not sell her house or enter into any kind of enforceable contract. She remained, almost literlly, an "outlaw".

The N.S.W. government has since legislated to give prisoners a right to sue — but it is a right hedged about with restrictions. In fact, the High Court in *Dugan* only held that a person convicted of a capital felony was incapacitated, leaving open the position of non-capital felonies. However, the N.S.W. Supreme Court has held that even non-capital felons may be similarly restricted: see Macari, per Justice Cantor.[11] When the N.S.W. government announced its intention to abolish this age-old disability, the news was welcomed by all — except by irresponsible elements in the press which thrived off the old "licence to defame" felons.

However, the *Felons (Civil Proceedings) Bill* fell considerably short of granting convicted felons a right of access to the courts equal to that of ordinary citizens. The key provision, cl.3 says:

> Subject to this Act, a person shall not, by reason of his having been convicted of, or found to have committed, a felony, be incapable of instituting and maintaining any civil proceedings in any court.

This removed the disability, but it is seriously qualified by clause 4 which provides that a convicted felon in custody may *not* institute civil proceedings *except by leave of the court* in which relief is sought. Clause 5 specifies the hurdles which must be jumped in order to secure such a grant of leave. It is not simply a matter of discretion. The relevant tribunal *shall not grant leave* unless it is satisfied (1) 'that the proceedings are not an abuse of process'; and (2) 'that there is prima facie ground for the proceedings'.

Although it is not clear on the face of the legislation, it appears that the onus is upon the applicant for leave. The criteria to which the court granting leave must have regard impose an intolerable and quite unjustifiable burden on the prisoner. No other litigant must surmount such obstacles. Rules about frivolous and vexatious litigants, provisions as to costs and merits tests for access to legal aid provide the courts with ample flexibility to deal with any circumstances which may arise.

Further, and ironically, if Justice Cantor was wrong in *Macari*, and the disability recognised by the High Court in *Dugan* only extended to persons convicted of capital felonies (an admittedly diminishing group of people), the net result of this legislation will be to set back prisoners' rights in this area rather than to extend them.

Amongst the categories of legal rights of most concern to prisoners are those relating to the length and nature of their imprisonment. These include length of sentence, place of imprisonment, accumulation of remission and grant and revocation of parole.

The length of sentence is not a topic within the scope of this paper, but I must say unjustifiable disparities in sentencing can lead to great resentment against the system. Obviously, this is most true of what are perceived to be unduly harsh sentences. For example, one client of mine, received a sentence in the N.S.W. District Court of 9 years imprisonment for breaking into a country club and stealing $2,800 — a pure property crime in which no-one was hurt. He had pleaded guilty. He had a long record for similar offences and this one was committed while on parole. As a result, parole was revoked. No doubt legally his analysis is flawed, but he sees himself as having received *15 years gaol* for that crime. Indeed, had he been declared an habitual criminal he would probably have been given only 5 years on top of his balance of parole, not 9. His sentence was confirmed on appeal as not being outside the permissible range.[12]

While judges and magistrates do determine the *length* of sentence, they have very little control (and tend to exercise less) over the nature of the imprisonment. The range of penal institutions available is broad, but judicial sentencing virtually ignores that fact. Classification of prisoners, transfer between institutions and use of segregation are all powers placed firmly in the hands of prison administrators.

It is clearly a qualitatively different form of punishment to spend years in the new Special Unit at Goulburn (or indeed in the now-closed but notorious Katingal) from a quiet spell on a prison farm, such as Emu Plains.

In her J.V. Barry Memorial lecture in 1974 Justice Roma Mitchell noted that

> "A Supreme or District Court judge in (S.A.) may order that imprisonment will be served in a particular prison, but rarely, if ever, does so."[13]

She does not discuss *why* that power is not used. Nor do I know if practice has since changed in S.A., but I very much doubt it.

Parole

Release, for most prisoners occurs by way of parole. At

present judicial concern at the fate of the prisoner ceases as he or she is led from the dock. Applications for release do not come back before that judge, or before any other *judge in court,* for that matter. Yet if sentencing is a matter for judicial determinations, why is release from prison, possibly subject to conditions, an administrative matter only? The South Australian Criminal and Penal Methods Reform Committee recommended abolition of the Parole Board in its 1st Report in 1975. Whether one accepts that view or not, four judges — Mitchell, Nagle, Muir and Kirby have all castigated the present parole procedures.

Parole Boards sit in secret, do not generally refer adverse reports to prisoners, do not hold hearings, do not give intelligible reasons, are not subject to appeal, are not within the ambit of the Ombudsman's offices and generally constitute a blight on our legal system. My own view is that abolition of parole may well be tantamount to throwing out the baby with the bath-water, but I have great sympathy for those, like the N.S.W. Director of Probation and Parole, Ken Lukes, and A.L.R.C. Chairman Justice Michael Kirby who would have parole abolished. My view is that it should be retained, proper procedures adopted and be open to usual forms of scrutiny.

Remissions

The idea that remissions are a "privilege" is outdated and flawed, and has been discarded by the High Court in *Smith* [14]: Prior to *Smith,* a prisoner in N.S.W. released on parole, who breached that parole, lost all remissions deducted from his head sentence prior to his release. The fact that that reading of the law had the authority of the Court of Criminal Appeal to support it merely made it more curious. Clearly, we decided, any challenge would have to go to the High Court and run the gauntlet of *Flynn*. Smith's proceedings were then travelling through the courts on the same point. He won — but the result is comprehensible only when the judgments of the N.S.W. Court of Appeal and the High Court are read together. Nevertheless, it is clear now that the courts will consider and rule on such matters.

Classification and Transfer

The administrative problems of housing over 3,000 men and women in over 20 secured institutions (as in N.S.W.) is clearly massive. Nevertheless, it is question-begging to assert that all matters of day-to-day prison mangement are purely administrative matters which must remain outside the realm of judicial control. If the rule of law and the procedural requirement of due process are to apply to prisoners, more and more administrative decisions will become subject to judicial review. If administrators view this with disgust, it will be a disgust common to many bureaucrats as the "new administrative law" starts to grow. Some people view this as a growth of "lawyers' control. The brutal and animalistic regime which prison officers admitted before Justice Nagle existed at Grafton Gaol has helped to increase judicial intervention into prison administration, a movement which will be further advanced by the refusal of the NSW Wran government to deal firmly with confessed criminals in its own employ.

However, before judicial intervention can take effect, it needs two pegs to hang its hat on. First, there must be a clearly defined purpose for an action. Thus, in NSW, s.27 of the Prisons Act defines with some specificity the kinds of reason which will justify *transfers* between institutions: s.22 similarly defines (though more broadly) purposes for which "administrative segregation" can be ordered. Where expressed reasons or circumstantial evidence suggest ulterior motives, the courts may be willing to intervene.

Secondly, where decisions must be based on findings of fact, courts will often intervene to require that decision makers apply the rules of natural justice in reaching conclusions of fact.

At present, Australian judges show a far more interventionist approach in reports of inquiries than in judgments on individual cases. But I believe progress is being made in the courts. Nor is all reform won by court action. Disciplinary hearings have been subjected to "law-and-orderly" procedures and representation and appeals; censorship of mail and visits has been eased, communication with lawyers in NSW has been greatly facilitated and so on. Some (including perhaps Dr. Vinson) would view the progress of the NSW prison system with trepidation! As I said before, that adjustment increases tension in the short term, and some trouble is inevitable. However, there is also now an *expectation of reform* which, if nipped in the bud by a timorous government, could lead to longer term unrest.

Remand Prisoners

May I say at this stage — and I suspect Dr. Vinson and many others would agree — one group of prisoners with very special demands for a far better deal are remand prisoners. As Justice Roma Mitchell said in her 1974 J.V. Barry Memorial Lecture, a remand centre "must be of maximum security because it is intended to house those whom the courts regard as unsafe to be at large pending trial."

I interpolate there that she assumes those in custody have not been granted bail — in fact many have been, but have not found the necessary cash or sureties. Therefore, her conclusion that maximum security is needed does not follow for all remand prisoners. However, she correctly goes on to say they should have access to a phone, they should have moderate modern comforts and amenities, facilities to work on their defences, and should be permitted freely to correspond with and receive visits from lawyers, relatives and friends. They should also be able to work if they wish.

Most important, they (and indeed all prisoners) should be protected from police harassment. No person should be forced to accompany police except under arrest. Nor should they be required to sit through an interrogation. Indeed, it is a further anomaly that prisoners in New South Wales can refuse visits from anyone, *except* a police officer in NSW, by virtue of Reg. 76B. This is one of the less acceptable "reforms" introduced under the present regime.

DISCIPLINARY PROCEEDINGS

In NSW considerable progress has been made in regularizing disciplinary proceedings before the Visiting Justices. There have been four stages in the process, which have occurred in almost the reverse of a logical order. First, the availability of an appeal to the District Court was established in 1977 in *R v. Fraser.*[15] Then legal aid was provided for such appeals. Thirdly, representation was arranged at V.J. hearings — largely at the instigation of Mr. Kevin Anderson, S.M., Deputy Chairman, NSW. Finally, arrangements are just now being put into operation to provide legal aid for defendants in such hearings.

I am sure you will each know your own jurisdiction better than I, but I was called on to look at the S.A. Prisons Act not long ago and it provides a revealing comparison in this regard — showing NSW in a highly favourable light.

While many provisions of this Act are confusing, one is absolute, clear and quite astonishing. Section 50 provides that there shall be no appeal from an order made under s.47 or s.48 of the Act. That this legislation contains the power for two Justices to sentence a prisoner to "hard labour for any term not exceeding one year", such term to be served cumulatively on his or her present sentences (s.49) and have absolutely no right of appeal and possibly no right of legal representation is one of the most Draconian provisions I have come across in any legislation in Australia.[16] I also suspect without checking

that the power to punish by imprisonment with hard labour for up to one year is probably one of the most extensive powers given to Visiting Justices in prisons in this country. In New South Wales Visiting Justices, who must be stipendiary magistrate sitting by themselves can only confine a prisoner to his or her cell for 14 days for any single offence. Such a sentence would by statute result in the loss of two months remissions. Any suggestion that a right of appeal should not apply to effective sentences of imprisonment imposed by magistrates in relation to offences which happen to be committed in prison cannot be countenanced.

CONCLUSION

My own belief is that prisoners should have far more legally enforceable rights than they presently enjoy. Physical oppression is no longer an acceptable way of running the prison system in a civilised country. I like to think that documents like the *Nagle Report* and films like "Stir" and "Brubaker" have helped to establish that principle.

However, physical oppression is only one form of uncontrolled authoritarianism. If the prison authorities are to be accountable they must be accountable through Parliament or through the courts. Quite frankly I see the principle of ministerial accountability in the so-called Westminster tradition as an inadequate and often cynically offered sop to allegations of mal-administration and state-condoned crime.

True accountability lies in a combination of checks and balances designed to complement each other. These include a vigorous and independent Ombudsman with teeth, and access to the courts with adequate legal aid and other ancillary mechanisms to make such access effective.

FOOTNOTES

1. See Alan Beaver, "Prisoners' Access" (1979) 95 *L.Q.R.* 393.
2. *R. v. Danhach* (unrep., 12 August 1977).
3. *R. v. Vachalec* (unrep., 5 October 1979), emphasis added.
4. Beaven, note 1, p.417.
5. This summary is taken from Disney, "Prisoners' Voting Rights" (1976) 2 *L.S.B.* 24 (June 1976).
6. This was reported in 6 *L.S.B.* 46 (Feb., 1981).
7. The phrase was used by Justice Staples in a paper republished in (1975) 1 *Alt.Criminology J.* 11.
   The role of the Australian courts has been succinctly outlined by George Zdenkowski, "Judicial Intervention in Prisons" 6 *Monash L. Rev.* 294 (June, 1980).
8. (1949) 79 C.L.R. 1
9. (1899) 21 L.R. (NSW) 7
10. (1979) 53 ALJR 166.
11. *Macari v. Mirror Newspapers* (unrep., Justice Cantor, 1980).
12. *R. v. Burr* (unrep., Ct. of Crim. App., 1979).
13. See s.17, Prisons Act (S.A.).
14. (1980) 2 N.S.W.L.R. 171 (N.S.W. C.A.) and 33 A.L.R. 25 (1980) (H.Ct.).
15. (1977) 2 N.S.W.L.R. 867.
16. Since writing this paper, I have received a copy of the decision of the S.A. Full Court in *The Queen v. Bridgland & Ackland, ex parte Robinson* (24 September 1981) which suggests the position in that state is not quite as bleak as I feared.

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