THE USE OF *HABEAS CORPUS* TO CHALLENGE PRISON CONDITIONS

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I. INTRODUCTION

The prerogative writ of *habeas corpus*[1] has long served as an important safeguard for the liberty of the subject. Traditionally, when an application for the writ is filed, a gaoler must satisfy a court that the prisoner is held under lawful authority, otherwise the court will order that the prisoner be released. This procedure provides an important means by which the legality of a person's detention can be tested. If a gaoler provides evidence which is prima facie capable of supporting the prisoner's detention a court will inquire no further. The writ is not designed to identify and correct procedural errors, often referred to as narrow,

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1 The writ has many forms, the relevant type here is *habeas corpus ad subjiciendum*. Most others have fallen into desuetude, but are not necessarily extinct, for example *Rules of the Supreme Court of Victoria*, r 57.09 (accepting applications other than for ad subjiciendum). For a brief discussion of some of the older forms of the writ, see *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 at 609, per Lord Birkenhead. The authoritative modern text on the writ is R Sharpe, *The Law of Habeas corpus*, Clarendon Press (2nd ed, 1989), see Chapter One. The best history is W Duker, *A Constitutional History of Habeas corpus*, Greenwood Press (1980), see Chapter One. The Australian authorities are examined in M Aronson and N Franklin, *Review of Administrative Action*, Law Book Company (1987), see Chapter 20.

procedural or simple *ultra vires*. It is directed solely to the lawfulness of detention in a substantive sense. If the detention is unlawful the writ must issue. If the detention is lawful any illegality surrounding other aspects of the conduct of authorities is irrelevant. The writ, therefore, cannot provide relief where proper authority to imprison or detain the person exists but the person has been subject to some form of unlawful treatment during incarceration.

In *Prisoners A to XX inclusive v New South Wales*[2] a group of prisoners brought an action in which they sought to challenge this well established limitation on the scope of *habeas corpus*. The prisoners instituted an action to force the New South Wales Department of Corrective Services to reverse its longstanding policy against the supply of condoms in prison.[3] The prisoners launched a two-fold attack against the Department's policy. The first part of the claim was based in negligence. The prisoners alleged that the Department's refusal to supply them with condoms constituted a breach of the duty of care it owed to the prisoners held in its custody.[4] The claim also sought relief against the policy in public law.[5]

The prisoners then sought to amend their statement of claim to include a claim for the issue of *habeas corpus*. There was good reason to attempt an application for the writ. *Habeas corpus* provides a potentially attractive form of relief because, as detailed below, if an applicant makes a case it must be issued as of right. The unusual aspect of this part of the prisoners' claim, however, was that the appellants were not seeking to be released from custody, which is the form of relief normally provided by the writ. Justice Dunford, at first instance, held that the true basis of the plaintiffs' application for *habeas corpus* was not a challenge to the lawfulness of their detention but to the conditions in which this confinement was served. His Honour held that *habeas corpus* did not extend to provide relief to an applicant who alleges that the conditions, as opposed to the fact, of their imprisonment is unlawful. The application to amend the statement of claim was therefore refused.[6]

The use of a prisoner's conditions of confinement as one basis of an application for the issue of *habeas corpus* was raised in a slightly different fashion in the Court of Appeal. The plaintiffs appealed against Dunford J's refusal of the writ on

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2 (1994) 75 A Crim R 205 (Dunford J at first instance); (1995) 38 NSWLR 622. An application for special leave to appeal to the High Court was refused on 23 November 1995, per Dawson, Toohey and McHugh JJ.

3 The Department has since commenced a trial program to supply condoms to prisoners: B Lagan, "Condoms in Prisons Outrage Prison Staff" *The Australian*, 6 December 1995, p 6; E Callister, "Condoms for Convicts" *The Australian*, 14 December 1995, p 8.

4 The prisoners sought relief in the form of damages and an injunction. The claims in negligence were allowed to proceed subject to substantial modification. An injunction was not issued. Justice Dunford held that if the prisoners were able to establish that the failure of the Department to provide them with condoms constituted a breach of the duty of care owed by the Department to them, they could be entitled to injunctive relief: *Prisoners A to XX inclusive v New South Wales* (1994), note 2 *supra* at 213.

5 The claim sought a declaration that the policy of prohibiting the supply of condoms was unreasonable. The claim also sought certiorari to quash the decision to adopt the policy. It was submitted that a total prohibition on condoms could not be justified in light of the potential for transmission of the HIV virus in the New South Wales gaol system. Justice Dunford held that the prisoners could not challenge a policy which had been formulated by the Commissioner for Corrective Services in conjunction with the relevant Minister: *Prisoners A to XX inclusive v New South Wales* (1994), note 2 *supra* at 209-11.

6 *Ibid* at 212.

the basis that their continued imprisonment was made unlawful through the actions of the defendants. The plaintiffs submitted that the denial of condoms increased their risk of contracting HIV and hepatitis which potentially affected their health greatly, indeed placed their lives at risk, and therefore rendered their conditions so intolerably bad as to make their continued imprisonment unlawful. This submission was based upon several English decisions in which it was held that where a prisoner is held in intolerable or unbearable conditions, those conditions may be so bad as to render the detention unlawful. When such a submission succeeds, the prisoner can satisfy the most important criterion for the issue of the writ - unlawful detention - even though he or she may be subject to a lawful sentence issued by a superior court.

Many of the cases that deal with the intolerable conditions concept as a ground for the issue of *habeas corpus* also suggest another novel ground for the issue of the writ. In some decisions, particularly from Canada, prisoners have successfully sought issue of the writ to effect their removal from unlawful segregation and return to the general prison population. These cases have accepted the view that a prisoner can still possess a level of freedom in gaol ('residual liberty') in the form of the privileges and freedoms that are normally provided to inmates in the general prison population. If a prisoner is removed from this relatively liberal regime and placed in more severe confinement, it follows that they are placed in a prison within a prison. Where this is done unlawfully, *habeas corpus* may go to return the prisoner to the general prison population because the two conditions for issue of the writ, restraint and unlawfulness, are present.

These developments in the scope of *habeas corpus* raise important issues which have been previously unexplored in Australian law. Although the Court of Appeal refused the prisoners leave to amend the statement of claim to include an application for the issue of the writ, the wide ranging discussion of principles regarding the issue of *habeas corpus* undertaken by Sheller J is of general importance in all Australian jurisdictions. The purpose of this article is to examine the recent cases from England, Canada and America to explain how those decisions have expanded the scope of *habeas corpus* so that the writ may be used by prisoners to challenge the conditions under which they are confined. It will be argued that the Court of Appeal did not entirely reject the conceptual foundations upon which *habeas corpus* has been used in other countries as a means by which prisoners may challenge *some* of the conditions under which they are held.

II. NATURE OF THE WRIT

At common law every imprisonment is illegal and must therefore be justified by lawful authority.[7] *Habeas corpus*[8] has given this principle teeth by providing both

7 *Liversidge v Anderson* [1942] AC 206 at 245, per Atkin LJ. Conversely, there is no power to release a prisoner before the due expiry of a lawfully pronounced sentence: *Payne v Lord Harris of Greenwich* [1981] 2 All ER 842 at 847, per Shaw LJ. Release by the royal prerogative is an exception to this rule.

8 The majority of English statutes concerning the writ have been preserved in Australia, see *Imperial Acts Application Act* 1969 (NSW), s 6 and Schedule 2, Part 1 (adopting, inter alia, the *habeas corpus* statutes of

an avenue to question the authority of a gaoler to imprison someone and a mechanism to force the release of successful applicants. Accordingly, relief under the writ is not discretionary. If an applicant makes a case for the writ, it must be issued as of right. The availability of more convenient alternative remedies is not a sufficient reason to refuse the writ.[9] Furthermore, the writ is accorded special priority in court business. An application for *habeas corpus* normally takes precedence over all other matters before a court.[10] These principles make *habeas corpus* a very attractive remedy for persons who are unlawfully imprisoned.

The nature of the remedy provided by the writ - release from custody - means that it is inherently directed towards situations involving some form of custody or restraint. Imprisonment is the most obvious example. For prisoners under sentence, *habeas corpus* is traditionally granted when an application establishes that their custody is without legal foundation,[11] or that the sentence is illegal.[12] Classic examples focus on challenging the warrant of commitment, which is the documentary basis of imprisonment, such as a warrant which is fatally defective,[13] or has expired,[14] or where the sentencing court has exceeded its jurisdiction so as to make its order a nullity,[15] or does not properly indicate the nature of the sentence.[16] There is also authority suggesting that any statute which purports to

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1640 (16 Car I c 10), 1679 (31 Car II c 2) and 1816 (56 Geo III c 100); *Imperial Acts Application Act* 1980 (Vic), Part 2 Division 2; Imperial Acts Application Act 1984 (Qld), ss 5, 6 and Schedule 1; *Imperial Acts Application Ordinance* 1986 (ACT) Schedules 2 and 3. The *habeas corpus* statutes are in force in Tasmania through the operation of the *Australian Courts Act* 1828 (UK), s 24. They form part of the law received upon settlement in Western Australia in 1829, and South Australia in 1836: *Clayton v Ralphs & Manos* (1987) 45 SASR 347 at 410. In the Northern Territory they are part of the law received via South Australia. See also, *Parole Board of the Northern Territory v Gamarrow* (1993) 115 FLR 302 at 315, per Kearney J (the *Habeas corpus Act* 1679 (Imp) is in force in the Northern Territory).

9 *R v Pentonville Prison Governor; ex parte Azam* [1974] AC 18 at 32, 41. See also *Murray v Director-General of Health and Community Services Victoria & Superintendent, Larundel Psychiatric Hospital* (unreported, Vic Sup Ct, Eames J, 23 June 1995) at 26: "If the detention is unlawful then there is no discretion and the writ must issue." But see the recent cases cited below on the refusal of the writ where an alternative avenue of action exists.

10 *R v Home Secretary; ex parte Cheblack* [1991] 1 WLR 890 at 894, per Lord Donaldson MR; *Dien v Manager of the Immigration Detention Centre at Port Hedland* (1993) 155 FLR 416 at 418. Special provision is often made for such applications, see for example, Rules of the Supreme Court of Victoria, r 57.02(8) (court may dispense with formalities in urgent cases of the writ). Doubt has been expressed as to whether this rule provides any practical advantage because a similar priority is normally accorded to judicial review cases that involve the liberty of the subject: *R v Oldham Justices; ex parte Cawley* [1996] 1 All ER 464. There are, however, many graphic examples of urgent applications for the writ being heard and resolved within a matter of minutes: *R v Commissioner of Police; ex parte Ivusic* (1973) 1 ACTR 65 (application made while applicant was held in custody on board a plane which was waiting to take-off. Applicant was removed from plane). On the procedural advantages of the writ see also, M Shrimpton, "In Defence of *Habeas corpus*" (1993) *PL* 24 at 25-6.

11 *R v Governor of Metropolitan Gaol, Coburg; ex parte Kimball* [1937] VLR 279 (*habeas corpus* is the appropriate remedy in an application for release of an illegally detained prisoner).

12 *R v White* (1875) 13 SCR (NSW) 339; *Re Price* (1885) 6 LR (NSW) 140; *R v Governor of the Metropolitan Gaol; ex parte Kimball, ibid.*

13 *Ex parte O'Brien* (1869) 8 SCR (NSW) 305 (illegally issued summons and warrant); *Re Wall* (1875) 1 VLR (L) 246 (expired warrant cited).

14 *Thomas v Quarmby* (1982) 62 FLR 402.

15 *Ex parte Williams*, at 549-50, per Dixon J; *R v Governor of the Metropolitan Gaol; ex parte Kimball*, note 11 *supra* at 282.

16 *R v Lansberg* (1947) 4 CR 414 (warrant not stating commencement date of sentence).

impair any right to personal liberty effectively, and which thereby curtails the availability of the writ, will be construed strictly.[17]

The writ has three significant limitations which undercut its worth to persons under sentence of imprisonment. Firstly, the case law clearly places greater emphasis on substantive rather than formal defects, so that the writ will not issue for merely technical defects.[18] This principle is fortified in most Australian jurisdictions by statutory provisions which direct that sentences are not to be declared invalid simply due to any failure to comply with procedural requirements.[19] Furthermore, the sentence of a superior court is, as a general rule, itself sufficient authority for its execution.[20] Therefore the order of the sentencing court may be sufficient authority to justify the detention of an applicant. The operation of this rule is reinforced, in respect of superior courts at least, by the strong presumption against the reviewability of the orders of superior courts.[21] The sentencing order of a superior court will, therefore, normally provide a conclusive answer to an application for the writ. Accordingly, gaolers may defeat a claim for the writ by producing a warrant of commitment that appears valid on its face.[22] This restriction presents a practical obstacle to any use of the writ to challenge conditions of confinement because, once the warrant is produced, the application proceeds no further.[23]

The second important limitation on the use of *habeas corpus* by prisoners is that the writ cannot be issued in a qualified manner. English law has never recognised a partial form of *habeas corpus*. The writ will be issued to set a person free

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17 This point was made forcefully in *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 520-3, per Brennan J.

18 *Ex parte Williams; Re Seery* (1931) 48 WN (NSW) 221 (no writ if conviction appears sound despite a bad warrant, or if the problem is a mere technicality); Aronson and N Franklin, note 1 *supra*, p 664: see footnote 129, where the authors cite many cases which hold that defects falling short of causing completely illegal detention may be ignored, or that mistakes in the return can be amended in order to prevent unjustified release.

19 For example, *Sentencing Act* 1991 (Vic), s 103(1) (sentences are not to be held invalid simply for a failure to meet its procedural requirements); *Crimes Act* 1958 (Vic), s 455(2) (no Magistrates' Court conviction can be queried by certiorari despite defects in a warrant as long the conviction is "good and valid"); *Prison Act* 1977 (Tas), s 37(2) (no warrant of commitment shall be held void by reason of a formal defect). *Correctional Services Act* 1982 (SA), s 21A. This section prohibits admission of a prisoner without a written statement containing particulars of the order of the sentencing court or a warrant detailing particulars of the court order it is founded upon. *Corrective Services Act* 1988 (Qld), s 35 is similar. Both provisions would theoretically operate to detect such problems.

20 *Young v Registrar of Court of Appeal* [No 3] (1993) 32 NSWLR 296 at 287, 291; *Ex parte Williams*, note 15 *supra* at 548-50; *Censori v Holland* [1993] 1 VR 509 at 512. However a warrant of commitment serves an obviously useful evidentiary or confirmatory function for the court's judgment: *Rogers v Corrective Services Commission of New South Wales* (unreported, NSW Sup Ct, McInerney J, 26 May 1988) at 9.

21 See D Lanham, "The Reviewability of Superior Court Orders" (1988) 16 *MULR* 603 at 608-9. There is some authority that the rule extends to all courts of record which means that, strictly speaking, the County and District Courts do not have to issue warrants of commitment for those persons they sentence to imprisonment: *Rogers v Corrective Services Commission of New South Wales, ibid.*

22 See for example *Prisoners A to XX inclusive v New South Wales* (1994), note 2 *supra*. There is, however, some authority that courts have become more concerned with the legality of the underlying court order than with the face of the warrant. See the discussion in *R v Oldham Justices; ex parte Cawley*, note 10 *supra* at 472-4.

23 This approach was adopted by Dunford J in *Prisoners A to XX inclusive v New South Wales* (1994), note 2 *supra* at 212.

without restriction, and nothing less.[24] This means the writ cannot be used to challenge the place and manner of a lawful form of confinement, so a prisoner cannot use it to force their transfer from a division "where the confinement was stricter and the food more scanty" to a more favourable place.[25] This restriction on the scope of the writ explains why it has not traditionally been used by prisoners who seek to challenge the conditions of their confinement.

The final limitation upon *habeas corpus*, which perhaps is not yet fully developed, arises where an alternative remedy is available to the applicant. In respect of criminal proceedings, there is long standing authority that the writ cannot be used as a collateral means of attacking convictions.[26] There is, however, a growing number of modern authorities which point to the further development of a general rule against any use of the writ as a collateral means of review. Many recent cases have held that the failure of an applicant to utilise more suitable or convenient avenues of relief, if one is available, may provide a sufficient reason for a court to refuse to grant the writ.[27] Thus, if an applicant for the writ may more easily seek judicial review of the decision which has led to his or her detention,[28]

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24 *R v Secretary of State for the Home Dept; ex parte Bhajam Singh* [1976] QB 198 at 201, per Lord Widgery CJ. One rarely invoked exception to this principle arises where the writ is sought by, or on behalf of, a minor. If the court finds that a minor is unlawfully held, the writ will not be issued to set the child free from all restrictions. The court will order that the child be transferred to the custody of the child's legal guardian. For an example of an attempt to use the writ for this purpose, see *Brown v Kalal* (1986) 7 NSWLR 423.

25 This phrase is taken from the facts of *Ex parte Rogers* (1843) 7 Jur 992, as stated in the report. The court held that it could not grant an application for the writ phrased in such terms. See also *R v Governor of Wandsworth Prison; ex parte Silverman* (1952) 96 Sol J 853 and R Sharpe, note 1 *supra*, pp 151-4 (branding English authorities on this point "meagre"). The writ may, however, be used to effect a transfer rather than absolute release where the warrant authorises confinement in a particular place from which a prisoner has incorrectly been transferred: *Kelleher v Corrective Services Commission of New South Wales* (1987) 8 NSWLR 423 (prisoner held under warrant naming one prison only, was properly transferred but re-transferred illegally. Unlawful transfer was void but conferred no right to immediate or unconditional release. *Habeas corpus Act* 1679 (UK), s 8 empowered Court to order prisoner's return to a specifically named prison). The majority in *Day v R* (1983) 153 CLR 475 held the provision inapplicable if a warrant did not specify a certain prison, but this was vigorously rejected by Brennan J who held that s 8 covered all committals, at 488-9.

26 This rule has been acknowledged frequently in recent times: *Re Superintendent of Training Centre at Goulburn; ex parte Pelle* (1983) 48 ALR 225 at 227-9, per Brennan J; *Re Officer in Charge of Cells, ACT Supreme Court; ex parte Eastman* (1994) 123 ALR 478 at 480, per Deane J; *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 285, per Kirby P; *Little v Governor of Pentridge Prison & Secretary of the Law Institute of Victoria* (unreported, Vic Sup Ct, Appeal Division, Young CJ and Nathan J, 11 November 1991) at 5-8; *Harriman v R* (unreported, WA Sup Ct, Murray J, 12 July 1995).

27 In *Eaves v James* (1988) 33 A Crim R 369 at 374, the New South Wales Court of Appeal stated that "...the courts of Australia have made it plain that the writ of *habeas corpus* is not an appropriate means of seeking review of the lawfulness of a decision where another regular means which a prisoner has invoked to test that lawfulness exists and has not been invoked or has been exhausted". In many older cases the writ was issued to remand prisoners who were held for inordinately long periods. There is clear authority that difficulties in the detention of a remand prisoner should now be resolved under the provisions of bail legislation, not by an application for the writ: *Clarkson v Director-General of Corrections* [1986] VR 425 at 434-6.

28 *R v Oldham Justices; ex parte Cawley*, note 10 *supra* at 478-81 (court rejecting applications from several fine-defaulters who sought to challenge their detention on the grounds of various flaws in committal documents. Court held that judicial review was the correct avenue of challenge for this class of decision). See also *R v Secretary of State for the Home Dept; ex parte Muboyayi* [1992] QB 244 at 257 where, in refusing the application of an asylum seeker who sought the writ, Lord Donaldson MR stated "...the evolution of the...extended system of judicial review under RSC Order 53 with its in-built

or if there is a statutory right of appeal against continued detention,[29] the writ may be refused. It is submitted that these newer cases indicate that the rule mentioned above (that there is no discretion to refuse the writ where an alternative remedy is available to the applicant) is now of uncertain standing.

III. INTOLERABLE CONDITIONS AS A BASIS FOR THE ISSUE OF *HABEAS CORPUS*

The intolerable conditions concept has been discussed in several recent English cases in which prisoners have sought to challenge their imprisonment on the basis that the conditions under which they are confined are so bad as to render the prisoner's detention unlawful. The concept presupposes that there is some minimum standard that prison conditions should, or must, meet. It follows from this supposition that if these minimum standards, whatever they may be, are breached, the prisoner's detention is no longer lawful. This last point is relevant to the law of *habeas corpus* because the writ will issue where a prisoner can demonstrate that he or she is unlawfully detained. The concept also raises issues of general importance to prison administration because it implies that, unless the conditions under which a prisoner is held meet some basic standard, the detention will not be lawful. There are many American cases in which prisoners have challenged the conditions of their confinement on the basis that these conditions are 'cruel and unusual' and, therefore, contravene the constitutional prohibition against cruel and unusual punishment.[30] These cases do not provide useful guidance to the intolerable conditions concept because they have arisen in the context of a fundamentally different constitutional framework. The English cases on the intolerable conditions concept however, are cases concerning the common law and may therefore provide guidance to Australian courts.

The 'intolerable conditions' concept was first mentioned in England in *Williams v Home Office (No 2).*[31] There, Tudor Evans J held that there was no modern authority to support the view that a detention which is lawful at its commencement may become unlawful if the nature or conditions of the imprisonment subsequently

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safeguards...justify us in confining the ambit of the writ...". This decision led one English commentator to suggest that the writ should be abolished and replaced by an expanded judicial review procedure: A Le Suer, "Should We Abolish the Writ of *Habeas corpus*?" (1992) *PL* 13.

29 In recent years there has been an increasing number of applications for the writ made by persons detained under mental health legislation. Courts have expressed a preference that such applicants utilise statutory appeal mechanisms so that a properly constituted decision maker may undertake a full examination of the applicant's mental health: *Attorney-General (Tas); ex parte Thompson* (1994) 73 A Crim R 448 at 477; *Murray v Director-General, Psychiatric Hospital and Community Services, Victoria* (unreported, Vic Sup Ct, Eames J, 23 June 1995) at 45-7.

30 Some of the huge number of cases in this area are discussed in A Newman, "Eighth Amendment - Cruel and Unusual Punishment and Conditions Cases" (1992) 82 *J Crim Law & Criminology* 979; M Previn, "Prisoners' Rights" (1995) 83 *Georgetown LJ* 1461 at 1462-82. See also the discussion below of the American cases regarding the residual liberty of prisoners.

31 [1981] 1 All ER 1211.

change.[32] However, the submission was not central to the action so the court did not hear extensive arguments on the matter. The issue received fuller consideration in *R v Commissioner of Police for the Metropolis; ex parte Nahar.*[33] In that case, a Divisional Court heard an application for *habeas corpus* made by two remand prisoners. The prisoners' committal documents ordered that they be delivered to the governor of Brixton Prison, but that prison was subject to various restrictions upon the admission of prisoners, so they were instead taken to the cells beneath a nearby Magistrates' Court. Although this arrangement was clearly authorised by statute,[34] the prisoners challenged the lawfulness of their detention on the basis that the conditions under which they were kept were so bad as to be unlawful. The Court received detailed evidence on the conditions in the holding cells, and it expressed many reservations about these conditions, but the Court declined to find that the conditions were intolerable. However it accepted, in principle, the idea that there was some minimum standard for conditions of imprisonment beyond which detention would become unlawful. Both judges in the case declined to provide clear illustrations of the kind of conditions which might render a prisoner's detention unlawful, but it was apparent from the general tone of their judgments that they thought only very extreme conditions would suffice to establish a case for relief.[35]

These decisions were considered by the Court of Appeal in the case of *Middleweek v Chief Constable of Merseyside* (the *Middleweek* case).[36] The facts of that case were as follows. Middleweek was a solicitor engaged by two police officers in their defence of criminal charges. In the course of the trial a prosecution witness noticed that Middleweek possessed copies of several important documents which could only have been obtained through unlawful means. Middleweek was arrested and subsequently detained and searched at the local police station. The search uncovered no unlawfully obtained documents. Middleweek commenced an action for damages for wrongful arrest and false imprisonment. The jury returned a verdict indicating that they regarded the original arrest, search and period of detention to be reasonable but that the decision to detain the plaintiff in a police cell was unreasonable. Both parties appealed, on grounds which are not presently relevant, but the Court of Appeal made important remarks about the 'intolerable conditions' concept.

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32 The decision was followed in *R v Board of Visitors of Gartree Prison; ex parte Sears* (1985) Times LR, 20 March. In that case a prisoner commenced a judicial review application which sought, inter alia, compensation for eight days of cellular confinement and loss of privileges as part of a prison disciplinary sentence ordered by the board. Justice Mann held that if a person is held in a place where they may be lawfully imprisoned any variation of those conditions of confinement is not capable of constituting the tort of false imprisonment.

33 (1983) Times LR, 28 May.

34 *Under the Imprisonment (Temporary) Provisions Act* 1980 (Eng), s 6(2).

35 [1992] 1 AC 179 at 186.

36 The case is noted in [1992] 1 AC 179 which follows the report of *R v Deputy Governor of Parkhurst Prisons; ex parte Hague* (hereafter *Hague's* case) [1992] 1 AC 58. Following the latter decision the *Middleweek* case was belatedly reported at [1990] 3 All ER 662. (The *Middleweek* case was decided in 1985, but was not reported until it was clear, in early 1990, that the *Hague* and *Weldon* cases were going from the Court of Appeal to the House of Lords, and would be the subject of substantial argument before the Lords).

The Court held that there was no absolute rule which precluded a detention which was initially lawful from subsequently becoming unlawful by reason of a change in the conditions of the imprisonment. The judgment of the Court of Appeal, delivered by Ackner LJ, agreed with the views expressed in *Ex parte Nahar* that it was possible to conceive of hypothetical cases in which the conditions of detention were so intolerable as to render that detention unlawful. The Court gave examples of where a prisoner's cell became and remained seriously flooded or contained a burst gas pipe. However the Court concluded that in the present case no such conditions were present, therefore the claim on this point failed.[37]

The House of Lords considered all of these authorities in the case of *R v Deputy Governor of Parkhurst Prison; ex parte Hague* (*Hague's* case).[38] In that case the House of Lords heard joined appeals both of which involved prisoners who had sued their gaolers in private law, even though both prisoners were lawfully detained in prison. Each prisoner based his claim upon allegations that he had been subjected to treatment which was not authorised at law. In the appeal which is presently relevant, the prisoner claimed that he had been placed in a strip cell (in which disturbed prisoners are stripped naked and placed in something akin to a padded cell) without sufficient reason. The allegation was used as a foundation for a claim that the prisoner's detention was unlawful because the conditions were intolerable in the sense considered in the *Nahar* case. This submission was made doubly interesting by the elevation of Lord Ackner to the House of Lords subsequent to his approval of the concept in the *Middleweek* case.

In the leading judgment, Lord Bridge made a strong attack on the intolerable conditions concept. His Lordship expressed great sympathy for prisoners held under the conditions with which many of the cases discussed above were concerned. He held however that the idea that the conditions under which a prisoner was held could render the detention itself unlawful was plagued with "formidable difficulties".[39] Lord Bridge observed that the logical corollary of this notion was that it entitled the prisoner to be set free immediately. This clearly made his Lordship uncomfortable, but he was further troubled by the inability of the proponents of the intolerable conditions concept to define the criteria by which proscribed conditions could be established with any satisfactory degree of precision. Lord Bridge stated that the only clear examples which were provided in the *Middleweek* case, noted above, were so extreme as to be of little value.[40] Lord Jauncey, who delivered the only other lengthy judgment in the case, was in substantial agreement with Lord Bridge.[41] Lords Bridge and Jauncey held that where the conditions of a prisoner's detention were intolerable, in the sense considered by the previously discussed cases, an appropriate remedy would lie in public law, to enforce the custodian's lawful duties in respect of his or her prisoners, or in negligence where the consequences of the conditions of

37 [1992] 1 AC 179 at 185-6.
38 *Hague's* case, note 36 *supra*.
39 *Ibid* at 165.
40 *Ibid* at 164-5.
41 *Ibid* at 175-7.

confinement otherwise met the requirements of that cause of action. In a very brief judgment, Lord Ackner bowed to the logic of Lord Bridge's judgment and recanted his previously expressed views to the contrary.[42] The idea that a variation of the conditions under which a prisoner is detained can render an otherwise lawful imprisonment unlawful was therefore unanimously rejected by the House of Lords.

In *Prisoners A to XX inclusive v New South Wales*[43] Sheller JA examined the authorities on intolerable conditions at length. Justice Sheller concluded that they provided no support whatsoever for the intolerable conditions concept as a basis on which a prisoner might seek *habeas corpus* to gain their removal from the offending regime. He was also strongly influenced by the difficulties with the idea identified by Lord Bridge in *Hague's* case. Justice Sheller also concluded that the American and Canadian cases did not provide any decisive authority on this issue, although upon a close reading of his Honour's judgment it seems that he did not find any direct consideration of the intolerable conditions concept in those decisions.[44] In fact, his Honour's examination of the intolerable conditions concept seems to have been based wholly on the English cases. It follows from those cases that the conditions under which a prisoner is detained can never form the basis for the issue of *habeas corpus* in England and Australia.[45]

It is submitted that Sheller JA was correct to reject any move to adopt the intolerable conditions concept, but not because of the apparent difficulties identified by the English cases. The intolerable conditions concept is simply not the best means to correct very bad conditions. When the facts of a case demonstrate that a prisoner is being held in very bad conditions, the important issue is not whether the prisoner should remain in gaol, which seems to be the ultimate purpose of the intolerable conditions concept. The most important issue is to ensure that the prisoner is promptly removed from any intolerable conditions. It is also important that prison administrators receive clear judicial guidance so that they are able to appropriately amend any offending conditions. Accordingly, when an action demonstrates that a prisoner is held in intolerable conditions a court should grant relief which includes: a finding that the conditions under which the prisoner is held are unlawful; the basis for this finding; and a direction that the prisoner be removed from these conditions. Any such relief would also be

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42 *Ibid* at 166.

43 *Prisoners A to XX inclusive v New South Wales* (1995), note 2 *supra*.

44 *Ibid* at 630-2. Justice Sheller concluded that the status of the intolerable conditions argument was "open" in America. With respect, that is not correct. In America any allegations by prisoners which raise issue of intolerable conditions are decided by reference to the constitutional prohibition against cruel and unusual punishment (see US Bill of Rights, Art 8). This form of action is a constitutional tort. The form of relief provided is normally damages, or a negotiated settlement which removes/adjusts the offending conditions. There are few United States cases in this area that involve *habeas corpus* because such actions normally proceed under the procedure of 42 USC §1983, which is described below.

45 In England the writ is now most often sought by suspects detained for questioning by the police, who seek release by challenging the legality of their holding or the denial of bail. See for example, *Re Craig* (1990) 91 Cr App R 7; *R v Governor of Winson Green Prison, Birmingham; ex parte Trotter* (1991) 94 Cr App R 29; *R v Sheffield Justices; ex parte Turner* (1991) 93 Cr App R 180. In a recent test case it was held that the writ was not an appropriate means for fine defaulters to challenge their commitment: *R v Oldham Justices; ex parte Cawley*, note 10 *supra*.

instructive to prison administrators on how they should alter the relevant conditions in order to make them conform with the requirements of law. It is submitted that a declaration would normally be an adequate remedy to achieve these goals. Where it was not, an injunction could also be issued to require gaolers to remove a prisoner from an unlawful regime of treatment and prevent any return of the prisoner to the offending conditions. The proposed form of relief would also remove any need for the grant of *habeas corpus*.

IV. *HABEAS CORPUS* AND THE RESIDUAL LIBERTY OF PRISONERS

There is another, more secure, foundation upon which *habeas corpus* can be used to challenge the conditions under which a prisoner is confined. In some countries the writ has been sought by prisoners who do not dispute the lawfulness of their sentence but allege that they have been unlawfully restrained during that sentence. In these cases, applicants for the writ have based their claim on the idea that, even within prison a prisoner possesses some level of residual liberty, and that if they are unlawfully placed under conditions that are more restrictive than those endured by the general population of the prison, the writ of *habeas corpus* will go to effect their release from this 'prison within a prison'. The residual liberty concept has arisen mostly in cases where prisoners have sought judicial review of their placement in segregation.

This notion of 'residual liberty' is important to prisoners who seek the issue of *habeas corpus* because the writ may only be issued where a prisoner demonstrates that he or she is under some form of unlawful restraint or custody. If one accepts that a prisoner possesses some kind of liberty, an infringement of that liberty may fulfil the requirement of custody or restraint. If that custody or restraint is unlawful, a case for the issue of the writ may, in theory, be made out. There is strong English authority which rejects this proposition and equally strong Canadian authority in support of the idea, but no clear Australian decision on the issue. The decision in *Prisoners A to XX inclusive*[46] provides some indication that the New South Wales Court of Appeal might not adopt the English position. Before considering that case, however, some explanation of the notion of residual liberty within a prison and its relevance to *habeas corpus* is necessary.

A. Do Prisoners Possess Any Residual Liberty? The English View

A useful starting point within the English cases is *Williams v Home Office (No 2)* (the *Control Units* case)[47] In that case a prisoner sought to challenge, by an action 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. Those units were used to subject the most difficult prisoners to

46 (1995), note 2 *supra*.

47 Note 31 *supra*. The Court of Appeal subsequently refused Williams leave to amend his statement of claim on technical grounds: [1982] 2 All ER 564.

a regime in which they were strictly segregated, denied any company or association and allowed very few privileges.[48] Williams was detained for 180 days because he was deemed to be a "dedicated troublemaker" who needed behavioural correction.[49] When released several years later, Williams sued over his placement in the unit, arguing that it constituted a false imprisonment. The action failed, but there was lengthy consideration of exactly what the segregation power authorised gaolers to do and whether the power 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 English statutory provision,[50] of which there is an equivalent in every Australian jurisdiction,[51] 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. 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.[52]

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48 The philosophy of the program was to break the spirit of prisoners, to force them to behave in a compliant fashion. The full regime and its history is described at note 31 *supra* at 1215-7, and it is compared with similar regimes of that time in WE Lucas, "Solitary Confinement as Coercion to Conform" (1979) 9 *ANZJ Crim* 153.

49 The phrase comes from a report by the Governor of Williams' prison, quoted by Lord Denning MR in a case concerning disclosure of documents related to this action: *Home Office v Harman* [1981] 2 All ER 349 at 358-9.

50 *Prison Act* 1952 (UK), s 12(1).

51 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 (WA), ss 16-7, 21-8; *Correctional Services Act* 1982 (SA), ss 24-7; *Corrections Act* 1986 (Vic), ss 4, 69; *Corrective Services Act* 1988 (Qld) ss 32, 69, 75-7. *Prisons Act* 1952 (NSW), s 39(1) confers custody of prisoners with governors, and s 27 empowers governors to order the movement of prisoners.

52 Note 31 *supra* at 1240-1. A separate provision enables prison administrators to place prisoners in segregation: *Prison Rules* 1964 (UK), r 43. Justice Tudor Evans did not invoke that provision in support of his finding that the statutory powers to hold and locate prisoners enabled the Home Office to place prisoners in whichever gaol it chose, and also within any part of a particular prison. At first glance this appears to be an oversight. However, it is submitted that there are two reasons why the finding of Tudor Evans J cannot be fortified by reference to r 43. Firstly, any power to segregate prisoners is necessarily dependent upon the more general power of custodians to hold and locate prisoners. If the prisoner is not validly subject to those general custodial powers, he or she cannot be subject to the other powers of prison administrators, such as segregation. It is submitted that the scope of the greater power necessarily includes that of the lesser. Secondly, by resting his finding on the general custodial provisions, the finding of Tudor Evans J is not limited to segregation. It is implicit in his view of the scope of s 12(1) that his Honour accepts that the provision does not simply allow gaolers to place prisoners in segregation. The provision also enables gaolers to place prisoners in other, varying, forms of custody, such as the different regimes that are normally used in a hierarchical classification system (maximum, medium and low etc). This view is consistent with the generalised nature of his Honour's finding on the scope of custodial powers.

Therefore, under English law, prisoners possess no express or residual 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 the prisoner possesses some kind of right to a minimum level of freedom or absence of restraint. One immediate consequence of this principle is 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 to protect and none which can support an action for damages against gaolers.[53] This part of the *Control Units* case was expressly approved by the House of Lords in *Hague's* case.[54]

B. The American View

In the United States, prisoners possess wide avenues for challenging restrictions upon their level of intra-prison freedom. These are founded upon constitutional guarantees, especially the constitutional requirement of procedural fairness under the due process amendment and the prohibition against cruel and unusual punishment. Fundamental to this protection is the right to liberty, which has been held to encompass a core right to freedom from any bodily restraint, such as imprisonment.[55] This links the right to procedural correctness at trial to the legitimacy of any imprisonment that results from that trial. The connection of these two issues allows a sentence to be challenged in forms unknown in other common law jurisdictions. Prisoners are further aided by a constitutional right of access to legal materials and advice to vindicate their civil rights, and specific judicial prohibitions against prison administrators attempting to prevent prisoners from assisting each other with the preparation of petitions for *habeas corpus*.[56] The Federal *Civil Rights Act*[57] provides significant assistance for the enforcement of these constitutional rights. The Act allows for suits which allege an infringement, by acts of public officials, by way of an action in damages. Prisoners often seek *habeas corpus* as an additional remedy in such actions. American law classifies *habeas corpus* petitions as civil in nature. This allows for more favourable standards of proof for prisoners and less deference towards prison administrators and criminal prosecutors than would be used under normal public law principles or criminal trial provisions.[58]

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53 Note 31 *supra* at 1227, 1241.

54 *Hague's* case, note 36 *supra* at 163-6, 173-6, 178. The issue arose in *Hague's* case because one prisoner alleged that he had been placed in segregation without proper authority. Part of the prisoner's claim against the gaolers was in false imprisonment, which was based on the idea that the unlawful segregation had interfered with his residual liberty.

55 *Ingraham v Wright* (1977) 430 US 651 at 673-4; *Greenholtz v Inmates of Nebraska Penal & Correctional Complex* (1979) 442 US 1 at 18.

56 *Johnson v Avery* (1969) 393 US 483 at 490.

57 42 USC § 1983. On the use of this procedure by prisoners see MP Previn, "Prisoners' Rights - Procedural Means of Enforcement Under 42 USC 1983" (1995) 83 *Georgetown LJ* 1498.

58 See Anon, "Detaining Successful *Habeas corpus* Petitioners Due To Dangerousness: Hilton v Braunskill" (1988) 9 *Nth Illinois ULR* 129 at 131, see footnotes 10 and 11.

The resulting structure of constitutional rights contains firm and enforceable restrictions upon any infringements of liberty, including any intensifications of the conditions of custody such as segregation.[59] Furthermore, the notion of what may constitute 'custody' for the purposes of a *habeas corpus* application has expanded extraordinarily to include cases of parole, bail and post-release disabilities.[60] *Habeas corpus* is available as a regular rather than extraordinary form of relief to supplement these constitutional rights, though it is generally used in a challenge to the underlying sentence rather than the nature of confinement.[61] In this complex constitutional framework, the writ has moved far beyond its traditional role as a device to facilitate the physical release of a prisoner.[62] It may also assist a prisoner who seeks relief from a disability or restriction suffered in consequence of imprisonment.[63]

Before the post-war rebirth of civil rights litigation, when American law was more comparable with ours, the writ had virtually no application to prisoners. In respect of convicts, it would issue to bring them to court to testify and do no more.[64] The law of *habeas corpus* has expanded beyond recognition in the last 35 years, and the aggressive use of the writ in that country must be seen in this context.[65] The wide scope of *habeas corpus* in the United States flows from that

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59 See for example *Hewitt v Helms* (1983) 459 US 460 (constitutionally protected liberty interest affected when prisoner placed into administrative segregation).

60 W Duker, note 1 *supra*, see Chapter Six.

61 The writ may be used to supplement some appeal procedures and it has a complex relationship to other post-conviction remedies for American prisoners, see L Bell "The Exhaustion Doctrine: State Prisoners Caught Between Civil Rights Actions and Writs of *Habeas corpus*" (1992) 29 *San Diego LR* 497 and Anon, "The Supreme Court - Leading Cases, *Habeas corpus*" (1990) 104 *Harvard LR* 129 at 308-19.

62 This approach is diametrically opposed to the English authorities considered above. The restrictive English approach to the writ has long since been rejected in America: *Coffin v Richard* (1944) 143 F 2d 443 [6th Cir]; *Johnson v Avery*, note 56 *supra*; *Wilwording v Swenson* (1971) 404 US 249.

63 *Carafas v LaVallee* (1968) 88 S Ct 1556 (record of conviction carried various state and federal civil disabilities which were held to be sufficient to anchor federal jurisdiction over a former state prisoner's petition against their conviction and present a real issue for the adjudication).

64 R Rosenblatt, "The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can be Done?" (1991) 8 *J Human Rights* 489 at 495, see footnote 46, citing *Ex parte Dorr* (1845) 44 US 103.

65 This expansion has largely been facilitated by extending federal civil rights laws into the disputes of State prisons, and *habeas corpus* has been the principal remedy. See CD Forsythe, "The Historical Origins of Broad Federal Habeas Review Reconsidered' (1995) 70 *Notre Dame LR* 1079 where the arguments for and against the use of federal *habeas corpus* statutes to federal standards on the conditions in which state prisoners are held are canvassed. W Duker, note 1 *supra*, see Chapters Four and Five. The author mounts a persuasive argument that this is a corruption of the arrangement intended by the writers of the United States Constitution, and has vastly expanded federal legislative and judicial power over state administration, of which prisons are but one example. There is some Australian authority to support the reverse proposition, ie a State court has jurisdiction to determine the validity of an applicant's detention under Federal law: *Ah Sheung v Lindberg* [1906] VLR 323; *R v Lloyd; ex parte Wallach* [1915] VLR 476 (reversed on other grounds: *Lloyd v Wallach* (1915) 20 CLR 299). Importantly, however, those cases do not involve the imposition of state legal standards on federal action. See for example *Dien v Manager of the Immigration Detention Centre at Port Hedland*, note 10 *supra* at 418 (Western Australian Supreme Court hearing application for writ from person held under *Migration Act* 1958 (Cth). Court accepted it had jurisdiction to issue writ, however the validity of the applicant's detention was considered solely by reference to the Federal Act).

nation's Constitution rather than from the writ itself.[66] The importance of these constitutional differences cannot be overstated. Any attempt in Australia to invoke the writ in situations where it would go in an equivalent American case fails to appreciate that *habeas corpus* is not the source of rights for a prisoner in that country, but simply the means by which prisoners' constitutional rights are given effect. In *Prisoners A to XX inclusive v New South Wales*[67] Dunford J stated that these constitutionally peculiar arrangements "complicated" any use of American cases on the writ. Justice Sheller was similarly troubled by the constitutional differences between this country and the United States. Although not expressly stated, it is implicit in his Honour's judgment that these differences preclude the adoption of the American cases in Australia.[68]

The American approach is also beset with practical difficulties. Most notably, the broad potential scope of the writ is widely believed to precipitate an enormous number of frivolous legal applications from prisoners. The United States Supreme Court has delivered several recent decisions which clearly seek to narrow the scope of the writ.[69] This can be interpreted as a judicial admission that it has been overly widened, causing an ever growing level of applications beyond the capacity of the legal system to effectively manage.[70] This trend serves as a potent justification for Australian courts to shun the American approach.

C. The Canadian View

Canada has achieved a middle ground between the extremities of England and the United States. The Canadian Supreme Court has accepted the idea that a prisoner can still retain some residual liberty in gaol.[71] The Court has

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66 There is, however, strong American authority to support the idea that the writ itself is viewed as the source of some of the relative vigour with which prisoners' rights are protected. See for example *Jones v Cunningham* (1963) 371 US 236 at 243, where the Supreme Court declared that the writ was "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be freed from wrongful restraints upon their liberty."

67 (1994), note 2 *supra* at 211.

68 *Prisoners A to XX inclusive v New South Wales* (1995), note 2 *supra* at 631-2.

69 This trend has occurred alongside the continued endorsement of the death penalty. Appeals against this penalty normally lie at the heart of most *habeas corpus* applications heard by the Supreme Court: *Walton v Arizona* (1990) 497 US 639; *Whitmore v Arkansas* (1990) 495 US 149; *Wainright v Witt* (1985) 469 US 412. See also TS Hall, "A Stricter Standard of Review for Abuse of the Writ of *Habeas corpus* Involving Several Successive Federal Petitions" (1992) 25 *Creighton LR* 233, on superior court efforts to halt multiple applications for the writ, and V Googe, "Herrera v Collins: Federal *Habeas corpus* Review and Claims of Actual Innocence" (1993) 27 *Georgia LR* 971 and J Anest, "Brecht v Abrahamson and Harmless Error: The Court Continues to Narrow Federal *Habeas corpus*" (1995) 38 *Howard LJ* 201 (both noting the Supreme Court's continued endorsement of federal court review of state convictions but interpreting the grounds strictly). For the Supreme Court's most important recent pronouncement in this area see *Schlup v Delo* (1996) 115 S Ct 851, noted in an extended casenote by J Turocy (1996) 34 *Duquesne LR* 372.

70 A majority of the Court appears to believe that *habeas corpus* is not the only remedy to which this criticism applies, see *Sandin v Connor* (1995) 115 S Ct 2293 at 2299 (five justices criticising a non-habeas decision of the Court on the basis that it created a relaxed standard for the grant of relief, which had led to "the involvement of Federal courts in the day-to-day management of prisons, often squandering judicial resources with little off-setting benefit to anyone.")

71 *Miller v The Queen* (1985) 24 DLR (4th) 9 at 30-1 (the *Miller* case). Prior to this decision there was significant Canadian case law in support of the English view, see *R v Beaver Creek Correctional Camp*

acknowledged that imprisonment can comprise any one of a variety of gradations of custody, and that within imprisonment there may be many shades of confinement. Therefore, the removal of a prisoner from the general population of a gaol, with its standard freedoms and privileges, and their relocation into a special handling unit involving cellular confinement and reduced or no privileges effectively places them in a prison within a prison. The Supreme Court of Canada has also accepted that such an action can constitute a 'deprivation of liberty' sufficient for *habeas corpus* to issue.[72] This reasoning was first applied to prison disciplinary decisions. Canadian courts held that a disciplinary procedure causing a prisoner to be placed in punitive segregation should be subject to the rules of natural justice on the basis that the punishment had the effect of depriving the prisoner of his or her residual liberty, by committing him or her to a 'prison within a prison'.[73] The concept of residual liberty is, however, not limited to disciplinary decisions.[74] The Supreme Court of Canada has firmly declared that a similar deprivation of residual liberty occurs when a prisoner is placed in non-punitive segregation.[75] In such a case, where the prisoner has been placed in segregation by way of improper procedures, or for insufficient reason, *habeas corpus* will issue to effect his or her return to the general prison population. The remedy has proven particularly effective when segregation decisions have been quashed by judicial review, but the curial orders were then either ignored or the prisoner re-segregated under the same defective procedures or on inadequate facts.[76]

The Canadian cases have emphasised that the expanded scope to issue *habeas corpus* will not extend to trivial matters. The mere loss of privileges on the part of

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Head; ex parte McCaud (1969) 2 DLR (3d) 545 at 551 and *Morin v National Special Handling Unit Review Committee* (1985) 24 DLR (4th) 71 at 75-6. However, at 76-8, the Court made it clear that those decisions were swept away by the *Miller* decision. See also *R v Olson* (1987) 33 CCC (3d) 534 at 544-5 [Ontario CA].

72 The *Miller* case, *ibid* at 30-1. The Court acknowledged that certiorari often provided the same remedy by judicial review of the relevant decision, but felt the potential overlap should not detract from the wide role of *habeas corpus*, or the merits of individual cases. In *Cardinal & Oswald v Director of Kent Institution* (1985) 24 DLR (4th) 44, both writs were sought: *certiorari* to quash the prison Director's refusal to accept a review committee decision to end segregation, and *habeas corpus* to ensure the prisoner's release from segregation. See also *Gaudet v Marchand* (1995) 94 CCC (3d) 1 at 7 (certiorari is available as an 'aid' to challenge the unlawful deprivation of a prisoner's residual liberty).

73 This is a paraphrasing of a decision of Dickson J (as he then was) in *Martineau v Matsqui Institution Disciplinary Board [No 2]* (1979) 106 DLR (4th) 385 at 405 [SCC].

74 The concept also enables a prisoner who has been unlawfully segregated to sue his or her gaoler for false imprisonment. See for example, *Brandon v Canada (Correctional Service of Canada)* (1996) 131 DLR (4th) 761 (Fed Ct, Trial Div). In that case a prisoner had previously been granted *habeas corpus* to force his release from segregation. He then sued his gaoler for false imprisonment. The short decision of the Court is remarkable because it appears that the gaoler did not dispute that if the Court found the segregation to be unlawful, liability would automatically be established. The main point of dispute was whether an award of exemplary damages should be made. The Court awarded the prisoner exemplary damages of $3,000, and an additional $10 per day for every day that he was segregated.

75 Note 70 *supra*.

76 For example, *R v Franco* (1992) 12 CR (4th) 325 where a protective segregation order was quashed for a failure to observe mandatory procedures and an insufficient factual basis. The order was remade using similarly inadequate procedures and deficient facts, so pending a legally correct hearing, the prisoner was released into the general prison population by *habeas corpus*: *Franco v Ottawa-Carleton Detention Centre* (1992) 12 CR (4th) 331.

a prisoner is an insufficient basis upon which to seek the writ. In order to succeed, an application must:

> ...challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.[77]

These Canadian principles have been developed without reference to the *Charter of Freedoms* so they cannot be distinguished, as the American principles can be, on the grounds that they arise from a fundamentally different constitutional order.[78]

D. The Australian Position

The Australian position on the residual liberty concept is yet to be authoritatively determined. It is clear that where a prisoner is detained after the expiration of their head sentence they have a right of action for false imprisonment based on this wrongful detention.[79] A prisoner may also be entitled to be released, even though their head sentence has not expired. For example, once a valid parole order is issued, a prisoner obtains an entitlement to release. If a gaoler refuses to honour the parole order the prisoner can easily seek judicial assistance to enforce the order.[80] These principles are, however, of little direct value to prisoners who attempt to challenge their placement in segregation or other conditions of confinement because 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 law action to enforce an asserted right to intra-prison freedom have neither accepted nor rejected, decisively, the idea that a prisoner may possess some residual right to

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77 Note 70 *supra*, and reiterated in *Morin v NSHU* (1986) 24 DLR (4th) 71 at 77-8.

78 *R v Olson*, note 71 *supra* (continued segregation upheld, despite many procedural defects, because it was based on sound management factors. Applicability of the *Miller* case not doubted despite passing of the Charter). PW Hogg, *Constitutional Law of Canada*, Carswell (3rd ed, 1992) pp 1087-8. The author asserts that the Charter will affect *habeas corpus* by making its suspension or removal very difficult. See also D Alderson, "The Charter, Fundamental Justice and Prison Administration: The Common Law's Doppleganger" (1991) 34 *Crim LQ* 12.

79 *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 719. See also *Fritz v Queensland Corrective Services Commission* (unreported, Qld Sup Ct, Derrington J, 11 April 1995) where the court noted that Cowell and many nineteenth century English cases which allowed a prisoner to sue their gaolers for false imprisonment all involved plaintiffs who were entitled to be released. In the modern cases involving prisoners who had alleged that they had been unlawfully segregated, and sought to pursue an action in false imprisonment against prison administrators, the prisoners were not entitled to be released. Justice Derrington felt this was a "serious distinction". The issue was also raised in *Collins v Downs* (unreported, NSW Sup Ct, Roden J, 14 December 1982) as discussed in a casenote by I Potas (1983) 7 *Crim LJ* 229. In that case a prisoner who alleged that he had been unlawfully segregated sought to sue the gaolers for both breach of statutory duty and false imprisonment. The Court dismissed the former action on the basis that the legislation in question did not contain the intention required to confer such a right of action. The case is also briefly discussed in M Hogan, "Segregation in NSW Prisons - Part 2" (1984) 9 *LSB* 69 at 72.

80 *Mackie v SA* (1985) 20 A Crim R 455. There is a clear distinction between an entitlement to release and eligibility to be considered for parole. The latter confers no private law rights to a prisoner. Any difficulties that arise in the parole process may be resolved through public law relief.

freedom of movement.[81] However more recent cases have moved towards the English position under which a prisoner is deemed to be incapable of possessing any type of right to freedom whilst in prison. *Re Walker*[82] is a good example. In that case a prisoner sought a declaration that his transfer from a low security division to a higher one was unlawful. The Queensland Supreme Court held that, as a general rule, prisoners lose their right to liberty upon sentence. In the Court's opinion, once a person is imprisoned they have no right to be placed in a particular prison nor in a particular part of any prison in which the person is located. It followed, the Court said, that a prisoner has no entitlement to spend the remainder of his or her sentence in any particular prison or under any particular regime of treatment. This meant that if a prisoner has been placed in a liberal wing under a routine of relative freedom with many privileges, and those conditions are 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 he or she sought to impugn the transfer decision. The prisoner might be able to query the procedure by which the transfer was made (depending on the structure of the statutory power in question) but not on the basis that his or her 'rights' had been affected.[83]

E. Which View is Preferable?

The refusal of the English courts 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, and that the only form of legally enforceable liberty is nothing less than total freedom.[84] That idea appears consistent with the way prison laws are phrased. No Australian correctional statutes or regulations provide a basis upon which a prisoner might be able to assert that they possess any sort of freedom whilst in gaol. Such legislative schemes are therefore incapable of supporting a right of action in false imprisonment or breach of statutory duty. Therefore, if prisoners are segregated or

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81 In *Bromley v Dawes* (1983) 34 SASR 100 at 110-2, Legoe J felt 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. See also *Collins v Downs*, as noted by I Potas, note 79 *supra*. There, 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. See also *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317 at 327-8 (The Court held that prison legislation conferred private rights upon prisoners in some situations. However, the Court did not decide whether private rights were conferred upon prisoners with respect to segregation because court held no segregation had occurred in this case). The decision is comprehensively explained in G Zdenkowski, "Judicial Intervention in Prisons" (1980) 6 *Mon U L Rev* 294 at 315-9.

82 [1993] 2 Qd R 345.

83 See also *Modica v Commissioner of Corrective Services* (1994) 77 A Crim R 82 (appeal against a transfer order removing prisoner from 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).

84 This 'all or nothing' assumption was first made by Tudor Evans J in *Williams v Home Office*, note 31 *supra* at 1242. Its application is not limited to segregation, see for example *Re Walker*, note 82 *supra*.

otherwise placed in a high security division, both of which can severely restrict their movement and increase the harshness of their life, this will not confer a private right of action upon the prisoner, no matter how factually or legally flawed the relevant decision might be.[85]

The drawback of this position is obvious. Segregation involves the imposition of considerable hardships and deprivations upon prisoners. Prisoners in segregation are normally denied many privileges, given access to fewer educational and recreational programs, placed under more intensive observation and allowed significantly less unsupervised movement. The English approach, by virtue of its focus on the nature of the statutory powers to detain prisoners, naturally lends itself to an emphasis on the powers of prison administrators rather than the rights of prisoners. This means that any action which seeks to impugn a prisoner's placement into segregation or other restrictive conditions inevitably becomes an exercise in the statutory interpretation of the relevant administrative powers. It is noteworthy that there is no reported decision in which an English prisoner has successfully sought relief in public law against their placement into segregation. The Canadian approach on the other hand, is more finely balanced. The acceptance that prisoners may possess a right to residual liberty whilst undergoing a sentence of imprisonment provides courts with a basis upon which they can qualify the powers exercised by prison administrators, because an application for *habeas corpus* is not determined solely by reference to the powers of prison administrators.

Justice Dunford did not directly consider the residual liberty concept, but he did accept that the Canadian cases, which are firmly rooted in the concept, established that *habeas corpus* could issue to challenge the segregation of prisoners.[86] Justice Sheller touched on the residual liberty argument at various points through his judgment, although mainly in the form of noting the views expounded in overseas cases rather than passing any substantive comment on those cases. However, towards the end of his judgment Sheller JA 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 and whether the writ of *habeas corpus* runs where

85 To some extent the two forms of action can be equated in this circumstance because, in order to succeed, a prisoner must somehow construct some type of a residual right to liberty. The House of Lords has held that the failure of the legislature to provide any foundation for an improperly segregated or confined prisoner to maintain an action in breach of statutory duty would be defeated if they could sue gaolers in false imprisonment in the same circumstances. The Lords felt that to allow the latter remedy would do little than to relabel what is essentially an action for breach of statutory duty in circumstances where an action for that tort could not otherwise succeed: *Hague's* case, note 36 *supra*. The English Court of Appeal has held that a prisoner has no cause of action against authorities if he or she is placed in segregation due to the negligence of prison administrators. See *H v Secretary of State for the Home Dept* (1992) Times LR, 7 May (the prisoner was placed in segregation after administrators failed to conceal his previous convictions for sex offences. He was in great danger of attack once the convictions became known to other prisoners. The prisoner sued for negligence. Particulars of damage were based on the restrictive conditions endured in segregation. The Court cited Hague's case and held that conditions in segregation could not as a matter of law give rise to a claim in negligence).

86 *Prisoners A to XX inclusive v New South Wales* (1994), note 2 *supra* at 212.

a person is illegally held in a prison within a prison. The Supreme Court of Canada provides powerful authority in support of that proposition.[87]

This remark indicates that the Court of Appeal may be prepared to adopt the Canadian rather than the English cases on this point which, it is submitted, would represent a significant and desirable development in Australian law. The true benefit of such a change is not that it would alter the nature of *habeas corpus* but that it would recognise a right which, if unlawfully infringed, would provide a foundation to achieve the release of improperly restrained prisoners.

Most academic commentators fail to appreciate that a recognition of the residual liberty concept is important if *habeas corpus* is to serve a useful remedial function for prisoners who seek relief against something other than their initial sentence. For instance, Aronson and Franklin attack the orthodox approach to *habeas corpus*, under which the writ cannot issue to release an improperly segregated prisoner. They flatly declare that the current Australian approach is wrong. Aronson and Franklin argue that if the writ will go to vary other forms of confinement, such as removing a child from the custody of one person to another, it should issue to extricate prisoners from restrictive conditions that are unlawful without impugning the overall authority to incarcerate the prisoner.[88] It is submitted that this view is more likely to gain judicial acceptance if the idea that prisoners may possess some level residual liberty is first accepted.

Sharpe similarly argues that because the writ commands a gaoler to bring the prisoner before the court and justify his or her detention, it is a "small step" to enlarge its scope to investigate cases where some measure of restraint is lawful but the application attacks the manner in which this is done.[89] He concludes that the real issue is not whether *habeas corpus* is an appropriate remedy in the review of improper prison conditions, but whether it can be moulded to meet current legal problems and grant immediate relief as it has in the past.[90] This criticism is correct in the sense that it seems clear that *habeas corpus* is not currently regarded by Australian courts as a potential remedy with which to expand the scope of review over decisions in prisons. Traditionally, the writ has been granted in order to release prisoners immediately from unlawful custody, but in cases involving improper or unlawful prison conditions courts have generally refused to issue any form of relief which immediately extricates the prisoner from the offending conditions.[91] The true hurdle for prisoners who seek judicial scrutiny of prison conditions is the perceived inappropriateness of judicial intervention rather than

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87 *Prisoners A to XX inclusive v New South Wales* (1995), note 2 *supra* at 663.

88 M Aronson and N Franklin, note 1 *supra*, p 652. Also, Young J accepted that the writ would issue against someone who wrongfully held a child, though he denied its issue on the facts, in *Brown v Kalal* (1986) 7 NSWLR 423 at 425.

89 R Sharpe, note 1 *supra*, p 155. Sharpe does not consider the recent English cases noted above, his argument has changed little between editions. He cites *Re Faid and the Queen* (1978) 44 CCC (2d) 62 as an example of the adaptability of the writ (writ granted to afford prisoner proper facilities to communicate with a lawyer when this was otherwise impossible).

90 *Ibid.*

91 The normal form of relief is a declaration and sometimes courts have indicated that the prisoner could commence an action in damages (see for example *Holden v SA* (1992) 57 SASR 494). Both remedies are usually *ex post facto* in nature. For an exception see *Sandary v South Australia* (1987) 48 SASR 500.

the form it should take.[92] If courts hesitate, by refusing to grant discretionary relief, over whether to involve themselves in particular issues about prison conditions, any change to such attitudes will be unlikely to turn on the form of judicial remedy. It will turn rather on the foundation for award of relief. Should there be a change in judicial attitudes, there is no reason why a declaration would not prove an adequate remedy.

Sharpe also suggests a middle ground, although not involving the writ, where imprisonment or detention may be initially unlawful but subsequently rendered lawful by appropriate administrative or judicial action.[93] One example is when a prisoner is placed in segregation without sufficient reason or proper authority but the defect is subsequently cured.[94] In this situation an unlawful detention has been corrected, therefore the remedy of release into the general prison population would not be appropriate. Sharpe suggests an action in false imprisonment as a solution that offers redress to a prisoner for a past injustice but does not impugn a detention that is presently lawful.[95] This would be an ideal resolution for prisoners unlawfully detained in restrictive or punitive regimes because it would offer effective redress but not the extreme remedy of total liberty.[96] In practice, however, this option has floundered for the same reason that the writ has not issued to release such improperly detained prisoners in the first place: there is no recognised and enforceable right to residual liberty within a prison. The problem is a 'chicken and egg' one, and nothing short of a recognition of a such a right will break the impasse. The adoption of the Canadian view which accepts that prisoners have some basic right to residual liberty whilst in prison could provide a substantive right which would break that impasse.

V. CONCLUSION

The decision of *Prisoners A to XX inclusive v New South Wales*[97] opens an important debate in the modern law of *habeas corpus* in Australia. Some of the issues raised in the decision have been settled, but others have not. In respect of *habeas corpus* the decisions of both Dunford J and the Court of Appeal indicate

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92 See for example, the judgment of Thomas J in *McEvoy v Lobban* [1990] 2 Qd R 235. In that case a prisoner sought relief against a prison manager's decision to place him in administrative segregation. Justice Thomas repeatedly acknowledged the jurisdiction of the Court over such decisions. However his Honour also emphasised that the Court would only contemplate the issue of relief in exceptional situations.

93 Note 1 *supra*.

94 *Fricker v Dawes* (1992) 57 SASR 494.

95 R Sharpe, note 1 *supra*, pp 61-2.

96 Sharpe, *ibid*, suggests declaration as an alternative, but this remedy usually has no practical worth for a prisoner who has been unlawfully detained in the past but not at the time of the hearing. In such circumstances a declaration is normally refused as a moot issue, for example, *Forrest v South Australia* (1989) 52 SASR 256 at 260, 262. Nor does it necessarily inhibit the future actions of gaolers, although it does provide guidance by interpreting any statutory provisions at issue, but this occurs in every adjudication on the lawfulness of detention irrespective of the remedy. Aronson and Franklin limit their discussion to judicial review of the legal regularity of administrative decisions to segregate and do not consider the potential of false imprisonment as a supplementary remedy, note 1 *supra*.

97 (1994), note 2 *supra*; (1995), note 2 *supra*.

that prisoners cannot hope to invoke the writ by reason of intolerable prison conditions. There seems little doubt that Sheller JA was troubled by the apparent difficulties with the intolerable conditions concept which have been identified in the English decisions. The idea that very bad prison conditions might be capable of rendering a prisoner's continued detention unlawful is particularly troubling. The concept is made doubly problematic by the lack of any satisfactory criteria which may be used as a benchmark to determine whether prison conditions are intolerable in the required sense. Justice Sheller's rejection of the concept is, therefore, hardly surprising. It has been argued that this is an acceptable conclusion because, if conditions of imprisonment become intolerably bad, there is no reason why the normal remedies of public law, such as declaration and injunction, cannot suffice to cure those conditions. In such circumstances the form of the remedy sought is not important.

The examination of the writ as a means of protecting a prisoner's residual right of liberty is a different matter. Whilst Dunford J was mindful of the divergence between English and Canadian law on the issue of whether the writ would issue to remove a prisoner from segregation, his Honour firmly declined to undertake a general review of the cases. The approach taken in the Court of Appeal was far more expansive. Justice Sheller was clearly not prepared to endorse the current English position which deems prisoners to be incapable of possessing any level of residual liberty which is enforceable against their custodians. However, the comparative analysis undertaken by Sheller JA on this point is useful because it indicates a welcome preparedness to consider decisions from other common law jurisdictions, particularly Canada, in which the law has diverged significantly from that of England. The Canadian decisions are useful not so much because they demonstrate the potential utility of *habeas corpus* in a modern context but because of the recognition of the right which underlies the cases. The residual liberty concept represents an important potential development for Australian prisoners because it would provide a secure means by which they could challenge the imposition of any additional restrictions, such as placement in administrative segregation, during their imprisonment. The acceptance of a such a right would represent an important advance in judicial attitudes towards applications by prisoners who seek relief against the conditions under which they are held. The significance of this concept is, therefore, not limited to the impact that it could have on the scope of *habeas corpus*.