The *Corrective Services Bill 2006* and judicial review of corrective service decisions

Mark Plunkett
Barrister-at-law
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Forum on the *Corrective Services Bill 2006*

"Judicial review is neither more nor less than the enforcement of the rule of law over executive action": per Brennan J in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70.

At 11:30 am on 29 March 2006 at the Queensland Legislative, Assembly the Minister for Police and Corrective Services the Hon. Judy Spence MLA, introduced the *Corrective Services Bill 2006*[1] (the Bill).

At the second reading speech the Minister said:-

> "The bill gets tough on prisoners and makes it clear that prisoners do not have the same rights to access things the way law-abiding community members do. This means no running a business from behind bars, no right to reproduce and no right to change identity. Also, prisoners will have no right to challenge decisions made in relation to their security, supervision or placement through judicial review."[2]

Undoubtedly this is an important piece of proposed legislation.[3] This is because, not only as the Minister observes, "the current prisoner population in Queensland is more than 5,400 … projected that by 2015 the state's prisoner population will have risen by 90 per cent to 7,300"[4], but also because "the interests of correctional administrators and prisoners in prisoners' rights cases exert a significance influence on the relationship, or non-relationship, between prisoners and the legal order".[5]

Essentially, the 2006 Bill restates the law as in the *Corrective Services Act 2000* with some important changes. These are conferring automatic parole for an under 3 year sentences. The parole authorities are empowered to approve re-settlement leave of absences in accordance with a managed program taking these decisions away from the chief executive. The Bill also abolishes that awful mouthful of Post Prison Community Based Released order and restores the word parole. There are other beneficial changes which is left to the other speakers to address.

The contentious proposed changes are to be found in clause 17, clause 66 and clause 68

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[1] http://www.legislation.qld.gov.au/Bill_Pages/Bill_51_06.htm
[2] Hansard, *Queensland Parliamentary Debates*, 29 March 2006, page 940.
[3] Least of all because the Bill is 334 pages long, compared to 190 pages for the 2000 Act and 130 pages for the 1988 Act. While word processors and pdf formats may make for easier tinkerings and additions by a multitude of advisors and stakeholders to a Bill, it also makes the law more open for unintelligible expression and hence the need for interpretation by judges.
[4] Hansard, *Queensland Parliamentary Debates*, 29 March 2006, page 943.
[5] Edney, Richard. *Judicial deference to the expertise of correctional administrators: The implications for prisoners' rights* [2001] AJHR 5

of the Bill which are an attempt to oust the jurisdiction of the Supreme Court in respect to decisions concerning a prisoner's security classification and transfer, respectively.

Security classification is important because it is about how a prisoner is housed, who the prisoner is kept with and the conditions of the prisoner's confinement. It is also crucial to assessment of remissions (where they remain for prisoners sentenced before 1 July 2000 Act) and parole.

Prison transfers are important because it is about where a prisoner is housed close to away from their families disrupting their outside support structures and existing inside social support networks. This is also important as it involves decisions concerning transfers for medical and psychological treatment and examination: clause 68.

In each case the Bill provides that the *Judicial Review Act 1991*, parts 3, 4 and 5, other than s. 41(1), do not apply to a decision made, or purportedly made about a prisoner's security classification or about transferring a prisoner: clause 17(1); 66(1).

Rather extraordinarily, the relevant clauses then go to say in the section the word "decision" includes a decision affected by jurisdictional error. This is dealt with at greater length below.

This means that a prisoner cannot challenge these decisions by way of application for statutory order of review or application for order of review.

Further, it would result in a prisoner not being entitled to a statement of reasons in writing for these decisions, although they obtain an information notice that givens them some of but perhaps not all of what s. 27B of the *Acts Interpretation Act 1954* (Q) usually requires being the findings on material questions of fact and refer to the evidence or other material on which those findings were based and the reasons for the decision.

The explanatory notes make it quite clear that the *Judicial Review Act 1991*, parts 3, 4 and 5, other than section 41(1), do not apply to a decision made under this section about the transfer of a prisoner or classification of a prisoner. The *Judicial Review Act 1991*, part 3 deals with statutory orders of review, part 4 deals with reasons for decisions and part 5 deals with prerogative orders and injunctions.

Existing court challenges are preserved. A proceeding started before the commencement under a provision of any of the repealed Acts, and pending at the commencement, may be continued as if this Act had not been enacted: clause 468.

Importantly, applications for judicial review are open for parole decisions and remission decisions (where there continue to apply).

So judicial review would still remain for the important decisions about when a person is released from custody in advance of a full time discharge of sentence imposed by the Court.

The Bill purports to offer a token trade off by providing that if a prisoner is dissatisfied

with a classification or a transfer a prisoner (other than as the prisoner's initial placement after admission to a corrective services facility) the prisoner may, within 7 days after being given notice of the decision, apply in writing to the chief executive for a reconsideration of the decision of transfer and classification: cl 18; 70. After reconsidering the decision, the chief executive may confirm, amend or cancel the decision.

I say this is a token concession because s. 24AA of the *Acts Interpretation Act 1954* empowers and an administrative decision maker to amend or repeal the instrument or decision in the same way, and subject to the same conditions, as the power to make the decision. So it is perhaps not necessary to make specific provision for it in the Bill is not necessary.

Importantly, it must be borne in mind what an application to the Supreme Court under the *Judicial Review Act 1991* is.

Judicial review cannot be used to have the Court embark on an impermissible review of the merits of a decision. It is not an appeal where the Court is asked to substitute its own view about what the correct decision on the substance should be. It is not a means whereby a prisoner cannot seek to persuade a judge to order a particular classification or transfer. A judge on judicial review cannot and will not do this.

Fundamentally, judicial review is limited to reviewing the legality of administrative action where the grounds of judicial review which ought not be used ordinarily as a basis for a complete re-evaluation of the findings of fact[6] or a reconsideration of the merits of the case[7] or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.[8]

An application under the *Judicial Review Act 1991* is only concerned with procedural and not substantive errors.

All an application to the Court is really about whether or not the government acted lawfully in the making of the decision.

Now as far as past applications are concerned there are probably no more than one or two of these applications a year made concerning prison transfers or classifications.

The Explanatory Notes accompanying the state that the Bill explicitly provides for the

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[6] *Re Minister For Immigration And Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 by Kirby J at [114]; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–6; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 597–8

[7] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36–8; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 391; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–2, 291; *Guo* (1997) 191 CLR 559 at 577

[8] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 344 [63]; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 190 ALR 402 at 408 [26]; *Minister for Aboriginal Affairs v Peko-Wallsend* (1985) 162 CLR 24 at 40-41; *Parramatta City Council v Pestell* (1972) 128 CLR 305 at p 323

exemption of classification and transfer decisions from judicial review and makes provision for a merits review (as outlined above): at page 7;

The notes say:-

> "not all decisions under the Bill will be subject to judicial review, in particular the ability to review classification and transfer decisions will be exempted from the Judicial Review Act 1991. The rationale for this being, that decisions relating to the supervision, security and placement of prisoners are fundamental to the operation of a safe and secure correctional environment and prisoners should not be able to challenge or influence security requirements. The removal of a prisoner's ability to have a security classification decision, or transfer decision reviewed under the *Judicial Review Act 1991* may involve a breach of a fundamental legislative principles. Arguably the removal of this avenue of review will adversely affect the rights and liberties of prisoners. However it is widely accepted that the rights and liberties normally enjoyed in the community must be significantly curtailed in the prison environment (see Scrutiny of Legislation Committee Alert Digest No 10 of 2000). Any possible breaches must be balanced against the safety of the community and staff and the security and good order of corrective services facilities. In order to protect the safety of the community and properly implement the sentencing court's order of imprisonment, it is necessary for correctional authorities to be able to determine the type of accommodation and supervision that is necessary for each prisoner. Classification decisions are determined by an assessment of a prisoner's risk to the security of corrective services facilities, risk to the community if the prisoner escapes and risk to staff and other prisoners. It is not appropriate for prisoners to attempt to influence their placement within the correctional system and the level of supervision that they are subject to by challenging security classification or transfer decisions. In the absence of judicial review the Bill provides for an internal mechanism for the merits review of security classification and transfer decisions. In addition a prisoner may raise a grievance relating to his or her security classification or transfer with an official visitor for investigation."

And then comes the beginning of the rationale for the exemption:

> "The courts have recognized for some time that certain prison management decisions are so integral to the nature of imprisonment that the correctional system would become unworkable if these decisions were made reviewable. In the case of powers relating to the accommodation and supervision of prisoners, the purpose of such powers is to give proper effect to the original decision of the court to restrict an offender's liberty by imprisonment."

This observation is correct enough, especially after the High Court decision in *Griffith University v Tang* (2005) 79 ALJR 627 which is concerned about the meaning of the crucial words "decision under enactment" as a pre-requiste to the exercise of the review jurisdiction for a statutory order of review.

As recently observed by Justice Douglas in *Meizer v Chief Executive, Dept of Corrective Services & Anor* [2005] QSC 351 (1 December 2005) at [8]:-

> "Those words have been considered recently by the High Court in *Griffith University v Tang* (2005) 79 ALJR 627", referring to the principal judgment of Gummow, Callinan and Heydon JJ, when considering what was required for a decision to meet the statutory description, concluded at 644, [89]:
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> > "The determination of whether a decision is 'made ... under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made ... under an enactment' if both these criteria are met."

In *Meizer*, Justice Douglas dismissed an application to review a decision to suspend a prisoner from a work programme for 14 days because of a complaint made against him because it was not a decision under an enactment. His Honour said at [4] "Whether his participation was a privilege rather than a right assumes a significant degree of importance in this decision." At [9] His Honour said "the crucial issue is, however, that the *Corrective Services Regulation* makes it clear that participation in the program is simply a privilege, not a right." Justice Douglas ruled at [11] that "participation in the work programs by individual prisoner has been made a privilege by s 16 of the *Corrective Services Regulation."* He found at [10] that "the situation is more akin, under this statutory regime, to that expressed by Byrne J in *Gray v Hamburger* [1993] 1 Qd R 595, 602, namely that "today's favour is not yet tomorrow's duty". Accordingly, applying the decision in *Griffith University v Tang* and the legislative prescription, Justice Douglas found in *Meizer* that the decision was not a decision under an enactment.

It is submitted that the decision for which the prisoners seek management reviews are often decisions relating to a privilege of a prisoner (s. 16(h) the *Corrective Services Regulation*) and is not a decision under an enactment as it fails to meet the second criteria in Tang because the decision not to permit access to the prisoner's personal computer does not "confer, alter or otherwise affect legal rights or obligations".

This approach is entirely consistent with a long line of authorities (which precede *Tang*) that provide that the powers of correctional authorities are to be interpreted broadly[9] and purely managerial decisions concerning prisoners are generally not reviewable.[10]

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[9] *Williams v. Home Office (No. 2)* [1981] 1 All ER 1211; *Vezitits v McGeechan* [194] 1 NSWLR 718; *Modica v Commissioner for Corrective Services* [1994] 77 A Crim R 82; *Binse v Williams* [1998] 1 VR 381; cf *Sandery v South Australia* (1987) 48 SASR 500, at 512, Olsson J.; *Forrest v South Australia* (1989) 52 SASR 256, at 259-260, Duggan J. *McEvoy v Lobban* [1990] 2 Qd R 235; *Gray v Hamburger* [1993] 1 Qd R 595; *Re Walker* [1993] 2 Qd R 345; *Stewart v Lewis* [1996] Qd R 451 (1993) 70 A Crim R 88, Macrossan CJ and Davies JA, at 458-459; cf Pincus JA at 460-461.

[10] *Sutherland v Davidson* [2005] QCA 056; BC200500960; *Barrow v Chief Executive, Department of Corrective Services* [2004] 1 Qd R 485; 13 June 2002, Holmes J. at pars [4] to [9]; *Murdock v McDermott* [2003] QSC 201; *Murdock v McDermott* [2003] QSC 201; *Corrigan v Chief Executive, Department of Corrective Services* [2002] QSC 384; *Bartz v Chief Executive Department of Corrective Services* [2002] 2 Qd R 114; *Masters v Chief Executive, Department of Corrective Services* [2001] QSC 055; (2001) 121 A

As, Justice Williams recounted in *Brendon James Abbott v Chief Executive, Department of Corrective Services* [2000] QSC 492 (December 2000), at [27]:-

> "The observation of Dixon J in *Flynn v King* (1949) 79 CLR 1 at 8 is still apposite; he there said:
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> > "It is pointed out in the case of *Horwitz v Connor* (1908) 6 CLR 38 that if prisoners could resort to legal remedies to enforce gaol regulations responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to the court by prisoners for legal remedies addressed either to the Crown or to the gaolers in whose custody they remain. Such a construction of the regulation making power was plainly never intended by the legislature and should be avoided."

Justice Williams said at [28] in *Abbott* this principle "is reflected in the decisions in *Smith v Commissioner of Corrective Services* (1978) 1 NSWLR 317 at 329, *R v Classification Committee; ex parte Finnerty* (1980) VR 561 and *Re: Walker* [1993] 2 Qd R 345" and went on to say "as noted in *Walker* at 351 the position may well be different where an entitlement to a specific benefit was clearly confirmed either by the legislative provision or by the administrative policy and practice in question. But short of such considerations a court should be loathe to interfere with what are essentially operational matters within the prison system."

Justice R Douglas in *Masters v The State of Queensland and Anor* [2001] QSC 55 at [13] to [15] reviewed the authorities prior to and since the introduction of the 2000Act concerning prison management decisions involving the exercise of a discretion to grant a prisoner a privilege and resolved they were not reviewable. In *Masters* Justice R Douglas ruled that reasons were not required for revocation of a grant of a leave of absence since it was one relating to prison management. Justice Byrne in another decision about prisoner Abbott's access to the use of computers expressed some doubts about the extent of this reach of this principle but nevertheless followed the decision of Douglas J in *Meizer* and Muir J in *McGrane v Corrective Services Commission* 16 February 2006.

Crim R 173; BC200100619; *Renton v Bradbury & Anor* [2001] QSC 167; Williams J in *Brendon James Abbott v Chief Executive, Department of Corrective Services* [2000] QSC 492 (December 2000) at par 27 (citing Dixon J in *Flynn v King* (1949) 79 CLR 1 at 8); *Graveson v Queensland Corrective Services Commission* [2000] 1 Qd R 529; *McEvoy v Lobban* [1990] 2 Qd R 235; (1989) 48 A Crim R 412; *Gray v Hamburger* [1993] 1 Qd R 59; *Walker v Criminal Justice Commission* [1993] 2 Qd R 467; BC9202635; *Kelleher v Commissioner, Department of Corrective Services* [1999] NSWSC 86; *The Herald and Weekly Times Ltd v Correctional Services Commissioner* [2001] VSC 329; *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562; see Edney, Richard. *Judicial deference to the expertise of correctional administrators: The implications for prisoners' rights* [2001] AJHR 5

Nevertheless the Courts will review managerial decisions of prison authorities for bad faith and where the decision has a direct impact on liberty.[11]

To return then to the explanatory notes to the bill, when discussing the rationale for the exemption from judicial review the explanatory notes remind us both that a classification decision and a transfer decision are prison management decisions about the appropriate security and supervision requirements of the prisoner.

If this be the rationale for the exclusion, then it begs this question why these matters should not appropriately be left to the courts to decide or not, rather than attempt prescriptively in advance seek to pre-emptively exclude the judicial umpire at all.

As observed above what is perhaps even more extraordinary is the bold provision that for the exempting provisions a decision includes a decision affected by jurisdictional error.

The exceptional feature to the Bill is that seeks to exclude from judicial review a decision that was made even if there was no basis in law for making the decision or that it was otherwise founded on an error of law or which is totally unlawful.

It is instructive to reflect on the observations of more enlightened times in the immediate post Commissioner Fitzgerald times of the report of the *Electoral and Administrative Review Commission Report of Judicial Review of Administrative Decisions and Actions, December 1990* which noted that both the Australian Labor Party and the National Party submissions agreed that private clauses (ie clauses to oust judicial review) should be overriden at par. 7.6. At paragraph 7.53 the report said:-

> "There is a certain inconsistency in Parliament passing a law, with which the Executive is intended to comply, while at the same time enacting a privative clause to deny a citizen the opportunity to pursue a remedy though the court system in the event the Executive fails to comply with the law."

The report then went on to quote from Professor Wade's book on Administrative law (1988, p. 728) by relevantly observing:-

> "Parliament is mostly concerned with short-term considerations and is strangely indifferent to the paradox of enacting a law and then preventing the courts from enforcing it. The judges with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power. Needless to say, they have maintained throughout that they are correctly interpreting Parliament's true intentions."

Be under non illusions these amendments wind back the Fitzgerald reforms.

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[11] *Graveson v Queensland Corrective Services Commission* [2000] 1 Qd R 529; *McEvoy v Lobban* [1990] 2 Qd R 235; (1989) 48 A Crim R 412; *Gray v Hamburger* [1993] 1 Qd R 59; *McGrane v Corrective Services Commission* 16 February 2006.

Usually attempts to oust judicial review have been ineffective where there is a manifest excess of or failure to exercise jurisdiction, whether in the traditional sense of jurisdictional error[12] or under the *Anisminic* doctrine of jurisdictional error.[13]

This is so in Queensland even where the provisions of the *Judicial Review Act 1991* have been expressly excluded or attempted to be ousted by privative clauses.

For two recent excellent examples see *Emerald Developments (AUST) P/L v. Minister for Environment, Local Government, Planning and Women* [2006] QSC 73 (11 April 2006) where an application for a declaration was issued despite s 5.8.4 of the *Integrated Planning Act 1997* which provided that ministerial call in decisions were not capable of being reviewed under the *Judicial Review Act 1991* for a decision made 18 months earlier and a review entertained but refused despite a privative clause in s. 341(1) of the *Industrial Relations Act 1999* in the *Electrical Trades Union of Employees Queensland v. The President of the Queensland Industrial Court & Ors* [2006] QSC 76 (13 April 2006) [14] And even more recently see the High Court in *Batterham v QSR Limited* [2006] HCA 23 (18 May 2006) on the inutility of some aspects of privative clauses.

A decision of a public servant if made in jurisdictional error is amenable to examination by the Court by way of an application for a declaration, especially for jurisdictional error.[15]

In *Craig v State of South Australia* (1995) 184 CLR 163 their Honours Brennan, Deane, Toohey, Gaudron and McHugh JJ considered what constitutes jurisdictional error at 179 where they was said that:-

> "If such an administrative tribunal falls into error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or

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[12] R *v Wood* (1855) 5 El & Bl 49; 119 ER 400; *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47; 72 WN (NSW) 21; 1954 AR (NSW) 369 ; *R v Industrial Appeals Court; Ex parte Henry Berry & Co (A'asia) Ltd* [1955] VLR 156 at 163 ; *Brown v Rezitis* (1970) 127 CLR 157; [1971] ALR 317; (1970) 45 ALJR 41 ; *Stevenson v Barham* (1977) 136 CLR 190; 12 ALR 175; 51 ALJR 393 ; *Wilson Parking (NSW) Pty Ltd v Industrial Commission of New South Wales* [1979] 1 NSWLR 396 at 407 ; *Production Spray Painting & Panel Beating Pty Ltd v Newnham* (1991) 27 NSWLR 644; 37 IR 46 per Priestley and Handley JJA) under the jurisdictional fact doctrine (*R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; [1953] ALR 461; (1953) 27 ALJ 382

[13] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163

[14] *Industrial Relations Act 1999*, s 349(2) and s 349(3); *Judicial Review Act 1991*, s 18(2); Schedule 1, Part 1; *Judicial Review Act 1991*, Part 4; *Carey v President of the Industrial Court Queensland & Anor* [2004] QCA 62 (12 March 2004), Justice McPherson JA at [4] at paragraph [22], relying upon *Craig v South Australia* (1995) 184 CLR 163, 177-178; *Squires v President of Industrial Court* [2002] QSC 272 par 30 to 33 (Mullins J)

[15] *Craig v State of South Australia* (1995) 184 CLR 163 Brennan, Deane, Toohey, Gaudron and McHugh JJ at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 McHugh, Gummow and Hayne JJ; *Minister of Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24, Gaudron and Gummow JJ (with whom McHugh and Hayne JJ agreed) at 614 at [51] Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

> to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 (31 May 2001) McHugh, Gummow and Hayne JJ endorsed the above passage in *Craig* and observed that 'jurisdictional error' embraces a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive and said:-

> "What is important, however is identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is made to be an error of law."

Where a decision is affected by jurisdictional error, the decision is void. This means that there is nothing for a privative clause to protect, for there is no decision in exercise of jurisdiction under the empowering Act.[16]

In this regard the Supreme Court of Queensland has an inherent power to grant declaratory relief.[17]

The origin of that inherent power is two fold.

First, the Supreme Court has all jurisdiction necessary to administer justice in Queensland. It is a superior court of record and the supreme court of general jurisdiction in the state with unlimited jurisdiction in law, in equity or otherwise: s 58 *Constitution of Queensland Act 2001*. As a consequence nothing shall be outside the jurisdiction of the Supreme Court except that which specially appears to be so.[18]

Recently, Justice Jerrard JA in the Queensland Court of Appeal in *AMACSU v Ergon Energy Corporation Ltd & Ors* [2005] QCA 351, referring to s. 58(1) of the *Constitution of Queensland 2001* (Q) said at [27]:-

> "Section 58(1) of the *Constitution of Queensland 2001* (Qld) preserves for this Court all the jurisdiction necessary for the administration of justice in Queensland, including unlimited jurisdiction at law, in equity and otherwise, and

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[16] E*x parte Wurth; Re Tully* (1954) 55 SR (NSW) 47; 72 WN (NSW) 21; 1954 AR (NSW) 369 ; *R v Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313 ; *Ex parte Moss; Re Board of Fire Cmrs of New South Wales* [1961] SR (NSW) 597 at 604; *R v Bleby; Ex parte Royal Australian Nursing Federation* (1973) 4 SASR 445 at 463 ; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351; 62 ALR 17; 59 ALJR 804; 11 IR 331; That an administrative decision involving jurisdictional error is regarded in law as no decision at all was reasserted by the High Court in the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24, delivered 4 February 2003

[17] *Ainsworth v CJC* (1992) 106 ALR 11 at 22 per Mason CJ, Dawson, Toohey and Gaudron JJ, Brennan J agreeing at 33-34

[18] *re Totalisator Administration Board of Queensland* [1989] 1 Qd R 215 at 217; *Cameron v Cole* (1944) 68 CLR 571 at 585; *DMW v CGW* (1982) 151 CLR 491 at 509

this Court would be astute to ensure that an obvious injustice caused by error could be corrected."

This was referred to again by the Court of Appeal in *von Risefer & Ors v Permanent Trustee Co P/L & Ors* [2005] QCA 109 at [17] to [21].

Secondly, the Supreme Court has all the powers that it held immediately before the commencement of s 9 of the *Supreme Court of Queensland Act 1991* on 14 December 1991. These powers included the same jurisdiction, power and authority of the Supreme Courts of Common Law and High Court of Chancery in England.[19]

The English Courts of Chancery had an inherent ability to make declaratory judgments accompanied by principal relief.[20] Declaratory relief can be issued in Queensland without the need to be accompanied by principal relief: s 128 *Supreme Court Act 1995*.

In Queensland, "[n]o suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declarations of right without granting consequential relief: s. 128 of the *Supreme Court Act 1995* (Q); see also rule 585 of the *Uniform Civil Procedure Rules 1999*(Q).

Accordingly, notwithstanding the attempt in the Bill to oust judicial review in the manner proposed the prisoner classification and transfer decisions are open to review by the Supreme Court by way of an application for a declaration.

The power to grant a declaration is a discretionary power that it is neither possible nor desirable to fetter.[21]

The power to grant declaratory relief is conferred in wide and general terms. Further, what is conferred is a discretion to be exercised according to the facts of each individual case.[22] A court may declare that a public authority has a duty to act in a certain way.[23]

A declaration may be framed in negative terms, that is, it may say that a certain right or duty does not exist.[24]

In my opinion the Bill fails in even attempting to oust a review of a prisoner classification or prisoner transfer by the Supreme Court by way of an application for a declaration.

It is open to be determined at some future stage, no doubt, but it seems highly unlikely that the Supreme Court would decide that the Parliament could circumscribe the power of

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[19] s. 21 *Supreme Court Act of 1867* (repealed); *re Totalisator Administration Board of Queensland* at 218
[20] *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 568
[21] *Ainsworth* at 22; *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437 per Gibbs J; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 471
[22] *Ibeneweka v Egbuna* [1964] 1 WLR 219 at 224
[23] *Pyc Grantie Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1993) 113 ALR 257
[24] *Guaranty Trust Co of New York v Hannay* [1914-1915] All ER Rep 24

itself to exercise its inherent jurisdiction to review executive action for jurisdictional error.

This must be so, as it is emphatically the province and the duty of the Court to say what the law is and whether a person breached it: *Aronson* at 183 referring to US Chief Justice Marshall in *Marbury v Madison*— a view endorsed by the Lord Hoffman in *R (Prolife Alliance v British Broadcasting Corp* [2003] 2 WLR 1403 at [75] –[76] declaring that "the principle upon which decision making powers are allocated are principles of law."

In *R v Secretary of State for Home Department; Ex parte Simms,* [2000] 2 AC 115 at 131. See also *R v Secretary of State to the Home Department; Ex parte Pierson* [1998] AC 539 at 587 per Lord Steyn. Lord Hoffman said:

> "The principle of legality means the Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

Chief Justice Gleeson, in *Plaintiff S157/2002 v Commonwealth,* (2003) 211 CLR 476 at 492 [29] - [33] grouped Lord Hoffman's statement of the principle of legality together with the proposition of Justice Brennan that "judicial review is neither more nor less than the enforcement of the rule of law over executive action"(*Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70) in association with rule of statutory interpretation that privative clauses are to be construed "by reference to a presumption that the legislative does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied": *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160.

No doubt some Department mandarin or Ministerial advising commissar will realise that there exists a declaration making power independent of the *Judicial Review Act 1991* and also attempt to include applications for declarations in the exemptions.

Such attempts at exclusion of what is essentially the rule of law over the executive will not confer immunity upon the prison officials to do what they like about prison transfers and classifications without the Supreme Court looking over their shoulders.

Fundamentally, as was affirmed most recently by the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] by Gaudron, McHugh, Gummow, Kirby and Hayne JJ, also per Gleeson CJ at 488 [19] when a statute says that an administrative "decision made under" an Act is immune from judicial review, a finding

of jurisdictional error serves to trump the privative clause: see *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; Groves, M (ed) *Law and Government in Australia*. Federation Press 2005, Chapter 7, Nullity by Aarons, page 139 at al.

A decision affected by jurisdictional error is "regarded in law as no decision at all", and accordingly cannot be treated as a "decision" within the meaning of a privative clause.

It follows that the only way that Parliament could more completely attempt to be fully exclude judicial review is to amend the Section 58(1) of the *Constitution of Queensland 2001*, *Supreme Court of Queensland Act 1991*, the *Supreme Court Act 1995* (Q), the *Uniform Civil Procedure Rules 1999*(Q) and rules of common law and equity.

The government well knows this, but no doubt finds the prospects of such radical constitutional and legislative surgery too unpalatable a political undertaking, even for the apparently immensely popular political cause of getting tough on the odd prisoner every year who has the temerity to approach the Supreme Court about a Departmental decision.

Why would the government want to re-arrange and dismantle an essential part of the whole machinery of the effective functioning of the State to discard a fundamental at the heart of the separation of powers to stop the one or two prisoners a year who make applications under the *Judicial Review Act 1991* concerning transfers and classification decisions? Why attempt to do this when only two cases out the dozen or so applications that have been made to the Court in 15 years have been set aside?

The exemptions in the Bill are legally ineffective and politically lacking in utility.

In this sense it begs the question why the judicial review exemptions ought to be included in the Bill at all. Is there a more sinister reason why the Department wants to put transfer and classification decisions beyond the reaches of the law? Is that transfers and classifications are to be used punitively or as a means of behaviour control? If the reservation of caprice or arbitrariness or even bad faith be the motive, then there is be an even greater need for judicial oversight.

Exemption of judicial review sends a bad message to the community and prisoners.

It is timely to remind ourselves of an important legacy derived from the Commissioner Fitzgerald reforms in the form of the *Electoral and Administrative Review Report on Judicial Review of Administrative Decisions*, December 1990 at par 7.6; 7.53 and 7.56.

Since the introduction of the *Judicial Review Act 1991*, there have been remarkably few decisions to review prisoner classification and transfer decisions, possible no more than a dozen over the last decade and a half—less than one a year.

There is nothing in the current state of affairs that indicates any abuse of the system of the current system or burden to the State by having these decisions examined by the courts.

The costs of servicing applications for judicial review of transfer and classifications is miniscule in terms of the Department's over all budget.

The fiscal benefits of allowing prisoners to approach the judicial umpire on the other hand are inestimable. Access to the courts where a dispute exists between citizen and the State, even for prisoners is fundamental not only to justice in the esoteric sense but also as a matter of hard practical common sense.

It is not infrequent that applications by prisoners under the *Judicial Review Act 1991* have been conceded by the Department before trial and re-made according to law without the necessity of going to judgment.

Once needs to be reminded that administrative law provisions such as procedural fairness are not only important for the person affected but also important for the decision maker to ensure that he or she got it right improving the quality of decision making: see *Kioa v West* (1985) 159 CLR 550; Australian Bar Association Conference, Paris, Wednesday, 10 July 2002, The Hon Justice McHugh AC, *Tensions Between The Executive And The Judiciary.*

The access to the Courts under the *Judicial Review Act 1991* for prisoners is very important in terms of their acceptance and acknowledgement of the rule of law as well as an important safety valve for people under going the very real frustrations of imprisonment.

The costs of access to the Courts is far cheaper than the costs of containing riots and rebuilding burnt out prisons. If prisoners lose faith in the legal order then real management risks will emerge. The perception of prisoners of the fairness of the system is vital for the safe and proper management of prisons, the Department and the community at large. These amendments are an unacceptable risk the community.

Many will see these attempts at exemptions as the thin edge of the wedge for the total abolition of access to the courts for not only prisoners but also other citizen's in other areas of public administration. It is a serious roll back of the Fitzgerald reforms. These amendments are a rank Bjelke-Petersenism.

These issues are too important to become caught up in political bidding wars, as parties vied with one another to appear tougher on crime, without any discernible benefit in actual levels of crime.[25]

The Bill should be reconsidered and the exemptions from judicial review dropped.

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[25] Pettit, Phillip. *Deliberative Democracy And The Case For Depoliticising Government* [2001] UNSWLJ 58; various governments in their insatiable quest (to be seen) to be "tough on crime" resulted in the decisions of the High Court in *Fardon v. Attorney General for the State of Queensland*, (2004) 210 ALR 50 and *Baker v. The Queen*, (2004) 210 ALR 1, 31 which demonstrate the lack of constitutional protections afforded to prisoners: [2005] Deakin Law Rev 13