
Constitutional right of access to courts in Australia: The case of prisoners

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This article considers a little-known provision of Australian statute law which conditions the right of particular individuals to access courts on the permission of a public official. This provision raises fundamental questions, including the extent to which the Australian Constitution protects the right of an individual to access Australian courts to obtain redress for claimed wrongs. Several arguments are made. First, rule of law concerns with limits to the ability of individuals to practically access courts are considered. A related, but separate, argument might be made from the High Court's past acceptance of notions of "equal justice". It considers the development of an implied right to access courts, sourced in Ch III of the Constitution. It considers whether a right to access courts might be considered part of the existing implied freedom of political communication, since many claims affected by this approval requirement would concern aspects of performance of public functions. Finally, it considers whether conditioning the hearing of a legal action on the permission of a public official might offend the "institutional integrity" of a Ch III court.

INTRODUCTION

This article considers the somewhat novel issue of the extent to which the right of an individual to access courts is constitutionally guaranteed in Australia. Such a right is implicated by various kinds of laws, for instance, privative clauses, purporting to limit or remove the right of an individual to challenge particular legislation or particular decisions, or no-invalidity clauses. It is by now clear that such clauses will not prevent a supervisory court from having the power to review the decision, at least where the claim is based on jurisdictional error. This doctrine applies both at federal¹ and State level.² These developments have been well discussed in the literature³ and those issues will not be re-ventilated here.

This article asks a different question. It considers legislation that specifically restricts the ability of particular claimants to access the courts, making it subject to the consent of a member of the executive. Specifically, s 95 of the *Public Trustee Act 1978* (Qld) restricts the ability of a long-term prisoner to take legal action. Subsection (1)(b) prevents a long-term prisoner from "bringing any action of a property nature or for the recovery of any debt or damage" without the written consent of the Public Trustee, an office belonging to the Executive arm of government. A long-term prisoner means a person sentenced to at least three years' jail, including those serving life sentences and those subject to indefinite detention. A short and little litigated⁴ provision, but one which raises fundamental,

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¹ *Plaintiff S157/2002* (2003) 211 CLR 476.

² *Kirk v Industrial Relations Commissioner* (2010) 239 CLR 531.

³ Bateman W, "The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review" (2011) 39 *Federal Law Review* 463; McDonald L, "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" (2010) 21 *PLR* 14; Kirk J, "The Entrenched Minimum Provision of Judicial Review" (2004) 12 *AJ Admin L* 64; Campbell E and Groves M, "Privative Clauses and the Australian Constitution" (2004) 4(1) *Oxford University Commonwealth Law Journal* 51; Beaton-Wells C, "Restoring the Rule of Law – Plaintiff S157/2002 v Commonwealth of Australia" (2003) 10 *AJ Admin L* 125.

⁴ Examples include *Morteza Kashani-Malaki and Salvatore Di Carlo* [2012] QSC 139; *Tyler v Krause* [2002] QCA 295; *Fitzgerald v Jackson* [1989] 2 Qd R 542; *Lewis v Hillhouse* [2004] QSC 311. A brief discussion of the history of s 95 appears in McPherson JA (White and Wilson JJ agreed) in *Tyler* at [7]–[8]. There, McPherson JA also drew attention to the "double punishment" aspect of s 95 at [12]. White J also considered aspects of the operation of the section "unduly harsh" at [17]. The Full Court found in *Fitzgerald v Jackson* that s 95 applies to the bringing of personal injuries actions by prisoners.

broader questions about the extent to which access to courts is constitutionally protected. Legislation in other Australian States also restricts the ability of prisoners to bring action in court, although since these are conditioned on the consent of the court, they raise fewer constitutional objections.⁵

Such restrictions have some loose parallels with more odious consequences of criminal conviction that legal systems embraced in the past, before eventually discarding them in line with developments in criminology and a generally more sophisticated view of criminal behaviour in our society.

HISTORICAL CONTEXT AND CURRENT RESTRICTIONS ON THE RIGHT TO ACCESS THE COURTS

One of the earliest known societal reactions to criminal behaviour was *outlawry*, evident in early Roman history. Those who committed certain crimes were declared to be *sacer*, with the consequence that they were ousted from the community and were deprived of all rights, including the right to life. This practice morphed to some extent into the principle of *infamy*, used to describe those who committed particular crimes, and which also involved substantial loss of civil rights and ability to participate in community life.⁶

In medieval times, the concept of “attainder” gained prominence in England. This was a principle applied to those convicted of felonies. It had three main features: (a) corruption of blood, such that the person attainted could not inherit property, nor leave property to others upon death; (b) forfeiture of all property of the person attainted upon conviction; and (c) “civil” death, involving the loss of civil rights, including the right to bring an action in court etc.⁷ This was appropriate when the penalty for felonies was the death sentence, so that it applied to the transitory period between the finding of guilt and the carrying out of the death penalty. However, it did not disappear when death sentences had largely been commuted to life sentences, or lengthy prison terms. Attainder was largely abolished in the United Kingdom in 1870,⁸ but the concept of “civil death” continued to be applied elsewhere after that time. The United States *Constitution* only expressly forbids the first two of the three aspects of attainder discussed above, not “civil death”.⁹ While, by the early 20th century, some American courts were expressing revulsion to the concept,¹⁰ statutes in some states continued to recognise “civil death” in some form, and continue to do so.¹¹

A majority of the High Court of Australia found that attainder remained part of the common law in Australia in 1978 with respect to certain individuals (including the plaintiff Dugan), and that this position had not been altered by statute. The case involved the question whether a person sentenced to death, but whose sentence had been commuted to life imprisonment, could bring a civil claim of defamation in the courts. A majority of the High Court, with Murphy J dissenting, found the common law of Australia, unaltered by statute, precluded those such as the plaintiff from pursuing such an

⁵ *Felons (Civil Proceedings) Act 1981* (NSW), s 4 (with respect to someone convicted of a serious indictable offence); *Prisoners (Removal of Civil Disabilities Act) 1991* (Tas), s 4(2) (with respect to a “long term prisoner”). Elsewhere, there is an intention to remove the effects of old common law restrictions, discussed briefly in the article: *Crimes (Amendment) Act 1973* (Vic), s 5; *Criminal Code 1913* (WA), s 730; *Criminal Code* (NT), s 435A. Recently, the New South Wales Court of Appeal found State provisions requiring leave in order to bring “civil proceedings” did not apply to applications for judicial review: *New South Wales v Patsalis* [2012] NSWCA 307.

⁶ Damaska M, “Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study” (1968) 59(2) *Journal of Criminal Law, Criminology and Police Science* 347 at 350-351.

⁷ Saunders H, “Civil Death – A New Look at an Ancient Doctrine” (1970) 11 *William and Mary Law Review* 988 at 989.

⁸ *Forfeiture Act 1870* (UK), though it maintained some restrictions on the ability of a prisoner to bring legal action with respect to a claim regarding property, debt or damage. By the 1980s, the British courts were referring to a prisoner’s right to unimpeded access to a court: *Raymond v Honey* [1983] 1 AC 1.

⁹ United States *Constitution*, Art 3, s 3, cl 2.

¹⁰ *Collins v Metro Life Insurance Co* 83 NE 542 (Ill, 1907) at 545: “[I]t raises a feeling of repulsion, whether the incapacity is presented singly or as a consequence of another punishment. It is a barbarism condemned by justice, by reason and by morality.”

¹¹ Chin G, “The New Civil Death: Rethinking Punishment in the Era of Mass Conviction” (2012) 160 *University of Pennsylvania Law Review* 1789 at 1798, cites New York, Rhode Island and Idaho as states where it continues in some form.

action while they were incarcerated.¹² More recently, the legal rights of prisoners in Australia have been recognised in other contexts, notably an implied right to vote.¹³

Today, restrictions on the ability of prisoners to bring civil claims in Australia have narrowed further, but they have not disappeared altogether. Restrictions vary in type; the most restrictive is a Queensland Act that requires prisoners sentenced to a term of at least three years' imprisonment to obtain the permission of the Public Trustee prior to bringing a civil claim in court.¹⁴ This provision will provide the focus for the discussion in the article. Restrictions in other jurisdictions exist, typically requiring that, prior to the prisoner bringing the civil claim to court, they must have the court's permission. While these restrictions are a vast improvement on the old days of outlawry and attainder, they still implement a discriminatory treatment of prisoners who wish to access the courts compared with those who are not prisoners. Federal discrimination legislation does not generally forbid discrimination against prisoners. The question remains whether there are constitutional arguments against such discriminatory treatment of prisoners.

CONSTITUTIONAL ARGUMENTS AGAINST RESTRICTIONS ON PRISONERS' ACCESS TO COURTS

A range of constitutional arguments is presented below in relation to a law conditioning access to Australian courts on the consent of a member of the Executive. It should be emphasised at this point that the Australian *Constitution* does not contain a bill of rights, and specific rights to equal protection and due process are not expressly enshrined in it. Nor does Australia have an equivalent to the *European Convention on Human Rights*. This makes arguments about protecting rights more difficult, but not impossible. Indirect paths may be necessary.

The article first argues that such a restriction is contrary to the rule of law as it is considered. This will require amplification of the nature of the rule of law, and its presupposition of rights to access courts, as well as to notions of equality, and the status of the rule of law in Australian constitutional jurisprudence. Next, an argument is considered that such a law undermines the notion of equal justice enshrined in the *Constitution*, if it is not accepted as being part of the rule of law, or that the rule of law does not have substantive constitutional effect. Case law in the 1990s in Australia was suggestive of a right to equal justice enshrined in the *Constitution*, but such a right has not been developed much in High Court decisions since.

The article then suggests an implied right to access Australian courts, not currently recognised expressly by law. By using a theory on constitutional implications, it is argued that the right to access courts should be recognised by the High Court of Australia. In the alternative, it is suggested that the right to access a court may be considered part of the (currently accepted) implied freedom of political communication, since a legal complaint by a prisoner is likely to raise issues concerning the running of jails which are a governmental concern, or involve discussion of legal principles which may be viewed as discussion about governmental matters, and that conditioning the right of a prisoner to sue is hard to justify on the two-limb test currently used to assess the validity of laws challenged under this implied freedom.

Finally, it is argued that the High Court of Australia's rapidly developing separation of powers jurisprudence might also suggest constitutional protection of the right to access courts. In the language of "institutional integrity", the court's current touchstone of Ch III requirement validity, it is argued that a court's institutional integrity presupposes the ability of individuals to access it; that courts have an essential constitutional role in resolving disputes, deciding the legality of exercise of executive power, and limits on governmental power; that the court has inherent and express discretion to avoid

¹² *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

¹³ *Roach v Electoral Commissioner* (2007) 233 CLR 162 (obviously, the right is not confined to prisoners); see Orr G, "The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia" (2009) 8(2) *Election Law Journal* 123.

¹⁴ *Public Trustee Act 1978* (Qld) s 95, together with s 90.

abuse of process; and that the Queensland law under consideration undermines the right of an individual to a fair hearing, in a manner offensive to a court's institutional integrity.

Rule of law

The mention of this doctrine immediately raises at least two issues: (1) the exact meaning of the concept, since it can mean different things to different authors, and there is substantial difference among these views; and (2) the extent to which the rule of law is enshrined in the Australian *Constitution*, and hence its utility in striking down statutory provisions. In general terms, the rule of law is taken to reflect that there should be no exercise of state power against an individual without clear legislative sanction. There are at least two aspects of the rule of law, as often defined, relevant to the present discussion. These are the notions of some kind of equality before the law, and the notion of access to the courts to test the legality of actions purported to be taken under law.

Rule of law and equality

It is relatively uncontroversial to suggest the rule of law requires some kind of equality before the law, meaning (at least) that the same legal principles are applied to each member of society, regardless of their rank or station.¹⁵ In other words, the rule of law is against arbitrary exercise of power, or the exercise of unfettered discretion by those in positions of authority.

Recently, Lord Bingham, in reflecting on the equality aspect of the rule of law, stated that it required that laws should apply equally to all, except to the extent that objective differences justified differentiation.¹⁶ Lord Hoffmann expressly cited with approval comments of Justice Jackson of the United States Supreme Court that there was no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law to be applied against a minority must be applied to all.¹⁷ Lord Bingham described these remarks as reflecting a "pillar of the rule of law itself".¹⁸

This concern, that the legal rules should essentially be the same for individuals in society, is also reflected in the writings of various philosophers who turned their attention to the requirements of the rule of law.¹⁹ In his book, *Constitutional Justice: A Liberal Theory of the Rule of Law*, TRS Allan states that a bill of attainder offends the rule of law because of its violation of the principles of

¹⁵ Dicey AV, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 1885) pp 110-114.

¹⁶ Lord Bingham, "The Rule of Law" (2007) 66(1) *Cambridge Law Journal* 67 at 73.

¹⁷ *Railway Express Agency Inc v New York* 336 US 106 (1949) at 112-113: "I regard it as a salutary doctrine that [governments] must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the *Constitution* knew, and we should not forget today, that there is no more effective practical guaranty [sic] against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely nothing opens the door to arbitrary action so effectively as to allow these officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that will be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

¹⁸ Lord Bingham, n 16 at 75.

¹⁹ Locke J, *Second Treatise of Government*, Chapter VII Of Political or Civil Society, s 87: "And thus all private judgment of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all parties, and by Men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right". See also Dicey, n 15, p 114: "In England, the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen... A just constitution is defined as a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the (principle) that each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a system of liberty for all"; Rawls J, *A Theory of Justice* (HUP, 1971) p 355: "[T]he laws must be general, equal and certain" (referring to the requirements of the rule of law); Hayek F, *The Political Idea of the Rule of Law* (National Bank of Egypt, 1955) p 34: "[T]he true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all"; Hayek F, *The Constitution of Liberty* (Routledge, 1960) p 153. See also Fuller L, *The Morality of Law* (2nd ed, YUP, 1969) pp 200-224, who described eight features of a sustainable legal system; his first was that laws should be of "general application". See further WI Jennings *The Law and the Constitution* (1959) p 50: Jennings outlined what he described as the limited notion of a rule of law, assuming "that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be

equality and due process. He added:

There is no distinction of principle between an act of attainder that identifies its intended victims by name and one that designates them by reference to some questionable trait or characteristic, such as membership of a specific group or association or political party. Accordingly, the scope of the principle prohibiting acts of attainder depends on those considerations that determine, more widely, the operation of the general doctrine of equality: the principle is only a primary instance of the basic doctrine, excluding arbitrary and discriminatory treatment of persons ... what is contrary to the rule of law is the imposition of constraints or disqualifications on specific individuals, or particular groups, that lack a plausible justification in terms of a (legitimate conception of) the common good.²⁰

The idea that the rule of law encompasses equality has been accepted by members of the Australian High Court in extra-curial comments.²¹ In *Green v The Queen*, three members of the High Court specifically acknowledged that equality before the law was an aspect of the rule of law.²²

Rule of law and access to courts

In civil matters one can scarcely conceive of the rule of law without their being a possibility of having access to the courts.²³

British Law Lords have commented on the link between the rule of law and access to courts, including in a recent speech by Lord Neuberger, President of the United Kingdom Supreme Court.²⁴ Lord Bingham elaborated on his understanding of the rule of law in a recent significant speech. In a passage considered particularly relevant to this article, he wrote:

[M]eans *must* be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. It would seem to be an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined ... (this rule) recognise(s) the *right of unimpeded access to a court* as a basic right, protected by our own domestic law, and in my view comprised within the principle of the rule of law.²⁵

Raz, who favoured a narrower conception of the rule of law than others,²⁶ agreed that it required that the courts should be easily accessible.²⁷ Whitford, who also favoured a minimalist conception of

the same for all citizens of full age and understanding"; Detmold MJ, "Australian Constitutional Equality: The Common Law Foundation" (1996) 7 PLR 33 at 48: "We need the rule of law. And we need the rule of justice (individual rights, respect for difference, constitutional equality, non-discrimination, legitimacy etc. In the common law they are the same thing"; Tamanaha B, *On the Rule of Law: History, Politics, Theory* (CUP, 2004) p 119; Saunders C and Le Roy K, *The Rule of Law* (Federation Press, 2003) p 5, stated that the rule of law requires that disputes involving governments are resolved in the same way as those involving private parties, and that the law contain "general rules".

²⁰ Allan TRS, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2001) pp 148-149, 152.

²¹ Gleeson M, "Courts and the Rule of Law" in Saunders and Le Roy, n 19, p 181 (one of 11 stated requirements of the rule of law); Stephen N, "The Rule of Law" (2003) 22(2) *Dialogue* 8 (one of four cardinal principles of the rule of law); Kiefel S, "Social Justice and the Constitution: Freedoms and Protections" (2013) 20 *James Cook University Law Review* 1 at 20 stated that equal justice was an aspect of the rule of law.

²² *Green v The Queen* (2011) 244 CLR 462 at 472 (French CJ, Crennan and Kiefel JJ).

²³ *Golder v United Kingdom* [1975] ECHR 1 at [34] (the context was a claim by a prisoner where regulations required any prisoner claim to have the consent of the Home Secretary – held invalid); Triggs G, "Prisoners' Rights to Legal Advice, and Access to the Courts: The Golder Decision by the European Court of Human Rights" (1976) 50 ALJ 229. The United Kingdom Supreme Court recently referred to the rule of law as an important value in the context of the right of a person to present arguments to a court: *Osborn v Parole Board* [2014] UKSC 61 at [71].

²⁴ Lord Neuberger, *Closing Address* (Global Law Summit, 25 February 2015) at [10], [14]: "In the civil, family, criminal and public law fields, genuine access to justice, in terms of competent advice and representation in an impartial court, is essential if a society is to maintain genuine adherence to the rule of law ... a government which undermines its citizens' rights to go to court ... undermines the rule of law."

²⁵ Lord Bingham, n 16 at 77 (emphasis added).

²⁶ Raz J, *The Authority of Law: Essays on Law and Morality* (1979) p 214.

²⁷ Raz, n 26, p 217: "[G]iven the central importance of the courts in ensuring the rule of law, it is obvious that their accessibility is of paramount importance". Raz added that the discretion of public officials or public agencies should not be allowed to pervert the law (p 218).

the rule of law, required that the process by which agreed standards were applied by the court had to be practically available to an aggrieved person.²⁸ Dicey expressed the third aspect of the rule of law in terms of the role of courts providing the general principles of constitutional law through judicial decision.²⁹ Other scholars³⁰ stated that the rule of law required the government to ensure citizens had access to the law.

The view that an essential component of the rule of law is that citizens have access to the courts to seek to have grievances dealt with has also attracted judicial support. As Gibbs CJ noted in *Onus*:

In a community which professes to live by the rule of law the courts should be open to anyone who genuinely seeks to prevent the law from being ignored or violated.³¹

Status of the rule of law in Australia

Australian statutes tend not to refer to the “rule of law” in express terms.³² The Australian *Constitution* contains no express reference to the rule of law. However, it is by now settled law that implications can be drawn from the written text of the *Constitution*.³³ Dixon J was famously prepared to make such an implication with respect to the rule of law:

It is Government under the *Constitution* and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.³⁴

²⁸ Whitford W, “The Rule of Law” (2000) *Wisconsin Law Review* 723 at 726.

²⁹ Dicey, n 15, p 115.

³⁰ Dyzenhaus D, “Normative Justifications for the Provision of Legal Aid” in McCamus J (ed), *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Ontario Legal Aid Review, 1997) pp 477-479; Trebilcock M and Daniels R, *Rule of Law Reform and Development* (Elgar Publishing, 2008) pp 237-238; Whitford, n 28: “A second condition essential to the actualisation of the rule of law is meaningful access to justice. Government decisions will not be measured against predetermined standards unless persons aggrieved by government action or by wrongful action by another person ... have the practical ability to initiate a process by which some agency, usually a court, will assess the consistency of the action with the rule of law.”

³¹ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35. In a book chapter “The Courts and the Rule of Law” in Saunders and Le Roy n 19, Chief Justice Murray Gleeson cited 11 principles said to be required by the rule of law; one was that access to the courts should be available to citizens who sought to prevent violation of the law within reasonable requirements as to standing. Former justice of the High Court Sir Ninian Stephen provided four “cardinal” principles of the rule of law; they included ready access to the courts: n 21.

³² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8, refers to individuals being equal before the law, and entitled to equal protection, rather than using the phrase “rule of law”; see also *Human Rights Act 2004* (ACT), s 8; cf *Legislative Standards Act 1992* (Qld), s 4(1), citing the rule of law as a fundamental legislative principle.

³³ *The Queen v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108 (Griffith CJ, asserting that an individual has the “right” to come to the seat of government to assert a claim, to transact business with it, to seek its protection, share offices or engage in administration of its functions), 109-110 (Barton J, speaking of the citizen’s right of access to the institutions, and due participation in the activities of the nation). See also *West v Commissioner of Taxation* (NSW) (1937) 56 CLR 657 at 681: “[S]ince the *Engineers* case a notion seems to have gained currency that in interpreting the *Constitution* no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied”; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193. Gummow and Hayne JJ noted in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 that the occasion was “yet to arise” for consideration of all that may follow from this comment of Dixon J. It is considered to be unduly pedantic to argue that the “assumption” to which Dixon J referred in *Australian Communist Party* differs in substantive effect from the “implications” to which he also made reference in his comments. The author believes Dixon J was talking about essentially the same thing – principles that are not expressed in the *Constitution*, but which are clearly contemplated by it and which are necessary for the system of governance contemplated by the founding fathers to function as intended. It is hardly contentious to say that the rule of law is implied in (or assumed by) the *Constitution*. Why else would the *Constitution* expressly set out the legislative powers that levels of government would have in the new nation, if the rule of law were not to underpin our system of government? If it were not intended, there would indeed be no need for a *Constitution*, and governments could wilfully exercise power arbitrarily and capriciously.

This passage was referred to with evident approval by six members of the High Court in *Plaintiff S157/2002*.³⁵ Immediately after citing Dixon J's reference to the rule of law, the joint reasons in *Plaintiff S157/2002* confirmed that legislation which purported to oust the jurisdiction of a court to engage in judicial review with respect to jurisdictional error would be constitutionally invalid, as an interference with rights enshrined by s 75(v) of the *Constitution*:

The centrality and protective purpose of the jurisdiction of this Court ... places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid, and ministerial or other official action lawful and within jurisdiction ... In the end, pursuant to s 75 of the *Constitution*, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.³⁶

This decision was in the context of a federal matter, but the principle was extended to State courts in *Kirk v Industrial Court of New South Wales*.³⁷ A State superior court cannot be deprived of its ability to grant relief for jurisdictional error because to do so would deprive it of the character of a court, contrary to the requirements of Ch III of the *Constitution*. Spencer says that jurisdictional error has "become the predominant form of the rule of law".³⁸ The work of Caron Beaton-Wells and Leighton McDonald reflects the rule of law basis of the decision in *Plaintiff S157/2002*. Clearly then, the High Court recognises that the rule of law is implicit in the *Constitution*, contemplated by s 75,³⁹ and gives the principle substantive effect.

Several members of the High Court have more recently alluded to the rule of law and its status as a constitutional principle. In *APLA Ltd v Legal Services Commissioner (NSW)*, Gleeson CJ and Heydon J stated the rule of law was an assumption upon which the *Constitution* was based, and upon which the *Constitution* depends for its efficacy. They stated that Ch III gave effect to the assumption.⁴⁰ Kirby J agreed that the rule of law lay at the heart of the judicature provided for in the *Constitution*.⁴¹ In *South Australia v Totani*, French CJ referred to it as an assumption to be drawn from the text and structure of Ch III, including s 77(iii), and described it as having "universal application throughout the Commonwealth".⁴² Gummow J stated that Ch III gave practical effect to the assumption of the rule of law "in the development of a free and confident society".⁴³ Crennan and Bell JJ agreed that the rule of law was an assumption under which the *Constitution* was framed.⁴⁴

To the extent that the implication of principles in the *Constitution* requires a textual basis, Ch III, and in particular s 75(v), can provide it, in the case of the rule of law.⁴⁵

³⁵ *Plaintiff S157/2002* (2003) 211 CLR 476 at 492 (Gleeson CJ), 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

³⁶ *Plaintiff S157/2002* (2003) 211 CLR 476 at 514; Beaton-Wells, n 3. This meets the High Court's requirement that any implication drawn from the *Constitution* must be based on its "text and structure": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³⁷ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; McDonald, n 3; Gouliaditis N, "Privative Clauses: Epic Fail" (2010) 34 *Melbourne University Law Review* 870, something anticipated by some commentators: Campbell and Groves, n 3 at 75.

³⁸ Spencer T, "An Australian Rule of Law" (2014) 21 *AJ Admin L* 98 at 122; Endicott T, "The Impossibility of the Rule of Law" (1999) 19 *Oxford Journal of Legal Studies* 1 at 10: "[J]udicial review is an instrumental requirement – a check against departures from the rule of law."

³⁹ Writing extra-judicially recently, Kiefel noted the connection between the rule of law and s 75 of the *Constitution*: n 21.

⁴⁰ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 351.

⁴¹ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 441.

⁴² *South Australia v Totani* (2010) 242 CLR 1 at 42.

⁴³ *South Australia v Totani* (2010) 242 CLR 1 at 62; see also *Thomas v Mowbray* (2007) 233 CLR 307 at 342 (Gummow and Crennan JJ).

⁴⁴ *South Australia v Totani* (2010) 242 CLR 1 at 155.

⁴⁵ *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 (Brennan J): "Judicial review is neither more nor less than the enforcement of the rule of law over executive action."

It seems clear that the requirement in s 95 of the *Public Trustee Act 1978* (Qld) for a long-term prisoner to obtain the consent of the Public Trustee prior to commencing a civil claim would be unconstitutional, at least to the extent that it purported to deny the ability of a prisoner to make a claim based on jurisdictional error, however defined.⁴⁶ This is taken to be required by the High Court decisions in *Plaintiff S157/2003* and *Kirk*,⁴⁷ and further discussion here is not required.⁴⁸

The more contentious question is the extent to which that section, and sections in other Acts requiring the consent of a court in order to bring a claim, are constitutionally valid outside the realm of claims for jurisdictional error.

Regarding the equality aspect of the rule of law, if it requires that objective differences justify differentiation, as Lord Bingham suggested, and if it precludes the imposition of disqualifications on individuals or groups without plausible justification, as TRS Allan found, there is no justification on the face of the legislation as to why prisoners need the consent of a member of the Executive in order to bring an action to court, but others do not.⁴⁹ Nor is it clear why only prisoners serving a sentence of at least three years must seek such consent. Perhaps the claimed justification is that prisoners tend to make spurious legal claims. If indeed this claim is true, something which is hard to substantiate, it remains unclear why the courts' existing jurisdiction to stay proceedings that would be an abuse of process, or existing legislation providing for the staying of vexatious proceedings, are not sufficient to meet this need. The fact that it is a member of the Executive deciding whether or not the claim proceeds, where it is expected that many claims a prisoner might have would be against the government, tends to sharpen the sense that the legislation suffers from the defect of "inequality" of treatment without defensible justification.

Regarding the "access to courts" aspect of the rule of law, Lord Bingham wrote of the "right of unimpeded access to a court" as a basic right comprised within the rule of law.⁵⁰ Many other philosophers have pointed to the essentiality of access to a court to have grievances heard in a system which contemplates independent decision-makers to ensure government (and others) act within the law, as did Gibbs CJ in *Onus*. Griffith CJ in an early case spoke of the right to "come to the seat of government and to assert any claim he may have upon that government ... he has a right to free access (to) ... the courts of justice",⁵¹ as did Quick and Garran.⁵² While the right to access to courts is not unlimited, and reasonable restrictions are acceptable, for instance, based on the dollar value of

⁴⁶ The precise meaning of "jurisdictional error" is of course a matter of ongoing debate: Gouliaditis, n 37 at 883. Interestingly, in the recent decision of *Patsalis v New South Wales* [2012] NSWCA 307, the New South Wales Court of Appeal interpreted a requirement that prisoners obtain leave of the court in order to commence a "civil proceeding" not to apply to claims based on jurisdictional error. See for discussion Donnelly J, "The Convicted Felon's Right to Judicial Review and the Common Law Doctrine of Attainder in Australia" (2013) 2 JCivLP 32; see *Patsalis v New South Wales* [2012] NSWCA 307 at [26] (Basten JA, with whom Allsop P and Sackville AJA expressed agreement) on the question of attempts to create "islands" of executive power not subject to judicial review.

⁴⁷ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531. An argument might be made that since the basis of the High Court's decision in *Kirk* was that at the time of federation, colonial supreme courts had the jurisdiction of the Court of Queen's Bench in England (at 580), and that in the past English law restricted the ability of prisoners to bring matters to court, that somehow the continuing power of State courts to adjudicate on claims of jurisdictional error should continue to be subject to those limits that may have applied as at the time of federation. This argument is not accepted here. The High Court was making the bare point in *Kirk* that at the time of federation, colonial supreme courts did possess power to adjudicate on claims of jurisdictional error. It did not seek to embrace all of the limits that may have existed in England in the 1890s and set them in stone in relation to how we perceive state supreme courts' ability to adjudicate on jurisdictional error for all time.

⁴⁸ In the context of provisions in the *Corrective Services Act 2006* (Qld), purporting to exclude statutory judicial review on the basis of jurisdictional error for decisions made under the Act (for instance s 17(2) with respect to security classifications, s 66(7) in relation to work and ss 68(7) and 71(6) in relation to transfer decisions). Groves has similarly concluded that these provisions are invalid, following the *Kirk* decision: Groves M, "Federal Constitutional Influences on State Judicial Review" (2011) 39 *Federal Law Review* 399 at 420.

⁴⁹ Given the legislation was passed in 1978, it has not proven possible to obtain the relevant Minister's speech introducing the provisions; nor is an Explanatory Memorandum to the legislation available.

⁵⁰ Lord Bingham, n 16 at 77; see also *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [5] (Lord Bingham, with whom all other Lords agreed), [31] (Lord Cooke).

⁵¹ *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108; see also Barton J at 109-110.

disputes, and the fact that particular courts have specialised jurisdictions, again limitations need to be carefully justified to ensure they are not impeding the system from working as intended. It is surely intended that someone who argues that an institution or individual has breached their legal obligations has a right to air those grievances before an independent tribunal for resolution. Again, in this light it is argued that conditioning an individual's right to bring civil proceedings on the written permission of a member of the Executive sufficiently impedes that system that it ought be held unconstitutional, as contrary to the functioning of the rule of law contemplated by, assumed by, and implicit in, the *Constitution*.

Arguably contrary to this argument, it is true that the High Court in *Roach v Electoral Commissioner*, in the course of declaring invalid provisions removing the right to vote of any incarcerated person, declared valid provisions removing the right to vote to those convicted of serious offences and serving a term of imprisonment of three years or more. Superficially, it may seem this finding would support the constitutional validity of measures making the right of a prisoner serving at least a three-year jail term conditional on approval by a member of the Executive because, in both cases, the right of a prisoner serving a serious sentence of imprisonment is being restricted.⁵³

While to that extent the two situations – that of a right to vote and the right of access to courts – are similar, in critical respects they differ. For instance, in validating temporarily taking the right to vote away from those serving serious terms, Gleeson CJ spoke of the right to vote as reflecting the fact that the voter was a member of the community, and that if a person was temporarily physically segregated from the community, it was defensible to temporarily suspend their right to vote as a right connected with community participation.⁵⁴

The joint reasons of Gummow, Kirby and Crennan JJ applied the test whether the measures were consistent with representative and responsible government enshrined in the *Constitution*, given their view that the right to vote is to be deduced from ss 7 and 24 of the *Constitution*. In applying this approach, they referred at some length to historical instances of denial of the franchise to offenders, and note that the removal of the right to vote for someone serving a three-year (or more) jail term reflects the “primacy of the electoral cycle”.⁵⁵ Clearly, denial of the right of a prisoner to sue in a court does not enjoy the same kind of historical support as the denial of the vote to prisoners.⁵⁶ And the reasoning related to the “electoral cycle” cannot be applied to a right to sue. Given that the right to sue is based on provisions other than ss 7 and 24, the same limits that would apply to implications drawn merely from those provisions cannot automatically be applied to that right. For these reasons, the decision in *Roach* is of highly marginal relevance to constitutional consideration of a right to sue; it does not stand in the way of the argument here.

Equality and the Australian Constitution

It is necessary to consider the extent to which the principle of equality is enshrined in the *Constitution*, independently of its being a feature of the rule of law which is said to be implicit in the document. This is because those High Court judges who have asserted something like a right to equality at constitutional level have not (at least expressly) described it as being sourced from the rule of law, which is perhaps an error given its struggle to be accepted as part of mainstream constitutional

⁵² Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (1901) p 959. They stated that the people had a right to sue in the Federal Courts.

⁵³ In respect of eligibility for election as a member of Federal Parliament, s 44(ii) precludes those attainted of treason or under sentence, or subject to sentence by any Commonwealth or State law, for an offence punishable by at least one year in prison.

⁵⁴ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 179.

⁵⁵ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 204; at federal government level in Australia, and in Queensland, members of parliament are elected for a (maximum) three-year term (except the Senate): *Australian Constitution*, s 28.

⁵⁶ In saying this, it is acknowledged that, exceptionally, a small number of offenders were subject to “civil death”, and this did indeed involve loss of rights, including the right to sue.

principle, and the need to source suggested implications in the text and structure of the *Constitution*.⁵⁷ Obviously equality is not a notion confined to Australian law; notions of equality appear in international human rights instruments.⁵⁸

The leading case where notions of equality were considered in the constitutional context is *Leeth v Commonwealth* where three justices of the High Court, Deane, Toohey and Gaudron JJ, stated that the *Constitution* contained a guarantee of equality. After quoting a statement from Isaacs J as to the duty of the High Court to take judicial notice of fundamental constitutional doctrine when interpreting the *Constitution*, Deane and Toohey JJ added:

The doctrine of legal equality is in the forefront of those doctrines. It has two distinct but related aspects. The first is the subjection of all persons to the law: "every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals" (quoting Dicey). The second involves the underlying or inherent theoretical equality of all persons under the law and before the courts. The common law may discriminate between individuals by reference to relevant differences and distinctions, such as infancy or incapacity, or by reason of conduct which it proscribes, punishes or penalizes ... nonetheless ... the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government ... at the heart of th(e) obligation (to act judicially) is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.⁵⁹

Their Honours purported to base this notion on express references in the *Constitution* to "the people", and on the requirements of Ch III of the *Constitution*. Deane and Toohey JJ stated that Ch III required that courts exhibit the essential attributes of a court, including the obligation to act judicially, and that "at the heart" of that obligation was the duty of the court to extend to the parties before it "equal justice". This was defined as an obligation to treat parties fairly and impartially as equals before the law, and to refrain from discrimination on irrelevant or irrational grounds.⁶⁰

Gaudron J also claimed the source of the equality doctrine was the requirements of Ch III, stating that like treatment of like persons in like circumstances, including treating genuine differences as such, was fundamental to the judicial process.⁶¹ It seems that Gaudron J had a more limited view of the doctrine, but that it was not confined to a requirement of equality in treatment of people in different parts of Australia.⁶² Brennan J expressed a similar view, while suggesting that the words "in one indissoluble Federal Commonwealth" in the preamble contemplated the "constitutional unity of the

⁵⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁵⁸ Art 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR) states that all persons are to be equal before courts and tribunals; Art 10 of the *Universal Declaration of Human Rights* contemplates a right to a fair and public hearing "in full equality" in determination of their rights and obligations. The European Court has found that Art 6(1) of the European Convention regarding the right to a fair and public hearing contemplates the right to access a court: *Golder v United Kingdom* [1975] ECHR 1. The right to equality before the law also appears in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8(2) and of the *Human Rights Act 2004* (ACT), s 8.

⁵⁹ *Leeth v Commonwealth* (1992) 174 CLR 455 at 485-486. It should be conceded that *Leeth* was not a case about questions of equality between prisoners and non-prisoners, but equality of prisoners in different jurisdictions. The statements of those judges favouring a right to equality in this case were in broad terms, not confined merely to a right to equality between prisoners in different jurisdictions.

⁶⁰ *Leeth v Commonwealth* (1992) 174 CLR 455 at 487.

⁶¹ *Leeth v Commonwealth* (1992) 174 CLR 455 at 502; this suggestion has been the subject of criticism: see Kirk J, "Constitutional Implications (II): Doctrines of Equality and Democracy" (2001) 25 *Melbourne University Law Review* 24 at 31-43. Writing extra-judicially, McHugh J claimed that the view of Gaudron J in *Leeth* had been "at least partially endorsed" in *Kruger v Commonwealth* (1997) 190 CLR 1 (McHugh and Dawson JJ). McHugh does not cite the particular passages from *Kruger* in which support is allegedly provided to the view of Gaudron J: McHugh M, "Does Chapter III Protect Substantive as well as Procedural Rights?" (2001) 21 *Australian Bar Review* 235 at 251.

⁶² Wheeler F, "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia" (1997) 23(2) *Monash University Law Review* 248 at 279-283; Wheeler F, "Due Process, Judicial Power and Chapter III in the New High Court" (2004) 32 *Federal Law Review* 205 at 221-224.

Australian people”, creating difficulties for a federal law that, without more, applied differently in different parts of Australia.⁶³ It is noteworthy that none of these judges purported to base the equality guarantee on the rule of law.

Of the other judges in the case on this point, none of them disagreed expressly with the views of Deane, Toohey and Gaudron JJ. Mason CJ Dawson and McHugh JJ merely stated that there was nothing in the *Constitution* that required Commonwealth laws to operate uniformly throughout the Commonwealth, subject to specific express exceptions.⁶⁴ The court in *Kruger* took a more negative stance towards the view expressed by Deane and Toohey JJ in *Leeth*.⁶⁵

Subsequent cases have elaborated on the meaning of a “judicial process” in the context of the requirements of Ch III.⁶⁶ This has occurred because the court has accepted that laws that require or permit departure from key characteristics of a judicial process may offend the separation of powers doctrine symbolised by, and implicit in, Ch III of the *Constitution*.

In recent elaborations of what a “judicial process” is, judges have rarely made explicit reference to a requirement of equality before the law, or “equal justice”. One example appears in the judgment of Gaudron J in *Nicholas v The Queen*,⁶⁷ where her Honour included within the requirements of the “essential character of a court” that the court ensure “equality before the law”. In *Bass v Permanent Trustee Ltd*,⁶⁸ six members of the court, in stating that judicial power involved application of the law to facts found in proceedings conducted in accordance with the judicial process, referred to the page number on which the statement of Gaudron J appears. Another example appears in *Cameron v The Queen*, where McHugh J suggested that “equal justice” is a central concern of the judicial power of the Commonwealth.⁶⁹ In *Wong v The Queen*, Gaudron, Gummow and Hayne JJ stated that equal justice was a “fundamental principle”.⁷⁰

The general approach has been that of wariness towards articulating an all-encompassing explanation of the essential characteristics of a “judicial process”, generally preferring the traditional common law method of considering this question only to the extent that the case at hand requires. So while subsequent High Court judges (with the exception of Kirby J) have not developed or applied the concept of “equal justice” as being a feature of a judicial process, neither have they settled on an all-encompassing explanation of what a “judicial process” is that excludes equal justice, nor expressed disagreement with what Deane, Toohey and Gaudron JJ said in this regard in *Leeth*.

Some reference to the views of Kirby J may be in order, given their centrality to the argument developed in this article. In the case of *Muir v The Queen*,⁷¹ the High Court considered the right of a prisoner to appear in court to present submissions in support of a special leave application. In dissent,

⁶³ *Leeth v Commonwealth* (1992) 174 CLR 455 at 475. Brennan J seems to be in agreement with Deane, Toohey and Gaudron JJ here. This is how the case was interpreted by Detmold, n 19 at 43: “On the principle of the case – the existence of an implied right of equality – the majority lies with Brennan, Deane, Toohey and Gaudron JJ”.

⁶⁴ *Leeth v Commonwealth* (1992) 174 CLR 455 at 467.

⁶⁵ *Kruger v Commonwealth* (1997) 190 CLR 1 at 63 (Dawson J), 113-114 (Gaudron J), 142 (McHugh J), 153 (Gummow J).

⁶⁶ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-359; *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 67-68 (Gleeson CJ), 76-77 (Gummow Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 43 (French CJ), 63 (Gummow J), 82 (Hayne J), 157 (Crennan and Bell JJ), 162-163 (Kiefel J); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [67] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ), [182]-[188] (Gageler J).

⁶⁷ *Nicholas v The Queen* (1998) 193 CLR 173 at 208.

⁶⁸ *Bass v Permanent Trustee Ltd* (1999) 198 CLR 334 at 359.

⁶⁹ *Cameron v The Queen* (2002) 209 CLR 339 at 352; the doctrine was also discussed with evident approval by Kirby J (at 369-371).

⁷⁰ *Wong v The Queen* (2001) 207 CLR 584 at 608 (Gaudron, Gummow and Hayne JJ); Kirby J stated that fairness and equal treatment were fundamental aspects of criminal justice (at 617); see also *Lowe v The Queen* (1984) 154 CLR 606 at 611 (Mason J).

⁷¹ *Muir v The Queen* [2004] HCA 21 (three judges presided, with McHugh and Hayne JJ refusing leave for the prisoner to appear in court to make submissions regarding the leave application, with Kirby J dissenting).

Kirby J would have recognised such a right. In so deciding, Kirby J made express reference to a prisoner's legal rights: "they have not lost their human dignity or their right to equality before the law."⁷² He referred to the "legal and symbolic importance of equality before the courts".⁷³ He repeated these statements in dissent in *Thomas v Mowbray*, stating that courts "must treat with essential equality all parties who come before them".⁷⁴

While the extent to which the Australian *Constitution* in fact requires "equal justice" or "equality" is doubted by some scholars;⁷⁵ others have embraced the principle. Professor Detmold stated it was necessary to distinguish between what was implicit in the words of the *Constitution*, and what was implicit in having a constitution. In his view, the principle of equality could be derived from the latter:

In the matter of the *Constitution*, the principle (of equal respect) is for the same reason implicit in the having of a constitution (we might even say it is the constitution of the *Constitution*). We, the citizens, have a *Constitution*. Granted that premise, we have it equally. And, having the *Constitution* equally, we have the power that it generates equally. It follows from this that there is an implied right of constitutional equality as a control on our equally held power (our legislative power) ... This principle of equality as it applies to legislation is that all persons subject to law must be treated equally unless there is a rational (or proportionate) ground for discriminating between them.⁷⁶

If the principle of "equality before the law" or "equal justice" were accepted by the High Court, one interpretation of it would subject to scrutiny legislation that discriminated between or among individuals on irrelevant grounds. Deane and Toohey JJ discussed this in *Leeth*, stating that equal justice required fair and impartial treatment of individuals as equals before the law and a refrain from discrimination on irrelevant and irrational grounds.⁷⁷ It can be argued that a requirement that a category of claimants, namely prisoners serving reasonably lengthy jail terms, obtain the written consent of a member of the Executive to commence a civil claim, but no other claimant must do so, does discriminate against those prisoners on irrelevant and irrational grounds.

As it happens, in the United States, some cases involving prisoner access to courts have been decided on the basis of the principle of "equal protection", enshrined in the 14th Amendment.⁷⁸ Clearly, there are substantial philosophical links between notions of equal protection and equal justice

⁷² *Muir v The Queen* [2004] HCA 21 at [25]; this dissent mirrors the recent decision of the United Kingdom Supreme Court in *Osborn v Parole Board* [2013] UKSC 61 regarding the essentiality of fair process, including in many cases the right to an oral hearing, in the context of parole proceedings, as part of "due respect" to the rights of the prisoner: at [68]; *The Queen v Parole Board; Ex Parte Smith, Ex Parte West* [2005] UKHL 1. Its sentiments are also reflected in Australian human rights instruments such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 22 (person detained to be treated with humanity and with respect for their human dignity); see for a recent example *Castles v Secretary to the Department of Justice* [2010] VSC 310.

⁷³ *Muir v The Queen* [2004] HCA 21 at [20]. This principle also appears in *Magna Carta*, Art 29: "[T]o no one will we deny or delay right or justice."

⁷⁴ *Thomas v Mowbray* (2007) 233 CLR 307 at 442.

⁷⁵ Kirk, n 61 at 31-43.

⁷⁶ Detmold, n 19 at 43.

⁷⁷ *Leeth v Commonwealth* (1992) 174 CLR 455 at 485-486.

⁷⁸ Examples include *Boddie v Connecticut* 401 US 371 (1971) at 385-386. Douglas J dealt with fee-based restrictions on a person's ability to access the courts in terms of equal protection; *Griffin v Illinois* 351 US 12 (1956) at 19 involving a successful challenge to state law charging a person for a transcript required by the person in order that they prosecute an appeal, which effectively precluded some prisoners from appealing because they lacked means. Black J (for Warren CJ, Douglas and Clark JJ) struck out the legislation in equal protection terms: "Many States have ... provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Frankfurter J discussed the legislation in equal terms, pointing to the "squalid discrimination" in the law, and concluding that states could devise their appeal schemes, but could not "bolt the door to equal justice" (at 24).

or equality before the law, in the sense of a collective commitment against arbitrary distinctions in the application of laws to people within a community. These were expressly noted extra-judicially recently by Lord Bingham.⁷⁹

Since 1941, the United States Supreme Court has found that the right of prisoners to access the courts is constitutionally mandated.⁸⁰ This “fundamental constitutional right” to access the courts⁸¹ has a practical dimension, requiring that those in charge of prisons ensure that prisoners have access to sufficient legal materials in order that they can adequately prepare their cases. This has been expressed as a requirement that measures be taken to ensure prisoners’ rights to access the courts is “adequate, effective and meaningful”.⁸² It has meant that a state could not charge a prisoner for a transcript of their case, which was necessary to properly mount an appeal, if they did not have sufficient funds.⁸³ It could not prohibit a prisoner from assisting another with their legal claim.⁸⁴ Prisoners’ right to access the courts applies to civil cases, as well as criminal cases.⁸⁵

A leading case concerning the 14th Amendment is *Romer v Evans*. The case concerned measures at city level to prohibit discrimination on the basis of sexuality. An amendment to the state’s *Constitution* purported to repeal these provisions, and to generally prohibit any legislative, executive or judicial measures designed to protect homosexual people. That legislation was successfully challenged in the United States Supreme Court on equal protection grounds. In so doing, the court made explicit the links between the notion of the rule of law, and equal protection:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance ... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.⁸⁶

The court added that it will always insist, in equal protection cases, on knowing the relationship between the classification adopted and the object to be attained. In this case:

⁷⁹ Lord Bingham, n 16 at 75.

⁸⁰ *Ex Parte Hull* 312 US 546 (1941) (holding invalid a state law prohibiting prisoners from filing a habeas corpus petition without a finding by a “legal investigator” appointed by the parole board that the application was properly drawn); Herman S, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue” (1998) 77 *Oregon Law Review* 1229; Hinckley S, “Bounds and Beyond: A Need to Re-Evaluate the Right of Prisoner Access to the Courts” (1987) 22 *University of Richmond Law Review* 19; Ichida W, “Prisoners’ Rights – Access to Courts” (1970) 42 *University of Colorado Law Review* 275; Franklin J, “Three Strikes and You’re Out of Constitutional Rights? The Prison Litigation Reform Acts ‘Three Strikes’ Provision and its Effect on Indigents” (2000) 71 *University of Colorado Law Review* 191; Shults P, “Calling the Supreme Court: Prisoners’ Constitutional Right to Telephone Use” (2012) 92 *Boston University Law Review* 369; Lukens J, “The Prison Litigation Reform Act: Three Strikes and You’re Out of Court – It May be Effective, But is it Constitutional?” (1997) 70 *Temple Law Review* 471.

⁸¹ *Bounds v Smith* 430 US 817 (1977) at 828; *Lewis v Casey* 518 US 343 (1996); *Boddie v Connecticut* 401 US 371 (1971) at 374: “[P]erhaps no characteristic of an organised and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a legal system, social organisation and cohesion are virtually impossible, with the ability to seek regularised resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganised society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists calls the state of nature.”

⁸² *Bounds v Smith* 430 US 817 (1977) at 822.

⁸³ *Griffin v Illinois* 351 US 12 (1956); *Boddie v Connecticut* 401 US 371 (1971) at 381: “[T]here [is] no necessary connection between a litigant’s assets and the seriousness of his motives in bringing suit”; the right to access American courts extends to non-resident aliens: *Rasul v Bush* 542 US 466 (2004).

⁸⁴ *Johnson v Avery* 393 US 483 (1969).

⁸⁵ *Wolff et al v McDonnell* 418 US 539 (1974). Here the court found a state could not take away a prisoner’s “good time” privileges without according them due process, including advance notice of the claimed misbehaviour, a statement of the evidence relied upon, reasons for the disciplinary measures, and a chance for the prisoner to respond.

⁸⁶ *Romer v Evans* 517 US 620 (1996).

If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate government interest.⁸⁷

In a 1949 decision, *Railway Express Agency Inc v New York*, Jackson J stated:

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the *Constitution* knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution which might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.⁸⁸

Citing this passage, Lord Bingham stated that this was not merely a salutary doctrine but “a pillar of the rule of law itself”.⁸⁹

In summary, recognition of a right to equality under the law could be argued to be consistent with, and complementary to, the rule of law itself in protecting citizens against arbitrary exercises of power. It would be consistent with international human rights instruments, and has enjoyed support from a number of members of the High Court. While not a mandatory rule, the notion of equality would require governments proposing legislation that is discriminatory to justify the basis of the discrimination on the basis of identification of legitimate objectives, as a protection against arbitrary and capricious exercise of power. Some analogy is possible with another case considering prisoners’ constitutional rights, *Roach v Electoral Commissioner*. There a majority of the High Court invalidated legislation denying the right to vote to those who were incarcerated at a given time, on the basis that it infringed an implicit “right to vote” in the *Constitution*, derived from provisions such as ss 7 and 24 which contemplated a representative democratic form of government. A member of the majority, Gleeson CJ, concluded the legislation was invalid because it took away a fundamental right, and did so without a “substantial reason”.⁹⁰ In finding the legislation invalid, he noted that: “the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary”.⁹¹ This is an example of arbitrary interference with an implicit constitutional right being held constitutionally invalid.⁹²

If this doctrine were accepted and applied here, it would be difficult for the Queensland government to argue that a law requiring long-term prisoners, but not free persons and not short-term

⁸⁷ *Romer v Evans* 517 US 620 (1996) at 634.

⁸⁸ *Railway Express Agency Inc v New York* 336 US 106 (1949) at 112-113.

⁸⁹ Lord Bingham, n 16 at 75.

⁹⁰ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 (Gleeson CJ Gummow Kirby and Crennan JJ, Hayne and Heydon JJ dissenting).

⁹¹ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182.

⁹² It is true that the High Court did not say that any interference with the voting rights of prisoners was invalid, and that while finding invalid provisions denying the right to vote to all prisoners, it upheld previous provisions prohibiting those convicted of a serious offence and serving a term of imprisonment of three years or more. This does not defeat the argument made here, because of the way in which the right to vote was conceived by the majority judges. For instance, Gleeson CJ said it was constitutionally valid for the temporary suspension of the “right to participate by voting in the political life of the community” for someone who had temporarily been deprived of their connection with the community (at 179). It is considered to be more difficult to connect deprivation of a right to sue with deprivation of connection with the community. In other words, the right to vote has a community aspect missing in the case of a right to sue, making comparisons between the rights inappropriate. In other words, the fact the High Court found constitutionally valid deprivation of a right to vote for serious prisoners in *Roach* is not considered to mean that it would, or should, find deprivation of a right to sue for serious prisoners valid. In the joint reasons on this point, Gummow, Kirby and Crennan JJ stated that deprivation of a right to vote to serious prisoners serving at least three years in jail was valid, partly because it “reflects the primacy of the electoral cycle for which the *Constitution* itself provides in s 28” (at 204) (reasoning which, of course, is not at all relevant to consideration of the right of a prisoner sentenced to a three year plus jail term to sue), and other reasoning of the judges was confined to whether the restriction was consistent, compatible

prisoners, to obtain the written consent of a member of the Executive prior to commencing proceedings was consistent with the notion of equality or equal justice. It is much more likely to be consistent with an arbitrary exercise of power, made more egregious by the possible spectre of conflict of interest given, that many of the possible claims a prisoner could make would be against the government.⁹³

Direct implication of the right to access courts based on Chapter III

In this section the extent to which a person might be argued to have an implied right to access the courts, sourced in the requirements of Ch III rather than as an aspect of the rule of law, is considered.

First, something similar to this implication appears in the early High Court decision of *The Queen v Smithers; Ex parte Benson*, where two of the founding fathers recognised this right. Griffith CJ spoke of the:

[r]ight to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it, to seek its protection ... he has a right to free access to its seaports ... to the sub-treasurers, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it.⁹⁴

Clearly, a reference to a “right to come to the seat of government to assert any claim he may have upon that government” can be equated with a right to bring legal action in the courts, the courts being a dispute resolution facility provided by government to adjudicate upon the assertion of claims. Further, most prisons in Australia are run by governments. Griffith CJ referred to the right being independent of “the will of any state over whose soil he must pass”. While Griffith CJ was speaking more than a century ago and might have been referring to States not physically blocking the path of an individual to the “seat of government”, obviously this can be readily adapted to an era in which court documents are filed electronically. Just as States could not physically block the path of someone wishing to access the seat of government to assert any claim, surely the modern equivalent is that States could not block the ability of an individual to access the courts, by for instance banning appeals from State court decisions, requiring that would-be appellants have State government consent etc. The fact that two of the founding fathers advocated the drawing of implications from the written words of the *Constitution* is considered significant. From 1901 until 1920, other implications were being made by other members of the High Court, some of whom were also founding fathers, namely the implied immunities doctrine and the doctrine of reserved powers.⁹⁵

The notion of drawing implications from the *Constitution* suffered a setback with the *Engineers* decision in 1920 but by the 1940s⁹⁶ and 1950s⁹⁷ important constitutional implications were again being drawn. Dixon J addressed the issue expressly in numerous cases, stating that implications could

and proportionate to the system of representative government (at 204), reasoning which again is not relevant to a right to sue, possibly apart from the extent to which the right to sue is seen as implicit in the freedom of political communication. This article assumes that this is only of the possible bases of such a right.

⁹³ It is difficult to obtain a lot of data to quantify this. However, the *Prisoners' Legal Service (Qld) Annual Report of 2013-2014* discloses 202 cases in that year involving disputes over incarceration matters. This is the fifth largest area of prisoner (legal) complaint. In other states, separate data is not available on prisoner cases, and has been aggregated into general Legal Aid data. Recent case examples of prisoner complaints about prison management include *Patsalis v New South Wales* [2012] NSWSC 267; *ID, PF and DV v Director-General, Department of Juvenile Justice* [2008] NSWSC 966; *Sleiman v Commissioner of Corrective Services* [2009] NSWSC 304; *Abbott v Howden* [2006] QSC 186; *Gilders v Keen* [2010] QSC 110. On prisoner rights more generally, *Castles v Secretary to the Department of Justice* [2010] VSC 310. In the United Kingdom, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *Osborn v Parole Board* [2013] UKSC 61; *The Queen v Secretary of State for Justice* [2014] UKSC 66.

⁹⁴ *The Queen v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108; Barton J spoke of the right of “free citizens” to access the institutions (at 109-110). Quick and Garran, n 52 expressed similar views: “The people of the Commonwealth having a right to sue in the Federal courts in the prosecution of causes specified by the Constitution, a State could not obstruct the citizens of other States in suing its own citizens in the Federal courts”

⁹⁵ *D'Emden v Pedder* (1904) 1 CLR 9. In 1920, the High Court overturned the implied immunities and reserved powers doctrines: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁹⁶ *Melbourne Corporation v Commonwealth* (1947) 47 CLR 31.

and should be drawn from the text of the *Constitution*.⁹⁸ During the 1970s, it was primarily Murphy J (dissenting) in numerous cases who kept the notion of constitutional implications (particularly in the human rights area) near the surface. It was the first half of the 1990s where the High Court collectively decided that implications could and should be drawn from the *Constitution*, in the face of inevitable criticism from some that to do so invites “too much” judicial activism and subjectivity, is anti-democratic, is contrary to originalist interpretation etc.

The pivotal cases were *Australian Capital Television Pty Ltd v Commonwealth*⁹⁹ and *Nationwide News v Wills*¹⁰⁰ where the High Court stated that the *Constitution* contemplated a representative democracy, reflected in sections such as ss 7 and 24, and that certain implications could be drawn from the fact of Australian as a representative democracy, including an implied freedom of political communication. In relation to guidance as to the circumstances in which implications could or should be made, Mason CJ stated that a structural implication was possible where the term sought to be implied was “logically or practically necessary for the preservation of the integrity of that structure”.¹⁰¹ Mason CJ found that political discussion was an indispensable aspect of representative government.¹⁰² Subsequent High Court cases have emphasised the textual and structural basis of the implication.¹⁰³

More recently, as discussed above, members of the High Court have been prepared to imply from the representative government contemplated by ss 7 and 24 of the *Constitution* a constitutional right to vote.¹⁰⁴ The right is not absolute, but departures from it would need to be carefully justified as being proportionate means of achieving a legitimate end,¹⁰⁵ and not arbitrary in nature.¹⁰⁶ Interestingly for current purposes, the context was a law that disqualified from voting those who were serving a jail term for committing a criminal offence. A majority of the High Court invalidated the law due to the implied constitutional right to vote, and the disproportionality between the government’s claimed legitimate end, and the means chosen to achieve it. It did validate restrictions on the right to vote with respect to those imprisoned for serious offences, but the reasoning by which it did so is not considered applicable to the current context of the right to sue.

The argument is that the existence of courts, guaranteed at least to some extent by the provisions in Ch III of the *Constitution*, contemplates a right to access them. In the words of Mason CJ in *Australian Capital Television*, such an implication is “logically or practically necessary for the

⁹⁷ *The Queen v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

⁹⁸ “I do not see why we should be fearful about making implications”: *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; see also *Lamshed v Lake* (1945) 99 CLR 132 at 144; and commenting that claims that implications could not be drawn in interpreting the *Constitution*, Dixon J famously stated that “such a method of construction would defeat the intention of any instrument, but of all instruments, a written constitution seems the last to which it should be applied”: *West v Commissioner of Taxation* (1937) 56 CLR 657 at 681.

⁹⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹⁰⁰ *Nationwide News v Wills* (1992) 177 CLR 1.

¹⁰¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135; this test was adopted by Brennan CJ in *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169; see also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, tying the making of implications to the text and structure of the *Constitution*.

¹⁰² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138: “essential to sustain the system of representative government prescribed by the *Constitution*” (Brennan J at 149), “representative parliamentary democracy is a fundamental part of the *Constitution*” (Gaudron J at 210), “the words ‘directly chosen by the people’ in ss 7 and 24 of the *Constitution* have to be interpreted against the background of the institutions of representative government and responsible government to which the *Constitution* gives effect but does not specifically mention” (McHugh J at 230); *Nationwide News v Wills* (1992) 177 CLR 1 at 70, Deane and Toohey JJ stated that representative government “underlie(s) the *Constitution* and forms part of its structure”.

¹⁰³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

¹⁰⁴ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 (Gleeson CJ),

¹⁰⁵ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202 (Gummow Kirby and Crennan JJ).

¹⁰⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 (Gleeson CJ).

preservation of the integrity of that structure".¹⁰⁷ The court structure would not possess integrity if individuals were precluded from accessing it. Surely, if the High Court believes that representative government requires freedom of political communication in order to make it function effectively and as intended,¹⁰⁸ people need access to courts in order to make them work effectively and as intended. Griffith CJ's insistence that "people had the right to access the seat of government" was not confined to a right to travel to courts only to admire their physical beauty, or a right to travel only to find that their doors were (literally or metaphorically) closed to would-be litigants. If ss 7 and 24 dealing with representative government imply a right to participate by voting, including at least some of those who are incarcerated, Ch III of the *Constitution*, creating courts, implies a right to participate by litigating, including those who are incarcerated.

An analogy is also possible in another area in which the High Court has been prepared to make an implication in the *Constitution* – that of the relationship between the federal and State governments. In discussing the question of constitutional implications in *Nationwide News*, Deane and Toohey JJ referred to (a) the federal system, and (b) the separation of legislative, executive and judicial power as being sources of implications.¹⁰⁹ Specifically regarding the former, the High Court has found that federal laws that threaten the ability of the States to function effectively might fall foul of the relevant principle.¹¹⁰ As Kirk put it, "if the *Constitution* creates a structure or institution, it may be taken impliedly to protect that institution's existence and functioning".¹¹¹

There is not a great deal of literature on the theoretical question of the extent to which, and in what circumstances, implications can reasonably be drawn from the *Constitution*.¹¹² A notable exception is found in the work of Kirk. Kirk cited several criteria by which arguments for implications should be assessed: (a) the strength of the positive imperatives supporting the implication; (b) textual manifestation and guidance; (c) whether the implication can be precisely defined; (d) consequences; (e) the practical judicial administrability of the suggested implication; and (f) political centrality of the issues.¹¹³

According to these criteria, a strong argument can be made for the implication of a right to access the courts. First, regarding criterion (a) above, Kirk is more supportive of implications based on institutions that are contemplated by the *Constitution*, where the implication protects that institution's existence and ability to function.¹¹⁴ Here, an independent system of courts is contemplated by the *Constitution*, and a right to access those courts ensures that courts can carry out their designated

¹⁰⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135.

¹⁰⁸ This was how McHugh J expressed it in *Australian Capital Television*: "if the institutions of representative and responsible government are to operate effectively and as the *Constitution* intended" (at 231), the business of government had to be examinable and the subject of scrutiny, debate and accountability in elections.

¹⁰⁹ *Nationwide News v Wills* (1992) 177 CLR 1 at 70.

¹¹⁰ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 81 where Dixon J rejected the suggestion that legislative powers of one government could be used to deprive another government of powers or authority reposed in it or to restrict that government in their exercise; *Re Australian Education Union* (1996) 184 CLR 188 at 231 (laws which operate to destroy or curtail the continued existence of the States or their capacity to function as governments); *Austin v Commonwealth* (2003) 215 CLR 185 at 219 (Gleeson CJ), 249 (Gaudron Gummow and Hayne JJ) curtailment of ability of States to function as governments, 301 (Kirby J).

¹¹¹ Kirk, n 61 at 53.

¹¹² Goldsworthy J, "Implications in Language, Law and the Constitution" in Lindell G (ed) *Future Directions in Australian Constitutional Law* (1994); Sawyer G, "Implications and the Constitution – Part I" (1948) 4 *Res Judicatae* 15; Williams G, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *Federal Law Review* 223; Campbell T, "Democracy, Human Rights and Positive Law" (1994) 16 *Sydney Law Review* 195.

¹¹³ Kirk J, "Constitutional Implications I: Nature, Legitimacy, Classification, Examples" (2000) 24 *Melbourne University Law Review* 645 at 655-656. Regarding (f), this means that a court should be more wary where the suggested implication relates to issues seen to be highly "political" in nature.

¹¹⁴ Kirk J, n 113 at 656-657.

function. In an extreme case, if a parliament were to abolish the courts, or condition access to courts on parliamentary or executive approval, the courts could not effectively perform their constitutional function.

Regarding (b), ss 71-80 provide an adequate textual manifestation of the suggested implication. Regarding (c), the implication can be defined adequately in terms of an implied right to access the courts. As with most rights, this right would not be absolute, being subject to something like a “reasonable restriction” exception of the kind that is familiar to European human rights scholars, and inherent in the High Court of Australia’s approach in another implied freedom context, that relating to freedom of political communication. It is not thought, regarding (d), that the consequences of finding an implied right to access the courts would be particularly serious. The court would retain its inherent discretion to stay proceedings considered to be an abuse of process. Parliament would retain the ability to legislate to limit, to some extent, the jurisdiction of particular courts, or the types of matters that a particular court might be able to hear, or appeal points. The implication is certainly able to be administered by the judiciary, given their proven record in being able to apply the conceptually similar implied freedom of political communication. And the right of access to a court is not considered to be a sensitive political issue where judges should be wary to tread. It sits, or should sit, above the political fray.

The issue arose in a slightly different context in *APLA Ltd v Legal Services Commissioner (NSW)*, involving State laws restricting the extent to which legal advisers could advertise their services to the public, including restricting advertising with respect to claims under federal law. Two members of the High Court held the legislation to be constitutionally invalid. McHugh J (with whom Kirby J expressed agreement)¹¹⁵ found that communication between legal adviser and client with respect to federal law was indispensable to the exercise of judicial power of the Commonwealth and protected by Ch III.¹¹⁶ A law restricting communication between practitioners and clients, and thus between practitioners and judges interfered with an essential element of judicial processes under the *Constitution*, “without which proceedings in federal jurisdiction would become a mockery of the judicial system contemplated by Chapter III”.¹¹⁷

Comments by majority justices in *APLA* are also considered useful to the current argument. While Callinan J rejected the appellant’s claim, he agreed that access to courts was fundamental to democracy.¹¹⁸ Gleeson CJ and Heydon J stated that Ch III did not require that lawyers be able to advertise their services, because the effective exercise of judicial power did not require immunity of legal practitioners from restrictions on advertising.¹¹⁹ Gummow J agreed it was not part of the essential nature of a court or a necessary incident of the judicial process that lawyers advertise.¹²⁰ Hayne J stated that the challenged regulations focused on steps at least one step removed from seeking to engage judicial power.¹²¹

Surely, conditioning access to a Ch III court on written permission of a member of the executive likewise make a mockery of the independent judicature contemplated by Ch III, in the words of McHugh J (and Kirby J) in *APLA*. The courts cannot fulfil their essential constitutional task if a member of the Executive has the power to veto access to the courts. Gleeson CJ, Heydon and

¹¹⁵ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 441.

¹¹⁶ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 367.

¹¹⁷ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 368.

¹¹⁸ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 480; Callinan J then stated that access was not unlimited, pointing out other laws that restricted the right of an individual to access courts, including provisions requiring leave to appear, time limits, (statutory) causes of action that could be pursued, practice rules etc (at 480-481). Hayne J also rejected the appellant’s claim, but in so doing noted that the challenged restrictions “focus on steps that are at least one step removed from seeking to engage the judicial power of the Commonwealth” (at 455). This indicates he may have looked more warily on laws that directly restricted access to the judicial power of the Commonwealth.

¹¹⁹ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 352.

¹²⁰ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 411.

¹²¹ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 455.

Gummow JJ dismissed the Ch III challenge in *APLA* on the basis that the effective exercise of judicial power did not require lawyer advertising, it is more difficult to find that the effective exercise of judicial power does not require that a person be able to access the court. And in terms of Hayne J's "one step removed" language in *APLA*, conditioning an individual's ability to access courts on the permission of the executive is at least one step closer to the exercise of judicial power than were restrictions on lawyer advertising.

The argument then is that the *Constitution's* contemplation of a system of courts operating independently of the legislature and executive is suggestive of the fact that an individual has a right to access those courts. A court could not function if individuals or organisations could not approach it to resolve their disputes. While Parliament may be accepted to have some legislative power with respect to aspects of a court's operations, a requirement that a person first obtain the written permission of a member of the Executive before effectively being able to access the courts is argued to be a law that is effectively curtailing the ability of a court to function as it was intended to do so, as a means of resolving conflicts for all those who wish to avail themselves of it.

Right to access courts as part of the implied freedom of political communication

Another constitutional argument against conditioning the right of a prisoner to access the courts on written approval by a member of the Executive concerns the implied freedom of political communication. In a series of cases from the early 1990s, the High Court determined that implicit in the system of representative and democratic government contemplated by the *Constitution*, including ss 7 and 24, was a freedom of communication with respect to political matters.¹²² In the view of the court, this was essential in order that representative government could effectively function. The freedom is limited to the extent necessary to ensure that the system of representative government can operate effectively; hence, its concern with communication that is political in nature. The freedom is a negative one, in the sense of a protection against laws which would impair it, rather than being a positive source of rights. A distinction is made between laws directly interfering with freedom of political communication, and laws which do so indirectly. Laws of the former kind are more difficult to justify.¹²³ The freedom applies to State laws.¹²⁴

The court has settled on a two-stage test to determine constitutional challenges to legislation based on the implied freedom:¹²⁵

- (1) Does the law effectively burden freedom of communication about government or political matters, either in its terms, operation or effect;?
- (2) If so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

If the answer to the first question is yes and the answer to the second question is no, the law is constitutionally invalid. The article will now consider the application of these tests to the Queensland law.

It is argued that the first test is met. A law that conditions the right of access by a prisoner to a court on the written approval of the Public Trustee imposes a burden, at least in some cases, on political communication. It is expected that many legal claims that a prisoner might like to make would be against the government and/or prison authorities, employees or contractors. In the course of such a case, allegations might well be aired about aspects of the management of a prison, or the conduct of prison workers.

¹²² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹²³ *Hogan v Hinch* (2011) 243 CLR 506 at 555; *Wotton v Queensland* (2012) 246 CLR 1 at 16.

¹²⁴ *Unions NSW v NSW* (2013) 87 ALJR 227 at 233-234.

¹²⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, as slightly reworded by the High Court in *Coleman v Power* (2004) 220 CLR 1; Stone A, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668.

There is authority that comment regarding public officials is “political” for the purposes of the first limb. This occurred in a case where the court found the implied freedom applicable to communication regarding a state police officer:

The relevant subjects of political and governmental communication include the activities of the executive arm of government. For that purpose, the Executive includes Ministers, public servants and statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.¹²⁶

Any suggestion that the relevant limitation is not a burden on freedom of communication in the *Constitution* because it applies with respect to a prisoner housed in a State-run prison facility is not convincing. There is past authority that the freedom extends to discussion of State politics.¹²⁷ Members of the High Court have recognised in past cases the extent of co-operation between authorities at federal and State level. This has led them to the conclusion that comments about a State police officer attracted the freedom.¹²⁸ French CJ made a similar point in *Hogan v Hinch* about the extent of co-operation between federal and State authorities through COAG. He said this made it difficult to identify subjects not capable or potentially capable of discussion as matters of concern to the national government. That case involved sex offenders, and French CJ added:

The supervision and rehabilitation of serious sex offenders, for example, may raise questions about the adequacy of Commonwealth funding of state and territory services and co-operative arrangements between the Commonwealth and the States and Territories.¹²⁹

Accepting then that a law conditioning prisoner access to the courts on the permission of a member of the Executive is a law burdening freedom of political communication, the question becomes whether such a law is reasonably appropriate and adapted to the achievement of a legitimate end the fulfilment of which is compatible with representative and responsible government.

The impugned provision is silent as to the reasons for conditioning prisoner access to the courts on the written approval of the Public Trustee. It might be presumed that the legitimate end sought to be achieved by the government is to ensure that courts are not clogged up by an excessive number of complaints, some frivolous or vexatious, by those who are incarcerated.¹³⁰ This is the justification that governments elsewhere have used for such restrictions.¹³¹ No doubt some prisoners are arguably guilty of bringing frivolous or vexatious proceedings.

On the other hand, in the assessment of whether such a law is reasonably appropriate and adapted to attainment of that end, it should be noted that courts have inherent power to stay proceedings that are viewed as being frivolous or vexatious. It is not clear how this power is not sufficient to meet the

¹²⁶ *Coleman v Power* (2004) 220 CLR 1 at 45; see also 30, 78, 120, 113-114. In *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322 at 361, McHugh J indicated that legislative and executive acts or omissions concerned with the administration of justice were included within the implied freedom.

¹²⁷ *Unions NSW v NSW* (2013) 88 ALJR 227 at 233-234; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572: “[T]he discussion of matters at State, Territory or local level might bear on the choice that people have to make in federal elections or in voting to amend the *Constitution*, and on their evaluation of the performance of federal ministers and their departments. The existence of national political parties operating at federal, state, territory and local government levels, the financial dependence of state, territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.”

¹²⁸ *Coleman v Power* (2004) 220 CLR 1 at 78.

¹²⁹ *Hogan v Hinch* (2011) 243 CLR 506 at 543; recently in *Wotton v Queensland* (2012) 246 CLR 1 at 15 it was conceded by the Commonwealth that the exercise of executive powers in the context of Indigenous affairs would be subject to the constitutional freedom.

¹³⁰ Some other possible justifications appear in the judgment of McPherson JA (with whom White and Wilson JJ agreed) in *Tyler v Krause* [2002] QCA 295 at [12]. McPherson JA opined there was an aspect of “double punishment” in s 95.

¹³¹ Ayers J, “To Plead or Not to Plead: Does the Prison Litigation Reform Act’s Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?” (2005) 39 *University of California Davis Law Review* 247 at 248-249; Van Vort M, “Controlling and Deterring Frivolous in Forma Pauperis Complaints” (1987) 55(6) *Fordham Law Review* 1165 at 1170, fn 33. In *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [19], government claims that random prison cells were necessary in order to improve security, preventing crime and maintaining law and order did not outweigh a prisoner’s right to legal professional privilege.

possible legitimate end of weeding out baseless civil claims of prisoners, such as might justify this special rule. The fact that less drastic means are available to achieve any legitimate end is relevant to the balancing exercise contemplated by the second limb of the *Lange* test.

Further, the substance of the prisoner's claim might well involve complaints about how corrective services is functioning, something which is relevant to voters' assessment of a particular government;¹³² in other words the possibility of the legal claim represents an accountability mechanism which this law curtails. This is worsened by the fact that the office that decides whether or not to grant permission for the claim to proceed is itself a government office, creating a perception of a possible conflict of interest for that office, in that the public might perceive that rather than making decisions to allow or not allow possible civil actions based on the believed merits of the claim, the office might make its decision based on possible adverse consequences for the government if the claim were to proceed.¹³³ Other research has noted the positive consequences associated with a prisoner perceiving some control in relation to court processes affecting them, and reported feelings of frustration, anger and despair from those prisoners who perceive processes affecting them are unfair, potentially compromising their motivation and respect for authority.¹³⁴

The precedent of *Wotton v Queensland*¹³⁵ can be distinguished. That case involved sections of the *Corrective Services Act 2006* (Qld) preventing a person from interviewing a "prisoner" (defined to include an ex-prisoner), or obtain a written or recorded statement from a prisoner, without the approval of the chief executive, a member of the executive arm of government. Further, the Act gave the parole board power to grant parole upon conditions it believed were necessary to ensure good conduct and prevent re-offending. The parole board granted Wotton parole, partly on the condition that he not attend public meetings on Palm Island, and not speak with the media. He challenged both provisions on the basis of the implied freedom of political communication. The High Court dismissed both claims.

In essence, while the court acknowledged the restrictions impacted on political communication, it believed that both measures were reasonably appropriate and adapted to legitimate ends, namely community safety and crime prevention.¹³⁶

Here the situation is more complex. Unlike the legislation considered in *Wotton*, the legislation at issue here does not identify the end/s sought to be achieved by the restrictions, making the assessment more difficult.¹³⁷ While restrictions on communication might be justifiable in the case of a person with a conviction for participating in a violent riot, as in *Wotton*, they are much less justifiable when applied to *any* prisoners serving a significant jail sentence. This is particularly so when the supposed legitimate end of weeding out spurious civil claims¹³⁸ from disgruntled prisoners can already be

¹³² Similarly, Cunliffe E, "Open Justice: Concepts and Judicial Approaches" (2012) 40 *Federal Law Review* 385 at 389: "In safeguarding public access to information about courts and their activities, open justice provides a set of principles that facilitate other liberal democratic values – the right to know the law and to understand its application, the salutary effects of permitting citizens to observe and *evaluate the operation of government*, and a repugnance for arbitrary power" (emphasis added).

¹³³ Further, the Public Trustee is not required to provide reasons for their refusal to consent to the claim. While judicial review of their decision might be available, the practical ability of the reviewing authority to do so would be greatly constrained by the fact the decision maker likely has not provided reasons for their decision.

¹³⁴ Padfield N, *Understanding Recall 2011*, University of Cambridge Faculty of Law Research Paper No 2/2013 (2013); Atrill and Leill, "Offenders' Views on Risk Assessment" in Padfield N (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007); *Secretary of State for the Home Department v AF* (No 3) [2009] UKHL 28 at [63], all referred to with evident approval in the recent unanimous United Kingdom Supreme Court decision in *Osborn v Parole Board* [2013] UKSC 61 at [70], where the court concluded that "the potential implications for the prospects of rehabilitation, and ultimately for public safety, are evident".

¹³⁵ *Wotton v Queensland* (2012) 246 CLR 1.

¹³⁶ *Wotton v Queensland* (2012) 246 CLR 1 at 16, 33.

¹³⁷ The author has not been able to obtain a copy of 1978 Hansard to see whether any express justification was given for the inclusion of s 78 in the *Public Trustee Act*, and no Explanatory Memorandum is available.

¹³⁸ There is reference to this in the United States literature: Lukens refers to a "deluge of frivolous prisoner litigation": Lukens, n 80; Riewe claims the federal courts have been "inundated with prisoner litigation": Riewe J, "The Least Among Us:

managed by the court through its existing inherent powers. This is in contrast to *Wotton* where the purpose of the restrictions could not easily be achieved by resort to other measures.

Separation of powers and due process

Four arguments will be made in this part, all related to the broad constitutional requirement of the separation of powers. The first is that the characteristics of a court's institutional integrity that have already been identified in the case law presuppose the right to access a court. The second is that an essential feature of judicial power is the ability of a court to resolve disputes, including disputes involving questions of the limits of government power and legality of government action. The third is that courts' power to prevent abuse of process is guaranteed by Ch III and cannot be usurped by Parliament or the Executive. The fourth is that fairness is also a defining characteristic of a judicial proceeding, which cannot be effectively gutted by executive fiat.

It is axiomatic that the *Constitution* contemplates a separation of powers between the judicial and the non-judicial arms of government. As a general rule, it is problematic when powers that are judicial in nature are exercised by non-judicial bodies, and vice versa.¹³⁹ Laws will infringe the requirements of Ch III of the *Constitution* where they offend the institutional integrity of a Ch III court, for example by conferring powers upon it that are incompatible with its role as a court, by undermining its independence and impartiality, or by requiring it to adopt processes that are incompatible with traditional characteristics of a judicial process.¹⁴⁰ The High Court has found that a strict separation is necessary so that the checks and balances contemplated by a separation of governmental power among the legislature, Executive and judiciary can work as intended. The current position is that the principle of separation of powers operates in a narrower way at state level than it would at federal level, although the court has acknowledged the integrated nature of the Australian court hierarchy, and that state courts must remain suitable repositories of federal judicial power, and that State courts must continue to meet the definition of a "court" and conduct itself as a "court" in substance, not just form.¹⁴¹

While the High Court has been somewhat reluctant to articulate just what the characteristics of a "judicial process" are,¹⁴² it is clear that an independent and impartial tribunal will be required. So too will a generally open court,¹⁴³ application of the rules of natural justice,¹⁴⁴ fair process,¹⁴⁵ and a fair application of the law to facts that have been properly ascertained.¹⁴⁶ It considers specific allegations.¹⁴⁷ A court provides reasons in public for its decisions.¹⁴⁸ It has power to review the

Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995" (1997) 47 *Duke Law Journal* 117; De Wolf G, "Protecting the Courts from the Barrage of Frivolous Prisoner Litigation: A Look at Judicial Remedies and Ohio's Proposed Legislative Remedy" (1996) 57 *Ohio State Law Journal* 257: "There has been an explosion of civil rights lawsuits brought by prisoners over the past three decades. From just a few hundred in the 1960s to more than 33 000, prisoner lawsuits accounted for fifteen percent of all civil suits filed in the federal courts in 1993 ... the truth is that most filings by prisoners are frivolous." While this may be the justification for the s 95 limit, other scholars have pointed out that data on frivolous or vexatious litigation rates in Australia is not available: Kirby N, "When Rights Cause Injustice: A Critique of the Vexatious Proceedings Act 2008 (NSW)" (2009) 31 *Sydney Law Review* 163 at 175.

¹³⁹ *The Queen v Kirby: Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁴⁰ *Assistant Commissioner Condon v Pompano* (2013) 87 ALJR 458.

¹⁴¹ Ratnapala S and Crowe J, "Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power" (2012) 36 *Melbourne University Law Review* 175 at 178.

¹⁴² *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 76; the standard definition is that it is the power to decide controversies between subjects, or between itself and its subjects, by a tribunal with power to give and binding and authoritative decision: *Huddart Parker Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

¹⁴³ *Russell v Russell* (1976) 134 CLR 495 at 520, 532.

¹⁴⁴ *Bass v Permanent Trustee Ltd* (1999) 198 CLR 334 at 359.

¹⁴⁵ *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326, 353, 362.

¹⁴⁶ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359.

¹⁴⁷ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

¹⁴⁸ *Wainohu v New South Wales* (2011) 243 CLR 181.

decision of a lower court for jurisdictional error.¹⁴⁹ A common law court adopts an adversarial process.¹⁵⁰ The historical characteristics of a court will be important.¹⁵¹ Justice must be done, and seen to be done.¹⁵²

A court's institutional integrity presupposes the ability of individuals to access it

It is difficult to see how the “checks and balances” contemplated in the *Constitution*, and reflected in the separation of judicial from non-judicial power, can work effectively when it is essentially for a member of the Executive to determine whether certain prisoners can access the judiciary to have claims aired. The protections that the requirement of “institutional integrity” create for due process, including the requirement of open and transparent courts, natural justice, independent and impartial decision-makers, and the requirement for reasoned decisions, pre-suppose the right of an individual to actually access a court. Fiercely independent judges, open courts and strong guarantees of procedural fairness would, after all, count for nought if the right of an individual to actually access the court could be removed or substantially restricted by the Parliament. A pyrrhic victory, and a triumph of form over substance, if one was given the keys to a “Rolls Royce” court system, but the government could take the tyres off before you got to go for a ride. Chapter III clearly contemplates a right to access courts. A court's institutional integrity would be gutted if Parliament or the Executive could operate arbitrarily or capriciously to deny access to individuals or organisations not favoured by them, an unexpected and unwelcome return to a pre-glorious revolution era of arbitrary, unbridled power.

The courts' essential constitutional role in resolving disputes and determining the legality of executive power and the limits of governmental power

Upon the judicature rest(s) the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised.¹⁵³

In *Kable v DPP (NSW)*¹⁵⁴ McHugh J denied that the State Parliament had the power to “abolish its Supreme Courts or to leave its people without the *protection* of a judicial system” due to the requirements of Ch III. He claimed that abolition of appeal rights to a state supreme court would breach Ch III requirements.¹⁵⁵ Gaudron J cited her earlier comments in *Re Nolan; Ex Parte Young* that a central purpose of a judicial process was to *protect* an individual from arbitrary abrogation of rights by ensuring that rights were not interfered with other than in consequence of the fair and impartial application of the relevant law to properly ascertained facts.¹⁵⁶

Similar sentiments appear in *Plaintiff S157/2002* where Gleeson CJ stated:

The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the *Constitution*, or of any law made under the *Constitution*.¹⁵⁷

¹⁴⁹ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

¹⁵⁰ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 76, 136, 150.

¹⁵¹ *Thomas v Mowbray* (2007) 233 CLR 307 at 329, 356; *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at 580-581.

¹⁵² *Grollo v Palmer* (1995) 184 CLR 348 at 394; see also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 205.

¹⁵³ *The Queen v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276.

¹⁵⁴ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 111 (emphasis added).

¹⁵⁵ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 114; see also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 275 where McHugh J said the “basic purpose of the civil court is to protect individual rights”.

¹⁵⁶ *Re Nolan; Ex Parte Young* (1991) 172 CLR 460 at 107.

¹⁵⁷ *Plaintiff S157/2002* (2003) 211 CLR 476 at 483. There the High Court had constitutional concerns with a legislative attempt to remove the ability of a court to hear an appeal from a ministerial immigration decision. The court resolved the issue by reading down the provision so that it did not apply to decisions tainted by jurisdictional error, as these were not “decisions”. See

Applying these remarks, a State law that purported to remove the ability of a State court to hear claims by a prisoner that there had been a breach of, for example, their obligations under corrective services legislation would be invalid. It is argued here that state corrective services legislation is a “law made under the *Constitution*” since states ultimately derive their ability to pass legislation from s 107 of the Commonwealth *Constitution*.¹⁵⁸

Gleeson CJ continued that:

Legislation which confers power or jurisdiction on officials or tribunals, or imposes public duties, or enacts laws which govern official conduct, and which, in addition, deprives, or purports to deprive, courts of jurisdiction to control excess of power or jurisdiction or to compel performance of duties or to restrain breaches of the law, involves a potential inconsistency. A provision that defines and limits the jurisdiction of a tribunal may be difficult to reconcile with a provision that states there is no legal sanction for excess of jurisdiction.¹⁵⁹

This passage suggests Gleeson CJ would, at the very least, look cautiously at legislation which could in effect deny the ability of a prisoner the right to complain about a “breach of the law”, such phrase being read broadly, including possible breaches of the government’s obligations under the *Corrective Services Act 2006* (Qld) and/or general duties of care at common law. Denial that a prisoner has the right to air claims in court is arguably inconsistent with the fact that prison authorities are constrained by law, including statute and common law, in the exercise of their statutory functions, and that it is the role of the court to enforce those limitations.¹⁶⁰

The joint reasons expressed similar sentiment:

The centrality, and protective purpose, of the jurisdiction of this Court ... places significant barriers in the way of legislative attempts (by privative clause or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.¹⁶¹

The High Court has clarified that the trial of an action for a civil wrong is an “inalienable exercise of judicial power”.¹⁶² A member of the executive is given power potentially to render this power nugatory by blocking access to the court.

The courts’ inherent (and express) jurisdiction to avoid abuse of process

Legislation in most States confers further express powers on courts to deal with vexatious litigants.¹⁶³ This is relevant for two reasons. First, it undercuts any argument that provisions of the likes of s 95 of the *Public Trustee Act 1978* (Qld) are needed to weed out spurious claims that are said to be clogging

also Brennan J in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70: “[J]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.”

¹⁵⁸ *The Queen v Phillips* (1970) 125 CLR 93 at 116; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 431.

¹⁵⁹ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 484.

¹⁶⁰ He also referred to a presumption that legislation does not intend to deprive citizens of access to the courts (492), citing Dawson and Gaudron JJ in *Public Service Association (SA) v Federated Clerks’ Union* (1991) 173 CLR 132 at 160 to like effect.

¹⁶¹ *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 514.

¹⁶² *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562: “[T]here are some matters which pertain exclusively to the judicial power. For example, the determination of criminal guilt and the trial of actions for breach of contract and for civil wrongs are inalienable exercises of judicial power.”

¹⁶³ *Vexatious Proceedings Act 2008* (NSW), s 8(7); *Supreme Court Act 1986* (Vic), s 21(2); *Vexatious Proceedings Act 2005* (Qld), s 6(2); *Supreme Court Act 1935* (SA), s 39(1); *Vexatious Proceedings Act 2011* (Tas), s 6(2); *Vexatious Proceedings Restriction Act 2002* (WA), s 4(1); *Vexatious Proceedings Act* (NT), s 7(3); *Judiciary Act 1903* (Cth), s 77RN(2); *Federal Court of Australia Act 1976* (Cth), s 37AO(2).

the courts or resulting in inefficient use of resources. Secondly, it reflects the idea that the decision regarding whether or not to allow a particular claim to proceed or not is one exercised by a court, not parliament or a member of the executive.¹⁶⁴

The court has inherent discretion to stay proceedings that would otherwise be an abuse of process.¹⁶⁵ Members of the High Court in *Williams v Spautz* explained this discretion:

The public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion in public confidence by reasons of concern that the court's processes may lend themselves to oppression and injustice.¹⁶⁶

This has been recognised as a power inherently within the judicial realm by overseas superior courts:

The essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.¹⁶⁷

This creates potential Ch III difficulties. Members of the High Court have specifically left open the question of whether the inherent power to prevent abuse of process is an attribute of the judicial power of the Commonwealth contemplated by Ch III.¹⁶⁸ The issue was canvassed by some members of the High Court in *Nicholas v The Queen*,¹⁶⁹ and in *Dietrich v The Queen*.¹⁷⁰ Members of the High Court recently considered the issue again in *Assistant Commissioner Condon v Pompano Pty Ltd*. While French CJ expressly stated the point had not been argued in the case, he quoted a lecture of Master Jacob that in turn noted the essential character of a superior court to prevent its authority from being obstructed and abused; that it was intrinsic in a superior court, its life blood, essence and immanent attribute.¹⁷¹ This might suggest that, if pressed, French CJ would find that the court's inherent (implied) powers were protected from interference by Ch III. Gageler J linked institutional integrity (a Ch III concept) to the court's inherent power to avoid abuse of process.¹⁷²

There is some support from academic commentators for the proposition that Ch III protects the inherent jurisdiction of courts from interference. Beck recently noted:

The supervisory jurisdiction of a State Supreme Court is often described as being located within a particular category: the court's inherent jurisdiction. The High Court has considered that the State Supreme Courts, as superior courts of record of general jurisdiction, possess inherent jurisdiction. If judicial review is a defining characteristic of a State Supreme Court and if judicial review is one part of

¹⁶⁴ Mason K, "The Inherent Jurisdiction of a Court" (1983) 57 ALJ 449 at 454.

¹⁶⁵ *Williams v Spautz* (1992) 174 CLR 509 at 518. In that case, the court identified two policy considerations relating to the court's inherent jurisdiction here – that the public interest in the administration of justice require; *Vexatious Proceedings Act 2008* (NSW), s 7; *Vexatious Proceedings Act 2005* (Qld), s 4; *Vexatious Proceedings Act 2011* (Tas), s 4; *Vexatious Proceedings Act* (NT), s 6; *Judiciary Act 1903* (Cth), s 77RM; *Federal Court of Australia Act 1976* (Cth), s 37AN. For further discussion see Kirby, n 139.

¹⁶⁶ *Williams v Spautz* (1992) 174 CLR 509 at 520.

¹⁶⁷ *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at 749-750, this quote was based on a lecture by Master Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 27, which was cited with apparent approval by French CJ in *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7 at [41]. "[T]he protection of its own functions and the preservation of the purity of its own temple belongs only to the court": *Sorrells v United States* 287 US 435 (1932) at 457 (quoted with approval by Mason CJ Deane and Dawson JJ in *Ridgeway v The Queen* (1995) 184 CLR 19 at 34).

¹⁶⁸ *Batistatos v RTA (NSW)* (2006) 226 CLR 256 at 266 (Gleeson CJ Gummow Hayne and Crennan JJ); other judges in the case did not discuss the issue.

¹⁶⁹ At least Kirby J apparently agrees that the court's inherent (implied) jurisdiction is protected by Ch III: *Batistatos v RTA (NSW)* (2006) 226 CLR 256 at 259; Hayne J specifically left the question open (at 276).

¹⁷⁰ *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362-364.

¹⁷¹ *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7 at [41].

¹⁷² *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7 at [187]; the joint reasons did not canvass the issue.

what is often called “inherent jurisdiction”, then adopting inductive reasoning, it might be the case that certain other, perhaps even all, parts of what is often described as inherent jurisdiction are also defining characteristics of a State Supreme Court.¹⁷³

It is true that legislation does to some extent determine the scope of the jurisdiction of some courts. However, in *Wainohu v New South Wales*,¹⁷⁴ French CJ and Kiefel J stated that the *Kable* principle necessitated that State legislatures could not validly enact legislation “affecting an impermissible executive intrusion into the processes or decisions of a court”. It can be argued that while Parliament has power to set out general rules regarding a court’s jurisdiction, in terms of which types of subject matter it will hear, what types of factors are relevant to the court’s decision, and the types of orders it might make once it has made a decision, the decision as to whether a particular action by a plaintiff proceeds, or does not proceed, is a matter for the court, and not the Parliament or Executive.¹⁷⁵

The court has drawn a distinction between an interference with substantive rights at issue in a proceeding, and interference with the judicial process itself, with the latter being invalid and the former valid.¹⁷⁶ The provision here (s 95 of the *Public Trustee Act 1978* (Qld)) constitutes an interference with the judicial process itself, by precluding certain individuals from being able to access the judicial process.

Members of the High Court in *Nicholas v The Queen* considered these issues in the context of a law stating that when a court considered whether evidence should be admitted in a criminal trial, the fact it was obtained by unlawful means should be disregarded. A majority of the court (McHugh and Kirby JJ dissenting), validated the legislation. In so doing, members made comments considered apposite to current issues. Toohey J stated that the doctrine of separation of powers (reflected in Ch III) existed to protect an independent judiciary and to safeguard litigants’ rights to have claims decided before judges.¹⁷⁷ One of the reasons he decided the legislation there was valid was that the challenged provision did not determine whether a charge would succeed or fail.¹⁷⁸ Gaudron J stated that a court could not be required or authorised to proceed in a manner that would render its proceedings inefficacious, and that Ch III required among other things that an independent decision makes resolved the dispute.¹⁷⁹

McHugh J, dissenting in the result, stated that Ch III prohibited a “usurpation” of judicial power,¹⁸⁰ and that this would occur when the legislator had made a “legislative judgment” against

¹⁷³ Beck L, “What is a ‘Supreme Court of a State?’” (2012) 34 *Sydney Law Review* 295 at 304-305. See also Lacey W, “Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution” (2003) 31 *Federal Law Review* 57 at 86; Wheeler (1997), n 62 at 266.

¹⁷⁴ *Wainohu v New South Wales* (2011) 243 CLR 181 at 210.

¹⁷⁵ In a slightly different context, members of the High Court recently noted that “all courts, superior or inferior, have the authority to decide whether a claim that is made in the court is within its jurisdiction. That power can be described as a court having jurisdiction to decide its own jurisdiction”: *NSW v Kable* [2013] HCA 26 at [13]. In *Gilding v Eyre* (1861) 10 CB (NS) at p 604; 142 ER at p 589, Willes J stated that “it is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination”.

¹⁷⁶ *Australian Building Construction Employees’ and Labourers’ Federation v Commonwealth* (1986) 161 CLR 88 at 96; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 563.

¹⁷⁷ *Nicholas v The Queen* (1998) 193 CLR 173 at 200-201, quoting *Commodity Futures Trading Commission v Schor* 478 US 833 (1986) at 848.

¹⁷⁸ *Nicholas v The Queen* (1998) 193 CLR 173 at 202.

¹⁷⁹ *Nicholas v The Queen* (1998) 193 CLR 173 at 208.

¹⁸⁰ Gummow J agreed that this was constitutionally impermissible (232), as did Kirby J (254-255). See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37 (Brennan Deane and Dawson JJ): “A law of the Parliament which purports to direct ... that no court ... shall order the release from custody of a person whom the Executive Government has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this court. Such a law manifestly exceeds the legislative powers of the Commonwealth ... even to the extent that (the section)

particular individuals.¹⁸¹ He agreed with comments of Professor Lane that usurpation would occur where there had been legislative interference in specific proceedings, the interference affected pending litigation, and the interference affected the judicial process itself.¹⁸² McHugh J specifically addressed the question of the extent to which a legislator could interfere with the court's inherent or implied discretion to prevent an abuse of process:

Consistently with maintaining the independence of the federal judiciary which Chapter III of the *Constitution* guarantees to the nation, the federal courts cannot transfer to the Parliament of the Commonwealth the power or responsibility for defining what is an abuse of their process. Parliament ... cannot prevent a litigant from invoking the jurisdiction of this Court by declaring conduct to be an abuse of process when it is not.¹⁸³

Kirby J expressed similar sentiments.¹⁸⁴

Fairness

Members of the High Court have indicated that "fairness" is a defining feature of a judicial process. Recent examples of this appear in *Wainohu*, *Totani*, *International Finance Trust*, and *Pompano*.¹⁸⁵ A majority of the High Court in *Dietrich v The Queen* stated that the right of an accused to a fair trial was fundamental to Australia's criminal justice system. Some of the majority justices specifically referred to Art 6 of the European Convention, and Art 14 of the ICCPR, as defining some of the attributes of a fair trial.¹⁸⁶ This is surely close to an annexation of the rights referred to in these documents to Australian law. Some justices in *Dietrich* stated that the right to a fair trial had a constitutional dimension.¹⁸⁷ This is important because Art 6(1) has been interpreted to include the right to access a court. In other words, to the extent that "fairness" is essential to the institutional integrity of a court, fairness might be argued to include a right to access the court, given the European case law, and express reference to and evident approval of Art 6(1) by the High Court as reflecting some of the requirements of fair process in Australia.

The application of Art 6(1) rights in the context of a prisoner was raised in *Golder v United Kingdom*, a case highly pertinent to current discussions. Prisoner Golder was accused by a prison officer of assault. He was not charged with an offence, but his personal record was amended to reflect the allegation. Golder wished to commence a defamation action against the prison officer making the allegation. Relevant prison rules at the time required a prisoner wishing to commence a civil action to obtain the consent of the Home Secretary in order to consult a lawyer about a possible legal action.

is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is inconsistent with Chapter III ... It is (impermissible) for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction"; see also at 53 (Gaudron J).

¹⁸¹ *Nicholas v The Queen* (1998) 193 CLR 173 at 220-221.

¹⁸² These comments were made in interpreting the Privy Council decision in *Liyanage v The Queen* [1967] 1 AC 259.

¹⁸³ *Nicholas v The Queen* (1998) 193 CLR 173 at 226. The court's inherent jurisdiction may be circumscribed by their jurisdiction as at the commencement of federation. Recently, Basten JA (with whom Allsop P and Sackville AJA agreed) stated that "if under the common law as at 1901 attainder prevented a person under sentence for a felony from bringing proceeding in any court, such limitation would have to be reflected in any description of the inherent characteristics of a State Supreme Court": *Patsalis v New South Wales* [2012] NSWCA 307 at [24].

¹⁸⁴ *Nicholas v The Queen* (1998) 193 CLR 173 at 254: "An equal offence against the principle of separation would be an attempt by the Parliament to prejudge an issue which is before a court affecting a particular individual and which required that court to exercise its functions in accordance with such pre-judgment."

¹⁸⁵ *Wainohu v New South Wales* (2011) 243 CLR 181, where French CJ and Kiefel J said that procedural fairness was a defining characteristic of a court. Gummow, Hayne, Crennan and Bell JJ agreed that confidence in judicial process required judges to use fair procedures (at 225-226); see also *South Australia v Totani* (2010) 242 CLR 1 at 43 where French CJ said fairness was a defining characteristic of a court; *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 at 354; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 497 (Gageler J).

¹⁸⁶ *Dietrich v The Queen* (1992) 177 CLR 292 at 300.

¹⁸⁷ *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362.

Golder did so; the Home Secretary refused on the basis Golder did not have a strong claim. Golder then argued to the European Court that his rights under Art 6(1) of the European Convention had been infringed.

A majority of the court agreed with Golder, finding that he had been denied his right to access a court. The majority noted that the preamble to the Convention referred to the rule of law and its connection with the rights enshrined in the Convention:

One reason why the signatory governments decided to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration (of Human Rights) was their profound belief in the rule of law ... And in civil matters one can scarcely conceive of the rule of law without their being a possibility of having access to the courts.¹⁸⁸

The majority interpreted the right to a fair hearing to include a right to access the court, rejecting the argument of the government that the right to a fair hearing applied only to proceedings that had commenced, not to the question of who could commence proceedings. The majority concluded that it was inconceivable that Art 6(1) would describe in detail the procedural guarantees to which an applicant was entitled, but not protect that individual's right to access the court in the first place.¹⁸⁹

The court rejected the government's argument that the requirement of the Home Secretary's consent before a prisoner's claim could be brought was consistent with convention requirements:

It was not for the Home Secretary himself to appraise the prospects of the action contemplated: it was for an independent and impartial court to rule of any claim that might be brought. In declining to order the leave which had been requested (to commence an action), the Home Secretary failed to respect ... the right to go before a court as guaranteed by Article 6 para1.¹⁹⁰

As with the vast majority of Convention rights, the court has determined that the right to access a court is not absolute. Contracting states enjoy a margin of appreciation in regulating the right, provided the very essence of the right is not impaired. Limits would need to relate to a legitimate aim, and reflect a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁹¹

In summary for part five, it is argued that features of a court's institutional integrity implicitly require that a person have a (substantive) right to access the court. It cannot seriously be maintained that individuals have a right to expect natural justice during a hearing, impartial judges during a hearing, and an open court during the hearing, if Parliament could simply remove the right to actually bring an action in such a forum. Such a power would render all of the features of a court's institutional integrity essentially meaningless. Further, it is a central feature of the role of a court to determine disputes, often disputes concerning the extent to which government has acted lawfully. This role

¹⁸⁸ *Golder v United Kingdom* (1975) 1 EHRR 524 at [34].

¹⁸⁹ *Golder v United Kingdom* (1975) 1 EHRR 524 at [35]; Triggs, n 23.

¹⁹⁰ *Golder v United Kingdom* (1975) 1 EHRR 524 at [40]; the tenor of this judgment was replicated in subsequent British court decisions. For example, in *Raymond v Honey* [1983] 1 AC 1, the House of Lords declared that a convicted prisoner retained all civil rights not taken away expressly or by necessary implication. It referred to the "basic" right of a prisoner to "unimpeded access" to a court; similar sentiments were expressed in *Re Secretary of State for the Home Department Ex Parte Leech No 2* [1993] EWCA Civ 12; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [5], [31]. Regarding the "not taken away expressly or by necessary implication", the court was obviously talking at a time when the United Kingdom had not enshrined the *European Convention on Human Rights*, including the right to a fair hearing, in the *Human Rights Act 1998* (UK), and was applying a notion of parliamentary sovereignty which is not directly applicable in Australia: *Lange v Australian Broadcasting Authority* (1997) 189 CLR 520 at 564: "[T]he *Constitution* displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature."

¹⁹¹ Examples have included a requirement to pay court fees, which could effectively block access to court by an indigent prisoner. Here the size of the fee, and the stage of proceedings at which the fee is imposed, will be relevant. Restrictions unrelated to the plaintiff's prospects of success will face strict scrutiny (*Shishkov v Russia* [2014] ECHR 188 at [109]-[112], *Julin v Estonia* [2012] ECHR 889 at [157]-[158]). A requirement that actions of a certain kind not be brought by the person aggrieved but by another body on their behalf will likely infringe the right of access to a court: *Philis v Greece* [1991] ECHR 38. Pure assumptions that certain classes of claimant are vexatious litigants are unlikely to be supported (*Seal v United Kingdom* [2010] ECHR 1976 at [77]). Submitted claims are presumed to be genuine and serious: *Zelcer v Poland* [2011] ECHR 1248. The right of a prisoner to make personal submissions is considered significant: *Pashayev v Azerbaijan* [2012] ECHR 342 at [65].

cannot, consistently with Ch III requirements, be effectively gutted by executive veto. Further, courts have an inherent power to prevent abuse of process, which is protected by Ch III. The inherent power to prevent abuse of process includes the ability to not allow spurious claims to proceed, the evident objective of provisions restricting prisoner access to courts. It is a breach of Ch III requirements for the executive to arrogate this power to itself. Finally, Australian courts have found that fairness is an essential characteristic of a judicial process. Australian courts have expressly referred to Art 6(1) of the European Convention in determining what fairness requires. The European Court has found that fairness includes a right to access courts.

For these reasons it can be argued that s 95 of the *Public Trustee Act* is offensive to the requirements of Ch III of the *Constitution*.¹⁹²

CONCLUSION

This article has noted continued vestiges of legal discrimination against prisoners, namely restrictions on their right to access courts, most egregiously subjecting that right to the consent of a member of the Executive. Such laws raise fundamental questions regarding the extent to which individuals do, and should, have a right to access courts to have claims heard by an independent decision-maker. It is more difficult to challenge such laws in the Australian context, in the absence of an express bill of rights. This article has concluded that the rule of law requires that individuals, including prisoners, have a right to have claims aired in court, given that rule's concern with equal treatment of individuals and of access to courts as the essential mechanism by which we guarantee observance of the limits of government power. The article has also considered the possibility of a constitutional right to equality, or implied right to access courts, as standalone rights. In the alternative, an argument can be made that a restriction on access to court infringes the implied freedom of political communication.

There are also substantial difficulties with provisions restricting access to courts in the manner contemplated by s 95 of the *Public Trustee Act 1978* (Qld) in terms of the separation of powers principle. The Ch III promise of the institutional integrity of courts pre-supposes that individuals have a practical right to access them, requires the continued ability of courts to resolve disputes and determine the proper boundaries of government power, and ensures that the inherent power of a court to avoid abuse of process stays with a court, rather than being usurped by a non-judicial body. The requirement of fairness of process includes a right to access that process.

¹⁹² "A law that removes a key characteristic of the judicial process may be invalid, particularly if that characteristic can be characterised as supporting the independence and impartiality of the judicial institution. A law that removes the ability of a party to plead its case, or alternatively, a law which privileges one party over the other may meet such criteria": Bateman W, "Procedural Due Process Under the Australian Constitution" (2009) 31 *Sydney Law Review* 411 at 440. Bateman suggested a "stringent" approach to Ch III questions concerning any actions to which a government is a party. Many actions brought by prisoners would be against the government.