# Prisoners' right to access legal resources

**JA Information Paper Draft 020217**

People when they are held in custody without the normal citizen's access to information and communication don't lose their right to defend themselves. There is a special obligation on the authority holding them, to ensure their right to defend their interests are properly supported. Here are some leading cases laying out those principles.

*RIGHT TO AN ADJOURNMENT:*

***Dietrich v The Queen*** **[1992] HCA 57: "**In the absence of exceptional circumstances, the judge should, on application, adjourn, postpone or stay a trial where an indigent accused person charged with a serious offence is, through no fault of their own, unable to obtain legal representation."

COMMENTARY: The court has an obligation to adjourn court proceedings if Mr Liristis has not obtained legal representation. However, the court may neglect to adjourn if Mr Liristis has not taken adequate steps to seek out legal representation. Mr Liristis must demonstrate that he has done everything in his power to prepare himself for court. If Mr Liristis has not applied for legal aid, the prosecution may use this fact against Mr Liristis.

*RIGHT TO BE RELEASED ON BAIL:*

***Trinh v The Queen*** **[2016] NSWCCA 110, and** ***Shalala v R*** **[2012] NSWSC 351:**
If a defendant is unable to gain access to information technology (e.g. a laptop or personal computer) for the purposes of reviewing prosecution evidence and preparing his or her defence case, a court is obligated to take this into account when determining whether or not a defendant should be released on bail.

***Miles v R*** **[2012] NSWCA 88:**
**Facts:**

- Defendant appealing against conviction for sexual assault
- Defendant seeking to be released on bail as he has been prevented from adequately preparing his case by Corrective Services while in prison (he had limited access to legal resources)

**Justice Hulme:** *"However, what I have seen does tend to reinforce the impression that I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in."*

*"I merely wish to record that what I have seen is a cause for concern and I would urge the Department to ensure that the applicant is provided with sufficient time and sufficient facilities in which to prepare his case."*

**Hoeben JA:** *"I also join in Justice Hulme's recommendation to the Department of Corrective Services that it provide reasonable assistance and facilities to allow the applicant to prepare his appeal."*

COMMENTARY: Please note that the above judgments are bail application cases. They are predominately concerned with the application of the Bail Act 2013 (NSW). Therefore, there is no inherent right for a defendant to be released on bail if he is unable to gain access to a computer to prepare his or her case. Rather, this is just one factor that must be considered in relation to many other matters set out in section 18(1) of the Bail Act when a court decides whether a defendant should be released on bail.

*CIVIL RIGHT OF ACCESS TO THE COURTS:*

***Patsalis v State of New South Wales* [2012] NSWCA 307**

Facts of this case:

- Michael Patsalis was sentenced for murder. Patsalis sought leave from the Supreme Court to sue the State of New South Wales in negligence for preventing him from accessing his legal documents while Mr Pastalis was in prison.

**Basten JA judgment:** In paragraphs 51-53 of the written judgment, Basten JA noted that Mr Pastalis' right to access his legal documentation is an extension of his more fundamental right of access to the courts. It has been consistently held in Australia that access to the courts is an inherent common law right and an essential component of the Rule of Law. Chief Justice Gibbs, in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, observed that:
"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." It follows that access to legal documentation should be protected to the same extent that an individual's access to the courts is, given that receiving and comprehending material relevant to one's case is an important precondition to participating effectively in court.

COMMENTARY: Please note that *Pastalis v State of New South Wales* turns on the Supreme Court's interpretation of section 4 of the Felons (Civil Proceedings) Act 1981 (NSW). Basten JA is not explicitly analysing whether Pastalis has a civil right to access his legal documents.

*PROCEDURAL FAIRNESS/NATURAL JUSTICE:*

***Kioa and Ors v West and Anor* [1988] HCA 81**
Mr Tony Liristis may be able to refer the court to Mason J's definition of procedural fairness in *Kioa and Ors v West and Anor* [1988] HCA 81: "It is a fundamental rule of natural justice that when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it."
COMMENTARY: Mr Tony Liristis is being prevented from accessing documents and prosecution evidence relevant to his case. As a consequence, he is unable to prepare his defence and is incapable of adequately responding to the case against him. It is clear that, in light of Mason J's above definition, Tony Liristis is being denied procedural fairness if the trial were to proceed without him having access to the prosecution's evidence.

*OFFICIAL ODPP GUIDELINES:*

**Section 23 extract on Unrepresented Defendants → From Prosecution Guidelines, Office of the Director of Public Prosecutions (ODPP). Website: http://www.odpp.nsw.gov.au/prosecution-guidelines**

***Guideline 23***

*Particular care must be exercised by a prosecutor in dealing with an accused person without legal representation. The basic requirement, while complying in all other respects with these guidelines, is to ensure that the accused person is properly informed of the prosecution case so as to be equipped to respond to it, while the prosecutor maintains an appropriate detachment from the accused person's interests.*

COMMENTARY:

The Guidelines are not legally authoritative. However, they are persuasive statements of government policy on the importance of ensuring a defendant has sufficient access to prosecution evidence. This is particularly applicable to Mr Liristis' case, as his is currently unable to access material provided to him by the ODPP.

**EXTRACT FROM Patsalis v State of New South Wales:**

Basten JA paragraphs 51-53:

51 The scope and operation of the Felons Act may be illustrated by reference to the applicant's claim for access to legal documents. That is said to be based upon his right of access to the courts and, by extrapolation, his right to petition the Governor under s 76 of the Crimes (Appeal and Review) Act 2001 "for a review of [his] conviction or sentence or the exercise of the Governor's pardoning power". The significance of the applicant's claim, in considering the question of statutory construction, is that whatever consequences may have flowed from attainder under the common law, they have been greatly reduced by the effects, whether intended or not, of modern statutory reforms.

52 Raymond v Honey [1983] 1 AC 1 involved a complaint that prison authorities had opened a letter from the respondent to his solicitors, believing it contained matter not relating to pending proceedings. Upon finding that it contained an allegation against a prison governor, the letter was stopped. The respondent then prepared an application to the High Court for leave to apply for an order of committal of the officer stopping the letter for contempt of court: at 10B. The application, including a statement, a draft affidavit and exhibits, was also stopped. The proceedings before the House of Lords were concerned with both the original letter and the application to the High Court. The question was whether the conduct of the prison officers was "calculated to obstruct or interfere with the due course of justice, or the lawful process of the courts, [which] is a contempt of court": per Lord Wilberforce at 10D. Lord Wilberforce then identified a second principle that "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication: see Reg v Board of Visitors of Hull Prison, Ex parte St Germain [1979] QB 425, 455 and Solosky v The Queen (1979) 105 DLR (3d) 745, 760, Canadian Supreme Court, per Dickson J."

53 Thus, where a prisoner has a legal right enforceable by a court under the general law, conduct calculated to obstruct or interfere with his or her access to the courts will constitute a contempt, for which, in turn, there will be a right of access to the courts for relief in respect of the contempt. Such a right may be removed or conditioned by statute, but the intention in that respect must be clear. While the imposition of a leave requirement, which vests control of access to the courts within the courts themselves, will involve a lesser intrusion on civil rights than other forms of restraint, the presumption in favour of noninterference will mean that the leave requirement will not be given an expansive construction.

**EXTRACT from a helpful summary of the Patsalis v State of New South Wales case by Jason Donnelly (article name Judicial Review for the convicted felon in Australia – A consideration of stator context and the concept of the attainder):**

IV IMPLICATION 2 – PROTECTION OF THE CIVIL RIGHTS OF PRISIONERS

The second important implication from Patsalis is the protection of the civil rights of prisoners in New South Wales. In effect, the New South Wales Court of Appeal was faced with whether to adopt either a narrow or broad construction of the phrase 'civil proceedings' in the FCPA. A narrow construction would mean that the phrase 'civil proceedings' is not co-extensive with judicial review proceedings in the context of the FCPA. A broad construction would mean, in effect, that 'civil proceedings' in the FCPA are inclusive of judicial review proceedings. Basten JA, who wrote the leading judgment in Patsalis, sought to give effect to protecting the civil rights of prisoners by favouring a narrow construction of the phrase 'civil proceedings' in the FCPA. In this respect, his Honour cited with approval the decision of Raymond v Honey [1983] AC 1 where Lord Wilberforce held that: 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.'

Basten JA subsequently reasoned: 'Thus, where a prisoner has a legal right enforceable by a court under the general law…. such a right may be removed or conditioned by statute, but the intention in that respect must be clear.' Given the apparent ambiguity of what legal meaning was to be ascribed to the phrase 'civil proceedings' in the FCPA, his Honour reasoned that the ambiguity must be construed in favour of the prisoner: While the imposition of a leave requirement, which vests control of access to the courts within the court themselves, will involve a lesser intrusion on civil rights than other forms of restraint, the presumption in favour of non-interference will mean that the leave requirement will not be given an expansive construction. Basten JA went further, notably stating:

*The requirement for leave is itself a constraint on access to the courts, being an important civil right which is no longer removed from those convicted of serious indictable offences. Accordingly, it is appropriate to adopt an approach to the question of statutory construction which limits the civil rights in question only to the extent necessary to give effect to the statutory provision.*

Patsalis represents a prime example of a case where civil rights will not be taken away unless the intention of parliament is abundantly made plain in the passing of relevant laws.31 Given that it was not clear that the enactment of the FCPA was to place greater limits on access to the courts by prisoners than applied at common law (given the common law principle of attainder), a broad construction could not be adopted. As Allsop P held: 'The purpose of the leave provision was to ameliorate the perceived harshness of the doctrine of attainder.'

More modern thinking holds that the loss of liberty is the proper measure of the punishment imposed by the court, and that goals of rehabilitation and respect for authority will be better served if prisoners retain their civil rights in other respects. In the past the courts showed greater reluctance to accede to judicial review applications than is now the case. It was formerly considered that there was a public policy which prevented the review of decisions made in the course of administering prisons, on the basis that such interference might promote discord and undermine authority. Such a policy was consistent with the view that imprisonment was accompanied by a loss of civil rights. Accordingly, Patsalis appears to accord with modern thinking which allows prisoners to retain their civil rights. Despite a change in judicial attitudes, willingness to intervene depends on where the decision under review falls along a spectrum, intervention being most likely when a right to release, albeit conditional, is directly affected and least likely where the decision made affects the enjoyment of amenities and is justified on administrative grounds.

## Miles v R [2012] NSWCCA 88 Justice Hulme statement extract

**RS HULME J:** I agree with the orders proposed by Schmidt J and substantially with her Honour's reasons. I would, however, add some remarks of my own. One of the matters referred to in s 32 of the *Bail Act* and which the Court is required to take into account in considering whether to grant bail is the interests of the applicant having regard to the needs of the person to be free to prepare for the person's appearance in Court or to obtain legal advice or both. Those needs are obviously greater in circumstances such as those we are informed exist here where the Legal Aid authorities have declined to assist the applicant in his appeal. Persons charged and persons convicted who have lodged an appeal are entitled to prepare their case or have their case adequately prepared for consideration by courts.

Recently I had occasion to grant bail to someone who would not otherwise have received it because on the evidence in that case the Corrective Services Department was not providing reasonable facilities for the applicant to prepare his case. The applicant today makes a similar complaint. He subpoenaed from the Corrective Services Department his file and, although it has not been formally tendered, in anticipation of the hearing today I skimmed through the many hundreds of pages which were there.

It is apparent that since December of last year the applicant has made a number of representations to the authorities for access to a legal library or cases contained therein and for time in which to prepare his appeal. Although in the documentation it is clear that to some degree the applicant's requests have received favourable treatment, it is by no means apparent that he has been provided with reasonable time and facilities. The limited evidence which the applicant put before the Court in this connection was not such as to inspire or require a response by the Corrective Services Department and accordingly I make no concluded judgment on the topic. However, what I have seen does tend to reinforce the impression I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in.

The Department must realise that if the only way that an accused person or appellant can prepare his case is by being granted liberty then that is the course which the Court might have to take.

As I have indicated, I express no concluded view in this case. I merely wish to record that what I have seen is a cause for concern and I would urge the Department to ensure that the applicant is provided with sufficient time and sufficient facilities in which to prepare his case. That is, of course, not a suggestion that the Department has to provide the applicant with whatever in those respects he may require. Clearly the custodial authorities have other matters which they must bear in mind.

There is another matter to which I refer because it also has a bearing on the topic. The applicant has complained that he has been hampered in his preparation by frequent moves from one gaol to another. A study of his file suggests that the Corrective Services Department has not found the applicant an easy person to deal with. That said his custodial history shows that since 2007 he has been moved some eighteen times between one corrective institution and another and that since October of last year he has been moved six times. It is difficult to believe that this is an efficient use of gaol resources and certainly it adds support to his complaint that he has been unduly hampered in the preparation of his case. I find it hard to believe that the number of changes in his correctional services centre over the period can reasonably be justified. That said I have indicated that I agree that the appeal should be rejected.

**SHALALA v R [2012] NSWSC 351 (Complete case included below):**

**RS HULME J:** Alec Shalala was arrested on 8 December 2010 on charges of supplying, on a number of occasions between 12 November and 6 December 2010, amphetamines. On two occasions, the amounts said to have been supplied were approximately 450 g. He has also been charged under s 25A of the *Drugs (Misuse and Trafficking) Act* 1985 with ongoing supply. The individual amounts supplied have been aggregated and the subject of a further charge of supplying a large commercial quantity of amphetamines. The maximum penalty prescribed for that offence is life imprisonment.

The evidence against him was obtained in large part by video and audio surveillance in the course of a controlled operation involving a police undercover operative and another person who was assisting police at the time.

The evidence against Mr Shalala, at least as presented to me during this application - and it includes extracts from the transcripts of statements by Mr Shalala apparently recorded on listening devices - is, if not compelling, at least very strong. Further evidence of his guilt is afforded by a statement he made and which is recorded on the transcript when this matter first came before me on 22 March last. That statement was as follows:

> If I may say one more thing. The thing is, the person that supplied the drugs himself has been on bail from two weeks after his arrest and my co-accused has been on bail now for three months and I'm the only one left in here and I had the smallest part involved in this whole thing.

Mr Shalala has an extensive criminal record which commenced in 1970 when he was but 17 and includes offences of robbery (for the first of which he was sentenced to 9 years penal servitude), the supply of a prohibited drug (for which he was sentenced to 5 years imprisonment) and a further offence of supply a prohibited drug (for which, in 1998, he was sentenced to 7 years imprisonment).

Despite the strength of the Crown case, Mr Shalala desires to defend the charges against him. It seems clear that, at least in large part, he wishes to do so on the basis that the conduct of the police was improper and not authorised by or pursuant to the *Law Enforcement (Controlled Operations) Act* 1997. Nevertheless, he wishes also to review the content of the recordings upon which the Crown relies. Those recordings consist of, according to the representative of the Crown in these proceedings, something of the order of 10 DVDs or the like. Mr Shalala also desires to conduct his defence himself in consequence of dissatisfaction with a legal aid lawyer who appeared for him for a time.

Appearing for himself is a right Mr Shalala has. However, to effectively exercise that right he has to have opportunity to present his case and opportunity and facilities with which to listen or view the content of the DVDs and which would seem to form a very large part, and perhaps the strongest part, of the evidence against him. He also wishes access to a legal library and clearly any defence based on impropriety of the police or actions which were in law unauthorised would need some access to such a library.

On the evidence before me, Mr Shalala has made numerous requests of gaol authorities for access to computers and a library. He has also complained to two magistrates about being denied such access and it appears at least one of these has publicly endorsed Mr Shalala's request. Nevertheless, according to Mr Shalala, computers have been made available to him for only a very limited time and on at least one occasion, the format of the DVDs was inaccessible to the computer provided and another had no working audio.

When Mr Shalala's application first came before me on 22 March last and it became apparent what his primary complaint was, I adjourned the proceedings inviting Mr Shalala to provide some specificity to the Crown as to his complaints in order that the Crown might obtain a response from Corrective Services. Mr Shalala provided specificity in a letter of 26 March 2012 which was forwarded on to Corrective Services. He specified that he had made four applications at the MRRC, three at Nowra, five at Parklea and two at Long Bay.

Mr Stainer, appearing for the Crown on this application, provided a copy of that letter to Corrective Services, pursued the obtaining of a response and was assured on 4 and 11 April 2012 that one would be forthcoming. Ultimately, after four further calls to the Commissioner's office yesterday, a response was received in the following terms:-

Unfortunately, Corrective Services NSW is unable to provide an official response to your letter in regards to inmate Shalala. At this point in time, I have been informally advised that there was no indication that the inmate had been denied computer access at any of the centres.

In an earlier letter which Mr Shalala provided on 22 March 2012 during the hearing before me, he had made somewhat similar but more limited complaints. His complaints were endorsed by Corrective Services officers on that letter.

Since Mr Shalala's arrest, he has been moved some nine times from one gaol to another. He has had court appearances either in person or via video link on 14 occasions prior to his bail application coming before me on 22 March. His committal proceedings are a long way from being

finished. Certainly, one must accept that that latter situation is probably in part due to Mr Shalala's desire to challenge the controlled operation and to obtain from the police or other authorities documents which may provide a basis for this.

Nevertheless, the result is entirely unsatisfactory.13A charge of the supply of a large commercial quantity of drugs falls within s 8A of the *Crimes Act* 1900 and sub-section (2) of that section provides that a person so accused is not to be granted bail unless the person satisfies the Court that bail should not be refused. Authorities indicate that that imposes a high threshold.

Otherwise, the matters to which I may have regard are stated exhaustively in s 32 of that Act and, so far as is presently relevant, may be summarised as follows:-
(a) the probability of whether or not the person will appear in court;
(b) the interests of the person; and
(c) the protection and welfare of the community.

The section requires that in making a judgment in relation to those topics, regard may be had to only specified matters, but I do not see it as necessary to detail those here.

I am informed that a warrant for Mr Shalala's arrest has been issued in Western Australia. In an extract from one of the intercepted telephone conversations, Mr Shalala is recorded as admitting to a serious offence in Queensland many years ago, that he was there given bail, took off and never went back. The sentence he is likely to receive if convicted of the more serious of the charges against him is such as to provide an incentive to not appear if admitted to bail and, when one has regard to the totality of the permissible matters in that connection, one is forced to the conclusion that there is certainly an appreciable risk that Mr Shalala will seek to disappear.

On the other hand, he makes the point that, despite numerous charges in New South Wales, some obviously rendering him liable to substantial penalties, he has not failed to appear in New South Wales.

The seriousness of the offences charged, one of the matters which I am entitled to take into account in making a judgment as to the protection and welfare of the community, clearly argues against bail being granted. One is tempted to say that the applicant's record adds weight to that argument but the illogical restrictions contained in s 32(1)(c) and s 32(2) mean that I cannot take his record into account in this connection. I am not prepared to find, despite Mr Shalala's record, that in the limited time for which any bail will operate he is during that period "likely to commit" other offences.

I turn to Mr Shalala's interests. On the evidence before me, it is impossible to avoid the conclusion that Mr Shalala is unable to prepare his case while incarcerated and this because the Corrective Services authorities have not provided him with a computer or other equipment on which to see or listen to the recorded evidence and there is nothing to suggest that their stance will change.

On the evidence before me, it seems also that there has been scant provision of any significant library facilities to Mr Shalala.

The evidence indicates, although there is a library at the MRRC where Mr Shalala is currently incarcerated, because of cut backs to prison staff, that library is practically inaccessible unless a Corrective Services officer can be spared at any particular time to supervise Mr Shalala.

The terms of s 8A of the *Bail Act* 1978 and the significance of the matters referred to in paragraphs (a) and (c) of s 32(1) of that Act 1978 are such that in the normal course I would unhesitatingly have refused Mr Shalala's application for bail. However, he is entitled to prepare his case. Given that he is effectively being prevented from doing so whilst in custody by the attitude of the Corrective Services, I feel constrained to give him bail.

There is one further matter to which I should refer. The Crown fairly advised me of the fact or at leas possibility that, if admitted to bail, Mr Shalala will be re-arrested pursuant to a warrant from Western Australia. Should that occur, Mr Shalala will presumably need to make another bail application. Given the history of the matter, he should feel free to request that it be referred to me to be dealt with as a matter of urgency.