



# HABEAS CORPUS

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## REFINING THE PROCEDURE







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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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## FOREWORD

It is no exaggeration to say that the writ of *Habeas Corpus* is one of the most ancient and effective legal methods of dealing with the arbitrary use of government power. The writ is older than Magna Carta. It establishes the process for checking illegal imprisonment. The Law Commission in 1997 recommended a simplified procedure for dealing with Habeas Corpus applications in New Zealand. The old and complicated English law was revoked.

The reform has been successful. But like many laws experience has revealed a few anomalies. The purpose of this report is not to alter in any substantial way the law of Habeas Corpus but provide some technical tweaks that will allow it to work better.

The report is accompanied by a draft Bill that shows with precision the effects that it will have. We thank Parliamentary Council Office for their fine efforts in this regard. The Law Commission is grateful to people who made submissions on the discussion paper. They have materially altered the shape of our recommendations.



*Geoffrey Palmer*  
President

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## INTRODUCTION 1

Habeas corpus *ad sub judiciem* is a writ for a person's release from unlawful detention. Under habeas corpus, the judge stands between the subject and any encroachment upon the subject's liberty, so that when any person is arrested or detained, the validity of that detention may be tested by an application for habeas corpus.<sup>1</sup> If the detaining party does not show that there is sufficient cause for detention, a writ of habeas corpus is issued which orders the release of the prisoner. The grant of the writ is not at the discretion of the court, but is available as a matter of right.<sup>2</sup> This reflects the law's presumption that there is a general right to liberty unless there is a legal basis for abridging it.<sup>3</sup> The right of persons arrested or detained to apply for habeas corpus is enshrined in section 23(1)(c) of the New Zealand Bill of Rights Act 1990.<sup>4</sup>

- 2 The origin of the writ was not in securing freedom from detention, but rather in ensuring a person's attendance before a court of law so that justice (whether civil or criminal) might be administered in their presence. Only gradually did the writ emerge as a means of testing the legality of detention.<sup>5</sup> The writ is not "an all-encompassing panacea against every form of wrongful detention".<sup>6</sup> Lord Brown notes it has never applied to unlawful committal for contempt, and criminal convictions have always been outside the reach of habeas corpus, even when there was no right of appeal against a criminal conviction.<sup>7</sup>
- 3 In 1997 the Law Commission recommended a simplified procedure for dealing with habeas corpus applications. The Law Commission's recommendations were implemented by the Habeas Corpus Act 2001 ("the Act"). The Act revoked the application of the old English statutes on habeas corpus<sup>8</sup> but carried over in simplified form the major reforms introduced by the earlier Acts.<sup>9</sup>
- 4 Experience with the Act since it came into force suggests it has largely achieved its objective of providing an effective procedure for dealing with habeas corpus applications. However, some practical problems have emerged, including the misuse of the procedure by some applicants to obtain a priority hearing on matters that should be brought by another form of proceeding, such as judicial review.
- 5 The Minister of Justice invited the Law Commission on 27 June 2007 to look at whether minor changes needed to be made to procedural aspects of the legislation.

1 PA Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 1069.

2 Ibid, 1071.

3 D Clark and G McCoy *Habeas Corpus: Australia, New Zealand and the South Pacific* (The Federation Press, Sydney, 2000) 16.

4 Which reads: 23 (1) Everyone who is arrested or who is detained under any enactment—

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

5 Lord Brown "Habeas Corpus – A New Chapter" (2000) Public Law 31, 34.

6 Ibid, 35.

7 Ibid.

8 The Habeas Corpus Act 1640 (Eng), Habeas Corpus Act 1679 (Eng) and Habeas Corpus Act 1816 (UK). Professor Sharpe, in *The Law of Habeas Corpus* (2 ed, Clarendon Press, Oxford, 1989) observed that the Habeas Corpus Act 1679 "marks the point at which the writ took its modern form" (20).

9 PA Joseph, above n 1, 1071.



- 6 The Law Commission issued its study paper<sup>10</sup> after consultation with the Ministry of Justice, the Crown Law Office, the Department of Corrections and the judiciary. This report takes into account the views expressed in the course of that consultation, as well as the submissions received on the study paper.
- 7 Finally, we note that it has not been the purpose of this review to bring about any fundamental change to the law relating to habeas corpus. As with the earlier Law Commission report on habeas corpus, our focus has been on procedure. However it became apparent during the course of our research, that there are some significant issues that warrant further consideration at an appropriate time. These include the continued need for habeas corpus in areas such as mental health, where there are specialised regimes with their own in-built mechanisms for challenging unlawful detention, and the relationship between habeas corpus and judicial review.<sup>11</sup>

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10 New Zealand Law Commission *Further Reform of Habeas Corpus Procedure* (NZLC, Draft Study Paper 18, Wellington, August 2007).

11 See, for example, Lord Brown, above n 5 on this.

# Issues and Recommendations

## THE REQUIREMENT FOR PRECEDENCE OVER OTHER COURT BUSINESS

- 8 Section 9 of the Habeas Corpus Act 2001 requires habeas corpus applications to be given precedence over all other court business. Appeals from habeas corpus proceedings are also to be given precedence over other matters before the court.
- 9 It is questionable, however, whether habeas corpus applications should be given precedence over all other court business in every case.<sup>12</sup> While liberty is an important value, and is to be accorded respect as such, it is not difficult to envisage other cases that deserve at least equal precedence. Cases where the court needs to intervene to ensure that children receive life saving medical treatment, and interim injunction applications to prevent publication of material injurious to national security may be examples.<sup>13</sup>
- 10 In their Study Paper, the Law Commission suggested that the requirement for precedence be repealed. The Paper drew a distinction between precedence, which the Law Commission proposed be amended, and the requirement that runs alongside it, that applications for habeas corpus be treated as a matter of priority and urgency. The dictates of priority and urgency are long-standing and clearly appropriate because habeas corpus applications involve questions of individual liberty. By amending the requirement for absolute precedence over all other court business it is not suggested that habeas corpus applications be dealt with in any other way than as a matter of priority and urgency.
- 11 A number of submitters conflated the precedence rule with the requirement of priority and urgency. On this point, it was argued that to do away with the precedence requirement would slow down proceedings to the extent that New Zealand's handling of habeas corpus applications might not meet international standards. The example provided to us was the Supreme Court decision of *Sestan v The Director of Area Mental Health Services, Waitemata District Health Board*, where it took three months for the habeas corpus application to move through the courts.<sup>14</sup>
- 12 In its submission to the Law Commission in the earlier reform of habeas corpus, the Rules Committee pointed out the need for flexibility in procedures in this area.
- 13 Lord Brown acknowledged this point in his article on habeas corpus, above n 5, 40. He suggested there are other challenges which are no less important and urgent than those alleging wrongful detention, such as the threatened removal of a new-born baby from her imprisoned mother, a local authority's discontinuance of round-the-clock supervision over a child at risk, and the withdrawal of possibly life-saving treatment from a patient.
- 14 *Sestan v the Director of Area Mental Health Services, Waitemata District Health Board* [2007] NZSC 10. The Supreme Court rejected the applicant's complaints about the delays in hearing the matter, noting that Counsel for the applicant had indicated the need for preparation time so that the matter could be well argued and to allow interveners to be heard.

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- 12 There was also a suggestion that there are currently sufficient numbers of High Court and Appellate judges to ensure that habeas corpus is given precedence alongside other urgent matters. However, while generally there will be no difficulty in giving precedence to habeas corpus applications, this will not always be the case particularly in centres which do not have a permanent High Court, or in the Appellate courts.
- 13 One submission drew to our attention the significance of the precedence requirement as reaffirming the right to liberty under the New Zealand Bill of Rights Act 1990. The submitter accepted that there may be other urgent matters but suggested that in reality all urgent applications, whether under the Habeas Corpus Act or otherwise, would be accorded utmost importance.
- 14 There is force in the suggestion that the precedence requirement affirms the importance of the right to liberty, and gives it a symbolic significance. However, we have concluded that a recommendation to allow other urgent cases to be accorded precedence where necessary will not interfere unduly with the speed of habeas corpus cases, for two reasons. First, the requirements of priority and urgency remain, so that judges and court staff must continue to ensure habeas corpus applications are dealt with promptly. Secondly, it would seem that at common law the nature of the issues to be determined in a habeas corpus application already decide how urgently the matter is heard. Clark and McCoy argue that where necessary, the court will clear the case list to make space to hear a habeas corpus application, and “usually the first items on the court’s agenda” are the habeas corpus applications.<sup>15</sup> The implication from this statement is that on occasion other matters can take priority. The authors also accept that if there are serious matters in issue, or notice needs to be given to the other side, the matter may be adjourned until a later date. Clark and McCoy argue that the point of the precedence rule is that the process of resolving the matter should be put on foot as soon as possible, but due weight should be allowed for the complications of a given case.<sup>16</sup>
- 15 Having regard to the significance of the precedence requirement, we consider that rather than repealing it altogether, as we originally proposed, precedence should remain the ordinary rule subject to the ability of a Judge to relax the requirement if the circumstances so require. This would reflect the common law position and would introduce the necessary flexibility while maintaining the symbolic significance of the requirement in reaffirming the right to liberty. Though ordinarily scheduling decisions are made by a registrar, we consider that the decision to give a matter other than habeas corpus applications precedence (whether at first instance or on appeal) should be made by a Judge, rather than the registrar, to reflect the importance of the requirement.

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15 D Clark and G McCoy, above n 3, 202.

16 Ibid.

16 Section 9(3) of the Act provides that:

The Registrar must allocate a date for the *inter partes* hearing of an application that is no later than 3 working days after the date on which the application is filed.

17 The three day time limit is consistent with the need for urgency. However, the strictness of the requirement has caused difficulties in practice, especially where the habeas corpus case involves complicated legal issues. For example, in *Togia v General Manager, Rimutaka Prison*<sup>17</sup> an application filed late on a Monday was set down for hearing on the Wednesday morning (there being no available court time on the Thursday which was the third day after filing). The case involved complex legal issues that Harrison J decided could not be dealt with fully in view of the time constraints. Accordingly, His Honour gave an interim decision “releasing” the applicant from detention in prison (under an interim recall order) to detention in a secure care facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

18 The parties settled the habeas corpus proceeding before the final hearing. However, had the matter proceeded to a final hearing (which had been set down for 30 March 2007), Mr Togia would have spent a month detained in a secure care facility awaiting resolution of the legal issues surrounding his detention. Arguably, the matter could have been dealt with more expeditiously by allowing the parties more time to prepare fully prior to the initial hearing.

19 In submissions received on this point, concerns were raised about the extent to which the rights of an individual should be balanced against any disruptive effects to the court case list. It was pointed out to us that in the context of child custody disputes, a writ of habeas corpus is sometimes the only remedy available when a child has been abducted, since remedies under the Care of Children Act 2004 can be impracticable, with warrants being of little practical use because they cannot be enforced unless the whereabouts of the child are known.

20 We acknowledge the concerns of the submissions that the liberty of the subject is in issue, and that therefore the writ of habeas corpus requires the matter be heard as soon as possible. However, where complicated matters of law must be addressed in a habeas corpus application, justice cannot be done unless counsel and the courts can properly prepare for a hearing. The practical reality is that in some cases it takes longer than three days to prepare complex issues for hearing. In this respect Lord Brown cautioned against over accelerated hearings in difficult cases and the consequent risk of the law being set off on the wrong path.<sup>18</sup>

21 Two submitters agreed there should be power to dispense with time frames but suggested this should only occur with the applicant’s consent. We do not agree that consent should be the determinative factor. An inadequate timeframe can operate to the disadvantage of an applicant as much as it can to a respondent. Moreover, it is as important from the perspective of the Court, as well as the parties, that there is adequate preparation time to allow the issues to be properly resolved.

17 *Togia v General Manager, Rimutaka Prison* (28 February 2007) HC WN CIV-2007-485-358 Harrison J.

18 Lord Brown, above n 5, 40.

- 22 One submitter suggested that the problem of inadequate timeframes would be resolved if the law reverted to the traditional common law two-stage procedure for determining applications. Under that procedure a preliminary hearing was initially held for the detainee to persuade the judge that there was an issue to be addressed by the court, to be followed by another hearing where the person was brought before the court for a substantive hearing of the merits of a case.
- 23 There is some force in the submission that to revert to the traditional two-step approach would ensure that appropriate time frames were set for hearing an application, but to do so would undermine the purposes of the 2001 reform. It is possible, however, to build on the advantages of the earlier system while preserving the dictates of urgency by requiring the judge to hear from the parties, whether by teleconference, or otherwise, before dispensing with the three day requirement. This would ensure the judge was apprised of the relevant issues before dispensing with the three day requirement, and could fix appropriate timeframes for hearing a habeas corpus application. The power to relax the requirement should be vested in a High Court Judge rather than a registrar given the nature and importance of these applications. We think this proposal sufficiently protects habeas corpus applications in family custodial situations, which we consider should be treated consistently with other habeas corpus applications.
- 24 Accordingly, we recommend that Judges be given power to relax the three day requirement subject to the proviso that the Judge hear from the parties before extending the timeframe.

## RIGHT OF APPEAL

- 25 Section 16 of the Act confers a right of appeal against the refusal of a writ of habeas corpus, but no right of appeal against the grant of a writ. This is potentially problematic where the decision on the application creates a legal precedent that affects other persons who are detained.
- 26 In its earlier report<sup>19</sup> the Law Commission recommended against enacting a right of appeal against the grant of the writ. The Law Commission considered that if it was necessary to challenge an adverse decision on a point of principle, this could be done by means of an application for declaratory judgment.<sup>20</sup>
- 27 This position is not entirely satisfactory. In practice, the declaratory judgment procedure is cumbersome and limits the speed with which an order for a writ of habeas corpus can be challenged. There are other disadvantages. As one submitter pointed out, it requires the respondent to find a prisoner in the same circumstances so that a declaratory judgment can be applied for. It also depends on the cooperation of counsel to bring a declaratory judgment application, which cannot always be assumed. In the Law Commission's Study Paper we recommended allowing a right of appeal to a defendant on a point of law subject to the proviso that a successful appeal would not entail the return to custody of a person who has been released as a result of a writ.
- 28 Some of the submissions received on this point opposed giving a right of appeal to a defendant, arguing it went against the fundamental nature of the writ, whilst

19 New Zealand Law Commission *Habeas Corpus* (NZLC R44, Wellington, 1997).

20 See *Superintendent of A Prison v S* [2001] 3 NZLR 768 (CA) for a successful declaratory judgment against a writ of habeas corpus.



others supported a right of appeal but questioned why an applicant should get the advantage of no longer being detained even if the defendant's appeal is successful. It was also suggested that if the current position is maintained there should be an exception in extradition proceedings, allowing a return to custody following a successful appeal by the country requesting extradition, so that the extradition process could continue. It was pointed out this would accord with New Zealand's international obligations arising under treaties.

- 29 The issue is not straightforward. Historically, there has been no right of appeal against habeas corpus decisions, reflecting the "cardinal" principle of the law of England that, once a person has been held entitled to liberty by a Competent Court, there shall be no further question.<sup>21</sup> This remains the position in a number of jurisdictions.<sup>22</sup>
- 30 The Administration of Justice Act 1960 (United Kingdom) reflects an intermediate position. Under that Act the defendant has a right to appeal in civil or criminal habeas corpus applications.<sup>23</sup> In a criminal matter, an appeal lies from a decision of the High Court to the House of Lords, subject to leave. If the defendant appeals in a criminal case, the detained person will still be released<sup>24</sup> except where immediately after the court makes an order for the discharge, the opposite party gives notice that he or she intends to apply for leave to appeal. In that case, the court may make an order providing for the detention of the applicant, or directing that he is not to be released so long as the appeal to the House of Lords is pending,<sup>25</sup> although the court may grant him bail in the meantime.<sup>26</sup>
- 31 This approach has been criticised because it requires the defendant to apply 'on the spot' for the applicant to be detained, pending a successful application for leave to appeal to the House of Lords.<sup>27</sup> If this is not done, a person who has been released cannot be detained again.<sup>28</sup> We agree that the United Kingdom approach is unsatisfactory. It seems anomalous to allow a person to be returned to custody if notice is given at the time a writ is issued, but not at a later stage within the ordinary appeal period (which is designed to allow proper consideration of whether or not to appeal.) This approach would encourage respondents to seek orders postponing release in every case to preserve the position while the possibility of appeal is considered. Ultimately this could

21 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 621 per Lord Dunedin.

22 For example the High Court of Australia (High Court Rules 2004, Rule 25), the Supreme Court of Canada (Supreme Court Act 1985, Section 39) and Ontario (Criminal Code 1965, ss 784 (3)-(5)). The Australian states have not enacted separate habeas corpus statutes, and with the exception of Victoria and New South Wales, none of them have given a right of appeal against the grant of a writ of habeas corpus.

23 Administration of Justice Act 1960 (UK), s15(1): *subject to the provisions of this section, an appeal shall lie, in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as against the refusal of such an order.* See also the position in New South Wales, where s 101(3) Supreme Court Act 1970 (NSW) provides for a right of appeal for a defendant.

24 Administration of Justice Act 1960 (UK), s 15(4).

25 *Ibid*, s5(1).

26 *Ibid*, s4(2).

27 *R v Secretary of State for the Home Department, ex parte Virk* (Queen's Bench Division, The Times, 13 October 1995).

28 See for example: *US Government and others v McCattery* [1984] 2 All ER 570.

disadvantage applicants who could be required to remain in custody or on bail, despite the issue of a writ where the prospects of a successful appeal are remote.

- 32 We have considerable sympathy with the view that where a person has been released as a result of an erroneous decision he or she should not continue to enjoy liberty where a higher court finds the original detention was lawful. It would be possible to craft recall provisions which could apply in the event of a successful appeal. However this would represent a fundamental change to the law on habeas corpus. On balance we have concluded that such a change should not be undertaken without more detailed consideration and fuller consultation than this limited review on procedure has allowed.
- 33 We therefore reserve any recommendations on the right of the defendant to appeal a writ of habeas corpus. In the meantime the position should remain the same with the declaratory judgments procedure being available if there is a need to resolve issues of law. We have also considered whether there should be a specific exception in extradition cases to ensure that international obligations are met. However, it appears that there has been no problem in practice with extradition cases<sup>29</sup> and we therefore recommend that this area also await further consideration.

#### TRANSFER OF APPLICATIONS TO THE FAMILY COURT

- 34 Section 13 of the Habeas Corpus Act 2001 provides for ancillary powers where the detainee is a child or young person:

#### **13 Powers if person detained is young person**

- (1) In dealing with an application in relation to a detained person who is under the age of 18 years, the High Court may exercise the powers that are conferred on a Family Court by the Care of Children Act 2004.
  - (2) If the substantive issue in an application is the welfare of a person under the age of 16 years, the High Court may, on its own initiative or at the request of a party to the proceeding, transfer the application to a Family Court.
  - (3) An application referred under subsection (2) must be dealt with by the Family Court in all respects as if it were an application to that Court under the Care of Children Act 2004.
- 35 In *F v Chief Executive of the Department of Child, Youth and Family Services*<sup>30</sup> the Court of Appeal heard an appeal against a decision of the High Court transferring an application for habeas corpus to the Family Court. The application had been brought in response to an order of the Family Court made without notice in care and protection proceedings in respect of the applicant's son. The High Court transferred the case back to the Family Court under section 13(2) without convening a hearing.
- 36 The Court of Appeal noted that:
- ...the writ can theoretically issue in cases involving custody of children. Sometimes issuing the writ may be an appropriate response, but more often the appropriate response will invoke the expertise of the Family Court and its procedures.

29 See for example: *Muller v United States of America* (9 March 2007) HC AK CIV 2006-404-007667 Venning J.

30 *F v Chief Executive of the Department of Child, Youth and Family Services* (20 July 2005) CA130/05.

- 37 However, the Court concluded that section 13(2) of the Act could not be invoked without first complying with section 14, which requires the court to determine an application by refusing the application or issuing the writ. It then proceeded to treat the appeal as a rehearing of the application and determined the application by refusing to issue the writ. The Court also exercised its ancillary powers under section 13(2) and referred the matter back to the Family Court.
- 38 It may be seen that if the application has been determined by the court finding that the “detention” of a child is lawful, then it must be that there is nothing live to be transferred to the Family Court. It would make sense to amend section 13 so that were the court to transfer an application to the Family Court it need not “determine” the application in accordance with section 14 first.
- 39 Almost all of the submissions agreed with this recommendation, suggesting this would deal with the situation where parties to Family Court proceedings used a writ of habeas corpus to ‘get round’ the process in the Family Court. One submission suggested that where this was done there should be a statutory appointed counsel for the court. We note, however, that the court already has the power to appoint counsel where necessary. We do not agree that this should be mandatory in every case.
- 40 Accordingly, section 13 should be amended to make clear that where the court decides the most appropriate response is to transfer an application to the Family Court it need not “determine” the application in accordance with section 14 first.

#### APPLICATIONS BY THE WRONG PROCEDURE

- 41 A further problem addressed in the Draft Study Paper is the use of the habeas corpus procedure in circumstances where the issues are not susceptible to summary determination. Many applications of this kind are brought by prisoners in person. Some cases have involved wide ranging complaints about matters that have nothing to do with unlawful detention, such as conditions in prison. Some appear to have been brought in circumstances where the applicant has known the procedure was wrong for the purposes of securing an early hearing. The Act currently allows the applicant to choose whether to bring an application for habeas corpus, or judicial review proceedings.<sup>31</sup>
- 42 For example, in *Greer v Parole Board at Auckland*<sup>32</sup> the Court of Appeal noted that the appellant had made a number of habeas corpus applications where the distinction between matters properly brought as a habeas corpus application and those that are more properly dealt with in judicial review had arisen.<sup>33</sup> The court also noted the scope for an applicant to present issues as a habeas corpus application in order to have them dealt with more urgently.<sup>34</sup>
- 43 There have also been a number of cases involving repeat applications on substantially the same grounds despite the fact that section 15(1) of the Act bars successive applications.<sup>35</sup>

31 Habeas Corpus Act 2001, s 7(2).

32 *Greer v Parole Board at Auckland* (21 December 2006) CA 271/06.

33 *Ibid*, para 5.

34 *Ibid*, para 9.

35 See, for example, *Manuel v Superintendent, Hawkes Bay Regional Prison* [2006] 2 NZLR 63; and *F v The Chief Executive of the Ministry of Social Development* CA79/07.



- 44 These cases pose two problems. First, there is the need to give these applications urgency. Second, there are the costs and administrative burdens they impose. Defendants are put to the trouble and expense of obtaining at short notice affidavits that establish the lawfulness of the detention. In the case of prisoners, the Department of Corrections has to arrange for the prisoner to be transported to the court to prosecute the application. The court and the Department of Corrections are also required to put in place measures for courtroom security.
- 45 The Study Paper suggested judges should be able to dismiss a habeas corpus application without the need for the defendant to establish the lawfulness of the detention where it is a repeat application, or habeas corpus is the wrong procedure.
- 46 No issue was raised in the submissions about the dismissal of repeat applications. However a number of submissions expressed concern about summary dismissal on the grounds that habeas corpus is the wrong procedure.
- 47 The major issue raised in the submissions is what constitutes the ‘wrong procedure’, and in particular, the vexed question of the relationship between habeas corpus and judicial review.
- 48 Habeas corpus is not available where it is not seriously contended that immediate release is appropriate. In *Miller v New Zealand Parole Board*<sup>36</sup> the applicant was sentenced to preventive detention, and in March 2003 the Parole Board ordered that the appellant’s next parole hearing be postponed until November 2006. The applicant appealed that decision, and also filed a writ of habeas corpus. Miller J held that if an applicant seeks something less than release from custody, judicial review or statutory appeals should be used.<sup>37</sup> Further, habeas corpus cannot be used to challenge prison conditions, security classification decisions or segregation decisions.<sup>38</sup>
- 49 Two submitters suggested that habeas corpus should always be available if an applicant seeks release from custody, although one of the submitters appeared to acknowledge that this approach would only be possible if the traditional two step procedure of habeas corpus was reinstated, so that appropriate timeframes could be set for the hearing of applications.
- 50 However, the proposition that habeas corpus is available whenever an applicant seeks release from custody does not reflect the current law. In *Manuel v Superintendent of Hawkes Bay Prison* the Court of Appeal made it clear that habeas corpus procedure is available only where the issues are capable of summary determination by habeas corpus. For the Court, William Young J (as he then was) suggested that:<sup>39</sup>

36 *Miller v New Zealand Parole Board* (11 May 2004) HC WN CRI-2004-485-37.

37 *Ibid*, para 80.

38 See *Karaitiana v Superintendent of Wellington Prison* [2002] NZAR 64, where Karaitiana challenged his detention in solitary confinement and sought cancellation of his maximum security classification. See also *Bennett v Superintendent of Rimutaka Prison* [2002] 1 NZLR 616, where it was held that habeas corpus is not available for the protection of residual liberty.

39 *Manuel v Superintendent of Hawkes Bay Prison* [2005] 1 NZLR 161.

It will be a rare case, we think, where the habeas corpus procedures will permit the Court to enquire into challenges on administrative law grounds to decide which lie upstream of apparently regular warrants. This is particularly likely to be the case where the decision maker is not the detaining party.

- 51 It was also submitted that New Zealand's international obligations require that habeas corpus be available to challenge all cases of alleged unlawful detention, and that this would be a preferred form of action because it is a writ as of right, it ensures urgency in proceedings, and there is no Court filing fee for an application. We were asked to defer releasing our report until the United Nations Human Rights Committee (UNHRC) had given its views on a communication by Mr Manuel under the individual complaints procedure, which raised amongst other matters the consistency of New Zealand's habeas corpus law with the International Covenant on Civil and Political Rights (ICCPR).
- 52 The UNHRC has recently released its report on the Manuel communication and confirmed that the mix of habeas corpus, judicial review and specific statutory mechanisms in New Zealand is consistent with article 9(4) of the ICCPR and New Zealand's international obligations.<sup>40</sup> In this respect, under New Zealand law, judicial review is a much more robust mechanism for challenging detention than it is in the United Kingdom. Unlike the position in the United Kingdom,<sup>41</sup> there is no leave requirement for judicial review. Furthermore, as the Court of Appeal pointed out in *Manuel v Superintendent of Hawkes Bay Prison*, prompt hearings are available in judicial review cases, and although the remedies are discretionary, it is "inconceivable" that a Judge would refuse relief on discretionary grounds to someone who is illegally detained.<sup>42</sup>
- 53 While acknowledging that there is often no "bright line" between what is and what is not susceptible to summary determination, we consider that our recommendation that the court should be able to dismiss erroneous habeas corpus applications, without the respondent being required to establish the lawfulness of detention, should stand. It is wasteful of the scarce resources of the court, and of no benefit to an applicant, to have a hearing on a matter that will inevitably be dismissed because the wrong procedure has been used. The dismissal of the habeas corpus application will not preclude an applicant from commencing an application by the correct procedure, or indeed prevent the court from hearing the application as if it had been commenced by the correct procedure if the circumstances so require.<sup>43</sup>
- 54 Accordingly we recommend that there be power to dismiss applications without the need for the defendant to establish lawfulness of the detention where the application is statute barred under section 15(1) of the Act or involves the wrong procedure. In cases where the wrong procedure is used, the judge could at the time of dismissal indicate the procedure by means of which the application could be appropriately brought.

40 Benjamin Manuel, to the United Nations Human Rights Committee "Communication 1385/2005" (7 November 2007) CCPR/C/91/D/1385/2005.

41 Civil Procedure Rules 1999 (United Kingdom), Rule 54.4.

42 *Manuel v Superintendent, Hawkes Bay Regional Prison*, above n 39, para 48.

43 See the comments by the Court of Appeal in *Greer v Parole Board at Auckland*, above n 32, in this respect.

TELEPHONE  
HEARINGS AND  
HEARINGS BY  
VIDEO LINK

- 55 Section 7(1) of the Act provides that a habeas corpus application is an originating application, and s7(3) excludes the High Court Rules on originating applications where they relate to directions made by the Court before the hearing, such as making orders which affect the hearing or convening a conference of parties. This is in line with the High Court Rules, where Rule 458N provides that Rules which allow for directions pre-hearing do not apply in the case of habeas corpus.
- 56 The exclusion of the High Court Rules in habeas corpus proceedings, including those relating to pre-hearing conferences, reflects its urgent summary nature. The intention is that these proceedings should not be slowed down by interlocutory matters, such as discovery. However, there are circumstances where a pre-hearing conference will facilitate the speedy resolution of the matter, rather than slow it down. For example, a greater use of telephone hearings to deal with preliminary matters could ease the burden on counsel by focussing the matters to be heard in the substantive hearing.
- 57 We suggested in the Study Paper that the Court almost certainly has the inherent power to convene a telephone conference, where necessary, and that some of the present problems could be overcome by a greater use of teleconferences. Most submitters supported that proposal. Teleconferences are likely to be particularly useful if our recommendation that courts be given the ability to relax the timeframe is adopted, because it would enable a judge to use a teleconference to explore with the parties the preparation time required and the need for relaxation of the statutory timeframe. Accordingly, we recommend that there be express provision for pre-hearing conferences, including telephone conferences.
- 58 As well, the Department of Corrections drew to our attention the fact that some prisons have video conferencing facilities. One submitter suggested there should be the power to have hearings by video link. We agree that there should be the flexibility to use video conferences. This could resolve some of the problems associated with urgent hearings in centres where there is no High Court, and with the transportation and security of prisoners. We can see no difficulty with having the substantive hearing by video link. However, if there are to be such hearings it would be desirable for rules to be made similar to those in s 26IB of the Judicature Amendment Act 2006. Accordingly we recommend the enactment of an express provision for substantive hearings by video link, as well as the enactment of a rule-making power to govern the hearings.

PROPER  
DESCRIPTION  
OF THE  
DEFENDANT  
WHERE THE  
APPLICANT IS  
A PRISONER

- 59 Section 8(a) of the Habeas Corpus Act 2001 provides that where an applicant is a prisoner the prison manager of a prison in which the detained person is alleged to be illegally detained is the defendant. However, section 38 of the Corrections Act 2004 provides that the chief executive of the Department of Corrections has the lawful custody of a prisoner.
- 60 This would appear to be an inconsistency that has arisen from oversight at the time of the enactment of the Corrections Act. All submitters agreed this should be changed.
- 61 Section 8(a) of the Habeas Corpus Act should be amended to bring it into line with the Corrections Act.

## FORM OF SCHEDULE

- 62 Finally, it was brought to our attention by a member of the judiciary that the Schedule of the Act, which contains the form of a Writ of Habeas Corpus, refers to the “Chief Justice of Our High Court of New Zealand” as the witness to a writ. Of course, a writ of habeas corpus is now issued by a High Court judge. The reference to “Chief Justice of Our High Court” appears to be a historical hangover, and we recommend that be changed to a “Judge of the High Court of New Zealand”.



# Summary of Recommendations

We recommend that:

- 1 the precedence of habeas corpus applications over all other court business remain the ordinary rule, subject to the ability of the Court to relax the requirement if the circumstances necessitate. The requirement that judges and court staff treat applications with priority and urgency should remain;
- 2 the three day timeframe remain the ordinary rule but that High Court judges be given the ability to relax the requirement in appropriate cases. If the circumstances appear to require an extended timeframe, a High Court judge must hear from the applicant and respondent by a telephone hearing or otherwise before dispensing with the three day requirement;
- 3 the declaratory judgments procedure remain the vehicle for challenging legal decisions where a writ has been granted for the defendant, until a comprehensive policy review of habeas corpus has been undertaken;
- 4 section 13 be amended to make clear that where the court decides the most appropriate response is to transfer an application to the Family Court it need not “determine” the application in accordance with section 14 first;
- 5 there be power to dismiss applications without the need for the defendant to establish lawfulness of the detention where the application is statute barred under section 15(1) of the Act or involves the wrong procedure. The judge could indicate the procedure by means of which the application is appropriately brought;
- 6 the enactment of an express provision permitting pre-hearing conferences, by telephone, video link or other technology authorised by the Rules;
- 7 provision be made for allowing hearings by video link or other technologies authorised by the Rules;
- 8 section 8(a) of the Habeas Corpus Act be amended to bring it into line with the Corrections Act; and
- 9 that the Schedule be amended from “Chief Justice of Our High Court of New Zealand”, to “Judge of the High Court of New Zealand”.



# Habeas Corpus Amendment Bill

Government Bill

## Explanatory note

### General policy statement

Habeas corpus *ad sub judiciem* is a writ for a person's release from unlawful detention. Under habeas corpus, the Judge stands between the subject and any encroachment upon the subject's liberty, so that when any person is arrested or detained, the validity of that detention may be tested by an application for habeas corpus. If it is shown during the course of proceedings that there is insufficient cause for detention, a writ of habeas corpus is issued that orders the release of the prisoner. The grant of the writ is not at the discretion of the court, but is available as a matter of right. This reflects the law's presumption that there is a general right to liberty unless there is a legal basis for abridging it. The right of persons arrested or detained to apply for habeas corpus is enshrined in section 23(1)(c) of the New Zealand Bill of Rights Act 1990.

The origin of the writ was not in securing freedom from detention, but rather in ensuring a person's attendance before a court of law so that justice (whether civil or criminal) might be administered in his or her presence. Only gradually did the writ emerge as a means of testing the legality of detention. The writ is not "an all-encompassing panacea against every form of wrongful detention". Lord Brown notes that it has never applied to unlawful committal for contempt, and criminal convictions have always been outside the reach of habeas corpus, even when there was no right of appeal against a criminal conviction.

In 1997, the Law Commission (the **Commission**) recommended a simplified procedure for dealing with habeas corpus applications. The Law Commission's recommendations were implemented by the

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Habeas Corpus Act 2001 (the **Act**). The Act revoked the application of the old English statutes on habeas corpus but carried over in simplified form the major reforms introduced by the earlier Acts.

Experience with the Act since it came into force suggests it has largely achieved its objective of providing an effective procedure for dealing with habeas corpus applications. However, some practical problems have emerged, including the misuse of the procedure by some applicants to obtain a priority hearing on matters that should be brought by another form of proceedings, such as judicial review.

The Minister of Justice invited the Law Commission on 27 June 2007 to look at whether minor changes needed to be made to procedural aspects of the legislation.

The Law Commission issued a study paper after consultation with the Ministry of Justice, the Crown Law Office, the Department of Corrections, and the judiciary. The Commission's report (published in December 2007) takes into account the views expressed in the course of that consultation, as well as the submissions received on the study paper.

The Bill incorporates the following recommendations from the Law Commission's report:

- the High Court or a Judge of that Court should be given the ability to dispense, in appropriate cases, with the rule that habeas corpus applications take precedence over all other business;
- while the 3-day time frame for hearing an application should remain the ordinary rule, the High Court or a Judge of that Court should be given the ability to dispense with this requirement in appropriate cases. If the circumstances appear to require an extended time frame, a High Court Judge must hear from the applicant and respondent by a telephone hearing or otherwise before dispensing with the 3-day requirement;
- section 13 of the Act should be amended to make clear that where the court decides the most appropriate response is to transfer an application to the Family Court it need not determine the application in accordance with section 14 first;
- that there be a new power to dismiss applications without the need for the defendant to establish the lawfulness of the detention where the application is statute barred under section 15(1) of the Act or involves the wrong procedure. The Judge

could indicate the procedure by means of which the application is appropriately brought:

- there should be an express provision permitting pre-hearing conferences, by telephone, video link, or other technology authorised by rules of court;
- provision should be made for allowing hearings by video link or other technology authorised by rules of court;
- That section 8(a) of the Act should be amended to bring it into line with the Corrections Act 2004;
- that the Schedule of the Act be amended by omitting a reference to the Chief Justice of Our High Court of New Zealand and substituting a reference to a Judge of the High Court of New Zealand.

### Clause by clause analysis

*Clause 1* relates to the Title of the Bill.

*Clause 2* provides that the Bill (once enacted) comes into force on the day after the date on which it receives the Royal assent.

*Clause 3* provides that the principal Act amended is the Habeas Corpus Act 2001.

### Part 1 Amendments to principal Act

*Clause 4* amends section 8 of the principal Act to provide that the defendant, in the case of a prisoner detained in a corrections prison, is the chief executive of the Department of Corrections, not the prison manager.

*Clause 5* amends section 9 of the principal Act by removing the requirement that applications for habeas corpus must be given precedence over all other Court business by allowing the Court or a Judge of the Court to direct otherwise, if the Court or Judge considers that the circumstances require a departure from the ordinary rule. *Clause 5* also amends section 9 to allow a Judge, after giving the parties an opportunity to be heard, to order that a hearing may be set down later than 3 working days after the application for habeas corpus is filed.

*Clause 6* inserts a new section 10A into the principal Act (which allows a Judge to determine certain matters relating to an application for habeas corpus by conference). A conference may be convened by



telephone conference, video link, or by any other technology authorised by rules of court, or held in chambers.

*Clause 7* amends section 14 to allow the High Court to refuse an application for habeas corpus, without requiring the defendant to establish the legality of the applicant's detention, in the following circumstances—

- if section 15(1) applies (section 15(1) bars second or subsequent applications on the same issue);
- if an application for the writ of habeas corpus is not the appropriate procedure for considering the allegations made by the applicant.

An applicant whose application is refused on these grounds will have the same right to appeal as an applicant whose application is refused on other grounds.

*Clause 7* also makes it clear that the High Court may transfer an application to the Family Court under section 13(2) of the principal Act (if that provision applies) instead of granting or refusing the application under section 14(3).

*Clause 8* inserts a *new section 14A* into the principal Act (which allows an application for habeas corpus to be heard using a video link or any other technology authorised by rules of court, if a Judge is satisfied that conducting a hearing by this means is in the interests of justice).

*Clause 9* alters provisions requiring appeals against decisions on applications for habeas corpus to be given precedence over all other Court business to enable the relevant Court or a Judge of that Court to direct otherwise if the Court or Judge considers that the circumstances require a departure from the ordinary rule.

*Clause 10* amends section 20 to enlarge the power to make rules of court under section 51C of the Judicature Act 1908.

*Clause 11* updates a reference in the Schedule.

## **Part 2**

### **Transitional provision**

*Clause 12* is a transitional provision dealing with the application of the amendments made by this Act to applications or determinations made before the commencement of this Act.

# Habeas Corpus Amendment Bill

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### Part 2

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Habeas Corpus Amendment Act **2007**.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

**3 Principal Act amended**

This Act amends the Habeas Corpus Act 2001.

**Part 1****Amendments to principal Act****4 Description of defendant by reference only to office**

Section 8 is amended by repealing paragraph (a) and substituting the following paragraph:

“(a) the chief executive of the department for the time being responsible for the administration of the Corrections Act 2004, if the detained person is alleged to be illegally detained in a corrections prison; or”.

**5 Urgency**

- (1) Section 9(1) is amended by adding “unless the Court or a Judge considers that the circumstances require otherwise”.
- (2) Section 9(3) is amended by omitting “The Registrar” and substituting “Unless a Judge otherwise orders, the Registrar”.
- (3) Section 9 is amended by adding the following subclause:  
“(4) A Judge may not make any order under subsection (3) without giving the parties to the proceeding an opportunity to be heard (whether by conference convened under **section 10A** or otherwise).”

**6 New section 10A inserted**

The following section is inserted above section 11:

**“10A Power to convene teleconferences**

- “(1) A Judge may, on application or on his or her own initiative, convene a conference of the parties to an application for the purpose of making any order or giving any directions considered necessary or desirable for the just and efficient determination of the application, including—
  - “(a) extending under **section 9(3)** the time for hearing the application;
  - “(b) directing that the hearing of the application be conducted by video link or other technology under **section 14A**.
- “(2) A conference under this section may be or convened by telephone conference, video link, or by using any other form of

technology authorised by rules of court, or may be held in chambers.”

**7 Determination of applications**

- (1) Section 14 is amended by inserting the following subsection after subsection (1):
  - “(1A) Despite subsection (1), the High Court may refuse an application for the issue of the writ, without requiring the defendant to establish that the detention of the detained person is lawful, if the Court is satisfied that—
    - “(a) section 15(1) applies; or
    - “(b) an application for the issue of a writ of habeas corpus is not the appropriate procedure for considering the allegations made by the applicant.”
- (2) Section 14(3) is amended by omitting “A Judge” and substituting “Subject to section 13(2), a Judge”.

**8 New section 14A inserted**

The following section is inserted after section 14:

**“14A Hearing by video link or other authorised technology**

- “(1) A Judge may, on application or on his or her own initiative, direct that an application be heard by video link or by any other technology authorised by rules of court, if the Judge is satisfied that for any reason a hearing by video link or by using any other technology authorised by rules of court is in the interests of justice.
- “(2) A hearing conducted under this section—
  - “(a) has effect as if the Judge were physically present; and
  - “(b) does not affect the privileges and immunities of the Judge or of any witness, counsel, or the parties appearing at the hearing.”

**9 Urgency in hearing appeals**

Section 17(1) is amended by adding “unless that Court or a Judge of that Court considers that the circumstances require otherwise”.

- (2) Section 17(1A) is amended by inserting “unless that Court or a Judge of that Court considers that the circumstances require otherwise” after “the Supreme Court”.

**10 Rules**

Section 20 is amended by repealing subsection (2) and substituting the following subsection:

- “(2) Without limiting subsection (1), rules may be made under section 51A of the Judicature Act 1908—
- “(a) authorising the use of any specified technology as a means of—
    - “(i) convening conferences under **section 10A**; or
    - “(ii) conducting hearings under **section 14A**;
  - “(b) regulating the manner in which hearings under **section 14A** are conducted;
  - “(c) amending the form in the Schedule or revoking the form and substituting a new one.”

**11 Schedule**

The form in the Schedule is amended by omitting “Chief Justice of Our High Court of New Zealand” and substituting “Judge of the High Court of New Zealand”.

## **Part 2**

### **Transitional provision**

**12 Transitional provision**

The amendments made by this Act apply in respect of an application made under the principal Act whether before, on, or after the commencement of this Act.



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