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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 44

Habeas Corpus
Procedure

November 1997
Wellington, New Zealand

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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20 November 1997

Dear Minister

I am pleased to submit to you Report 44 of the Law Commission, *Habeas Corpus: Procedure.*

Habeas corpus ad subjiciendum is a writ for a person's release from unlawful detention. When any person is arrested or detained, the validity of that detention may be tested by an application for habeas corpus.

Liberty of the person and freedom from arbitrary arrest are among the most important rights that New Zealand law protects. As a means of securing everyone's right not to be arbitrarily – including unlawfully – detained, "the great writ" of habeas corpus has long been widely accepted as a constitutional protection of basic importance. So, in the Magna Carta of 1215, it was provided that "no free man shall be taken or imprisoned or disseized of his . . . liberties . . . *but by the law of the land*."

That New Zealand courts should provide effective means for testing the legality of detention is recognised internationally (see article 9(4) of the International Covenant on Civil and Political Rights 1966, ratified by New Zealand 28 December 1978). New Zealand's first (1983) Report under the Covenant stated that "anyone who is deprived of his liberty by arrest or detention is able to institute an application for a writ of habeas corpus at common law" (para 108). The 1985 White Paper, *A Bill of Rights for New Zealand*, acknowledged habeas corpus as a remedy from New Zealand courts' existing armoury for ensuring the lawfulness of arrest or detention: paras 10.101 and 10.184.

But in New Zealand today habeas corpus can be obtained only through English procedures. These procedures, devised for English courts, must be adapted so that they can apply in New Zealand. Sometimes this necessary adaptation can be achieved only with difficulty. A new procedure for habeas corpus applications was included in the 1984 Judicature Amendment Bill that enacted the High Court Rules 1985. But concerns, such as that the scope of the writ should not be limited inadvertently, led as a temporary measure to these provisions being deferred for further consideration.

As well as not reflecting adequately the constitutional status of habeas corpus, the current arrangements fail to provide a procedure that is modern, clear, well-integrated with related procedures, and locally appropriate. Traditionally courts also issued writs of habeas

corpus ("produce the body") for other purposes, like summoning prisoners to give evidence. Nowadays courts' powers for these other purposes are provided for by specific statutory provisions, so these unnecessary and obscure other writs of habeas corpus should be abolished. Personal liability of judges under the Imperial Acts should also be removed.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Introduction

The basic right

1 IT IS THE RIGHT OF EVERY INDIVIDUAL not to be imprisoned or detained either by the government acting arbitrarily and without due process, or by the wrongful act of another citizen or citizens. The fundamental constitutional importance of this right is not diminished by the circumstances that it is not the current practice of New Zealand governments to imprison their opponents in some local equivalent of the Tower of London, or that oubliettes are not a customary feature of New Zealand domestic architecture. Political imprisonment did not end with the Stuarts. In 1881 Gladstone's government, by executive action,[1] imprisoned Parnell for 6 months in Kilmainham Gaol in the hope (unrealised) that this would in some way dampen down Irish agrarian disturbances. Wartime internments are a more recent memory. The price of liberty is the maintenance of an armament to defend it.

The need for a remedy

2 It is easy enough to affirm, as does the New Zealand Bill of Rights Act 1990 s 22, that "everyone has the right not to be arbitrarily arrested or detained", but a right without a remedy is an empty thing. The lesson to be learned from English constitutional history since at least the sixteenth century is of the need for an effective procedure to enforce the right. The provision of that procedure was the principal purpose of the various Habeas Corpus Acts commencing with that of 1640.

Habeas corpus ad subjiciendum

3 The procedure that had evolved to test the lawfulness of detention involved the issue of a writ, originally in Latin, commencing with the imperative "Habeas corpus ad subjiciendum": Produce [to the Court] the body of a named person so that there may be subjected to scrutiny the justification claimed for that person's detention. It

[1] Pursuant to An Act for the Better Protection of Person and Property in Ireland (1881) 44 Vict c 4, enacted in March 1881, some 10 weeks before Parnell's arrest.

was from this wording that, as early as the thirteenth century, there derived the name "habeas corpus" for this area of the law.

Problems of the present "practice, pleading, and procedure"

4 The English practice, pleading and procedure of habeas corpus applied to New Zealand by virtue of rule 606 of the former Code of Civil Procedure:

> 606 English practice to be followed
>
> The practice, pleading, and procedure in the High Court on all informations and other criminal proceedings (other than those in relation to offences for which the offender may be proceeded against by indictment), and on application such as would be taken for a writ of habeas corpus, shall be the same as in England, so far as the English practice, pleading, and procedure are applicable to New Zealand and consistent with any other rules of the High Court and with the laws of New Zealand.

5 The 1984 Bill annexing the new High Court Rules, enacted as the Judicature Amendment Act 1985, included in those Rules a procedure for habeas corpus applications. But that part of what was proposed proved controversial. Rather than delay all of that long-awaited reform of the Civil Code, the provisions relating to habeas corpus were dropped and, as a temporary alternative, the Judicature Act 1908 s 54C was enacted:

> 54C Procedure in respect of habeas corpus
>
> (1) The practice, pleading, and procedure in the High Court on an application for a writ of habeas corpus shall be the same as in England so far as the English practice, pleading, and procedure are applicable in New Zealand and consistent with any other rules of the High Court and with the laws of New Zealand.
>
> (2) Subject to subsection (1) of this section, nothing in the High Court Rules affects the practice, pleading, or procedure in respect of an application for a writ of habeas corpus.

There the matter has remained. The problems of marrying "English practice, pleading, and procedure" to the current New Zealand procedure are described lucidly in appendix 3 to *McGechan on Procedure* (Wellington, Brooker's, 1988).

How the writ is used

6 The draft Act we recommend is not meant to define or alter the metes and bounds of the availability of the habeas corpus remedy,

the flexibility of which has been one of its great strengths. (On the present width of the writ's scope, see *Barnardo v Ford* [1892] AC 326 applied in *Re Jayamohan* [1996] 1 NZLR 172 (HC), (1997) 15 FRNZ 486 (CA)). As the received method of testing the legality of detention, habeas corpus is referred to in such statutes as the Fugitive Offenders Act 1881 (Imp) (ss 5–6, and 29A), the Extradition Act 1965 (ss 5, and 10–12), and the Immigration Act 1987 (s 128A). It has, in the past in New Zealand, provided a machinery for determining custody disputes, and it has even been suggested that it may have a use where the detention is not physical but the consequence of the brainwashing of impressionable persons by religious cults. A purpose of the draft Act we recommend is to provide, for the first time in this country, a procedure based on New Zealand practice and appropriate to New Zealand conditions.

The recommended procedure

7 The original English procedure required an ex parte application on which the applicant had to demonstrate a prima facie case for the issue of the writ. If the applicant succeeded, the next step was for the court to issue, and for there to be served, a writ requiring the respondent, within a limited time, to make a return setting out the justification advanced for the detention. The final step was a substantive hearing, at the conclusion of which the applicant's release from detention was or was not directed. The simplified procedure that evolved from this was for the substantive issue to be determined inter partes on the point of whether or not the writ should be issued.

8 The procedure we recommend is even simpler. It is based on Part IVA of the High Court Rules, relating to originating applications. It provides for an application under that Part to be disposed of with urgency in the manner described in the draft Act and commentary that follow (see pages 11–28 and paras C1–C29).[2] We are told that in Auckland (and perhaps elsewhere) the procedure that has evolved and is followed is not very different from that recommended in this report. In accepting this procedure judges have been properly anxious not to let matters of form stand in the way of civil liberties. The Commission prefers the procedure it recommends to the more complex approach suggested in *McGechan*.

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[2] To distinguish them from existing provisions this report refers to all draft Act provisions in full and in italics, eg, *section 1*.

No successive applications but a right of appeal

9 It is sometimes asserted that an unsuccessful habeas corpus applicant has the right, if he or she fails before one judge, to renew the application before another judge. It is doubtful whether that is the law in New Zealand (see para C19) but, if it is, the draft Act abolishes any such right. Instead, the draft Act would confer on an unsuccessful applicant a right of appeal (as was done in England by s 15 of the Administration of Justice Act 1960): see *section 13*.

No appeal but a declaration if defendant unsuccessful

10 Unlike the English statute, the draft Act confers a right of appeal on an unsuccessful defendant only in custody cases, and the use of the habeas corpus procedure in those cases is likely to be rare. The absence of a right of appeal for an unsuccessful defendant in other cases drew some criticism from those from whom the Commission sought comment on a draft of this report (see para 22). That is not the traditional view:

> [I]t was suggested that if there was an appeal in the one case, it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be to my mind nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused, but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with; the refusal to discharge, on the other hand, was always open to review; and although this review was not, properly speaking, by way of appeal, its practical effect was precisely the same as if it had been.[3]

11 If the applicant's release from detention is ordered that should be the end of the matter:

> [I]t is a cardinal principle of the law of England, ever jealous for personal liberty, that when once a person has been held entitled to liberty by a competent Court there shall be no further question.[4]

12 The Commission's recommendation is consistent with the appeal being a trade-off for statutory quietus being given to the right an unsuccessful applicant once had or was thought to have to renew the application before another judge. It was the decisions in

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[3] *Cox v Hakes* (1890) 15 App Cas 506, 536, per Lord Herschell.

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

Re Hastings[5] denying a right of successive application that triggered the English statute conferring an appeal.[6]

13 It was suggested to the Commission that the absence of a right of appeal for the defendant makes it impossible for a defendant to challenge points of principle decided adversely to the defendant in habeas corpus proceedings. Reference was made to the 1976 case of *Re Ashman and Best*,[7] which prompted the hasty enactment of the Fugitive Offenders Amendment Act 1976. The solution to this problem is the one adopted in *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 (the ticks and crosses case), in which an unappealable High Court decision on an electoral petition was challenged by means of an application for a declaratory judgment removed into the Court of Appeal. This seems to the Commission a neater solution than the English one of allowing a defendant to appeal but on the basis that "it shall not affect the right of the person restrained to be discharged in pursuance of the order under appeal and . . . to remain at large regardless of the decision on appeal": Administration of Justice Act 1960 s 15(4). There is no question of an unsuccessful defendant being estopped *per rem judicatam* in such subsequent proceedings as a claim for damages for wrongful detention.[8]

Custody cases

14 As para 6 mentions, habeas corpus proceedings have in the past been used as an appropriate procedure for determining custody disputes. Today, however, there is a perfectly satisfactory machinery provided by the Guardianship Act 1968. It would be undesirable if a practice arose of bypassing the expertise of the Family Court in favour of the fast-track offered by a new Habeas Corpus Act.[9]

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5 *(No 2)* [1959] 1 QB 358 and *(No 3)* [1959] Ch 368, affirmed [1959] 1 WLR 807.

6 Discussed, for example, by Sharpe, *The Law of Habeas Corpus* (2nd ed, Clarendon Press, Oxford, 1989), 202. The Court of Appeal's decision in *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440–441, suggests inconclusively that a right of appeal may in some way have been conferred by s 23(1)(c) of the New Zealand Bill of Rights Act 1990. See too *R v B* [1995] 2 NZLR 172, 179, 181, 185, 186, 187.

7 A note of which is reported: [1985] 2 NZLR 224.

8 See, for example, the discussion in Sharpe, 62 and 201–202; *In re Hastings (No 2)* [1959] 1 QB 358, 371; and *Re Tarling* [1979] 1 All ER 981, 987.

9 See, for example, the court's observations in *Re D (Infants)* [1969] NZLR 865, 865, and Lord Goddard LCJ, "The Prerogative Writs: Habeas Corpus" [1956] NZLJ 214, 214: "It would be much better, I think, if all those could be sent to the Divorce Court."

The Commission is loath to withhold entirely the remedy of the habeas corpus procedure in custody situations, and so *section 10(1)* of the draft Act confers on the High Court the various special procedural powers (such as the right to appoint counsel for the child) conferred by the Guardianship Act. The draft Act also gives an unsuccessful defendant in custody cases a right of appeal. But to thwart the routine use of the habeas corpus procedure in custody cases we have (after consultation with the Principal Family Court Judge) included as *section 10(2)* a provision enabling removal of proceedings to the Family Court on the application of either party or by the court on its own motion.

A statutory procedure for a basic constitutional right

15 Concern was expressed to us on behalf of the High Court judges, the Rules Committee and by the Solicitor-General (a member of the Rules Committee) that the draft Act would go too far in regulating procedure and create avoidable difficulties in amendment. The matter was expressed forcefully by the Chairman of the Rules Committee who, in a letter dated 3 September 1997, said that

> placing rules of procedure in a statute has the practical effect of fragmenting the procedures applicable to civil proceedings and making them difficult to locate. It makes for inefficiency for the public, the court officers and the profession and greatly increases the danger that a procedural provision will be overlooked. It also freezes in time any special procedures for any particular class of proceeding with the result that such classes of proceeding cannot avail themselves of adaptations to the High Court Rules designed to increase efficiency and thereby better utilise the valuable resources of the courts.

16 In relation to the first two sentences, we are confident that the draft Act we recommend will be user-friendly, and we cannot imagine anyone with a habeas corpus problem doing other than reaching for the (very short) Habeas Corpus Act. On the point that the recommended Act would be difficult to amend, *section 17* does of course make some provision for amendment.

17 But there is a more basic point of principle to be invoked in response to the criticism that the draft Act should not include provision for matters of procedure. The Imperial Acts to be replaced are largely concerned with spelling out detailed procedural rules (for example, tight time limits for steps in the proceeding). The existing Judicature Act 1908 provision which we recommend be repealed (s 54C) is concerned only with "practice, pleading, and procedure". There is good reason for this. The right of freedom from arbitrary detention existed in English law well before the

Habeas Corpus Acts. What Parliament in its long conflict with Crown and executive found to be missing was an effective procedure to enable the swift enforcement of that right. It was that lack that the Habeas Corpus Acts were designed to repair. (This is made clear by the preamble to the 1679 Act.) If that existing (though now archaic) procedure is to be replaced by a new procedure more suited to contemporary and local circumstances, the Commission has no doubt that the protection of the liberty of the subject requires that the new procedure too should be enshrined in an Act of Parliament. To do otherwise would be to leave the processes available to protect a basic constitutional right subject to the risk (however theoretical) of being restricted without any involvement by Parliament itself.

18 The habeas corpus procedure has always entitled the applicant to obtain in a summary way "an instant determination as to the lawfulness of an existing imprisonment. . . . It was as [Sir Edward] Coke described it *festinum remedium*".[10] The provisions of our draft Act, especially *sections 6–7* and *14*, endeavour to capture this tradition. Concern has been expressed that the provision in *section 6(1)* – for a habeas corpus application to have priority over other matters – may prove disruptive. But *section 6(1)* states the substance of the existing law,[11] and we are confident that the judges and the employees of the Department for Courts will cope with any problems in the future as they have in the past. To the extent that *section 6(1)* may be disruptive, the Commission shares the traditional view that this is part of the price of preserving the liberty of the subject by providing "an expeditious and effectual method of restoring any person to his liberty who has been unjustly deprived thereof".[12] Access may be had to the whole of New Zealand's judicial resources to resolve what is an issue of administration and priorities.

Legal aid

19 In many cases an applicant for habeas corpus will need legal aid. Our draft Act therefore provides (following consultation with the Legal Services Board) for an amendment to s 19 of the Legal Services Act 1991 to include habeas corpus applications within

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[10] "A hasty remedy": *Cox v Hakes* (1890) 15 App Cas 506, 514–515, per Lord Halsbury LC.

[11] See, for example, *R v Home Secretary, ex parte Cheblak* [1991] 1 WLR 890, 894.

[12] Preamble to the Habeas Corpus Act 1816 (Imp).

the definition of civil proceedings. This amendment would enable the invocation of the provision for urgency contained in s 25 of the Legal Services Act 1991.

When habeas corpus not available

20 *Section 11(2)* of the draft Act makes it clear that habeas corpus proceedings may not be employed to relitigate criminal convictions and bail applications. In an earlier draft we also attempted to restate the rather complicated rules determining the boundary between the powers of the courts and any parliamentary power to commit a person to prison. However, it was pointed out to us that the New Zealand Parliament had never exercised such a power and that we should not recommend provisions based on the possibly contentious premise that such a power exists.[13] So the draft Act provides no more than that any power of the House of Representatives to punish for contempt is unaffected: *section 4(2)*.

Removing the obsolete

21 Historically there existed types of habeas corpus writs other than habeas corpus ad subjiciendum.[14] Since each of these has been rendered obsolete by changes in the law,[15] the opportunity has been taken formally to abolish them: *section 15*. The draft Act also would not repeat the provisions in the Imperial Acts (s 6 of the 1640 Act, and s 9 of the 1679 Act) that impose personal liability on judicial officers.

How the Commission arrived at its recommendation

22 The Commission circulated a draft of this report (including the draft Act) to all the judges of the High Court and the Court of Appeal, to departments and Crown entities likely to be affected by the draft Act, to practising and academic lawyers known by the

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[13] See, for example, the discussions in 1(1) *Halsbury's Laws of England* (4th ed Reissue, 1989), para 244, and *The Law of Parliamentary Privilege in New Zealand* (NZLC MP5, 1996), para 80.

[14] See para C3 of this report and 1(1) *Halsbury's Laws of England*, para 265.

[15] Most recently by s 2(1) of the Penal Institutions Amendment Act 1994, which (from 1 March 1995: cl 3(1) of SR 1995/3) inserted in s 2 of the Penal Institutions Act 1954 a definition of "attendance for judicial purposes". For completeness, we note, however, the misconceived invocation (abandoned at hearing) of the writ of habeas corpus ad deliberandum in *Palmer v Superintendent of Auckland Maximum Security Prison* [1991] 3 NZLR 315, 317–318.

Commission to be interested in this field, and to civil liberties groups. With the reservations already referred to, the responses were overwhelmingly in support of what the Commission proposed. Many thoughtful proposals were made for improvement in matters of detail.

23 The Commission is especially grateful for the constructive comments and assistance of:

Hon Justice Blanchard
A Bracegirdle, Office of the Clerk of the House of Representatives
G Buchanan, Chief Legal Adviser, Department of Labour
Department for Courts/Te Tari Kooti
Hon Justice Doogue, Rules Committee Chairman
LJ Gibb, Legal Section, New Zealand Police National Headquarters
Hon Justice Gallen, Acting Chief Justice
Hon Justice Giles (on behalf of the Auckland High Court Judges)
RPG Haines, Barrister
Dr RE Harrison QC
PW Hogg QC, Professor of Law, Osgoode Hall Law School, York University
G Illingworth, Barrister
Ministry of Justice/Te Manatü Ture
Hon Justice Sir Kenneth Keith
JJ McGrath QC, Solicitor-General
Judge PD Mahony, Principal Family Court Judge
New Zealand Law Society
Rt Hon Sir Geoffrey Palmer
Hon Justice Pankhurst (on behalf of the South Island High Court Judges)
Hon Justice Potter
Hon Justice Robertson
DM Smith, Executive Director, Legal Services Board
M Soper, Crown Counsel, Rules Committee Secretary
M Taggart, Professor of Law, University of Auckland
Hon Justice Tompkins

The Commission is most grateful for all the help it has received, as a result of which the draft Act is much improved. We would make particular reference to help given by Mr GJX McCoy QC, whose knowledge of the law of habeas corpus is unrivalled. Ross Carter, a Commission researcher, worked on the preparation of this report. The provisions of the draft Act were prepared by Mr GC Thornton QC, legislative counsel to the Commission.

Recommendation

24 The Commission recommends that Parliament enact the draft Habeas Corpus Act included in this report.

DRAFT
HABEAS CORPUS ACT

Public Act . . . of 199–
Royal Assent: Day Month 199–
Comes into force: Day Month 199–

CONTENTS

The Parliament of New Zealand enacts as follows

1 Title

This Act is the Habeas Corpus Act 199–.

Definitions: habeas corpus, s 3, Act, *Acts Interpretation Act 1924* s 4

2 Purposes

The purposes of the Act are

(a) to reaffirm the historic and constitutional purpose of the writ of habeas corpus as a vital means of safeguarding individual liberty; and

(b) to establish an efficient procedure for applications to the High Court for the issue of a writ of habeas corpus and the expeditious determination of habeas corpus applications and matters arising from such applications; and

(c) to provide certain unsuccessful parties in habeas corpus proceedings with a right of appeal to the Court of Appeal; and

(d) to abolish writs of habeas corpus other than the writ of habeas corpus ad subjiciendum.

Definitions: applicant, application, habeas corpus, s 3; Act, *Acts Interpretation Act 1924* s 4

3 Definitions

In this Act

applicant means the plaintiff in an application;

application means an application to the High Court for a writ of habeas corpus;

detention includes every form of restraint of liberty of the person;

habeas corpus means habeas corpus ad subjiciendum;

judge means a judge of the High Court;

registrar includes a deputy registrar;

Rules Committee means the Rules Committee established by section 51B of the *Judicature Act 1908*;

working day means any day other than

(a) a Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's Birthday and Waitangi Day; and

(b) a day in the period beginning on 20 December in any year and ending on 20 January in the following year.

Definitions: Act, *Acts Interpretation Act 1924* s 4

COMMENTARY

Section 2

C1 *Section 2* states the purposes of the Act, emphasising that it is directed to questions of procedure.

Section 3

C2 *Section 3* gives the meaning of terms the Act uses.

C3 Habeas corpus means in the Act the writ of habeas corpus ad subjiciendum: commanding a person detaining another person to deliver the body of the prisoner with the cause of the prisoner's detention so that a court can judge its sufficiency and remand the prisoner to prison, or admit the prisoner to bail, or release the prisoner. Historically there were four other writs of habeas corpus:

- habeas corpus ad testificandum: to enable a detained person to be brought before a court to give evidence;
- habeas corpus ad respondendum: to enable a detained person to be brought before a court for trial;
- habeas corpus ad deliberandum: to enable a detained person to be brought before a court for examination on any other charge;
- habeas corpus recipias: to enable a detained person to be removed for trial from the custody of one to the custody of another.

Each of these four other habeas corpus writs is almost certainly obsolete in New Zealand, having been made unnecessary by the current terms of the Penal Institutions Act 1954 s 26, or, in cases of detention of a person elsewhere than in a penal institution, by courts' powers to issue subpoenas and injunctions. *Section 15* provides therefore for their abolition (see para C24).

4 Application to the Crown and contempt of Parliament

(1) This Act binds the Crown.

(2) This Act does not limit or affect the power or authority of the House of Representatives to punish for contempt.

Definitions: Act, *Acts Interpretation Act 1924* s 4

Application for a writ of habeas corpus

5 Manner of application for a writ

(1) An application to challenge the legality of a person's detention may be made by an application for a writ of habeas corpus.

(2) An application for a writ of habeas corpus is to be made to the High Court by an originating application in the manner provided by Part IVA of the High Court Rules, but this subsection does not exclude the High Court's inherent power to make an order on an oral application in circumstances of unusual urgency.

(3) Notwithstanding subsection (2), rules 255, 458I, 458J, and 458K of the High Court Rules do not apply to an application and no applicant shall be disqualified for lack of capacity or standing.

(4) A party to a proceeding for a writ of habeas corpus is not entitled to general or special discovery of the documents of any other party to the proceeding or to an order for security for costs and the High Court Rules concerning discovery and inspection of documents and security for costs do not apply.

(5) No fee is payable to the High Court or the Court of Appeal for filing any document in respect of an application or an appeal against the refusal of an application.

(6) An application may describe a defendant by reference only to his or her office as:

(a) the Superintendent of a penal institution in which the applicant is alleged to be illegally detained; or

(b) the Commissioner of Police if the applicant is alleged to be illegally detained in police custody, except following the exercise of powers under the *Immigration Act 1987*; or

(c) the Secretary of Labour if the applicant is alleged to be illegally detained in police custody following the exercise of powers under the *Immigration Act 1987*; or

(d) the Comptroller of Customs if the applicant is alleged to be illegally detained in the custody of the New Zealand Customs Service.

Definitions: applicant, application, detention, habeas corpus, s 3; Act, High Court, *Acts Interpretation Act 1924* s 4

Section 4

C4 The Act would bind the Crown: *subsection (1)*.

C5 *Subsection (2)*, by analogy with s 9(a) of the Crimes Act 1961, provides that the Act in no way affects the power or authority of the House of Representatives to punish for contempt (see para 20, and compare Defamation Act 1992 s 54).

Section 5

C6 Challenges to the legality of the detention of a person may be made by applications for the writ of habeas corpus: *subsection (1)*. *Section 5* is permissive. A plaintiff must be free to challenge the legality of his or her detention by means other than the fast-track habeas corpus procedure. A plaintiff may (and if he or she is likely to need discovery would be well advised to) prefer an application for judicial review, or may wish to bring an action for damages for the tort of false imprisonment.

C7 The procedure is that for an originating application under Part IV of the High Court Rules: *subsection (2)*. But, to expedite or facilitate applications, some of the High Court Rules are excluded, for example:

- *subsection (3)* excludes rules 458I (interlocutory application for directions), 458J (application for directions affecting hearing), and 458K (court may convene chambers conference for making an order or giving directions affecting hearing),
- *subsection (3)* also provides that no applicant shall be disqualified for a lack of capacity or standing,
- *subsection (4)* excludes rules about discovery and inspection of documents (eg, rules 297–317A) and security for costs (rule 60) – parties are not entitled to general or special discovery of any other party's documents or to security for costs, and
- *subsection (5)* provides that no court filing fees are payable.

Rule 255 of the High Court Rules is also excluded because *section 7* of this Act provides specifically for speedy transfers of applications (see para C11).

C8 To make the Act more user-friendly *subsection (6)* provides that certain defendants may be described in an application or a writ simply by reference to their offices (so relaxing the usual requirements of full name, occupation, and place of residence of rule 458E(4)(a)). See *section 11(5)* and *Schedule 1* for a suggested form of the writ.

6 Urgency

(1) An application for a writ of habeas corpus is to be given precedence over all other matters before the High Court and judges and employees of the Department for Courts are to ensure that every such application, including any interlocutory application, is disposed of as a matter of priority and urgency.

(2) The registrar must allocate a date for the *inter partes* hearing of an application that is no later than 3 working days after the application is filed, and the allocated date must be shown on the notice of application in accordance with rule 458G of the High Court Rules.

(3) Notwithstanding subsection (2), an application may be made to a judge at any time on any day, whether a working day or not.

Definitions: application, habeas corpus, judge, registrar, working day, s 2; High Court, *Acts Interpretation Act 1924* s 4

7 Urgency where no resident judge available

(1) If an application is filed at a Registry of the High Court in a place where no judge is at that time available, the registrar must ensure that the application is dealt with in some other place within the time limit referred to in section 6(2); and any other registrar or employee of the Department for Courts whose assistance is sought by the registrar in whose Registry the application is filed has a corresponding obligation.

(2) If subsection (1) applies, the registrar must

(a) make such urgent enquiries as are necessary to determine where and by whom the application can most conveniently and expeditiously be dealt with; and

(b) forward the application and any other relevant documents without delay to the registrar at the place where the application is to be dealt with; and

(c) without delay inform every party to the proceeding of the action taken under this section.

Definitions: application, judge, registrar, s 3

Section 6

C9 Each of the Imperial Habeas Corpus Acts in force in New Zealand (there are three, of 1640, 1679 and 1816, see Imperial Laws Application Act 1988 s 3(1) and First Schedule, for the texts see pages 29–58) emphasise the entitlement of an applicant for a writ of habeas corpus to urgency. So s 6 of the 1640 Act provides that the hearing of the application for a writ must be "without delay upon any pretence whatsoever" and that the hearing is to be at most within 3 days after the return of the writ. Section 1 of the 1679 Act provides that the return must be made within 3 days after service. Lord Eldon's words seem appropriate here:

> The like writ [of habeas corpus] is to be granted out of the Court of Chancery, either in the time of the term (as in the King's Bench), or in the vacation, for the Court of Chancery is officina justiciae, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time, as in the term. (*Crowley's Case* (1818) 2 Swan 11, 48, as quoted in *In re "N" (Infants)* [1967] 1 Ch 512, 526, per Stamp J)

C10 Like the provisions in the Imperial Habeas Corpus Acts, *section 6* is designed to achieve urgency by:

- requiring judges and court employees to deal with habeas corpus applications as a matter of urgency, disposing of them before other matters: *subsection (1)*;
- requiring registrars to allocate a hearing date that is within 3 working days of the filing of the application: *subsection (2)*; and
- preserving what is probably the present law (see *In re "N" (Infants)* [1967] 1 Ch 512) that an application to a judge may be made at any time: *subsection (3)*.

Section 7

C11 *Section 7* is a strengthened version of High Court Rule 255 and is intended to ensure that habeas corpus applications, more particularly those filed in provincial courts, are disposed of promptly.

Determination of applications

8 Interim orders for release from detention

(1) The High Court may make an interim order for the release from detention of an applicant for a writ of habeas corpus pending final determination of the application and may attach such conditions to the order as the Court thinks appropriate to the circumstances.

(2) In the case of an applicant who is charged with an offence, the Court must not make an order under this section if the Court is of the opinion that bail would not be granted to that person under the *Crimes Act 1961* or under sections 45A to 50A of the *Summary Proceedings Act 1957*.

(3) If a person has been released from detention under an interim order, the Court may, on the application of any party to the proceeding or on the Court's own initiative, make an order varying or revoking any condition of the interim order or substituting or imposing any other condition.

Definitions: applicant, application, detention, habeas corpus, judge, s 3

9 Power of arrest of absconder etc

(1) A member of the police may arrest without warrant a person who has been released from detention under an interim order made under section 8 if the member of the police believes on reasonable grounds that

(a) the person so released has absconded or is about to abscond for the purpose of evading any appearance or further appearance in Court in connection with the application; or

(b) the person has failed to comply with any condition attached to the interim order.

(2) Every person who is arrested under this section must be brought before the High Court as soon as possible and, if the Court is satisfied that the person had absconded or was about to abscond or did fail to comply with a condition attached to the interim order or an undertaking to the Court in reliance on which the interim order was made, the Court may revoke the interim order.

(3) A member of the police may, for the purposes of this section, enter at any time on to any premises, by force if necessary, if the member of the police has reasonable cause to believe that the applicant is on those premises, but if that member of the police is not in uniform and a person in actual occupation of the premises requires the member of the police to produce evidence of his or her authority, the member of the police must before entering on the premises produce his or her badge or other evidence of membership of the police.

Definitions: applicant, application, detention, judge, s 3

Section 8

C12 *Section 8* provides for orders for release from detention pending final determination of a habeas corpus application.

Section 9

C13 *Section 9* complements *section 8* by conferring powers in the event of a person released absconding or breaching a condition on which a court granted an interim order for release from detention.

10 Powers as to young applicants

(1) In dealing with the application of a person who is under the age of 20 years, the High Court has and may exercise the powers that are conferred on a Family Court by the *Guardianship Act 1968*.

(2) If the substantive issue in an application is the welfare of a person under the age of 16 years, the High Court may, of its own initiative or at the request of a party to the proceeding, transfer the application to a Family Court, and in such an event the application is to be dealt with by the Family Court in all respects as if it were an application to that Court under the *Guardianship Act 1968*.

Definitions: application, judge, s 3; Family Court, *Acts Interpretation Act 1924* s 4

11 Determination of applications

(1) The High Court is to grant a writ of habeas corpus ordering the release of the applicant from detention as a matter of right and justice where the defendant fails to establish that the detention of the applicant is lawful.

(2) A judge dealing with an application is to enquire into the matters of fact and law claimed to justify the detention and is not confined in that enquiry to the correction of jurisdictional errors. But this subsection does not entitle a judge to call in question

(a) a conviction of an offence by a court of competent jurisdiction or a duly constituted court-martial; or

(b) a ruling as to bail by a court of competent jurisdiction or a duly constituted court-martial.

(3) A judge must determine an application by

(a) refusing the application for the issue of the writ; or

(b) issuing the writ ordering the release from detention of the applicant.

(4) All matters relating to the costs of and incidental to an application are to be in the discretion of the Court and the Court may refuse costs to a successful party or order a successful party to pay costs to an unsuccessful party.

(5) A writ of habeas corpus may be in the form set out in Schedule 1.

Definitions: applicant, application, detention, habeas corpus, judge, s 3

Section 10

C14 Because use of habeas corpus proceedings for routine custody disputes is undesirable, the Court is given power to transfer proceedings to a Family Court (see para 14). If an application involves the custody of a child, the Court determining that application should have and be able to use the various special procedural powers available under the Guardianship Act 1968.

Section 11

C15 *Subsection (1)* clarifies that the defendant bears the onus of justifying the detention and that if he or she fails to establish that the detention is lawful then the applicant is entitled as a matter of right to an order of release. *Subsection (2)* provides that courts considering whether or not a detention is lawful are not confined to considering the formal position, but are to examine the merits. (Compare ss 3–4 of the 1816 Act.) The wording of *subsection (2)* is intended to overcome the problems discussed, for example, by Professor Sir William Wade QC, "Habeas Corpus and Judicial Review" (1997) 113 LQR 55, and the Law Commission (England and Wales), *Administrative Law: Judicial Review and Statutory Appeals* (LAW COM 226, 1994), 93–97. *Subsection (2)* reproduces however the qualifications to this general rule in the existing law, namely that habeas corpus applications must not be used to relitigate the merits of criminal convictions, or of bail applications. *Subsection (2)* is also not intended to interfere in any way with the provisions of ss 7–9 of the Inferior Courts Procedure Act 1909, each of which empowers a court hearing a habeas corpus application to amend the record of proceeding in certain respects.

C16 *Subsection (3)* confines the court to either granting or refusing an application.

C17 *Subsection (4)* gives the court a general discretion in making orders about costs. It is included to avoid the argument in criminal cases that the general power in the High Court Rules (rule 46) may not apply.

C18 *Subsection (5)* provides that the writ may take the form in *Schedule 1*.

12 Finality of determinations

(1) Subject to the right of appeal conferred by section 13, the determination of an application is final and no further application can be made by the applicant either to the same or to a different judge on grounds requiring a re-examination by the Court of substantially the same questions as those considered by the Court when the earlier application was declined.

(2) A person who has been released from detention in accordance with a writ of habeas corpus must not be re-arrested or detained again on grounds requiring a re-examination by the Court of substantially the same grounds as those considered by the Court when the earlier release was ordered.

Definitions: applicant, application, detention, habeas corpus, judge, s 3

Appeals by certain unsuccessful parties

13 Certain unsuccessful parties may appeal

(1) The provisions of the *Judicature Act 1908* relating to appeals to the Court of Appeal against decisions of the High Court in civil cases apply with respect to a determination refusing an application for the issue of a writ of habeas corpus, but do not apply to a final determination that orders the release from detention of an applicant unless the substantive issue is the welfare of a person under the age of 16 years.

(2) The court cannot order that security for costs be given by the appellant in an appeal against the refusal of an application where the respondent in the appeal is the Crown or a public officer or other person purporting to act on behalf of the Crown.

Definitions: application, detention, habeas corpus, s 3

14 Urgency of hearing appeals

An appeal under this Act is to be given precedence over all other matters before the Court of Appeal and judges of the Court of Appeal and employees of the Department for Courts are to use their best endeavours to ensure that every such appeal is disposed of as a matter of priority and urgency.

Definitions: habeas corpus, s 3

Section 12

C19 *Subsection (1)* is designed to clarify that there is no right for an unsuccessful applicant (to whom *section 13* gives a right of appeal) to renew an application. This is probably the existing law (see *Ex parte Bouvey (No 2)* (1900) 18 NZLR 601 and *Re Hastings (No 2)* [1959] 1 QB 358; *Re Hastings (No 3)* [1959] Ch 368; to the contrary effect are *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] 1 AC 459 (PC) and *In re Tamasese* [1929] NZLR 209, 211).

C20 *Subsection (2)* (like s 5 of the 1679 Act) forbids re-arrest of a successful applicant on substantially the same grounds. It is intended to state the existing law as laid down in such cases as *Attorney-General for Hong Kong v Kwok a Sing* (1873) LR 5 PC 179, 202 and *R v Governor of Brixton Prison, Ex parte Stallman* [1912] 3 KB 424.

Section 13

C21 *Subsection (1)* would introduce to New Zealand a right of appeal for applicants whose application is at first instance refused, and for defendants in custody cases (see para 9), but not for other unsuccessful defendants (see paras 10–13).

C22 By analogy with appeals in criminal proceedings, *subsection (2)* provides that if the respondent is the Crown, a public officer, or a purported agent of the Crown, then the court cannot order the appellant to give security for costs.

Section 14

C23 *Section 14* is designed to ensure that appeals are disposed of swiftly.

Miscellaneous

15 Abolition of certain writs

It is hereby declared for the avoidance of doubt that the writs of habeas corpus ad testificandum, habeas corpus ad respondendum, habeas corpus ad deliberandum, and habeas corpus recipias are abolished.

16 Contempt of court

(1) A person commits a contempt of court who

(a) wilfully hinders the prompt disposal of an application; or

(b) being aware that an application has been filed in the High Court seeking the release from detention of a person, removes or attempts to remove that person from the jurisdiction of the Court; or

(c) having been released under an interim order made under section 8, fails to comply with a condition attached to the order; or

(d) wilfully fails to comply with a writ of habeas corpus ordering the release from detention of a person.

(2) This section does not limit or affect any power or authority of the High Court or the Court of Appeal to punish any person for contempt of court in any case to which this section does not apply.

Definitions: application, detention, habeas corpus, s 3

17 Power to make rules

(1) The Rules Committee may for the purpose of facilitating the expeditious, inexpensive, and just disposal of applications under this Act, make rules not inconsistent with this Act regulating the practice and procedure of the High Court in relation to such applications and to the practice and procedure of the Court of Appeal in relation to appeals from refusals of such applications.

(2) The Rules Committee may make rules amending the form in Schedule 1.

(3) Section 51A of the *Judicature Act 1908* is to apply to rules made under this section in the same way as it applies to High Court Rules.

Definitions: application, habeas corpus, Rules Committee, s 3; Act, *Acts Interpretation Act 1924* s 4

Section 15

C24 For clarity *section 15* declares that four other habeas corpus writs rendered obsolete by changes in the law are abolished (see para 21, *section 2(d),* and para C3).

Section 16

C25 *Section 16* provides that certain acts constitute a contempt of court. Because habeas corpus is used in contexts including immigration and extradition (see, eg, s 5 of the Fugitive Offenders Act 1881 (UK)), and applications under s 5 of the Visiting Forces Act 1939, habeas corpus applications should not be frustrated by the removal of a person beyond New Zealand: *subsection 16(b)* (compare s 3 of the 1816 Act).

Section 17

C26 Because the procedure envisaged is a new one, it is appropriate to empower the Rules Committee to supplement, in ways consistent with the Act, the provisions of the Act.

18 Supplementary procedure

If a matter arises in relation to an application for which this Act does not provide, the High Court is to dispose of it as nearly as is practicable in a manner consistent with this Act, and to the extent that they are not inconsistent with this Act, in accordance with the High Court Rules.

Definitions: application, s 3; Act, *Acts Interpretation Act 1924* s 4

19 Repeals and amendments

(1) Section 54C of the *Judicature Act 1908* is repealed.

(2) The First Schedule to the *Imperial Laws Application Act 1988* is amended by repealing so much of it as relates to enactments relating to Habeas Corpus and accordingly

(1640) 16 Cha 1, c. 10—The *Habeas Corpus Act 1640*, section 6,

(1679) 31 Cha 2, c. 2—The *Habeas Corpus Act 1679*, sections 1 to 11,

(1816) 56 Geo 3, c. 100—The *Habeas Corpus Act 1816*

cease to have effect as part of the laws of New Zealand.

(3) Section 19(1) of the *Legal Services Act 1991* is amended by inserting after paragraph (c) the following:

"(ca) Proceedings in the High Court or the Court of Appeal relating to an application for a writ of habeas corpus:".

(4) Section 51E of the *Judicature Act 1908* does not apply in respect of the form and manner of any application made under this Act to the High Court or a judge or to the Court of Appeal.

Section 18

C27 *Section 18*, broadly analogous to rule 9 of the High Court Rules, provides that matters not provided for are to be determined consistently with the Act and, to the extent that they are not inconsistent with the Act, the High Court Rules.

Section 19

C28 *Section 19* repeals the existing statutory provision (s 54C of the Judicature Act 1908) and, in their application to New Zealand, the Imperial Habeas Corpus Acts.

C29 *Subsection (3)*, by adding habeas corpus applications to the list of civil proceedings in the Legal Services Act 1991, enables legal aid applications for habeas corpus proceedings to be dealt with urgently under s 25 of that Act (see para 19).

SCHEDULE 1
WRIT OF HABEAS CORPUS

Habeas Corpus Act 199–
(Section 11(5))

(Intitulement)

Elizabeth the Second, by the Grace of God Queen of New Zealand and Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith:

To: [*Name, place of residence, and occupation of the defendant, or other person in whose custody the plaintiff is alleged to be detained*]

We command you immediately to discharge and release from custody and detention [*Full name*] (who may be called by another name)

Witness the Chief Justice of Our High Court of New Zealand this

_____ day of _____ 19 [*or* 20] ___

By Order of Court

(Deputy) Registrar

Warning:
Take notice that if you wilfully fail to comply with this writ of habeas corpus, the High Court will be moved as soon as counsel can be heard for an order committing you to prison for your contempt.

[In the printed version of this report four Acts are attached as appendices: Imperial Laws Application Act 1988, Habeas Corpus 1640 (Imp.), Habeas Corpus 1679 (Imp.), Habeas Corpus 1816 (Imp.)]