# Further Reform of Habeas Corpus Procedure

Law Commission

Draft Study Paper 18

August 2007

## Introduction

1. Habeas corpus ad sub judiciem 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. 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.

2. In 1997 the Law Commission recommended a simplified procedure for dealing with habeas corpus applications.[1] The Law Commission's recommendations were implemented by the Habeas Corpus Act 2001.

3. 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 some other procedure such as judicial review.

4. 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 statutory timeframes

*The requirement for precedence over other court business*

5. Section 9 of the Habeas Corpus Act 2001 requires habeas corpus applications to be given precedence over all other court business. Judges and court staff are required to dispose of applications as a matter of priority and urgency. Appeals are also to be given precedence over other court business and to be treated with priority and urgency.

6. The principle that habeas corpus applications should be accorded priority and dealt with as matters of urgency is longstanding. The dictates of priority and urgency are clearly appropriate, because habeas corpus applications involve questions of individual liberty. But it is questionable whether such applications should be given precedence over all other court business. While liberty is an important value, it is not

---

1 *Habeas Corpus: Procedure* (NZLC R44, 1997).

difficult to envisage other cases that are deserving of at least equal priority. 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.

7. We recommend that the requirement that habeas corpus applications be given precedence over all other court business be repealed. The requirement that judges and court staff treat applications with priority and urgency should remain. This would mean that it would be left to the court to determine the relative priorities if a habeas corpus application needs to be dealt with alongside other urgent court business.

*The three day time frame*

8. 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.

9. The three day time limit is consistent with the need for urgency. However, the strictness of the requirement has caused difficulties in practice. For example, in *Togia v General Manager, Rimutaka Prison* [2] 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.

10. 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.

---

2 (28 February 2007)HC WN CIV-2007-485-358, Harrison J.

11. We recommend the three day timeframe remain the ordinary rule but that High Court judges be given the ability to relax the requirement if the circumstances so require. 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.

**Right of appeal**

12. 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.

13. As we noted earlier, complex legal issues can arise in the habeas corpus context.[3] The requirements for urgency complicate matters further. The lack of a right of appeal for an unsuccessful defendant effectively means that there is no way of elevating such complex issues for clarification and determination at the appellate level.

14. The problems arising from this limitation can be seen with a series of habeas corpus decisions in the mental health context. In *Keenan v Director of Mental Health Services* [4] and *Chu v District Court at Wellington* [5] applicants were granted writs of habeas corpus on the basis of non-compliance with section 9(2)(d) of the Mental Health (Compulsory Assessment and Treatment) Act 1992. It was only when Asher J distinguished these decisions in *Sestan v Auckland District Health Board* [6] and declined to issue a writ in relation to a breach of section 9(2)(d) that the matter was elevated to the Court of Appeal. The Court of Appeal held that a breach of section 9(2)(d) does not invalidate a detention for compulsory assessment and treatment.[7]

15. At common law there was no right of appeal against the grant of a writ of habeas corpus. This reflects the "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".[8]

---

3 A further example of complex issues arising can be seen with *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26.
4 [2006] 3 NZLR 573.
5 [2006] NZAR 415.
6 (16 November 2006) HC AK CIV-2006-404-6868, Asher J.
7 See CA254/06 and SC94/06 (Supreme Court declining leave to appeal to Mr Sestan).
8 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 621, Lord Dunedin.

16. In its earlier report the Law Commission recommended against enacting a right of appeal against the grant of the writ. The 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.

17. In practice, however, the declaratory judgment procedure is too cumbersome to provide a satisfactory alternative to an appeal on a point of law. If a habeas corpus decision establishes a legal principle that applies to persons other than the immediate applicant, it is obviously desirable that any challenge to the principle be dealt with as a matter of urgency and priority. If this cannot occur, potentially large numbers of people might have to be released from detention in circumstances where the law is in dispute.

18. Accordingly we recommend the enactment of a right of appeal on points of law where a writ of habeas corpus is granted. However, the legislation should make it clear that a successful appeal does not result in the return to custody of the person who has been granted the writ. Section 15 of the Administration of Justice Act 1960 (UK) provides a model for this kind of approach.

**Transfer of applications to the Family Court**

19. 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.

20. In *F v Chief Executive of the Department of Child, Youth and Family Services* [9] 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

9 (20 July 2005) CA130/05.

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.

21. 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.

22. 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 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.

23. However, 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. 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**

24. A further problem is the use of the habeas corpus procedure in circumstances where the issues are not susceptible to summary determination by the habeas corpus procedure. 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. 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.

25. For example, in *Greer v Parole Board at Auckland* [10] 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. The court also noted the

---

10 (21 December 2006) CA 271/06.

scope for an applicant to present issues as a habeas corpus application in order to have them dealt with more urgently.

26. 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.[11]

27. 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.

28. 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 is appropriately brought.

**Telephone hearings**

29. Some of the present problems with the habeas corpus procedure could be overcome by greater use of telephone hearings. Telephone hearings could be used to avoid the need to transport prisoners to and from court where this is unnecessary and would also allow for pre-hearing directions in appropriate circumstances. For example, if the matter appears to be of particular complexity, this would enable the judge to explore with the parties the preparation time required and the need for relaxation of the statutory timeframe. The court has inherent power to convene telephone hearings to deal with habeas corpus applications, but the power is rarely used.

30. We recommend the enactment of an express provision for telephone hearings where this would facilitate the expeditious resolution of the matter. Such a provision is likely to ensure a greater use of telephone hearings in appropriate circumstances.

---

[11] See, for example, *F v Chief Executive of Child Youth and Family* 2007 [NZFLR] 613.

**Proper description of the defendant where the applicant is a prisoner**

31. 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.

32. This would appear to be an inconsistency that has arisen from oversight at the time of the enactment of the Corrections Act. Section 8(a) of the Habeas Corpus Act should be amended to bring it into line with the Corrections Act.

**Summary of recommendations**

33. We recommend the following amendments to the Habeas Corpus Act 2001:

33.1 The repeal of the requirement that applications and appeals take precedence over all other court business.

33.2 The enactment of provisions giving High Court judges the power to relax the three day timeframe within which the registrar must set the application down for hearing.

33.3 The enactment of provisions extending a right of appeal on points of law only where a writ of habeas corpus has been granted, but making it clear that this does not require the return to custody of the person who has been granted the writ. Thus, a person who has been granted the writ cannot be returned to custody even if the appeal succeeds.

33.4 The enactment of a provision that makes it clear that the power to transfer cases to the Family Court can be exercised prior to determination of habeas corpus applications.

33.5 The enactment of provisions giving High Court judges power to dismiss applications without a full hearing where the matter is statute barred or involves the wrong procedure.

33.6 The enactment of provisions giving High Court judges power to convene telephone hearings where this would facilitate the expeditious resolution of the matter.

33.7 The amendment of section 8(a) to ensure consistency with section 38 of the Corrections Act 2004.

34. The Law Commission is seeking submissions on this paper by 17 September 2007, after which it will finalise the paper.

10 August 2007

GP Print Limited VAX/VMS 1 GPWDHCM /206006FB/COPYPREP 10-AUG-07 09:12
Style: TSET:[PAGER.STYLES]NEWLAYOUT.BST;17 File: DISK$COPYPREP:[DATA.LEGINZ.TEST]8153V7.S Format: PAGER$FORMAT:leginzv5.FM
Seq: 5 Free lead 240D*points, Next lead 885D, Vjust R

*Hon Mark Burton*

# Habeas Corpus Amendment Bill

Government Bill

## Contents


| | | Page |
|---|---|---|
| 1 | Title | 1 |
| 2 | Commencement | 1 |
| 3 | Principal Act amended | 1 |
| | **Part 1** | |
| | **Amendments to principal Act** | |
| 4 | Description of defendant by reference only to office | 2 |
| 5 | Urgency | 2 |
| 6 | New section 10A inserted | 2 |
| | 10A Power to convene teleconferences | 2 |
| 7 | Determination of applications | 2 |
| 8 | Certain unsuccessful parties may appeal | 3 |
| 9 | Urgency in hearing appeals | 3 |
| | **Part 2** | |
| | **Transitional provision** | |
| 10 | Transitional provision | 3 |




**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.

GP Print Limited VAX/VMS 1 GPWDHCM /206006FB/COPYPREP 10-AUG-07 09:12
Style: TSET:[PAGER.STYLES]NEWLAYOUT.BST;17 File: DISK$COPYPREP:[DATA.LEGINZ.TEST]8153V7.S Format: PAGERSFORMAT:leginzv:
Seq: 6 Free lead 120D*points, Next lead 565D, Vjust R



# Part 1
# Amendments to principal Act

**4 Description of defendant by reference only to office**

Section 8(a) is repealed and the following paragraph substituted:

"(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 repealed.

(2) Section 9(3) is amended by omitting "The Registrar" and substituting "Unless a Judge otherwise orders, the Registrar".

**6 New section 10A inserted**

The following section is inserted above section 11:

**"10A Power to convene teleconferences**

"(1) A Judge may convene a teleconference, after considering an application and any affidavits filed in support, if the Judge considers that convening a teleconference would facilitate the expeditious hearing of the application.

"(2) If a Judge convenes a teleconference, the Judge has all the powers that he or she would have if the application were heard in the ordinary way."

**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".

GP Print Limited VAX/VMS 1 GPWDHCM /206006FB/COPYPREP 10-AUG-07 09:12
Style: TSET:[PAGER.STYLES]NEWLAYOUT.BST;17 File: DISK$COPYPREP:[DATA.LEGINZ.TEST]8153V7.S Format: PAGER$FORMAT:leginzv
Seq: 7 Free lead 2080DMpoints, Next lead 0D, Vjust J1:1



**8 Certain unsuccessful parties may appeal**

Section 16(1) is amended by repealing paragraph (b) and substituting the following paragraph:

"(b) any appeal against an order granting an application—

"(i) may be on a point of law only; and

"(ii) does not affect the liberty of the person released as a consequence of the order granting the application, unless the substantive issue is the welfare of a person under 16 years."

**9 Urgency in hearing appeals**

Section 17(1) and (1A) are repealed.

## Part 2
## Transitional provision

**10 Transitional provision**

(1) 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.

(2) However, the amendments made to section 16 of the principal Act by section 8 of this Act do not confer a right of appeal in respect of a final determination made before the commencement of this Act ordering the release of a person aged 16 years or older.



Wellington, New Zealand: Published under the authority of the New Zealand Government—2007

8153V7
10-AUG-07
8153V7