



Liberty Writ Large – Habeas Corpus



"I thought habeas corpus only belonged in old-fashioned detective stories!" **David Simpkin**, a solicitor with the Auckland and Warkworth Lawlink firm of Webster Malcolm & Kilpatrick, describes this long-established remedy for the abuse of state power and outlines how it works in New Zealand today.

The importance of our freedom from arbitrary imprisonment by the state is difficult to overstate. Depriving us of personal liberty is a very serious matter. In an environment where increased state powers are being granted to combat terrorism, it is appropriate to reflect on this important remedy for abuse of power by the state.

HABEAS CORPUS

The habeas corpus procedure allows a person detained without lawful justification to contest whether their imprisonment is legal. Once it has been established that the person has indeed been detained, it is up to the agent of the state to justify the detention. If the detention cannot be justified then the applicant, as of right, must be released.

HISTORY OF HABEAS CORPUS

The writ of *habeas corpus ad subjiciendum* (these are the opening words of a writ which is addressed to the Sheriff. In English this means approximately, "You must physically bring this person before the court") has a long history. Around the time of the Magna Carta in 1215, English courts used the writ to summon a person whose presence was required for a

legal proceeding. By the 15th and 16th centuries it had evolved into a procedure for releasing people wrongly detained by lower courts where they did not have the power to detain people.

In the 17th century habeas corpus became a means by which arbitrary arrest by the King's officers could be contested. It assumed its modern constitutional significance during the reign of the ill-fated King Charles I. The King, a strong believer in the supremacy of the monarchy over parliament, nonetheless needed parliament's authority to raise taxes. When he started to run out of money, Charles resorted to imprisoning wealthy subjects at the King's pleasure (then a prerogative right of the monarch). The King's pleasure lasted until the prisoners agreed to lend to the crown money on favourable terms! Attempts to obtain habeas corpus initially failed in 1627 when five people brought an application in the *Five Knights* case. The King's Bench judges initially found the royal prerogative outweighed habeas corpus. When parliament was recalled, it acted quickly to overturn that legal precedent and to assert the supremacy of habeas corpus over the royal prerogative. Thirteen years later, in the Petition of Right 1640, parliament guaranteed the subject's right to habeas corpus against the King and his officers.

HABEAS CORPUS IN NEW ZEALAND

Further refinements to the law ensured that New Zealand inherited a well-developed law on habeas corpus when the British proclaimed sovereignty over New Zealand in 1840.

Despite its importance, there have been occasions when the writ of habeas corpus has been suspended in New Zealand, such as war time, and in relation to specific offences. For example, the Defence of the Realm Acts of 1914-15 which allowed cabinet to issue regulations to ensure the defence of the country during World War One suspended habeas corpus in New Zealand for the first time. In public emergencies this power of the

courts over the executive government has been perceived as detrimental to the interests of New Zealand as a whole. It is only in times of extreme public emergency that suspension of habeas corpus may be justified because it deprives a detainee of the right to release or a swift trial. Ultimately there is no substitute for the vigilance of the public in protecting our right to habeas corpus from unwarranted intrusions.

In New Zealand today habeas corpus is most often used in technical cases of detention arising out of immigration and deportation or illness, and occasionally in cases of child custody. The fact that it is rarely used to protect more basic human rights must not be seen as evidence that it is unnecessary. To the contrary, it is evidence that the availability of the writ is an effective deterrent to the arbitrary exercise of state power.

THE HABEAS CORPUS ACT 2001

Until the passage of the Habeas Corpus Act 2001, there was no easy way to apply the English law in the New Zealand context. Applying for habeas corpus used to mean reconciling centuries old English practice to a modern New Zealand context, often a time-consuming task for lawyers and judges. This meant that in practice the remedy of habeas corpus was not as swift as it could be.

The Habeas Corpus Act is designed to ensure that situations involving habeas corpus are dealt with more efficiently. This recognises the fundamental importance of the citizen's right to freedom from unlawful detention. Detention is defined as *every form of restraint of the person*. The Act applies not only to penal institutions but also to police, immigration, or customs detentions. It has a number of unusual features:

1. It excludes procedures which might delay the hearing, such as inspection of documents and the like. These are time-consuming and pale into insignificance in the context of a person's liberty.

- Any delaying tactics on the part of the executive government must not prevent the release of an unlawfully detained applicant.
2. Any person can bring an application for habeas corpus. The applicant need not be a New Zealand citizen or permanent resident (a detained tourist can bring an application).
 3. The Act is generous in its provision for ex parte applications (that is, applications which can proceed in the absence of the party seeking to confirm the imprisonment). Normally it is considered unjust not to give both interested parties the opportunity to make submissions. The ex parte provision is designed to ensure that in emergency situations an unjustified detention is not prolonged while the opposing party is notified.
 4. Procedural details are dealt with in the body of the Act itself, not in rules of court. Historically, over the centuries the executive branch of government at times abused people's liberty by imprisoning them without legal reason. Having the procedure spelled out in an Act of parliament means that the executive branch of government is prevented from simply making secondary rules to frustrate the remedy of habeas corpus. If any government wishes to interfere in the liberty of the person it will now have to pass legislation accordingly.
 5. Habeas corpus is given absolute priority over all other court applications. The courts must hear applications for habeas corpus before dealing with any other business that is scheduled for the day. Again, this recognises its importance.
 6. The court does not charge for an application for habeas corpus. The applicant's lawyers will charge, but in worthy cases there will be no shortage of lawyers prepared to take the case without charge, as a point of principle where fundamental liberties have been infringed.

characteristics of a police state where the powers of agents of the state go unchecked. Without habeas corpus, the statement in the New Zealand Bill of Rights Act 1990 that *everyone has the right not to be arbitrarily detained* would be an unenforceable pretence. Some consider that it is only a matter of time until future government agents do detain people unlawfully. The Habeas Corpus Act ensures that if this happens, the High Court in New Zealand has an efficient remedy at its disposal.

Email webmalwww@wmklaw.co.nz
Website www.wmklaw.co.nz

The existence of the writ of habeas corpus is one reason that New Zealand does not exhibit the