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The Clerk
Justice and Electorate Committee
Parliament House
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HABEAS CORPUS AMENDMENT BILL

1. I write this written submission and seek to supplement it orally before the Committee in due course.

2. It is fair to say in the words of then Simon France, Crown Counsel to the Court of Appeal that in his view, (now Justice France) I was the lawyer who uses habeas corpus the most, and from that perspective I can speak authoritatively about the supposed need for reform.

3. The Law Commissions finding that "*we have found a number of practical problems*" is interesting, but the cure for a few practical problems may be throwing out the baby with bath water.

4. My approach is to identify what are claimed to be problems namely:

    A. Clause 4: The correct defendant—no concerns;
    B. Clause 5: Precedence and Three day time frame—major concerns;
    C. Clause 6: Conferences—some concerns;
    D. Clause 7: Transfers to Family Court—major concerns;
    E. Clause 8: Video link—some concerns;
    F. Clause 9: Precedence—major concerns
    G. Clause 10:Rule Changes—some concerns
    H. Clauses 11 and 12—no concerns

5. First let me deal with the single matter that I agree with.

Clause 4—Proper description of the defendant where the applicant is a prisoner.

Clauses 5 that part of clause 7 which addresses wrong procedure and clause 9 Major Problem Habeas or Judicial Review—Disguised attack on the essence of the Writ

6. I consider the most major problem to be with the way Courts approach habeas vis a vis judicial review.

7. To make a recommendation that Judges can dismiss the Writ for the wrong procedure, would not only be constitutionally offensive, it would be in effective a major castration of fundamental liberty rights.

8. With respect the way it has been suggested appears to be sneaky. At the very least it is a significant disguised attack on *the most fundamental legal right*[1] known in the common law world, and significantly offensive to human rights.

9. In **Cartwright**[2] Lord Steyn said at 16:

> "Although the case law is riddled with contradictions, the modern tendency is to view the writ [of habeas corpus] as a specific application of principles of common law judicial review to cases affecting the liberty of the subject…

10. This accords with principle, and the academic debate that has raged over this issue for decades, whatever the right or wrong procedure is the matter of major debate, not capable of dismissal in a few lines.

11. See for example the reknown Sir 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. Wade at p62 says:

> "the message from the authorities is surely clear. All the accepted grounds for judicial review, *ie* for claiming that some administrative act or decision is unlawful, ought to be equally available on habeas corpus if they affect the prisoner's right to his liberty. Instead of making the expansion of judicial review into a pretext for restricting the right to habeas corpus, the grounds for seeking both remedies should expand in parallel, since exactly, the same principle of legality is in issue in both.

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1 David Clark; Gerard McCoy, *The Most Fundamental Legal Right; Habeas Corpus in the Commonwealth*, OUP 2004

2 Cartwright v **The Superintendent of Her Majesty's Prison [2004] UKPC 10 (10 Febraury 2004)**

> Whether there is an "underlying administrative decision" is quite irrelevant. The question is whether the prisoner's detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which if made good, would entitle him to his release. To this he is entitled as of right, as has been clear for centuries. To bar him from any part of this right, and to tell him to start separate proceedings where relief is merely discretionary [judicial review] cannot be justified. In the well known words of Lord Shaw of Dunfermline[3]
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> > **"to remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand**"

12. So to catergorise an application as use of the "wrong procedure" is far from a simple exercise, and significantly leaves out that this there is major academic literature, and jurisprudence expressing the contrary view. What is capable of summary determination is matter of opinion, as well as judicial decision, and to suggest a habeas is being misused because it cannot be determined by summary procedure is to beg the question. Detention itself is usually summary. e.g. police arrest or mental health detention, and so should its review. This is hardy a fair basis on which to embark on a "procedural review"

13. On Monday 8 October I will arguing this very question in the Court of appeal on a habeas case. What is the right procedure is a difficult question not capable of being summarily determined.

14. This question cannot be seen in isolation to its international counterparts, an international analysis is also required.

NZBORA

15. The NZBORA right (in addition to the Habeas Corpus Act) reads;

> Arrest
>
> (I) Everyone who is arrested or who is detained under any enactment 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.
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> [**Bold added**]

16. Has this legislation been vetted by the Attorney-General and does it have a s 7 certificate?

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[3] Scott v Scott [1913] AC 417 at p 477

Major problems with habeas failing to measure up as an International Remedy and not complying with Article 9(4) of the International Covenant on Civil and Political rights.

17. There are at least 3 limbs to this problem. Scope of the remedy, Lack of discovery, and speediness.

18. First, neither judicial review or habeas are in international human rights law sufficient remedies in respect of Article 9(4), but in my view habeas is the least deficient.

19. To require conversion to judicial review as suggested is a seriously defective proposal that should not be proceeded with.

20. Article 9(4) is the habeas provision of the ICCPR:

> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

21. The very similar European Convention on Human Rights Article 5(4) reads:

> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

22. The American Convention Article 7(6) reads:

> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. ACHR, An. 7 § 6

23. Insufficient consideration or no consideration was given by the Law Commission in its original report as to whether habeas corpus complies with our international obligations. Since then the 2004 judgment of the European Court of Human Rights *HL v UK* (see below) has confirmed prior European Human Courts Rights jurisprudence that habeas and judicial review <u>do not</u> provide a sufficient remedy.

24. Habeas is of course a remedy of <u>right</u>, judicial review is a remedy of

discretion. That battle was successfully fought in Parliament when the Habeas bill was introduced. It seems now to be resurfacing in the guise of procedural reform.

25. Habeas is also speedy. A speedy hearing is of little use if one does not have the documents, which are in the State's possession, especially if those documents determine the legality of a detention.

26. Section (7)5 bars discovery:

> **(5)** In a proceeding for a writ of habeas corpus—
>
> (a) no party to the proceeding is 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

27. Without full disclosure how can one mount a speedy application, let alone win it?

28. The absence of availability of documentation that resides in the State's hands is a powerful inequality of arms. See discussion of this point in *Stefan Trechsel*,[4] who states in his authoritative text, *Human Rights in Criminal Proceedings*[5] at pages 484/5:

> (c)The Right of Access to the File
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> The leading case on access to the file in habeas corpus proceedings is Lamy… In the Court's view, it was therefore essential to inspect the documents in question in order to challenge the lawfulness of the arrest warrant effectively'. This approach was later confirmed in subsequent Jurisprudence; … In relation to Article 5 § 4, the Court has suggested that equality of arms is not ensured if 'counsel is denied access to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of his client's detention'.

3 day time frame

29. In my submission the major significant compliance of the Act with international law is the time frame, which we should be proud of, reflecting that rights in the New Zealand Bill of Rights are merely minimum rights.[6] We

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[4] Judge of the International Criminal tribunal for the Former Yugoslavia, Former Professor of Criminal Law and Procedure at the University of Zurich, and a former President of the European Commission of Human Rights,

[5] Oxford University Press (2006)

[6] See Blanchard J in *Taunoa V Attorney-General* [2007] NZSC 70 [179] First, the application of ss 9 and 23(5) to particular cases will be influenced by the jurisprudence under the overseas human rights instruments. But in some instances a New Zealand court may consider it appropriate to require of New Zealand authorities a higher standard of behaviour than might have been required in the case in question

comply here, any watering down of this puts an already ineffective remedy further backwards: Again I refer to *Stefan Trechsel*

> 463/4"the protection of persons deprived of their liberty, however, goes further than the right to a general remedy in at least two respects: it provides for access to a judicial authority, and it requires that the decision be given speedily and effectively. This notion of effectiveness dictates that it be possible to obtain immediate release which considerably enhances the protection on the domestic level…
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> Experience on the European level demonstrates that the guarantee also has a considerable practical importance; it is often invoked and a relatively high number of complaints have been upheld.
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> p466 the Court found a violation of paragraph 4 in a case where some Dutch conscientious objectors had to wait six, seven, and thirteen days respectively before they could challenge the legality of their detention before a court.59 In ca
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> p 467 A period of twelve or more days is quite excessive,62 although in its jurisprudence the Court has even been faced with periods of thirty days.
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> One might expect a different solution in cases where confinement to a psychiatric institution has been ordered in judicial proceedings. This had been the case in Luberti where the applicant applied for judicial control barely three days after the judgment. The Court referred to the notion of 'incorporation' and 'reasonable interval', but also noted that Italian law did not oblige the applicant to wait—excessive delays led, nevertheless, to the finding of a violation of Article 5 § 4.

30. The Law Commission report states:

> 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.
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> 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

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under, for instance, the ICCPR. That is because, in this country, more may be required of persons in authority than adherence to minimum standards that can realistically be applied and enforced internationally.

> 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 preparefully prior to the initial hearing.
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> [2] (28 February 2007)HC WN CIV-2007-485-358, Harrison J.

31. There is no requirement that the hearing must be heard on the last of three days, it could be properly heard on day 1, 2, or 3.

32. I was counsel in the Togia case cited. The fact that he was released on an interim writ, shows the current act works not that it does not.

33. A better example would be Allan Miller's case a Habeas Corpus in the Court of Appeal, CA90/04 31 May 2004, a parole board postponement order case, where it had not become apparent that Dr Chaplow was not a Parole Board member despite pretending he was. This necessitated a change of tactic, the statutory appeal heard with the habeas was won in the High Court, but he was not released. An appeal on the habeas which had been unsuccessful, was therefore made.

34. This is of importance as it clearly illustrates a judicial review does not entitle to release, that is merely discretionary, but if one can fit within a writ of rights such as habeas release must follow.

35. I wanted a habeas and judicial review heard together. As the way things stand now and then, you have to file a judicial review wait three days before the hearing, and then file a habeas, this is plainly silly. But that it was I did in the High Court. The Minute of Anderson P in the Court of Appeal recorded:

> Mr Ellis has sought an adjournment of this appeal for some months so that the ancillary or additional forms of relief relating to Mr Miller's grievances can be instituted and developed. It may be expedient to deal with the broad span of proceedings such as the sentence appeal, judicial review and habeas corpus, compendiously in due course so that Mr Miller's position may be comprehensively examined and responded to. It is not convenient today or in the near future to even contemplate the presentation and development of evidence and argument of the sort that might eventuate having regard to the instructions counsel might receive.

36. It had been my view that the 3-day rule did not apply if the applicant sought the habeas adjourned.

37. I can see no reason in principle why if the applicant **consents** to an adjournment then the 3 day rule should not apply.

38. However to permit a Judge to extend the time without consent would be opposed as being contrary to a requirement of speediness, and a major retreat on the compliance with international rights.

Clause 6 Telephone Conferences

39. Given a three-day timetable being burdened with telephone conferences does not help. In the reality of drafting the application, writing submissions and obtaining affidavits time is precious.

40. I see no objection to the parties being able to consent to a telephone conference, but conferences should not be forced upon them.

Clause 7 Family Court

41. I have no expertise on this topic.

42. All I can say is that in principle this seems to be delegation of a form of habeas to a Family Court Judge, given the importance of the Writ it should only be determined in the High Court. Principle should always prevail over pragmatism.

Clause 8 Videolink

43. The requirement of producing the body has already been done away I see no objection to the parties being able to consent to a telephone conference, but conferences should not be forced upon them.

44. Justice Duffy recent High Court decision[7] on use of videolink in civil proceedings is instructive and rights centred see Paragraphs 55-67 and

45. The use of videolinks should be revisited especially given Duffy J's observations about their use being overlooked see Para 62:

> Furthermore, I consider the Explantory Note and reports in Hansard reveal that the full implications of the unqualified reference to "participant" in section 7(2)(b) and the impact this might have on plaintiffs in public law litigation did pass unnoticed.

46. Given the body always needed to be produced in Court was abolished this further watering down of rights is worrying.

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[7] *Taylor v Manager* of *Auckland Prison* Judgment 5 June 2012

Clause 10 Rules

47. The more control parliament has over the liberty of the subject the better the power to obtain triple damages for judges not obeying the 1640 Act was abolished in the Principal Act, given more power to judges effectively via the Rules Committees is not warranted.

Conclusion

48. The majority of the matters do not require legislative reform; it is not surprising the legislative program is weighed down with bills awaiting passage.

49. A major reform of the Act is not required and should be enacted. Precedence, timing and presence are matters that should be undisturbed.

Tony Ellis
5 October 2012