

7 January 2016

Senate Standing Committee  
on Community Affairs  
Parliament House  
Canberra ACT 2600

Dear Senators,

This is a submission for your inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia. I have a family member who is subject to permanent detention by the Queensland Government on psychiatric grounds. For the last 15 years, I have been seeking the restoration of this person's civil rights. Two years ago, I became a law student, in order that one day this person could have legal representation.

I have brought a number of appeals of decisions to detain the person in question. I was perhaps the first person to successfully appeal a decision of the Guardianship and Administration Tribunal to the Supreme Court of Queensland. In recent years I have been bringing habeas corpus applications in various courts. Currently I have a proceeding pending in the Federal Court.

Guardianship and involuntary treatment are really matters for state parliaments and not the federal parliament. Arbitrary detention, however, is a matter for the federal parliament, as Australia is a party to treaties forbidding arbitrary detention. I have written a draft "Habeas Corpus Act" that could be enacted by the federal parliament using the external affairs power. This would prevent arbitrary detention on psychiatric grounds. Also I have written a draft "Mental Health Act" dealing with guardianship and involuntary treatment that could be enacted by state and territory parliaments.

The important thing to grasp about detention on psychiatric grounds is that it is open to abuse, just as the criminal justice system is open to abuse. Currently there are no safeguards in psychiatric cases. As a result, there are about three times as many people who are subject to restrictive measures as there should be. Similarly, if the police could lock up anyone they thought was guilty, there would be three times as many people in prison as there actually are.

When a person is detained on psychiatric grounds, it is because they are alleged to have done something wrong. For example, my family member is alleged to have run away to Sydney in 2009 and not taken any medication for several months. In actual fact, at all relevant times in 2009, this person was in Queensland and taking the prescribed medication.

As this example shows, the allegations against psychiatric patients are similar to the allegations against criminals. But unlike accused criminals, psychiatric patients do not have trials. If there was a trial, then it would not be possible for the court to find that my relative ran away to Sydney in 2009, because there are no witnesses whom the government could call who could testify to seeing this person in Sydney in 2009.

These abuses are possible because psychiatric tribunals are not bound by rules of evidence, but can inform themselves as they think fit. These tribunals adopt reports written by psychiatrists. It is not possible to challenge a report, as a psychiatrist is not subject to cross-examination. Many psychiatric reports contain false information.

I have in my possession two reports on the same patient written a year apart. Both reports contain a section in which the doctor had to write up a recent interview with the patient. The description in each report is identical word for word. Consider the odds that the patient said the same thing at two different interviews a year apart. I spoke to the patient on one of these days and the patient was not behaving as described in the report. It is obvious that the doctor was using standard wording that was previously accepted by the tribunal, and that the reports were not a true account of what happened.

We have seen how the Australian journalist Peter Grete was convicted of terrorism by an Egyptian court. This was possible because the court adopted a police report saying he was a terrorist. Before we criticise Egyptian judges for backward practices, we must recognise that the same gross miscarriages of justice happen in Australia on a daily basis before psychiatric tribunals.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There is a strong parallel between psychiatric cases and criminal cases. To investigate and solve a criminal case, considerable expertise may be needed. However, to decide whether or not the person is guilty, no special expertise is needed. To solve a case, someone like Hercule Poirot may be needed, but to try the case, any ordinary person can serve on the jury.

Similarly, to diagnose what is wrong with a patient and correctly work out a treatment, a person may need a medical degree and a postgraduate diploma. But to see whether a patient is out of control and needs to be subject to restrictive measures, no special expertise is needed. Any ordinary person is capable of judging whether a patient is out of control.

With psychiatric tribunals, the tribunals are by law supposed to judge whether the patient is out of control and needs to be subject to restrictive measures. But in practice, the tribunals have abdicated this function to psychiatrists. In practice, tribunals rubberstamp the finding by a psychiatrist that the person is out of control. In many cases, tribunals find that patients are out of control when there is no evidence or indication of this.

Most people have on occasions received advice from their doctors that they have refused to accept, for example that they stop eating roast beef. They either ignore the advice or start seeing a different doctor, and the doctor has to put up with his advice being ignored. Psychiatrists are somewhat different. If you ignore a psychiatrist's advice to stop eating roast beef, he can have you certified as insane and locked up. Then he can put you on a low potassium, beef free diet. In some cases, patients are being certified insane to protect the psychiatrist from having patients poached by other doctors.

To remedy the situation, legislation will be needed to require psychiatric tribunals to follow rules of evidence, which forbid reports being adopted by a tribunal. Also, there needs to be a rule for a lawyer to appear and argue the case against the patient being subject to restrictive measures. Also, there needs to be a rule that the patient's family members are entitled to attend the proceeding and be heard. Also, there needs to be an effective method for overturning the decision if the tribunal ignores the rules.

Australians are taught at school about our legal remedy of habeas corpus, that is said to give us a level of freedom unknown in many countries. Some of us have parents and grandparents who came to Australia because of our legal system of which habeas corpus has been an important part. What Senators may not realise is that habeas corpus has been "white-anted" over the years, and we no longer have the effective habeas corpus remedy that we had in colonial times.

Senators may have heard about how applications for habeas corpus have priority over all other business of the court. It may surprise Senators to find out that last year I made an application for habeas corpus to the High Court in its original jurisdiction as an unrepresented litigant. The court should have held a hearing by video link the following week. If nothing else, they should have remitted my application to another court. This is what would have happened 20 years ago. What actually happened is that my application sat on a shelf for two months before anyone bothered to write to me about it.

The current Australian legislation on habeas corpus was enacted in 1640, 1679 and 1816, and is written in Shakespearian English. Most of the law on habeas corpus is not contained in legislation but in case law. If a lawyer wants to find out about the law relating to habeas corpus in Queensland, he has to go not to “Halsbury’s Laws of Australia” but to “Halsbury’s Laws of England”. The 1909 edition of Halsbury’s is the best. As in all areas of law with extensive case law, this gives a judge complete discretion to decide the case according to his or her personal opinion on whether he or she wants the person locked up.

The main areas in which the remedy of habeas corpus has been “white-anted” or undermined are as follows. First, at one time, an applicant could select the judge who would hear the case, unlike in any other litigation, where the court selects the judge. Secondly, at one time, costs were not awarded. How is it fair that criminals can apply for bail and not be awarded costs, but mental patients have to pay costs if they lose? Third, at one time, anyone could apply to get another person released. Now, courts are refusing to entertain habeas corpus applications on the basis that the applicant does not have standing. Fourth, at one time, court staff could be sued for damages unless an application was heard promptly. Now, as I mentioned earlier, habeas corpus cases have no special priority. Fifth, at one time an applicant could make any number of applications, in principle to every judge in the country, and now they cannot do this in some states.

In 2001, New Zealand, which had identical laws on habeas corpus to Australia, enacted an up-to-date Habeas Corpus Act. As with much legislation written by professional draftspeople, their Act leaves a lot to be desired. I have written what I consider to be the ideal Habeas Corpus Act, which appears below. My proposed Act is better than the New Zealand Act because it incorporates all the case law into the Act. In areas where the law is mostly in the form of case law, litigants need to employ senior counsel to represent them, whereas if the case law is codified, anyone can represent them. My proposed Act relies on the Commonwealth’s external affairs power. If it was enacted, it would largely fix the problem of the arbitrary detention of people with cognitive and psychiatric impairment.

Yours faithfully,

(Geoffrey J. Bird)

## **Habeas Corpus Bill 2016**

An Act for more effectually securing the liberty of Australians

### **PART 1 - PRELIMINARY**

#### **1. Short Title**

This Act may be cited as the Habeas Corpus Act 2016.

#### **2. Commencement**

This Act commences on the day it receives the Governor-General's assent.

#### **3. Purposes**

The purposes of this Act are to:

- (a) more effectually secure the liberty of Australian inhabitants;
- (b) clarify the law in relation to habeas corpus; and
- (c) give effect to the International Covenant on Civil and Political Rights.

#### **4. Act to Bind Governments**

This Act binds the government of the Commonwealth of Australia, the governments of the Australian states, and the governments of Australian internal and external territories.

## **PART 2 - HABEAS CORPUS PROCEDURE**

### **5. Application for Habeas Corpus**

(1) Where any person shall be confined or restrained of his or her liberty, a commissioner for habeas corpus is hereby required, upon complaint made to him or her by or on the behalf of the person so confined or restrained, if it appears by affidavit that there is a probable and reasonable ground for such complaint, to award a writ of habeas corpus ad subjiciendum in Form A of the Schedule, to be directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same.

(2) A writ of habeas corpus ad subjiciendum is available in the following circumstances and in any other circumstance where a person is confined or restrained of his or her liberty:

(a) someone has been imprisoned while awaiting trial for a crime which he or she denies having committed, and bail has been unreasonably refused or the surety is unreasonably high or other conditions of bail are unreasonable;

(b) someone has been imprisoned after having been convicted of a crime which conviction he or she has appealed, and which appeal has not been heard, and bail has been unreasonably refused or the surety is unreasonably high or other conditions of bail are unreasonable;

(c) someone has been imprisoned or subjected to restrictive measures based on an unreasonable view that he or she is a threat to public health or public safety;

(d) someone has been imprisoned or subjected to restrictive measures, such as control of his or her spending or involuntary medical treatment, based on an unreasonable view that he or she is mentally incapacitated;

(e) a child is in the custody of one person or persons, and another person or persons claims they should rightfully have custody; or

(f) a mentally incapacitated person is in the custody of one person or persons and another person or persons claims they should rightfully have custody.

(3) It is immaterial that the person in custody is detained outside Australia if the person detaining him or her is present in Australia.

(4) It is immaterial that the person detaining the person in custody does not have formal custody of him or her if the person detaining him or her is in a position to effect the release of him or her.

## **6. Standing**

The following persons have standing to apply for a writ of habeas corpus ad subjiciendum:

- (a) The person who is confined, restrained of his or her liberty or is in custody, even if he or she is a child or is mentally incapacitated or is otherwise under legal disability;
- (b) Any adult who has the permission of the person who is in custody, even if the permission is subsequently withdrawn;
- (c) Any adult if the person who is in custody objects to being in custody or is unable to communicate freely with other people;
- (d) A husband, wife or de facto spouse of the person who is in custody;
- (e) A natural or adopted parent of the person who is in custody;
- (f) An adult child whether natural or adopted of the person who is in custody;
- (g) A natural or adopted brother or sister of the person who is in custody;
- (h) An ancestor or adult descendant of the person who is in custody;
- (i) A solicitor or attorney of the person who is in custody; or
- (j) A friend of the person who is in custody.

## **7. Method of Application**

(1) An application for habeas corpus ad subjiciendum is to be made by providing a completed application, in Form B of the Schedule, accompanied by an affidavit in Form C of the Schedule, to a commissioner for habeas corpus by:

- (a) handing these documents to an employee at a registry of an Australian court;
- (b) handing these document to a commissioner for habeas corpus;
- (c) sending these documents by registered post to a commissioner for habeas corpus; or
- (d) handing these documents to a person who is apparently of the age of sixteen years or greater at the residence of a commissioner for habeas corpus.

(2) No fee or tax is payable for making an application to a commissioner for habeas corpus or for appealing such a proceeding or for taking a step in such a proceeding or in an appeal of such a proceeding.

## **8. Right to Choose Commissioner**

- (1) An applicant for habeas corpus ad subjiciendum has the right to choose the commissioner for habeas corpus who will hear the application.
- (2) The name of the commissioner chosen by the applicant is to be marked on the application form, or if no commissioner's name is marked, the court is to choose the commissioner.
- (3) The applicant shall only personally hand an application to a commissioner or post an application to a commissioner or deliver an application to a commissioner's residence if that commissioner is the commissioner whom the applicant has chosen to hear the application.

## **9. Consideration of Application**

- (1) The commissioner must consider an application for habeas corpus ad subjiciendum within 24 hours of the application being delivered to the registry or commissioner, unless the commissioner is on long service leave or is outside the country or is medically unfit to consider the application, and must within that period either grant the application by issuing a writ in accordance with Form A to the Schedule, or must provide the applicant with detailed written reasons for refusing the application.
- (2) The writ need not contain a proceeding number.
- (3) Should a commissioner fail to comply with this section, he or she or the person responsible for the delay is liable to the applicant for exemplary damages of not less than one million dollars.

## **10. Service of Writ on Respondents**

- (1) An applicant shall serve the writ, together with a copy of the application and supporting affidavit, on the respondent or respondents, two clear days before the hearing date appointed by the commissioner, not counting Saturday, Sunday or public holidays, unless:
  - (a) the Commissioner decides the respondent or respondents should have less than two clear days' notice; or
  - (b) the applicant consents to the respondents having more than two clear days' notice.
- (2) Service of the writ may be effected either by the actual delivery of the writ, together with a copy of the application and supporting affidavit to the respondent or respondents, or by leaving the documents at the place where the party is confined or restrained with any employee or agent of the person or persons so confining or restraining.



## **11. Person in Government Custody**

(1) If the person said to be in custody is said to be in the custody of a government department, or of an agency whose directors or chief executive is appointed by the government, the Attorney-General for the government in question may be made the sole respondent.

(2) Service of a writ of habeas corpus on the Attorney-General may be effected by delivering the writ, together with a copy of the application and supporting affidavit to the government solicitor's office and leaving them with an employee, by taking the documents to any police station that is under the jurisdiction of the government in question and leaving them with an employee, or by posting the documents to the Attorney-General by registered post.

(3) An order by a commissioner for habeas corpus against an Attorney-General is to be treated as binding on all employees of all government departments and agencies whose directors or chief executive are appointed by the government in question.

## **12. Return to Writ**

(1) The respondent or respondents to a writ of habeas corpus ad subjiciendum must provide the commissioner for habeas corpus with a return to the writ in Form D to the Schedule.

(2) The return must set out the reasons why the person is in custody, or alternatively may deny that the person is in custody, if that is true.

(3) Failing to provide a return and providing a false return are contempts of court.

(4) The respondent or respondents must provide the applicant with a copy of the return as soon as possible.

## **13. Hearings and Release on Bail**

(1) On the respondent or respondents appearing before the commissioner, even if the return to the writ of habeas corpus is good and sufficient in law, the commissioner may nevertheless inquire into the truth of the facts set forth in the return by affidavit and as to whether a decision to hold the person in custody is based on any jurisdictional error.

(2) Applicants and respondents have a right of audience to appear before a commissioner for habeas corpus in person or by lawyer.

(3) An application for habeas corpus shall be held in open court unless the application concerns the custody of a minor or the custody of a person who is alleged to be mentally incapacitated.

(4) The commissioner may adjourn the hearing from one day to another.

(5) Pending the commissioner's decision of the matter, the commissioner may release the person who is in custody on bail with or without conditions such as a surety.

(6) A person granted bail by a commissioner for habeas corpus while his or her trial for an offence is pending, or while his or her appeal for an offence is pending, may not be rearrested for the same offence, and anyone who rearrests him or her for the same offence is liable to him or her for exemplary damages of not less than \$250,000.

#### **14. Person in Custody due to Jurisdictional Error**

Neither a commissioner for habeas corpus, nor a court having the power to recognise jurisdictional errors, has any discretion to refuse to set aside a decision to have someone in custody if the decision is affected by a jurisdictional error.

#### **15. Decision**

(1) In cases where the person the subject of the writ is in custody due to being accused of committing a crime and awaiting trial, or having been convicted of committing a crime and awaiting an appeal of the conviction, the commissioner may grant bail to the person pending the trial or appeal, or if bail has already been granted, may grant bail to the person on more favourable terms.

(2) In cases where a person is in custody due to his or her being a minor or supposedly being mentally incapacitated, supposedly being a threat to public health or public safety, or for some other reason unconnected with having committed a crime, the commissioner may release the person from custody, may release the person into the custody of another person, or may order a court, tribunal or other authority to reconsider the decision to detain the person.

(3) In all cases the commissioner may grant other remedies that it appears the applicant or the person in custody are entitled to and that can be more conveniently granted by the commissioner than in a separate court proceeding.

#### **16. Costs**

A commissioner for habeas corpus shall not award costs, and each party shall bear his or her own costs of the proceeding.

## **17. Appeal**

- (1) Where a commissioner for habeas corpus is a judge or magistrate of a court of an Australian state, the commissioner's decision may be appealed to the Court of Appeal of that state.
- (2) Where a commissioner for habeas corpus is a federal judge or magistrate or a judge or magistrate of an Australian territory, the commissioner's decision may be appealed to the Full Court of the Federal Court.
- (3) A decision of a commissioner for habeas corpus that someone has been unlawfully detained and ordering his or her release from custody cannot be appealed.
- (4) A decision of a commissioner for habeas corpus to return a minor to the custody of his or her natural parents cannot be appealed.
- (5) A decision of a commissioner for habeas corpus to grant bail to someone accused of a crime pending his or her trial or appeal or to grant more favourable bail conditions cannot be appealed.

## **18. Successive Applications**

- (1) If an application for habeas corpus has been refused by one commissioner, the applicant may make the same application to another commissioner.
- (2) Without limiting the generality of the foregoing, the applicant may apply for habeas corpus to every commissioner in Australia in turn.
- (3) Without limiting the generality of the foregoing, the applicant may make the same application repeatedly to the same commissioner.
- (4) A commissioner must determine each new application on its merits, even if it has already been rejected by himself or herself or by another commissioner.

## **19. Effect on Other Acts**

- (1) A commissioner for habeas corpus shall release a person accused of a crime pending trial or appeal in an appropriate case, notwithstanding anything contained in another federal law or in a law of an Australian state or internal or external territory.
- (2) A commissioner for habeas corpus shall consider applications for habeas corpus from people who are designated as vexatious litigants, and shall grant such an application in an appropriate case, notwithstanding anything contained in another federal law or in a law of an Australian state or internal or external territory.
- (3) Where there is a disagreement between this Act and another Act, the provisions of this Act shall prevail.

(4) Legislation on habeas corpus enacted before 1828 shall cease to apply in Australia.

## **20. Exempt Situations**

(1) A writ of habeas corpus ad subjiciendum shall not be addressed to a foreign diplomat or to an official of a foreign state who is visiting Australia or the external territories on official business, nor shall it command the release of a person from custody in a foreign embassy in Australia.

(2) A writ of habeas corpus ad subjiciendum shall not be addressed to a member of a visiting allied military force or command the release from the custody of a visiting allied military force of someone who is a member of the same force.

## **PART 3 - COMMISSIONERS FOR HABEAS CORPUS**

### **21. Judges and Magistrates to be Commissioners**

(1) The following persons are required to act as commissioners for habeas corpus:

(a) federal judges other than High Court judges;

(b) federal stipendiary magistrates;

(c) judges of Australian states;

(d) stipendiary magistrates of Australian states;

(e) judges of Australian internal and external territories;

(f) stipendiary magistrates of Australian internal and external territories.

(2) A person when acting in the capacity of a commissioner for habeas corpus does not act in the capacity of a judge or magistrate of the court of which he or she is a member.

### **22. Habeas Corpus Cases to Have Priority**

(1) A person's duties as a habeas corpus commissioner have priority over his or her duties as a judge or magistrate, and over his or her duties in other official capacities, but do not have priority over his or her duties as Administrator of the Commonwealth of Australia, as Administrator of an internal or external territory of the Commonwealth, or as Acting Governor of an Australian state.

- (2) A person's long service leave has priority over his or her duties as a habeas corpus commissioner.
- (3) A person's duties as a habeas corpus commissioner have priority over his or her weekend leave and over his or her annual leave.
- (4) A person's weekend leave and annual leave have priority over his or her duties as a judge or magistrate.

### **23. Powers of Commissioners for Habeas Corpus**

- (1) A commissioner for habeas corpus when hearing and determining an application for habeas corpus has the powers of a judge of a superior court of record, and without limiting the generality of the foregoing, has the following powers:
- (a) to issue writs of habeas corpus ad subjiciendum, mandamus, certiorari and prohibition;
  - (b) to make mandatory orders, injunctions and declarations;
  - (c) to award damages;
  - (d) to make, amend and cancel guardianship orders, administration orders, involuntary treatment orders, and orders for the removal of life support;
  - (e) to order the appearance of witnesses, documents and other exhibits;
  - (f) to examine witnesses under oath; and
  - (g) to fine and imprison for contempt.
- (2) Legal process issued by a judge or magistrate in his or her capacity as a commissioner for habeas corpus runs throughout Australia and its external territories.

### **24. Duties of Courts**

- (1) All Australian federal courts, state courts and territory courts must act in aid of commissioners for habeas corpus, and without limiting the generality of the foregoing, must:
- (a) accept applications for habeas corpus in their registries and pass these on without delay to the appropriate commissioner;
  - (b) make available hearing rooms for hearing habeas corpus applications;
  - (c) make available court staff for conducting hearings of habeas corpus applications;
  - (d) prepare transcripts of habeas corpus cases as though they were normal applications to the court;

- (e) keep records of habeas corpus cases as though they were normal applications to the court;
  - (f) allot a proceeding number to a habeas corpus application as though it was a normal application to the court; and
  - (g) on the instructions of a commissioner, issue process under the seal of the court as though it was process for a normal application to the court.
- (2) The file and transcript for an application for habeas corpus shall not be open to public inspection.

## **25. Courts to Continue to Issue Habeas Corpus**

- (1) Supreme Court judges of an Australian state or internal or external territory and Federal Court judges, when acting in their capacity as judges, must issue a writ of habeas corpus ad subjiciendum in an appropriate case.
- (2) High Court Judges must issue a writ of habeas corpus ad subjiciendum in an appropriate case.

## **PART 4 - DECISIONS AFFECTING LIBERTY**

### **26. Part Applies to Certain Decisions**

- (1) This Part applies to decisions by courts, tribunals and other government authorities of the Commonwealth of Australia, Australian states, and internal and external Australian territories to:
  - (a) find that a person is a threat to public health or public safety;
  - (b) find that a person is mentally incapacitated; or
  - (c) find that a person has mistreated his or her natural or adopted child.
- (2) This Part does not apply to interim, temporary decisions.

## **27. Hearsay Evidence Inadmissible**

(1) A court, tribunal or other government authority cannot make a decision to which this Part applies based on hearsay evidence.

(2) A court, tribunal or other government authority cannot adopt a report written by a public servant or expert witness, but must instead question the witness under oath, and have the witness available for cross-examination by the persons affected by the decision.

(3) A lawyer representing a child cannot assert that a child has a particular preference for one parent or guardian or another or for one arrangement or another unless the lawyer provides a complete recording of the interview with the child at which the child is supposed to have expressed such a preference.

(4) A medical practitioner or other medical professional cannot assert that a patient has exhibited deranged behaviour at an interview unless the medical practitioner provides a complete recording of the interview at which the deranged behaviour is supposed to have occurred.

## **28. Certain Opinions Inadmissible**

(1) An opinion that a person is a threat to public health or public safety is not an expert opinion but is a personal opinion.

(2) An opinion that a person is mentally incapacitated is not an expert opinion but is a personal opinion.

(3) An opinion that a person has mistreated a child is not an expert opinion but is a personal opinion.

(4) A court, tribunal or other government authority cannot make a decision to which this Part applies based on a personal opinion which it has adopted but only on a conclusion which it has drawn from facts established by evidence.

## **29. Right of Certain Parties to be Heard**

(1) In making a decision that someone is a threat to public health or public safety, the following affected people must be heard:

(a) the person who it is alleged is a threat to public health or public safety;

(b) if that person is a child, his or her parents or guardians;

(c) any husband, wife or de facto spouse of the person;

(d) any attorneys for that person; and

(e) any lawyers representing any of the above-mentioned people.

(2) In making a decision that someone is mentally incapacitated, the following affected people must be heard:

- (a) the person who is said to be mentally incapacitated;
- (b) anyone whom the person in his or her demented state appoints to represent him or her;
- (c) any husband, wife or de facto spouse of the person;
- (d) any natural or adopted parent of the person;
- (e) any adult child whether natural or adopted of the person;
- (f) any natural or adopted brother or sister of the person;
- (g) any ancestor or adult descendant of the person;
- (h) any attorney of the person;
- (i) any guardian or administrator of the person; and
- (j) any lawyers representing any of the above-mentioned people.

(3) In making a decision that someone has mistreated a child, other than a decision to convict a person of mistreating a child, the following affected people must be heard:

- (a) the child said to have been mistreated;
- (b) the child's natural parents;
- (c) any adopted parents of the child;
- (d) the person said to have mistreated the child; and
- (e) any lawyers representing any of the above-mentioned people.

(4) If a court, tribunal or other government authority makes a decision to which this Part applies, without giving the affected people the opportunity to be heard, and without providing the affected people with written reasons for the decision, the decision is legally invalid.



### **30. Requirement for Legal Representation**

(1) A decision to which this Part applies is not legally valid unless a lawyer with no conflict of interest argues the case against making the decision.

(2) A decision to which this Part applies is not legally valid if the lawyer arguing the case against making the decision is not knowledgeable about administrative law or does not present an effective case.

(3) A mentally incapacitated person is to be taken to have the capacity to instruct a lawyer to represent him or her in a case in which the question of whether he or she is mentally incapacitated is in issue.

**SCHEDULE**

*Form A - Order Nisa for Habeas Corpus*

**WRIT OF HABEAS CORPUS**

Court:

Proceeding Number:

In the matter of an application by  
Writ of Habeas Corpus for the release from custody of

for a

To:

WHEREAS the undersigned Judge or Magistrate, the Honourable  
has been given to understand and be informed, upon reading the affidavit of  
sworn on 20 that you or all of you have one  
unlawfully in your custody.

YOU ARE COMMANDED upon pain of fine or imprisonment to appear before the  
undersigned Judge or Magistrate at the Court,  
, at am or pm on 20  
in person or by your lawyer, to show cause why you should not be ordered to release the  
aforesaid from your custody.

You must at that time produce this Writ together with a Return stating the reasons for the  
aforesaid being in your custody.

- (a) You must produce the aforesaid  
alive and well at the court at the abovementioned time and place \*
- (b) You must take very good care of the aforesaid  
but need not produce him or her at the court for the time being \*

If you are more than 200 kilometres away from the abovementioned court, you may  
arrange with the abovementioned court before the hearing to attend a nearer court.

By Authority:

Seal

Signed: .....  
Judge or Magistrate  
Dated:

\* Strike out if not applicable

*Form B – Application for Habeas Corpus*

APPLICATION FOR HABEAS CORPUS

Applicant's Name: .....

Applicant's Residential Address: .....

Town or Suburb ..... State ..... Postcode .....

Firm of Solicitors (if applicable) .....

Solicitor in charge of matter .....

Address for Service .....

.....

Telephone ..... Facsimile .....

Name of Person Unlawfully in Custody .....

Gender, Age and Other Description of Person in Custody .....

.....

Names of Parties in Whose Custody the Person is Held .....

.....

.....

.....

Address where the Person is Unlawfully Held (if known).....

.....

Name of Judge or Magistrate Nominated by the Applicant to Hear the Application

.....

I the undersigned undertake on pain of imprisonment that the facts given in this form are correct and I undertake to diligently prosecute the case.

Signature of Applicant or Solicitor .....

Form C - Supporting Affidavit

SUPPORTING AFFIDAVIT

Court:

Proceeding Number:

In the matter of an application by ..... for a  
Writ of Habeas Corpus for the release from custody of

I, ..... (full name) of .....  
..... (address),  
..... (occupation), say on oath or affirm as follows:

1. Here I will set out what I know of a person being unlawfully in custody, in numbered paragraphs, using as many paragraphs and pages as necessary.

2.

3.

Sworn by me at ..... (town or suburb) in the State or Territory of  
..... this ..... day of .....(month) 20.....

)  
)  
) before me:  
)  
)

.....  
Applicant for Habeas Corpus

.....  
Justice of the Peace, or  
other person authorised  
to witness Commonwealth  
statutory declarations

Name of Authorised Witness .....

Address of Authorised Witness .....

.....

Telephone ..... Facsimile: .....

*Form D - Return to Writ*

## RETURN TO A WRIT OF HABEAS CORPUS

Court:

Proceeding Number:

In the matter of an application by  
Writ of Habeas Corpus for the release from custody of

for a

Respondent's Name(s): .....

.....

Firm of Solicitors (if applicable) .....

Solicitor in charge of matter .....

Address for Service .....

.....

Telephone ..... Facsimile .....

Here set out, in as many numbered paragraphs and pages as you need, your detailed response to the allegation that you have the subject person unlawfully in your custody:

1.

2.

3.

Signature of Respondent(s) or Solicitor .....

*Form E - Order Absolute for Habeas Corpus*

WRIT OF HABEAS CORPUS

Court:

Proceeding Number:

In the matter of an application by  
Writ of Habeas Corpus for the release from custody of

for a

To:

WHEREAS the undersigned Judge or Magistrate, the Honourable  
has afforded you the opportunity to be heard and to provide a return stating your response  
to the allegation that you have one unlawfully in your custody.

YOU ARE COMMANDED upon pain of fine or imprisonment to release the aforesaid  
from your custody:

- (a) unconditionally \*
- (b) into the custody of \*
- (c) on bail pending his or her trial or appeal subject to the payment of a surety of \*
- (d) on bail pending his or her trial or appeal subject to the conditions in the attached pages \*
- (e) and the Judge or Magistrate makes the orders shown in the attached pages \*

By Authority:

Seal

Signed: .....  
Judge or Magistrate  
Dated:

\* Strike out if not applicable