The New Zealand Bill of Rights Act: A Commentary 2nd Edition

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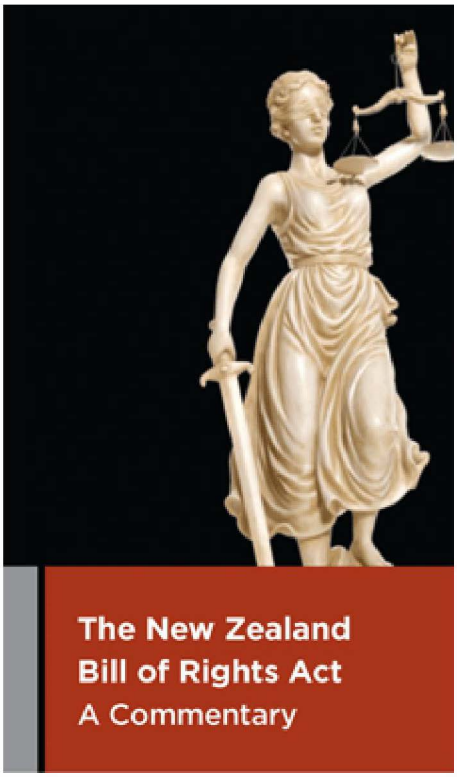

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CHAPTER 31

EXTRAORDINARY REMEDIES, SPECIFIC PERFORMANCE, JUDICIAL REVIEW, DECLARATIONS, HABEAS CORPUS AND TORTS

31.1 INTRODUCTION

31.1.1 This chapter considers a range of civil remedies available to mark a breach of the New Zealand Bill of Rights Act 1990 ("BORA"), reverse the effects of such a breach, and/or prevent the occurrence of, or harm flowing from, such a breach. The specific remedies considered are:

(1) the extraordinary remedies;

(2) specific performance;

(3) judicial review;

(4) declarations;

(5) habeas corpus; and

(6) torts.

31.1.2 It is not our purpose to set out in detail the grounds on which these remedies can be granted or to discuss all the procedural limits attaching to each of these remedies. Rather, this chapter provides a concise summary of the main legal requirements for these remedies and key issues relating to when these remedies will or will not be available. More detailed information is available from one of the many expert commentaries on these remedies.[1]

1. For detailed consideration of the Judicature Amendment Act 1972, see A Beck et al *McGechan on Procedure* (Brookers, Wellington, online loose-leaf ed); with respect to injunctions and specific performance see A S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at chs 24 and 25; for habeas corpus, see *McGechan on Procedure* at (Brookers, Wellington, online loose-leaf ed); for extraordinary remedies, see P A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014), ch 27, and *McGechan on*

31.2 EXTRAORDINARY REMEDIES: MANDAMUS, INJUNCTION, PROHIBITION, CERTIORARI

31.2.1 Part 30 of the High Court Rules ("HCR") recognises the "extraordinary remedies" of mandamus, injunction, prohibition and certiorari. First, this chapter discusses the nature of each of the individual remedies and the relevant rules. We then consider a range of generic issues relevant to the circumstances in which the extraordinary remedies can, and cannot, be ordered.

Mandamus

31.2.2 An order for mandamus requires the performance of a public duty. Rule 30.3 of the HCR provides that the extraordinary remedies, such as mandamus, are to be commenced by a statement of claim and notice of proceeding. Under the former HCR, R 623 provided that the High Court could make an order for mandamus ordering an inferior court (such as a District Court, the Māori Appellate Court, etc), tribunal, or other person "to perform a public duty of the Court, tribunal or person". Rule 623 illustrates that the HCR previously specified the content of the power of the court to order mandamus, and the other extraordinary remedies. The Judicature (High Court Rules) Amendment Act 2008 introduced a new set of HCR that removed this substantive description. However, this particular revision was motivated by a desire to streamline and simplify the procedure by which the orders may be sought and not to change the substance of the orders.[2] It is therefore suggested that the nature of the remedy is not affected.[3]

31.2.3 Mandamus is a useful remedy if, for example, a public official fails to enable or permit an otherwise qualified person from registering to vote, or where some social right (for example, education) is denied a person based on discrimination. Where the particular court, tribunal or person is under a public duty, but performance of that duty involves a discretion as to what order or decision should be made, then mandamus cannot be used to compel the performance in a particular way (unless, in the particular circumstances, only one outcome is possible).

Injunction

31.2.4 Under R 30.2 of the HCR, another extraordinary remedy is an injunction "in relation to the breach, threatened breach, continuation of a breach, or further breach of a duty of a court, tribunal, or person exercising public functions". The previous version of this rule (R 624) qualified the injunction as a "restraining" injunction.

Procedure (Brookers, Wellington, online loose-leaf ed); for torts, see S Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013).

2. See Judicature (High Court Rules) Amendment Bill (247-1) (explanatory note) and, for a more general review of the prerogative writs, Law Commission *Review of Prerogative Writs* (NZLC IP9, 2008).
3. A Beck et al *McGechan on Procedure* (Brookers, Wellington, online loose-leaf ed). For a recent discussion of the nature of the remedy of mandamus see *Harrison v Auckland District Health Board* [2012] NZHC 2693 at [113].

This had the effect that only prohibitory injunctions *not* mandatory injunctions could be obtained under it. Mandatory injunctions could instead be sought in reliance on the High Court's inherent equitable jurisdiction conferred by s 16 of the Judicature Act 1908 (although in many cases a type of mandatory injunction, at least for BORA purposes, could be sought by way of mandamus).

31.2.5 In *Dunne v CanWest TVWorks Ltd* Ronald Young J granted a mandatory injunction under what was then Part 7 of the HCR.[4] While it was described as a "mandatory interim injunction", in substance it was an order for mandamus with specific directions. It is possible that further applications for mandatory injunctions could be encouraged by the unqualified wording of the new rule.

31.2.6 Bearing in mind that public authorities (and indeed private persons and bodies performing public functions, powers or duties in terms of s 3 of BORA) are required to act consistently with BORA, it is certainly arguable that any act and/or omission that they undertake or propose to undertake in a manner which is inconsistent with BORA is susceptible to an application for a prohibitory injunction. So, for example, a local government body's planning rules which might interfere with free expression (say, a signage restriction) could be susceptible to an injunction application (unless the rule is in the form of an enactment, in which case the enactment would first need to be declared invalid). Equally a public health provider's access-to-treatment guidelines where they were discriminatory in nature might attract an injunction for BORA inconsistency.

Prohibition

31.2.7 The High Court may make a prohibition order requiring an inferior court, tribunal or person to refrain from exercising a jurisdiction that the court, tribunal or person is not by law empowered to exercise.[5] Prohibition has been sought to prevent a court, tribunal or person from proceeding to determine a matter that is *within* its jurisdiction if the court, tribunal or person adopts a procedure to determine the matter that is inconsistent with the principles of natural justice. For this reason, prohibition is a useful anticipatory remedy in protection of s 27(1) of BORA.

Certiorari

31.2.8 An order for certiorari results in the quashing of a decision. Traditionally such an order only issued in respect of courts, tribunals and persons required to act judicially, and on the grounds that a jurisdictional error had been committed, jurisdiction had been exceeded, and/or there was some error of law, defect or invalidity on the face of the record. Those restrictions have been eroded through common law decisions and no longer apply in New Zealand.

4. *Dunne v CanWest TV Works Ltd* [2005] NZAR 577 (HC) at [54].
5. The discussion relating to the nature of the remedy of mandamus under the new HCR is likely to apply equally in relation to the remedy of prohibition. A case in which a prohibition order under Part 30 of the HCR could have been granted is *Terminals (NZ) Ltd v Comptroller of Customs* [2012] NZHC 447.

31.2.9 Under R 626 of the previous HCR, the High Court could make an order for certiorari (and/or any other order that the court thought fit) in respect of "all or part of a determination"[6] of an inferior court, a tribunal, or a person exercising either a statutory or prerogative power or a power that affected the public interest. Although this provision is not replicated in the current HCR, it is likely that the broad approach taken in *O'Regan v Lousich*[7] will continue to apply as the revised HCR were intended to simplify procedure rather than modify substantive law.[8] As demonstrated in *Takerei v Winiata*, review under Part 30 of the HCR is available even in the absence of the exercise of a "statutory power". Secondly, s 4(2A) of the Judicature Amendment Act 1972 expressly provides that it is no bar to granting a writ of, or an order in the nature of, certiorari that the person exercising a statutory power was not under a duty to act judicially.

31.2.10 Certiorari can thus be used to quash decisions, reports and other types of determinations which have been made in breach of natural justice or are otherwise made in excess of jurisdiction. In this way certiorari can be used to remedy breaches of s 27(1) of BORA. Further, it can also be used to quash any determination that is inconsistent with BORA (for example, a search warrant that has been issued in breach of s 21 of BORA, a suppression order made in breach of s 14 of BORA, and so on), unless the determination is protected by the terms of s 4 of BORA.[9]

Limitations on extraordinary remedies

31.2.11 Rule 30.1 of the HCR explicitly provides that Part 30 of the HCR "does not limit or affect the Crown Proceedings Act 1950". In turn, s 2(1) of the Crown Proceedings Act 1950 expressly excludes from the definition of "civil proceedings" those proceedings relating to mandamus, prohibition or certiorari, thereby rendering the Crown unamenable to those three types of proceedings. Moreover, s 17(1)(a) of the 1950 Act prevents the grant of an injunction against the Crown. In parallel, s 17(2) of the 1950 Act provides that a court must not grant an injunction against any officer of the Crown if the effect of granting the injunction or making an order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. It is important to clarify what "the Crown" means in this context. This issue arises because while at common law mandamus, prohibition and certiorari could not be directed to the Crown or to any servant of the Crown acting in his or

6. A comment in the reasons for decision of an inferior court that was injurious and made without observing natural justice was held to be quashable (*O'Regan v Lousich* [1995] 2 NZLR 620 (HC)). However, where a report only has the *potential* to affect an individual's rights or interests, certiorari is not available.
7. *O'Regan v Lousich* [1995] 2 NZLR 620 (HC).
8. See *Takerei v Winiata* HC Hamilton CIV-2010-419-1071, 2 March 2011, Potter J, for an application for an (unsuccessful) order of certiorari under Part 30 of the HCR; see *Taylor v Manager of Auckland Prison* [2012] NZHC 3591 in which the High Court quashed a blanket ban on smoking across all areas of Auckland Prison on the basis that it falls outside the scope of the rule making power in s 33 of the Corrections Act 2004.
9. Section 4 of BORA is discussed in Chapter 7: Interaction with Other Enactments.

her capacity as a Crown servant[10] it *was* possible to obtain these orders against Crown servants exercising their own functions or duties. A somewhat complex jurisprudence has, not surprisingly, developed in order to distinguish between the two situations.[11]

31.2.12 The extraordinary remedies discussed above are at the discretion of the court. Even if a prima facie case has been made out for granting one of the remedies, it may nonetheless be declined on a number of grounds such as delay, the applicant's (mis) conduct, impact on third party interests, an equally convenient or effective remedy being available, prematurity, and so on.

31.3 SPECIFIC PERFORMANCE

31.3.1 Specific performance is an order requiring the defendant personally to do that which he or she has agreed to do. It is used to enforce contractual undertakings. As a result of this focus, specific performance is unlikely to be frequently resorted to as a form of relief in BORA proceedings, although it is not inconceivable that contractual undertakings giving effect to BORA rights and obligations could be enforced (or at least be sought to be enforced) in this way. As with applications for injunctive relief, however, the Crown Proceedings Act 1950 places limits on the availability of the remedy of specific performance against the Crown. In particular, s 17(1)(a) of the 1950 Act provides that when, in proceedings against the Crown, relief is sought that could, in proceedings between subjects, be granted by way of specific performance then the court cannot make an order for specific performance. The court may, instead, make an order declaratory of the parties' rights. This prohibition extends to proceedings against Crown servants when the effect of the grant of relief would be to require the Crown to undertake specific performance (s 17(2)).

31.4 APPLICATION FOR JUDICIAL REVIEW

31.4.1 In paragraphs 31.2.1–31.2.10 we considered the so-called "extraordinary remedies", including mandamus, prohibition and certiorari. As noted, these extraordinary remedies are now governed by Part 30 of the HCR. For a long time these remedies were subject to a range of technical pleading requirements, restrictions as to the bodies against which they could be used, and restrictions as to the grounds on which they could be ordered. In addition, at common law it was important that the correct remedy be sought — it was not possible (generally speaking) to grant a remedy that had not been pleaded.[12] Many of the technicalities around pleading the extraordinary remedies were removed or simplified by the Judicature Amendment Act 1972. Under s 4 of the 1972 Act, a person may bring "an application for review" in the High Court in respect of the exercise of a statutory power of decision. If

10. See, for example, *Reynolds v Attorney-General* (1909) 29 NZLR 24 (CA).
11. See *Victoria University of Wellington Students Association Inc v Shearer (Government Printer)* [1973] 2 NZLR 21 at 25 (SC Wellington old); cf *M v Home Office* [1994] 1 AC 377, [1993] 3 All ER 537 (HL).
12. See J F Northey "An Additional Remedy in Administrative Law" [1970] NZLJ 202 for criticism of the technicality of this aspect of the law.

a ground of review is made out then the court may grant relief in the nature of mandamus, prohibition, certiorari or by way of a declaration or injunction.

31.4.2 A number of limitations need to be noted about proceedings for review under the 1972 Act. First, the Act is available only in respect of the exercise, refusal to exercise, or proposed or purported exercise of a statutory power (s 4(1)). In turn, a statutory power means (s 3) a power or right conferred, inter alia, by or under an Act to do one or more of the following:

(a) make regulations, rules, bylaws, and so on;

(b) exercise a statutory power of decision;

(c) require a person to do or refrain from doing any act or thing that, but for such a requirement, he or she would not be required by law to do or refrain from doing;

(d) do any act that would, but for such power or right, be a breach of the legal rights of any person; and/or

(e) investigate or inquire into the rights, powers, privileges, immunities, duties or liabilities of any person.

31.4.3 Accordingly, an application for judicial review cannot be brought to secure compliance with affirmative non-discretionary duties imposed by BORA.[13] Secondly, because it is only available in respect of *statutory* powers of decision, an application for review under the 1972 Act cannot be brought in respect of actions taken pursuant to a common law power.[14] Thirdly, as with the extraordinary remedies discussed in paragraphs 31.2.1–31.2.10, if the effect of an application for judicial review would be to secure an order against the Crown, or a Crown servant simply acting in his or her capacity as a servant, then relief in the nature of mandamus, prohibition or certiorari is not available. Further, injunctive relief cannot lie against the Crown,[15] or against a servant of the Crown, if the effect of granting such relief would be indirectly to give relief against the Crown.[16] As a result, in such cases the only relief available against the Crown under the 1972 Act is a declaration (see paragraph 31.5 below).

13. See, for example, *CIR v Lemmington Holdings Ltd* [1982] 1 NZLR 517 (CA); applied in *Helicopters (NZ) Ltd v Director of Civil Aviation* HC Wellington CIV-2010-485-2454, 20 December 2010, Gendall J.
14. Further, in *Deliu v Executive Board of the New Zealand Law Society* [2013] NZHC 2504, [2013] 3 NZLR 833, Toogood J clarified that the reference in s 3(b) to the exercise of a statutory power of decision does not include the making of a decision, permitted by statute, to apply to a court. This is because such a decision "does not decide or prescribe or affect rights, powers, privileges, immunities, duties or liabilities of any person" as required by the definition of "statutory power of decision".
15. Crown Proceedings Act 1950, s 17(1).
16. Crown Proceedings Act 1950, s 17(2).

31.4.4 Judicial review has frequently been used to correct procedural errors in breach of natural justice (s 27(1) of BORA),[17] as well as to correct errors of law, such as the failure to take into account a BORA right or freedom in the exercise of a statutory power of decision.[18]

31.5 DECLARATION

31.5.1 A declaration[19] is an order of the court which declares or states legal duties or rights. Unlike the other remedies outlined above, a declaration carries no compliance obligation; it neither requires that something be done nor prevents a thing from occurring. Accordingly, performing an act that is inconsistent with a declaration issued by a court does not render the breaching party in contempt of court. Rather, the party whose rights have been breached may commence a new proceeding against the alleged violator. In short, a declaration provides a ruling of law as to legal rights or duties between the parties, but its power lies in the preparedness of the unsuccessful party to abide by its terms. In the case of the Crown in New Zealand, compliance with a declaration is expected and occurs.

31.5.2 In an early essay on remedies for violation of BORA, David Paciocco suggested that a declaration might in fact prove to be the only order available for BORA violations, since in his view it seemed that "every order compelling a public official to comply with the Bill of Rights has the effect of forcing the discharge of Crown obligations and will therefore be denied".[20] We do not agree with this view. First, BORA applies to acts and omissions done by many bodies, entities and persons who could not be classed as the Crown. For example, many state-owned enterprises, statutory boards, Crown entities, schools, universities, and in certain instances private persons, are bound by BORA; yet none of these can benefit from the Crown's special

17. See *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 for a discussion of the relationship between the right to natural justice under the common law and under s 27(1) of BORA.

18. See, for example, *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA), a successful judicial review of a name suppression order on the grounds that the District Court judge failed to take into account freedom of expression protected under s 14 of BORA; *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) for the successful judicial review of the Wanganui District Council (Prohibition of Gang Insignia) Bylaw on the grounds that the Council "failed to give proper attention to [BORA] issues"; *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176 at [161]–[169] in which the argument that a Fixed Fees Policy was unlawful as the Secretary failed to take into account the rights protected by ss 24(d), 24(f) and 25(e) of BORA was unsuccessful. Inconsistency with BORA rights can also render a decision ultra vires and invalid for the purposes of judicial review as discussed in *Cropp v Judicial Committee* [2008] NZSC 4, [2008] 3 NZLR 774 at [25].

19. The jurisdiction to make declarations can be found in the Declaratory Judgments Act 1908, ss 2 and 3, the Judicature Amendment Act 1972, s 4, and the Crown Proceedings Act 1950, s 17(1)(a).

20. D Paciocco "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in Legal Research Foundation *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 40 at 63.

common law status in respect of the extraordinary remedies. Secondly, in many instances the individual rights and freedoms protected by BORA are not directly enforceable, but affect the proper meaning of statutes. In this way they are indirectly enforced, rather than being dependent on direct enforcement. That being the case, it may be possible to secure a compliance remedy such as prohibition or mandamus if a person or body has exercised its powers in a manner inconsistent with BORA (unless of course the defendant is the Crown or a Crown servant acting in his or her capacity as Crown servant).

31.5.3 Declarations can be sought in respect of many of the rights protected by BORA,[21] although there may be instances where an alternative form of proceeding (for example, where there has been non-compliance with fair trial rights, the use of criminal appeal rights under the Summary Proceedings Act 1957 or the Crimes Act 1961) will be considered more appropriate, and, accordingly, a claim for a declaration will be declined.

31.5.4 In *Manga v Attorney-General*[22] Hammond J made a number of useful observations on the purpose of remedies in the case of BORA violations and, in particular, emphasised the critical role of declarations in that regard. *Manga* involved a claim for damages for false imprisonment and BORA compensation for arbitrary detention, arising out of the detention of the plaintiff for eight months beyond his proper release date (due to the Department of Corrections' misunderstanding of the relevant provisions of the, now repealed,[23] Criminal Justice Act 1985). His Honour's observations are worth reproducing:[24]

> [126] Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not "just" private: they have overarching public dimensions. The context of such a proceeding necessarily changes, in at least three ways. First, the case is not a winner-takes-all kind of case. Damages are an economic concept. Bill of Rights cases routinely involve a rearrangement of the social relations between the parties, and sometimes with third parties. The object is to promote mutual justice, and to protect the weak from the strong. Secondly, the future consequences of such a case are every bit as important as the past, and the particular transgression. Thirdly, there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction …
>
> [129] … [T]he starting considerations for remedial choice in litigation of this character, I think, must be something like this.
>
> [130] First, at the practical level, the old order of things reverses itself. A Court must first clearly *declare* something to be a violation of the right. There must be no doubt on that score. Whether a Court should move to monetary relief surely depends on whether

21. See for example *Van Essen v Attorney-General* [2013] NZHC 917 in which a declaration was made that the plaintiff's right to be free from unreasonable search and seizure was breached.
22. *Manga v Attorney-General* [2000] 2 NZLR 65 (HC).
23. Criminal Procedure Act 2011, s 411.
24. *Manga v Attorney-General* [2000] 2 NZLR 65 (HC) at [126] and [129]–[133].

there is anything which is not (appropriately) covered by an existing or collateral cause of action. And structural relief (possibly through affirmative equitable relief) is a difficult and quite unexplored proposition in New Zealand. Quite apart from the "political" dimension, directing Bill of Rights compliances would have a feasibility dimension. Any formal order for compliance would have to be specified, the costs quantified, and the money found, in appropriate cases.

[131] Secondly, at a higher level of abstraction — that of the proper place of government and Courts — it has constantly to be borne in mind that structure and process are, as Alexander Bickel rightly put it, "the essence of the theory and practice of constitutionalism" (*The Morality of Consent* (1975) at p 30). What Courts should look to, first and foremost, is voluntary compliance — not a confrontation with legislative, or Executive, power.

[132] Thirdly, at the end of the day, the real power of a Court in this subject area is that of moral persuasion. A New Zealand Court cannot control the purse, and the lions' strike should generally be withheld, in favour of a legitimate judicial expectation that public confidence will be enlarged, public morality advanced, and democratic decision making improved, by the Courts clearly identifying breaches and exercising remedial powers with restraint. Judicial declarations of right are usually not in vain, even if they reach the recipient with a sound no more audible than the turning of a page.

[133] I have made these general observations for two reasons. First, … Secondly, I also wish to emphasise the importance of publicly identifying Bill of Rights violations. The importance of declaratory relief in this subject area should not be overlooked.

31.5.5 In *Manga* Hammond J granted the plaintiff a declaration that his rights under s 22 of BORA had been violated. He emphasised that, while Mr Manga had not specifically sought a declaration in his pleadings, it was appropriate nonetheless to grant such relief. At the same time, however, his Honour stated that the better practice is to specifically seek such relief and raise the precise terms of the declaration sought in BORA claims.[25]

31.5.6 In *Wilding v Attorney-General*, the Court of Appeal emphasised that while breaches of freedoms or rights protected by BORA may be remedied under the common law or other statutes, "it may well still be appropriate for such a remedy to be accompanied by a declaration concerning the infringement of the plaintiff's rights".[26] The value of a declaration was reaffirmed by John Hansen J in *Percival v Attorney-General* as a means of recognising the existence of a breach of a right and marking its importance.[27] Nevertheless, the courts have also opined that, in certain circumstances, declaratory relief alone will be an ineffective remedy.[28] For further discussion of the question of when damages will also be necessary to provide an effective remedy see Chapter 27: Compensation.

25. *Manga v Attorney-General* [2000] 2 NZLR 65 (HC) at [146].
26. *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at [14].
27. *Percival v Attorney-General* [2006] NZAR 215 (HC) at [54].
28. For instance, see among others *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [52]; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; *Van Essen v Attorney-General* [2013] NZHC 917, [2013] NZAR 809 at [101].

31.5.7 Finally, the issue as to whether a declaration can be made that an enactment is inconsistent with BORA is the subject-matter of separate consideration in Chapter 28: Declaration of Inconsistency.

31.6 HABEAS CORPUS

31.6.1 As noted in paragraph 20.8, s 23(1)(c) of BORA guarantees the right of a person arrested or detained under any enactment 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. The Habeas Corpus Act 2001 now governs the procedure surrounding applications for habeas corpus, although, as noted in paragraph 20.8.3, the *grounds* on which habeas corpus can be granted, and the types of detention in respect of which it can be granted are still largely governed by common law.

31.6.2 A fundamental postulate of Anglo-New Zealand habeas corpus law is that the effect of an order for release under habeas corpus is that the applicant should be set free (be at liberty). Conversely, if the applicant merely seeks to bring to an end one type of detention and have another type of detention substituted for it, then the application must be denied. So, for example, a habeas corpus application by a prison inmate to be released from solitary confinement and to be returned to custody within the general prison population must fail.[29] Equally, habeas corpus cannot be used to rectify unlawful *conditions* of detention (such as unsanitary conditions, overcrowding of cells, etc)[30] unless, perhaps, those conditions are so serious and incapable of redress by other means as to render the detention unlawful. In both of the above examples, the proper route for relief is an application for judicial review, or for one of the prerogative writs under Part 30 of the HCR.

31.6.3 This position differs from that adopted within Canadian jurisprudence. Beginning with the cases of *R v Miller*, *Cardinal v Kent Institution* and *Morin v Canada* the Canadian courts have held that habeas corpus is available to challenge the conditions of detention in certain circumstances.[31] The *Miller* trilogy concerned the validity of the confinement of an inmate in administrative segregation, and the transfer of inmates from a maximum security institution to a Special Handling Unit. In *Miller*, Le Dain J could not identify any sound reason in principle relating to the nature and role of

29. *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA) at [59]–[75]; *Nunn v Superintendent, Waikeria Prison* [2004] NZAR 240 (HC) at [13]; See also *Teina v Attorney-General* [2007] NZCA 464 in which the Court of Appeal affirmed that the treatment of the appellant by the Parole Board did not go to the legality of detention and therefore could not support an application for habeas corpus; *Hines v Manager of Custodial Services, Auckland Prison* [2007] NZAR 297 (HC) in which the High Court holds that a change from low medium to maximum security classification cannot support an application for habeas corpus.
30. See *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA) at [25]–[47].
31. *R v Miller* [1985] 2 SCR 613; *Cardinal v Kent Institution* [1985] 2 SCR 643; *Morin v Canada (National Special Handling Unit Review Committee)* [1985] 2 SCR 662; confirmed in *May v Ferndale Institution* 2005 SCC 82, [2005] 3 SCR 809 at [32].

habeas corpus to restrict the application of the remedy.[32] His Honour reasoned that a prisoner is not without some residual liberty and therefore that habeas corpus can apply to release a person from a particular form of unlawful detention, without completely restoring their liberty. The concept of residual liberty is in tension with the orthodox position in English law that the effect of habeas corpus was to set a person free without restriction.[33] For this reason, it was rejected in *R v Deputy Governor of Parkhurst Prison, ex parte Hague*.[34] The House of Lords held that placing prisoners in strip cells and segregation "altered the conditions under which they were detained but did not deprive them of any liberty which they had not already lost when initially confined".[35]

31.6.4 The Court of Appeal in *Bennett* declined to follow *Miller* primarily "because it [was] unnecessary to do so. Judicial review sufficed".[36] The Court was also concerned that if the writ extended to conditions of detention it would be very difficult to restrict the use of the writ.[37] The Canadian courts are aware of the need for caution on this matter and have declined applications concerning prison conditions on the grounds that the conditions do not pose a significant restraint on residual liberty.[38] As stated in *R v Miller* by Le Dain J:[39]

> I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

31.6.5 The authors submit that the need for caution ought not to restrain the availability of the remedy in New Zealand. The issue of setting an appropriate threshold could be resolved by using comparative case law for guidance and orientating itself on rights protected under s 9 or s 23(5).[40] Cases that violate the latter would certainly meet Le Dain J's requirement of being "more severe than the normal".[41]

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32. *R v Miller* [1985] 2 SCR 613 at [35].
33. *R v Secretary of State for the Home Department, ex parte Bhajan Singh* [1976] QB 198 at 201.
34. *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58 (HL).
35. *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58 (HL) at 176.
36. *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA) at [74].
37. *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA) at [74].
38. For instance, in *Green v R* 1992 413 (BC SC) the Court concluded that "the loss of ready access to family visits is not the type of condition of confinement in a penitentiary to which [Le Dain J] intended habeas corpus apply". See also *Mennes v Canada (Attorney-General)* [2008] Carswell Ont 572 (ON SC). In contrast see *May v Ferndale Institution* 2005 SCC 82, [2005] 3 SCR 809 in which the Supreme Court held that a transfer from a minimum to medium level security institution constituted a significant deprivation of liberty.
39. *R v Miller* [1985] 2 SCR 613 at [36].
40. See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 for a discussion of these rights.
41. Case law across all jurisdictions emphasises the need for a high threshold. Among the few English authorities to entertain the extension of the remedy was *Middleweek v Chief Constable*

31.6.6 Although the New Zealand position set out in *Bennett*[42] has been confirmed in subsequent cases, an approach more in line with Canadian jurisprudence is desirable from a human rights perspective.[43] This approach is open in the interpretation of the 2001 Act which enables applications to be made to "challenge the legality of a person's detention" and defines detention to include "every form of restraint of liberty of the person".[44] As acknowledged in the Supreme Courts of Canada and the United States, habeas corpus is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty".[45] The application of habeas corpus in relation to unlawful conditions of detention ought not to be discarded as "unnecessary" but ought to be pursued for the utility it may provide as a further remedy available to respond to violations of BORA.

31.6.7 Further restrictions on the scope of habeas corpus are found in the 2001 Act. Section 14(2)(a) of the 2001 Act provides that an application for habeas corpus cannot be used to call into question the lawfulness of a conviction entered by a court of competent jurisdiction (or a court martial) and s 14(2)(b) prohibits the use of habeas corpus to call into question a bail ruling made by a court of competent jurisdiction. As a result of these provisions, habeas corpus is a remedy available in respect of a limited range of BORA rights (principally s 22 of BORA) and on a relatively narrow basis (those arbitrary detentions that are without lawful authority).

31.7 TORT

31.7.1 It is worth noting that BORA compensation (dealt with in detail in Chapter 27: Compensation) is not necessarily the exclusive means of obtaining a monetary remedy for a BORA violation. Depending on whether any immunity may exclude or restrict liability, BORA violations might well be remedied by an action in tort. Such a tort claim could rely on causes of action such as false imprisonment, assault,

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of Merseyside [1992] 1 AC 179 which held that only very extreme conditions would suffice to require relief, such as a prisoner's cell becoming and remaining seriously flooded or containing a burst gas pipe. In the United States, *Sandin v Conner* 515 US 472 (1995) held that restrictions on housing or movement within prison are generally not cognisable in habeas corpus unless they impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Similarly *Willis v Ciccone* 506 F 2d 1011 (8th Cir 1974) held that habeas corpus is limited to claims involving the deprivation of substantial rights.

42. *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA).
43. F Deliu "Habeas Corpus and Judicial Review" [2008] NZLJ 184; J Farbey, R J Sharpe and S Atrill *The Law of Habeas Corpus* (3rd ed, Oxford University Press, New York, 2011) at 171–172.
44. Habeas Corpus Act 2001, ss 3 and 6. Although note the argument that Parliament intended to broaden the scope of habeas corpus by virtue of these provisions was denied in *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616 (CA) at [64].
45. *May v Ferndale Institution* 2005 SCC 82, [2005] 3 SCR 809 at [21] citing *Jones v Cunningham* 371 US 236 (1962) at 243.

trespass, misfeasance in a public office and so on.[46] For example, there have been numerous cases where an arrest has been found to be both illegal (and therefore a false imprisonment) and arbitrary (and so contrary to s 22 of BORA). As discussed in Chapter 27: Compensation, to date the courts have not awarded different sums for false imprisonment and arbitrary arrest. Nonetheless, it is not inconceivable that there may be advantage to a plaintiff in using BORA to "strip away" the justification (that is, the statutory power) relied on by a public official in support of the legality of a particular act (or omission), but then seeking to demonstrate that the impugned act amounts to a tort for which damages ought to be recoverable in accordance with tort principles. Such a strategy was alluded to by Gault J in *Simpson v Attorney-General*[47] when his Honour opined that the tort of false imprisonment might be developed in response to BORA such that failure to meet the requirements of BORA when a person is arrested or detained could render the arrest or detention unlawful and actionable under false imprisonment.[48]

31.7.2 The beginnings of such development may be noticed in *Caie v Attorney-General*[49] in which the failure of the police to provide the reason for arrest to Mr Caie at the time of the arrest was found to breach s 316 of the Crimes Act and s 23(1)(a) of BORA. Due to this failure, the arrest was invalid and constituted false imprisonment. Reasons why this combined BORA–tort "justification-stripping" approach might be attractive to a plaintiff include:[50]

(1) entitlement to tort damages is less likely to be affected by discretionary factors that seem to inform BORA compensation; and

(2) causation rules for certain torts (including conversion and detinue) may be more plaintiff-friendly than those applicable to BORA compensation.

46. As noted in *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at [38] there is a great range of cases in which both a claim for breach of BORA and a claim in tort are made. The "wrong" of a BORA breach may also found the claim in tort, see for example *Phillips v Muriwai Golf Club* DC Waitakere CIV-2012-90-444, 12 July 2013, Judge Cunningham, in which a breach of BORA is the basis for the claim of misfeasance in public office.
47. *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).
48. *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at [96].
49. *Caie v Attorney-General* [2005] NZAR 703 (HC).
50. This issue is usefully addressed in A Butler and G McLay "Liability of Public Authorities" (New Zealand Law Society Seminar, Wellington, June 2004) at 161–186.