



# Habeas Corpus – Australia, New Zealand and The South Pacific<sup>1</sup> (2nd ed)

*David Clark & Gerard McCoy (The Federation Press 2018)*

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‘The writ of Habeas Corpus is rather like a classic that everyone has heard of but no one has actually read.’<sup>2</sup> What a fabulous start to a fabulous book.

It is peppered with history (including a reference to Magna Carta<sup>3</sup>) and Latin including “in favorem libertatis,<sup>4</sup> “in toto”<sup>5</sup> (one of my personal favourites), “functus officio,”<sup>6</sup> and habeas corpus “ad testificandum,”<sup>7</sup> to name but a few.

This text is a reminder of the usefulness of this remedy which “is English in origins”<sup>8</sup> and dates from at least 1206.<sup>9</sup>

In the past the “practical obstacles” in using the writ (in its various forms)<sup>10</sup> may have been due, in part, to the “slowness of horse and sea travel.”<sup>11</sup> However, this is not the case today and it is “an error to suppose that something not in frequent and current use is therefore obsolete.”<sup>12</sup>

There are 10 chapters in Habeas Corpus and each is interesting in its own right.

I would proffer that the most relevant sections of the text for NT practitioners concern the liberty of those detained via the criminal justice system<sup>13</sup> (unless such detention is legally justified)<sup>14</sup> and the rights of those most vulnerable in our society.<sup>15</sup>

The book contains many gems and a great deal of reference to differing and enticing case law. “The remedy is remedial”<sup>16</sup> is one of those absolutely precious literary moments worth savouring. However, elsewhere in Habeas Corpus the remedy is called “parastic”<sup>17</sup> which is not to my taste....

Sadly a number of the cases referred to in Habeas Corpus concern First Nations peoples in Australia and elsewhere.

One that stands out concerns two Aboriginal boys Tommy and Archie. These boys were the subject of court proceedings in the NSW Supreme Court in 1861; the following case relates to Tommy. In the matter of *Ex p Reverend West* [1861] 2 Legge 1475 (NSW FC)

“...the New South Wales Supreme Court allowed standing to a minister, the Reverend West, who had been told by a printer, David Russell, that a squatter named Collins had boasted that he had run off with the boy Tommy from his tribe. The Court awarded custody not to the applicant minister, but to the Crown which placed the boy Tommy in the custody of the matron of the Immigration Barracks.”<sup>18</sup>

Apart from reference to refugees<sup>19</sup> and prisoners<sup>20</sup> there is also discussion about the use of the remedy vis-à-vis military personnel<sup>21</sup> and aliens,<sup>22</sup> the various stages of a hearing,<sup>23</sup> standing,<sup>24</sup> the orders a court may make<sup>25</sup> and so on.

This text is well researched and very easy to read. It shows that habeas corpus is not obsolete<sup>26</sup> and indeed should be considered in any case – whether it relates to immigration,<sup>27</sup> mental health,<sup>28</sup> elder law,<sup>29</sup> family law<sup>30</sup> or criminal law. Usefully Habeas Corpus not only puts the law into context but deals with a number of practical issues such as current terminology,<sup>31</sup> urgency,<sup>32</sup> discovery<sup>33</sup> and adjournments.<sup>34</sup>

After being invigorated by Habeas Corpus I expect you will be flooding the NT courts with writs seeking this old but new found remedy. The authors warn however that the “remedy applies only to the living body of a natural person”<sup>35</sup> and therefore not to property, animals or a deceased person.<sup>36</sup> I personally think this is an arguable point given the highlighted section<sup>37</sup>

below in the case of *Clayton v Brookes*, which was reported in the New Zealand Herald on 21 February 1868 at page 2,<sup>38</sup> and where:

“the applicant’s representatives sought the body of a man who had died in Mt Eden Gaol. The Court did not decide specifically that the writ was unavailable in such a case but viewed the matter with scepticism and, in any case, the matter was resolved when the prison superintendent handed the body over to friends of the deceased. The judge asked whether, if habeas corpus had applied, would the dead body be brought to the court in a coffin!”<sup>39</sup> ■

1. Referred to herein as “Habeas Corpus” unless otherwise specified.
2. Page 1.
3. Page 19.
4. Page 16.
5. Page 48.
6. Page 165.
7. Page 33.
8. Page 19.
9. Page 19; refers, e.g., to the case of *Tebaldus de Bilton v Wilemun fratrem suum* [1206] 4 Curia Regis Rolls 153 r 41 m 8
10. Page 33.
11. Page 21.
12. Page 4.
13. For example, see Chapter 3 re Bail but also note there is much throughout the book of relevance such as transfer of prisoners between prisons (e.g. p 55). As an aside, did you know that bail has been around since about the 13th century? (p 58)
14. Page 16; *Liversidge v Anderson* [1942] AC 206.
15. Including refugees, the elderly, children and those with mental health issues – see, e.g., Chapter 5.
16. Page 39.
17. Page 5.
18. Page 143.
19. For example, at page 110.
20. Page 97.
21. Page 112.
22. Page 147.
23. Page 228.
24. For example, relatives – page 145-6.
25. Page 238.
26. There are many references in the book about the use of the writ in recent case law – e.g. - *Ledger Acquisitions Australia MB Pty Ltd v Keifer* [2014] FCCA 2216. However, the book notes that many of the forms of habeas corpus are now obsolete – see page 33.
27. Page 110.
28. Chapter 5.
29. Page 133.
30. Page 124. If seeking the return of a child from overseas under the Hague Convention or from interstate via a Recovery Order perhaps consider filing a writ of habeas corpus ad subjiciendum. *Re D (Infants)* [1969] NZLR 865.
31. Page 37.
32. Page 213.
33. Page 228.
34. Page 234.
35. Page 69.
36. Page 69.
37. My emphasis.
38. Page 69.
39. Page 69.

With our everyday lives bombarded with sad news or bad news—here’s some feel-good news.

A bar association, the Order of Attorneys of Brazil (OAB), has hired a new Cattorney: Dr Leon Advagato.

Dr Leon was found loitering around the office building and was the subject of some complaints. OAB felt they could use an extra attorney around the office and hired him on the spot.

Looking the part in his tailored suits together with ID card, Dr Leon is an expert in greeting staff and other very important people and keeps the President’s couch warm.

Dr Leon is a very modern Cattorney and keeps everyone informed on his workday through his very own Instagram account [www.instagram.com/dr\\_leon\\_advogato/](http://www.instagram.com/dr_leon_advogato/)

Attachment to Dr Leon has grown to such an extent that OAB now has plans to launch an animal rights institute and will fund local animal NGOs.



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