New Zealand's link with the Privy Council and the proposed Supreme Court

Introduction

The Government has introduced the Supreme Court Bill 2002 to establish a new Supreme Court of New Zealand, which will be New Zealand's final appellate Court, and to end more than 160 years of New Zealand appeals to the Judicial Committee of the Privy Council.

Since 1840, when the British Crown gained sovereignty over New Zealand, the final superior Court of New Zealand has been the Judicial Committee of the Privy Council.

The Privy Council comprises, in formal terms, a body of several hundred persons appointed by her Majesty the Queen on the advice of the United Kingdom Prime Minister. While several centuries ago the Council was the source of important advice in the process of royal government, today the role is largely ceremonial – the full Privy Council only meets on major occasions, such as a coronation.

The Judicial Committee of the Privy Council was created by United Kingdom statute in 1833. It is comprised of the Lord President of the Council, the Lord Chancellor, former Lords President, the Lords of Appeal in Ordinary, and such other members of the Privy Council as shall from time to time hold or have held high judicial office. Membership has also been extended to Privy Councillors who are, or have been, judges of some Commonwealth countries, including New Zealand.

The Judicial Committee has actively provided judicial functions of the Privy Council as a final court of appeal in matters entirely external to the United Kingdom itself (although the Lords of Appeal in Ordinary sit in the House of Lords as the final court of appeal for United Kingdom law). But the Judicial Committee's jurisdiction now extends only to the few remaining colonies and to those Commonwealth states which chose to retain the appellate role after independence from Britain.

1 Judicial Committee Act 1833, as extended by the Appellate Jurisdiction Acts 1876 and 1887 (UK).
The Privy Council in the New Zealand Court structure

The decisions of the Judicial Committee are advice to the monarch (hence, reference to “appeals to Her Majesty in Council”) and are promulgated by Order in Council.

On the foundation of New Zealand as a British colony in 1840, its inhabitants as British subjects acquired the right to appeal to the Queen in Council. The mechanics of this right were gradually formalised. At present the right of appeal is governed by Orders in Council made in Britain in 1910 and 1972. The Privy Council is at the apex of a Court structure which, generally, runs from the District Court through the High Court to the Court of Appeal. There are other specialist Courts such as the Family Court and the Employment Court. There are also the Maori Land Court and the Maori Appellate Court from which appeals lie to the Court of Appeal and/or the Privy Council. These latter Courts deal principally with Maori land.

Approaches in other jurisdictions – the Caribbean Court of Justice

Of all the former Dominions (Canada, Australia, South Africa, and New Zealand), all except New Zealand have abolished appeals to the Privy Council, the last being Australia in 1986. (In Canada and Australia, issues relating to the adoption of a written constitution and federal issues were important considerations in abolishing the right of appeal in those countries.) All the major new Commonwealth states also have abolished the appeal. The jurisdiction still also operates in the remaining British colonies and in a number of smaller Commonwealth states (principally in the West Indies). On 14 February 2001, an agreement providing for the establishment of the Caribbean Court of Justice was signed by a number of Commonwealth countries in the West Indies. It is expected that in 2003 the Caribbean Court of Justice will be inaugurated as a regional final appeal court replacing the Privy Council for many countries including Barbados, Belize, Guyana, St. Lucia, Trinidad and Tobago, the Commonwealth of Dominica, and St Vincent and the Grenadines.

Developments in reform

In 1978, the Royal Commission on the Courts outlined arguments for and against the right of appeal to the Judicial Committee. It recommended reforms within New Zealand before consideration of the issue, but considered that “the sole criterion must be whether the abolition of such appeals will be beneficial to the New Zealand judicial system.”

In 1989, the Law Commission reported on the structure of the courts should appeals to the Judicial Committee be abolished. It made appellate recommendations including a High Court, and then a Supreme Court, each consisting of three Judges.

In May 1995, a report by the then Solicitor-General contained recommendations – largely reflected in the New Zealand Court Structure Bill 1996 (see below) – for a single right of appeal from the High Court to a divisional or Full Court of Appeal. The Judicial Committee would have, in effect, not been replaced by a separate Court.

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Politically, the abolition of appeals to the Privy Council first became a matter of
government policy in 1987 when the Minister of Justice, Sir Geoffrey Palmer,
announced that the then Labour Party Government would effect the abolition
to coincide with the 1990 150th anniversary commemorations of the
establishment of British sovereignty and the signing of the Treaty of Waitangi
in 1840.

In 1991, the National Party Government indicated it would consider abolition
once it had enhanced the appellate court structure within New Zealand. It was
concerned with “fiscal neutrality” – appropriate replacement appellate
structures without major fiscal implications.

In April 1996, when the Government introduced the New Zealand Court
Structure Bill, the then Attorney-General (Hon. Paul East) indicated that
abolition would be effected only with the “broad support” of the House of
Representatives. That Bill did not proceed.

The Labour-Alliance coalition government (1999-2002) renewed calls to end
appeals to the Judicial Committee and issued a discussion paper on New
Zealand’s appeal structure. Possibilities included a regional Australasian or
South Pacific appellate court, a second-tier New Zealand Court of Appeal (with
or without secondment of sitting or retired appellate court judges from Australia
and other jurisdictions), or a horizontally restructured Court of Appeal sitting in
divisions or as a full Court in cases of public importance.

The Supreme Court Bill was introduced into the House of Representatives on
09 December 2003. The Bill was referred to the Justice and Electoral Select
Committee, which called for public submissions. The Select Committee must
report the Bill (with any recommended amendments) by 16 June 2003.

The Bill establishes the Supreme Court of New Zealand (the Court) as the
Court of final appeal for New Zealand. It is to be a Court of record.8 The
Supreme Court is given jurisdiction to hear and determine an appeal by a party
to a civil proceeding in the Court of Appeal against any decision made in the
proceeding unless an enactment9 provides that the decision is final or binding
or the decision is a refusal to give leave or special leave to appeal to the Court
of Appeal from the High Court.

The Supreme Court has jurisdiction to hear and determine appeals by parties
to civil proceedings in the High Court against any decision made in the
proceeding. The Court can hear and determine appeals against decisions by
Courts other than the High Court and the Court of Appeal where an enactment
provides for such appeals. In its criminal jurisdiction the Supreme Court may
hear and determine appeals, generally on questions of law. Appeals to the
Supreme Court can only be heard with the Supreme Court’s leave.

Finally, the Bill provides that no appeal to the Privy Council (“to Her Majesty in
Council”) lies or may be brought from or in respect of any civil or criminal
decision of a New Zealand Court made after the commencement of the Act (28
days after it receives the Royal Assent).

8 Ministerial Advisory Group, ‘Reshaping New Zealand’s Appeal Structure: Discussion Paper’, Margaret
Wilson, Attorney-General, Wellington, Office of the Attorney-General, 2000, at:


10 A Court of record is a Court which permanently records its proceedings and decisions and which has the
power to punish for contempt of Court.

11 An enactment is the whole or a portion of an Act or regulations, Section 29 of the Interpretation Act 1999.
As a transitional measure, certain proceedings may be heard and determined by the Privy Council unless the Privy Council has not begun to hear the appeal and all parties agree in writing that application should be made to the Supreme Court for leave to appeal to the Supreme Court against the decision concerned.

The Government’s position

In an accompanying media release, the Attorney-General, Hon Margaret Wilson said:

Having a court of final appeal in New Zealand would mean more people would have access to justice. Currently many New Zealanders simply cannot afford to take their case to the Privy Council, but with the final right of appeal in their own country they will be able to exercise their full appeal rights. The Privy Council only hears about 11 appeals from New Zealand each year, but the new Supreme Court is expected to hear about five times this number. The increases in appeals will not only result from reduced costs but because unlike the Privy Council, the Supreme Court will be able to hear appeals of employment, environment, and family court matters. There will also be more access to justice for New Zealanders wishing to appeal criminal matters as currently it is very rare for the Privy Council to grant them leave to appeal.

Response to the Bill

Since the Bill was introduced, a robust debate has developed in New Zealand on the merit of abolishing appeals to the Judicial Committee of the Privy Council, and on aspects of the creation of the new Supreme Court. Some of the contributions to the debate are:

The Need for a Referendum on Such an Issue

A certain unease is in evidence that this major constitutional change can take place so easily by means of a simple statute passed by the New Zealand Parliament and assented to by the Governor-General just like any other statute. This objection relates to the peculiar characteristics of the New Zealand constitution. New Zealand is one of the few countries which have an unwritten constitution. This means that the limits on the use of power are not in one over-arching, supreme written document. There are some limits found in statutes such as the Electoral Act 1993, the Constitution Act 1986, or the Public Finance Act 1989. Other limits are found in conventions. Conventions are rules or customs which have evolved over time and which cannot be enforced in the courts. An example is that the New Zealand Governor-General will sign all Bills passed by the Parliament into law, although there is no written, legally enforceable obligation for her to do so.

Any legislation of the New Zealand Parliament (and that early legislation of the British Parliament adopted by the New Zealand Parliament) can be amended or repealed, in effect, by any Government (since by definition a Government has a majority in the Parliament).

There are two exceptions to this. If a Government passed an Act changing the voting system to be used or the need for rough proportionality between constituencies, it could give itself a built-in advantage into the future. It could lock-in an advantage for itself. Section 268 of the Electoral Act 1993 therefore requires that a referendum be won. But Section 268 is only singly entrenched and so legally could be avoided by a simple majority vote in the House (by repealing the entrenchment clause).

Media Release, Hon. Margaret Wilson, ‘Supreme Court Bill introduced to the House’, 9 December, 2002.

The Quality of the Privy Council Judges

The view has been expressed that abolishing the highest existing Court and creating a new one has the same degree of importance as the voting system or the arrangement of constituencies.

The potential is there to influence matters well into the future, after this Government is gone. Just get five Judges you like – the five people who will have the last say about interpreting every single piece of legislation ever passed and all aspects of the common law – and you can lock in future generations.

Thus, replacing the Privy Council enters into deep constitutional waters. Depending on the particular proposal for the new Court, it may well require that a referendum first be held and won. Given that Ms Wilson [the Attorney-general of New Zealand] is proposing to use essentially the regular appointment process for Judges, with a couple of self-serving qualifications, it looks as though this Government will be hand-picking the members of our new highest Court.12

A different point of view has been expressed as follows:

… it is not clear that a national referendum is necessary or appropriate in respect of the Supreme Court Bill. The modest magnitude of the constitutional change may not warrant the invocation of such an expensive and cumbersome public decision-making mechanism. Informed debate should take place, and be fed into the regular parliamentary decision-making process through submissions to the Select Committee and through communications to individual members of Parliament.13

In a press release, the Executive Director of the New Zealand Business Round Table said that there was no evidence of strong public support for change and that much broader support should be required for a major constitutional initiative. He said that in practice most appeals to the Privy Council were on commercial cases and business sector submissions had been overwhelmingly in favour of maintaining the link.

From a business perspective, the Privy Council is an excellent court; it continues to correct poor Court of Appeal decisions; there is still limited commercial expertise in the higher reaches of the New Zealand judiciary and the talent pool for top judges is quite small; New Zealand benefits from the detachment of the Privy Council and the global connectedness it offers; the chances of political influence over the judiciary and of judicial activism would both be increased without the anchor of the Privy Council; and the sovereignty and cost of access arguments for abolition are not compelling, at least in respect of commercial cases.

12 James Allan, ‘A latter-day Portia’, The New Zealand Law Journal, February 2003, p. 18. Mr Allan heads his article with the following extract from The Merchant of Venice, Act IV, Sc 1, ll. 214-222.

  Bossanio: I beseech you,  
  Wrest once the law to your authority:  
  To do a great right, do a little wrong …

  Portia: It must not be. There is no power in Venice  
  Can alter a decree established:  
  'Twill be recorded for a precedent,  
  And many an error by the same example  
  Will rush into the state.

New Zealand’s economic stability and growth is very dependent on confidence in its laws and institutions. It has been criticised for weaknesses in constitutional rules and attitudes that create uncertainty for business. A clear separation of powers is a vital constitutional feature which is not easy to achieve in small countries. For these reasons broad public approval (e.g. by way of a referendum) and a level of parliamentary support appropriate for constitutional measures should be established before the Bill is passed.14

Another commentator has said in relation to this question of expertise:

There is a certain logic about a bigger UK pool of lawyers producing a better quality of Judges at the top of the judicial hierarchy. At the same time there is persuasive evidence of the New Zealand legal education system producing legal minds of world quality. For example, our Lord Cooke until recently sat as a full member of the UK’s highest Court, the Appellate Committee of the House of Lords, and as a member of the Privy Council. Further, students from New Zealand perform exceedingly well in the highly competitive Oxford, Cambridge and leading North American postgraduate programmes in law. It is possible that any community fears of inadequacy will be allayed after the Court has been observed in action over a period of years.15

The cost of the changes

Commentators question whether the new Supreme Court will be cheaper in any sense, pointing out that New Zealand gets the Privy Council for free.

This new Court will cost millions to set up, millions to house, and about $NZ350,000 per annum per judge (plus very generous superannuation) to staff. It will, of course, cost less to take your second level appeal to Wellington rather than London, but not that much less. (Let us be abundantly generous to Ms Wilson and assume it will be $150,000 per litigant cheaper.) That said, Ms Wilson deliberately overlooks the fact only about a dozen cases a year go to London whereas this new Court is to hear many, many more. All those extra second tier appeals will cost the litigants more than before. So repeat users of the Court system – like the Crown – will pay more than once the Privy Council is gone.16

Another commentator has said:

The argument for retention on the grounds that the Privy Council service is free to the New Zealand taxpayer is embarrassing. It should be an irrelevant consideration in the debate. There is no moral justification for New Zealand continuing to have its final appellate Court funded by the British taxpayer. The UK could properly charge the New Zealand Government for the service.17

Who will be the Judges of the Supreme Court?

One of the most contentious issues surrounding the new Supreme Court is the appointment of Judges to it. The Bill as introduced proposes that the Chief Justice will be ex officio its president and another four Judges will be appointed. The significance of this issue also impinges on the New Zealand constitution. New Zealand continues to have a process for appointment to the Bench, the detailed procedure for which is not prescribed in law, which has the potential to be dominated by the Government, or more particularly, the Attorney-General of the day even though there are well-established conventions of consultation in both the legal and wider communities before judicial appointments are made.

15 Bruce Harris, p. 15.
16 James Allan, p. 20.
17 Bruce Harris, p. 15.
In a report commissioned by the Attorney-General, the Rt. Hon Sir Geoffrey Palmer has recommended that a Judicial Appointments Commission independent of the Government be established.\textsuperscript{18}

The Government has not yet accepted that recommendation and, if it did, the Supreme Court could be established long before the necessary legislation to establish the commission could be passed. It is feared that the current government, which is likely to have the opportunity to appoint the inaugural Supreme Court, may be tempted to appoint Judges which have political sympathies in line with those of the Government. A suggestion has been made that because of this danger the four current most senior Judges of the Court of Appeal be automatically appointed to the Supreme Court Bench or alternatively, the Supreme Court not be established until a Judicial Appointments Commission is established. No doubt, there would also be controversy about the Government’s appointment of the members of such a commission.

But one commentator has said,

\textit{… the concern about the possible politicisation of the Supreme Court Bench should, however, be tempered by an historical appreciation of the appointment of Judges in New Zealand. Until now we have never been seriously concerned about the possibility of politics influencing appointments to the Bench. To date the system has produced Judges whom the public generally believes to be apolitical. This includes the Court of Appeal, which has been the stopping point for all but a handful of appeals each year. Should we not be confident that the convention of non-political appointments to the Bench will be maintained in respect of the Supreme Court?}

Further, it should be remembered that final appellate Judges do not have carte blanche. They are constrained in our common law legal system by the force of our doctrine of precedent, the risk of criticism by expert legal commentators, and the fair of warranted criticism from an increasingly informed wider community. Foibles and cracks in credibility are likely to be quickly and effectively exposed. Also in the judicial accountability chain the final link is Parliament itself, which in theory, through its supremacy, can pass legislation to override anything which the Supreme Court may choose to do by way of deciding the appeal at hand, or exposition of the law. Parliament would no doubt be most circumspect about taking any legislative action which would be perceived as a constitutionally destructive conflict with the Supreme Court.\textsuperscript{\textsuperscript{\textsuperscript{19}}}

\textbf{Maori interests} From 1840, the Privy Council has been involved in many cases relating to the settlement of Maori claims especially against the Crown and the interpretation and implications of the Treaty of Waitangi.

However the link with the Privy Council also has a more profound symbolic meaning. The Privy Council represents “a form of access to the Sovereign which is of symbolic importance in relation to the Treaty.”\textsuperscript{\textsuperscript{20}}

A leading Maori academic, Professor Winiata Whataragi, has explained another aspect of the Maori position as follows:

\textit{Given the way in which the colonial government over the years have behaved, it is important for Maori people to have external bodies like the Privy Council … to turn to.}\textsuperscript{\textsuperscript{21}}

A recent academic examination of the role of the Privy Council and of six of the most controversial cases to come before the Privy Council, that have had a significant effect on the development of New Zealand’s “unique jurisprudence”, has come to the conclusion that the New Zealand Court of Appeal has been more important.

It is arguable that it is the Court of Appeal, not the Privy Council, that has in recent times assumed the role of guardian of [Maori] interests against the Crown, and that it has been more active than the Privy Council in promoting the Treaty of Waitangi as a constitutional document.

In the Supreme Court Bill as introduced the various grounds under which the Supreme Court may give leave to appeal are set out. One of these is that “the proposed appeal involves a significant issue relating to the Treaty of Waitangi or tikanga Maori”. The right to appeal directly from the Maori Appellate Court to the Privy Council is transferred directly to the new Supreme Court.

Recently a Judge of the Maori Land Court has strongly attacked the New Zealand Court of Appeal and the proposed abolition of appeals to the Privy Council in the context of a recent decision of the Court of Appeal involving Maori Freehold Land.

To the legal philosopher, the Judicial Committee of the Privy Council once offered the alluring vision of a uniform common law almost encircling the earth; for a diminishing number, the words can still evoke memories of the past glories of the British race, for some, the term expresses a mere clog on the equity of national development.

In a speech given to the 13th Commonwealth Law Conference in Melbourne on Wednesday 16 April 2003, the Chief Justice of New Zealand, Dame Sian Elias, made some comments on the Privy Council in relation to New Zealand.

She observed that the first appeal to the Privy Council from New Zealand resulted in the full Court of the Supreme Court (now the High Court of New Zealand) being overturned and that over the years the local courts have been upheld and overturned in about the proportions to be expected of further appeal. Dame Sian Elias said that the real benefit obtained by New Zealand’s legal system from appeals to the Privy Council was the benefit of a second appeal.

But the benefit of this second appeal was only available in a tiny number of cases. That for New Zealand, said Dame Sian Elias, was the real cost of not having a final court in New Zealand.

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19 Bruce Harris, p. 16.
26 The views of the Chief Justice were expressed orally at the Commonwealth Law Conference and, as set out in this paper, they are the recollections of the writer.
This meant that it is only the wealthy or those who are “possessed” who can overcome the barriers to access to a Court on the other side of the world who have been able to access the second appeal. She observed that the cases from New Zealand, at least in recent years, overwhelmingly involved large commercial enterprises or the Government.

Dame Sian Elias said that the effect of the inaccessibility of New Zealand’s highest Court was that the country failed to achieve the benefit of second-level appeal in most areas of New Zealand law. She said that the benefit of two appeals arose from the quality of adjudication through the refinement of argument and the deliberation permitted to judges who are freed of the intermediate appellate volume of work.

Dame Sian Elias said that the Court of Appeal was dangerously overworked. The result of this was that areas of law of critical importance to the lives of New Zealanders (Family law, Criminal law, Human Rights law) effectively did not achieve the quality of adjudication available in final courts. That result was destructive of the integrity of the structure of the New Zealand legal system and the development of the law. Dame Sian Elias felt that no change was not an option and that either there must be improved accessibility to the Privy Council for all cases which merited a second appeal or appeals must be restructured locally. She felt that both options carried costs.

Dame Sian Elias recognised that there had been decisions on appeals from New Zealand to the Privy Council which were legal landmarks, of great significance. But she thought that in some cases where the New Zealand Court of Appeal was rightly reversed, the same result would have been achieved on further appeal within New Zealand. But it was striking how few of the cases decided by the Privy Council on appeal from New Zealand she would put in the “landmark” category.

Dame Sian Elias thought that there may be a number of reasons for this, the first being the fact that for cases where the amount in issue was over $5,000, appeals to the Privy Council lay as of right and that therefore many New Zealand cases were relatively pedestrian, legally speaking. Another factor was that, until comparatively recently, the Privy Council delivered one opinion only. Dame Elias observed that Lord Reid believed that that circumstance led to compromises and lack of clarity which diminished the standing of decisions of the Privy Council.

However Dame Sian Elias thought that the main reason that there were so few landmark decisions on appeal from New Zealand was that in the common law world such decisions were landmarks for all countries. She felt that all countries drew upon the great judgments of other common law jurisdictions. The common law tradition tended to pull all countries together in most cases. This meant that the landmark decisions of the House of Lords, or the High Court of Australia, or the Supreme Court of Canada generally gained acceptance in New Zealand and throughout the common law world as much as or even more than those of the Privy Council.

Dame Sian Elias observed that the Privy Council has increasingly accepted that local conditions justify different treatment. Examples are the cases of Invercargill City Council v Hamlin and Lange v Atkinson.

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27 [1996] 1 NZLR 513 at 519-520. In relation to the liability of local authorities under the tort of negligence, upholding the decision of the New Zealand Court of Appeal, the House of Lords decision in Murphy v Brentwood District Council was not applied by the Privy Council to New Zealand.
In both these cases the judges in the New Zealand Court of Appeal consciously departed from English case law on the ground that conditions in New Zealand were different and the Privy Council felt constrained to accept those decisions.

Suggestions have been made in recent years in the United Kingdom that the Appeals Committee of the House of Lords and the Judicial Committee of the Privy Council should both be replaced by a new United Kingdom Supreme Court. Lord Bingham of Cornhill, the senior Law Lord, has suggested such a reform several times. He has said: “I think there is a very strong case for having a supreme court that is in the same position constitutionally as the supreme courts of every other country in the world, whether it be the US, Canada, Australia, India or France.” It may well be that if New Zealand does not choose to make the break now, the decision to make the break will be forced by the process of constitutional reform in the United Kingdom itself.

In a recent public opinion poll, 51 percent were in favour of the Supreme Court Bill, but 40 percent admit that they know nothing about the issue. The Bill is a Government measure to implement Government policy and is therefore likely to be passed in some form late in 2003 or in 2004.


John McSoriley, Barrister, Parliamentary Library

For more information, contact John at ext. 9626.