

## A New Supreme Court of New Zealand

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### Introduction

On 17 October 2003 the Supreme Court Act 2003 received the royal assent. Its effect was to end appeals from New Zealand courts to the Judicial Committee of the Privy Council,<sup>1</sup> and to create a new Supreme Court of New Zealand.<sup>2</sup> The Bill passed its third reading in Parliament with a majority of 10, in the face of strong opposition, not all of which was motivated by party politics.

New Zealand may be at constitutional, political, and legal crossroads. On the one hand there is now a new final appellate court in New Zealand, no longer one which is shared with other Commonwealth countries. But at the same time there remain calls for the right of appeals to the Privy Council to be restored. These controversies are serious because they potentially undermine public confidence in the judiciary as a whole, and particularly in the new Supreme Court.<sup>3</sup> But the fact that the creation of the new Supreme Court has been accompanied by such controversy raises important questions about the timing of the reform, if not its nature.

It might well be asked why many individuals and groups felt so strongly about the Privy Council. This issue could have been dismissed as purely technical, of interest only to lawyers. But this was not so. This may have been due in part to the manner in which the Government championed the Supreme Court Act in the face of widespread opposition from the business community and the legal profession. There were concerns expressed that whatever the merits of the proposal, it was being forced on a reluctant public. Further, many have argued that this was a constitutional reform, which ought to be subject to a referendum,<sup>4</sup> or at least have a two-thirds majority vote in Parliament.<sup>5</sup> Critically, opposition came from business groups,<sup>6</sup> local government, Maori

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<sup>1</sup>With effect from 1 January 2004 (s 2).

<sup>2</sup>Between 1841 and 1981 the principal court of original jurisdiction in New Zealand was the Supreme Court – now renamed the High Court.

<sup>3</sup>Both by criticising the past performance of judges and courts – including the Privy Council – and by suggesting that the new court would be inherently politically active, or otherwise less than acceptable.

<sup>4</sup>Several opposition parties, including the largest, the National Party, have promoted a referendum on the retention of the right of appeal to the Privy Council. Now that the legislation ending appeals has been passed, the referendum issue remains important as these parties have pledged to repeal the Supreme Court Act and reinstate appeals to the Privy Council.

<sup>5</sup>Only certain provisions of the Electoral Act 1993 are subject to the requirement for special majorities.

<sup>6</sup>Represented by such bodies as the Business Roundtable, the Employers Federation, the Auckland Chamber of Commerce, and the main accounting firms; Irene Chapple, “Law

organisations, the legal profession,<sup>7</sup> and elsewhere, and could not therefore be dismissed as simply politically motivated.

Most importantly – and this has been overshadowed to some extent – there are also concerns about the unknown nature of the flow-on effect of the abolition of the right of appeal to the Privy Council. I will briefly outline some of these concerns. But first I shall outline the nature of the new Supreme Court.

## Background

The Supreme Court Act 2003 was intended to implement Government policy to end New Zealand appeals to the Judicial Committee of the Privy Council. This process began with the release of a Government Discussion Paper – *Reshaping New Zealand's Appellate Structure* – in December 2000.<sup>8</sup> This proposed that the abolition of the right of appeal was politically necessary, and concentrated on options for replacement – including no replacement. It gave little attention to the possibility of retention. Additional arguments based on access to the courts, and cost, were only emphasised at a comparatively late stage.

The form the Supreme Court was to take were subsequently identified in the report of the Ministerial Advisory Group, established by the Attorney-General and chaired by the Solicitor-General. The report, *Replacing the Privy Council – A New Supreme Court*, was released by the Government in April 2002.<sup>9</sup>

In the course of 2002 and 2003 legislation was drafted, introduced into Parliament, and subsequently enacted as the Supreme Court Act 2003. The overarching objective of the Act is said to be to improve access to justice through:

- improving the accessibility of New Zealand's highest court; and
- broadening the range, and increasing the volume, of appeals considered by New Zealand's highest court; and
- using the greater understanding of local conditions of the Judges of New Zealand's highest court.<sup>10</sup>

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Lords retain their appeal” New Zealand Herald 3 December 2001 D1; See New Zealand Business Roundtable, *Appeals to the Privy Council: a submission to the Attorney-General on the Solicitor-General's report on issues of termination and court structure in relation to appeals to the Privy Council* (New Zealand Business Roundtable, Wellington, 1995).

<sup>7</sup>For the legal community; “Council endorses decisions by Privy Council meeting” (12 April 2001) 13 Law News p 3; “Meeting over Privy Council access sought with Attorney-General” (30 March 2001) 11 Law News pp 1, 5.

<sup>8</sup>Crown Law Office, *Reshaping New Zealand's appeal structure* (Crown Law Office, Wellington, 2000).

<sup>9</sup>Available at <<http://www.crownlaw.govt.nz>>.

<sup>10</sup>Supreme Court Bill – Explanatory Note.

Opponents of the Bill disputed all of these aims, either on the grounds that they could be achieved by other means, or (particularly the last) in principle.

### **Essential elements – jurisdiction**

The Supreme Court will be New Zealand's final appellate court.<sup>11</sup> It will be possible for proceedings originating in any New Zealand court to ultimately reach the Supreme Court. Previously appeal provisions were restricted in the case of proceedings brought in certain courts of special jurisdiction.<sup>12</sup>

Virtually all appeals determined in the Supreme Court will be second or subsequent appeals, following a judgment of an intermediate appellate court. Most appeals to the Supreme Court will occur following a judgment of the Court of Appeal. In practice, most appeals will be resolved at this intermediate appellate level, and the volume of appeals determined by the Supreme Court will be considerably lower than the number determined by the Court of Appeal.

In exceptional circumstances, the Supreme Court may give leave to bring appeals direct from certain decisions of some New Zealand courts other than the Court of Appeal. This special provision will apply only to a proceeding where the appeal on the decision would normally be made to the Court of Appeal. It is expected that the occasions of such appeals will be rare.

The importance of the Privy Council to New Zealand has been minimised on the grounds that only a handful of appeals were heard from New Zealand. However, on a population basis, and as a percentage of the total number of civil and criminal actions, the number of appeals to the Privy Council from New Zealand was no less than the number of appeals to the final appellate courts in the UK, Australia, or Canada.

It has been said that the new court will hear more cases than the Privy Council does. It is perhaps to be hoped that this will be so, given the high cost of the new court to the taxpayer. But numbers alone should not be the principle reason for abolish appeals.

### **Leave provisions**

Before the Supreme Court will hear and determine an appeal, it will be necessary for the appellant to apply to the Supreme Court for leave to appeal.<sup>13</sup> This is consistent with the practice in final appellate courts in comparable countries.

In determining whether or not to grant leave, the Supreme Court must be satisfied that the case fulfils one of the statutory criteria. These matters could concern the Treaty of

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<sup>11</sup> s 6.

<sup>12</sup> Such as the Family Court.

<sup>13</sup> s 12.

Waitangi, which is New Zealand's founding document,<sup>14</sup> or tikanga Maori (Maori practice and culture), or be of general commercial significance, or arise where the hearing of an appeal may be necessary in the interests of justice or to avoid a substantial miscarriage of justice.<sup>15</sup>

The Court will normally determine applications for leave to appeal after an examination of written submissions, but may choose to conduct an oral hearing. The Supreme Court will not be required to give reasons for refusing an application for leave to appeal, but may do so.<sup>16</sup> It may be expected that it will normally do so.

An aspect related to jurisdiction and leave provisions is cost. This also has a bearing on access to the courts, which was one of the issues addressed by the new court structure. Considerable expense was involved in pursuing an appeal to the Privy Council, although in comparison with the cost of appeals to the Court of Appeal they were not inordinately expensive. Frequently civil appeals will only reach the level of the Court of Appeal or Privy Council where there is a significant amount of money involved, either directly or indirectly, and thus the direct costs of the appeal are not necessarily as significant as they may at first glance appear. Since appeals to the Supreme Court will be by way of rehearing they may be more expensive to appellants than previous appeals to the Privy Council.<sup>17</sup>

It remains to be seen whether the replacement of the London-based Privy Council with a Wellington-based Supreme Court will result in savings to litigants, or an increase in the numbers of appeals. Both of these are said to be objectives of the reform, though neither are supported by independent studies.

## **Constitution**

The Supreme Court will be composed of the Chief Justice, and four other Judges appointed by the Governor-General.<sup>18</sup> The Chief Justice is the head of New Zealand's judiciary. On appointment, the other four Judges will become New Zealand's most senior Judges after the Chief Justice.<sup>19</sup>

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<sup>14</sup>See, for example, New Zealand 1990 Commission, *The Treaty of Waitangi: The symbol of our life together as a nation* (New Zealand 1990 Commission, Wellington, 1989).

<sup>15</sup>s 13.

<sup>16</sup>s 15.

<sup>17</sup>The New Zealand taxpayer can avoid some cost as the Privy Council is maintained by the British taxpayer. For details of which see Andrew Le Sueur and Richard Cornes, *The Future of the United Kingdom's Highest Courts* (The Constitution Unit, University College London, London, 2001) 151-153.

<sup>18</sup>s 17.

<sup>19</sup>s 18.

In the absence or unavailability of the Chief Justice, the next senior-most Judge of the Supreme Court will be the Acting Chief Justice.<sup>20</sup> This represents a change from the current statutory provisions of the Judicature Act 1908, whereby the Acting Chief Justice is the senior Judge of the High Court who is not a member of the Court of Appeal. The change in designation reflects the importance of the Supreme Court.

All Supreme Court Judges will enjoy concurrent appointment as Judges of the High Court.<sup>21</sup> This will enable them to exercise the inherent powers of a Judge of the High Court. As with all other Judges in New Zealand, a Supreme Court Judge must retire on attaining the age of 68 years.

There may be occasions when a Supreme Court Judge is unable to hear a proceeding. To provide for this possibility, the Governor-General may appoint acting Judges of the Supreme Court from retired Judges of the Supreme Court or Court of Appeal who have not reached the age of 75 years.<sup>22</sup>

There will also be a panel of acting Judges. The Chief Justice will be able to draw from that panel when satisfied that a permanent member of the Supreme Court is unavailable.

It is expected that the new Judges will be current members of the Court of Appeal, although the appointment of judges from outside the pre-existing appellate bench has not been ruled out. One of the flow-on effects of the creation of the new Supreme Court will be its effect upon the personnel of the judiciary. This has at least two aspects.

Firstly, there are a comparatively small number of senior legal practitioners from which to recruit judges, and a smaller number of experienced appellate judges. The creation of a new tier without previously increasing the number of judges will present problems of continuity for the bench at High Court and Court of Appeal level. One of the lessons from the first thirty years of the Court of Appeal was that there were never enough suitable judges available.<sup>23</sup>

Secondly, it has been observed that if an objective interpretation of the law of New Zealand is a principal aim – one which is disinterested or impartial – it is desirable to have judges somewhat removed from the social and political influences of New Zealand. The Judicial Committee of the Privy Council was a rich legal resource of a depth not readily available in a comparatively small country.<sup>24</sup> New Zealand has a very compact

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<sup>20</sup>s 19.

<sup>21</sup>s 20, just as all Judges of the Court of Appeal are also Judges of the High Court.

<sup>22</sup>s 32.

<sup>23</sup>Peter Spiller, *New Zealand Court of Appeal 1958-1996: A History* (Brookers, Wellington, 2002).

<sup>24</sup>“The special qualities of learning, experience, depth of legal culture, and refinement of style will not foreseeably be replaced” [in the event of the ending of appeal rights from New Zealand], Sir Thomas Eichelbaum, “Brooding Inhibition – or Guiding Hand?”

legal society, and the dispassionate view of an outsider concerning our most critical litigation is valuable. This is particularly important in the commercial field.<sup>25</sup>

If an objective interpretation of the law of New Zealand is required, extraneous matters are irrelevant, and it is thus desirable to have judges somewhat removed from the social and political influences of New Zealand. Such a situation helps to keep our statute law especially, up to the strict requirements of “pure law”.<sup>26</sup> An illustration of the potential problems which can arise is seen in the 1982 the Privy Council decisions of *Levave v Immigration Department*<sup>27</sup> and *Lesa v Attorney-General*,<sup>28</sup> which gave rise to much debate of the question of whether or not New Zealand should continue to allow the right of appeal to the Privy Council.<sup>29</sup> In the immediate aftermath of a decision which the then Government found unwelcome, the Minister of Justice expressed the view that there was no longer any need for the retention of the right of appeal to the Privy Council. On that occasion the response, certainly from the legal profession, was strongly in favour of the retention of appeal rights. The Council of the New Zealand Law Society were unanimously in favour of retention.<sup>30</sup>

The Judicial Committee itself acknowledges that it has limits as an appellate tribunal in cases where the decision depends upon considerations of local public policy. It may also be possible that the overseas members of the Judicial Committee are as well placed as New Zealand judges to decide matters of policy. Whilst local judges may be better placed to consider relevant local considerations, they may also be less able to take a broader perspective. The Judicial Committee would not substitute its own views, if different, from those of the Court of Appeal.<sup>31</sup> The role of the Privy Council remained important in interpreting parts of the common law which do not differ for reasons of public policy between New Zealand and other jurisdictions, and in allowing the Court of Appeal to reconsider its own judgements in light of more recent English and other judgements which considered New Zealand and other cases.

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Reflections on the Privy Council Appeal” in Philip Joseph (ed), *Essays on the Constitution* (Brookers, Wellington, 1995) 112, 128.

<sup>25</sup>And evidence appears to suggest that the Court of Appeal is relative unsophisticated in its understanding of law and economics; James Farmer, “The Judicial Process in New Zealand” (Legal Research Foundation, Auckland, 2001) 8.

<sup>26</sup>If indeed there can be such a thing.

<sup>27</sup>[1979] 2 NZLR 74

<sup>28</sup>[1982] 1 NZLR 165. See also Ministry of Foreign Affairs, *New Zealand Citizenship and Western Samoa* (Ministry of Foreign Affairs, Wellington, 1983).

<sup>29</sup>See, for example, Janice Urlich, “The Privy Council: is it obsolete?” (1984) unpublished University of Auckland LLB(Hons) dissertation.

<sup>30</sup>Public Issues Committee of the Auckland District Law Society, *Proposals to abolish the right of appeal to the Privy Council* (Public Issues Committee of the Auckland District Law Society, Auckland, 1983). As they were in 1976; *Court Structure, A submission by the New Zealand Law Society to the Minister of Justice* (New Zealand Law Society, Wellington, 1976).

<sup>31</sup>*Lange v Atkinson* [2000] 1 NZLR 257 (PC).

With the Judicial Committee of the Privy Council now replaced, the advent of the new Supreme Court will doubtless have a long-term effect on the laws of New Zealand. There will likely be less reliance upon English precedents – though these will remain important. Because the Supreme Court will lack the self-imposed public policy restraint of the Judicial Committee, it will be freer to develop the law in accordance with social and political considerations. The effect will potentially be a more activist final appellate court. Whether this is desirable or not is immaterial, but it does tend to support the contention that this reform is sufficiently significant – and constitutional in nature – to justify a referendum being held.

### **Powers of the Supreme Court**

Appeals in the Supreme Court will be conducted by way of a rehearing.<sup>32</sup> The Court hears the matter on the basis of the evidence from the Court below, but is entitled to receive further evidence. The Court determines the legal rights and obligations of the parties as at the date of the rehearing.

This is quite distinct from the practice of the Judicial Committee of the Privy Council – or indeed of appellate courts generally – which do not concern themselves with matters of evidence which were dealt with at trial level. The consequences of this are as yet unknown, but it has the potential to increase the length – and so the cost – of appeals.

### **Ending of appeals**

The Act ends appeals from any decisions of a New Zealand court to the Judicial Committee of the Privy Council with effect from 1 January 2004.<sup>33</sup>

No appeal 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 this Act—

- (a) whether by leave or special leave of any court or of Her Majesty in Council, or otherwise; and
- (b) whether by virtue of any Act of Parliament of the United Kingdom or of New Zealand, or the Royal prerogative, or otherwise

As a transitional measure, the Act provides for the continuation of existing appeals and applications for leave or special leave to appeal to the Judicial Committee, where these proceedings have been initiated before the commencement of the Act.

### **Opposition to the reform**

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<sup>32</sup>s 23.

<sup>33</sup>s 2. Hearings will not, however, begin before 1 July 2004 (s 53).

At the most abstract, or theoretical, appeals to the Privy Council are in constitutional theory appeal to Her Majesty The Queen in Council. The right to petition The Queen for redress is the right of every subject of the Crown. In particular, it formed one of the rights of British subjects which has arguably been guaranteed to the Maori people by the Treaty of Waitangi 1840.<sup>34</sup> Many Maori groups in particular see the retention of the right of appeals as an aspect of the constitutional link with the Crown. The underlying motivation for removing that link is widely suspected (rightly or wrongly) to be the republicanism of the Attorney-General and certain other members of the Cabinet.<sup>35</sup>

There is nothing unusual in a country having provision for the decisions of non-domestic judicial bodies to apply in domestic case law, aside from the extra-territorial jurisdiction of such as the International Court of Justice, and the European Court of Justice. There are now many instances of supranational courts, over most of which New Zealand has little or no influence. However, the Government has taken the political decision to sever ties with the Privy Council, and Parliament has enacted this.

In some countries considerations of nationalism have featured prominently in the abandonment of the right of appeal to the Privy Council.<sup>36</sup> It is considered to be an infringement of national sovereignty that a court in another country should be entitled to deliberate upon matters of internal law. This is the crux of the argument for abolition advanced by the Government,<sup>37</sup> and one which is difficult to assess dispassionately, for it is essentially political.<sup>38</sup> There is no doubt that many see continued appeals to the Privy Council as something of an embarrassment, yet support the retention of appeals for pragmatic reasons.<sup>39</sup>

After some decades of debate the legal profession, the commercial community, and many Maori groups have yet to be convinced that there are good reasons why the right of

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<sup>34</sup>G Chapman, “The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-making” [1991] NZLJ 228 and the rejoinders: Paul McHugh, “Constitutional Myths and the Treaty of Waitangi” [1991] NZLJ 316 and David Williams, “Chapman is Wrong” [1991] NZLJ 373.

<sup>35</sup>And others, such as Green Party MP Nandor Tnczos, who saw the ending of appeals as party of the de-colonisation process, of which the next logical step was the abolition of the monarchy and the creation of a republic.

<sup>36</sup>Australia and Canada, and many of the newer Commonwealth countries.

<sup>37</sup>Crown Law Office, *Reshaping New Zealand’s appeal structure* (Crown Law Office, Wellington, 2000) 1.

<sup>38</sup>See also Noel Cox “The abolition or retention of the Privy Council as our final court of appeal” LawTalk 561 14 May 2001 p 18; Noel Cox “The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism” (2002) 20 New Zealand Universities Law Review 220-238; Noel Cox, “End of the Privy Council as the final Court of Appeal for New Zealand?” (2002) 11(2) The Commonwealth Lawyer 32-34.

<sup>39</sup>For example, Roger Partridge, of Bell Gully, cited in Irene Chapple, “Law Lords retain their appeal” New Zealand Herald 3 December 2001 D1.



appeal to the Judicial Committee of the Privy Council should cease. They remain, generally, convinced that there are many reasons why it should be retained. Calls for a referendum were rejected by the Government on the grounds that the reform was not of a constitutional nature, nor was a public vote necessary.

New Zealand is at a crossroads because we are facing major reform, whether of our judiciary alone or of the constitution itself, in an atmosphere of distrust, animosity, and political controversy. This is undesirable. Since the Government could not muster a significant level of public and political support for the Supreme Court Act, it should have withdrawn it. To proceed in the current circumstances risks harming the judiciary, and possibly the constitutional balance itself.

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