

The Honours prerogative in New Zealand

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From time to time doubts have been expressed about the legal status in New Zealand of imperial honours. It is said that because the proper procedures were not followed as New Zealand became independent, the Statutes of the British Orders of chivalry were not incorporated as part of the law of New Zealand¹. It followed, so the argument goes, that if the Statutes had no legal effect in New Zealand, any precedence they ascribed would be nugatory.

There are two major objections to this contention. Firstly, the law regulating precedence and royal honours is prerogative, not statutory law, and therefore was not affected by the Imperial Laws Application Act 1988. Secondly, the prerogative extends throughout the realms of the Queen, even though the Crown has become to some degree divisible². Therefore an Order originally created by the Sovereign in the United Kingdom is equally valid in New Zealand.

The so-called imperial honours are under the authority of prerogative instruments issued by the Sovereign on the formal advice of British Ministers. Thus the George Medal is administered in New Zealand under a royal warrant of 30 November 1977, countersigned by British Prime Minister James Callaghan. This was published in the *New Zealand Gazette* on 9 March 1978 (SR 1978/43).

New Zealand-originated honours are governed by prerogative instruments which are issued under the Seal of New Zealand, on the advice of New Zealand Ministers. Thus, the warrants establishing the Order of New Zealand and The Queen's Service Order were both sealed with the Seal of New Zealand, and countersigned by David Lange and Wallace Rowling respectively.

However, the actual means of authentication of prerogative instrument is immaterial to its legal validity, unless there is some statutory or regulatory requirement that a particular method be used³. Therefore a warrant signed on the advice of a British Minister can still apply to New Zealand, if this was intended.

Normally in both the United Kingdom and New Zealand royal warrants will be countersigned by a Minister, thereby signifying that ministerial advice had been given. But absence of evidence of ministerial advice does not invalidate a warrant⁴.

While The Queen's Service Order and the Order of New Zealand are self-evidently Orders of the Crown in right of New Zealand⁵, it is also clear that the

royal warrants establishing the various British Orders are of equal application in New Zealand⁶.

The Statutes or other prerogative regulations establishing or amending an imperial honour is a part of the law of New Zealand whether or not it is published in the *New Zealand Gazette*, though it may well be so published⁷. For example, the royal warrant establishing The Queen's Gallantry Medal was countersigned by British Prime Minister Harold Wilson on 12 June 1974, and subsequently published in the Statutory Regulations series in New Zealand as SR 1974/248. This warrant has no greater or less authority in New Zealand than the Statutes of the Most Excellent Order of the British Empire, the latest version of which were countersigned by British Home Secretary Douglas Hurd on 27 March 1986, but never published in New Zealand.

All British medals which were conferred on New Zealander have now been replaced, either by local medals of the same design, or by new medals. An example of the former is the New Zealand Army Long Service and Good Conduct Medal⁸. This replaced the old Medal for Long Service and Good Conduct (Military), which was created by royal warrant of 23 September 1930. New Zealand regulations signed by Viscount Cobham, countersigned by Phillip Connolly 29 September 1959, were published in the *New Zealand Gazette* 8 October 1959 (SR 1959/155).

The Imperial Laws Application Act 1988 did not undermine the legal validity of prerogative instruments. The application of that Act is limited to imperial subordinate legislation (s 4). Subordinate legislation is defined in the Act as any Order in Council, regulation, or other legislative instrument made under any imperial enactment. Prerogative measures are preserved by s 5 of the Act. There has never been any requirement for prerogative instruments to be published in New Zealand⁹.

The Imperial Laws Application Act 1988 was not intended to institute, or even to recognise, the concept of a divisible Crown. At the turn of the century New Zealand was a British colony, owing allegiance to the British Crown. Today, although the paths of development have at times been tortuous, there clearly exists a distinct New Zealand Crown. It does not follow however that Orders instituted by the Crown of the United Kingdom have no legal status in New Zealand. For though distinct, the two Crowns remain linked to some degree.

In the Statutes of the Most Excellent Order of the British Empire¹⁰ it is stated that the "Kings or Queens Regnant of Our Said Realm, are and for ever shall be Sovereigns of this Order..." (cl 3), yet by "Our Said Realm" it is clearly meant the various realms, not merely the one in which the Order was established, namely the United Kingdom. In contrast, the Statutes of The

Queen's Service Order (SR 1975/200) provided that "We, Our Heirs and Successors, Kings and Queens Regnant of New Zealand, are and forever shall be Sovereigns of this Order" (cl II). This clearly confined the scope of the Order to New Zealand, though not perhaps as unequivocally as the wording might suggest.

The wording for The Queen's Service Order was followed in the Statutes of the next New Zealand Order to be established. The Order of New Zealand (SR 1987/67) provides that "We, Our Heirs and Successors, Kings and Queens Regnant of New Zealand, are and forever shall be Sovereigns of this Order" (cl 3). Similarly, the Statutes of the New Zealand Order of Merit (SR 1996/205) provide that "We, Our Heirs and Successors, Queens and Kings Regnant [sic]¹¹ of New Zealand, are and forever shall be Sovereigns of this Order" (cl 4).

In no case does the territorial reference necessarily limit the scope of the Orders, any more than did the reference to "Kings or Queens Regnant of Our Said Realm" in the Statutes of the Order of the British Empire. None of these statutes presupposes that the Queen was Sovereign only of the country for which the Order was being created, whatever some constitutional theorists might say about the implications of the divisible Crown. This is made clearer if one looks at the provisions for membership of these Orders.

In the Statutes of the Most Excellent Order of the British Empire it is stated that "Additional members include those former foreigners appointed honorary members, "who become subjects of Our Crown, and in respect of whom the relevant Government shall so desire..." (cl 19). Persons eligible for appointment to the civil division of the Order are those who "have rendered important services to Our United Kingdom, to those Members of the Commonwealth overseas of which We are Queen... to Our Colonies, to Our other Territories, or to the Territories under Our Protection or Administration" (cl 6).

Foreigners can only be honorary members (cl 7), the definition of foreigner being clearly restricted to persons who are not subjects of the Queen. The Statutes clearly presuppose a single Crown, though with multiple national Governments.

The Statutes of the first distinctly New Zealand Order, The Queen's Service Order (SR 1975/200), were in conformity with this approach. They originally provided that membership was confined to "Our faithful subjects under Our Protection in a civilian capacity within Our Realm of New Zealand" (cl V). "Foreign Persons and Citizens of countries within the Commonwealth of which We are not Queen" were honorary members (cl VIII).

In 1981 the Statutes were amended, and now reads "Our faithful subjects under Our Protection in a civilian capacity within Our Realm of New Zealand, *or in other Realms and Territories of which We are Queen*" (new cl V, SR 1981/288). This made it clear that subjects of The Queen's other realms were

eligible for the award, something which was not the case with the original wording, probably through an oversight, rather than deliberate design.

The Statutes of the Order of New Zealand, the next New Zealand Order to be established (SR 1987/67), followed the same pattern. These provided that "Persons to be admitted as Ordinary Members of this Order shall be subjects of Our Crown" (cl 7), and that "Persons to be admitted as Honorary Members of this Order shall be citizens of Commonwealth Nations of which We are not Queen or citizens of Foreign States" (cl 8). Appointments were to be published only in the *New Zealand Gazette* (cl 14), rather than also in the *London Gazette*, as was the case with The Queen's Service Order.

The Statutes of the New Zealand Order of Merit (SR 1996/205) provided that "persons to be admitted to the Order shall be such persons, being citizens of New Zealand or citizens of Commonwealth Nations of which We are Sovereign" (cl 6). "Persons who are not New Zealand citizens or citizens of nations of which We are Sovereign are eligible to be admitted to this Order [as honorary members]" (cl 7).

Honorary members who subsequently become naturalised New Zealand citizens, or a "citizen of a Commonwealth Nation of which We are Sovereign" shall be eligible to be reclassified as an Additional Member (cl 8). Thus the qualifications for both members and honorary members of the New Zealand Order of Merit are defined solely in terms of citizenship, rather than in terms of both citizen and subject. And the expression "Our Crown" is avoided, probably to avoid the difficulties which had been experienced with The Queen's Service Order between 1975 and 1981.

It is now made clear that the Sovereign may be Sovereign of more than one realm, but it does not necessarily suggest, as the Statute of the Order of New Zealand appeared to do, that this meant there was but one imperial Crown. However, the degree of connection between the Crowns is left uncertain, probably deliberately so.

It is clear that the royal warrants establishing the various British Orders are still applicable in New Zealand. Her Majesty remains head of the various Orders in terms of their respective constitutions. Whilst she remains Sovereign of New Zealand her British (or, for that matter, Australian, and Canadian) Orders remain equally valid in New Zealand¹².

This is clear when one looks to those honours awarded on the personal initiative of the Sovereign. Awards of the Royal Victorian Order were, and remain, at the sole discretion of the Sovereign. Although in the early years the Order was conferred on persons whom the Sovereign personally wished to honour, today it is used to reward personal services to the Crown, and to members of the royal family. Although unaffected by the decision to end the

award of other British honours, these royal awards are only distinguishable by the absence of British ministerial advice¹³.

Governors-General have normally been appointed Knights and Dames Grand Cross of the Royal Victorian Order (GCVO). Most recently Dame Catherine Tizard, Governor-General 1990-96, was appointed in 1995.

The peerage is generally regarded as restricted in application to the United Kingdom. In New Zealand most Governors-General were made peers until Lord Porritt, the last British-based appointee, though he was New Zealand-born. These peerages were specifically awarded for services to the Queen, and to New Zealand, rather than to the United Kingdom¹⁴.

Although it might have been thought that the time was long past that a New Zealander would be raised to the peerage, in 1996 Sir Robin Cooke was so elevated¹⁵. Although the New Zealand government was consulted, and raised no objections to the creation¹⁶, constitutionally the appointment was solely on the basis of advice from British Ministers to the Queen.

However there remains another, more significant, situation in which British Ministers play a role in advising the Queen on bestowing honours upon New Zealanders.

The appointment of Ministers to the Privy Council is regarded as part of the Royal Honours system¹⁷. However, appointments have not ended with the adoption of the recommendations of the Prime Ministers Committee on the Royal Honours System¹⁸, even though the Privy Council's role is purely ceremonial.

On 21 May 1998 four Ministers and former Ministers, as well as three Court of Appeal judges, were appointed to the Privy Council¹⁹. Whilst the most recent previous judicial appointment had been in 1996, and might be expected to continue whilst appeal rights to the Judicial Committee are retained, the latest political appointments (the first since 1992), were perhaps more of a surprise.

These political appointments follow a long tradition, eleven colonial premiers having been appointed Privy Counsellors in 1897. The Prime Ministers of all the countries of which the Queen is Sovereign are still customarily appointed to Her Majesty's Privy Council²⁰.

New privy counsellors unable to attend the next Council after their appointment is announced are appointed by Order in Council. This is a survival of the exercise of a prerogative power having application in New Zealand through a British political organ, if the Privy Council in this role can be so regarded.

It is also technically possible for the Privy Council to make Orders in Council under the prerogative, which have application in New Zealand. The Privy Council is not however normally regarded as being an advisory body of the Crown of New Zealand, and Privy Counsellors naturally have no role or

function in relation to New Zealand, unless they are members of the Judicial Committee²¹.

From time to time the position of Lord President of the Council, who is responsible for the business of the Council and is normally a British Cabinet Minister, may be filled by a Minister of the Crown from a realm other than the United Kingdom.

In 1995 the Right Hon James Bolger, Prime Minister of New Zealand, was appointed acting Lord President, by declaration in Council, for the meeting of the Council held in Wellington on 7 November of that year. Marie Shroff, Clerk of the Executive Council and Secretary of the Cabinet, was acting clerk of the Council.

The Queen has in fact regularly presided over meetings of the Privy Council in New Zealand, since her first in 1954. That was the first held by the Sovereign outside the United Kingdom, although in 1920 Edward Prince of Wales held a Council in Wellington to swear in the Earl of Liverpool as Governor-General.

These regular meetings suggest that the Privy Council is regarded as something more than an honorary body, as there is no equivalent meetings of the various Orders of Chivalry in New Zealand, though these are regular events overseas. This would seem to be indicated by the continuing practice of appointing Prime Ministers from the various realms to the Council.

Whether it was appropriate for New Zealand to continue using imperial honours until 1996, the legality of such a practice is clear. The continued use of the honours awarded at the personal behest of the Queen is also quite appropriate. It should be for Her Majesty herself to decide what honours she will confer upon her New Zealand subjects. Nor is there anything to be gained by denying existing holders of traditional honours the standing which is due to them.

1 ¹Macaulay, "False Assumptions and Missed Opportunities" (1998) New Zealand Armorialist 16, p16; "The NZ Order of Merit" [1996] NZLJ 457-8; "Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand" (1994) Cantaur LR 5, p381.

2 ²*Sammut v Strickland* [1938] AC 678 (PC).

3 ³They are not, however, invalid if they are not so sealed, unless the use of the seal is expressly required by an enactment (s 5 (1)).

4 ⁴Nor must the Sovereign, as fount of honour, necessarily have to act always only with the benefit of ministerial advice. This was evidenced by the decision in 1948 that the Orders of the Garter and the Thistle would, in future, be conferred by the Sovereign personally, without formal advice from the Prime Minister.

5 ⁵Being created by royal warrant under the Seal of New Zealand, and published in the *New Zealand Gazette* in accordance with the Regulations Act 1936; Macaulay, "Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand" (1994) *Cantaur LR* 5, p381 at 388.

6 ⁶In the same way that a royal warrant signed by the Queen of New Zealand would be of legal force in the United Kingdom.

7 ⁷The Statutes of the Order of the British Empire was enacted under the Seal of the Order, and orders usually provide for the abrogation or amendment of their statutes by a notification under the sign manual of the Sovereign of the Order, rather than by the Sovereign of the Realm.

8 ⁸Royal Warrant signed 6 May 1985, countersigned by David Lange, published in the *New Zealand Gazette* 16 May 1985 (SR 1985/90).

9 ⁹See the Acts and Regulations Publication Act 1989, replacing the Regulations Act 1936. Section 3 of the earlier Act did not require prerogative instruments to be published, only printed and sold by the Government Printer. Section 2 of Acts and Regulations Publication Act 1989 defines regulations in terms of s 2 of the Regulations (Disallowance) Act 1989. This includes "Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand". All regulations made after the passage of the Act are to be forwarded to the Chief Parliamentary Counsel (s 5), who shall arrange for the printing and publication of the regulations, and of reprints (s 4). All regulations so printed and published are to be published in the *New Zealand Gazette*.

There is no legal requirement that prerogative instruments issued before 1989 be published in the *New Zealand Gazette*. Most regulations governing the so-called imperial honours were not so published, though few if any warrants were issued after 1989. The Acts and Regulations Publication Act 1989 allows the Attorney-General to exempt any regulation or specified class of regulations from this requirement (s 3 (1)).

1 ¹⁰Signed 27 March 1986, countersigned by Douglas Hurd, Home Secretary; Privately printed 1986.

2 ¹¹A King Regnant is of course a physical and logical impossibility, the result, no doubt, of sloppy drafting and an ignorance of Latin.

3 ¹²Though they may not be accorded official precedence.

4 ¹³The distinction between "British" and "dynastic" Orders, initiated by the Prime Minister's Advisory Committee on honours has no other basis in law or practice.

5 ¹⁴Cox, "Honours conferred at the personal initiative of the Sovereign on New Zealanders and those with direct New Zealand connections" (1997) *New Zealand Armorer* 64, pp9-12.

6 ¹⁵See Cox, "The British Peerage: The Legal Standing of the Peerage and Baronetage in the overseas realms of the Crown with particular reference to New Zealand" [1997] *New Zealand Universities Law Review* 17, pp378-401.

7 ¹⁶Press Release by the Prime Minister, the Right Hon James Bolger, 27 November 1995.

8 ¹⁷Cabinet, Secretary of the, *Cabinet Office Manual* (1988) para A.2.13.

9 ¹⁸Prime Minister's Honours Advisory Committee, *The New Zealand Royal Honours System* (1995). See also Cox, "The Review of the New Zealand Royal Honours System" (1997) *New Zealand Numismatic Journal* 75, pp17-21.

10 ¹⁹Jenny Shipley (Prime Minister), Winston Peters (Deputy Prime Minister), Doug Graham (Attorney-General), Paul East (former Attorney-General), and Sir Kenneth Keith, and Justices Peter Blanchard and Andrew Tipping- *New Zealand Herald* 22 May 1998.

11 ²⁰Apart from Canada (where the practice ceased after 1968) and Australia (the practice ended with John Howard in 1996, though Labour Party leaders had declined appointment since 1967).

12 ²¹Cf Macaulay, "Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand" (1994) *Cantaur LR* 5, p381 at 388.