

The abolition or retention of the Privy Council as our final Court of Appeal

By Noel Cox*

The recent release by the Attorney-General of a discussion paper proposing the abolition of appeals to the Privy Council is motivated by a desire to end appeals to a London-based tribunal. While Miss Wilson might like to have all-party support for her measure, it is doubtful that she can expect whole-hearted support from the legal community.

Before abolition of the right of appeal to the Privy Council, the Government and the legal profession need to be agreed about a court structure and exactly how it would work. The proposal should, in view of its constitutional significance be put to a referendum, as Winston Peters has noted.

It can be argued that justice is well served by having an extenuated two-tier system of appeal. Such a system, especially one which is finally resolved in a supra-national court, is indicative of a highly sophisticated legal system. The long history of the Privy Council dictates that it has a high degree of prestige.

If the right of appeal to the Judicial Committee of the Privy Council were abolished without substantially restructuring the New Zealand judicial hierarchy, then many actions would have only one level of appeal. It is worth observing in this regard that in both Canada and Australia, where appeals to the Privy Council have been abolished, there already existed a duality of federal and state courts, which ensured both different perspectives and further tiers of appeal. The options suggested in the discussion paper do not provide a sufficiently robust appeal process.

Cases originating in the High Court would have only one tier of appeal- almost all other common law countries have a system of two tiers of appeal. In exceptional cases, litigants can have their cases removed to the Court of Appeal for initial adjudication. These cases are usually matters of exceptional national concern. If the Privy Council appeal were abolished, there would be no right of appeal at all in such important matters. The first option in the Government discussion paper would be quite unacceptable, as it allows for no replacement for the Privy Council. The second and third are little better.

It is also symbolically important that appeals to the Privy Council are, in strict legal theory, appeals to the Queen in Council, something particularly important in respect of Maori appellants. The Privy Council is also sufficiently distant from the circumstances of individual cases to allow more dispassionate consideration to take place. The long history of the Privy Council dictates that it has a high degree of prestige. But its role in the New Zealand legal system is entirely a product of history, and does not depend upon prestige. The question as to whether our law should continue to be traditionally influenced is one which is beyond the scope of this paper, but it must be said that the Court of Appeal has been free to develop a number of innovative legal principle, while retaining appeals to the Privy Council. Disputes between the Court of Appeal and the Privy Council, especially in the field of tort law (see especially *Downsview v First City Corporation* [1993] 1 NZLR 513 (PC)) should not be used as evidence either in favour of the abolition of the right of appeal to the Privy Council or of its retention.

Nor are appeals to the Judicial Committee not heard by a purely English court. The judges are selected from a number of jurisdictions. Given their present membership, the Law Lords can hardly be said to be dominated by English judges. Indeed, the presence of three Scottish judges (and two others with civil law backgrounds) out of 13 is significant. Since 1913 New Zealand judges also have sat on the Privy Council, and other Commonwealth judges are also appointed from time to time.

Considerable expense is involved in pursuing an appeal to the Privy Council, but Court of Appeal hearings are hardly cheap either. The Privy Council is maintained by the British taxpayer. The benefit of the experience of some of the finest legal minds in the Commonwealth is available at no cost to the New Zealand taxpayer. Generally speaking, 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.

It was once fashionable to minimise the importance of the Privy Council to the New Zealand jurisdiction on the grounds that only a handful of appeals were heard from New Zealand. This claim, repeated in the discussion paper, does not bear serious study. 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 is no less significant than the number of appeals to the House of Lords. No one would seriously suggest that because the English Court of Appeal hears far more appeals than does the House of Lords, the Court of Appeal is in practice the highest court in England, and therefore the House can be abolished.

It may appear inevitable to some that in the long term the right of appeal to the Privy Council will be abandoned. However, for the various reasons outlined above, this is by no means necessarily so. Seventeen independent Commonwealth countries, including four republics, retain appeals to the Judicial Committee of the Privy Council, as well as many dependencies. The majority of the Queen's realms retain appeals to Her Majesty in Council. While it is true that New Zealand might be the largest country still retaining appeals, it is also true that we are a much smaller country than Australia or Canada, and do not possess the federal court structures which they have.

A significant proportion of legal decisions affecting New Zealand are now taken overseas. In an age of increasing internationalisation it is curious that we should be considering an inward-looking nationalism to determine the form of our court structure. The discussion paper is quite right in acknowledging that national independence and identity are the reasons why abolition is proposed. But it has signally failed to show how the suggested replacement would improve the New Zealand judicial system.

The retention of appeals to a court sitting in London is not an insult to New Zealand nationhood- it is, in fact, our legal heritage and a sign of national maturity that such ties need not be cut for the sake of petty nationalism. It is incorrect to suggest that New Zealand has so changed in recent decades that it has now to abandon such an important part its common law heritage. Rather than abolishing appeals to the Judicial Committee of the Privy Council, it can be argued that there could be a widening of the membership of the Judicial Committee, a practice which has occurred to a degree already over the past few decades. In an age of increasing internationalisation it is curious that we should be considering an inward-looking and parochial nationalism to determine the form of our court structure.

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