

THE ABOLITION OR RETENTION OF THE PRIVY COUNCIL AS THE FINAL COURT OF APPEAL FOR NEW ZEALAND: CONFLICT BETWEEN NATIONAL IDENTITY AND LEGAL PRAGMATISM

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1. Introduction

New Zealand currently retains the Judicial Committee of the Privy Council as its final court of appeal. The recent announcement by the Attorney-General of New Zealand of a five-judge Supreme Court to replace the Judicial Committee of the Privy Council¹ represents the penultimate stage in removing the right of appeals to the Privy Council. This has been all but inevitable since the release by the Attorney-General of a discussion paper proposing the abolition of appeals to the Privy Council. This was motivated by a political desire to end appeals to a London-based tribunal.² While Miss Wilson might like to have all-party political support for her measure, she did not receive whole-hearted support from the legal community³ - or from much of the business sector.⁴ Before abolition of the right of appeal to the Privy Council, the Government and the legal profession needed to be agreed about a court structure and exactly how it would work. Although Miss Wilson has stated that the legal profession has itself accepted the need for ending appeals, it is unlikely that this represents the real attitude of the legal profession, or the business community.

This paper explores reasons for this. And in looking at arguments for and against the retention of appeal right we will see aspects of a conflict between political aspirations and legal and business pragmatism. The question of the degree to which a judiciary should be international or national, and the question of whose opinions should prevail, judges and lawyers, or politicians, is crucial, and goes far beyond simple questions of national identity.⁵

Ironically, and perhaps more seriously for New Zealand, the loss of the right of appeal to the Judicial Committee of the Privy Council may proceed from United

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¹Scheduled for implementation by 2004; Press Release, 15 April 2002.

²*Reshaping New Zealand's appeal structure* (2000).

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

⁴Represented by such bodies as the Business Roundtable, the Employers Federation, the Auckland Chamber of Commerce, and the main accounting firms; Irene Chapple, "Law 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* (1995).

⁵See also Cox "The abolition or retention of the Privy Council as our final court of appeal" LawTalk 561 14 May 2001 p 18.

Kingdom initiatives,⁶ rather than from the choice of the people, Government or legislature of New Zealand.

2. *Appeal to the Queen in Council*

Appeal from the Court of Appeal of New Zealand to the Judicial Committee of the Privy Council is in constitutional theory appeal to Her Majesty The Queen in Council. This legal theory is reflected in the practice of the Lords of the Judicial Committee of the Privy Council not normally giving individual judgments, but rather collectively delivering an opinion to The Queen.⁷ The process of appealing the judgment of a final court of appeal to the Queen in Council does not strictly amount to the existence of a further tier of appeal within the ordinary judicial hierarchy, but is an appeal directly to the fount of justice. This 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 1840.⁸

If appeal to the Judicial Committee of the Privy Council were abolished, comparable provisions allowing appeal to the Crown could in principle be instituted. This could be akin to the provisions of s 406 of the Crimes Act 1961, which allow the Governor-General, in his or her exercise of the royal prerogative of mercy, to refer a criminal conviction or sentence to the Court of Appeal, whether or not the applicant has already appealed or still has the right to appeal. Under s 406 (b) the Court gives an opinion on any specific question put to it, rather than disposing of the case itself as it does under s 406 (a).⁹

When the Australian Federal Government finally prevailed upon the State Governments to surrender their right to retain appeals from state courts to the Judicial Committee, the legislation enacting the changes prohibited appeals from Australian courts, not only to the Queen in Council (the Judicial Committee of the Privy Council), but also to the Queen.¹⁰ The question of appeals in Australia was an aspect of the ongoing struggle between the federal and state governments. While the states retained some rights to appeals to the Privy Council, or otherwise to the Crown, they retained a significant vestige of judicial independence of the federal legal system. The republican

⁶See Andrew Le Sueur and Richard Cornes, *The Future of the United Kingdom's Highest Courts* (2001); Andrew Le Sueur and Richard Cornes, *What is the Future for the Judicial Committee of the Privy Council?* (2001). To a great extent this is being determined by devolution, and the possible effect of Article 6 (1) of the European Convention on Human Rights (which raises the prospect of a challenge to the Law Lords' positions as members of the legislature). The prospect of the loss of appeals from New Zealand and the Caribbean also will have an effect upon the possible reform of the Judicial Committee of the Privy Council.

⁷Although dissenting opinions have been permitted since 1966, see the Judicial Committee (Dissenting Opinions) Order 1966 (SI 1966/No 1100) (UK).

⁸Chapman, "The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-making" [1991] NZLJ 228 and the rejoinders - McHugh, "Constitutional Myths and the Treaty of Waitangi" [1991] NZLJ 316 and Williams, "Chapman is Wrong" [1991] NZLJ 373.

⁹See *R v Thomas* [1978] 2 NZLR 1; *R v Morgan* [1963] NZLR 593; *Re O'Connor and Aitken* [1953] NZLR 584.

¹⁰Australia Act 1986 (UK) s 11(1).

traditions of the Australian Labor Party was also not an insignificant factor. Such a motivation is not determinative in New Zealand. But many Maori groups appear to have seen the retention of the right of appeals as an aspect of the constitutional link with the Crown.¹¹ Thus, the right of appeal is not simply the right to an additional judicial tier, it is a link with the Sovereign, however fictitious the link may be.

3. *Tiers of appeal*

The question of tiers of courts is very important, particularly in a unitary state such as New Zealand. It can be argued that justice is served by having an extenuated two-tier system of appeal, though it could be argued that litigation should be brought to a speedy end. Allowing the right of appeal to the Privy Council does allow arguments to develop and mature but there must be a conclusion to appeal rights at some point. An extended appeal system is indicative of a highly sophisticated and complex legal system.¹²

If the right of appeal to the Judicial Committee of the Privy Council were abolished without a substantial restructuring of the New Zealand judicial hierarchy 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 exists a duality of federal and state courts, which ensured both different perspectives and further tiers of appeal.¹³

If no replacement court were instituted cases originating in the High Court of New Zealand 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 currently 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, without a genuine additional tier of appeals,¹⁴ there would be no right of appeal at all in such cases.¹⁵ This possibility was not fully considered in the discussion paper published by the Attorney-General – though it has now been accepted that an additional tier is required. The first option in the Government's discussion paper would be quite unacceptable to the legal profession and to many in the business community, as it allows for no replacement for the Privy Council. The opposition to all three proposals (no appeal beyond the Court of Appeal, a two-tier Court of Appeal, or a two-tier High

¹¹Maori deputations to the Sovereign, in 1882 and 1884 to Queen Victoria, and in 1914 and 1924 to George V, to seek redress of grievances under the Treaty, must be seen in this context; see Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (1990) 160-165, 183-184.

¹²Though it could be a sign of a lack of coherence or piecemeal development - something which is unlikely given that the system of courts has been subject to more than one comprehensive review; *The Royal Commission on the Courts* (1978) - the Beattie Report; Law Commission, *The Structure of the Courts* (1989) NZLC R7. The appeals structure is much more complex in the United Kingdom.

¹³In this respect the United Kingdom may be regarded as federal, since there is usually an appeal right to the Privy Council or House of Lords from the respective purely national courts.

¹⁴Rather than simply Court of Appeal judges in a second house.

¹⁵For example, *Re Erebus Royal Commission* [1981] 1 NZLR 614 at 618; *Re Royal Commission on Thomas Case* [1982] NZLR 252.

Court) has been recognised by the Attorney-General,¹⁶ who subsequently proposed a stand-alone Court of final appeal above the existing Court of Appeal.¹⁷ It is this model which has been adopted by the Attorney-General, after taking advice from an advisory committee. The stance of most opponents of abolition remains, however, unchanged,¹⁸ if only because of concerns about the recruitment of judges of sufficient calibre to fill the proposed new court.

4. *Numbers of appeals to the Privy Council*

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.¹⁹ It is unlikely that anyone 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.

Recent statistics for appeals in England and Wales show that the number of appeals from the High Court to the Court of Appeal is approximately one decision in every 170, while cases appealed from the Court of Appeal to the House of Lords amount to one every 25.²⁰ Given the approximate number of civil appeals in the New Zealand Court of Appeal one might expect 7 appeals to the Judicial Committee of the Privy Council annually from New Zealand.

The number of appeals has often exceeded this level, and the numbers have been increasing. There was an average of six and a half during 1990-94, nine and a half 1995-99, and ten in 1999.²¹

The authors of the discussion paper also apparently believe that the fact that a fairly high proportion of appeals to the Privy Council were unsuccessful is significant. The fate of individual appeals is largely irrelevant in determining the form of future appeals structures. The most important aspect of the numbers-based argument against the Privy Council is, however, that a new court has been proposed to replace the Privy Council. Therefore, though the numbers of appeals may have been relatively small, their importance was such that a substitute tribunal was necessary.

¹⁶Which was rejected by the majority of the 70 submissions received in response to the discussion paper; Chapple, "Law Lords retain their appeal" *New Zealand Herald* 3 December 2001 D1.

¹⁷*Ibid.*

¹⁸*Ibid.*

¹⁹Department for Courts, *Judicial Annual Report 1999* (2000, available also at http://www.courts.govt.nz/publications/Judiciary_report1999.pdf).

²⁰Lord Chancellor's Department, *Judicial Statistics for the year 1999* (2000, available also at <http://www.lcd.gov.uk/jsar99/jsar99.htm>).

²¹There were also 7 appeals from Jamaica, 15 from Trinidad and Tobago to the Judicial Committee, and 5 appeals from Scotland, 3 from Northern Ireland to the Appellate Committees of the House of Lords; Lord Chancellor's Department, *Judicial Statistics for the year 1999* (2000, available also at <http://www.lcd.gov.uk/jsar99/jsar99.htm>).

5. Procedure for appeals from New Zealand

A British Order in Council of 1910²² provides for appeals from the New Zealand High Court and Court of Appeal to the Privy Council. Appeals to the Privy Council from New Zealand Courts are now regulated by the Privy Council (Judicial Committee) Rules Notice of 1973.²³ This declared the Order in Council of 1910 and all subsequent relevant Orders in Council to be regulations, and set out the circumstances in which appeals to the Judicial Committee will lie, and the procedure to be followed in making such appeals. Appeals lie as of right in civil actions where the matter in dispute involves more than \$5,000, or with the leave of the court. In criminal actions appeal is by the leave of the court. Normally leave will not be granted unless there is a substantial point of law involved, or it is a matter of “great general or public importance”. Generally criminal appeals have tended to concern the interpretation of Commonwealth Constitutions.

The Judicial Committee is of course not a court as such and therefore does not enter a judgment, but tenders advice to Her Majesty the Queen in Council, which is then referred to the relevant New Zealand Court and thence to the parties concerned.

6. Prestige and wisdom of the Privy Council and its judicial independence

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 principles, while retaining appeals to the Privy Council. Disputes between the Court of Appeal and the Privy Council, especially in the field of tort law²⁴ 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.

New Zealand has no entrenched constitution, no second chamber of Parliament, nor an entrenched Bill of Rights.²⁵ The Privy Council could be seen, at least to some extent, in substitution for these institutions and assisting in upholding the rights of the individual against arbitrary conduct by the government - and has certainly been seen as such by some Maori groups.²⁶ This is particularly important given the form that the decisions of the Privy Council take - advice to the Crown.

If an objective interpretation of the law of New Zealand is required – one which is disinterested or impartial - extraneous matters are irrelevant, and it is thus desirable to have judges somewhat removed from the social and political influences of New

²²New Zealand (Appeals to the Privy Council) Order 1910 No 70 (L 3) (SR & O and SI Rev 1948 vol XI, 409; SR 1973/181).

²³SR 1973/181.

²⁴See especially *Downsview v First City Corporation* [1993] 1 NZLR 513 (PC).

²⁵For a review of the constitution, see Philip Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001).

²⁶Valuable as an external channel for redress, as well as an appeal to the Crown; Interview with Georgina te Heuheu, 7 December 1999. Examples of such recourse include *New Zealand Maori Council v Attorney-General (New Zealand)* [1994] 1 AC 466 (PC).

Zealand. Such a requirement for disinterestedness helps to ensure that the law as interpreted by the courts is consistent with the broad requirements of the rule of law. An illustration of the potential problems which can arise is seen in the 1982 the Privy Council decisions of *Levave v Immigration Department*²⁷ and *Lesa v Attorney-General*,²⁸ 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.²⁹ 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.³⁰

In October 1987 the then Government announced that it would remove the right of appeal within its current term, which ended in 1990. Further moves were made in the mid-1990s.³¹ Abolition did not eventuate in large part because there was no agreement as to what new court structure should replace the Privy Council - though opposition from Maori was significant. The first question has still not been resolved, even if the second has apparently subsided for the moment. A discussion paper which does not offer the option of the status quo is, quite simply, distorted.

The wisdom of the Judicial Committee of the Privy Council is a rich legal resource of a depth not readily available in a comparatively small country.³² That experience and distinction should not be discarded lightly. New Zealand has a very compact legal society, and the dispassionate view of an outsider concerning our most critical litigation remains necessary. This is particularly important in the commercial world.³³

7. Costs and savings of the Privy Council

Considerable expense is involved in pursuing an appeal to the Privy Council, although Court of Appeal hearings are hardly cheap. Frequently the parties will be required to brief English counsel, and it is necessary that the evidence which is submitted to the

²⁷[1979] 2 NZLR 74

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

²⁹See, for example, Ulrich, "The Privy Council: is it obsolete?" (1984) unpublished University of Auckland LLB(Hons) dissertation.

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

³¹Crown Law Office, *Appeals to the Privy Council: report of the Solicitor-General to the Cabinet Strategy Committee on the issue of termination and court structure* (1995).

³²"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? Reflections on the Privy Council Appeal" in Philip Joseph (ed), *Essays on the Constitution* (1995) 112, 128.

³³And evidence appears to suggest that the Court of Appeal is relatively unsophisticated in its understanding of law and economics; Farmer, "The Judicial Process in New Zealand" (Legal Research Foundation, Auckland, 2001) 8.

Privy Council be in a printed form.³⁴ But the New Zealand taxpayer can avoid some cost as the Privy Council is maintained by the British taxpayer.³⁵ 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.

When Hong Kong ended appeals to the Privy Council in 1997, the resulting Court of Final Appeal retained many of the advantages of the Privy Council, but at a significantly greater cost.³⁶ 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. The added cost to taxpayers is unavoidable.

8. *The constitutional function of the Privy Council as an administrative body*

In law the Privy Council is the principal council belonging to the Sovereign. Privy counsellors are appointed on the British Prime Minister's nomination, without either patent or grant, and on such nomination they become entitled to the style of Right Honourable during the life of the Sovereign who has chosen them, but subject to removal at his or her discretion.³⁷

With the advent of the Cabinet under King Charles II, and the last appearance of a Sovereign at a Cabinet in 1784, the substantial importance of the Privy Council declined.³⁸ However, the Council retains standing committees for Universities, Scottish Universities, Committee for the Purposes of the Crown office Act 1877, Baronetage, Political Honours Scrutiny, Jersey and Guernsey,³⁹ and ad hoc Committees concerned with applications for charters and statutes, interception of communications, and judicial appeals. The latter is of course the most important.

Although principally a British institution (and one of great antiquity, dating from 895), the Privy Council retains features of an imperial body. The Privy Council has met in New Zealand reasonably frequently, on the occasions of visits by Her Majesty The Queen,⁴⁰ and although the Judicial Committee has never met here there is no legal

³⁴Procedures for appeals are governed by statute and various regulations including References of appeals to Judicial Committee Order in Council 1909 (SR & O 1909 No 1228) Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982 No 1676) as amended by the Judicial Committee (General Appellate Jurisdiction) Rules (Amendment) Order 1990 (SI 1990 No 2297) and Judicial Committee (Fees) Order 1996 (SI 1996 No 3170); the New Zealand (Appeals to the Privy Council) Order 1910 No 70 (L 3) (SR & O and SI Rev 1948 vol XI, 409; SR 1973/181); New Zealand (Appeals to the Privy Council) (Amendment) Order 1972 (SI 1972/1994; SR 1973/181).

³⁵For details of which see Andrew Le Sueur and Richard Cornes, *The Future of the United Kingdom's Highest Courts* (2001) 151-153.

³⁶See Dr Gordon Cruden in a letter to LawTalk 562 4 June 2001 p 2, where it is questioned whether New Zealand would be prepared to meet such costs.

³⁷For these and other details of the Privy Council as a functioning institution see the Privy Council Office webpage at <http://www.privy-council.org.uk/secretariat/1999/council.htm>.

³⁸Peter Howell, *The Judicial Committee of the Privy Council, 1833-1876, its origins, structure, and development* (1979).

³⁹House of Commons Debates, 13 January 1998, col 000W.

⁴⁰Though no meeting was scheduled for the 2002 visit to New Zealand.

reason why they could not. This certainly would get around the objection to a court giving judgments on New Zealand law from London.

9. *Stare decisis, precedence and the Privy Council*

At present the Court of Appeal has felt itself to be strong enough to differ, not only from the House of Lords,⁴¹ but also the Privy Council - although strictly it is bound by its opinions, at least those decided on matters appealed from New Zealand and on all other matters unless they are demonstrably decided on legal situations which have no bearing of the position in New Zealand.⁴²

The freedom of the judiciary to develop in novel directions in New Zealand is not necessarily hampered by the presence of the Judicial Committee of the Privy Council, which is, after all, a part of the *New Zealand* judicial hierarchy. However removing the present safeguards may tempt less cautious High Court judges to attempt bold advances in legal reasoning by purposely choosing to ignore English judgments (of the House of Lords, and the Court of Appeal and lower courts) which have to date proved a fertile source of jurisprudential material for New Zealand jurists.

10. *Appeals from common law jurisdictions to supra-national and international courts*

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,⁴³ the European Court of Justice,⁴⁴ and Court of First Instance of European Communities.⁴⁵

The Eastern Caribbean Supreme Court (formerly known as the West Indies Associated States Supreme Court), based on St Lucia, hears cases from Antigua and Barbuda, the British Virgin Islands, Dominica, Montserrat, St Christopher and Nevis, St Lucia, and St Vincent. Each state possesses a High Court with a resident judge, and appeals lie to an itinerant Court of Appeal, consisting of a Chief Justice and three Justices of Appeal.⁴⁶ The former East African Court of Appeal dealt with appeals from Aden, Kenya, British Somaliland, Tanganyika, Uganda, Zanzibar, and the Seychelles.⁴⁷

⁴¹By which the Court of Appeal is not bound; *Brooker v Thomas Borthwick & Sons (Australasia) Ltd* [1933] NZLR 1118, 1121 (PC). Though see the judgment of Myers CJ in *Russell v Russell* [1933] NZLR 548, 557.

⁴²*Bognuda v Upton and Shearer Ltd* [1972] NZLR 741 cf. *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 (HCA).

⁴³Articles 7, 92-96 of the United Nations Charter, Statutes of the International Court of Justice.

⁴⁴Article 35, Treaty on European Union; Article 7, Treaty Establishing the European Community, Rome, 25 March 1957.

⁴⁵Decision 88/591/ECSC, EEC, Euratom, 24 October 1988.

⁴⁶The Judicial Committee (The Eastern Caribbean Supreme Court) Order 1992 (SI 1992/2664) (UK) under the authority of the Judicial Committee Amendment Act 1895 (58 & 59 Vict c. 44) (UK). Agreement was reached in principle in February 2001 to replace the Judicial Committee of the Privy Council with a Caribbean Court of Justice; Le Sueur and Cornes, *supra* n 35, 103.

⁴⁷A new east African Court of Appeal was proposed more recently: Ndirangu, "Kenyan Lawyers Poke Holes in EAC Pact" *The East African* 6-12 July 1998.

In the Channel Islands, which does not use the common law, but rather the civil law-based grand coutumier de Normandie, appeals from the Bailiffs of Jersey and Guernsey lie to the Court of Appeal of Jersey and Guernsey (set up in 1961), comprising the Bailiffs and Deputy Bailiffs of the Bailiwicks and a number of British Queen's Counsel. As the Channel Islands (and the Isle of Man) are neither British dependencies nor a part of the United Kingdom, but dependencies of the Crown, they enjoy considerable internal independence.⁴⁸

There are now many instances of supranational courts, over most of which New Zealand has little or no influence.⁴⁹ But the Privy Council remains essentially a British, or at least British-dominated, tribunal.

11. *Appeals to the Privy Council from other Commonwealth jurisdictions*

It may appear inevitable to some that in the long term the right of appeal to the Privy Council will be abandoned.⁵⁰ However, for the various reasons outlined above, this is by no means necessarily so. Many Commonwealth countries retain appeals, including 17 independent Commonwealth countries, as well as 9 dependencies.⁵¹ Appeals were abolished by Ireland in 1932, Canada 1933-49,⁵² and Australia in 1968 (federal jurisdiction)⁵³ and 1986 (state jurisdictions).⁵⁴ New Zealand remains a major source of appeals.

Following the lead of their former colonial masters Australia, Papua New Guinea has abolished appeals. However 11 of 16 realms retain appeals - Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Jamaica, New Zealand, St Kitts, St Lucia, St Vincent and the Grenadines, and Tuvalu. In addition to these, five countries which do not acknowledge the Queen as Sovereign retain the appeal. These include the Sultanate of Brunei, and 4 republics, including Dominica, Kiribati, Mauritius, Trinidad and Tobago.⁵⁵ The abolition of appeals from Hong Kong was not a deliberate choice, but inevitable with that territory returning to Chinese control. Nor is Fiji's example relevant, as the ending of appeals was a consequence of the 1987 coups.⁵⁶

12. *Uniformity in the common law*

Though it can be argued that it is desirable that each Commonwealth country should be free to develop its laws according to its own requirements, the right of appeal to the

⁴⁸E C S Wade and Godfrey Phillips, *Constitutional Law* (8th ed, 1970) 418-421.

⁴⁹The law is, in any event, becoming increasingly globalised; Dr Gordon Cruden in a letter to LawTalk 562 4 June 2001 p 2.

⁵⁰Sir Thomas Eichelbaum, Chief Justice of New Zealand, began a chapter on the Privy Council with this assertion; Eichelbaum, *supra* n 32.

⁵¹Crown Law Office, *Reshaping New Zealand's appeal structure* (2000).

⁵²Coen Pierson, *Canada and the Privy Council* (1960); British North America Act 1949 (12 & 13 Geo VI c 22) (UK).

⁵³Privy Council (Limitation of Appeals) Act 1968 (Australia).

⁵⁴Australia Act 1986 (UK). For some of the background to this latter move see Anthony Blackshield, *Abolition of Privy Council appeals: judicial responsibility and 'The law for Australia'* (1978).

⁵⁵*Whitaker's Almanack 2000* (2001).

⁵⁶Generally, see Brookfield, "The Fiji revolution of 1987" [1988] NZLJ 250

Privy Council assists in maintaining some degree of uniformity in the common law throughout the Commonwealth.⁵⁷ Uniformity, at least so far as fundamental principles are concerned, is not necessarily a bad thing, and the Privy Council has for many years been prepared to take into account local circumstances, and approve the development of distinct directions in the common law.⁵⁸

Any binding authority on relevant facts must be followed even if on grounds of policy a different result would seem preferable or justifiable.⁵⁹ Although decisions of the House of Lords are not strictly binding on New Zealand courts,⁶⁰ the Privy Council is unlikely to depart from the law as interpreted by the House of Lords, which is (or at least was⁶¹) the highest court in the British jurisdictions, though the common law of Northern Ireland is not identical with that of England and Wales, while Scotland does not even follow the common law, but uses the civil law-based Scots law. However the principle works both ways, so that decisions made on Commonwealth appeals are persuasive for courts in Britain, where the applicable law is relevant.

In recent years the Privy Council has clearly developed the attitude that the Court of Appeal should not be deflected from developing New Zealand common law merely because the House of Lords had not regarded an identical development as appropriate in England.⁶² New Zealand judges are in a better position to decide matters of policy than the Board, which now recognises that local conditions require local judgments.⁶³

The Privy Council has also been hesitant to upset findings of fact by the New Zealand courts. The frequently quoted opinion in *Reid v Reid*⁶⁴ included the statement that the case in hand was “a matter of discretion to which the Court appealed from is more favourably placed than their Lordships to consider the relevant local considerations...” To some extent the Privy Council has been forced to treat points of law which come to it from overseas countries as points of fact which precludes discussion of them.

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. The

⁵⁷In *Trimble v Hill* (1879) 5 App Cas 342, 345, the Privy Council said that “it is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of the law by the Courts should be as nearly as possible the same”. The perception of the uniformity of the common law however was to weaken as the imperial links weakened, in just the same way as the political and constitutional links weakened and changed; see Cox, “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity” (2001) unpublished University of Auckland PhD thesis.

⁵⁸See, for a view of the wider role of the tribunal, Powdrell, “New Zealand Appeals to the Privy Council: a consideration of the impact or contribution of the Judicial Committee decisions between 1960 and 1985 on the development of New Zealand law” (1986) unpublished University of Auckland LLB(Hons) dissertation.

⁵⁹*Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785.

⁶⁰*Bognuda v Upton and Shearer Ltd* [1972] NZLR 741.

⁶¹*Le Sueur and Cornes*, supra n 35, 22, 25; Joint Committee on Human Rights: Minutes of Evidence, 26 March 2001, Q 111, per Lord Bingham, on the possibility of conflict between judgments.

⁶²Eichelbaum, supra n 32.

⁶³*Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

⁶⁴[1979] 1 NZLR 572.

Judicial Committee would not substitute its own views, if different, from those of the Court of Appeal.⁶⁵ The role of the Board remains 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 judgments in light of more recent English and other judgments which considered New Zealand and other cases.

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. There is some evidence to suggest that this may be so.⁶⁶

13. *National independence, nationalism, and the Privy Council*

In some countries considerations of nationalism have featured prominently in the abandonment of the right of appeal to the Privy Council.⁶⁷ 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 concern. This is the crux of the argument for abolition advanced by the present Attorney-General of New Zealand.⁶⁸

Yet, many countries make use of various expedients to achieve the best and most cost-effective judicial systems. The Eastern Caribbean countries had a joint Court of Appeal. This was not seen as unduly infringing the independence of the domestic judiciaries, nor does the submission of New Zealand and almost all other countries to the jurisdiction of the International Court of Justice.⁶⁹

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. New Zealand has not so changed in recent decades that it has now to abandon such an important part of its common law heritage.⁷⁰ There is no doubt that many see continued appeals to the Privy Council as an embarrassment, yet support the retention of appeals for pragmatic reasons.⁷¹

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-

⁶⁵*Lange v Atkinson* [2000] 1 NZLR 257 (PC).

⁶⁶For which see Farmer, *supra* n 33, and the circumstances of the *Reid* case. The differences between the Privy Council and the Court of Appeal over the law of negligence may also be due to different understanding of policy, with the Court of Appeal not necessarily being any more correct than the Privy Council.

⁶⁷Australia and Canada, and many of the newer Commonwealth countries.

⁶⁸Crown Law Office, *supra* n 51.

⁶⁹There has also been steady growth in the number of international courts, and of their jurisdiction.

⁷⁰Just as some advocate a republic for similar non-legal reasons; see "Republican Sentiment in the Realms of the Queen: The New Zealand Perspective" (2001-2002) 29(1) *Manitoba Law Journal* 1-28.

⁷¹For example, Roger Partridge, of Bell Gully, cited in Chapple, *supra* n 16.

looking nationalism to determine the form of our court structure.⁷² It is clear, however, that certain members of the Government, at least, are determined to accomplish abolition.⁷³

14. *The Judicial Committee of the Privy Council*

The Judicial Committee of the Privy Council evolved out of the old Committee of Trade and Plantations which originally heard petitions to the Crown from overseas possessions, and can also claim descent from the much maligned Court of Star Chamber.⁷⁴ It now consists of the Lord President of the Council,⁷⁵ the Lord Chancellor, former Lord Presidents, 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.”⁷⁶

Membership has since 1895 years been extended to Privy Councillors who are, or have been, judges of some other Commonwealth countries.⁷⁷ Indian judges were appointed under the Appellate Jurisdiction Act 1929, and in the pre-War years other judges on the Judicial Committee were included.⁷⁸ The membership of the Judicial Committee thus is not exactly the same as that of the House of Lords, which is itself usually organised into two Appellate Committees each of five Lords of Appeal, and the Lord Chancellor, although as with the Privy Council usually only three or five hear each case. In both the Judicial Committee and the Appellate Committees the quorum is three.⁷⁹

Appeals to the Judicial Committee are governed by the Judicial Committee Act 1833,⁸⁰ the Appellate Jurisdiction Act 1876,⁸¹ and the Appellate Jurisdiction Act 1887.⁸² The jurisdiction of the Judicial Committee extends principally to appeals from all Commonwealth countries except those which have abolished appeals to it. It also has limited jurisdiction in the United Kingdom, including limited admiralty and ecclesiastical appeals, and the hearing of appeals by members of the medical and certain allied professions against decisions of the statutory disciplinary bodies. In addition, the

⁷²The United Kingdom has looked outwards, sometimes reluctantly, to the European Union.

⁷³See the Attorney-General’s Christmas message to the members of the New Zealand Law Society in LawTalk 574 3 December 2001 p 20; and Chapple, *supra* n 16.

⁷⁴Peter Howell, *The Judicial Committee of the Privy Council, 1833-1876, its origins, structure, and development* (1979). See also, for a wider perspective, Joseph Smith, *Appeals to the Privy Council from the American Plantations* (1965).

⁷⁵Although they may formally be eligible to hear appeals, it would seem to be established that only judicially-experienced members would actually do so; Le Sueur and Cornes, *supra* n 35, 23 n 62.

⁷⁶Superior Judges, including former Lord Chancellors, and judges of the Court of Appeal and the High Court. Also judges of the Crown Court (circuit judges and recorders), and of the Supreme Court of Northern Ireland and of the Court of Session.

⁷⁷In 1995 this included judges from the Bahamas, Australia, New Zealand, Barbados, St Lucia, and Jamaica.

⁷⁸See, for example, *Whitaker's Almanack 1938* (1939), for a list of members.

⁷⁹Wade and Phillips, *supra* n 48, 463.

⁸⁰3 & 4 Will IV c 41 (UK).

⁸¹39 & 40 Vict c 59 (UK).

⁸²50 & 51 Vict c 70 (UK).

Judicial Committee of the Privy Council gives advice to the Queen upon legal matters which may be referred to it.⁸³ The devolution of power to the Scottish Parliament and Welsh Assembly within the United Kingdom has also given the Judicial Committee an enlarged jurisdiction.⁸⁴

15. *British membership of the Privy Council*

By custom the numbers of the Law Lords normally includes several Law Lords from the Scots Bar (who do not practice the common law) and usually one from the Northern Ireland Bar. A recent Lord Chancellor, Lord Mackay of Clashfern was of the Scots Bar only, the first since the Act of Union with Scotland 1706. Recent appointments to the Appellate Committees of the House of Lords, and therefore to the Privy Council, have included Lord Steyn and Lord Hoffman. Although both have practised at the English Bar, both are South African-born, and practised in that country for some years. They therefore are especially well versed in the civil law tradition. Thus the Law Lords cannot be said to be dominated purely by English judges, and indeed the presence of three Scottish judges (and two others with civil law backgrounds) out of 13 is significant, as although appeals do lie from Scottish Courts in all but criminal matters, the Scottish jurisdiction is very much smaller than the English, on a population basis.⁸⁵

While any judicially experienced peer may sit on appeals, the specially appointed Lords of Appeal in Ordinary hear the majority of appeals. Since 1913 New Zealand judges have been in the Privy Council, and since 1975 judges of the Court of Appeal have regularly sat in the Judicial Committee of the Privy Council. This has benefitted the Privy Council (as in the *Hamlin*⁸⁶ and *Reid*⁸⁷ judgments), and enormously benefitted the judges who have sat there. Lord Cooke of Thorndon has regularly sat in the Privy Council, and has also sat on House of Lords appeals. There is no reason why more New Zealand judges cannot sit on the Privy Council,⁸⁸ nor hearings held in this country.⁸⁹

⁸³Under s 4 of the Judicial Committee Act 1833 (3 & 4 Will IV c 41) (UK). These need not be limited to justiciable matters. See *Re Parliamentary Privilege Act 1770* [1958] AC 331.

⁸⁴There is a growing corpus of 'devolution issue' disputes arising under the Scotland Act 1998 and the other devolution Acts. Current proposals may however dramatically reduce its case load, such as the agreement to establish a Caribbean Court of Justice, reform of New Zealand's appellate courts, and the re-routing of appeals from decisions of some professional bodies (such as the General Medical Council) to lower courts; Andrew Le Sueur and Richard Cornes, *What is the Future for the Judicial Committee of the Privy Council?* (2001).

⁸⁵Membership of the Judicial Committee need not be confined to Law Lords. In the case of *Spence v The Queen* [2001] UKPC 35 (16 July 2001), on appeal from St Vincent and the Grenadines, the Privy Council comprised one Law Lord (South African-born Lord Hoffmann), and four retired Court of Appeal judges (Sir Patrick Russell, Sir Christopher Staughton, Sir Andrew Leggatt, and Sir Philip Otton), two of whom had judicial experience on the Gibraltar Court of Appeal (Russell and Staughton).

⁸⁶*Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

⁸⁷*Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC).

⁸⁸Judges who have actually sat over the past 20 years have included Sir Gordon Bisson, Sir Maurice Casey, Sir Thomas Eichelbaum, Thomas Gault, Sir Michael Hardie Boys, John Henry, Sir Duncan McMullin, Peter Blanchard, Sir Robin Cooke, Dame Sian

16. Concerns about judicial quality

There have also recently been many who have argued in favour of the Privy Council by criticising the Court of Appeal.⁹⁰

It is ironic that at the time the latest politically-motivated attempt to abolish appeals is being made, the Privy Council itself should provide what its supporters see as a strong argument. In *Harley*,⁹¹ the Privy Council overturned the Court of Appeal in a case relating to the collapse of Wellington law firm Renshaw Edwards in 1992. Five law lords including Dame Sian Elias, Chief Justice of New Zealand, heard the appeal. In its advice, read by Lord Hope of Craighead, the Privy Council said that the entire decision of Giles J, in the High Court, was based “upon a series of mistaken assumptions, all of which were due to the unfair way in which he (Justice Giles) decided to broaden the scope of his inquiry”.⁹²

It is not usual for an appellate court to criticise, even harshly, a trial judge. But more seriously, they also totally rejected the Court of Appeal's view that Mrs Harley had been in serious dereliction of her duty to the court in pursuing a hopeless case on the insistence of her client.⁹³ The decisions of the trial judge and the Court of Appeal were so tainted by unfair process that neither could stand. The Privy Council added that the Court of Appeal had shown “a fundamental defect in its reasoning”.⁹⁴

In *Taito v R*⁹⁵, the Judicial Committee of the Privy Council again commented upon the Court of Appeal's former practice of dealing with criminal legal aid appeals.⁹⁶ The Privy Council considered that the correct approach was not in doubt. What was required was a collective judicial decision on the merits by three members of the Court of Appeal, sitting together, and arrived at after a hearing in open court. Their Lordships considered it was impossible to regard the so-called *ex parte* decisions as complying with the statutory scheme. The Board stated that “The rule of law itself requires that the legality of the practice of the Court of Appeal must be measured against the provisions

Elias, (all judges of the Court of Appeal of New Zealand), Sir Thomas Floissac (East Caribbean Court of Appeal), Telford Georges (Bahamas Court of Appeal), Edward Zacca (Supreme Court of Jamaica); Le Sueur and Cornes, *supra* n 35, 23 n 63, citing the HC Debates, 15 February 2000, col. 459W, updated. Since then further judges have sat, though none have been appointed since the change in Government in 1999.

⁸⁹Meetings of the Privy Council have been held in New Zealand, but the Judicial Committee has never sat outside London.

⁹⁰See, for instance, Dr Gordon Cruden in a letter to LawTalk 562 4 June 2001 p 2; Zahir Mohammed in a letter to LawTalk 562 4 June 2001 p 2.

⁹¹*Harley v Robert McDonald Glasgow Harley v Robert McDonald (New Zealand)* [2001] UKPC 20 (10th April, 2001).

⁹²*Ibid*, para 62.

⁹³*Ibid*, para 66.

⁹⁴*Ibid*, para 65.

⁹⁵[2002] UKPC 15 (PC).

⁹⁶Since altered by legislation, and regulations; Legal Services Act 2000, Crimes (Criminal Appeals) Amendment Act 2001, Court of Appeal (Criminal) Rules 2001 (SR 2001/371).

of the applicable statutory scheme”.⁹⁷ The system was not authorised by the legislation, and the dismissals in question were of no force or effect.

These are not isolated cases. Although quality comparisons with the Privy Council are invidious,⁹⁸ they will occur. One commentator has identified these concerns as:

Whether the Court [of Appeal] is as strongly committed to maintaining the vitality of its role in the public law area;

Whether, in its quest for efficiency in coping with its increasing work load, it is neglecting opportunities to provide some much needed statements of legal principle by inclining to the minimalist end of the spectrum of judicial decision-making;

Whether it is stultifying judicial creativity by institutional processes designed to economise on time spent on Judgment writing through the discouragement of multiple Judgments;

Whether again in its quest for efficiency, the Courts process are down-playing the importance of the development of argument orally by counsel and whether the testing of that argument by the Judges has a less formative role in the ultimate outcome than was formerly the case.⁹⁹

It may be that these concerns are overplayed, but they are real enough. When the Privy Council criticises the Court of Appeal for falling into serious error, and practitioners openly endorse the Privy Council, it is time to consider whether the New Zealand judicial system enjoys sufficient local support for greater responsibility to be placed upon it.¹⁰⁰

17. Reforms of the highest courts of the United Kingdom and the possible effect on New Zealand

The reform of the Judicial Committee of the Privy Council may yet occur, not because New Zealand decides to abolish appeals - though a significant number of its cases are heard from this country - but because constitutional changes in the United Kingdom may require this. The advent of Article 6 (1) of the European Convention on Human Rights¹⁰¹ raises the prospect of a challenge to the Law Lords' positions as members of the legislature. The devolution of legislative and executive functions to new Scottish,

⁹⁷[2002] UKPC 15 para 13, per Lord Steyn (PC).

⁹⁸Farmer, *supra* n 33.

⁹⁹*Ibid*, 14.

¹⁰⁰Compare this with the criticism (largely unfounded) of the Judicial Committee by the New Zealand legal community in 1903 over the decision of the Privy Council in *Wallis v Solicitor-General* [1903] AC 173 (PC) and the “Protest of Bench and Bar” 25 April 1903, in [1840-1932] NZPCC App 1730. See also David Swinfen, *Imperial Appeal. The Debate on the Appeal to the Privy Council 1833-1986* (1987) 166-167.

¹⁰¹Incorporated into United Kingdom law by the Human Rights Act 1998 (UK).

Northern Ireland, and Welsh institutions has given the Judicial Committee of the Privy Council new responsibilities.¹⁰²

The permutations of constitutional reform in the United Kingdom are as likely to lead to the reform or abolition of the Judicial Committee of the Privy Council,¹⁰³ as the politically-motivated desire of the present Government are to end the right of appeals from New Zealand. In an age of increasing globalisation it must be regretted that the lingering imperial link will have little prospect of survival, whatever the attitude of the New Zealand Parliament.

18. *Conclusion*

After some decades of debate the legal profession and the commercial community in New Zealand have yet to be convinced that there are good reasons why the right of appeal to the Judicial Committee of the Privy Council should cease.¹⁰⁴ They remain, generally, convinced that there are many reasons why it should be retained. There may be some political reasons why the right of appeal to the Judicial Committee of the Privy Council should cease, but equally valid reasons why it should be retained. The question is whether legal and commercial considerations, or the concept of national independence, should prevail.

The latest Government proposal, and the discussion paper upon which it is based, fails to offer convincing reasons for abandoning the Privy Council, beyond an assertion of national identity and independence. Making the Privy Council a more obviously New Zealand tribunal would achieve this end. This could be achieved without losing the irreplaceable benefits of continuity, tradition, informed detachment, and expertise of an older and larger society. Arguments for the retention of this legal link are not for sentimental reasons, they are based on realism and efficiency, and a desire to share in a wider legal heritage.

However, New Zealand may find itself, yet again, in the invidious position of making changes to its own institutions or procedures because of decisions taken overseas.

¹⁰²Scotland Act 1998 (UK), Northern Ireland Act 1998 (UK), and the Government of Wales Act 1998 (UK).

¹⁰³See *Le Sueur and Cornes*, supra n 35.

¹⁰⁴See *New Zealand Business Roundtable*, supra n 4.