

THE HARKNESS HENRY LECTURE

FROM PRIVY COUNCIL TO SUPREME COURT:  
A RITE OF PASSAGE FOR NEW ZEALAND'S LEGAL SYSTEM

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I. INTRODUCTION

May I first thank Harkness Henry for the invitation to deliver the 2010 Lecture. It gives me an opportunity to pay a special tribute to the firm for their support for the Waikato Law Faculty that has endured over the 20 years life of the Faculty. The relationship between academia and the profession is a special and important one. It is essential to the delivery of quality legal services to our community but also to the maintenance of the rule of law. Harkness Henry has also employed many of the fine Waikato law graduates who continue to practice their legal skills and provide leadership in the profession, including the Hamilton Women Lawyers Association that hosted a very enjoyable dinner in July.

I have decided this evening to talk about my experience as Attorney General in the establishment of New Zealand's new Supreme Court, which is now in its fifth year. In New Zealand, the Attorney General is a Member of the Cabinet and advises the Cabinet on legal matters. The Solicitor General, who is the head of the Crown Law Office and chief legal official, is responsible for advising the Attorney General. It is in matters of what I would term legal policy that the Attorney General's advice is normally sought although Cabinet also requires legal opinions from time to time. The other important role of the Attorney General is to advise the Governor General on the appointment of judges in all jurisdictions except the Māori Land Court, where the appointment is made by the Minister of Māori Affairs in consultation with the Attorney General. In this task the Chief Justice and the Solicitor General, who consult with the judiciary and the legal profession, advise the Attorney General.

The Supreme Court Act of 2003 was given assent on 17 October and came into force on 1 January 2004. It is a Court of five judges, including the Chief Justice. The Act established the Supreme Court as New Zealand's final Court of Appeal and in doing so by necessity ended appeals to the Judicial Committee of the Privy Council, though rights of appeal before 1 January 2004 were preserved.

In this paper I thought it would be useful to explain a little of the various attempts to abolish appeals to the Privy Council, before I comment upon the political process that resulted in abolition. It is useful because it identifies that the arguments for and against abolition were consistent over time. They had been well rehearsed by those interested in the issue and an explanation of the process will also help give understanding to the provisions of the Act. The influence of various pressure groups will become apparent. As lawyers, we are often trained to look at the outcome of

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political decision making when it results in legislation but an understanding of the process however, gives some insight into why we end up with the legislation that we do.

## II. PRIVY COUNCIL IN NEW ZEALAND CONTEXT

The first recorded judicial displeasure at the oversight by the Privy Council of New Zealand court decisions appeared in the *Commonwealth Law Review* of 1904<sup>1</sup> where Robert Stout noted: “At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, our conveyancing terms, or our history.” Or as Williams J said more plainly:<sup>2</sup> “That Court ... by the ignorance it has shown in this and other cases of our practice ... has displayed every characteristic of an alien tribunal.” This theme of lack of local knowledge was one of the most commonly heard criticisms of the Privy Council. Whatever outrage the judiciary may have felt by the comments of the Privy Council, the reality was the young colony did not have the judicial or legal resources to establish a local court of final appeal.

The Judicial Committee of the Privy Council was established for precisely this purpose – to assist colonies with judicial decision making. Its other motive was, of course, to continue the influence of Britain at a time when the Empire was disintegrating with the reality of the colonies asserting their independence.<sup>3</sup> The common law was seen as a link that would bind the countries and ensure the rule of law was established and maintained in the colonies. This desire to continue the legal relationship was later expressed in the idea of a Commonwealth Court.<sup>4</sup> Chief Justice Sir Michael Myers raised the idea of a tribunal in the 1940s<sup>5</sup> but it was Lord Gardiner, the Lord Chancellor who seriously suggested the possibility of a Commonwealth Court of Appeal at the 1965 Commonwealth and Empire Law Conference. Although initially supported by the then New Zealand Attorney General Hanan, it did not find support from other Commonwealth countries and shortly after even Hanan changed his mind and declared the notion of appeals outside New Zealand was outdated.

The idea of an international tribunal was raised again during the debate on abolition in 2000. On this occasion it appeared as a Pacific Court, with the Select Committee seeking submissions on the matter.<sup>6</sup> It is interesting to note this shift from the notion of preserving the common law with Commonwealth links to seeking an outside body within the region. This was not recognition of New Zealand seeking to develop a unique legal identity but more a statement by Māori that they wanted a final Court of Appeal that reflected their cultural and political aspirations. Again there was little support for this notion for a variety of reasons including a lack of qualified judges from South Pacific countries. It is interesting to note that the Commonwealth Law Association is now the remaining common law institutional link together with meetings of Commonwealth Law Officers conferences.

While not supporting a Commonwealth Court, New Zealand was more relaxed than other Commonwealth countries about judicial intervention from London. With the Caribbean countries,

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1 Robert Stout “Appellate Tribunals for the Colonies” (1904) 2 *Commonwealth Law Review* at 3-13.

2 BS Cameron “Appeals to the Privy Council – New Zealand” (1970) 172 *Otago Law Review* at 176.

3 Maurice Kelly “Leaving Their Lordships: The Commonwealth Experience” (1994) 101 *NZLJ* gives an interesting account of the history of the Privy Council and the Commonwealth countries process of abolition of appeals.

4 Dr AM Finlay paper to the First Fiji Law Conference in Suva, reported in *NZLJ* (1974) at 493.

5 (1950) 26 *NZLJ* at 119.

6 Report on Supreme Court Bill, Justice and Electoral Select Committee, 2003 at 1.

New Zealand had been the last to establish its own final Court of Appeal.<sup>7</sup> This reluctance to assert independence was also reflected in the fact it took 16 years after the Statute of Westminster of 1931 for New Zealand to declare itself fully independent in the Statute of Westminster Adoption Act 1947.

The reasons for this reluctance to formally assert independence are complex. A combination of economic and security dependency provide much of the explanation but also a singular lack of interest in constitutional formality is a characteristic of New Zealand's constitutional arrangements. It was this lack of constitutional formality that also made it difficult to situate the abolition of the appeal within a constitutional context. Was it a major constitutional change as proclaimed by some media and academics, or was it a matter of judicial administration with little constitutional significance? For my own part, the creation of a final Court of Appeal must be seen as having constitutional significance but in the given context of the change, it could not be judged to be a major event requiring a referendum like the adoption of the MMP electoral system.<sup>8</sup>

It is important to note that abolition of appeals to the Privy Council has never been a significant political issue. It is also fair to observe that there was relatively little criticism or comment about the Privy Council until after World War II. The little debate about the Privy Council that could be detected was amongst legal and academic elites. Even amongst these groups there has always been the assumption there would be the abolition of appeals at some stage. The question was when, and an even more important inter-related question, what would replace the Privy Council?

### III. PRIVY COUNCIL – ATTEMPTS AT ABOLITION

The first serious attempt to address the question came in 1987 when the then Attorney General Geoffrey Palmer announced that the Government would abolish appeals to the Privy Council to coincide with the 1990 150th Anniversary of the signing of the Treaty of Waitangi in 1840. In 1989 a Law Commission Report on the Structure of the Courts reported on the basis that the Government had announced appeals to the Privy Council would be abolished.<sup>9</sup> It therefore concentrated on the consequential structure of the courts which included a District Court, a High Court and a Supreme Court to which there would be appeals from the Court of Appeal and, in matters of exceptional importance involving a public interest, an appeal with leave to the Supreme Court, which was to be the final Court of Appeal.

On the matter of the Privy Council the Commission stated:

The underlying motive for ending Judicial Commission appeals is that the final New Zealand court responsible for clarifying and developing the law of New Zealand should be composed of senior New Zealand judges who are part of our community and closely familiar with our historical, social and legal history. Moreover they should be part of a permanent court, made up of judges regularly working together as a collegiate group. To repeat the point, it is now 30 years since we accepted in a broad way the proposition that we should have the final court actually sitting in New Zealand with permanent New Zea-

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7 Although the Caribbean countries have agreed on a final Court of Appeal, each country must ratify that decision before appeals to the Privy Council are abolished.

8 For comment on this issue see James Allen "A Latter-Day Portia" (2003) NZLJ at 18 who supported a referendum and BV Harris "The Constitutional Future of New Zealand" (2004) NZLR at 285 who argued against the need for a referendum.

9 I declare an interest in that I was a member of the Law Commission at that time as was Sian Elias QC, now Chief Justice. Sir Owen Woodhouse Chaired the Commission.

land members. A court with occasional members and drawn from outside New Zealand would contradict both the purposes.<sup>10</sup>

The issue of overseas judges sitting on the final Court of Appeal was a variation of the argument of an off shore court. The assumption that New Zealand judges needed such support for the credibility of the court has been a recurring theme.<sup>11</sup>

Although there was some academic comment on the Law Commission Report,<sup>12</sup> the matter of abolition was not progressed at the time. There was division in the Cabinet with the then Minister of Justice Hon Bill Jefferies opposing abolition. This attempt highlighted the need for political unity on the issue and even though the Government would have had the numbers in Parliament, internal division in Cabinet to such reform proved fatal.

The second serious attempt came less than ten years later when the National Government decided in principle to abolish the appeal and requested the Solicitor General to write a report on the implications of this decision. In an excellent report, the Solicitor General recommended that the Privy Council be replaced by an appeal to the full bench of the Court of Appeal, in other words that there would be one appeal only. The subsequent discussion on the report highlights two major areas of opposition – the legal profession that wanted two appeals and the Māori community who saw this as an opportunity to address their concern at the treatment of Māori by the legal system generally.<sup>13</sup>

There appeared to have been no internal political division however and a Bill was introduced to Parliament in 1996. However an election intervened before the Bill could be progressed. This election was the first held under the new MMP electoral system and resulted in the National Party entering coalition with the New Zealand First Party which opposed abolition of appeals to the Privy Council so the Bill did not progress. The Labour Opposition had also expressed concern at the mounting opposition to the Bill from Māori. The attitude of Māori to the Privy Council is another recurring theme and deserving of a paper in itself. Māori opposition may best be understood in the context of the special relationship Māori believe they have with the Crown because of the Treaty of Waitangi, and with their deeply felt criticism of the legal system's treatment of Māori and the therefore the desire for their own legal institutions.<sup>14</sup>

#### IV. PRIVY COUNCIL – ABOLITION SUCCESSFUL

The third attempt at abolition came in 1999 with the election of the Labour-led coalition Government. The Labour Party manifesto included a commitment to abolish appeals to the Privy Council. Its coalition partner, the Alliance Party, supported abolition also, as did the Green Party. As

<sup>10</sup> Law Commission *The Structure of the Courts*, (NZLC R7, 1989) at 166.

<sup>11</sup> At this point I must declare an interest in the Law Commission Report. I was a member of the Law Commission at the time, as was Sian Elias QC, now the Chief Justice, and Sir Kenneth Keith, now a member of the International Court of Justice, Jack Hodder, a Wellington lawyer who made influential submissions on the Supreme Court Bill in 2003, and Sir Owen Woodhouse, former President of the Court of Appeal who chaired the Commission.

<sup>12</sup> Phillip Joseph opened his article on the subject with the unequivocal observation that “The right of appeal of the Privy Council from New Zealand is unnecessary and unresponsive to our national way of law and demeaning of our sovereignty.” (1985) *Canterbury Law Review* at 273.

<sup>13</sup> *Appeals to the Privy Council* (prepared by the Māori Committee for the Law Commission 1995). This paper addresses issues of Māori sovereignty and other options for a court outside New Zealand.

<sup>14</sup> *Ibid*; National Hui *Seeking Solutions: A review of New Zealand's Courts System* (prepared to discuss Law Commission Consultation document, 2003).

Attorney General and Associate Minister of Justice I was given the task of implementing the policy. At the outset I must state I had always supported the abolition of appeals to the Privy Council. My reasons were both political and legal. On a personal level, I was at school when the debate surrounding the possibility of the United Kingdom entering the European Economic Community and thus fundamentally affecting New Zealand's market access was underway. It seemed to me this fundamentally changed whatever relationship there was between New Zealand and the United Kingdom and it was time for New Zealand to grow up and take responsibility for its own future. In many ways New Zealand has done precisely that. It has developed more trading partners through a free trade policy, diversified its economy and developed an independent foreign policy. It seemed only natural then in this reform context to question whether the legal system was also developing to meet the needs of a rapidly changing community.

When reviewing the legal needs of the community appeals to the Privy Council seemed increasingly anomalous. It was anomalous because of the narrow range of cases that actually were appealed to the Privy Council. The Privy Council itself recognised that some cases it considered were better settled by a New Zealand court and referred back for decision.<sup>15</sup> Its precedent value was therefore quite limited. Few cases got to the Privy Council because of the costs involved, and because in some areas, such as employment and environment law, the statutes barred such appeals.<sup>16</sup>

The Court of Appeal was effectively the final court for most citizens.<sup>17</sup> This may not have been a problem if it was not for the fact the Court of Appeal was overworked and under resourced and various attempts to remedy the situation had been unsuccessful. They had been unsuccessful in my view because there was a structural design problem with our court system. The architecture of it did not allow for a final Court of Appeal. In reality we had two final Courts of Appeal, one underworked and one overworked. One off shore and one on shore, with little real communication between them. For me then the whole question of abolition of appeals was really a question of reform of the court system.

I was conscious that a reform of the courts is a large task and that previous attempts had not met with a great deal of success.<sup>18</sup> A combination of institutional interests, lack of resources and a changed political environment by the time the review is released all combine to make change in this area very difficult politically. Nevertheless in May 2001, in my role as Minister Responsible for the Law Commission I agreed terms of reference for another review of the structure of the courts.<sup>19</sup> This review was partly a response to the issues that were raised with me during the rounds of consultation on abolition of appeals to the Privy Council, especially from Māori who expressed serious concern about the adequacy of the legal system to fulfil their needs. Just as in the 1989 review, the Law Commission did not address the question of appeals to the Privy Council because a separate process was already underway to address that issue.

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15 Andrew Beck "A New Appeal System" (2001) NZLJ at 53.

16 In recent years on average there had been 11 to 12 appeals a year.

17 In 2002 the Court of Appeal heard 665 appeals.

18 See Royal Commission on the Courts 1978, and the Law Commission Report on the Structure of the Courts 1989.

19 See Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

## V. THE ROLE OF CABINET

As Attorney General and Associate Minister of Justice I was the Minister responsible for implementing the Manifesto Policy. I was very conscious of the lack of success by my predecessors, as was the whole Cabinet. Those initiatives provided valuable lessons for us. The Cabinet therefore adopted a cautious approach as was seen in their reaction to the first paper submitted on 16 October 2000 seeking agreement to develop a public consultation paper with options for the new appellate structure. The paper was deferred until the coalition Alliance Party caucus had had an opportunity to consider the proposal. Political unity on the issue was essential. Also the Cabinet wanted to ensure there had been extensive consultation with Māori, the legal profession and the business community before it committed to the policy.

Whilst I agreed with the need to ensure political and sectoral support for the proposal, I was conscious of the fact that the next election was only two years away. Most Ministers feel the constraint of time on policy development that is imposed by a three-year election cycle. It was therefore important that the process be kept moving at an appropriate pace, which allowed full consultation and participation, but no slippage. I therefore proceeded with what may be termed cautious haste.

The first step was approval by Cabinet on 7 December 2000 to the content and release of a Discussion Paper for consultation with a closing date for submissions on 30 March 2001.<sup>20</sup> In addition to the Discussion Paper consultation the Attorney General agreed to continue consultations with the legal profession, the business community and Māori. The Cabinet also approved a group of Ministers to work with the Attorney General on the paper and the process. This group included the Prime Minister, the Deputy Prime Minister, Minister of Justice, Minister of Māori Affairs and other Ministers to be added as appropriate. An official group was also set up to assist the process. The Discussion Paper was designed to provoke public discussion by setting out the arguments for abolition and for retention as well as factual information about the Privy Council. Specific reference was made to issues for Māori and guiding principles for restructuring the appeal system were identified. Considerable thought and promotion had gone into the paper.

It was therefore disappointing when only 70 submissions were received and they were evenly divided between abolition and retention, with a preference for a new separate and independent final Court of Appeal if the decision of abolition was implemented. It was obvious this was not an issue that attracted a great deal of public concern and what concern that was expressed was amongst the elites. It was also obvious that minds were set on the issue and there was little scope, if any, for compromise. While there was an inevitability about appeals being abolished, those who supported retention were not going to concede this was the time for change. It was important however to try to address the concerns of the opposing groups and develop a model for a final Court of Appeal that achieved as wide as acceptance as possible. It was equally important to separate out the two issues: abolition and the new court. While agreement may not be gained on the first issue, it may be gained on the second.

The Cabinet, when it considered the matter again on 13 August 2001, again took a cautious approach. Further consultation was directed but this time it was directed toward the structure of a new final Court of Appeal. Importantly, a cross ministry officials group was set up to work on the project. No decision by Cabinet was made on abolition but the Attorney General was directed to report back to Cabinet on 30 September 2001. On 8 October 2001 the Cabinet approved the estab-

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<sup>20</sup> *Reshaping New Zealand's Appeal Structure* (Office of the Attorney-General/Te Toa Ture Tianara, 2000).

lishment of an advisory group of representatives of key stakeholders, including Māori, the legal profession and the business community, to develop a detailed proposal on key elements of the final Court of Appeal and the costs. This was a major breakthrough in terms of progress because it enabled a specific proposal on which to be consulted and provided the basis for drafting instructions on a Bill if that were approved. It also enabled a discussion to take place in the context of a specific alternative to the Privy Council.

The Ministerial Advisory Group was chaired by the Solicitor General<sup>21</sup> and was not concerned with the issue of abolition, but only of the structure of the new final Court of Appeal. On 25 March 2002 the Cabinet considered the Report, which recommended a new stand alone Supreme Court as the final Court of Appeal.<sup>22</sup> After consideration of the Report the Cabinet agreed in principle for the first time to abolish appeals to the Privy Council and subject to more detailed work on the proposal to the establishment of a new Supreme Court. It also noted that the Attorney General intended to introduce a Bill before the election but not to progress it until after the election. A public announcement of this decision was released in April. The purpose was to give the electorate notice of the proposal and time to discuss the issue.

## VI. EXTERNAL INVOLVEMENT

It is important to note that while this internal process was being undertaken, I felt it was appropriate to inform the Lord Chancellor of progress towards abolition. There was no special procedure required to effect abolition beyond an ordinary Act of Parliament. I felt however that courtesy dictated a meeting with Lord Irvine, who expressed his appreciation at the contact and wished us all the best. I repeated this visit in 2002 and was about to visit him again in 2003 when on the day I arrived there was the announcement of a new Lord Chancellor, Lord Falconer and a new Supreme Court and judicial administrative structure. Lord Falconer, at short notice, was kind enough to see me and again wished us good luck. I also communicated with him just before the legislation was enacted so it would not come as a surprise that after so much time New Zealand had finally established its own final Court of Appeal.

Two other external events were quite helpful during this period. In November 2002 I attended a Commonwealth Law Ministers Conference in St Vincent and the Grenadines. It provided an opportunity for both the Caribbean countries and New Zealand to discuss their proposals and the Commonwealth Secretariat agreed to host a seminar in London where the details of the proposals could be discussed. This seminar took place in June 2003. A late change in the arrangements by

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21 Other members were Richard Clarke (Chairperson of Legislation Advisory Committee), David Collins QC (President, Wellington District Law Society), Christine Grice (President of the New Zealand Law Society), Stuart Grieve QC (President New Zealand Bar Association), Cheryl Gwyn (Deputy Secretary for Public Law, Ministry of Justice), Jack Hodder (Partner Chapman Tripp Sheffield Young), Shane Jones (Ngāi Takoto, Te Aupōuri, Chairperson, Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission), Dr Ngatata Love (Te Ātiawa, member Law Commission, Professor of Māori Business at Victoria University of Wellington) Adrian More (President, Otago District Law Society), Joanne Morris (Member of Waitangi Tribunal and Board of the Legal Services Agency), Hon Bruce Robertson (President Law Commission), Maui Solomon (Mōriori, Kāti Huirapa (Ngāi Tahu), Solicitor and member Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission), Archie Taiaroa (Te Āti Haunui-a-Pāpārangi, Ngāti Tūwharetoa, Ngāti Apa, Ngāti Maru (Taranaki), Convenor Māori Congress, member Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission).

22 The Advisory Group Replacing the Privy Council *A New Supreme Court* (Office of the Attorney-General/Te Toa Ture Tianara, 2002).

the Secretariat meant I missed the crucial sessions but the report indicated the New Zealand proposal appeared to present no issues for the rule of law.<sup>23</sup>

I should note that there was little knowledge or understanding of the constitutional changes taking place in Britain at the same time New Zealand was struggling with the establishment of a new court. There was no concern that such events could have some effect on New Zealand. The assumption was business as usual and I was given assurances that the facilities of the Privy Council would still be available to New Zealand litigants. There was also little understanding of the effect the European Union and courts were having on the common law. Only Jack Hodder raised this issue in his submission to the Select Committee and queried whether New Zealand jurisprudence should be so influenced. The lack of interest by most in this issue however was confirmation that a great deal of the arguments advanced in the debate were driven more by emotion and sentiment than facts and reality. This did not make it any less difficult politically, in fact emotional arguments are always more difficult to deal with in a rational way in the political context.

## VII. THE PARLIAMENTARY PROCESS

An early election in 2002 intervened so no Bill was introduced before the election. The Labour Party formed another coalition government after the election, with a different set of partners, which required further negotiation on the proposal that was referred back to Cabinet on 11 November 2002. At that meeting, the Cabinet confirmed its decision to abolish appeals to the Privy Council and to proceed with a Supreme Court and agreed that the Associate Minister of Justice (also the Attorney General) introduce the Bill to Parliament. It was introduced on 9 December 2002 and read for the first time on 17 December 2002 when it was referred to the Justice and Electoral Committee.

The Select Committee reported back on 16 September 2003 that 312 submissions had been received. The written submissions were evenly divided between retention and abolition but the majority of oral submissions supported retention of the Privy Council. It was apparent that there was little public interest in the issue but those who were engaged felt strongly about the issue. The submissions did raise some issues that were considered by the Cabinet and amendments were recommended to the Bill. The substantive amendments related to the purpose clause and the criteria for leave which were designed to accommodate the concerns of Māori and the commercial community. I think it may be useful at this stage to set out both clauses in full because they clearly illustrate the influence of the submitters on the final wording of the Bill:

### 3 Purpose

(1) The purpose of this Act is –

- (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges-
  - (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
  - (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
  - (iii) to improve access to justice; and
- (b) to provide for the court's jurisdiction and related matters; and

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23 Commonwealth Meeting of the Expert Group to Examine the Removal of Appellate Jurisdiction from the Judicial Committee of the Privy Council by Member Countries (Marlborough House, London, June 2003).



- (c) to end appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts; and
  - (d) to make related amendments to certain enactments relating to courts or judicial proceedings.
- (2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

This purpose clause clearly rejects the notion of overseas judges sitting on the Supreme Court, which had been strongly advocated by some, including the late Lord Cooke who used the Hong Kong Final Court of Appeal as an example of this practice. Rt Hon E W Thomas QC is quoted as saying such an idea was "inconsistent, anomalous, impractical, and anti-collegial". The Select Committee had asked me to look closely at the possibility of including overseas judges on the Supreme Court and I appeared before the Select Committee to justify the provisions of the Bill and to explain that I had raised the matter with the Chief Justices of Canada, and the United Kingdom, both of whom explained to me the difficulties of administering their own courts without the added burden of releasing sitting judges to sit on another court. The logistics were just too difficult as I explained to Members of the Select Committee who had little knowledge or understanding of realities of judicial administration.

The purpose clause also sets out the expectation that the Supreme Court will be a New Zealand court addressing the needs of the community. The specific reference to the Treaty of Waitangi was another legal acknowledgement of the importance of the Treaty to New Zealand's constitutional arrangements. The final reference to the rule of law and the sovereignty of Parliament was a response to the concern that the new Supreme Court may usurp the authority of Parliament to make the law. It was not in the original Bill but inserted by the Select Committee. In many ways for me it was the most significant constitutional statement but seems to have passed without much comment.

The other clause of significance in this context is that relating to the criteria for leave to appeal. It also reflects the influence of the submitters on the final wording of the legislation. It reads in part:

#### 13 Criteria for Leave to Appeal

- (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
- (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if -
  - (a) the appeal involves a matter of general or public importance; or
  - (b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; or
  - (c) the appeal involves a matter of general commercial significance.
- (3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.

Again the influence of the Māori and business communities is reflected in the provision, as well as those sections of the legal community which were concerned to ensure that the Supreme Court had jurisdiction to hear matters of public importance or in matters where a miscarriage of justice had occurred. The original clause had included a reference to the Treaty of Waitangi and tikanga

as a specific ground for appeal. The Committee removed this reference after objection from several submitters including Māori.

The majority of the Committee supported the Bill as amended so the Government proceeded with the second reading on 7 October 2003, the Committee of the whole House on 8 and 9 October and the third reading on 14 October with the Royal Assent on 17 October 2003. Almost unprecedented media opposition and promises to repeal the legislation from opposition Members of Parliament accompanied the final stages of the Bill.

### VIII. ARGUMENTS – POLITICAL AND LEGAL

The main argument against such a court amongst legal critics appeared to be that the Privy Council, and only the Privy Council, could ensure the maintenance of the purity of the common law. A critical assessment of this argument however revealed that legislation was frequently enacted to clarify and provide certainty to the common law, for example in the contract area, but also to respond to specific local circumstances. Obvious examples include the development of a Treaty of Waitangi jurisprudence, social legislation such as the Accident Compensation system, the Resource Management Act 1990, Employment Relations Act 2000, and the Property Relationships Act 2002; and rights based initiatives such as the Bill of Rights Act 1990 and the Human Rights Act 1993.

The introduction of neo-liberal economic policies in the 1980s and 1990s had also raised new questions about the relationship between the citizen and the state. New commercial legal frameworks were introduced with state owned enterprises and public/private partnerships. While these instruments were not unique to New Zealand, the context within which they operated was. Any legal resolution of such matters seemed best dealt with within the New Zealand community by judges familiar with that community and responsible to it for the maintenance of the rule of law. The introduction of the new MMP electoral system also raised the possibility of constitutional issues requiring legal resolution. I was not therefore surprised that the first case decided by the Supreme Court involved electoral matters.<sup>24</sup>

An argument associated with the preservation of the common law has always been that New Zealand needs the distance and expertise of a Privy Council to ensure the rule of law is maintained. The Privy Council, it is argued, has a well-qualified independent judiciary that is removed from the pressures of the local community. A variation on this argument was that New Zealand's commercial interests would be detrimentally affected without the superior judging provided by a Privy Council. The business community with the assistance of the large accountancy firms, Māori business and insurance interests, all argued strongly that local judges deciding cases would seriously affect New Zealand's business credibility.

Whilst I respected their right to advocate their special interest, it was a special interest that took no account of the argument that many others in the community were denied the privilege of access. There was also no evidence to support this argument. In this context the question was often asked: what makes New Zealand judges worse than those of countries of comparable size such as Ireland that at the time was held up as a model economy? The business lobby lost some credibility with the argument that it was more cost efficient to go to the Privy Council because the British taxpayer paid for it.

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<sup>24</sup> *Prebble v Huata* [2005] SC 18.

The issue of judicial competency and independence is important because it goes to the heart of judicial legitimacy. The facts did not support the assertion of a lack of competency as was noted by many commentators. New Zealand has had over time developed a highly skilled judiciary and legal profession, who were very aware of legal developments outside New Zealand and were often participants in international conferences and seminars. Senior judges also sat on the Privy Council from time to time. Lord Cooke in his submission to the Select Committee noted it was time for New Zealand 'to take charge of its own judicial destiny' and that New Zealand law would be best decided by judges who are 'soaked' in it and not occasional to it.

Likewise a lack of judicial independence was also not evidenced by the facts. The Privy Council considered very few cases and their precedent value was often limited. The Rt Hon Sir Geoffrey Palmer noted in his submission that the Privy Council did not get enough cases to exercise the function of an appellate court, namely to clarify and develop the law of New Zealand as far as is appropriate for the courts. Francis Cooke, a Barrister, also noted the trend of the Privy Council to decline to overturn the New Zealand Court of Appeal in cases where there was a policy component.<sup>25</sup>

There was no evidence that New Zealand judges had not decided cases without influence from the executive or members of the community with money and influence. Nor had the judiciary been intimidated by media pressure, especially on matters of sentencing. It is true that from time to time judges would suggest the legislature should clarify the law, and Ministers or Members of Parliament would express disagreement with a particular decision. These incidents are not common however. The real threat to the independence of the judiciary in my experience comes from a lack of resources. This is rarely raised in debate but in practice is more important.

The perception however that a judge is not impartial in a small community because of knowledge of people or events is a real one. I had established a Judicial Conduct Commissioner to ensure there was a transparent process for complaints against judges to be investigated.<sup>26</sup> There is a counter argument that local knowledge leads to better judging and that ignorance is not always the best criteria of judicial decision-making. Knowledge of the community is an essential factor in the judiciary retaining the confidence of the people. Again there was no evidence of judges corruptly favouring one party over another. In fact New Zealand judges are very conscious of the need to recuse himself or herself if there is a conflict or perceived conflict of interest. The debate is an old one about the impartiality and neutrality of judging and cannot be explored in detail in this context.

While I am happy to debate the issue as an academic, as the Attorney General it did not seem to me to be an argument of sufficient merit to stop the reform. I was also conscious that it is important to try and make evidence based decisions and not those on what might be. It is always a risk assessment in such situations and in this case the risk of creating a corrupt incompetent judiciary through the establishment of a Supreme Court seemed slight measured against greater access to a final Court of Appeal.

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25 *Lange v Atkinson* (1999) [2000] 1 NZLR 257; [2000] 3 NZLR 385.

26 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

## IX. APPOINTMENTS

There was an aspect of this argument that did achieve prominence during the final stages of the process and that related to the appointment of judges to the Supreme Court. Once it was apparent that the legislation was likely to be enacted, the focus of the attack shifted to the appointment process. The normal appointment process of the Attorney General on the advice of the Solicitor General and the Chief Justice, after they have consulted with the profession and the judiciary, recommending appointment to the Governor General was criticised as not being transparent and leading to political corruption.<sup>27</sup> Again there was no evidence for this assertion but the media and the opposition politicians speculated at length on the likelihood of my political corruption. At the time I noted that in 1957 when the permanent Court of Appeal was established, the then Attorney General Hon (later Sir) John Marshall nominated the judges.

The appointment process of judges in my view could be improved. I had initiated a review to explore the establishment of a Judicial Appointments Commission, but work on this issue was slow however and fraught with difficulty in terms of achieving a majority view. I noted the establishment of such a Commission in Britain. It will be observed with interest in New Zealand where I am sure the issue will be raised again. My only concern about judicial appointments is that they are made on judicial merit and that the 'clone' theory of appointments is avoided to ensure the community, which is judged by these men and women, has confidence in them. Continuing to appoint middle aged to elder men of European descent is no longer acceptable when other candidates of merit are available. A balance is required. This point was made in the submissions to the Select Committee, where it was noted that "if the judiciary continues to be seen or drawn from a narrow demographic group, public confidence is likely to be undermined."<sup>28</sup>

In the event, the appointments of the most senior members of the Court of Appeal as judges to the Supreme Court were recommended after advice was taken from the Chief Justice, the Solicitor General and a former Governor General Sir Paul Reeves, whose task was to ensure the interests of Māori were protected. Māori interests had argued for a Māori judge to be appointed. The reality was that there was no Māori judge of sufficient judicial merit to make such an appointment and therefore the panel resolved that judges should be recommended for appointment in terms of their seniority on the Court of Appeal.

I duly informed the Cabinet of the recommendation and consistent with my previous experience there was very little comment or discussion and the matter went straight to the Governor General. I had insisted that merit should be the primary criteria but the media furore surrounding the appointments made this an impossible argument to sustain so seniority prevailed. The two arguments are not mutually exclusive I hasten to add and I had no difficulty with the decision to appoint on seniority in the circumstances of the first appointments. It made sense to me to ensure continuity and confidence. It will be interesting to see if this precedent will be followed in the future.

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27 See Judicial Appointments Officer, Attorney General Judicial Appointments Unit, <[www.justice.govt.nz](http://www.justice.govt.nz)> for a detailed account of the process for judicial appointments that I revised in May 2003.

28 Select Committee Report on the Supreme Court Bill (2003) HR 16 – 2.

## X. ARGUMENTS - NATIONALISM

For the sake of completeness, I should note that the advocates for retention also argued that abolitionists were nationalists who wanted a republic and this was another step on that road. On this point it is true that New Zealand will eventually become a republic but it is not a high priority for any political party or the community. It was true however that Labour-led Governments were consciously developing a sense of identity through support for the arts, sports and recognition of the importance of commemorating New Zealand's involvement in various 20th century wars. While abolition of appeals to the Privy Council was part of New Zealand's development to independence, it was not the primary motive for the initiative. It was more a natural outcome of an evolving community confident in itself to make decisions for itself.

## XI. PROCESS

I have described the Cabinet decision making process in some detail for several reasons. The first is that some supporters of retention considered the process was unconstitutional and more time should have been taken, including the holding of a referendum. While delay is always a tactic for opponents of a proposal, especially in New Zealand where the prospect of a change of government after three years offers the hope of a change of policy, I believe the accusation requires attention. The process of consultation, discussion and decision making took three years, including the intervention of an election where the proposal was clearly signalled in the Manifesto. The Government was aware of the 20-year debate around the issue. It was a debate however that was conducted essentially amongst some small elite lobby groups, who themselves were divided on the issue. The history also showed there was fundamental cross party support but the politics of the moment would require the Opposition to oppose the proposal.

There was never then likely to be total agreement, so the Government had to assess whether a greater good than harm was likely to result from the abolition of appeals to the Privy Council and the establishment of a new Supreme Court. The Cabinet undertook a cautious approach and wanted to be assured that what replaced the Privy Council would be to the benefit of all New Zealanders. It was not only sensible to have the full facts before a decision to abolish appeals was made, but it also made the decision more publicly defensible. The decision to abolish appeals could not be made in isolation, but rather where the people could see what was replacing the Privy Council and why. I personally found it interesting that in the numerous meetings I attended on this issue, especially with lawyers, the focus was always on the new Supreme Court.

It must be noted again in this context that there was little political capital to be gained from establishing a new Supreme Court. The truth was this was not an urgent matter or one that attracted or detracted voters. However once the media discovered the issue quite late in the process, there was a prospect that the matter could be again deferred. The media induced pressure of the moment was considerable and the need to maintain cross party support was essential. The Green Party and Progressive Party Members withstood the pressure while the United Future Party did not. The Government decided it had the numbers so would proceed. I would argue subsequent events proved this to be the correct decision. The Labour Party formed a Government after the subsequent election with the issue rarely being raised. The then Opposition National Party and now the Government has stated it will not repeal the legislation. I suspect the prospect of abolishing the

Supreme Court would have proved to be politically contentious with accusations of the executive interfering with the independence of the courts.

The question of whether a referendum should have been held is a serious one. New Zealand has no tradition of holding referenda with Parliament being recognised as the body to make decisions. Between 1919 and 1997 there were ten referenda – three on liquor use, one on betting, one on compulsory military training, one on superannuation, two on term of Parliament, and two on the voting system. As came to be seen, this was the usual method of political decision making. The Select Committee acknowledged this and did not recommend it. The call for a referendum has become more common however and is a useful political tactic to characterise the decision making as undemocratic.

The prospect of a three-year election is seen as the best referendum as it provides the opportunity for the people to express their view on issues. The referendum is also a somewhat blunt issue to determine complex matters. The experience of the MMP referendum and use of considerable financial resources to sway public opinion has raised the question of the need for better guidelines for such referenda. There is however a small and maybe growing section of the population that seeks more direct input into decisions and if New Zealand ever gets around to serious discussions on constitutional issues, this matter will be raised.

## XII. CONCLUSION

In conclusion, that is a brief account of the process undertaken to establish the Supreme Court and some of the debates and arguments surrounding that decision. I have not done justice to all the arguments but hope I have provided you with an idea of the issues and parties driving those issues. On a personal level I am grateful for the opportunity to have been part of that decision and look forward with interest like so many others to observing the progress of the Supreme Court.