

Copyright is owned by the Author of the thesis. Permission is given for a copy to be downloaded by an individual for the purpose of research and private study only. The thesis may not be reproduced elsewhere without the permission of the Author.

**Independence, Access to Justice, and the Patriation of
New Zealand's Final Court of Appeal:**

**An Investigation into the Legal and Constitutional Consequences of the Replacement of
the Judicial Committee of the Privy Council with a Supreme Court**

A thesis presented in partial fulfilment of the requirements for the degree of
Master of Arts
in
Politics

at Massey University, Manawatū Campus, New Zealand.

Robert Stanley Lyon

2014

Abstract

This thesis was an investigation into the consequences of the Supreme Court Act 2003. The main purpose of the research was to assess the extent that the Supreme Court reform has achieved its objectives. In addition, the project explored the constitutional significance of the reform. Two main themes, based on the purposes of the Supreme Court legislation, were chosen as focal points for the research. These themes were **a)** whether the patriation of the final court has promoted New Zealand's legal and constitutional independence and **b)** whether the Supreme Court reform has improved 'access to justice'.

The present study employed a mixed research design that combined both quantitative and qualitative data gathering and analysis techniques. The primary research method was the document analysis of the leave judgments and substantive judgments of the Privy Council and the New Zealand Supreme Court. Five document analyses were conducted during the course of the research. These analyses compared the two courts on, inter alia, the extent that they cite cases from various jurisdictions and on the range and volume of appeals that they heard. In addition, in-depth case studies were conducted on selected judgments in order to assess the approach of the Supreme Court to precedent. Finally, the current project drew on official sources and various secondary sources, especially the extra-judicial writings of senior judges from Australia, New Zealand, and the United Kingdom.

Three key findings emerged from this investigation. Firstly, it appears that patriation has improved 'access to justice'. In terms of leave arrangements and jurisdiction, the new Supreme Court is more accessible than the Privy Council. It also hears a much higher volume and broader range of appeals. Secondly, the present study found evidence that patriation has led to changes in the legal sources that are cited by the final court. In particular, the Supreme Court cites more New Zealand jurisprudence and a broader range of overseas case law than the Judicial Committee. Moreover, the citation of English jurisprudence, although still substantial, has declined relative to the citation of cases from these other jurisdictions. Finally, in terms of its constitutional significance, the Supreme Court Act, when considered in the context of New Zealand's overall constitutional development, can be viewed as completing the century-long process of updating, consolidating, and patriating the major elements of New Zealand's constitution.

Table of Contents

Abstract.....	ii
Table of Contents.....	iii
Acknowledgments.....	vii
List of Tables and Figures.....	viii
1) Introduction and Research Overview.....	1
1.1 The Constitutional Significance of the Supreme Court Act.....	1
1.2 Objectives and Themes of the Supreme Court Legislation.....	3
1.3 Overview of the Research.....	5
1.3.1 Research Objectives.....	5
1.3.2 Methodological Approach.....	5
1.3.2.1 Analysis of Court Judgments.....	6
1.3.2.2 Official Statistics.....	6
1.3.2.3 Secondary Sources.....	6
1.3.2.4 Limitations of the Data Collection Techniques.....	7
1.3.3 Thesis Structure.....	8
 Part One: Background to the Supreme Court Legislation	
Section Overview.....	10
2) Political, Social, and Legal Context.....	11
2.1 The Growing Desire for Reform.....	11
2.1.1 Attitudes toward the Privy Council.....	11
2.1.1.1 The Legal Profession and the Judiciary.....	11
2.1.1.2 Māori Perspectives.....	13
2.1.1.3 The Political Will for Change.....	15
2.1.2 Social, Legal, and International Developments.....	16
2.1.2.1 Legal and Cultural Nationalism.....	16
2.1.2.2 Ideology and Republicanism.....	17
2.1.2.3 Commonwealth Developments.....	18
2.2 The Patriation of the Final Court.....	20
2.2.1 Previous Attempts at Abolishing the Privy Council.....	20
2.2.2 The Supreme Court Act.....	21
2.2.2.1 Prelude to the Supreme Court Bill.....	21
2.2.2.2 Parliamentary Process.....	22
2.3 Summary.....	23
3) Constitutional Development and the Patriation of the Final Court.....	25
3.1 Overview of Constitutional Development in New Zealand.....	26
3.1.1 From Colony to Independent Dominion.....	26
3.1.1.1 Early Developments.....	26
3.1.1.2 Dominion Status and Intra-Imperial Constitutional Reform.....	26
3.1.1.3 Acquisition of Full Constituent and Plenary Powers.....	28
3.1.2 Post-War Constitutional Development.....	28
3.1.2.1 Constitution Amendment Act 1973.....	29
3.1.2.2 Royal Titles Act 1974.....	29

3.1.2.3 <i>The Nationalisation and Patriation of the Office of Governor-General</i>	30
3.1.2.4 <i>Constitution Act 1986: An Autochthonous Constitution?</i>	32
3.2 The Appeal to the Privy Council: A Constitutional Relic?	33
3.3 The Supreme Court Reform and Constitutional Discourse	35
3.3.1 <i>Public Engagement with Constitutional Reform</i>	35
3.3.2 <i>The Supreme Court Debate</i>	36
3.4 Summary	38

Part Two: The Privy Council and the Supreme Court: A Comparison

Section Overview	40
4) Structure, Composition, and Function	41
4.1 The Judicial Committee of the Privy Council	41
4.1.1 <i>The Origin of the Appellate Jurisdiction of the Privy Council</i>	41
4.1.2 <i>Structure and Composition of the Judicial Committee</i>	42
4.1.2.1 <i>The Judicial Committee Acts</i>	42
4.1.2.2 <i>British and Commonwealth Membership of the Judicial Committee</i>	43
4.1.2.3 <i>New Zealand Membership of the Judicial Committee</i>	44
4.1.3 <i>Jurisdiction and Function of the Judicial Committee</i>	45
4.2 The Supreme Court of New Zealand	46
4.2.1 <i>Structure and Composition</i>	46
4.2.1.1 <i>General</i>	46
4.2.1.2 <i>Composition</i>	47
4.2.1.3 <i>Overseas Judges</i>	47
4.2.2 <i>Role of the Supreme Court</i>	49
4.2.3 <i>The Supreme Court Reform and Role of the Chief Justice</i>	50
4.2.3.1 <i>The Traditional Roles of the Chief Justice</i>	50
4.2.3.2 <i>The Chief Justice and the Supreme Court</i>	51
4.3 Summary	52
5) Jurisdiction	54
5.1 Jurisdiction of the Privy Council	54
5.1.1 <i>General Provisions</i>	54
5.1.2 <i>Restrictions on the New Zealand Jurisdiction of the Privy Council</i>	55
5.2 The Jurisdiction of the Supreme Court	56
5.2.1 <i>General</i>	56
5.2.2 <i>Civil Jurisdiction</i>	56
5.2.3 <i>Broadening the Civil Jurisdiction of the Final Court</i>	57
5.2.4 <i>Criminal Jurisdiction</i>	58
5.2.5 <i>Limits on the Supreme Court’s Criminal Jurisdiction</i>	59
5.3 Summary: Jurisdictional Differences and Court Accessibility	60
6) Leave Arrangements	61
6.1 Leave Arrangements for the Privy Council	61
6.1.1 <i>Appeals from the Court of Appeal</i>	61
6.1.1.1 <i>General Provisions</i>	61
6.1.1.2 <i>Arrangements in Overseas Jurisdictions</i>	62

6.1.1.3 Consequences of the Mixed Leave Arrangements.....	63
6.1.2 Direct Appeals from the High Court	64
6.1.3 Petitions for Special Leave.....	64
6.1.3.1 Cases Where Leave Has been Refused by the Court of Appeal	64
6.1.3.2 General Principles for Civil Appeals.....	65
6.1.3.3 General Principles for Criminal Appeals	65
6.1.3.4 Criminal Appeals in New Zealand.....	66
6.2 Leave Arrangements for the Supreme Court	67
6.2.1 General Provisions	67
6.2.2 General or Public Importance	69
6.2.3 Substantial Miscarriage of Justice	69
6.3 Summary.....	70
6.3.1 Civil Appeals: Privy Council.....	70
6.3.2 Civil Appeals: Supreme Court	71
6.3.3 Criminal Appeals.....	72

Part Three: The Consequences of the Patriation of the Final Court

Section Overview	74
7) Patriation and the Accessibility of the Final Court	75
7.1 Methodological Strategy.....	75
7.1.1 Part One: Analysis of Supreme Court Leave Decisions	75
7.1.1.1 Aim and Data Collection Method	75
7.1.1.2 Sample.....	76
7.1.1.3 Variables.....	76
7.1.1.4 Data Analysis.....	77
7.1.2 Part Two: Comparison of the Privy Council and Supreme Court.....	77
7.1.2.1 Aim and Data Collection Method	77
7.1.2.2 Sample.....	77
7.1.2.3 Variables.....	78
7.1.2.4 Data Analysis.....	78
7.2 Results.....	78
7.2.1 Part One: Analysis of Supreme Court Leave Decisions	78
7.2.1.1 Overall Trends in Leave Decisions.....	78
7.2.1.2 Subject Matter of Leave Applications	79
7.2.2 Part Two: Comparison of the Privy Council and Supreme Court.....	81
7.2.2.1 Volume of Appeals	81
7.2.2.2 Range of Appeals	82
7.3 Discussion.....	84
7.3.1 The Supreme Court's Approach to Leave	84
7.3.2 Comparison of the Privy Council and Supreme Court	85
7.3.2.1 Volume of Appeals	85
7.3.2.2 Range of Appeals	86
7.3.3 International Comparisons	88
7.3.4 Summary: Patriation and the Accessibility of the Final Court	89
8) Patriation and the Doctrine of Precedent	90
8.1 Precedent and Patriation: The Expectations of Academics, Officials, and Judges	91
8.1.1 Report of the Ministerial Advisory Group	91

8.1.2 <i>The Australian Experience</i>	91
8.1.3 <i>Extra-Judicial Comments in New Zealand</i>	93
8.2 The Consequences of Patriation for the Doctrine of Precedent	94
8.2.1 Quantitative Data	94
8.2.1.1 <i>Overview and Samples</i>	94
8.2.1.2 <i>Variables</i>	94
8.2.1.3 <i>Results</i>	94
8.2.1.4 <i>Summary</i>	95
8.2.2 Court of Appeal Judgment: <i>R v Chilton</i>	96
8.2.3 Supreme Court Judgments	97
8.2.3.1 <i>R v Mist</i>	97
8.2.3.2 <i>Couch v Attorney-General</i>	98
8.2.3.3 <i>North Shore City Council v Body Corporate 188529</i>	104
8.2.3.4 <i>Westpac Banking Corporation v CIR</i>	104
8.3 Discussion	105
8.3.1 Approach of the Supreme Court to Precedent	105
8.3.2 Attitude of the Lower Courts to Privy Council Authority	106
8.3.3 Summary: Expectations of the Architects of the Supreme Court Act	107
9) Sources of the Common Law	109
9.1 Legal Development: International Trends	110
9.1.1 <i>Diminishing Englishness of the Common Law</i>	110
9.1.2 <i>Unity of Law</i>	111
9.1.3 <i>International Law and Non-Common Law Influences</i>	112
9.1.4 <i>The Privy Council and Legal Development</i>	113
9.1.4.1 <i>The Australian Experience: ‘Australianisation’</i>	113
9.1.4.2 <i>The Privy Council in New Zealand</i>	115
9.2 A Comparison of Privy Council and Supreme Court Judgments	116
9.2.1 Overview	116
9.2.2 Results	117
9.2.2.1 <i>Case Citations</i>	117
9.2.2.2 <i>Importance of Case Citations</i>	118
9.2.2.3 <i>Non-Judicial Sources</i>	120
9.3 Discussion	121
9.3.1 <i>English Authority and the Supreme Court</i>	121
9.3.2 <i>Diversity in the Sources of the Common Law</i>	122
9.3.3 <i>European Influences</i>	123
9.3.4 <i>Engagement with New Zealand Jurisprudence</i>	124
9.3.5 Summary: The ‘New Zealandisation’ of the Law?	125
10) Conclusion	126
10.1 Consequences of the Supreme Court Reform	126
10.1.1 <i>Jurisdiction, Leave Arrangements, and Access to Justice</i>	126
10.1.2 <i>An Indigenous Legal System?</i>	127
10.1.2.1 <i>The Composition of the Final Court</i>	127
10.1.2.2 <i>The Legal Consequences of Patriation</i>	128
10.2 The Supreme Court Act and the Constitution	129
References	131
Table of Cases	134

Acknowledgements

This research project was undertaken whilst I was an inmate at Wanganui Regional Prison. Such an environment is not conducive to tertiary study (let alone post-graduate research) and there were times during the research process when obstacles and restrictions (some anticipated, and some utterly unforeseen) threatened to derail work on this thesis. I would, therefore, like to acknowledge those people whose help and support were crucial to the completion of this research project.

Firstly, I would like to thank my research supervisor, Associate Professor Richard Shaw. His timely advice, and suggested reading material, helped me to get this project back on track when I was in danger of losing focus. I am also grateful for his assistance in dealing with difficulties in my enrolment, for arranging for the submission of this work, and for his patience as I plodded along, sometimes very slowly, working on this research.

I also wish to acknowledge Massey University's excellent distance library service and, especially, the often anonymous, but ever helpful librarians who have helped me to track down the 300-odd Privy Council and Supreme Court judgments that were used in this investigation.

Thirdly, I am grateful to the staff and management of Wanganui Prison for permitting me to undertake this research. In particular, I was fortunate enough to have been granted access to a computer for the duration of this research project. Sadly, however, recent policy changes now mean that other prisoners will be denied the resources and opportunities that I have enjoyed. I especially wish to express gratitude to those individual Corrections Officers who went out of their way to help me access the information and materials that I required, especially during those times when the Department itself was not so accommodating.

Finally, I wish to thank my mother and father, Cherie and Stewart. Their continued support, not just in study, but throughout my incarceration, has helped to motivate me to better myself and to look to the future with a renewed hope.

List of Tables and Figures

Tables

Table 7.1	<i>Categories of Law</i>	76
Table 7.2	<i>Proportion of Successful Applications for Different Types of Case</i>	80
Table 7.3	<i>Civil versus Criminal Appeals by Final Court</i>	82
Table 7.4	<i>Proportion of Appeals from Different Categories by Final Court</i>	83
Table 7.5	<i>Average Number of Cases per Year from Different Categories by Final Court</i>	83
Table 7.6	<i>International Comparison of the Proportion of Successful Leave Applications</i>	88
Table 7.7	<i>International Comparison of the Number of Appeal Judgments by Final Court</i>	89
Table 8.1	<i>Citation of Privy Council Precedent by Final Court of Appeal</i>	95
Table 9.1	<i>Dependent Variables</i>	116
Table 9.2	<i>Comparison between the Privy Council and Supreme Court on the Proportion of Judgments Citing Case Law from Selected Jurisdictions</i>	117
Table 9.3	<i>Average Number of Case Citations per Judgment by Final Court</i>	117
Table 9.4	<i>Approval of English Case Law by Final Court</i>	118
Table 9.5	<i>Disapproval of English Case Law by Final Court</i>	119
Table 9.6	<i>Approval of Australian and Canadian Case Law by Final Court</i>	119
Table 9.7	<i>Disapproval of Australian and Canadian Case Law by Final Court</i>	119
Table 9.8	<i>Approval of New Zealand Case Law by Final Court</i>	120
Table 9.9	<i>Disapproval of New Zealand Case Law by Final Court</i>	120
Table 9.10	<i>Comparison of the Supreme Court and Privy Council on the Proportion of Judgments Containing Non-judicial Citations</i>	120

Figures

Figure 7.1	Supreme Court leave applications by year.....	79
Figure 7.2	Number of civil and criminal leave applications granted by year.....	80
Figure 7.3	Proportion of civil and criminal leave applications granted by year.....	80
Figure 7.4	Privy Council and Supreme Court appeals disposed by year.....	81

1

Introduction and Research Overview

The Supreme Court Act 2003 instituted three major changes to the New Zealand court system. Firstly, it abolished the right of litigants to appeal the decisions of the New Zealand courts to the Judicial Committee of the Privy Council. Secondly, it established the Supreme Court of New Zealand, which would henceforth act as the country's final appellate court. Thus the Supreme Court Act 'patriated' the final court by replacing the London-based Privy Council with a local court, comprising solely New Zealand judges. Finally, the Supreme Court legislation redefined the role of the Chief Justice, who was now to preside over the new final court; and established the position of Chief High Court Judge to assume responsibility for the administration of the High Court.

It has been more than a decade since the passage of the Supreme Court Act. It seems timely, therefore, to evaluate the legal and constitutional implications of this reform. The current research project represents a step in this direction. The purpose of this thesis is to examine the impact of the Supreme Court legislation on the structure, role, and jurisdiction of the final court; and to assess the consequences that these changes have had for 'access to justice', for the doctrine of precedent, and for the development of the common law. In exploring these issues, this project has two main objectives. Firstly, it evaluates the reforms in terms of the objectives and expectations of the architects of the Supreme Court Act. Secondly, it assesses the overall constitutional significance of the Supreme Court reform.

1.1 The Constitutional Significance of the Supreme Court Act

One of the controversies associated with the Supreme Court reform was the question of whether it amounted to a major constitutional change or whether it was simply a matter of judicial administration that was largely devoid of constitutional significance.¹ The former view was articulated by a number of lawyers and legal academics, representatives of business interests, and parliamentarians. Most of these groups and individuals opposed the Supreme Court legislation.² Many also argued that, because of the constitutional dimension, the proposed legislation warranted either a referendum or a two-thirds majority in Parliament.³ In contrast, the constitutional significance of the reform was disputed or downplayed by some supporters of the legislation, most notably the Attorney-General, Margaret Wilson, who was one of the principle architects of the Supreme Court Act, and the Prime Minister, Helen Clark.

¹ Margaret Wilson, 'From Privy Council to Supreme Court: A rite of passage for New Zealand's legal system', *Waikato Law Review*, 18, 2010, p. 3.

² However, several Labour and Green Party MPs who supported the Bill alluded to the constitutional significance of the measure in parliamentary debates, including John Tamihere, David Parker, and Nandor Tanczos (see Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002).

³ See, for instance, D. McCurdy, What should replace the Privy Council?, *The Dominion Post*, 11 April 2003, p. 5; B., Rennie, Tide Against Abolition, *The Press*, 3 May 2003, p., 1; Bruce Logan and John McNeil, 'Supreme Court Act: Radical constitutional change', *Evidence*, summer 2004, p. 8-10.

To some extent the uncertainty about the constitutional significance of the Supreme Court legislation may reflect the New Zealand public's traditional apathy and ignorance about the nature and limits of the constitution. For example, in a retrospective account of the reform process, Margaret Wilson suggested that the difficulty in situating the changes in an appropriate constitutional context was symptomatic of New Zealand's lack of interest in constitutional formality.⁴ Similarly, other commentators have noted that a lack of understanding of constitutional issues may have stifled a genuinely productive debate on the constitutional implications of the reforms.⁵ For instance, Chief Justice Dame Sian Elias, speaking with reference to several policy proposals including the Supreme Court reform, has suggested that carelessness and a neglect of constitutional matters has meant that the public are not well equipped to debate issues touching upon the constitution. She noted that there is little shared vocabulary and much confusion and muddled thinking over key concepts.⁶

However, parliamentary politics also played a central role in obfuscating the constitutional importance of the Supreme Court legislation. The Labour-led Government tended to downplay the wider implications of the Supreme Court proposal when it was politically expedient to do so, especially in response to pressure by the Opposition and various interest groups to hold a referendum.⁷ In these situations the replacement of the Privy Council with a local Supreme Court was framed as a matter of court restructuring or 'judicial administration'. It was argued that there were no fundamental changes being made to the court system and, in particular, that two tiers of appellate courts were still being retained. As a result, the government asserted that the Bill was not a major constitutional measure and was not properly the subject of a referendum.⁸

Despite the narrow view portrayed by this politically motivated narrative, even a brief overview of the Supreme Court legislation suggests that it has a much broader legal and constitutional significance than was sometimes intimated. For instance, the Act is notable for its references in the purpose clause to the rule of law, to parliamentary sovereignty, and to New Zealand's independence.⁹ The incorporation of these constitutional values into positive law was seen as groundbreaking by some commentators.¹⁰ Nevill for instance, likened the content of the purpose clause to the wording found in supreme-law constitutional documents in countries such as the US and Canada. She suggested that, despite the highly selective nature of the values and the novelty of expressing them in court establishing legislation, the Act may 'be viewed as a small step toward the systematic treatment of constitutional values.'¹¹

⁴ Wilson, *Supra* fn 1, p. 3.

⁵ P. Nevill, 'New Zealand: The Privy Council is replaced with a domestic Supreme Court', *International Journal of Constitutional Law*, 3(1), 2005, p. 115-127.

⁶ Rt Hon Dame Sian Elias, 'Transition, stability and the New Zealand legal system', *Otago Law Review*, 10(4), 2004a, p. 475-477; Elias, 'Something old, something new: Constitutional stirrings and the Supreme Court', *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 121-122.

⁷ For instance, the Attorney-General publicly stated that the Bill represented '...an important change, but not a major constitutional change, as Opposition parties would have us believe. It certainly does not require taxpayers to spend \$10 million on a referendum.' (Statement by Attorney-General, Hon Margaret Wilson (3/7/2003) cited in Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p. 19.). See also Wilson *Supra* fn 1, p. 3. In this retrospective account of the reform process the former Attorney-General restated her views, but admits that the Bill has constitutional significance. Compare these statements to the first reading debate, before the referendum issue had gained traction, where many government members emphasised the constitutional significance of the measure.

⁸ See, for example, the parliamentary debates (Supreme Court Bill: First Reading, *Hansard*, 17th December 2002) and the select committee report (Justice and Electoral Committee, *Supra* fn 7). Also see the advice provided by the Crown Law Office to the Justice and Electoral Committee on the consistency of the Bill with the Treaty of Waitangi.

⁹ Section 3(2) of the Supreme Court Act provides: 'Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament'.

¹⁰ Elias, 2004b *Supra* fn 6, p. 122; Nevill, *Supra* fn 5, p. 127.

¹¹ Nevill, *Supra*, fn 5, p. 127

Moreover, the wider significance of the Supreme Court legislation is also indicated by the breadth of the public debate inspired by the reforms. These discussions highlighted, albeit often in a superficial or uninformed manner, a wide array of constitutional and legal matters.¹² For instance, the proposed reforms raised concerns about judicial independence, especially with respect to the appointment process for judges and the potential for the politicisation of the new Supreme Court. There was also discussion around the role of the final court, of the Chief Justice, and of the judiciary as a whole. Furthermore, the debate touched on concerns around the proper constitutional relationship between Parliament and the Courts. In particular, there were concerns expressed by some commentators that, in the context of the creation of a new final court, the judiciary could encroach on the law-making powers of Parliament.¹³

The Supreme Court Bill also raised a number of issues that were of particular importance to Māori. These included the representation of Māori in the judiciary and questions of how the New Zealand courts should deal with Māori values, Tikanga, and with matters arising out of the Treaty. Moreover, the decision to abolish appeals to the Queen in Council touched on the relationship between Māori and the Crown under the Treaty of Waitangi. There was some conflict between Māori and European ideas about the nature of this relationship and, especially, the Maori view that the Privy Council was symbolic of the link to the Crown and a means of direct access to the Sovereign. Furthermore, the Supreme Court proposal raised broader issues, such as the future of the Monarchy; the status of the Treaty of Waitangi, particularly in the context of future constitutional reform; and the possibility of a more fundamental review of the country's constitutional arrangements.¹⁴

1.2 Objectives and Themes of the Supreme Court Legislation

Two main themes were evident in the policy discussions associated with the decision to patriate the final court. The first theme was national identity and independence. Historically the primary arguments that were advanced in favour of abolishing the Privy Council were, at their core, arguments about New Zealand's sovereignty and national identity.¹⁵ For instance, one legal commentator in the 1970s argued that:

'to have our laws determined by any outside tribunal, however eminent, is inconsistent with our autonomy, with our sense of national self-respect, and with our image and reputation in other countries. It is a colonial leftover unbecoming to our sense of identity...'¹⁶

This theme was also at the forefront of the Labour-led Government's rationale for the Supreme Court legislation.¹⁷ The government portrayed the abolition of the Privy Council as 'an inevitable next

¹² Neville, *Supra* fn 5, p. 126. Most select committee submissions raised constitutional concerns.

¹³ See, for example, Justice and Electoral Committee, *Supra* fn 7, p. 23. These concerns were also expressed by Labour MP David Parker in the third reading debate (Supreme Court Bill: Third Reading, *Hansard*, 14th October 2003). **Chapter 2** discusses the implications of these concerns for the purpose clause of the Supreme Court Act.

¹⁴ See, for example, Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000, p 1 and 4; Justice and Electoral Committee, *Supra* fn 7, p. 11-2 and 52-3.

¹⁵ See, for example, B. J. Cameron, 'Appeals to the Privy Council-New Zealand', *Otago Law Review*, 1970, p 172-184; Philip Joseph, 'Towards abolition of Privy Council appeals: The Judicial Committee and the Bill of Rights', *Canterbury Law Review*, 2, 1985, p. 273-297; Sir Robin Cooke, 'The New Zealand National Legal Identity', *Canterbury Law Review*, 3, 1987, p. 171-183.

¹⁶ Cameron, *Supra* fn 15, p 183.

step in the development of New Zealand's national identity and independence'.¹⁸ It was suggested that ending Privy Council appeals would recognise New Zealand's constitutional status as an independent country; would reinforce confidence in the judiciary; and would ensure that decisions made by the final court are made by judges who reside in New Zealand and are familiar with New Zealand society.¹⁹

The last of these points was particularly salient. One of the longstanding criticisms of the Privy Council was that the Judicial Committee was predominantly comprised of British judges who were unaware or unfamiliar with New Zealand society, values, and history. It was felt that this unfamiliarity had a detrimental effect on ability of their Lordships to decide individual cases and, by extension, on their ability to develop and articulate law that is responsive and appropriate to New Zealand circumstances.²⁰ Thus one of the key objectives of the patriation of the final court was to create an 'indigenous justice system' that better represents New Zealand values and meets New Zealand needs.²¹

The second core theme was 'access to justice'. In the context of the Supreme Court debate this loosely defined term came to encompass several different ideas. Firstly, access to justice referred to the accessibility of the final court to potential litigants. The government argued that the vast majority of litigants had been precluded from taking an appeal to the Privy Council due to a variety of factors including cost, distance, and jurisdictional limits. It was asserted that only a very small number of, mostly commercial, appeals were heard by the Judicial Committee, whereas other cases, possibly more deserving of a second appeal, had been denied the opportunity of reconsideration by the final court.²² Like the arguments based on national identity, the issue of the accessibility of the Privy Council had been iterated by various commentators over the years.²³

Secondly, the concept of access to justice was also linked to the outcome of court judgments. In particular, the ability of the judiciary to apprehend local conditions was seen as an important component of access to justice. It was felt that an improved awareness of these contextual factors would lead to decisions that are more responsive to the values and aspirations of the individual litigants and of wider society. In addition, several commentators have pointed out that on a number of occasions the Privy Council has declined to decide those matters raised on appeal that would have required them to undertake an assessment of New Zealand conditions or policy considerations. It was alleged that in these circumstances the affected litigants were being denied the full benefit and satisfaction of a second appeal.²⁴

As the proposals for reform crystallised with the introduction of the Supreme Court Bill, access to justice became the primary justification for patriating the final court. Thus the select committee that examined the Supreme Court Bill reported that the purpose of the proposed legislation was to improve

¹⁷ See, for example, Office of the Attorney-General, *Supra*, fn 14; Justice and Electoral Committee, *Supra*, fn 7. See also the parliamentary debates (Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002). Ironically, the link between the Supreme Court legislation and issues of national identity, sovereignty, and decolonisation were emphasised by supporters of the reform, even whilst some disavowed the constitutional importance of the measure.

¹⁸ Office of the Attorney-General, *Supra* fn 14, p. 1.

¹⁹ *ibid*, p. 1.

²⁰ See, for example, comments by Joseph, *Supra* fn 15, p.279-284; Cooke, *Supra* fn 15, p.182-3.

²¹ Office of the Attorney-General, *Supra* fn 14, 'Attorney-General's Introduction'.

²² *ibid*, p. 2-3.

²³ See, for example, Cameron, *Supra* fn 15, p. 183 where he cites expense and delay as the principle practical disadvantages of the appeal; Joseph, *Supra* fn 15, p 275-79; Justice and Electoral Committee, *Supra* fn 7, p.7-9; Elias, 2004a, *Supra* fn 6, p. 475-491; Elias, 2004b, *Supra* fn 6, p. 121-137; Sir Kenneth Keith, The unity of the common law and the ending of appeals to the Privy Council', *International and Comparative Law Quarterly*, 54(1), 2005, p. 197-210.

²⁴ Keith, *Supra* fn 23, p. 209.

‘access to justice’ by ‘improving the accessibility of New Zealand’s highest court’ and ‘using the greater understanding of local conditions of the judges of New Zealand’s highest court’.²⁵

The themes of independence and access to justice outlined are reflected in the purpose clause of the Supreme Court Act. Section 3 provides that:

- 1) The purpose of the 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.

1.3 Overview of the Research

1.3.1 Research Objectives

As outlined above, the purpose of this thesis is to examine the nature and consequences of the reforms introduced by the Supreme Court Act. It has two major components. Firstly, the research compares the Privy Council and the new Supreme Court in order to identify the impact that patriation has had on the composition, role, and jurisdiction of the final court. Secondly, it considers the consequences that these differences, and other changes introduced by the Supreme Court legislation, have had for the accessibility of the final court, for the doctrine of precedent, and for the development of the common law.

In considering the changes brought about by the Supreme Court Act the project is guided by two overarching purposes. Firstly, it assesses the extent to which the Supreme Court has fulfilled the expectations and objectives of the architects of the reforms. The benchmarks for this evaluation include the core objectives of promoting New Zealand’s legal and constitutional independence and improving access to justice. Secondly, the current project focuses on the broader constitutional significance of the Supreme Court Act. To this end the present research situates the patriation of the final court, within the broader narrative of post-war constitutional development and decolonisation in New Zealand.

1.3.2 Methodological Approach

The current investigation employed a mixed research design that utilises both qualitative and quantitative data collection and analysis techniques. The selection of methods was shaped by two main considerations. Firstly, I have adhered to the question-driven approach to research design.²⁶ According to this approach the choice of methods is determined principally by the nature of the research questions, rather than the assumptions of an overarching research paradigm. Secondly, this project aims to balance the reliability of data collection techniques with the depth and meaningfulness of the findings. This implies the use of multiple research methods and analysis techniques that complement each other and which allow the triangulation of research findings across different approaches.

²⁵ Justice and Electoral Committee, *Supra* fn 7, p. 1.

²⁶ Z., O’ Leary, *The Essential Guide to Doing Your Research Project*, second edition, London: Sage Publications Ltd, 2010, p. 129.

1.3.2.1 Analysis of Court Judgments

The primary research method applied in the present study was the analysis of the leave judgments and the substantive judgments of the Privy Council and the Supreme Court of New Zealand. Five different document analyses were conducted in the present research, each employing different samples of judgments and different coding criteria. The specific details of these investigations, including information on samples, study variables, and analysis techniques, are recounted in **Chapters 7, 8, and 9**.

Three different data collection techniques were used to analyse court judgments. Firstly, the samples of court judgments were coded in terms of their latent content, including background or contextual information such the outcome and the date of the judgment. Secondly, some parts of this project focused on the surface content of the court decisions, including phrases, references, and case citations. Finally, a case study of selected Supreme Court judgments was undertaken in order to supplement the information obtained by content analysis.

1.3.2.2 Official Statistics

In addition to the analysis of court judgments, the study incorporated official statistics. In particular, statistics were employed to examine the workload of the Supreme Court, Privy Council and final appellate courts in overseas jurisdictions. The sources of these data included publications by the Ministry of Justice and Department for Courts in New Zealand, especially the annual reports; and official statistics produced by the Lord Chancellor's Department and the Privy Council Office in the United Kingdom.

1.3.2.3 Secondary Sources

Secondary sources were also used extensively in this research project. A wide range of New Zealand and overseas material were drawn on to assist in the interpretation and contextualisation of the research findings. However, in addition to incorporating general academic commentary, the project focused on two main types of secondary source. Firstly, it drew on official publications prepared by successive governments in New Zealand, Australia, and the United Kingdom, and by international organisations such as the United Nations and the Commonwealth secretariat. These publications include advice on the role and shape of the judiciary and reports on constitutional issues in general.

In addition the proposed project reviewed the extra-judicial writings of senior members of the judiciary from New Zealand, Australia and the UK. This inquiry had four main purposes. Firstly, it aimed to identify whether there were any major differences between the Law Lords and senior New Zealand, Canadian and Australian judges in their avowed approach to applying precedent and in the extent that they draw inspiration from different jurisdictions. Secondly, the review also examined judicial opinion on the role of a final court and, especially, whether there have been any differences in the roles performed by the Privy Council and the Supreme Court. Thirdly, the analysis of extra-judicial writings was used to glean insights into how the members of the New Zealand Supreme Court interpret the leave criteria set

out in section 13 of the Supreme Court Act and what opportunities and barriers this may create for different cases. Finally, these sources provided an authoritative account on how the common law in these three countries has evolved over the past twenty years.

1.3.2.4 Limitations of the Data Collection Techniques

Document analysis was the primary research method utilised throughout this project. The primary weakness with this strategy, as with most research techniques, is that there is a trade-off between reliability and validity.²⁷ On the one hand, coding by surface content, such as counting words and phrases, produces highly reliable data. However, this approach ignores the context in which the words and phrases of interest appear. As a result quantitative document analysis often fails to reveal the full meaning of a communication. On the other hand, coding by latent content, or underlying meaning enhances the richness of the data gathered, but because it necessarily involves a subjective evaluation of the meaning of a text it can be much less reliable than coding by surface content.²⁸

In the present study a number of techniques were employed to overcome this trade-off and increase both the reliability and richness of findings. Firstly, as explained above, the present study employed both quantitative and qualitative document analysis. In the first place, the substantive judgments of the Supreme Court and Privy Council were examined and codified in terms of surface content. As a result this part of the investigation produced highly reliable data. In the second place, selected judgments were then subject to a more in-depth case-study type analysis to ensure that reliability was balanced with depth and contextual understanding.

Secondly, problems with reliability can be mitigated through a systematic approach to gathering and analysing data, the acknowledgement of biases or subjectivities, and by ensuring the transparency of the methodological approach used.²⁹ In the present study each of the five document analyses were conducted using a systematic and clearly articulated approach to data collection and analysis.

An additional problem with the methodological approach is that it is based on the assumption that an analysis of court judgments will allow inferences to be drawn about the decision-making approach of the court in which the judgment was produced. This assumption is problematic, however. Walter Schaefer,³⁰ for example, has pointed out that the written opinions of a court only express the reasoning of the judge who wrote them. Whilst all of the members of court can and do have input into the writing of a judgment, that judgment does not necessarily reflect the opinion of the entire court. To the contrary, courts are often divided, especially over difficult cases, and judges may half-heartedly support a decision without complete conviction.³¹ In the present study I sought to mitigate this problem by referring extensively to extra-judicial material. Instead of simply inferring the decision-making approach of the Supreme Court from the content of its decisions, I have explored what the judges themselves wrote about the process of judging appeals. This allowed the findings of the present study to be triangulated, enhancing the overall reliability and credibility of the methodological approach.

²⁷ E., Babbie, *The Practice of Social Research*, 10th edition, Belmont: Wadsworth/Thomson Learning, 2004.

²⁸ *ibid.*

²⁹ O' Leary, *Supra* fn 26, p. 43.

³⁰ A former judge of the Illinois Supreme Court.

³¹ Walter Schaefer, 'Precedent and Policy', *University of Chicago Law Review*, 34, 1966.

A final methodological issue encountered in the present study was the difficulty in controlling for confounding variables. In particular, most of the Privy Council judgments employed in this project were decided before the sample of Supreme Court appeals. As a result I was unable to exclude the possibility that external factors, especially world-wide trends in the development of the common law, were not driving changes in the study variables over time. Nevertheless three strategies were employed to minimise this problem. Firstly, I selected a chronologically narrow sampling frame. The judgments used in the present study were decided between 1995 and 2012. Secondly, extra-judicial writings and secondary sources were used to highlight general trends in the common law. This allowed broader trends to be taken into account when interpreting the findings of the present study. Thirdly, where possible, time series analysis, using regression analysis, was employed in order to examine trends in the study variables over time.

1.2.3 Thesis Structure

The remainder of this thesis has the following structure. **Part One** examines the background to the Supreme Court Act. This discussion is broken into two parts. **Chapter 2** discusses in more detail the political, social, and legal context in which the final court was patriated and the process involved in drafting and enacting the requisite legislation. Moreover, it indicates how interest group pressure helped to shape the Supreme Court Act. **Chapter 3** explores the constitutional context of the Supreme Court reform. The emphasis of this discussion is on the extent that earlier constitutional developments have helped to set the scene for patriating the final court.

Part Two compares and contrasts the composition, function, and jurisdiction of the Judicial Committee Privy of the Council and the Supreme Court. It comprises three chapters. **Chapter 4** provides a brief overview of the origin, composition, and function of each court. It also discusses the implications of the Supreme Court legislation for the role of the Chief Justice. **Chapter 5** provides a detailed comparison of the jurisdiction of each court, with an emphasis on the limits of that jurisdiction. Finally, **Chapter 6** outlines the leave arrangements for each court and considers that implications of these arrangements for the types of appeals heard by the final court.

Part Three examines the broader legal and constitutional consequences of the patriation of the final court. The overall emphasis of this section is on assessing whether the patriation of the final court has achieved the intentions of the architects of the Supreme Court legislation, especially with respect to the objectives of recognising New Zealand's independence and improving 'access to justice'. It is organised into four chapters. **Chapter 7** compares the workload of the Privy Council and Supreme Court. **Chapter 8** then assesses the consequences of patriation for the doctrine of precedent. **Chapter 9** compares the two courts on the sources cited in their judgments and tentatively evaluates the impact of patriation on the shape of the law espoused by the final court. Finally, **Chapter 10** summarises the overall findings of this thesis.

Part One:

Background to the Supreme Court Legislation

Background to the Supreme Court Legislation

Section Overview

The first part of this thesis considers the background to the Supreme Court reform. This discussion is broken into two chapters. **Chapter 2** examines the political, social, and legal context in which the final court was patriated and the process involved in drafting and enacting the requisite legislation. It has three main purposes. Firstly, it discusses how political willingness to abolish the Privy Council grew in the final decades of the 20th Century and outlines the various social, legal, and international developments that contributed to these changing attitudes. Secondly, it highlights the recurrence of the themes of ‘access to justice’ and ‘independence’ in past debates over whether or not to abolish the Privy Council appeal. Thirdly, the chapter discusses how interest group pressure helped to shape the substantive provision of the Supreme Court Act, especially the purpose clause and leave criteria.

Chapter 3 focuses on the constitutional context of the Supreme Court legislation. The purpose of this discussion is to examine how the Supreme Court reform fits in with New Zealand’s overall constitutional development. Firstly, it briefly surveys the major steps in New Zealand’s transition from colony to independent nation. Secondly, the chapter examines the reasons why the Privy Council has increasingly been considered a constitutional anomaly. Finally, the last part of the chapter considers the impact of the Supreme Court debate on constitutional discourse in New Zealand.

2

Background to the Supreme Court Legislation *Political, Social, and Legal Context*

This chapter surveys in more detail the political, social, and legal background to the Supreme Court legislation. It is divided into two parts. The first section surveys interest group attitudes toward the Privy Council, the growing political willingness to abolish the appeal, and the social, legal, and international developments that helped to shape these attitudes. It also highlights the recurrence of the themes of ‘independence’ and ‘access to justice’ in past debates over whether or not to abolish the Privy Council. The second section considers the immediate political context to the Supreme Court legislation and traces the passage of the Bill through Parliament. In particular, I will outline how the various influences surveyed in the first section, notably pressure by interest groups, helped to shape the substantive provisions of the Supreme Court legislation, especially the purpose clause and the leave criteria.

2.1 The Growing Desire for Reform

2.1.1 Attitudes toward the Privy Council

2.1.1.1 The Legal Profession and the Judiciary

It is ironic that some of the most scathing criticism of the Judicial Committee was recorded one hundred years before the appeal was abolished. In *Wallis v Solicitor-General*¹ the Privy Council had been critical of both the Court of Appeal and the Solicitor-General. An indignant New Zealand judiciary responded with a ‘protest of bench and bar’ at a special sitting in the Court of Appeal in which several judges expressed their dissatisfaction with the Board.² Overall it was felt that their Lordships were unaware of the relevant provisions of New Zealand law and that they had made a number of errors of law and fact.³ For example, Chief Justice Sir Robert Stout (who did not sit on the *Wallis* case) suggested that:

‘[a]t 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, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest.’⁴

Later the Chief Justice outlined, extra-judicially, reasons why New Zealand should abolish the Privy Council.⁵ Yet, despite a strong protest to London by the Agent-General for New Zealand,⁶ the

¹ *Wallis v Solicitor-General* (1903) NZPCC 23

² *Wallis and Others v Solicitor-General*, 25th April 1903, (1840-1932) NZPCC 730 (Appendix).

³ Sir Kenneth, ‘The unity of the common law and the ending of appeals to the Privy Council’, *International and Comparative Law Quarterly*, 54(1), 2005, p. 202-3.

⁴ *Wallis v Solicitor-General*, *Supra* fn 1, at 746.

⁵ Stout, Sir Robert, ‘Appellate Tribunals for the Colonies’ (1904-5) 2 *Commonwealth Law Review* 3.

⁶ The forerunner to the High Commissioner.

colonial government made no moves to abolish or limit appeals. Indeed, at the time such reform was both politically and constitutionally impossible.⁷

During the interwar period discontent with the Privy Council abated. In fact the legal profession and the judiciary now came to strongly favour the retention of the appeal.⁸ This attitude persisted well into the post war period, with the legal establishment and its official voice, the New Zealand Law Society, consistently and enthusiastically supporting the retention of the Privy Council right up until the 1980s.⁹ Indeed, the legal profession as a whole was one of the main sectional interests that resisted abolition of the Privy Council during the 1990s and that opposed the Supreme Court Bill in 2003.¹⁰

Nevertheless, support for the Privy Council was far from unanimous, even amongst the legal profession. In 1970 the Chief Legal Advisor to the Department of Justice, B. J. Cameron, strongly denounced the Judicial Committee as an anachronism. He asserted the strongest argument for abolition was not legal, but political. He felt that to have New Zealand law interpreted by an overseas tribunal was inconsistent with New Zealand's independence.¹¹ Fifteen years later a prominent constitutional lawyer, P. A. Joseph, argued that the right of appeal to the Judicial Committee 'is unnecessary and unresponsive to our national way of life and demeaning of our sovereignty'.¹² Similar sentiments were later expressed by a number of academic lawyers during the Supreme Court debate.¹³

Furthermore, the view of the New Zealand Law Society became more moderate over time. From the 1960s the primary concern articulated by the association began to crystallise around the desirability of retaining a second appeal, rather than retaining an appeal to the Judicial Committee per se.¹⁴ By the time of the Supreme Court debate the Law Society, henceforth united in support of the Privy Council, had adopted a neutral position.¹⁵

The post-war period also witnessed support for abolishing the Privy Council gradually grow amongst the judiciary. In 1976 the President of the Court of Appeal, Sir Thaddeus McCarthy, argued that New Zealand has sufficient judicial resources to manage its judicial system without recourse to London. He suggested that, although it is ultimately a political decision, 'it is only a matter of time when the link with the Privy Council will go'.¹⁶ Eleven years later one of his successors, Sir Robin Cooke, publicly

⁷ Abolition was politically out of question because the local courts were not yet firmly established and a substantial part of the electorate was born in Britain and had strong sentimental attachments to Britain and the Empire (see B. J. Cameron, 'Appeals to the Privy Council-New Zealand', *Otago Law Review*, 1970 p 175). Moreover, the New Zealand legislature was unable to abolish the right of appeal until the adoption of the Statute of Westminster in 1947.

⁸ For example, in a speech at the 1930 Dominion Legal Conference Chief Justice Sir Michael Myers referred to the Judicial Committee as the finest tribunal in the world and expressed hope that it will 'forever remain' (*New Zealand Law Journal*, 6, 1930, p. 83). The Conference itself unanimously adopted a resolution that the right of appeal should be retained because it is in the best interest of New Zealand and the administration of justice.

⁹ In 1965 and again in 1983 the Council of the New Zealand Law Society passed resolutions supporting the retention of the right of appeal to the Privy Council. The position adopted in 1983 was unanimous (see Keith, *Supra* fn 3, p. 205).

¹⁰ See, for example, the select committee submissions made by legal interests. Most of the regional law societies (including the Auckland District Law Society) and the Criminal Bar Association opposed the abolition of the Privy Council appeal (Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p. 10).

¹¹ Cameron, *Supra* fn 7, p. 183.

¹² P. A. Joseph, 'Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights', *Canterbury Law Review*, 2, 1985, p. 273.

¹³ See, for example, Justice and Electoral Committee, *Supra* fn 10 p, 7-10.

¹⁴ Cameron, *Supra* fn 7, p. 178.

¹⁵ See, for instance, the submission of the New Zealand Law Society to the Justice and Electoral Committee. The submission of the Auckland Women Lawyers' Association also adopted a neutral position (see Justice and Electoral Committee, *Supra* fn 10, p. 13).

¹⁶ Sir Thaddeus McCarthy, *New Zealand Law Journal*, 1976, p. 380.

withdrew his support for the Privy Council and advocated abolition.¹⁷ By the 1990s a number of senior judges and ex-judges supported the ending of appeals to London, at least privately,¹⁸ although there were also notable exceptions.¹⁹ Many of these current and former judges made influential select committee submissions on the Supreme Court Bill.²⁰ For example, the Rt Hon E. W. Thomas, formerly a member of the Court of Appeal, commented that the system of appeals to London was ineffective and inefficient and impaired New Zealand's status as a sovereign nation.²¹

2.1.1.2 Māori Perspectives

Like the legal profession, Māori have also traditionally favoured the retention of the Privy Council appeal. In the first place, there has long been a perception amongst Māori that they have received a more favourable hearing from the Privy Council compared to the New Zealand courts.²² Many Māori, like their non-Māori counterparts, valued the Privy Council as independent, impartial, and predictable. In addition some Māori felt that the decisions of the New Zealand courts were sometimes based more on social context than on the law. In contrast, there was a perception that the Judicial Committee dealt with 'legal questions as legal questions'.²³

Secondly, the Judicial Committee has traditionally been portrayed, both by Māori and by some academic commentators, as the 'guardian of traditional Māori interests'. In part, this perception of guardianship stemmed from a collection of early Privy Council decisions, notably *Wallis v Solicitor-General*²⁴ and *Nireaha Tamaki v Baker*,²⁵ which were perceived as favorable to Māori. For instance, many Māori revered the Judicial Committee for rejecting the colonial government's claim that under the common law they had no customary title to their traditional lands²⁶ and for rejecting the insistence by the local courts that the issue was non-justiciable.²⁷ It is perhaps unsurprising that these were precisely the

¹⁷ See Sir Robin Cooke, 'The New Zealand Legal Identity' *Canterbury Law Review*, 3, 1987, p 171. Compare to Sir Robin Cooke, 'International Commission of Jurists Seminar', Wellington, 10 May 1985 where Sir Robin advocated retaining the Privy Council appeal because of the extensive experience of their Lordships in interpreting Commonwealth Bills of Rights.

¹⁸ Several retired senior members of the judiciary made oral submissions in favour of the Supreme Court Bill to the select committee, including the Rt Hon E. W. Thomas (Court of Appeal, 1995-2001) and the Rt Hon Lord Cooke of Thorndon (Court of Appeal 1976-1996, President from 1986). The evidence of sitting judges was treated as private evidence by the select committee. However, extra-judicial comments on the deficiencies of the Privy Council appeal by Elias CJ, Keith and Blanchard JJ following the enactment of the Supreme Court legislation indicate that many of New Zealand's senior sitting judges probably favoured patriation of the final court (See, for example, Rt Hon Dame Sian Elias, 'Something old, something new: Constitutional stirrings and the Supreme Court', *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 121-137; Keith, *Supra* fn 3; Rt Hon Peter Blanchard, 'The early experience of the New Zealand Supreme Court'. An address commemorating the retirement of Sir Kenneth Keith, 2007b).

¹⁹ In a 1995 essay the (then) Chief Justice, Sir Thomas Eichelbaum, noted that he had personally never advocated abolition and suggested that the special qualities of learning, experience, depth of legal culture, and refinement of style will not be foreseeably replaced if the Privy Council appeal is abolished (Sir Thomas Eichelbaum, 'Brooding Inhibition or Guiding Hand? Reflections on the Privy Council Appeal' in Joseph, P. A. (ed) *Essays on the Constitution*, 1995, p. 112, 128). In addition, Justice Sir Alexander Turner (Court of Appeal 1962-1973) and Justice Edward Somers (Court of Appeal, 1981-1990) expressed support for the Judicial Committee appeal in interviews with Peter Spiller in 1993 and 1998, respectively. Turner J believed that the appeal acted as a wholesome check on the Court of Appeal and kept the law more stable and consistent. Somers J felt that it was extremely important, especially in commercial matters, that cases be dealt with in the same way and that New Zealand and England not end up with different law (See Peter Spiller, *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2002.).

²⁰ See also the parliamentary debates on the select committee report (Supreme Court Bill: Second Reading, *Hansard*, 7th October, 2003).

²¹ Justice and Electoral Committee, *Supra* fn 10, p.7

²² Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000, p. 4.

²³ Justice and Electoral Committee, *Supra* fn 10, p.12.

²⁴ *Supra* fn 1.

²⁵ (1902) NZPCC 371 (PC).

²⁶ Megan Richardson, 'The Privy Council and New Zealand', *The International and Comparative Law Quarterly*, 46(4), Oct 1997, p. 913.

²⁷ *Wallis v Solicitor-General*, *Supra* fn 1.

decisions that had sparked unprecedented criticism of the Privy Council by the judiciary and colonial government.

It has also been suggested that the tendency of Māori to view the Judicial Committee as discharging a protective role reflects the internalised distrust that some Māori have towards the Executive as a result of the grievous injustices that were perpetuated by the colonial government.²⁸ Furthermore, Megan Richardson²⁹ has suggested that the Privy Council has given some credence to these feelings of distrust, by, for example, allowing a high proportion of appeals and through key decisions that were perceived as upholding traditional Māori tribal interests.³⁰ It is interesting to note that, during the Supreme Court debate, several Māori groups emphasised that they did not have trust or faith in the New Zealand courts, but expressed trust in the Privy Council.³¹

In the third place, some Māori have viewed the right of appeal to the Privy Council as a spiritual and personal link to the sovereign that was not otherwise available from the local courts, the Governor-General, the Executive, or Parliament.³² This link was seen as important because it underpinned the relationship that many Māori feel that they have with the Sovereign as partners to the Treaty of Waitangi.³³ However, the idea that the Privy Council provides a symbolic link to the Sovereign has often been downplayed by officials and academics³⁴ because it is based on a legal fiction.³⁵ Nevertheless, these notions were an important part of the perspective that was expressed by Māori during the attempts by successive governments to abolish the Privy Council in the 1980s and 1990s and again during the Supreme Court debate in 2003. For example, one submission on the Supreme Court proposal argued that Māori have a right of access to the Sovereign through the Privy Council under Article 3 of the Treaty. As a result, abolition of the appeal would be prejudicial to the status of Māori.³⁶

However, support for the Privy Council was not unanimous within Māoridom. In particular, urban Māori groups have been much less supportive of retaining links to the Judicial Committee than Māori who retain traditional tribal affiliations. This was readily apparent during debate over the Supreme Court Bill where the New Zealand Māori Council, the Māori Women's Welfare League and the National Urban Māori Authority (NUMA) were supportive of the Supreme Court proposal.³⁷ According to NUMA, which represents nine urban Māori authorities, the Judicial Committee had not operated as the guardian of urban Māori interests.³⁸ This attitude is unsurprising given that recent Privy Council decisions have tended to favour traditional Māori tribal interests over urban Māori interests.³⁹

²⁸ Arahia Macrae, 'The declining Relevance of the Privy Council in Māori Claims', *Auckland Universities Law Review*, n.d., p. 969-970. The author cites the opinion of Professor Winiata Whatarangi.

²⁹ A former Senior Legal Research Officer in the Law Commission.

³⁰ Richardson, *Supra* fn 26, p. 917.

³¹ Justice and Electoral Committee, *Supra* fn 10, p. 12.

³² *ibid*, p. 76.

³³ See, for example, Georgina Te Heuheu's speech during the first reading debate over the Supreme Court Bill where she explains the importance of this symbolic link (Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002)

³⁴ Examples of a dismissive attitude towards these issues during the debate over the Supreme Court legislation include the Attorney-General's discussion paper (Office of the Attorney-General, *Supra* fn 22, p. 4); and the terse treatment of the issue in the advice provided to the Justice and Electoral Committee by the Crown Law Office on the consistency of the Supreme Court Bill with the Treaty of Waitangi (Justice and Electoral Committee, *Supra* fn 10, p. 71-8).

³⁵ The modern notion of a separate and divisible Crown means that the obligations of the, once singular, Imperial Crown under the Treaty of Waitangi are now those of the Crown in Right of New Zealand, not the Sovereign's English representatives (*New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513). Moreover, although the decisions of the Judicial Committee take the form of advice to the Sovereign, it is in substance and reality a court of law (see *Ibralebbe v R* [1964] AC 900).

³⁶ Justice and Electoral Committee, *Supra* fn 10, p. 11.

³⁷ *ibid*, p. 9.

³⁸ *ibid*, p. 9.

³⁹ See, for example, *Treaty Tribes Coalition v Urban Māori Authorities* [1997] 1 NZLR 513.

2.1.1.3 The Political Will for Change

The question of whether or not to abolish the appeal to the Privy Council has never been a significant political issue.⁴⁰ Before World War II, with the notable exception of the reaction to the *Wallis* decision, there was very little parliamentary criticism of, or even comment about, the Privy Council.⁴¹ This political disinterest continued well into the post-war period. Instead the main issue, in terms of judicial reform, was the establishment of a permanent Court of Appeal in 1957.⁴² The lack of political impetus for reform was illustrated by the fact that when the court structure was reviewed in 1978 the terms of reference of the Royal Commission did not provide for a review of the final court.⁴³

On the few occasions where a Member of Parliament did comment on the Judicial Committee, the sentiments expressed were generally positive.⁴⁴ It is symbolic of the early post-war attitude that the only reform affecting the final court was an abortive attempt to confer additional appeal rights by empowering the Court of Appeal to grant leave to the Privy Council in criminal cases originating in the Magistrates Court.⁴⁵ This provision stands in stark contrast to developments in the remainder of the Commonwealth, where the overwhelming trend was to restrict or abolish appeal rights.⁴⁶

Nevertheless, parliamentary support for retaining links to the Judicial Committee was slowly beginning to wane. In 1965 the New Zealand Attorney-General, Ralph Hanan, embraced a suggestion by the Lord Chancellor, Lord Gardiner, that the Privy Council and House of Lords be replaced with a Commonwealth Court of Appeal.⁴⁷ Later he abandoned this stance and declared that an appeal to any tribunal outside New Zealand was outdated.⁴⁸ Furthermore, in 1983 Prime Minister Sir Robert Muldoon, in the wake of the controversial *Lesā* decision,⁴⁹ announced that the time is approaching when the Privy Council will decline in its usefulness to New Zealand. At least three subsequent Prime Ministers have also publicly supported abolishing the Privy Council,⁵⁰ although other senior Ministers have favoured retention.⁵¹ By the 1990s a fundamental cross-party consensus had emerged on the issue of ending the link with the Privy Council, although party politics often meant that the Government and Opposition of the day were obliged to adopt conflicting positions on the issue.⁵²

⁴⁰ Margaret Wilson, 'From Privy Council to Supreme Court: A rite of passage for New Zealand's legal system', *Waikato Law Review*, 18, 2010, p. 3.

⁴¹ Keith, *Supra* fn 3, p. 204.

⁴² *ibid*, p. 205.

⁴³ Joseph, *Supra* fn 12, p. 273. However, the Royal Commission still canvassed arguments for and against retaining the Privy Council.

⁴⁴ In 1947 at least one Legislative Councillor went so far as to vote against the Statute of Westminster Adoption Act on the basis that the grant of full legislative power would pave the way for the abolition of the Privy Council (Sir William Perry, 279 *New Zealand Parliamentary Debates* 531, cited in Cameron, *Supra* fn 7, p. 173).

⁴⁵ Justices of the Peace Amendment Act 1946, ss 4 and 5. These provisions conflicted with Privy Council practice and the relevant Imperial subordinate legislation. As a result in *Woolworths Ltd v Wynne* [1952] NZLR 496 (CA), the Court of Appeal, applying the Privy Council decision in *Chung Chuck v The King* [1930] AC 244, held that any grant of leave made under these provisions was ineffective. The Act was repealed in 1957.

⁴⁶ Cameron, *Supra* fn 7, p. 177.

⁴⁷ The suggestion was made at the Commonwealth and Empire Law Conference in Sydney.

⁴⁸ Cameron, *Supra* fn 7, p.177.

⁴⁹ *Lesā v Attorney-General* [1982] 1 NZLR 165 (PC). The Privy Council, disapproving the Court of Appeal decision in *Levave v Immigration Department* [1979] 2 NZLR 74 (CA), held that Western Samoans born before the British Nationality and New Zealand Citizenship Act 1948 came into force were New Zealand citizens. The decision conferred citizenship upon approximately 100,000 Western Samoans. This outcome was unacceptable to the New Zealand and Samoan Governments and remedial legislation was quickly passed to reverse the effect of the decision.

⁵⁰ Sir Geoffrey Palmer (1990), Jim Bolger (1990-1998), and Helen Clark (1999-2008)

⁵¹ Notable examples include the Hon Bill Jefferies, who was Minister of Justice in the Fourth Labour Government; and the Rt Hon Winston Peters, leader of the New Zealand First Party and Deputy Prime Minister and Treasurer from 1996-1997.

⁵² Wilson, *Supra* fn 40, p. 13.

2.1.2 Social, Legal, and International Developments

2.1.2.1 Legal and Cultural Nationalism

A number of social, cultural, and legal trends were associated with the growing political and judicial support for patriating the final court. In the first place, attitudes toward the Privy Council were closely tied to the development of an independent New Zealand legal identity. New Zealand legal history has been characterised by alternating periods of local adaptation and periods of ‘slavish imitation’.⁵³ For instance, the years before World War I saw a large amount of pioneering legislation, including the first movements towards a nascent welfare state; and innovative judicial decisions that responded to local conditions and drew on a broad range of overseas jurisprudence.⁵⁴ In contrast, the interwar and early post-war periods, were characterised by a much less innovative spirit. Legal decision-making was no longer capacious and adventurous, but narrow and derivative, with English decisions, especially those of the House of Lords, followed almost slavishly.⁵⁵ It is not a coincidence that criticism of the Privy Council was much more muted during the interwar period compared to the period before World War I.

The latter half of the 20th Century marked a new era of legal innovation. A number of distinctive statutory reforms emerged from the 1960s onwards, with the process of change accelerating during the free-market and public sector reforms of the 1980s and early 1990s.⁵⁶ In addition, there was a growing divergence between English common law and the common law of New Zealand. Many of these differences were driven by the new statutory reforms. However, local judicial innovation, the diminishing Englishness of the common law globally, and a new willingness to consider a broader range of overseas jurisprudence were also factors.⁵⁷ Moreover, the Privy Council, an institution whose purpose was to uphold the unity of the common law, increasingly countenanced local divergences, especially in areas of law involving a high policy component. To a large extent this reflected a growing awareness by their Lordships that the Board had limitations in assessing local conditions.⁵⁸

The development of a separate legal identity led the President of the Court of Appeal, Sir Robin Cooke, in 1987 to resile from his previous support for retaining the Privy Council and to declare that:

‘New Zealand law...has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook. Common sense dictates the inevitable result. The differences have reached the stage when the last say in the decisions of our case law...cannot sensibly be left to a remote body with little real connection with New Zealand or touch with New Zealand issues.... We must accept responsibility for our own national legal destiny and recognise that the Privy Council appeal has outlived its time. Not to take the obvious decision now would be to renounce part of our nationhood.’⁵⁹

Secondly, national identity and New Zealand’s sense of place in the world also helped to mould attitudes toward the Judicial Committee. Until the 1960s most New Zealanders identified as British. The ties with Britain and the Empire were emphasised and, at times, pro-imperial sentiment reached a quasi-

⁵³ Elias, 2004b, *Supra* fn 18, p. 126.

⁵⁴ *ibid*, p125-6; Keith, *Supra* fn 3, p. 200.

⁵⁵ Elias, 2004b, *Supra* fn 18, p. 126-7.

⁵⁶ Examples include the Ombudsmen Act 1962, various contract statutes, an accident compensation scheme, neo-liberal economic policies, the State Sector Act 1988 and other public sector reforms, the Bill of Rights Act 1990, a North American model of corporate law, the Human Rights Act 1993, reforms to employment law, an Act dealing with resource management, and the introduction of a proportional electoral system (Keith, *Supra* fn 3, p. 207; Wilson, *Supra* fn 40, p. 10).

⁵⁷ Cooke, 1987 *Supra* fn 17, p. 171-183; Elias, 2004b, *Supra* fn 18, p. 126-8.

⁵⁸ For instance, *Australian Consolidated Press v Uren* [1969] 1 AC 590; *Reid v Reid* [1982] 1 NZLR 147; *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

⁵⁹ Cooke, *Supra* fn 17, p. 182-3.

religious fervour.⁶⁰ Moreover, many political leaders did not recognise New Zealand as having a distinct international personality apart from the British Empire. As a result, they were reluctant participants in the intra-imperial processes that culminated in the 1926 Balfour declaration and the Statute of Westminster 1931.⁶¹ These attitudes reflected, inter alia, New Zealand's predominately English and Scottish migrant population and its economic and security dependence on Britain.⁶²

However, from the 1970s the sense of 'Britishness' was replaced with a more independent national identity. This transition reflected social changes within New Zealand including the post-1945 Māori resurgence; new social movements, including the anti-nuclear protests; changes to immigration; and, ultimately, a more multi-cultural population that has a less cultural or emotional allegiance toward Britain. It also took place in the context of the progressive weakening of New Zealand's political, defence, and economic ties with Great Britain.⁶³ Interestingly, Margaret Wilson, in an account of her personal reasons for wanting to abolish the Privy Council appeal, highlighted Britain's entry into the European Economic Community as a watershed moment. She suggested that this fundamentally changed the relationship between New Zealand and Britain and was a signal that it was 'time for New Zealand to grow up and take responsibility for its own future'.⁶⁴

2.1.2.2 Ideology and Republicanism

The ideological persuasion of the government, although perhaps not a major factor, is also part of the context of the Supreme Court legislation. During the Supreme Court debate some commentators suggested that the Supreme Court was the product of the republican and nationalistic leanings of the centre-left Labour government.⁶⁵ These commentators noted that key governmental figures, such as Prime Minister Helen Clark and Attorney-General Margaret Wilson, were republicans. They also pointed out that the government had taken several symbolic steps in the direction of a republic.⁶⁶

However, the contention that ideology was a primary driver of the Supreme Court reform is problematic. Firstly, the issue clearly transcended traditional ideological divides. Since the 1980s successive governments of varying ideological complexions had advocated the idea of abolishing appeals to the Privy Council.⁶⁷ In each case the Opposition had felt obliged, mostly for political reasons, to oppose any concrete government proposals. Secondly, although many of those who wanted to end appeals to the Privy Council were republicans,⁶⁸ some prominent supporters of the Supreme Court proposal were monarchists.⁶⁹ Moreover, there were republican politicians who voted against the Supreme Court Bill for political reasons.⁷⁰

⁶⁰ James Belich, *Paradise Reforged: A History of New Zealanders from the 1880s to the Year 2000*, Auckland and London, 2001.

⁶¹ Keith, *Supra* fn 3, p. 205.

⁶² Belich, *Supra* fn 60

⁶³ *ibid.*

⁶⁴ Wilson, *Supra* fn 40, p. 5.

⁶⁵ For instance, B., Logan, and J., McNeil, 'Supreme Court Act: Radical constitutional change', *Evidence*, summer 2004, p. 8-10.

⁶⁶ John, Armstrong, 'Perfect time for the axe to swing', *The New Zealand Herald*, October 9th, 2003.

⁶⁷ The Third National Government was socially conservative and economically interventionist, whereas the Fourth Labour Government and Fourth National Government were economically liberal. All of these governments expressed support for ending the Privy Council appeal.

⁶⁸ Notable examples include National Party Prime Minister Jim Bolger and Labour Party Prime Minister Helen Clark.

⁶⁹ Examples include the Deputy Prime Minister, Dr Michael Cullen, and Lord Cooke of Thorndon.

⁷⁰ A notable example was United Future leader Peter Dunne, ostensibly because the government had undertaken insufficient or flawed public consultation over the proposed changes.

Nevertheless, it does appear that nationalistic sentiment did influence the manner in which the policy was articulated and justified. Firstly, national identity and independence were amongst the main reasons for abolition set out in the Attorney-General's discussion document.⁷¹ Similar themes were also expressed in the parliamentary debates on the Supreme Court Bill. Those MPs who spoke in favour of the proposed legislation, especially members of the Green Party and Progressive Coalition, referred to nationhood, identity, forward progress and even, at times, expressed republican and anti-colonial sentiments. Moreover, it also appeared that, in general, centre-left politicians were more comfortable than those of the centre-right with the notion that New Zealand is a South Pacific nation and that it is increasingly culturally and economically separate from Britain and Europe.⁷²

Finally, the Supreme Court reform is part of a pattern of nation-building policies introduced by the fifth Labour Government. In her own account of the reforms, Margaret Wilson, although denying that independence and an eventual republic were the primary motives for abolition, did admit that the government had consciously sought to develop a sense of identity through support for the arts, sports, and commemorating New Zealand's involvement in the major 20th Century wars.⁷³ Other nationalistic and symbolic measures introduced contemporaneously with the Supreme Court Bill include the ending of knighthoods, the replacement of Queens Counsel with Senior Counsel, a hiatus in the appointment of senior politicians and judges to the Privy Council, and the decision not to schedule a meeting of the Privy Council in New Zealand during a visit by Her Majesty the Queen in 2002.

2.1.2.3 Commonwealth Developments

In addition to trends within New Zealand, the Supreme Court legislation can also be considered in the context Commonwealth and Empire-wide developments. Of particular relevance is the progress, throughout the second half of the 20th Century, of much of the former Empire towards greater political and legal independence. This process of decolonisation was associated with the decline of the Privy Council both in its role as Final Court for the Commonwealth and as symbol of Commonwealth unity.

Some commentators have suggested, somewhat erroneously, that the demise of the Privy Council was inevitable after the passage of the Statute of Westminster 1931 (Imp).⁷⁴ Certainly one of the main consequences of the Statute was to empower the Dominion⁷⁵ legislatures to limit or abolish appeal rights to the Judicial Committee.⁷⁶ Moreover, the Statute had an immediate impact. Ireland abolished appeals in 1932 and Canada excluded criminal appeals a year later. The swiftness of the latter reform was unsurprising. A large part of the impetus behind the Statute of Westminster itself was Canadian

⁷¹ Office of the Attorney-General, *Supra* fn 22, p. 1-2.

⁷² Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002.

⁷³ Wilson, *Supra* fn 40, p. 13.

⁷⁴ For example, Cameron, *Supra* fn 7, p. 177.

⁷⁵ Section 1 of the Statute of Westminster limited the definition of 'Dominion' to Australia, Canada, Newfoundland, New Zealand, the Irish Free State, and the Union of South Africa. The Statute did not apply to other parts of the British Empire.

⁷⁶ The Statute of Westminster provided that the laws made by the Dominion Parliaments had extra-territorial effect (s 3) and were no longer subject to the Colonial Laws Validity Act 1865 (s 2). The Privy Council decision in *British Coal Corporation v The King* [1935] AC 500 (PC) provides an authoritative statement of the implications of the Statute of Westminster for the competence of a Dominion legislature to limit or abolish Privy Council appeals.

dissatisfaction with several Privy Council decisions,⁷⁷ especially a decision in which their Lordships had held that the Canadian Parliament was powerless to limit the prerogative right of the King in Council to hear criminal appeals.⁷⁸

Yet, the Statute of Westminster applied only to the Dominions. In the rest of the Empire-Commonwealth the Privy Council remained an entrenched part of the constitutional framework. Such was the position until, after World War II, many of these territories began to progress towards independence. The issue of Privy Council appeals was then able to be addressed as part of the broader constitutional discussions that accompanied decolonisation. Because political leaders in the newly emergent nations tended to see independence of the judiciary as a non-negotiable aspect of sovereignty, many of the new states, especially in Africa and Asia, tended to abolish links to the Privy Council either at, or soon after, political independence.⁷⁹ By the 1960s the Privy Council was widely perceived to be a dying institution, reflecting the rapid pace of decolonisation.⁸⁰

Despite such dire predictions, a substantial number of Commonwealth countries still retained a right of appeal to the Privy Council, even at the turn of the Century.⁸¹ Nevertheless, the diminished jurisdiction of the Privy Council⁸² was a major issue raised by supporters of the Supreme Court reform. In particular, some political mileage was made over the fact that many of the remaining jurisdictions were small, often not very viable, Caribbean states, whereas the larger and more constitutionally stable Commonwealth countries had abolished the appeal.⁸³

Furthermore, two events intervened during the Supreme Court debate to raise additional questions over the future of the Privy Council. Firstly, in mid-2003 the Caribbean Community established the Caribbean Court of Justice (CCJ) and most Caribbean nations signalled their intentions to withdraw from the Privy Council in favour of the new regional court.⁸⁴ Secondly, at approximately the same time the British Government announced proposals to reform the United Kingdom's own court system. In particular, they announced plans to replace the Appellate Committee of the House of Lords with a new Supreme Court for the United Kingdom and to transfer devolution appeals from Scotland, Ireland and Wales from the Privy Council to the new Supreme Court.⁸⁵

⁷⁷ Much of the dissatisfaction arose from constitutional cases that dealt with questions around the proper balance of power between the provincial legislatures and the Dominion Parliament (Maurice Kelly, 'Leaving Their Lordships: The Commonwealth experience', *New Zealand Law Journal*, 1994, p. 102-3).

⁷⁸ *Nadan v The King* [1926] AC 482 (PC). The case questioned the validity of 1888 legislation that purported to bar criminal appeals to the Judicial Committee. Their Lordships held that, because the Dominion was subject to the Colonial Laws Validity Act 1865 (Imp), the legislature could not validly enact a statute that conflicted with imperial laws; in this case the Judicial Committee Acts. Moreover, the provision in question needed to have extra-territorial effect to operate. This was also barred by the 1865 Act.

⁷⁹ Kelly, *Supra* fn 77, p. 107. Notable exceptions included Ceylon, which retained appeals until 1972, and Kenya, Malawi, and Malaysia, which retained the Privy Council even though they became republics.

⁸⁰ Cameron, *Supra* fn 7, p. 177.

⁸¹ The Commonwealth countries that, as of December 2000, still retained appeal rights to the Privy Council included Antigua and Barbuda, Anguilla, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Brunei and Maldives, Cayman Islands, Dominica, Falkland Islands, Gibraltar, Grenada, Jamaica, Kiribati (constitutional rights), Mauritius, Montserrat, New Zealand (including Niue, Rarotonga, and Tokelau), Pitcairn Island, St Helena, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos Islands, and Tuvalu. In addition the Judicial Committee had jurisdiction to hear appeals from the UK's Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus (Office of the Attorney-General, *Supra* fn 22, p. 14).

⁸² The Commonwealth countries that have abolished appeal rights to the Privy Council include Australia (federal jurisdictions in 1968, state jurisdictions 1975 and 1986), Canada (criminal appeals in 1933, civil appeals in 1949), Cyprus, Fiji (following the 1987 coup), Ghana, Hong Kong (as part of the 1997 handover to China), India (1949), Ireland (1932), Lesotho, Malaysia (criminal and constitutional appeals in 1978, civil appeals in 1985), Malawi, Malta, Pakistan (1950), Sierra Leone, Singapore (1994), South Africa (1950), Sri Lanka (1972), Tanzania, Zambia, and Zimbabwe (Office of the Attorney-General, *Supra* fn 22, p.14).

⁸³ See, for example, Office of the Attorney-General, *Supra* fn 22, p. 2 and the parliamentary debates associated with the Supreme Court Bill.

⁸⁴ Justice and Electoral Committee, *Supra* fn 10, p. 5.

⁸⁵ See Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, CP 11/03 July 2003.

It seemed likely that the United Kingdom reforms, together with the projected loss of appeals from the Caribbean nations, would substantially reduce the Privy Council's case load and even to put its future in doubt.⁸⁶ The Justice and Electoral Committee, for example, estimated that the total number of Privy Council appeals per annum would be reduced to a paltry 24, twelve of which would be from New Zealand.⁸⁷ However, the dire predictions for the future of the Judicial Committee were premature. Although the Privy Council's jurisdiction to hear devolution appeals was duly transferred to the new Supreme Court for the United Kingdom,⁸⁸ the projected loss of appeals from the Caribbean did not occur. A decade after its establishment, only three out of the 15 countries of the Caribbean Community had submitted to the appellate jurisdiction of new Caribbean Court of Justice.⁸⁹

2.2 The Patriation of the Final Court

2.2.1 Previous Attempts at Abolishing the Privy Council

During the 1980s and 1990s two attempts were made by successive governments to abolish appeals to the Judicial Committee. The first attempt was initiated in 1987 when the Attorney-General, Sir Geoffrey Palmer, announced that the Labour Government would abolish the Privy Council to commemorate the 150th anniversary of the signing of the Treaty of Waitangi in 1990. A subsequent Law Commission report, published in March 1989, proposed that the District Court become a court of competent jurisdiction, the High Court be the immediate appellate court, and the Court of Appeal become the final appellate court.⁹⁰

The proposed reforms did not progress any further. The immediate reason was division within the Cabinet. In particular, the Minister of Justice, the Hon Bill Jefferies, preferred to retain the Privy Council.⁹¹ Opposition from the legal profession and commercial leaders also contributed to the decision not to proceed.⁹² Moreover, one legal researcher, Megan Richardson, has suggested that the Privy Council, by its own inadvertent actions, fostered continuing links with New Zealand, in a way that militated against abolition. Firstly, in the late 1980s their Lordships decided two major appeals in the government's favour.⁹³ Secondly, she concluded that, by allowing a high proportion of appeals, the Privy Council helped to reinforce the lack of trust that some sections of the community, especially Māori, have traditionally had in the New Zealand courts.⁹⁴

⁸⁶ Justice and Electoral Committee, *Supra* fn 10, p. 4-5.

⁸⁷ *ibid*, p. 5.

⁸⁸ The Supreme Court of the United Kingdom was established by Part 3 of the Constitutional Reform Act 2005. It began hearing appeals from the 1st of October 2009.

⁸⁹ Bert Wilkinson, 'Jamaica to assert independence by abandoning British appeals court', *New York Amsterdam News*, 103(3), 2012, p. 16.

⁹⁰ Law Commission, *The Structure of the Courts*, Wellington: Law Commission, 1989.

⁹¹ Wilson, *Supra* fn 40, p. 4.

⁹² Richardson, *Supra* fn 26, p. 909.

⁹³ *Databank Systems Ltd v Commissioner of Inland Revenue* [1989] 1 NZLR 422 and *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 27.

⁹⁴ Richardson, *Supra* fn 26, p. 909-918.

A further attempt to abolish the appeal was made during the 1990s by the National-led Government. On the initiative of Prime Minister Jim Bolger, the Solicitor-General was asked in 1994 to prepare a report on issues relating to the availability of appeals to the Privy Council, including arguments for and against abolition and possible alternatives. The subsequent report⁹⁵ advocated ending the Privy Council appeal and gave several options for an alternative. Option two, which was accepted by the government, proposed that the Court of Appeal should become New Zealand's highest appellate court.

In May 1996 the Minister of Justice, the Hon Douglas Graham, introduced the New Zealand Courts Structure Bill to Parliament. However, before the proposed legislation could be further progressed through Parliament, New Zealand had its first MMP election. After the election the National Party needed the support of the New Zealand First Party to form a government. New Zealand First opposed the abolition of the Privy Council and one of the stipulations of the coalition agreement with National was that the appeal would be retained. Outside Parliament there was also mounting opposition to the Bill from sectional interest groups, especially from Māori. Even the Labour Party, erstwhile proponents of abolition, now began to express concerns.⁹⁶ As a result the Minister of Justice announced in January 1997 that the government did not have sufficient support to proceed with the Bill.

2.2.2 The Supreme Court Act

2.2.2.1 Prelude to the Supreme Court Bill

A third attempt to abolish appeals to the Privy Council was made following the election of a Labour-led government in 1999. The first step in the reform process was the publication of a public discussion paper. The starting point for this paper, and the source of its 'guiding principles for reform' were the 1978 Royal Commission report and 1989 Law Commission report.

The discussion paper, entitled *Reshaping New Zealand's Appeal Structure*, was released by the Office of the Attorney-General in December 2000. It was a relatively short document, comprising two parts. The first part briefly summarised the reasons why the government felt that ending appeals to the Privy Council was 'inevitable'. The second part sketched out three proposals for a replacement final court. The first option was simply to end the right to appeal to the Privy Council and leave the Court of Appeal as the final court. The second was to create two levels of appeal within the Court of Appeal. Thirdly, it was suggested that an appeals division could be created within the High Court.

These proposals were underpinned by ten 'guiding principles for reform'. The most important was the idea that the Court of Appeal should become New Zealand's final court. Other key principles that guided the initial reform proposal were: maintaining judicial independence; recognising Māori values and interests protected by the Treaty of Waitangi; reflecting the nature of New Zealand society; meeting the needs of the community; and 'access to justice'.⁹⁷ These principles reflected many of the concerns that

⁹⁵ Solicitor-General, *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure*, Wellington: Crown Law Office, March 1995.

⁹⁶ Wilson, *Supra* fn 40, p. 4.

⁹⁷ Office of the Attorney-General, *Supra* fn 22, p. 12-13.

had previously been expressed about the Privy Council and anticipated many of the issues that would subsequently be raised during debate over the Supreme Court legislation.

Seventy submissions were received in response to the discussion paper. Opinion on the question of abolishing the Privy Council was evenly divided, but there was a strong preference for a new separate and independent final court if abolition was implemented. The Attorney-General concluded that, whilst the Privy Council was not an issue of high public concern, people's opinions on its retention or abolition were entrenched, with little room for compromise. However, she felt that agreement may be possible on the question of a replacement appellate court. As a result future public discussion and the Government's consultation with sectional interests focused on the new Supreme Court, not the question of abolition.⁹⁸

2.2.2.2 Parliamentary Process

In October 2001 Cabinet approved the establishment of an advisory group chaired by the Solicitor-General and comprising representatives of key stakeholder groups, including Māori, the legal profession, and business community, to advise the Attorney-General.⁹⁹ The Ministerial Advisory Group was not concerned with the issue of abolition, but on developing a detailed proposal in regards to the structure, role and composition of a new final court.¹⁰⁰ The Supreme Court Bill, based largely on the recommendations of the advisory group, was introduced to Parliament on the 9th of December 2002. It passed its third reading on the 14th of October the following year by the slim margin of 63 votes to 53.¹⁰¹

The Supreme Court Bill remained substantially unchanged during its passage through Parliament. Nevertheless, there were a few noteworthy amendments. The Justice and Electoral Committee, for example, proposed several changes that were designed to accommodate the concerns of Māori, the legal profession, and the business community.¹⁰² These included several amendments to the leave criteria. The major change was to remove 'a significant issue relating to tikanga Māori',¹⁰³ as one of the leave criteria. This change was the result of several submissions, including some Māori submissions, which argued that the reference to Tikanga was either too broad and ill-defined, or discriminatory.¹⁰⁴ Furthermore, the select committee proposed that the Supreme Court be required to give written reasons when it refuses to grant leave, rather than leaving this as a discretionary matter. Although compulsion goes against international precedent, a majority of the select committee felt that the requirement for written reasons is consistent with natural justice and that it would enhance the accountability and transparency of the new final court.¹⁰⁵

In addition, the select committee suggested two major alterations to the purpose clause. Firstly, it was emphasised that the purpose of establishing the new court was to recognise New Zealand's independence and to allow important legal matters, including those relating to the Treaty of Waitangi 'to

⁹⁸ Wilson, *Supra* fn 40, p. 6.

⁹⁹ Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report to Hon Margaret Wilson Attorney-General and Associate Minister of Justice*, Wellington: Office of the Attorney-General, 2002.

¹⁰⁰ Wilson, *Supra* fn 40, p. 7.

¹⁰¹ The narrowness of the government's majority fuelled concerns about whether major constitutional measures should be passed by a bare majority in Parliament (Justice and Electoral Committee, *Supra* fn 10, p. 19-21).

¹⁰² Wilson, *Supra* fn 40, p. 8.

¹⁰³ Supreme Court Bill, 2002, s 13(1)(a).

¹⁰⁴ Justice and Electoral Committee, *Supra* fn 10, p. 44-46.

¹⁰⁵ *ibid*, p 46-47.

be resolved with an understanding of New Zealand conditions, history and traditions'.¹⁰⁶ Secondly, a disclaimer was added emphasising that nothing in the Act would affect New Zealand's commitment to the rule of law and parliamentary sovereignty.¹⁰⁷ The reason given by the select committee for these amendments was that the changes would better reflect the context of the Bill and, in particular, would help to emphasise New Zealand's independence, its commitment to the rule of law and the 'primacy of parliament in making law and determining public policy'.¹⁰⁸ Moreover, the reference to the Treaty of Waitangi was seen helping to address concerns that there was a lack of recognition of the Treaty in the original bill.¹⁰⁹

The decision to incorporate a statutory reference to parliamentary sovereignty was a reaction to select committee submissions.¹¹⁰ Some submitters argued that the creation of a new final court could impact on the constitutional relationship between the Courts and Parliament. In particular, it was felt that the new final court may encroach on the law-making role of Parliament.¹¹¹ For instance, Jack Hodder,¹¹² argued that the original Bill's silence on the rule of law together with the selective leave criteria could mean that, over time, the Supreme Court could see its role as extending to active law-making.¹¹³

Hodder submitted a draft purpose clause that spelled out in some detail the role of the Supreme Court with respect to the rule of law, the separation of powers, and parliamentary sovereignty. In particular, clause 3 provided 'that substantial issues of public policy...should be decided by the outcomes of the Parliamentary process and not by judicial legislation'.¹¹⁴ Although the select committee felt that it was inappropriate to expand on the purpose clause in this way, they did decide to retain references to the rule of law and parliamentary sovereignty in the form of a savings provision.¹¹⁵

2.3 Summary

The foregoing discussion outlines a number of contextual factors that influenced the decision to patriate the final court and outlines how some of these factors shaped the development of the Supreme Court legislation. In the first place, it is important to iterate that the abolition of the Privy Council was never a politically significant issue or a matter of urgency. Throughout most of the post-war period the Privy Council incited little interest or comment and few questions were raised about the appropriateness of retaining the appeal. It was only in the 1970s that support for ending appeals to the Judicial Committee began to emerge in political and judicial circles. However, since 1987 there were three attempts to patriate the final court.

¹⁰⁶ Supreme Court Act 2003, s 3(1)a)ii.

¹⁰⁷ *ibid*, s 3(2).

¹⁰⁸ Justice and Electoral Committee, *Supra* fn 10, p. 23.

¹⁰⁹ *ibid*, p. 24.

¹¹⁰ Nevill, *Supra* fn 93, p. 126.

¹¹¹ These issues were most often raised by opponents of the Supreme Court legislation, but several supporters of the reform also raised concerns.

¹¹² A member of the Ministerial Advisory Group

¹¹³ Justice and Electoral Committee, *Supra* fn 10, p. 23.

¹¹⁴ *ibid*, p. 22-3.

¹¹⁵ *ibid*, p. 23.

Several factors contributed to the recent change in attitude. Social and cultural changes within New Zealand and new geo-political realities, especially Britain's declining power and subsequent decision to seek closer ties to Europe, impacted on New Zealand's sense of identity and reduced the importance of economic, military and, consequently, legal links to Britain. Moreover, the New Zealand courts were becoming more self-confident, less wedded to English common law, and more prepared to draw upon case from other jurisdictions. These trends, together with a growth in distinctive legislation, led to the gradual development of a separate New Zealand legal identity. Furthermore, there was a growing awareness that most other politically and economically stable Commonwealth countries had long since abolished appeals to the Judicial Committee. Matters seem to have come to a head in 2003 when the Caribbean Community began the process of creating a regional final court to replace the Privy Council. It appeared to New Zealand observers that the resultant decline in the number of appeals would soon put the future of the Privy Council itself in doubt.

Thirdly, the preceding discussion reveals that, when the issue of Privy Council appeals has been debated, the main justifications for abolition have related to the themes of independence and access to justice. Indeed, the most frequent argument for patriating the final court was that retaining the Privy Council was inconsistent with New Zealand's constitutional status as an independent country. It is also worth iterating that 'access to justice' was one of the guiding principles for reform enunciated in the reports produced in 1978, 1989, and 1995 and in the discussion document published by the Labour-led Government in 2000.

Fourthly, those groups that were most involved with the Privy Council, namely Māori, business, and the legal profession, opposed its abolition. During the late 1980s and 1990s the opposition of these groups, together with some prominent MPs, helped to defeat two successive attempts to abolish the Privy Council. These interests were ultimately unable to prevent the passage of the Supreme Court Act, but interest group pressure did contribute to several substantial amendments to the legislation. These included the inclusion of a reference to the Treaty of Waitangi in the purpose clause and the removal of 'a significant issue relating to tikanga' as one of the leave criteria.

Finally, promptings by legal academics and fears of 'judicial activism' led to the inclusion, in the purpose clause, of a provision that explicitly preserves New Zealand's commitment to parliamentary sovereignty and the rule of law. The statutory recognition of constitutional values is novel in New Zealand and has been viewed in both a positive and a negative light. On the one hand, court establishing legislation is not the best place for the expression of these constitutional sentiments. One commentator has, therefore, suggested that these references may reflect the traditional uncertainty that New Zealanders have in their capacity to manage change.¹¹⁶ On the other hand, the content of the purpose clause may signal a greater willingness on the part of New Zealanders to engage in constitutional discourse.¹¹⁷ It is notable that constitutional issues were pivotal in most public submissions to the Justice and Electoral Committee, notwithstanding the government's contention that the Supreme Court reform was not a major constitutional reform. The relationship between the Supreme Court legislation and constitutional discourse is examined further in the next chapter.

¹¹⁶ Nevill, *Supra* fn 93, p. 125-6.

¹¹⁷ Elias, *Supra* fn 18, p. 122.

3

Background to the Supreme Court Legislation *Constitutional Development and the Patriation of the Final Court*

As far back as 1904 the Chief Justice, Sir Robert Stout, contended that the Privy Council was ‘an anomaly in our Constitution’.¹ However, this assertion was made in the context of lingering judicial outrage towards the Privy Council in the wake of the controversial *Wallis* decision.² It certainly did not reflect constitutional or political realities. At the time New Zealand was still a colony (albeit with broad internal self-government), the local courts were not yet firmly established, there was no permanent local court of appeal, and the legislature did not possess the requisite plenary power to abolish the Privy Council,³ even if such a thing was politically possible.⁴

The dubious merits of Chief Justice Stout’s early criticism aside, similar sentiments have been expressed by modern commentators. B. J. Cameron,⁵ for instance, suggested that the Privy Council was a ‘colonial leftover unbecoming to our sense of identity’.⁶ Philip Joseph⁷ referred to it as ‘an anachronism superfluous to New Zealand’s needs’.⁸ More recently, Chief Justice Dame Sian Elias, citing her 20th Century predecessor, called the appeal an ‘anomaly’ and an ‘institutional relic’.⁹ Furthermore, the perception that the Privy Council was a colonial relic was a major driver of the decision to patriate the final court. One of the primary reasons for the policy, as articulated by the Attorney-General’s discussion document, was to ‘recognise New Zealand’s constitutional status as an independent nation’.¹⁰

The present chapter considers the Supreme Court legislation against the background of New Zealand’s constitutional development. It comprises three sections. The first section briefly surveys New Zealand’s progression from a colony to an independent nation. The second section then outlines, in light of these developments, the reasons why the Privy Council has been considered a constitutional anachronism. Finally, the last section briefly examines the impact of the Supreme Court legislation on constitutional discourse in New Zealand.

¹ Sir Robert Stout ‘Appellate Tribunals for the Colonies’, *Commonwealth Law Review*, 2, 1904, p 4.

² *Wallis v Solicitor-General* (1903) NZPCC 23 (PC). The Privy Council had criticised both the Court of Appeal and the Solicitor-General. See **Chapter 2** for a fuller discussion of the political and judicial response to this decision.

³ The General Assembly was unable to abolish the right of appeal until after the adoption of the Statute of Westminster in 1947.

⁴ B. J. Cameron, ‘Appeals to the Privy Council-New Zealand’, *Otago Law Review*, 1970 p 175. Cameron notes that abolition was politically out of question because the local courts were not yet firmly established and a substantial part of the electorate was British and had strong sentimental attachments to Britain and the Empire.

⁵ At the time he was the Chief Legal Advisor to the Department of Justice.

⁶ Cameron, *Supra* fn 4, p. 183.

⁷ A prominent constitutional lawyer.

⁸ P. A. Joseph, ‘Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights’, *Canterbury Law Review*, 2, 1985, p. 290.

⁹ Rt Hon Dame Sian Elias, ‘Something old, something new: Constitutional stirrings and the Supreme Court’, *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 121.

¹⁰ Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand’s Appeal Structure*, Wellington: Office of the Attorney-General, 2000, p. 1.

3.1 Overview of Constitutional Development in New Zealand

3.1.1 From Colony to Independent Dominion

3.1.1.1 Early Developments

In 1852, twelve years after the signing of the Treaty of Waitangi, New Zealand was granted a representative constitution.¹¹ The New Zealand Constitution Act 1852 (Imp) served as New Zealand's principle constitutional document for 134 years. The Act established a General Assembly comprising the Governor, an appointed Legislative Council, and an elected House of Representatives.¹² Section 53 provided that the General Assembly had the power 'to make laws for the Peace, Order, and Good Government of New Zealand, provided that no such laws be repugnant to the Law of England'. Initially, s 68 also empowered the General Assembly to amend the 1852 Act,¹³ but this provision was repealed by the New Zealand Constitution Amendment Act 1857 (Imp). Instead, the General Assembly was authorised to repeal all but 21 specifically entrenched sections of the principal Act.¹⁴

The 1852 Act was silent on the relationship between the legislature and the executive. But, following pressure by colonial politicians, responsible government was granted in 1854.¹⁵ Yet from the outset limitations were imposed. The Governor, Sir Thomas Gore Browne, maintained that in matters affecting the Royal prerogative or Imperial interests he would receive ministerial advice, but if he differed from his ministers then he would refer the matter to the Secretary for State for the Colonies in London. Originally, this restriction applied to internal defence, Māori affairs, trade, foreign affairs, and a diverse range of bills reserved for the Queen's assent.¹⁶ In 1870 full responsibility for internal defence and Māori affairs was passed to ministerial control,¹⁷ but the remaining qualifications to New Zealand's autonomy persisted until the 1917-1930 Imperial Conferences.

3.1.1.2 Dominion Status and Intra-Imperial Constitutional Reform

On the 26th of September 1907 New Zealand was granted Dominion status. Yet, at first, the new style was little more than symbolic.¹⁸ The United Kingdom Government, rather than responsible Dominion Ministers, still retained control over foreign affairs, defence, and trade. For example, at the

¹¹ Representative institutions had also been granted under the Constitution Act 1846 (Imp), but, on the instigation of Governor Sir George Grey, the Imperial Parliament passed legislation temporarily suspending the operation of those parts of the Act relating to the provincial and central assemblies. Although the Governor subsequently relented, the 1846 Act was superseded by the New Zealand Constitution Act 1852 (Imp) before provincial elections could be held.

¹² New Zealand Constitutional Act 1852, s 32. Initially the House of Representatives was elected for five years and the franchise was confined to propertied males. In 1893 the vote was extended to women. This last reform meant that, with the exception of a few restrictions on the powers of constitutional amendment, New Zealand had acquired full representative government (P. A. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edition, Wellington: Brookers, 2001, p. 100.).

¹³ Constitutional bills were subject to the Governor's discretionary power of reservation (s 56) and the Crown's power of disallowance (s 58).

¹⁴ *ibid*, s 2. Further reforms in 1862 and 1892 reduced the number of entrenched sections to fifteen

¹⁵ Joseph, *Supra* fn 12, p. 102-3.

¹⁶ *ibid*, p. 103.

¹⁷ *ibid*, p 104.

¹⁸ The new style was accompanied by some minor changes. For instance, the Letters Patent and Instructions of 1907 omitted instructions pertaining to the reservation of certain classes of Bills for the Kings pleasure. Moreover, under the Letters Patent and Royal Instructions of 11 May 1917 the Governor was re-designated the Governor-General.

1911 Imperial Conference the British Prime Minister, Herbert Henry Asquith, asserted that the UK Government had indivisible authority in foreign policy and defence because it was Britain that was shouldering the burdens of Imperial defence.¹⁹ However, after World War I, and in light of the Dominions' contributions to the British war effort, the British Government eventually conceded the right of each Dominion to, inter alia, make separate declarations of war, conclude separate treaties of peace, participate in the League of Nations, and exchange diplomatic representatives. Furthermore, at the 1923 Imperial Conference Britain recognised the right of the Dominions to conduct their own international trade negotiations.²⁰

The final steps towards full Dominion autonomy were taken at the 1926 Imperial Conference. *The Report of the Inter-Imperial Relations Committee*,²¹ commonly known as the Balfour Declaration, affirmed that the United Kingdom and the Dominions:

‘are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.’²²

To recognise this equality of status the Conference adopted several important conventions to regulate intra-Commonwealth relations.²³ Firstly, it was established that any alterations of the law of succession to the throne or the royal style and titles would require the assent of the Parliaments of the United Kingdom and all of the Dominions. Secondly, it was agreed that the United Kingdom would not legislate for a Dominion except at its request and with its consent.²⁴ Thirdly, in regards to the Judicial Committee of the Privy Council, it was affirmed that ‘it was no part of the policy of His Majesty’s Government in Great Britain that questions affecting judicial appeals...should be determined otherwise than in accordance with the wishes of that part of the Empire primarily affected’.²⁵

Finally, the Conference adopted resolutions relating to the constitutional role of the Governor-General. The Inter-Imperial Relations Committee held that the Governor-General should hold ‘in all essential respects’ the same position in relation to Dominion affairs as the Queen does with respect to British public affairs.²⁶ Moreover, it was recognised that the dual role of the Governor-General, as representative for both the Queen and the British Government, was no longer appropriate. The Conference, therefore, recommended the appointment of a High Commissioner to be the political representative of the United Kingdom.²⁷ New Zealand, however, was typically hesitant in embracing the change and it was not until 1939 that the country obtained its first United Kingdom High Commissioner.²⁸

¹⁹ Joseph, *Supra* fn 12, p. 106.

²⁰ *ibid*, p. 106.

²¹ London, 1926 (Cmd 2768). The Committee was mistakenly referred to as the Inter-Imperial Relations Committee, rather than the Intra-Imperial Relations Committee.

²² *ibid*, section I.

²³ The conventions relating to request and consent, the royal style and titles, and the law of succession are recited in the preamble to the Statute of Westminster 1931.

²⁴ This convention was superseded and given the force of law by s 4 of the Statute of Westminster.

²⁵ In *British Coal Corporation v The King* [1935] AC 500 at 523 their Lordships, in discussing the power of the Canadian Parliament to abolish the Privy Council appeal, cited this policy as part of the broader context.

²⁶ *The Report of the Inter-Imperial Relations Committee*, *Supra* fn 23, section I

²⁷ Joseph, *Supra* fn 12, p. 111.

²⁸ B. J. Cameron felt that the acquisition of a United Kingdom High Commissioner was the final mark of New Zealand’s formal independence (Cameron, *Supra* fn 4, p. 172).

3.1.1.3 Acquisition of Full Constituent and Plenary Powers

In 1947 there was a watershed in New Zealand's constitutional development. The General Assembly obtained both full plenary powers and the power to amend the entire New Zealand Constitution Act. Ironically, these changes occurred almost incidentally. Earlier that year the Leader of the Opposition, Sydney Holland, had introduced a private member's Bill to abolish the Legislative Council. However, the General Assembly did not possess the requisite power of constitutional amendment and the Bill could not succeed. A deal was struck whereby Holland agreed to withdraw his bill on the condition that the Government introduce legislation to remove the constitutional impediment.

The process involved two stages. Firstly, the government enacted the Statute of Westminster Adoption Act 1947 in order to adopt the Statute Westminster 1931 (Imp) into New Zealand law.²⁹ The Statute of Westminster gave legal recognition to the Dominion autonomy that was affirmed by the Balfour Declaration. Section 2 revoked the operation of the Colonial Laws Validity Act 1865 (Imp) and declared that Dominion legislation could not be declared void on the ground of repugnancy to the law of England. Section 3 declared and enacted that the Parliament of a Dominion has full power to make extra-territorial laws. Finally, s 4 provided that the Parliament of the United Kingdom could not legislate for a Dominion unless that Dominion had requested and consented to the enactment. By adopting these provisions New Zealand had finally, fifteen years after the Statute of Westminster was enacted, acquired full plenary powers.

The second stage was for the General Assembly to obtain full constituent powers so as to enable it to amend the entrenched sections of the New Zealand Constitution Act 1852 (Imp). The Statute of Westminster had expressly provided that its adoption would not confer any new power on the General Assembly to repeal or alter the 1852 Act.³⁰ However, the government availed itself of the 'request and consent' provision in s 4 to seek a separate grant. The United Kingdom Parliament acquiesced and enacted the New Zealand Constitution (Amendment) Act 1947. The amendment provided that the Parliament of New Zealand could 'alter, suspend, or repeal...all or any provision of the New Zealand Constitution Act 1852'.

3.1.2 Post-War Constitutional Development

During the post-war period there were a number of constitutional developments that had the overall effect of aligning New Zealand's institutions and constitutional laws with national self-image.³¹ The main themes evident in these reforms were the removal of obsolete constitutional provisions; the consolidation of the primary constitutional enactments; and, ultimately, the patriation and nationalisation

²⁹ Section 10 of the Statute of Westminster provided that ss 2-6 would not apply to Australia, New Zealand, or Newfoundland unless these sections were adopted by the Parliaments of those Dominions.

³⁰ Section 8.

³¹ Joseph, *Supra* fn 12, p. 443.

of the constitution. However, the reforms also tended to be incremental, piecemeal, and reactionary, rather than fundamental or sweeping.

3.1.2.1 Constitution Amendment Act 1973

The New Zealand Constitution Amendment Act 1973 (NZ) had two purposes. Firstly, s 3 of the Act repealed five obsolete and inoperative provisions of the New Zealand Constitution Act 1852.³² Secondly, s 2 substituted a new s 53 which provided that the General Assembly has ‘full power to make laws having effect in...New Zealand or...outside New Zealand’. This provision was drafted in response to doubts about New Zealand’s powers of extraterritoriality.³³ However, it raised questions about the basis on New Zealand’s sovereignty. As one prominent constitutional lawyer, P. A. Joseph, asked ‘since section 53 was the legal seat of New Zealand sovereignty, [can] it be validly evoked to effect its own amendment’?³⁴

Joseph supplied two possible answers to his question. The first was that s 1 of the New Zealand Constitutional (Amendment) Act 1947 (Imp) had provided that the General Assembly was competent to alter or repeal s 53. From this view it was an independent grant of constituent power to amend the 1852 Act. The second approach was that the 1973 Act severed New Zealand’s legal continuity by enlarging Parliament’s powers of legislation. From this perspective, ‘the foundations of the constitutional order have changed extra-legally through a shift in paramount power’³⁵

The latter view has some judicial acceptance. In *Re Ashman and Best*³⁶ Justice Wilson noted, after discussing the Statute of Westminster, that a

‘greater and more unequivocal move in the evolution of New Zealand from a ‘self-governing’ colony to an independent nation was the severing of the last bonds of dependence on the United Kingdom by the passing of the New Zealand Constitution Amendment Act 1973’.

Justice Wilson went on to argue that the 1973 Act, in conjunction with the Royal Titles Act discussed below, severed New Zealand’s constitutional ties with Britain. In essence he saw these measures as establishing New Zealand as an independent sovereign state.

3.1.2.2 Royal Titles Act 1974

Within a year, there was another significant development. Major changes were made to the Queen’s royal style and titles.³⁷ These changes affirmed New Zealand’s national identity in several ways. Firstly, the 1974 Act made no reference in the Queen’s title to the ‘Queen of the United Kingdom’. At the time the Prime Minister, Norman Kirk, argued that this omission aimed to clarify the Queen’s

³² The repealed provisions included the Governor-General’s power to reserve Bills for the Queen’s assent; the requirement for the Governor-General to act according to the Queen’s instructions; and s 58, which required the Governor-General to forward to London copies of Acts and provided that Acts could be disallowed within two years.

³³ Joseph, *Supra* fn 12, p. 135.

³⁴ *ibid*, p. 136.

³⁵ *ibid*, p 452-3.

³⁶ [1985] 2 NZLR 224.

³⁷ When Queen Elizabeth II ascended to the throne the Royal Titles Act 1953 Act proclaimed the her royal style and titles in right of New Zealand to be:

Elizabeth the Second, by the Grace of God of the United Kingdom, New Zealand and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith’.

The Royal Titles Act 1974 repealed the Royal Titles Act 1953 and redefined the royal titles as:

Elizabeth the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith’

constitutional status with respect to New Zealand and, especially to give emphasis to her status as Queen of New Zealand, rather than the Queen of the United Kingdom.³⁸

Secondly, the passage of the 1974 Act was a breach of Commonwealth conventions.³⁹ In 1953 the form of the royal style and titles was agreed upon by a meeting of Commonwealth Heads of Government in London. However, in 1974 the New Zealand Government felt that it would be inappropriate for them to seek Commonwealth agreement on a matter of New Zealand constitutional law. Instead, they simply informed other Commonwealth countries after the change had been made. Thirdly, the 1974 royal style and titles were defined by a New Zealand statute without royal proclamation. In contrast, the 1953 statute had assented to the royal style and titles being proclaimed in London under the Great Seal of the United Kingdom.⁴⁰

The importance of the Royal Titles Act 1974 may primarily lie in its recognition of a separate New Zealand crown. One of the consequences of the legal and political autonomy granted by the Balfour Declaration and the Statute of Westminster was that the single Imperial Crown gradually evolved into a plurality of national Crowns.⁴¹ The orthodox view is that New Zealand acquired a separate Crown in 1947 when it adopted the Statute of Westminster.⁴² However, in *Re Ashman and Best*⁴³ Justice Wilson suggested a much later date. He argued that it was the Royal Titles Act 1974 that established in law that the Queen of New Zealand was a different entity from, although same person as, the Queen of the United Kingdom.

3.1.2.3 *The Nationalisation and Patriation of the Office of Governor-General*

The development of a separate New Zealand Crown went hand in hand with contemporaneous changes to the office of Governor-General.⁴⁴ Originally the Governor was the local agent of the British government.⁴⁵ However, as explained above, this link gradually attenuated as New Zealand progressed toward executive and legislative autonomy.⁴⁶ Nevertheless, the fundamental British nature of the institution persisted until two key developments: the appointment of a New Zealand born Governor-General and the revision of the instruments that constituted and defined the office of Governor-General.

Appointments to the Office of Governor-General

³⁸ Rt Hon Norman Kirk, *New Zealand Parliamentary Debates*, 389, 1974, p. 1-2.

³⁹ These conventions were affirmed at the 1926 Imperial Conference, see above.

⁴⁰ Joseph, *Supra* fn 12, p 138.

⁴¹ At one time the Imperial Crown was held to be 'one and indivisible throughout the Empire...act[ing] in self-governing States on the initiative and advice of its own Ministers in these States' (*Theodore v Duncan* [1919] AC 699 at 106. See also *Re Silver Brothers Ltd; A-G (Quebec) v A-G (Canada)* [1932] AC 514 (PC)). However, as the Dominions evolved towards complete independence, the original unity of the Crown gave way to a plurality of national Crowns; each a separate legal entity. In *R v Secretary of State for Foreign and Commonwealth Affairs; Ex p Indian Association of Alberta* [1982] QB 892 the English Court of Appeal explained the development of separate Crowns as either the crystallisation into law of conventional usage and practice following the Balfour Declaration (per Lord Denning MR) or the result of the legal independence granted by the Statute of Westminster (per May LJ).

⁴² Joseph, *Supra* fn 12, p. 552.

⁴³ *Supra* fn 36.

⁴⁴ Raymond Miller & Noel Cox, 'Monarchy', in Miller, R. (Ed), *New Zealand Government and Politics*, (2nd edition), Auckland: Oxford University Press, 2001, p. 50.

⁴⁵ *ibid*, p. 50.

⁴⁶ At the 1926 Imperial Conference it was recognised that the dual role of the Governor-General, as represented both the Queen and the UK Government, was no longer appropriate. In addition, a number of provisions in the New Zealand Constitution Act 1852 relating to Office of Governor-General, such as the power to reserve Bills for the Queen's assent and the requirement to forward copies of Acts to London, had fallen into disuse or been repealed.

Originally Governors-General were appointed by the Queen on the recommendation of the United Kingdom Government, although there was informal consultation with the relevant dominion government.⁴⁷ After the 1926 Imperial Conference, however, the appointment process was criticised as inconsistent with the equal and autonomous status of the Dominions as expressed in the Balfour Declaration.⁴⁸ Consequently, at the 1930 Imperial Conference the convention was adopted that Governors-General would be appointed only on the advice of the Dominion concerned, after consultation between the Dominion Prime Minister and Sovereign.⁴⁹

Even after this reform of the appointment process, New Zealand Governors-General continued to be drawn from British aristocracy.⁵⁰ The first break with this tradition occurred in 1967 when the first New Zealand born Governor-General, Sir Arthur Porritt, was appointed. However, Porritt was not a New Zealand resident, but had instead forged a dual New Zealand-British identity. He has, therefore, been heralded as an important transitional figure in the nationalisation of the office of the Governor-General.⁵¹ His successor, a former High Commissioner to London, Sir Denis Blundell, was the first Governor-General to be both born and domiciled in New Zealand. Significantly, neither Porritt nor Blundell were drawn from the British aristocracy and, although they represented the Queen, they did not in any sense represent Britain.⁵²

Revision to the Letters Patent

The Letters Patent of 28th October 1983 had two principle aims. Firstly, they revised and updated the instruments constituting and defining the office of Governor-General, namely the Letters Patent and Royal Instructions of 1917.⁵³ For instance, the revised letters constituted the office as ‘Governor-General and Commander-in-Chief who shall be Our Representative in Our Realm of New Zealand’.⁵⁴ In contrast, the 1917 instruments had used the term ‘Dominion of New Zealand’, a style that had been officially discarded in 1953.⁵⁵ Moreover, the 1983 Letters Patent removed several riders to responsible government⁵⁶ and omitted the power to issue further Instructions by way of Order in Council, or Commission, or by one of the Queen’s Secretaries of State.⁵⁷

Secondly, the revised Letters sought to ‘patriate’ the office of Governor-General.⁵⁸ For example, the 1983 Letters were issued by the Queen acting on the advice of the Governor-General in Council, whereas the 1917 instruments were issued by the King on the advice of the Privy Council based in London. Moreover, the 1983 Letters recited the royal style and titles adopted by the Royal Titles Act

⁴⁷ The New Zealand Government had been consulted on the choice of Governor and Governor-General since 1892.

⁴⁸ Joseph, *Supra* fn 12, p. 147.

⁴⁹ *ibid.*, p. 111.

⁵⁰ Miller & Cox, *Supra* fn 44, p. 50.

⁵¹ *ibid.*, p. 50.

⁵² *ibid.*, p. 50.

⁵³ Joseph, *Supra* fn 12, p. 161.

⁵⁴ Clause I.

⁵⁵ Joseph, *Supra* fn 12, p. 162.

⁵⁶ These riders included a provision enabling the Governor-General to dissent from the Executive Council and the requirement that, where the exercise of the prerogative of mercy affects Imperial interests, then the Governor-General shall take those interests into personal consideration.

⁵⁷ Joseph, *Supra* fn 12, p. 162.

⁵⁸ *ibid.*, p. 161.

1974. Finally, the revised letters were sealed with the Seal of New Zealand adopted in 1977,⁵⁹ rather than the Great Seal of the United Kingdom.⁶⁰

3.1.2.4 *Constitution Act 1986: An Autochthonous Constitution?*

Three years after the patriation of the office of Governor-General, the government decided to consolidate and patriate New Zealand's primary constitutional enactments. The immediate catalyst for the revision of New Zealand's constitutional law was the brief constitutional crisis that was created when, in the wake of the 1984 snap election, the outgoing Muldoon Government, contrary to convention, refused to follow the advice of the incoming ministry and devalue the dollar. However, some commentators have contended that a growing desire for constitutional autarky, in which New Zealand's legal root is transposed from Westminster to Wellington, was also part of the legislative context.⁶¹

The Constitution Act 1986 had three main objectives. Firstly, in order to avoid a recurrence of the 1984 crisis, the statute sought to expedite the transfer of power after a general election.⁶² Secondly, the Act consolidated New Zealand's primary statutory constitutional laws. The four principle parts of the Act separately identify the Sovereign, the Executive, Parliament, and the Judiciary. The provisions contained in these Parts are declaratory, rather than constitutive. They are not, in of themselves, a source of state instruments and authority.⁶³ For example, s 15(1) simply declares that Parliament 'continues to have full power to make laws'.

Finally, the symbolic purpose of the Constitution Act was to recognise New Zealand's national sovereignty. The Officials Committee that drafted the legislation considered that 'the time is overdue to free our constitutional law from the shadow of our former colonial status.'⁶⁴ The Act contributed to this objective in two main ways. Firstly, s 15(2) provided that no Act of the United Kingdom Parliament would extend to New Zealand as part of New Zealand law. Thus the residual power of the United Kingdom to legislate for New Zealand was unilaterally revoked. Secondly, Part Five of the Act provided that several imperial enactments no longer had effect as part of the law of New Zealand. These included the New Zealand Constitution Act 1852 (Imp) and its amendments, the Statute of Westminster 1931 (Imp), and the New Zealand Constitution (Amendment) Act 1947 (UK).

Phillip Joseph has suggested that the Constitution Act 1986 may be New Zealand's ultimate proclamation of constitutional autochthony. On the one hand, he points out that s 15(1) declares the continuance of Parliament's legislative powers, rather than constituting or creating them. This declaration, he asserts, premises the existence of these powers and, by necessity, their source. Moreover, he notes that the 1986 Act is itself a product of the legislative autonomy gifted by Westminster. On the other hand, the Act simultaneously repudiates the sources of these legislative powers by revoking the relevant Imperial Acts. This leads Joseph to suggest that 'Parliament's sovereignty may have factual rather than legal force'.⁶⁵

⁵⁹ Seal of New Zealand Act 1977.

⁶⁰ Joseph, *Supra* fn 12, p.164.

⁶¹ *ibid*, p. 442.

⁶² See s 6(2).

⁶³ Joseph, *Supra* fn 12, p. 441.

⁶⁴ *Second Report of an Officials Committee on Constitutional Reform*, 1986, para 1.3.

⁶⁵ Joseph, *Supra* fn 12, p. 460.

3.2 The Appeal to the Privy Council: A Constitutional Relic?

As New Zealand progressed towards full constitutional and national maturity, a growing number of commentators contended that the Privy Council appeal was anomalous. Firstly, some critics of the Privy Council argued that the appeal was inconsistent with New Zealand's sovereignty. These commentators asserted that the retention of the Privy Council meant that one-third of the traditional powers of government, the judiciary, retained an institutional link with Britain long after the executive and legislative branches had gained complete autonomy. They felt that it was anomalous for New Zealand to permit its law, including important constitutional questions, to be determined and applied by a British tribunal in an era when it would no longer be acceptable for the United Kingdom to legislate for New Zealand or when the idea of the New Zealand Parliament being subordinate to the British Parliament would be inconceivable.⁶⁶

However, other commentators have disputed the claim that the Privy Council detracted from New Zealand's nationhood. Noel Cox, for example, has pointed out that it is increasingly common for sovereign nations to submit to the jurisdiction of international courts and tribunals, such as the International Court of Justice, without this being perceived as an infringement upon sovereignty.⁶⁷ However, there are important legal differences between retaining an appeal to the Privy Council and submitting to the jurisdiction of an international tribunal. On the one hand, the Privy Council was part of the New Zealand legal system and exercised, in the name of the state, the sovereign adjudicative power of the state. In contrast, extra-territorial tribunals are established by international convention and have a jurisdiction that is consensual. Although a country may submit to the jurisdiction of one of these tribunals, it does not cede to the tribunal its own sovereign power of adjudication over its own citizens.⁶⁸

Secondly, the form and forum for the promulgation of Privy Council decisions was arguably constitutionally anachronistic. In legal theory an appeal to the Judicial Committee is an appeal to Her Majesty in Council. Privy Council decisions are not judicial decrees or judgments, but rather are advice tendered to the Sovereign and are given effect via Order in Council.⁶⁹ Joseph, however, has noted that in receiving this advice and promulgating the Order in Council the Queen was not visibly performing a function as the Queen in Right of New Zealand. Instead the mechanism underpinning the appeal was a vestige of Empire that pre-dates the concept of a divisible Crown. He, therefore, concluded that the procedure was contrary to the spirit of the Royal Titles Act 1974.⁷⁰

⁶⁶ For example Cameron, *Supra* fn 4, p. 173; Joseph, *Supra* fn 8, p. 289-290.

⁶⁷ Noel Cox, 'The abolition or retention of the Privy Council as the final court of appeal for New Zealand: Conflict between nationalism and legal pragmatism' *New Zealand Universities Law Review*, 20(2), 2002, p. 228.

⁶⁸ *Tangiara v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC), at 22.

⁶⁹ Cox, *Supra* fn 67, p. 225.

⁷⁰ Joseph, *Supra* fn 8, p. 291.

The Privy Council itself has resisted this and similar arguments. For example, in *Ibralebbe v The Queen*⁷¹ their Lordships were confronted with a decision of the Chief Justice of Ceylon that, as a result of independence, the Queen had relinquished prerogative rights in respect of Ceylon, including the right to make Orders in Council. Their Lordships, however, held that Privy Council processes were not repugnant to independent status. They observed that the advice tended to the Queen was best seen as the decision of a Court and that the Order in Council was, in substance, a legal judgment and was distinct from an Order in Council that has administrative or legislative effect. Thus the Privy Council, its processes, and the legal theory underpinning these, have evolved to fit the realities of the post-imperial Commonwealth, including the recent doctrine of a divisible Crown,⁷² just as the notion of a divisible Crown was itself an adaptive response to the development of autonomous and co-equal Commonwealth states.

Finally, the primary roles of the Privy Council may be difficult to reconcile with New Zealand's independence. The chief purpose of the Privy Council was to supervise the courts in the infant colonies to help ensure that the local judiciary observed values such as incorruptibility, impartiality and judicial independence until such time as they had become part of colonial tradition.⁷³ However, Joseph has argued that, as New Zealand progressed towards constitutional and national maturity, and as the aforementioned values became axiomatic in the courts, the appeal to the Judicial Committee, viewed in terms of its original purpose, was increasingly redundant. Indeed, he suggested that the retention of the appeal could be seen as implying that the New Zealand courts fail to meet these standards or that these values would be imperilled without the continuation of the appeal. He felt that such a proposition would be derogatory to New Zealand's constitutional maturity.⁷⁴

Yet, there have been instances, even in modern times, where the Judicial Committee has been called upon to redress serious procedural and systemic failings in the way that the New Zealand courts have operated. For example, in 2002 the Privy Council heard twelve appeals that questioned the 'ex-parte' practice employed by the Court of Appeal for determining criminal appeals in cases where the appellant had been refused legal aid.⁷⁵ These appeals had been dismissed on the papers, without hearing, without conferral by the three judges involved, and often without consideration of the merits of the case. In allowing the appeals their Lordships held that the practice '...did not satisfy the minimum requirements of judicial adjudication by an appellate court...' and that the system operated arbitrarily, had a discriminatory effect, and '...was contrary to fundamental conceptions of fairness and justice'.⁷⁶

A second function of the Privy Council has also become redundant. In 1921 Lord Haldane argued that the real purpose of the Judicial Committee was to assist in maintaining imperial links.⁷⁷ However, this purpose was quickly overtaken by the subsequent decline in Imperial political unity and the accompanying intra-imperial constitutional changes, such as the Statute of Westminster.⁷⁸ Moreover, the rapid pace of decolonisation during the post-war period, in which many former colonies become

⁷¹ [1964] AC 900.

⁷² Maurice Kelly, 'Leaving Their Lordships: The Commonwealth experience', *New Zealand Law Journal*, 1994, p. 108.

⁷³ See, for example, Lord Normand 'The Judicial Committee of the Privy Council-Retrospect and Prospect' [1950] 3 CLP 1.

⁷⁴ Joseph, *Supra* fn 8, p. 290.

⁷⁵ *R v Taito* [2003] 3 NZLR 577 (PC).

⁷⁶ *ibid*, at 599-600.

⁷⁷ Rt Hon Lord Haldane of Cloan, 'The work for the Empire of the Judicial Committee of the Privy Council', *Commonwealth Law Journal*, 1(2), 1922, p. 154.

⁷⁸ Joseph, *Supra* fn 8, p. 291.

independent of Britain and, usually, abolished the Privy Council, ended the utility of the Judicial Committee as a symbol of Commonwealth unity.⁷⁹

Despite the disintegration of the Empire, advocates of the Privy Council continued to see a role for the Judicial Committee in helping to ensure the unity of the common law. Some policy-makers felt that the common law could act as a link that would help to bind the newly independent countries and maintain the influence of Britain.⁸⁰ Others felt that retaining conformity in some areas of law, notably commercial, trade, and maritime law, would yield economic benefits.⁸¹

However, throughout the post-war period the common law has progressively become less English. In part these trends mirrored the decline of Britain and the attenuation of political, economic and trade linkages with the Commonwealth. The demise of these practical reasons for legal unity, were accompanied with the emergence of divergent values, aspirations, and legal identities amongst newly independent Commonwealth countries.⁸² The diminished Englishness of the law also reflected the decline of the Privy Council as an instrument for conformity. Not only was the number of countries that utilised the appeal diminishing, but in a series of decisions the Judicial Committee itself acquiesced in some loss of conformity.⁸³ These developments led the Chief Legal Adviser to the Department of Justice to comment that ‘the pass has been sold by the very institution which the exponents of uniformity counted on to defend it’.⁸⁴

3.3 The Supreme Court Reform and Constitutional Discourse

3.3.1 Public Engagement with Constitutional Reform

Historically New Zealanders have been indifferent about constitutional issues. This is reflected in the traditional hesitancy with which the country has approached constitutional reform and the lack of public engagement with the reform process when change has occurred.⁸⁵ For example, New Zealand (along with Australia) was reluctant to accept the independence offered by the Statute of Westminster and insisted that the Statute not have effect until adopted by local enactment. In the parliamentary debates on the subject, speakers felt that the provisions of the New Zealand Constitution Act 1947 (Imp) were ‘thoroughly satisfactory’.⁸⁶ It then took fifteen years, a world war, a false start in 1944, and widespread dissatisfaction with the Legislative Council, for New Zealand to finally adopt the Statute.

A second example was the revocation of the New Zealand Constitution Act 1947. It was not until 1986 that the 1947 Act was repealed, despite that fact that many of its provisions had been forgotten

⁷⁹ Cameron, *Supra* fn 4, p. 177.

⁸⁰ Margaret Wilson, ‘From Privy Council to Supreme Court: A rite of passage for New Zealand’s legal system’, *Waikato Law Review*, 18, 2010, p. 2.

⁸¹ See, for instance, Justice Somers comments to Peter Spiller, cited in Peter Spiller, *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2002.

⁸² Kelly, *Supra* fn 72, p. 108.

⁸³ See, for example, *Australian Consolidated Press v Uren* [1969] 1 AC 590.

⁸⁴ Cameron, *Supra* fn 4, p. 179.

⁸⁵ Elias, *Supra* fn 9, p. 121-2

⁸⁶ *ibid*, p. 122.

or ignored.⁸⁷ Moreover, the replacement Constitution Act passed through Parliament unanimously and with a minimum of debate. For instance, the select committee that examined the Bill only received eight public submissions.⁸⁸

The lack of public engagement with constitutional matters has left New Zealanders unprepared to constructively debate policy reforms that have constitutional implications. In particular, it appears that the public, and many political leaders, have difficulty grasping constitutional concepts.⁸⁹ For instance, the Chief Justice has noted, in relation to the Supreme Court debate, that ‘we have little shared vocabulary and we often do not recognise the principles we are playing with. Nor are these concepts easy to get across. We are not well equipped to carry on a public debate on this topic’.⁹⁰ Lord Cooke expressed similar sentiments during his appearance before the Justice and Electoral Committee.⁹¹

Moreover, New Zealanders have seldom conceptualised policy or political debates in constitutional terms. For example, Andrew Sharp has noted that the public debates associated with recent constitutional changes have tended to be confined to relatively narrow questions that fixate on the political, rather than the constitutional, implications of the measure. For example, he pointed out that during the debate over electoral reform in the late 1980s and early 1990s discussion tended to focus on narrow questions such as “Which system would provide more powerful government?” or “How would MMP favour different political parties?” He argues that there was little awareness that ‘the nature of a whole system of rules and principles that governed politics was at stake, let alone a constitutional system’.⁹²

3.3.2 *The Supreme Court Debate*

The Supreme Court reform may represent a departure from the indifferent attitudes normally associated with constitutional measures. Firstly, the reform inspired a wide-ranging public debate on a number of constitutional matters raised by the proposed changes. These issues included the appointment process for judges, issues regarding the Treaty of Waitangi, whether New Zealand should become a republic, the role of the judiciary, and concerns about judicial activism and encroachment on the law-making powers of Parliament.⁹³ Viewing this debate in retrospect, some commentators expressed hope that the traditional reluctance to engage in public constitutional discussion may be changing.⁹⁴

Secondly, public involvement with the legislative process was greater than has typically been the case with this type of reform. The select committee that examined the Supreme Court Bill received at least 315 written submissions, and a public discussion document produced by the Office of the Attorney-

⁸⁷ Rt Hon Dame Sian Elias, ‘Transition, stability and the New Zealand legal system’, *Otago Law Review*, 10(4), 2004a, p. 475.

⁸⁸ Sharp, A., ‘Constitution’, in Miller, R. (Ed), *New Zealand Government and Politics*, (2nd edition), Auckland: Oxford University Press, 2001, p. 41.

⁸⁹ Elias, *Supra* fn 87, p. 475-6; Elias, *Supra* fn 9, p. 121-2.

⁹⁰ Elias, *Supra* fn 87, p. 476.

⁹¹ Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p. 20.

⁹² Sharp, *Supra* fn 88, p. 42.

⁹³ P. Nevill, ‘New Zealand: The Privy Council is replaced with a domestic Supreme Court’, *International Journal of Constitutional Law*, 3(1), 2005, p. 116.

⁹⁴ Elias, *Supra* fn 9, p. 122; Nevill, *Supra* fn 93, p. 116.

General engendered an additional 70 submissions.⁹⁵ Constitutional matters were pivotal in the majority of these submissions.⁹⁶ Interestingly, as a result of the various concerns raised by interest groups the select committee recommended a wider inquiry into New Zealand's constitutional arrangements, although no concrete proposals were set out in its report.⁹⁷

Thirdly, there was considerable media coverage of the reform, especially as the Supreme Court Bill approached its second and third readings. Indeed it appears that the voting behaviour of at least one political party, United Future, was affected by the growing media and public pressure.⁹⁸ Furthermore, there was even an attempt, backed by opposition political parties, to secure enough signatures to force a Citizens Initiated Referenda on the issue of patriation. Although the attempt was made late in the legislative process and petered-out once the Supreme Court Act was passed, it may still be indicative of a desire, perhaps belated, by some members of the public to express their opinion on constitutional matters.

However, the Supreme Court debate also had some negative features. The treatment of many of the constitutional and legal issues raised by the Supreme Court reform was superficial and uninformed.⁹⁹ Moreover, the public struggled to apprehend the broader constitutional significance of the proposed changes. Despite rhetorical references to constitutional concepts, political matters loomed large in the parliamentary and public discussion of the proposed legislation. In many cases the primary subjects of debate were not the substance of the reforms per se or their wider constitutional or legal implications, but relatively narrow issues such as whether or not a referendum should be held on the decision to abolish Privy Council appeals.¹⁰⁰ Even in cases where attention was given to more substantive constitutional values, such as judicial independence or parliamentary sovereignty, debate was superficial and employed a narrow conception of these issues that focused on power and on slogans such as 'judicial activism' and 'supremacy', rather than on a deeper understanding of the principles involved or on the respective constitutional roles of the courts and Parliament.¹⁰¹

The superficial and ill-informed nature of the debate has been problematic. Firstly, there is evidence that misunderstandings about the constitutional role of the judiciary have undermined public confidence in the courts.¹⁰² Chief Justice Elias, for example, suggested that 'muddled thinking and ignorance about our legal history and traditions' has led to unfounded criticism of judges and a deep suspicion of the common law.¹⁰³ Secondly, some commentators have argued that the inability to grasp constitutional matters has led to an uneven and inappropriate expression of constitutional values. As noted in the previous chapter, Nevill has suggested that the purpose clause of the Supreme Court Act, with its rhetorical references to the rule of law and Parliamentary sovereignty, exemplifies the uncertainty and lack of confidence that New Zealanders have in managing change.¹⁰⁴

⁹⁵ Justice and Electoral Committee, *Supra* fn 91, p. 1-3.

⁹⁶ Nevill, *Supra* fn 93, p. 126.

⁹⁷ Justice and Electoral Committee, *Supra* fn 91, p. 52-3.

⁹⁸ *ibid.*, p. 13.

⁹⁹ Elias, *Supra* fn 87, p.475-6.

¹⁰⁰ See for example, Justice and Electoral Committee, *Supra* fn 91, p. 20-1; Supreme Court Bill: Third Reading, *Hansard*, 14th October, 2003.

¹⁰¹ See, for example the discussion on the relationship between the Courts and Parliament in Elias, *Supra* fn 87.

¹⁰² *ibid.*, p. 475-6.

¹⁰³ *ibid.*, p. 477.

¹⁰⁴ Nevill, *Supra* fn 93, p. 126-7.

3.4 Summary

The Supreme Court Act marks the culmination of the century-long process of updating, consolidating, and patriating the major elements of the constitution. The main steps in this process were the progression towards executive autonomy during the interwar years, followed by the acquisition of full plenary power by the legislature when the Statute of Westminster was adopted in 1947. Thenceforth constitutional reform tended to be incremental, reactionary and, like the Supreme Court Act, aimed to symbolically affirm New Zealand's national identity. In 1974 the Queen was restyled, for the purposes of New Zealand law, as the Queen in Right of New Zealand and a decade later the Office of the Governor-General was patriated by the 1983 Letters Patent. Finally, the anachronistic New Zealand Constitution Act 1852 (Imp) was replaced by an indigenous statute in 1986. Not only did this patriate New Zealand's primary constitutional document, but, by unilaterally revoking the imperial legislation that established New Zealand's sovereignty, the 1986 Act has been seen as a proclamation of constitutional autochthony.

Cumulatively these changes left the Privy Council as a constitutional anachronism or, in the words of the Chief Justice Elias, the 'hardest of all institutional relics of colony'.¹⁰⁵ Firstly, it was incongruous, once New Zealand had achieved full executive and legislative independence, for the judiciary to remain linked to the British legal system. Secondly, the original functions of the Judicial Committee are now redundant. As a constitutionally mature country, New Zealand should no longer require the Judicial Committee to function as the 'guardian of justice' or to help ensure judicial adherence to values such as incorruptibility and impartiality. This is despite the fact that in recent years the Privy Council has been called upon to redress occasional serious and systematic procedural failings by the Court of Appeal. In addition, with the British Empire all but liquidated and the common law becoming less 'English', the role of the Privy Council in maintaining these linkages has also become less relevant.

Finally, the form and forum of the Privy Council appeal has been viewed as anachronistic. The Queen gives effect to Judicial Committees decisions by Order in Council on the advice of her (predominately British) Privy Council. The process harks back to a time when the Crown was considered one and indivisible throughout the Empire and, arguably, is contrary to the modern notion of a divisible Crown, as affirmed by the Royal Style and Titles Act 1974. The Law Lords have attempted, in cases such as *Ibralebbe v The Queen*, to reconcile Privy Council processes with independence, by emphasising the substance, rather than form, of what occurs. However, such arguments have proved unconvincing to those commentators who view Privy Council processes as detracting from national self-image in a symbolic sense.¹⁰⁶

¹⁰⁵ Elias, *Supra* fn 9, p. 121.

¹⁰⁶ For instance, Joseph, *Supra* fn 8, p. 291.

Part Two:

The Privy Council and the Supreme Court: A Comparison

The Privy Council and the Supreme Court: A Comparison

Section Overview

The second part of this thesis compares and contrasts the Privy Council and the Supreme Court in a number of areas including function, composition, jurisdiction, and leave arrangements. This comparison has three major purposes. Firstly, the overall objective is to highlight the impact that the Supreme Court reform has had on the membership, role, and accessibility of New Zealand's final court. Secondly, I will evaluate whether the changes to the jurisdiction and composition of the final court are consistent with the objectives of the Supreme Court legislation. In particular, the following chapters will assess whether the restructuring of the final court has contributed to the key themes of improving access to justice and creating an indigenous justice system.

Finally, by highlighting the differences between the Privy Council and the Supreme Court the current section helps to set the scene for the final part of this thesis where I empirically examine the consequences of patriation for litigants and for the wider legal system. In particular, the discussion of the jurisdiction and leave arrangements of the two courts (see **Chapters 5** and **Chapter 6**, respectively) leads to the formulation of tentative predictions in regards to the type and volume of appeals heard by each court. These hypotheses are then tested in the final section of this thesis (see **Chapter 7**).

4

The Privy Council and the Supreme Court: A Comparison *Structure, Composition, and Function*

One of the primary objectives behind the Supreme Court legislation was to recognise New Zealand's independence through the creation of an 'indigenous justice system'. As discussed in the previous chapters, the architects of the Supreme Court legislation had criticised the Privy Council in a number of respects. For instance, it was argued that the Privy Council was a colonial remnant that was inconsistent with New Zealand's growing constitutional maturity. Furthermore, the principal functions of the Privy Council, namely supervising the local courts and maintaining the Englishness of the common law, were seen as redundant in the modern era.

An additional criticism was that the Privy Council was comprised of predominantly British judges, who were relatively unfamiliar with New Zealand society, values and history. It was argued that this, in turn, impaired the ability of their Lordships make decisions that were responsive to New Zealand circumstances and needs. Consequently, a major aim of the Supreme Court reform was to 'ensure that final decisions are made by judges who live in New Zealand and who are familiar with New Zealand society'.¹

In light of these objectives and criticisms, the current chapter examines the consequences of the Supreme Court reform for the structure, composition, and role of the final court. It is divided into two main sections. The first section focuses on the Judicial Committee of the Privy Council. It briefly outlines the origins of the Privy Council's judicial functions, before discussing the composition and role of the modern Judicial Committee. The second section then outlines the structural reforms introduced by the Supreme Court legislation. In particular, it examines the composition and role of the new final court and briefly discusses the changes that the Supreme Court Act has made to the role of the Chief Justice.

4.1 The Judicial Committee of the Privy Council

4.1.1 The Origin of the Appellate Jurisdiction of the Privy Council

The Privy Council is the principal council belonging to the Sovereign. It is not a statutory creation, but a creature of the prerogative that predates the English Parliament.² At one time the Privy Council was the hub of Executive government, but its importance has declined markedly since the advent of Cabinet government during the reign of King Charles II.³ However, the modern Privy Council still

¹ Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000, p. 1.

² *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, at 20.

³ N. Cox, 'The abolition or retention of the Privy Council as the final court of appeal for New Zealand: Conflict between nationalism and legal pragmatism' *New Zealand Universities Law Review*, 20(2), 2002, p. 228.

performs a variety of functions. These range from ceremonial duties, such as the proclaiming of a new Monarch; to important constitutional functions, such as the promulgation of Orders in Council that formalise and give effect to, inter alia, ministerial and Cabinet decisions.

No deliberation takes place during a formal meeting of the Privy Council, notwithstanding the fact that Orders in Council are purportedly made by the Sovereign on the advice of the Council.⁴ However, deliberative functions are still performed by the sundry committees that the Privy Council retains for various purposes.⁵ The conclusions of these committees, in order to have legal effect, are subsequently reported to the Queen in full Council and embodied in a formal Order.⁶

Although it is an Executive organ, the Privy Council has long discharged judicial functions.⁷ Historically, any subject who was dissatisfied with a decision of the courts could, at last resort, present a petition to the Sovereign for redress. Originally, these petitions may have been little more than an entreaty to the Sovereign, in person, for protection against the unjust administration of the law. But, eventually, the practice evolved into a privilege belonging to every subject of the King.⁸

By convention, petitions addressed to the King were heard by the King in Council. However, in the context of the great 17th Century struggles for supremacy between the Crown and Parliament, the right of the King in Council to receive appeals from England and Wales, was abolished.⁹ Thenceforth, petitions from within the United Kingdom, with the exception of a few specialist matters,¹⁰ were heard either by the King in Parliament, which founded the appellate jurisdiction of the House of Lords; or the King in his Chancery, eventually spawning the Court of Chancery.¹¹ However, the King in Council did retain the right to hear petitions brought from Britain's overseas colonies and plantations and from the Channel Islands.¹² Over the next two centuries the number of appeals from these jurisdictions grew substantially.¹³

4.1.2 Structure and Composition of the Judicial Committee

4.1.2.1 The Judicial Committee Acts

Until the 19th Century no permanent arrangements were instituted for the hearing of judicial appeals by the Privy Council. As noted above, the appellate jurisdiction of the King in Council was founded entirely on a mixture of the prerogative powers of the Crown and conventional practice. Consequently appeals were dealt with in a rather ad-hoc fashion,¹⁴ although in later years they were

⁴ Rt Hon Lord Haldane of Cloan, 'The work for the Empire of the Judicial Committee of the Privy Council', *Commonwealth Law Journal*, 1(2), 1922, p. 145; P. A. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edition, Wellington: Brookers, 2001, p. 721.

⁵ Standing committees include the Committee for the Purposes of the Crown Office Act 1877; Baronetage; Political Honours Scrutiny; Jersey and Guernsey; and various committees for universities. Ad hoc committees deal with matters such as the application for charters and statutes, interception of communications, and, of course, judicial appeals (see Cox, *Supra* fn 3, p. 228).

⁶ For an account of the procedure with respect to decisions of the Judicial Committee, see Cloan, *Supra* fn 4, p. 145-6.

⁷ *Tangiora v Wellington District Legal Services Committee*, *Supra* fn 2.

⁸ *Nadan v The King* [1926] AC 482, at 491.

⁹ Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, CP 11/03 July 2003, p. 17. The precise date was 1641, less than three years before the English Civil War.

¹⁰ Examples include ecclesiastical and admiralty appeals.

¹¹ *British Coal Corporation v The King* [1935] AC 500, at 512.

¹² Jersey and Guernsey

¹³ Department for Constitutional Affairs, *Supra* fn 9, p. 17.

¹⁴ *ibid*, p. 17.

referred to the Committee of Trade and Plantations.¹⁵ The usual practice was for appeals to be heard by a committee of three, but in most cases these committees included one or two laymen who did not possess the requisite judicial or legal experience. A similar ad-hoc approach was also evident in the House of Lords where laymen were also regularly called upon to hear appeals.¹⁶

Throughout the 19th Century the Imperial Parliament passed a series of statutes to address the inadequacies of the Privy Council and the House of Lords with respect to their judicial functions. These statutes included the Judicial Committee Acts of 1833 and 1844, which affirmed and regulated the appellate jurisdiction of the Privy Council; and the Appellate Jurisdiction Acts of 1876 and 1887, which, inter alia, confirmed the jurisdiction of the House of Lords and provided for the appointment of judicially qualified life peers to hear appeals. The main consequence of these statutes, as far as the Privy Council was concerned, was the establishment of a Judicial Committee, with a defined membership, to hear and report to His Majesty on any appeals brought to the King in Council.¹⁷

Since the passage of the Judicial Committee Acts there has been some controversy as to whether the Imperial statutes have supplanted the prerogative or whether they merely regulate its exercise.¹⁸ Although some ambiguity remains,¹⁹ the main consequence of the Acts was clear. In *British Coal Corporation v The King* their Lordships held that, although appeals are in form to the Sovereign in Council, in reality they are to the Judicial Committee which exercises in truth, but not in name, the prerogative powers of the Sovereign in Council. In consequence the Judicial Committee was deemed to be, in substance, a Court of law rather than a committee of the Executive.²⁰

4.1.2.2 British and Commonwealth Membership of the Judicial Committee

The membership of the Judicial Committee, regulated by the Judicial Committee Act 1833 and the Appellate Jurisdiction Act 1876, comprises the Lord President of the Council, the Lord Chancellor, former Lord Presidents, the Lords of Appeal in Ordinary (the Law Lords), and ‘such other members of the Privy Council as shall from time to time hold or have held high judicial office’. Since 1895 membership has also extended to Privy Councillors who are or have been judges in certain Commonwealth countries.²¹

Appeals are normally heard by a panel of five, although, like the House of Lords, the quorum is three. In practice, most of the workload of the Judicial Committee is undertaken by the twelve Lords of Appeal in Ordinary, assisted by a few retired Law Lords who are under the age of 75. By convention the Lord President and the other non-judicial members of the Judicial Committee do not sit on appeals.

¹⁵ Cox, *Supra* fn 3, p. 223.

¹⁶ Department for Constitutional Affairs, *Supra* fn 9, p. 14-17.

¹⁷ For example, s 3 of the Judicial Committee Act 1833 provides:

‘**Appeals to King in Council from sentence of any judge, etc, shall be referred to the committee to report, to report thereon.** All appeals or complaints in the nature of appeals whatever, which by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council...shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council’.

¹⁸ Maurice Kelly, ‘Leaving Their Lordships: The Commonwealth experience’, *New Zealand Law Journal*, 1994, p. 101.

¹⁹ Compare, for example, *British Coal Corporation v The King*, *Supra* fn 11; *Walker v The Queen* [1994] 2 AC 36 (PC); *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC); *R v Clark* [2005] 2 NZLR 747 (SCNZ). The Courts variously speak of the prerogative having been ‘merged’ with statute, superseded, supplemented, supplanted, or abrogated.

²⁰ *British Coal Corporation v The King*, *Supra* fn 11, at 510-12.

²¹ Cox, *Supra* fn 3, p. 233. Originally the total for the Empire was set at five.

An often repeated criticism of the Judicial Committee is that it is an unrepresentative body that is primarily composed of members of the English judiciary.²² However, although the Privy Council is undoubtedly a British (or English) dominated tribunal,²³ the composition of the modern Judicial Committee is more diverse than is sometimes acknowledged. Lord Cooke, for example, has pointed out that he has sat on five member panels of the Judicial Committee where there has been only one member, or no members, who were of English origin.²⁴

Several factors have helped to mitigate the English dominance of the Judicial Committee. By convention, the Lords of Appeal in Ordinary include representatives of the various sections of the UK judiciary. For example, there are at least two Scotsmen, usually a member from Northern Ireland, three or four former Queens Bench judges, and three or four from the Court of Chancery. Moreover, the composition of the Board has become less homogenous as a result of the decision to increase the number of Lords of Appeal from ten to twelve.²⁵

Recent appointments to the House of Lords have further enhanced diversity. Firstly, in 1996 Sir Robin Cooke, a former president of the New Zealand Court of Appeal, was appointed as a thirteenth Law Lord.²⁶ Secondly, two recent Law Lords, Lord Steyn and Lord Hoffmann, were educated and had practised law in South Africa. Thus, by the end of the 1990s, five of the thirteen Law Lords had a civil law background.²⁷ Finally, the British membership of the Judicial Committee is supplemented by senior judges from other Commonwealth countries. Although these judges sit on a relatively small proportion of cases and, due to the peerage system, are permanently junior to the Law Lords, the presence of Commonwealth judges on the Judicial Committee is not insignificant.²⁸ In 2003, for instance, there were fifteen overseas members of the Privy Council who were qualified to sit on the Judicial Committee.²⁹

4.1.2.3 New Zealand Membership of the Judicial Committee

Since 1913 New Zealand judges have been appointed to the Privy Council.³⁰ Occasionally they took part in judicial hearings. For instance, one judge sat during the Great War and two more sat on appeals during the inter-war period.³¹ The practice fell into disuse during the 1930s, but it was revived in 1962,³² possibly with the aim of re-branding the Judicial Committee as a Commonwealth, rather than a purely English tribunal.³³ From 1975 New Zealand judges have regularly sat on the Judicial Committee.³⁴

²² See, for example, B. J. Cameron, 'Appeals to the Privy Council-New Zealand', *Otago Law Review*, p. 177; and the parliamentary speeches during the Supreme Court debate (Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002).

²³ Cox, *Supra* fn 3, p. 239.

²⁴ Rt Hon Lord Cooke of Thorndon, *Final Appeal Courts: Some Comparisons*, New Zealand Centre for Public Law, Occasional Paper No 7, Victoria University of Wellington, Dec 2001.

²⁵ *ibid*. The number of Law Lords was fixed by the Appellate Jurisdiction Act 1876, but is amendable by Order in Council.

²⁶ Lord Cooke retired in 2001.

²⁷ Cox, *Supra* fn 3, p. 234.

²⁸ Commonwealth Judges that have sat on the Judicial Committee since 1980 include Sir Gordon Bisson, Sir Maurice Casey, Sir Thomas Eichelbaum, Sir Michael Hardie-Boys, Sir Duncan McMullin, Sir Robin Cooke, Dame Sian Elias, Thomas Gault, John Henry, and Peter Blanchard (from the New Zealand Court of Appeal), Sir Thomas Floissac (East Caribbean Court of Appeal), Justice Telford Georges (Bahamas Court of Appeal), and Justice Edward Zacca (Supreme Court of Jamaica).

²⁹ Department for Constitutional Affairs, *Supra* fn 9, p. 17.

³⁰ Cox, *Supra* fn 3, p. 235.

³¹ Sir Kenneth Keith, 'The unity of the common law and the ending of appeals to the Privy Council', *International and Comparative Law Quarterly*, 54(1), 2005, p. 203.

³² The first President of the Court of Appeal, Sir Kenneth Gresson, duly sat on the Judicial Committee for a few months in 1963.

³³ Cameron, *Supra* fn 22, p. 176.

³⁴ Cox, *Supra* fn 3, p. 235.

It was not until 1972 that a New Zealand judge sat on a New Zealand appeal.³⁵ But thereafter it became a regular occurrence. For example, between 1995 and 2002 twenty-seven New Zealand cases were heard by a Board that included a New Zealand judge.³⁶ This represented almost thirty-nine percent of the New Zealand appeals during this period. Moreover, a New Zealand judge sat on half of the appeals heard in 1997, 1999, and 2000³⁷ and in 62 percent of the hearings in 2001.³⁸ Furthermore, on six occasions between 1999 and 2002 the Opinion of the Board was written and delivered by a New Zealand judge.³⁹ Finally, on at least one occasion the five member panel of the Judicial Committee has included two New Zealanders.⁴⁰

4.1.3 Jurisdiction and Function of the Judicial Committee

Until recently, the Judicial Committee of the Privy Council had four primary functions. Firstly, the Judicial Committee gives advice to the Queen on any legal matters referred to it.⁴¹ These may include non-justiciable matters.⁴² Secondly it dealt with appeals from a number of technical jurisdictions within the United Kingdom including admiralty and ecclesiastical appeals and appeals by medical professionals against the decisions of statutory disciplinary bodies.⁴³ However, most of the latter jurisdiction has, from April 2003, been transferred to the English High Court and the Scottish Court of Session.⁴⁴

Thirdly, until 2009 the Judicial Committee had the jurisdiction to hear devolution appeals. The role of the Privy Council in these appeals was to determine, with reference to the relevant devolution legislation, matters relating to the legal competence of the devolved administrations, the Welsh and Northern Ireland Assemblies, and the Scottish Parliament.⁴⁵ This jurisdiction has since been transferred to the new Supreme Court of the United Kingdom.⁴⁶

Finally, the most important function of the Judicial Committee is its role as the final court of the Crown Dependencies of Jersey, Guernsey, and the Isle of Man and of all Commonwealth countries outside of the United Kingdom, except for those states that have abolished the appeal. The jurisdiction of the Privy Council to hear appeals from the Commonwealth is regulated by various Imperial Orders in Council, specific to each Commonwealth jurisdiction, that, in conjunction with the Judicial Committee Acts, delimit appeal rights and fix the conditions for appeals from each country.

In its function as final court for the Commonwealth, the Privy Council has traditionally performed two main roles. Firstly, the original purpose of the Judicial Committee was to supervise the courts in the infant Crown colonies to help to ensure that values such as incorruptibility, impartiality and

³⁵ Keith, *Supra* fn 31, p. 203.

³⁶ One hearing comprised to two appeals.

³⁷ New Zealand judges sat on five New Zealand appeals in 1997, three in 1999 and three again in 2000.

³⁸ Eight out of thirteen hearings.

³⁹ These judgments were prepared by Lord Cooke (3), Sir Kenneth Keith (2), and Justice Tipping (1).

⁴⁰ For example, *Ernest John Fifield v W and R Jack Ltd* [2000] 3 NZLR 129. The New Zealand Judges were Lord Cooke and Justice Henry.

⁴¹ Pursuant to s 4 of the Judicial Committee Act 1833.

⁴² Cox, *Supra* fn 3, p. 234.

⁴³ *ibid*, p. 234.

⁴⁴ Department for Constitutional Affairs, *Supra* fn 9, p. 18.

⁴⁵ *ibid*, p. 17.

⁴⁶ The Supreme Court of the United Kingdom was established by Part 3 of the Constitutional Reform Act 2005. It began hearing appeals on the 1st of October 2009. In addition to the devolution matters formerly heard by the Judicial Committee, the Supreme Court assumed the judicial functions of the House of Lords.

judicial independence were adhered to by the local judiciary until such time as they had become part of colonial tradition.⁴⁷ However, as each colony transitioned towards self-government and, ultimately, independence, the role of the Privy Council with respect to that jurisdiction also evolved. Specifically, their Lordships became increasingly reluctant to act as the ‘guardian of justice’, were less willing to grant special leave and, eventually, would refuse to entertain some legal issues on the grounds that they were purely domestic questions.⁴⁸

Secondly, a major role of the Judicial Committee for much of the 20th Century was to help to ensure the unity of the common law. After the 1930s, when imperial links were beginning to weaken, the common law was seen as a link that would help to bind the newly independent countries. In addition, it was thought that conformity in some areas of law, notably commercial, trade, and maritime law, would yield tangible benefits, especially for business.⁴⁹

However, the role of the Privy Council continued to evolve as the countries that retain the appeal have developed towards full constitutional and national maturity. In the 1960s the Judicial Committee began to acquiesce in some loss of conformity. For example, their Lordships held that there can be national variations in some area of the common law, especially those areas that require an assessment of local policy considerations.⁵⁰ Since then the scope of ‘local conditions’ has been progressively broadened, devolving more and more responsibility for legal development to the local courts.⁵¹ In *Invercargill City Council v Hamlin* their Lordships spelled out the Privy Council’s contemporary role. They noted that, where a local court is purporting to apply settled principles of English common law, then it is the function of the Board to ensure that those principles are correctly applied. However, they also held that the local courts were entitled to depart from English case law on the basis that local conditions are different.⁵²

4.2 The Supreme Court of New Zealand

4.2.1 Structure and Composition

4.2.1.1 General

Unlike the Privy Council, whose appellate jurisdiction originates in the royal prerogative, the Supreme Court is a creation of statute.⁵³ One important consequence of this is that the jurisdiction of the Supreme Court is also entirely statutory. It can only hear an appeal if statute expressly authorises that it can do so.⁵⁴ In contrast, the Privy Council, whose jurisdiction was only later affirmed by Imperial statute,

⁴⁷ See, for example, Lord Normand ‘The Judicial Committee of the Privy Council-Retrospect and Prospect’ [1950] 3 CLP 1.

⁴⁸ Cloan, *Supra* fn 4, p. 153.

⁴⁹ See, for instance, Justice Somers comments to Peter Spiller (cited in Spiller, *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2001).

⁵⁰ For instance, *Australian Consolidated Press v Uren* [1969] 1 AC 590; *Reid v Reid* [1982] 1 NZLR 147.

⁵¹ Hon Robert Fisher, ‘New Zealand legal method: Influences and consequences’, in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p. 70.

⁵² [1996] 1 NZLR 513 at 519.

⁵³ See Supreme Court Act 2003, s 6.

⁵⁴ Rt Hon Peter Blanchard ‘New Zealand Supreme Court jurisdiction and practice’, *Commonwealth Law Bulletin*, 33(1), 2007a, p. 3.

still retains discretion to grant special leave under the prerogative. The Supreme Court possesses no such power.⁵⁵ The implications of these jurisdictional differences are further discussed in **Chapter 5**.

4.2.1.2 Composition

The Supreme Court comprises the Chief Justice and four or five other judges appointed by the Governor-General.⁵⁶ Upon appointment the members of the Supreme Court continue to hold office as Judges of the High Court, with all the powers of a High Court Judge,⁵⁷ but vacate all other judicial offices.⁵⁸ The Supreme Court Act also provides that Judges of the Supreme Court continue to hold office only so long as they remain a Judge of the High Court.⁵⁹ This, in effect, means that the retirement age for members of the Supreme Court, like other Judges of the High Court, is 68.⁶⁰

There is also provision for the appointment of temporary judges. Specifically, s 23(1) of the Supreme Court Act provides that retired members of the Supreme Court or Court of Appeal may be appointed as acting judges. Acting judges must be under 75 and are appointed for less than 24 months.⁶¹ They act as a member of the Supreme Court to the extent authorised by the Chief Justice.⁶² At present the Supreme Court has decided that acting judges will only be used where one of the permanent members recuses themselves and not to, for example, facilitate the taking of leave.⁶³

In ordinary circumstances appeals are heard and determined by a Court consisting of five judges (including any acting judges).⁶⁴ However, provision is made for three or four judges to hear an appeal if the other permanent members are unavailable.⁶⁵ The quorum for determining leave applications is two permanent judges.⁶⁶ However, the Court has adopted the practice of using a panel of three judges to hear most leave applications. Justice Blanchard has explained extra-judicially that this is to promote consistency in leave decisions and to reassure unsuccessful litigants that a majority of the permanent judges have considered their application.⁶⁷

4.2.1.3 Overseas Judges

One of the major questions that was raised during the Supreme Court debate was whether or not overseas judges should sit on the new final court. It is uncommon for an independent country to utilise overseas judges, however there are notable exceptions. Firstly, as discussed above, provision was made for senior Commonwealth judges to sit on the Judicial Committee. This arrangement reflected the fact

⁵⁵ See, for example, *R v Clark* [2005] 2 NZLR 747 at 748, where Elias CJ contrasts the jurisdiction of the Privy Council to hear petitions for special leave with the entirely statutory jurisdiction of the Supreme Court.

⁵⁶ Supreme Court Act 2003, s 17(1).

⁵⁷ *ibid*, s 20.

⁵⁸ *ibid*, s 21.

⁵⁹ *ibid*, s 22.

⁶⁰ Judicature Act 1908, s 13.

⁶¹ Supreme Court Act, s 23(2)

⁶² *ibid*, subs (3) and (4)

⁶³ Rt Hon Peter Blanchard, 'The early experience of the New Zealand Supreme Court'. An address commemorating the retirement of Sir Kenneth Keith, 2007b, p. 21.

⁶⁴ Supreme Court Act, s 27(1).

⁶⁵ *ibid*, s 30(1). This has happened twice, in *R v Thompson* [2006] 2 NZLR 577 (SCNZ) and *Southbourne Investments Ltd v Greenmount Manufacturing Ltd* [2008] 1 NZLR 30 (SCNZ) (fog and bereavement, respectively).

⁶⁶ *ibid*, s 27(2)(b)

⁶⁷ Blanchard, *Supra* fn 63, p.18.

that the Judicial Committee acts as the final court of appeal for a number of different countries. It was seen as appropriate that judges from these jurisdictions sit on the Board.⁶⁸

Secondly, the Hong Kong Court of Final Appeal comprises the Chief Justice, three Permanent Judges and a non-permanent Hong Kong Judge or a Judge from another common law jurisdiction. These arrangements were the product of a settlement reached in 1990 in the lead up to the transfer of Hong Kong from British to Chinese rule in 1997.⁶⁹ At the time of the Supreme Court debate, the Hong Kong Court of Final Appeal had employed retired judges from Australia and New Zealand, as well as three British judges.⁷⁰

Other Commonwealth countries have also made provision for overseas judges to sit on the final court. For example, the agreement establishing the Caribbean Court of Justice allows judges, with at least five years experience, to be appointed from ‘a Contracting Party or...some part of the Commonwealth, or...a State exercising civil law jurisprudence common to Contracting Parties’.⁷¹ Finally, a number of Pacific Island nations, including Samoa, Fiji, and the Cook Islands, source judges from Australia and New Zealand to sit on their domestic courts, including the final court.

The question of overseas judges was considered by both the Ministerial Advisory Group and the Justice and Electoral Committee. The Advisory Group unanimously rejected the idea. For example, they asserted that New Zealand has sufficient judicial resources to maintain both final and intermediate appellate courts.⁷² Moreover, it was assumed, based on the experience of the Privy Council and the Hong Kong Court of Final Appeal, that overseas judges would only be available for short periods. The Advisory Group felt that a frequent turn-over of judges would have a negative impact on the ability of the new final court to develop collegiality and would discourage reflective decision-making.⁷³ Finally, it was suggested that because overseas judges would only sit irregularly, they could not have a significant impact on the decisions of the Court.⁷⁴

In contrast, the Justice and Electoral Committee was more open to the use of overseas judges. Moreover, many of the submissions received by the select committee also supported the idea. For example, Lord Cooke,⁷⁵ reiterating comments that he had made in an earlier paper,⁷⁶ asserted that an overseas element would help to ensure diversity and prevent isolationism.⁷⁷ Specifically, he felt that there was a danger, given New Zealand’s small population and legal profession, of excessive local conformity. In contrast, he noted, citing the example of Hong Kong, that an overseas judge, especially one with wide experience, can bring a broader perspective than a local judge. Contrary to the conclusions of the Advisory Group, he noted that the overseas judge can and does have a decisive influence of the outcome of some appeals.⁷⁸

⁶⁸ Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report to Hon Margaret Wilson Attorney-General and Associate Minister of Justice*, Wellington: Office of the Attorney-General, 2002, p 35.

⁶⁹ Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p. 82.

⁷⁰ Two of the British Judges are available to sit for up to one month per year.

⁷¹ Article IV(10)(a)

⁷² Ministerial Advisory Group, *Supra* fn 68, p. 36.

⁷³ *ibid*, p. 36.

⁷⁴ *ibid*, p. 35.

⁷⁵ Ironically Lord Cooke, a former President of the New Zealand Court of Appeal, had, in 2001, completed a period serving on the Appellate Committee of the House of Lords.

⁷⁶ Thorndon, *Supra* fn 24.

⁷⁷ Justice and Electoral Committee, *Supra* fn 69, p. 38.

⁷⁸ Thorndon, *Supra* fn 24.

Other submissions were more critical of the idea of an overseas presence. For example, one former Court of Appeal judge⁷⁹ felt that overseas judges were ‘inconsistent, anomalous, impractical, and anti-collegial’.⁸⁰ Other objections included the fact that overseas judges would result in age limit anomalies (although the same argument applies to temporary judges); concerns that there would be limits on the judges available (for example that Canadian judges would not be available); and that the proposal indicates a lack of confidence in the New Zealand judiciary, legal profession and law schools.⁸¹

The select committee decided to ask the Attorney-General to explore whether British Law Lords could be provided to sit on the Supreme Court.⁸² However, in discussions with the Lord Chancellor⁸³ and senior members of the British judiciary⁸⁴ she received no confirmation that a sitting British judge could be made available, especially in light of the United Kingdom’s own Supreme Court proposals.⁸⁵ Nevertheless, a majority of the select committee supported making provision for the appointment of overseas judges.⁸⁶ The Minister subsequently indicated that she would be willing to amend the legislation. But, ultimately, no such amendment was made.⁸⁷

4.2.2 Role of the Supreme Court

The Ministerial Advisory Group recommended that the Supreme Court should perform the roles of error correction and the clarification and development of the law, with particular responsibility for the latter.⁸⁸ It was argued that the Supreme Court would be at the apex of the New Zealand judiciary and, thus, ‘it should focus on the development of the law, within the context of New Zealand society and the limits of judicial decision-making’.⁸⁹

The recommended role of the Court is reflected in several key provisions in the Supreme Court Act. Firstly, s 3 states that the purpose of establishing the Supreme Court was ‘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’.⁹⁰

Secondly, s 24 provides that appeals are to proceed by way of rehearing. In recommending this provision, the Ministerial Advisory Group noted that the role of an appellate court relates directly to the standard of review that it performs. On the one hand, if the function of the court is confined to law clarification and development, then the standard of review may be a strict appeal where the court cannot receive new evidence. On the other hand, if the role of the Court includes remedying miscarriages of justice then it should conduct appeals by way of rehearing with the ability to receive further evidence.⁹¹

⁷⁹ The Rt Hon E. W. Thomas QC.

⁸⁰ Justice and Electoral Committee, *Supra* fn 69, p. 38.

⁸¹ *ibid*, p. 38

⁸² *ibid*, p. 37. The request was made through officials from the Ministry of Justice.

⁸³ Lord Falconer of Thoroton.

⁸⁴ This included the Senior Law Lord, Lord Bingham of Cornhill, and the Lord Chief Justice of England and Wales, Lord Woolf.

⁸⁵ Justice and Electoral Committee, *Supra* fn 69, p. 37.

⁸⁶ *ibid*, p. 37. United Future, National, the Greens, New Zealand First, and Act recommended a flexible approach.

⁸⁷ *ibid*, p. 39.

⁸⁸ Ministerial Advisory Group, *Supra* fn 68, p. 19.

⁸⁹ *ibid*, p. 20.

⁹⁰ As per subsection 1(a)(ii)

⁹¹ Ministerial Advisory Group, *Supra* fn 68, p. 47.

Finally, the role of the Supreme Court is also reflected in the Court's leave arrangements. In particular, the Supreme Court can only hear appeals by way of leave.⁹² In recommending this restriction the Advisory Group argued that, where the main function of the final court is the clarification and development of the law, then review by the final court should be by leave only.⁹³ Moreover, the choice of leave criteria was also intended to help define the Court's role.⁹⁴ In particular, the criterion of 'public importance',⁹⁵ which focuses on the value of a case as a precedent generally, is associated with the Court's role of developing the law. In contrast, the 'miscarriage of justice' criterion⁹⁶ relates to the Court's secondary role of error correction.⁹⁷

4.2.3 The Supreme Court Reform and Role of the Chief Justice

One of the most important changes instituted by the Supreme Court Act, and one that has received little attention, was the redefinition of the role of the Chief Justice and the consequential establishment of the position of Chief High Court Judge. The nature and purpose of these changes is explored in the following sections.

4.2.3.1 The Traditional Roles of the Chief Justice

Under the Judicature Act 1908 the Chief Justice is the Head of the Judiciary. This has traditionally entailed a number of roles. Firstly, the Chief Justice provides leadership to the judiciary. He or she represents and speaks on behalf of the entire judiciary in dealings with the government and in public. Secondly, the Chief Justice helps to preserve the independence of the courts.⁹⁸ Thirdly, the role involves managing the relationship between the judiciary and the executive. For instance, the Chief Justice undertakes a consultative role in respect to appointments made to the High Court and Court of Appeal. Moreover, the Attorney-General, in concurrence with the Chief Justice, recommends to the Governor General which barristers should be appointed as Queen's Counsel.⁹⁹ Furthermore, the Letters Patent of 1983 provide that, in the absence of the Governor-General, it is the Chief Justice who acts as administrator of the Government of New Zealand.

Prior to the Supreme Court reform, the Chief Justice also administered the operations of the High Court. This role included certifying, in conjunction with three other permanent judges, the need for temporary or acting High Court Judges and nominating High Court Judges to sit in the Criminal or Civil Divisions of the Court of Appeal.¹⁰⁰ Finally, in addition to their administrative roles, the Chief Justice sat on both the High Court and the Court of Appeal and, as a Privy Counsellor, was eligible to sit on the Judicial Committee. It appears that the ability of the Chief Justice to sit on, and preside over, the Court of

⁹² Supreme Court Act, s 12.

⁹³ Ministerial Advisory Group, *Supra* fn 68, p. 44.

⁹⁴ *ibid*, p. 45.

⁹⁵ Supreme Court Act, s 13(2)(a)

⁹⁶ Supreme Court Act, s 13(2)(c)

⁹⁷ See **Chapter 6** for further discussion of the leave criteria and their relationship to the role of the Supreme Court.

⁹⁸ Ministerial Advisory Group, *Supra* fn 68, p. 32.

⁹⁹ *ibid*, p. 32.

¹⁰⁰ *ibid*, p. 33.

Appeal has sometimes led to tension with the President of that Court.¹⁰¹ This was particularly the case when the Chief Justice presided frequently or attempted to impose their views on the Court.¹⁰² As a result, in the late 1980s it was recommended by the Law Commission that the roles of Chief Justice and President of the Court of Appeal be combined.¹⁰³

4.2.3.2 *The Chief Justice and the Supreme Court*

In its report on the proposed Supreme Court, the Ministerial Advisory Group recommended that the Chief Justice should sit at the apex of the court system and should no longer preside on the benches of the lower courts or, consequently, administer the operations of the High Court.¹⁰⁴ The Justice and Electoral Committee subsequently endorsed these recommendations on the basis that hearing cases in the Supreme Court, in addition to directly administering the High Court, would place a heavy workload upon the Chief Justice.¹⁰⁵ However, it was recommended that the Chief Justice retain the roles of upholding judicial independence, providing leadership to the judiciary, and managing the relationship with the executive.¹⁰⁶

In light of these recommendations, the Supreme Court Act introduced several changes to the Chief Justice's role. In particular, the Act provides that the Chief Justice sits on and presides over the new Supreme Court.¹⁰⁷ Like the other members of the Court, the Chief Justice must sit on every case. Consequently, he or she no longer sits on the Court of Appeal or holds any other judicial office.¹⁰⁸ The Supreme Court Act also reaffirmed that the Chief Justice is the Head of the Judiciary.¹⁰⁹

Finally, during the penultimate stage of the legislative process the Attorney-General introduced s 43 which amended s 4 of the Judicature Act 1908. This amendment provides for the appointment and tenure of a Chief High Court Judge, responsible to the Chief Justice, 'to ensure the proper administration of justice of the [High Court]'.¹¹⁰ Specifically, s 4A provides that the Governor-General may, by warrant, appoint a High Court Judge, who is not a member of the Supreme Court or Court of Appeal, to be Chief High Court Judge.¹¹¹ Section 4B provides that the 'Chief High Court Judge is responsible to the Chief Justice for ensuring the orderly and prompt conduct of High Court business'.

¹⁰¹ Spiller, *Supra* fn 49.

¹⁰² Compare, for instance, the tense relationship that existed between Wild CJ and McCarthy P (in part because the former repeatedly presided over the Court of Appeal) to the harmonious relationship that was fostered during Sir Ronald Davison's tenure as Chief Justice.

¹⁰³ Law Commission, *The Structure of the Courts*, Wellington: Law Commission, 1989.

¹⁰⁴ Ministerial Advisory Group, *Supra* fn 68, p. 33.

¹⁰⁵ Justice and Electoral Committee, *Supra* fn 69, p. 33-4.

¹⁰⁶ Ministerial Advisory Group, *Supra* fn 68, p. 33.

¹⁰⁷ Supreme Court Act, s 29(1)

¹⁰⁸ *ibid*, s 21. This section requires Judges of the Supreme Court vacant all other judicial offices (except as a Judge of the High Court) on appointment.

¹⁰⁹ *ibid*, s 18(1).

¹¹⁰ Supreme Court Bill 9004: Committee of the Whole House, *Hansard*, 8th October 2003.

¹¹¹ Subsection (1).

4.3 Summary

The preceding discussion highlighted a number of important differences between the Judicial Committee and the Supreme Court. Firstly, the origin and nature of the two courts is starkly different. On the one hand, the Privy Council and the appellate jurisdiction that it exercises have their basis in the royal prerogative and in conventional practice. Although the Judicial Committee is a statutory body, the wider Privy Council is not. In contrast, the Supreme Court is entirely a statutory creation. Its jurisdiction, composition, procedure, and powers are spelled out, in toto, by the Supreme Court Act. Consequently, the Supreme Court cannot entertain appeals or exercise powers that fall outside of these provisions.

Furthermore, the Judicial Committee is not, strictly speaking, a Court at all, but a committee of the executive that reports its conclusions to the Sovereign in Council. Their Lordships have asserted that the procedure is mere form; that in substance the Judicial Committee is a court of law. Nevertheless, the manner and form of Privy Council decisions is a visible reminder that the judicial functions of the Privy Council have their original basis in the prerogative. Moreover, as noted in the previous chapter, the promulgation of Judicial Committee decisions by Order in Council is arguably constitutionally anachronistic. Strictly speaking, it meant that the Queen was making Orders in Council for New Zealand at the recommendation of her British, rather than New Zealand, advisors.

There were also major differences in the composition of the two Courts. The Judicial Committee has a large membership that included the twelve Law Lords, other judicially experienced Privy Counsellors, and occasionally senior judges from other Commonwealth countries. Appointments to the Privy Council are made by the British Prime Minister and the composition of the five member panel for any particular hearing is determined by the senior British judiciary and can vary considerably from hearing-to-hearing. Although there has been considerable Commonwealth and New Zealand participation on the Judicial Committee, overall it is a British dominated tribunal with the 12 Law Lords hearing the bulk of appeals.

In contrast, the composition of the Supreme Court is much more tightly prescribed. It comprises the Chief Justice and four or five other judges appointed by the Governor-General, plus any temporary judges that may sit from time to time. Furthermore, whereas the Privy Council employs judges from other Commonwealth jurisdictions, the architects of the Supreme Court declined to enable the appointment of overseas judges. Ultimately this decision is consistent with the Court's objective of creating an 'indigenous justice system'. But, it also raised concerns that the patriation of the final court could lead to isolationist tendencies on the part of the new final court.¹¹²

Finally, there are significant differences between the functions of the Judicial Committee and the Supreme Court. On the one hand the role of the Privy Council has evolved over time. Originally, in the infant colonies, it adopted a relatively interventionist role as the 'guardian of justice'. However, once the colonies, including New Zealand, developed into fully independent nations, the role of the Judicial Committee shifted. At first it attempted to maintain Imperial links by ensuring legal conformity, but eventually this purpose too was abandoned. Latterly the Privy Council has increasingly passed

¹¹² The approach of the Supreme Court to overseas jurisprudence is examined in **Chapter 9**.

responsibility for legal development to the local courts. In contrast, it is intended that the Supreme Court will perform a more conventional role. Its primary function is to develop and clarify the law, with a secondary responsibility for correcting errors.

5

The Privy Council and the Supreme Court: A Comparison *Jurisdiction*

The avowed purpose of the Supreme Court reform was to ‘improve access to justice’ by ‘improving the accessibility of the [final court]’ and ‘broadening the range of matters able to be considered by New Zealand’s highest court’.¹ With this objective in mind the following discussion compares and contrasts the jurisdiction of the Privy Council and the Supreme Court. The first part focuses on the Privy Council. It outlines the jurisdictional arrangements established and affirmed by the Judicial Committee Acts and describes the restrictions that were subsequently imposed on this jurisdiction by various New Zealand enactments. The second section then considers the Supreme Court. The emphasis of this section is on describing how the Supreme Court Act, and several contemporaneous reforms, sought to ‘improve access to justice’ by expanding the jurisdiction of the new final court.

5.1 Jurisdiction of the Privy Council

5.1.1 General Provisions

As noted in the previous chapter the appellate jurisdiction of the Privy Council is affirmed and regulated by the Judicial Committee Acts of 1833 and 1844. The jurisdiction defined by these statutes is both broad and general. The key provision is s 3 of the 1833 Act which provides that all appeals ‘which by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council’ shall be referred to the Judicial Committee. In addition, s 1 of the 1844 Act authorises His Majesty, by Order in Council, to provide for the admission of appeals from any colonial Court ‘although such Court shall not be a Court of Error or Appeal’. In other words this provision enables an appeal to be brought from any court, irrespective of whether or not it is an appellate tribunal.

Appeals to the Judicial Committee are further regulated by Imperial Orders in Council that provide for various appeal rights and that fix the conditions upon which appeals are to be permitted. In New Zealand appeals were primarily governed by the New Zealand (Appeals to the Privy Council) Order 1910.² This Order, inter alia, established that an appeal may lie to the Privy Council from a decision, whether final or interlocutory, of the Court of Appeal by the leave of that court.³

¹ Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p. 1.

² Amended by the New Zealand (Appeals to the Privy Council) (Amendment) Order 1972.

³ Rule 2.

The Privy Council also retains a discretion, deriving from the old prerogative powers of the Crown, to grant special leave.⁴ An appeal brought by way of special leave does not rest upon any domestic statutory appeal entitlements or on any Orders in Council, although they are still made under the general provisions of s 3 of the Judicial Committee Act 1833 (Imp).⁵ The ability to grant special leave broadens the Privy Council's jurisdiction in important ways. For instance, the 1910 Order, like similar instruments in other Commonwealth countries, did not make provision for criminal appeals.⁶ This meant that a criminal appeal could only be heard by the Privy Council by way of special leave.

In a number of cases the Privy Council has held that the Judicial Committee Acts have superseded the prerogative.⁷ Two main consequences follow. Firstly, the Privy Council does not have the jurisdiction to special grant leave unless the petition falls within the, admittedly very broad, provisions of the Judicial Committee Acts.⁸ Secondly, their Lordships have held that because the power to grant special leave is in substance statutory, with only a vestigial and purely formal residual of the old prerogative attached, it can be limited or abolished by statute through express words or necessary intendment. Thus their Lordships held that finality clauses, such as s 67 of the Judicature Act 1908 (NZ), restricted the Privy Council's right to consider petitions for special leave.⁹

5.1.2 Restrictions on the New Zealand Jurisdiction of the Privy Council

The very broad jurisdiction provided by s 3 of the Judicial Committee Act 1833 (Imp) and the New Zealand Order 1910 was subsequently limited by a number of New Zealand statutes. Firstly, s 144(5) of the Summary Proceedings Act 1957 provided that the decision of the Court of Appeal on any appeal under s 144 was final. Thus the Privy Council was unable to hear appeals on criminal cases that originated in the summary jurisdiction of the District Court and on a variety of civil matters where the relevant statute applied the appeal procedure set out in s 144.

Secondly, the Judicature Act 1908 (NZ) barred appeals to the Judicial Committee arising from proceedings in the inferior Courts. For example, s 67 provided that the decision of the High Court on an appeal from the inferior Courts was final, with the exception that leave may be given for an appeal to the Court of Appeal. In these circumstances the decision of the Court of Appeal was deemed to be final.¹⁰ Furthermore, s 68 also provided that the decision of the Court of Appeal was final in a leapfrog appeal from the inferior Courts.

Thirdly, appeals to the Privy Council arising out of the decisions of the specialist inferior Courts were also largely precluded. For example, the decision of the Court of Appeal was final in appeals against

⁴ This right was explicitly preserved, at least in respect of civil appeals, by r 28 of the New Zealand (Appeals to the Privy Council) Order 1910.

⁵ See, for example, *R v Clark* [2005] 2 NZLR 747 at 748, where Elias CJ contrasts the jurisdiction to hear petitions for special leave with the entirely statutory jurisdiction of the Supreme Court.

⁶ See, for instance, *Woolworths Ltd v Wynne* [1952] NZLR 496 (CA).

⁷ *British Coal Corporation v The King* [1935] AC 500; *Walker v The Queen* [1994] 2 AC 36; *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385.

⁸ For example see *Commonwealth of Australia v Bank of New South Wales* [1950] AC 235 (PC); *R v Thomas* [1978] 2 NZLR 1 (PC).

⁹ See, for example, *De Morgan, Supra* fn 7.

¹⁰ *ibid.*

proceedings originating in the Environment Court,¹¹ the Youth Court,¹² the Employment Court,¹³ and the Court Martial Appeals Court¹⁴. Moreover, s 213(4) of the Employment Relations Act barred an appeal against a Court of Appeal decision on judicial review proceedings of the Employment Court.

Finally, the Privy Council's jurisdiction to deal with family law matters was also heavily constrained. Most family law statutes provided that a decision of the Family Court or District Court was able to be appealed to the High Court and, in limited circumstances, to the Court of Appeal, but not to the Privy Council.¹⁵ Only a small number of statutes contained provisions permitting an appeal to the Judicial Committee.¹⁶

5.2 The Jurisdiction of the Supreme Court

5.2.1 General

The defining feature of the jurisdictional arrangements of the Supreme Court is that its jurisdiction is entirely statutory. The Court does not have inherent jurisdiction and can only hear an appeal in a particular case if a statute expressly authorises that the Court can do so.¹⁷ This represents an important difference between the Supreme Court and the Privy Council. As noted above, the Queen in Council retained a right to grant petitions for special leave on matters not covered by the statutory appeal entitlements.

5.2.2 Civil Jurisdiction

The Supreme Court is authorised to hear civil appeals by ss 7-9 of the Supreme Court Act 2003. Section 7 empowers the Supreme Court to hear and determine an appeal from a party to a civil proceeding in the Court of Appeal. Section 8 confers a jurisdiction to hear 'leapfrog' appeals directly from the High Court. Section 9 provides that the Supreme Court can hear an appeal against a decision in a civil proceeding in any New Zealand court other than the Court of Appeal or High Court, if some enactment other than the Supreme Court Act allows for such an appeal.

These sections impose three main jurisdictional limitations upon the type of civil case that can be appealed to the Supreme Court. Firstly, the Court cannot hear an appeal from the Court of Appeal or High Court if another enactment provides that there is no right of appeal against the relevant decision.¹⁸

¹¹ Resource Management Act 1991, s 308 (applying s 144 of the Summary Proceedings Act 1957).

¹² Children, Young Persons, and Their Families Act 1989, ss 351-355 (applying s 144 of the Summary Proceedings Act 1957).

¹³ Employment Relations Act 2000, s 214(1).

¹⁴ Courts Martial Appeals Act 1953, s 10.

¹⁵ For example, Guardianship Act 1968, ss 31 and 31B; Family Proceedings Act 1980, s 174; Protection of Personal and Property Rights Act 1988, ss 82-85; Child Support Act 1991, s 120; Domestic Violence Act 1995, s 93.

¹⁶ These were the Family Protection Act 1955, s15; the Law Reform (Testamentary Promises) Act 1949, s 5A; and the Property (Relationships) Act 1976, s 39B.

¹⁷ See for example, *R v Clark*, *Supra* fn 5.

¹⁸ Sections 7(a) and 8(a), respectively.

As a result, a number of enactments that had previously barred an appeal to the Privy Council continue to prevent an appeal to the Supreme Court.¹⁹ Secondly, ss 7(b) and 8(b) bar the Supreme Court from hearing an appeal against a decision by the Court of Appeal or High Court if that decision is a refusal to grant leave or special leave to appeal. However, the Court does have jurisdiction to hear an appeal in regards to whether or not an appeal lies to the Court of Appeal as of right.²⁰

Finally, s 8(c) prevents the Supreme Court from hearing an appeal against a High Court decision if that decision was made on an interlocutory application. Justice Blanchard has suggested that the policy behind this restriction is to expedite the substantive hearing of a case and to reduce the possibility of a party indulging in extended interlocutory warfare. He also argued that such a restriction will not lead to injustice because it has been well established in the Privy Council and, more recently, in the High Court of Australia, that during an appeal from a final judgment it is open to the appellant to question any interlocutory order that was a step in the proceeding leading to the final judgment.²¹

5.2.3 Broadening the Civil Jurisdiction of the Final Court

In line with its avowed objective of ‘broadening the range’ of appeals able to be taken to New Zealand’s final court,²² the government promulgated a number of amendments to legislation that had previously restricted appeals to the Privy Council. Firstly, the Supreme Court Act repealed the finality provision in s 214(7) of the Employment Relations Act 2000 which had previously barred an appeal on matters originating in the Employment Court. Instead a new section was inserted that expressly provides for an appeal to the Supreme Court on questions of law in exceptional circumstances.²³ However, the finality provision in s 213(4), relating to the judicial review of Employment Court decisions was retained.

Secondly, the civil jurisdiction of the final court was expanded through the repeal of the finality provision in s 144 of the Summary Proceedings Act 1957 and the conferral of a new appellate jurisdiction for the Supreme Court under s 144A. As a result the Supreme Court can now hear appeals on matters originating in the Environment Court and the Youth Court, although in both cases the Court’s jurisdiction is restricted to points of law.

Thirdly, an amendment to the Judicature Act 1908 further broadened the Supreme Court’s jurisdiction. During the first three years of the Court’s operation, this Act had imposed major limits on its civil jurisdiction. Firstly, s 65 provided that a decision of the Court of Appeal was final on any matter transferred to it by the High Court under this section. Secondly, s 67 barred an appeal against a Court of Appeal decision in a case originating in the inferior Courts.²⁴ When the likely impact of these sections was brought to the attention of Parliament, an amendment to the Judicature Act was drafted to remove the statutory bars. The Judicature Amendment Act 2006 repealed ss 65 and 68 (a defunct provision) and

¹⁹ Examples include the Maritime Transport Act 1994, s 428(3); the Employment Relations Act 2000, s 213 (4); and the Injury Prevention, Rehabilitation and Compensation Act 2001, s 317.

²⁰ *Siemer v Heron* [2012] 1 NZLR 325.

²¹ Rt Hon Peter Blanchard, ‘New Zealand Supreme Court jurisdiction and practice’, *Commonwealth Law Bulletin*, 33(1), 2007a, p. 8.

²² Justice and Electoral Committee, *Supra* fn 1, p. 1.

²³ Section 214A

²⁴ *De Morgan*, *Supra* fn 7.

recast s 67 to expressly permit appeals to the Supreme Court from cases originating in the District Court.²⁵

Finally, the Supreme Court eventually acquired an expanded jurisdiction to hear appeals arising from Family Court proceedings. The Supreme Court Act removed finality provisions from several family law statutes.²⁶ However, these changes were inconsistent with s 67 of the Judicature Act, which applied according to s 31B(1) of the Family Proceedings Act. Thus the Supreme Court's jurisdiction on family law matters was somewhat unclear until s 67 was recast by the Judicature Amendment Act 2006.²⁷

5.2.4 Criminal Jurisdiction

The Supreme Court's criminal jurisdiction is established and limited by s 10 of the Supreme Court Act. Section 10 provides that the Supreme Court can hear and determine appeals that are authorised by Part 13 or s 406A of the Crimes Act 1961, s 144A of the Summary Proceedings Act 1957, and ss 10A or 10B(1) of the Courts Martial Appeals Act 1953. Matters outside the scope of s 10 cannot be appealed to the Supreme Court.

The key provisions in Part 13 of the Crimes Act relevant to the Supreme Court are ss 397A, 383, and 383A. Section 379A, amended by the Supreme Court Act, allows an appeal on a pre-trial decision either to the Court of Appeal, or directly to the Supreme Court. Section 383 is a parallel provision which deals with post-conviction appeal rights. It similarly authorises an appeal either to the Court of Appeal, or a leapfrog appeal to the Supreme Court. Finally, s 383A authorises an appeal to the Supreme Court against a decision of the Court of Appeal on an appeal under s 383.

Section 406A is an amendment to the Crimes Act that was inserted by the Supreme Court Act. Subsection (1) provides for a direct appeal to the Supreme Court against decisions made on questions referred to the High Court under s 406(a). Such an appeal is subject to the restriction on leapfrog appeals in s 14 of the Supreme Court Act.²⁸ Subsection (3) provides for an appeal to the Supreme Court from an appeal to the Court of Appeal on High Court reference questions. Finally, subsection (2) allows an appeal against determinations made on questions referred to the Court of Appeal under s380 or s 406(a).

The Supreme Court Act also amended the Summary Proceedings Act 1957 to allow the Supreme Court jurisdiction to hear criminal appeals originating from proceedings in the summary jurisdiction of the District Court. Specifically, the finality clause in s 144(5) of the Summary Proceedings Act was repealed and s 144A was inserted. The new section now expressly provides for an appeal to the Supreme Court from a determination of the High Court on a stated case under s 107, a determination of the High Court made in a general appeal (other than on an interlocutory application), and a decision of the Court of

²⁵ Rt Hon Peter Blanchard, 'The early experience of the New Zealand Supreme Court'. An address commemorating the retirement of Sir Kenneth Keith, 2007b, p 14-5.

²⁶ For example the Family Proceedings Act 1980, s 174(5); the Child Support Act 1991, s 120; and the Guardianship Act 1968, s 31B.

²⁷ Blanchard, *Supra* fn 21, p. 11.

²⁸ Section 14 provides that the Supreme Court cannot grant leave to a direct appeal from a court other than the Court of Appeal unless it is satisfied that, in addition to it being necessary in the interests of justice for the Court to hear the appeal, there are also exceptional circumstances that justify a direct appeal.

Appeal on an appeal under s 144(1). As with s 406A, appeals directly from the High Court are subject to s 14 of the Supreme Court Act.

Finally, ss 10A and 10B of the Courts Martial Appeals Act 1953 were also inserted by the Supreme Court Act. Section 10A allows an appeal to the Supreme Court from a decision of the Court of Appeal made on an appeal from the Courts Martial Appeal Court. Previously s 10 had provided that the decisions of the Court of Appeal were final. Section 10B empowers the Supreme Court to hear a direct appeal from the Courts Martial Appeal Court, again subject to s 14 of the Supreme Court Act.

5.2.5 Limits on the Supreme Court's Criminal Jurisdiction

There are several important matters not covered by s 10 and, hence, that are not within the jurisdiction of the Supreme Court. Firstly, Justice Blanchard has speculated that some proceedings that are civil in form, but are in substance criminal matters, may not be appealable to the Supreme Court. He noted that there is a line of authority in the Court of Appeal which deemed such proceedings to be criminal matters.²⁹ Indeed, there were cases in which the Court of Appeal had denied an applicant leave to appeal to the Privy Council on this basis.³⁰

Secondly, the Supreme Court has held that it is not permitted to hear appeals against a refusal of leave or special leave to appeal to the Court of Appeal, even though there is no explicit bar to such appeals (unlike the restriction provided by s 7(b) in respect of civil cases).³¹ In eschewing jurisdiction to hear appeals against leave decisions, the Supreme Court has pointed out that this is consistent with the past refusal of the Court of Appeal to grant leave to appeal to the Privy Council against a decision to refuse leave to appeal from the High Court.³²

Finally, the Supreme Court Act makes no provision for the Supreme Court to hear a pre-trial appeal under s 379A of the Crimes Act 1961, except as a direct appeal from the High Court. The Court considered this limit to its jurisdiction in *R v Clark*.³³ In their submissions to the Leave Panel counsel for both the applicant and the respondent suggested an interpretation of s 379A which would allow for an appeal to the Supreme Court against a Court of Appeal decision on a pre-trial appeal. They pointed out that the purpose of the Supreme Court Act to improve “access to justice” and suggested that it is inconsistent with that purpose for the only jurisdiction of the Supreme Court to consider pre-trial applications to be through a direct appeal that is subject to the exacting s 14 criteria.³⁴

²⁹ Blanchard, *Supra* fn 21, p. 10.

³⁰ See, for instance, *Chiu v Richardson (No 2)* [1983] NZLR 522 (CA) where the Court of Appeal held that an application for judicial review was a criminal application because the essential question was the jurisdiction of a criminal Court of summary jurisdiction. Although leave was consequently declined by the Court of Appeal, the applicant could still petition the Privy Council for special leave to appeal.

³¹ See for example *Simpson v Kawerau District Council* [2004] NZSC 13 where the Leave Panel held that a refusal of leave by the Court of Appeal was a decision that an appeal was not to be permitted, rather than a ‘decision...on an appeal’. Hence no appeal was authorised by s 144A(1)c) of the Summary Proceedings Act 1957 (at para 5). The Supreme Court has also held that it has no jurisdiction to hear appeals on various related matters such as an appeal against the Court of Appeal’s refusal to allow an applicant to withdraw a notice of abandonment (see *Palmer v Palmer* [2004] NZSC 16) or an appeal against a refusal by the Court of Appeal to reopen an appeal (see *De May v R* [2005] NZSC 27).

³² *ibid*. The Leave Panel cited the Court of Appeal in *Collier v Elders Pastoral Ltd* (1991) 3 PRNZ 478 and *Shardy v Circa Holdings Ltd* CA250/98, 24 February 1999.

³³ *Supra* fn 5.

³⁴ *ibid*, at 749-750.

Ultimately, however, a five judge Leave Panel held that s 379A permitted only one appeal from a pre-trial ruling, either to the Court of Appeal or to the Supreme Court, not two consecutive appeals. In delivering the Court's judgment Chief Justice Elias noted that the New Zealand appellate jurisdiction in respect of pre-trial determinations is usual in its breadth. She pointed out that there is no equivalent interlocutory criminal appellate jurisdiction in the UK, Australia, or Canada. Ironically, the Chief Justice did note that on at least one occasion a petition to appeal a pre-trial ruling was considered by the Privy Council. Although the application was declined, this was not for want of jurisdiction.³⁵

5.3 Summary: Jurisdictional Differences and Court Accessibility

Several broad conclusions can be drawn from the above discussion. Firstly, the appellate jurisdiction of the Privy Council, as regulated by the various Imperial statutes and subordinate legislation, was very open-ended. In respect of civil cases, the New Zealand Order 1910 permitted appeals from any Court of Appeal decision. Moreover, the prerogative right of the Privy Council to entertain petitions for special leave ensured that the Privy Council could hear appeals on matters not covered by the various Orders in Council. Thus the Privy Council had an extremely broad jurisdiction to hear criminal appeals by way of special leave.

Secondly, domestic legislation severely curtailed appeal rights to the Privy Council. In respect to criminal appeals, s 144 of the Summary Proceedings Act 1957 barred the Judicial Committee from hearing matters originating in the summary jurisdiction of the District Court. Civil appeals were similarly restricted in a number of areas, most notably cases originating from the District Court; appeals on matters arising in specialist Courts such as the Environment Court, Youth Court, Employment, and the Courts Martial Appeals Court; and appeals involving many areas of family law.

Thirdly, the Supreme Court Act and subsequent amendments to the Judicature Act removed many of these jurisdictional barriers, enabling appeals to the final court on cases originating in the inferior and specialist Courts. Finally, the jurisdiction of the Supreme Court is more tightly defined than that of the Privy Council. The Court can only entertain appeals on matters that are covered by ss 7-10 of the Supreme Court Act. There is no equivalent to the prerogative power of the Privy Council to hear appeals that are not specifically authorised by statute. As a result some criminal matters that were previously within the jurisdiction of the Privy Council are unable to be appealed to the Supreme Court.

On the whole the foregoing discussion demonstrates that, in general, the Supreme Court has a much broader jurisdiction compared to the Privy Council. However, the extent to which these jurisdictional differences translate into a greater opportunity for litigants to access the final court depends on a variety of other factors, including the leave criteria that guide whether or not a proposed appeal will be granted a hearing. These leave procedures, and the degree to which they hinder or facilitate access to the final court, are the subject of the next chapter.

³⁵ *ibid*, at 751-752.

6

The Privy Council and the Supreme Court: A Comparison *Leave Arrangements*

The current chapter has several purposes. Firstly, it outlines and compares the leave arrangements of the Privy Council and the Supreme Court. Secondly, based on this discussion, I will formulate testable predictions on the impact of these arrangements on the accessibility of each Court. These hypotheses are tested in **Chapter 7**. Finally, the current chapter explains the link that exists between leave arrangements, accessibility, and the role of the final court. In particular, I will illustrate how differences in leave arrangements and the approach to leave of the Privy Council and Supreme Court reflect fundamental differences in the role undertaken by each court.

6.1 Leave Arrangements for the Privy Council

6.1.1 Appeals from the Court of Appeal

6.1.1.1 General Provisions

The Privy Council could only hear an appeal against a decision of the New Zealand Court of Appeal if leave to appeal was granted by that Court or if special leave was granted by Her Majesty in Council.¹ The determination of leave applications by the Court of Appeal was regulated by the New Zealand (Appeals to the Privy Council) Order 1910.² However, the Courts had long held that the 1910 Order did not authorise the Court of Appeal to grant leave in a criminal case.³ As a result criminal cases could only proceed to the Judicial Committee by way of special leave.

The 1910 Order provided for a mixed system of leave whereby some appeals were heard as of right and others at the discretion of the Court of Appeal.⁴ In the first place, an appeal lay to the Privy Council as of right where the matter in dispute amounted to or exceeded the value of five thousand dollars (NZ).⁵ Only an appeal against a final judgment of the Court of Appeal was able to be brought to the Privy Council by way of right. Interlocutory orders, in contrast, could only be appealed at the discretion of the

¹ Judicial Committee (General Appellate Jurisdiction) Rules Order 1982.

² Amended by the New Zealand (Appeals to the Privy Council)(Amendment) Order 1972.

³ See, for example, *Woolworths Ltd v Wynne* [1952] NZLR 496 where the Court of Appeal applied the Privy Council decision in *Chung Chuck v The King* [1930] AC 244.

⁴ The relevant provisions of the 1910 Order were:

2. Subject to the provisions of these Rules, an appeal shall lie:-

- a) as of right, from any final Judgment of the Court of Appeal where the matter in dispute on the Appeal amounts to or is of the value of five thousand New Zealand dollars or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of five thousand New Zealand dollars or upwards; and
- b) at the discretion of the Court of Appeal from any other Judgment of that Court, whether final or interlocutory, if, in the opinion of that Court, the question involved in the Appeal is one which by reason of its *great general or public importance, or otherwise*, ought to be submitted to His Majesty in Council for decision...(emphasis added).

⁵ Rule 2(a).

Court of Appeal⁶ or by way of special leave. As a result, it became the practice of English and Commonwealth Courts to deem some apparently final orders to be interlocutory so as to deny the litigant an automatic right of appeal or to restrict such a right.⁷ This approach was adopted by the New Zealand Court of Appeal in *Re Chase (No 2)*⁸ where an order dismissing an action on the ground that there was no reasonable cause of action was treated as interlocutory to prevent leave from being granted as of right.

Secondly, the 1910 Order empowered the Court of Appeal to grant leave for civil matters that did not qualify for leave as of right. In order for leave to be granted the Court of Appeal had to be satisfied that the proposed appeal involved an issue of 'great general or public importance'.⁹ The test of 'public importance' is a widely utilised and understood threshold for leave applications. It governs access to the final court in many Commonwealth jurisdictions¹⁰ and is one of the leave criteria employed by the Supreme Court of New Zealand.¹¹ In addition, the Court of Appeal had a residual discretion to grant leave where the matter 'otherwise' ought to be submitted to the Privy Council, but this discretion was only used in exceptional circumstances.¹²

6.1.1.2 Arrangements in Overseas Jurisdictions

At one time mixed systems of leave were the standard arrangement for final courts throughout the Commonwealth. Not only did identical leave provisions apply in those countries that retained the Privy Council,¹³ but similar arrangements also governed access to the High Court of Australia,¹⁴ the Supreme Court of Canada,¹⁵ and the House of Lords. However, by the end of 20th Century the majority of these jurisdictions had reformed their leave arrangements. In particular, appeals as of right were abolished in the House of Lords in 1934 and in the Australian High Court in 1984.¹⁶ These jurisdictions now employ a system of discretionary leave based, inter alia, on the test of public importance.¹⁷ In addition, Canada abolished the appeal as of right based on a monetary criterion in 1975. Now virtually all civil appeals to the Canadian Supreme Court, and the majority of criminal appeals, require leave.¹⁸

⁶ Rule 2(b).

⁷ See, for example, *Hunt v Allied Bakeries Ltd* [1956] 1 WLR 1326. Lord Evershed MR observed that 'rightly or wrongly, orders dismissing actions-either because they are frivolous and vexatious, or on the ground of disclosure of no reasonable cause of action-have for a very long time been treated as interlocutory' (at 1328).

⁸ [1989] 1 NZLR 345.

⁹ Rule 2(b) of the New Zealand Order 1910.

¹⁰ Notable examples include the High Court of Australia (s 35A of the Judiciary Act 1915 (Cth) introduced in 1984); the Supreme Court of Canada (s 41 of the Supreme Court Act 1875 (Cdn) introduced in 1949); the House of Lords, and its successor the Supreme Court of the United Kingdom.

¹¹ Supreme Court Act 2003, s 13(2)(a).

¹² Andrew Beck, 'Litigation', *New Zealand Law Journal*, Feb 2006, p 17.

¹³ The Orders in Council that regulated the appeal were virtually identical throughout the Commonwealth, save that the specified monetary amount (and currency) differed in each jurisdiction.

¹⁴ See Judiciary Act 1915 (Cth), ss 25 and 35. In addition to a stipulated monetary amount, the obligatory jurisdiction of the High Court included cases in which the judgment impacted on the status of laws relating to aliens, marriage, divorce, bankruptcy or insolvency (s 35). In other cases the Court could grant special leave at its discretion (s 25).

¹⁵ See Supreme Court Act 1875, ss 36 and 41. Initially leave to the Supreme Court was as of right for cases exceeding the stipulated monetary minimum (\$10,000 from 1956) or by leave of the highest court of last resort in each province. An amendment to s 41 in 1949 introduced an overlapping power for the Supreme Court to admit appeals.

¹⁶ The sole exception is those cases where the High Court exercises its original jurisdiction. In these cases a right of appeal exists to the appellate High Court.

¹⁷ Public importance is one of several nominated grounds to which the High Court must have regard. Others include whether the appeal is in the interest of the administration of justice and whether there were divergent judgments in the lower courts (Judiciary Act 1915 (Cth), s 35A).

¹⁸ Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report to Hon Margaret Wilson Attorney-General and Associate Minister of Justice*, Wellington: Office of the Attorney-General, 2002, p 62.

6.1.1.3 Consequences of the Mixed Leave Arrangements

The mixed leave arrangements had important consequences for the types of appeal that were heard by the Privy Council. Firstly, the system of appeals as of right may have resulted in the Privy Council hearing cases that did not warrant an appeal to the highest court. It appears that some appeals involved matters that were relatively straightforward, or were of little public interest beyond the parties themselves, or had little value as precedents.¹⁹ For example, the Privy Council heard appeals that concerned the construction of one-off contracts or leases;²⁰ that were solely or predominantly factual disputes;²¹ or that involved the drawing of inferences from facts established in the lower courts.²²

At times the Judicial Committee itself has explicitly or implicitly suggested that the case under consideration should not have reached the final appellate court. For example, in *Wislang v Medical Council of NZ & Ors*, which was a judicial review appeal that was brought as of right, their Lordships commented that '[t]his challenge has been from first to last misconceived. It is regrettable that it was ever the subject of judicial review, let alone appeal to the Board.'²³ Furthermore, in interviews with one New Zealand researcher²⁴ several Law Lords pointed out that there were cases that had reached the Privy Council that should not have done so and that a more stringent leave system was required.

Secondly, the mixed leave system may have narrowed the range and content of the appeals that were heard by the Privy Council. On the one hand, the five thousand dollar threshold meant that certain cases, predominately involving commercial matters, were guaranteed a hearing as of right. On the other hand, those appeals that were taken as of right may have left little room for those that required leave. Chief Justice Elias has argued that this was a reason for the small numbers of criminal petitions that received special leave.²⁵

This conclusion is consistent with the experience in other Commonwealth countries. For example, Justice Kirby of the High Court of Australia has argued that the abolition of appeals as of right in 1984 was one of the reasons for the High Court's increased involvement in criminal appeals. He notes that prior to this reform a significant number of appeals could be brought to the High Court as of right. Consequently, these cases took up a significant proportion of the High Court's time. The residue of time available for special leave cases, particularly criminal cases, was limited.²⁶

A similar experience was evident in Canada. Anne Roland,²⁷ for example, has noted that before the monetary criterion was abolished approximately 85 percent of appeals were heard as of right, whereas only 15 percent were heard at the Court's discretion.²⁸ Moreover, a report prepared by the Canadian Bar Association found that due to an increase in the numbers of appeals as of right, fewer discretionary applications for leave were being granted. In 1961 the Supreme Court granted around 48 percent of leave

¹⁹ Rt Hon Dame Sian Elias, 'Transition, stability and the New Zealand legal system', *Otago Law Review*, 10(4), 2004a, p. 482.

²⁰ *Nippon Credit Bank Ltd v Air NZ Ltd* [1997] UKPC; *Norwich Union Life Insurance Society v Attorney-General* [1995] UKPC.

²¹ *Stemson v AMP General Insurance (NZ) Ltd* [2007] 1 NZLR 289; *Gilrose Finance Ltd v Ellis Gould* [2000] 2 NZLR 129.

²² *Norbrook Laboratories Ltd v Bomac Laboratories Ltd* [2006] UKPC 25.

²³ [2004] UKPC 59 at para 29.

²⁴ Peter Spiller. See Spiller, *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2002.

²⁵ Rt Hon Dame Sian Elias, 'Something old, something new: Constitutional stirrings and the Supreme Court', *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 139-130.

²⁶ Hon Michael Kirby, 'Why has the High Court become more involved in criminal appeals', *Australian Bar Review*, 2, 2002, p. 4.

²⁷ Registrar of the Supreme Court of Canada.

²⁸ Anne Roland, 'Appeals to the Judicial Committee of the Privy Council: A Canadian perspective', *Commonwealth Law Bulletin*, 34(4), 2006, p. 581.

applications, but this number had fallen to 17 percent by 1971. Furthermore, the report argued that important issues that did not meet the \$10,000 threshold were not being heard by the final court.²⁹

6.1.2 Direct Appeals from the High Court³⁰

In limited circumstances provision existed for an appellant to seek the leave of the High Court to bypass the Court of Appeal and appeal directly to the Privy Council. Leave for a leapfrog appeal could be granted only if the High Court felt that the question was one that should be considered by the Privy Council ‘by reason of its great general and public importance or of the magnitude of the interests affected or for any other reason ought to be submitted to His Majesty in Council for decision’.³¹

There are few cases in which the High Court has been prepared to grant leave for a direct appeal.³² That said, leave has been granted in cases where the value of the disputed matters exceeded the monetary threshold for an appeal to the Privy Council as of right.³³ However, leave has been refused where both parties did not consent to the grant of leave.³⁴ After 1918 the direct appeal fell into disuse, prompting suggestions by later commentators that it could be pronounced dead.³⁵

6.1.3 Petitions for Special Leave

It has been the longstanding practice of the Privy Council to not give reasons for its leave determinations. Notable exceptions to this rule include decisions on applications that raise important jurisdictional or constitutional questions³⁶ or matters of Privy Council practice.³⁷ The lack of written reasons makes it more difficult to tease out the principles applied by the Board in determining leave applications. Nevertheless, a few observations can be gleaned from the small number of petitions where the Board has provided reasons for its decisions.

6.1.3.1 Cases Where Leave Has been Refused by the Court of Appeal

Overall the Privy Council has been reluctant to grant applications for special leave in cases where leave has been refused by the local appellate court. It was felt that such a petition was, in effect, an

²⁹ Canadian Bar Association (1973) *Report of the Canadian Bar Association Committee on the Supreme Court of Canada*, Ottawa cited in Roland, 2006, *Supra* fn 28, p. 580.

³⁰ The New Zealand High Court was referred to as the Supreme Court until 1980. I have used the term High Court throughout this discussion to avoid confusion with the new Supreme Court of New Zealand.

³¹ *Boyd v Colby* (1918) GLR 333, at 333.

³² For instance *Franck v Stead* 1 NZLR SC 112 (SC).and *Gillies v The Gane Milking Machine Co Ltd* (1916) 17 GLR 313 (SC).

³³ *Gillies v The Gane Milking Machine Co Ltd*, *Supra* fn 68. The Chief Justice considered that, on the facts, it appeared that more than £500 was involved. He reasoned that if the Court of Appeal came to the same decision as the High Court, then the plaintiff would, under Rule 2(a) of the Privy Council Rules, have an appeal as of right to the Privy Council. Thus if leave was refused and the applicant appealed unsuccessfully to the Court of Appeal, the case may proceed to the Privy Council anyway. On this basis leave was granted.

³⁴ For instance *Re New Zealand Midland Railway Co. Ltd; Ex P Coates* (1898) 17 NZLR 596 (SC)

³⁵ B. J. Cameron, ‘Appeals to the Privy Council-New Zealand’, *Otago Law Review*, 1970, p 174.

³⁶ For example, *British Coal Corporation v The King* [1935] AC 500; *Walker v The Queen* [1994] 2 AC 36; *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385.

³⁷ For example *Strathmore Group v Fraser* [1992] 3 NZLR 385 (PC); *Elders Pastoral Ltd v Bank of New Zealand* [1990] 3 NZLR 129 (PC).

appeal against the exercise of discretion of the local court. However, the Privy Council has been prepared to entertain petitions for special leave in cases where the applicant was entitled to appeal as of right, but the Court of Appeal had erroneously refused leave to appeal.³⁸

6.1.3.2 General Principles for Civil Appeals

In *Prince v Gagnon*³⁹ the Judicial Committee stated that in civil cases special leave would not be granted except where the case involved matters of public interest or some important question of law or property worth a considerable amount, or where the case otherwise raises matters of some public importance or very substantial character. However, public importance was not, in of itself, a sufficient condition for a grant of special leave. For instance, the Judicial Committee has refused to grant leave where the proposed appeal did not have a reasonable prospect of success or if there was an undue delay in bringing the petition, especially where this was prejudicial to the position of the respondent.⁴⁰

Extra-judicially Lord Haldane has noted that in determining special leave applications the Judicial Committee takes into account the jurisdiction from which the petition originates and the constitutional place of the Privy Council in respect of that jurisdiction. For instance, he distinguished between a petition from a Crown colony, where the local courts may be relatively undeveloped and where the Privy Council sits as the guardian of justice; and a petition from an independent Dominion⁴¹ which has its own fully organised courts and where the people have a sense that it is their right to dispose of their own litigation. In the latter case their Lordships will not grant leave unless the question is of such importance that only the Judicial Committee can resolve it satisfactorily. Moreover, the Privy Council will not entertain some legal issues on the grounds that they are domestic questions.⁴²

6.1.3.3 General Principles for Criminal Appeals

For most of its history the Privy Council has been especially reluctant to act as a court of criminal appeal. In *Nadan v The King* their Lordships observed that:

‘It has for many years past been the settled practice of the Board to refuse to act as a Court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.’⁴³

The rationale offered for this approach was that a drawn out series of criminal appeals would create ‘extreme inconvenience’. The Board argued that it was extremely important that a decision on a criminal charge should take immediate effect without a long drawn out process of appeal. Their Lordships felt it undesirable that the Board should do anything to encourage appeals on criminal decisions.⁴⁴

³⁸ See *Strathmore Group v Fraser*, *Supra* fn 37.

³⁹ (1882) LR 8 App Cas 103 (PC).

⁴⁰ See, for example, *Pritchard v Attorney-General* reported as *The Contradictors v Attorney-General* [2001] 3 NZLR 301 (PC). In this decision Their Lordships cited the high public importance of the two petitions as the reason for taking the exceptional step of giving written reasons for refusing leave.

⁴¹ Lord Haldane used Canada, which had not then abolished Privy Council appeals, as an example.

⁴² Rt Hon Lord Haldane of Cloan ‘The work for the Empire of the Judicial Committee of the Privy Council’, *Commonwealth Law Journal*, 1(2), 1922, p. 153.

⁴³ [1926] AC 482 (PC) at 495

⁴⁴ *ibid*, at 496

It follows that successful leave applications invariably raised issues of jurisdiction, process, and procedural deficiency. In *Muhammad Nawaz v R*⁴⁵ their Lordships observed that the Judicial Committee would be prepared to grant leave if the local courts refused to hear the case of the accused; if the trial took place in his or her absence;⁴⁶ if the local court was corrupt, was not properly constituted, or did not have the jurisdiction to try the crime or pass the sentence handed down; or if language barriers prevented the jury or accused from understanding the proceedings.⁴⁷ However, the Board also stipulated that they were not concerned with matters such as the sufficiency, weight, or conflict of evidence; with the inferences to be drawn from evidence; with questions of the corroboration or contradiction of testimony; with the cross-examination of a hostile witness; or with the particular sentence handed down by the local Courts.

These dicta have not always been rigidly adhered to.⁴⁸ For instance, although it is the practice of the Board to leave the weighing of evidence to the trial court,⁴⁹ the Privy Council will hear an appeal if there is no evidence to support the conviction.⁵⁰ Moreover, the wrongful admission of evidence may be a good ground for granting leave to appeal.⁵¹ There is also evidence that the Privy Council has become more inclined to intervene in criminal cases where the grounds for appeal allege a denial of constitutional rights entrenched under a Bill of Rights.⁵²

6.1.3.4 Criminal Appeals in New Zealand

Over the course of 162 years the Privy Council granted leave to twenty-four criminal applications from New Zealand. Although their Lordships rarely gave reasons for leave decisions, some general observations about the Board's approach to criminal applications can be gleaned from the few cases that proceeded to a full hearing.

Firstly, it appears that the Privy Council has become more willing to act as a court of criminal appeal. Initially, their Lordships acted in line with the approach articulated in *Nadan v The King* and were extremely reluctant to grant leave. The first criminal appeal from New Zealand was in 1897.⁵³ The second was heard seventy-eight years later.⁵⁴ However, during the 1980s and 1990s their Lordships heard five criminal appeals⁵⁵ and after 2000 criminal appeals had become almost commonplace with 17 successful leave applications.⁵⁶

⁴⁵ (1941) LR 68 IA 126

⁴⁶ See also *Lawrence v R* [1933] AC 699 (PC) where an accused, after receiving a general sentence on several counts, subsequently had separate sentences substituted in his absence.

⁴⁷ See also *Ras Behari Lai v RI* (1933) LR 60 IA 354 (PC) where one of the members of the jury who convicted the appellant was found not to know sufficient English.

⁴⁸ Sir Kenneth, Roberts-Wray, *Commonwealth and Colonial Law*, London, 1966.

⁴⁹ *Sambasivan v Public Prosecutor of Federation of Malaya* [1950] AC 458 (PC).

⁵⁰ *Akerele v R* [1943] AC 255 (PC).

⁵¹ *Kuruma v R* [1955] AC 197 (PC).

⁵² See Philip Joseph 'Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights', *Canterbury Law Review*, 2, 1985, p. 286 citing *Bell v Director of Public Prosecutions of Jamaica* [1985] 2 All ER 585 (PC) and *Robinson v R* [1985] 2 All ER 594 (PC). Joseph's observations were born out in several later cases, including *Pratt v Attorney-General for Jamaica* [1993] 4 All ER 769 (PC) and *Walker v The Queen* [1994] 2 AC 36 (PC). In the latter case (actually three appeals) their Lordships, clearly concerned about the large numbers of people held on death row, took the exceptional step of granting leave despite the length of time that had passed since the initial convictions and appeals. More surprisingly, leave was granted despite, and in order to more fully explore, questions around whether or not the Privy Council actually had jurisdiction to hear the appeals.

⁵³ *Annie Brown v A-G for New Zealand* (1897) NZPCC 106.

⁵⁴ *Nakhla v R* [1975] 1 NZLR 393.

⁵⁵ *McDonald v R* [1983] NZLR 252; *Kaitamaki v R* [1984] 1 NZLR 385 (two separate appeals); *Grant Adams v The Queen* [1995] 1 WLR 52; and *Ramstead v R* [1999] 1 NZLR 513.

⁵⁶ Twelve appeals raised similar grounds and were considered together (see *R v Taito* [2003] 3 NZLR 577). The remaining five were: *R v Karpavicius* [2004] 1 NZLR 156; *R v Howse* [2006] 1 NZLR 433; *Bain v R* [2007] UKPC 33; *R v Lundy*; and *R. v Pora*.

Secondly, their Lordships heard appeals involving matters that were outside the narrow range of grounds set down by the early authorities. For example, in *Bain v R*⁵⁷ the Judicial Committee granted leave in order to consider whether the jury might have reasonably reached a different conclusion if it had had the opportunity to consider the case with the benefit of fresh evidence that was not before it. In essence their Lordships were prepared, in this case, to adopt the role of assessing how the thinking of a New Zealand jury may have been influenced by the new evidence. This is the sort of question that would have traditionally been deemed to be the exclusive preserve of the local Courts.⁵⁸ It is also worth emphasising that the case posed no significant legal questions for the determination of their Lordships. There was no criticism of the Court of Appeal's formulation of the relevant law, but rather of the application of the 'well-settled principles' to the facts.⁵⁹

6.2 Leave Arrangements for the Supreme Court

6.2.1 General Provisions

Section 12 of the Supreme Court Act provides that an appeal to the Supreme Court can only be heard with the leave of that Court. Applications for leave are subject to the criteria specified in s 13.

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.

Several general observations can be made about these criteria. Firstly, it seems that the criteria stated in s 13(2) are not all-embracing. Justice Blanchard has commented extra-judicially that it is clear that the Court could identify situations other than those listed in s 13(2) where an appeal is in the interests of justice. He believes that the Court, therefore, has some flexibility that enables it to grant leave in an unusual case.⁶⁰ However, in practice it appears that the Supreme Court has eschewed an open-ended interpretation of s 13. Instead it has looked to the applicant to bring the matter within s 13(2).⁶¹

Secondly, the Court has determined that s 13 does not require it to grant leave where the proposed appeal is obviously futile, even if the issues raised in the application are otherwise capable of meeting the leave criteria.⁶² This refusal to hear hopeless appeals is similar to the approach of the Privy Council with respect to applications for special leave.⁶³

⁵⁷ *Bain v R*, *Supra* fn 56.

⁵⁸ See, for instance, *Muhammad Nawaz*, *Supra* fn 45; *Sambasivan v Public Prosecutor of Federation of Malaya*, *Supra* fn 49.

⁵⁹ *Bain v R*, *Supra* fn 56, at para 34.

⁶⁰ Rt Hon Peter Blanchard, 'New Zealand Supreme Court jurisdiction and practice', *Commonwealth Law Bulletin*, 33(1), 2007a, p. 4.

⁶¹ Beck, *Supra* fn 12, p. 18.

⁶² See, for example, *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* (2007) 18 PRNZ 424; *Pranfield Holdings Ltd v The Minister of Fisheries and Ors* [2008] NZSC 86

⁶³ See, for instance, *Pritchard v Attorney-General*, *Supra* fn 40; *Strathmore Group v Fraser*, *Supra* fn 37.

However, unlike the Privy Council,⁶⁴ the Supreme Court has been prepared to grant leave to hear a moot appeal in order to determine an important legal question. In *Gordon-Smith v R*⁶⁵ a Leave Panel comprising all five members of the Supreme Court granted leave even though there was no live issue between the parties.⁶⁶ The Panel argued that the question of whether or not the Court should hear a moot appeal is one of judicial policy. They observed that, in general, leave will not be granted for such an appeal. However, they also pointed out that there may be circumstances that could warrant an exception to this policy.⁶⁷ A key consideration was the responsibility of the courts to show proper sensitivity to their role in the system of government. They argued that this

‘policy [is] of considerable constitutional importance. It requires that the appellate court consider whether it should leave an issue of law that is no longer the subject of a live controversy for legislative attention rather than proceed to decide it in circumstances where that is not required by the particular case. Courts develop the law in the exercise of their constitutional function by deciding cases put before them by parties to resolve their disputes. They should be careful not to appear to be doing so gratuitously by giving what amounts to advisory opinions’.⁶⁸

Finally, the Supreme Court has, for all practical purposes, reduced the leave criteria to two key tests: general or public importance and substantial miscarriage of justice. Specifically, the Court has observed that ‘a matter of general commercial significance’⁶⁹ is merely a spelling out of a particular instance of ‘general importance’.⁷⁰ Thus unless a case has general importance in the sense that it will have application as a precedent generally, then leave is not likely to be granted on the basis of the third criterion, even if it is a commercial case with a large sum of money at stake.⁷¹ For example, Justice Blanchard has cited two recent Privy Council cases⁷² that probably would not be granted leave by the Supreme Court, even if the provisional view had been taken that the Court of Appeal had erred. Both cases involved significant sums of money and were of commercial importance to the parties, but Justice Blanchard considered that neither was of *general* commercial significance.⁷³

Interestingly, subsection 2(c) owed its inclusion in the leave criteria to concerns, raised by the Ministerial Advisory Group, that the removal of the appeal as of right to the Privy Council could result in few commercial cases having the opportunity to be heard by the new final court. It was felt that explicitly recognising cases of commercial significance in the leave criteria may help to ameliorate such a possibility.⁷⁴ However, the approach to subsection 2(c) articulated extra-judicially by Justice Blanchard appears to downplay such considerations.

⁶⁴ Lord Haldane, for instance, points out that the Judicial Committee refuses to decide matters that it is not necessary to decide and avoids all controversies that arise out of abstract propositions (Cloan, *Supra* fn 42, p152). See also *Elders Pastoral v BNZ*, *Supra* fn 37. In the case their Lordships cited the refusal of the House of Lords in *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 to hear academic appeals.

⁶⁵ [2008] NZSC 56.

⁶⁶ Following *R v Secretary of State for the Home Department ex Salem* [1999] 1 AC 450 (HL) where Lord Slynn held that ‘in a case where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal even if by the time the appeal reaches the House there is no longer a list to be decided which will directly affect the rights and obligations of the parties inter se’ (p 456-7). Compare this approach to the earlier decision in *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 (HL) where it was held that a matter in actual controversy ‘is an essential quality of an appeal fit to be disposed of by this House’ (at 114).

⁶⁷ Citing *Borowski v A-G Canada* [1989] 1 SCR 342

⁶⁸ *Gordon Smith v R*, *Supra* fn 65, at para 25.

⁶⁹ Subsection 2(c)

⁷⁰ Subsection 2(a).

⁷¹ Blanchard, *Supra* fn 60, p. 4.

⁷² *Contact Energy Ltd v A-G* [2005] UKPC 13; *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740.

⁷³ Blanchard, *Supra* fn 60, p. 5.

⁷⁴ Ministerial Advisory Group, *Supra* fn 18, p. 46.

6.2.2 General or Public Importance

Several observations can be made regarding the Supreme Court's application of the criterion of 'general importance'. Firstly, this test is associated with the Supreme Court's primary function of developing and clarifying the law.⁷⁵ Accordingly, the types of appeal most likely to meet this criterion are those that allow the Court the opportunity to better clarify the law, or better align difference areas of law, or to resolve inconsistencies in separate lower court decisions.⁷⁶

Secondly, this criterion rules-out disputes where the outcome has little significance for anyone beyond the parties themselves. For example, leave would be unlikely for a case that turns on the construction of unique documents.⁷⁷ Thirdly, 'public importance' largely precludes the Supreme Court from hearing appeals that predominantly turn on a review of facts.⁷⁸ However, Justice Blanchard has suggested a possible exception to this. He felt that leave could be granted to hear a case where the matter is not of general precedential value, but has some public element that nevertheless renders it of importance. He cites, as an example, a completely fact-based case involving the reputation of a Minister of the Crown, but noted that such cases would be uncommon.⁷⁹

There is some evidence that the Supreme Court has not always strictly adhered to the principles outlined above. For instance, Andrew Beck has suggested that, over time, the Supreme Court has taken a more relaxed approach to leave decisions. He cited three leave applications that were granted in late 2005 despite no apparent issue of general or public importance.⁸⁰ He argued that if these cases were considered a year earlier, then leave may have been refused.⁸¹ Moreover, Beck cited appeal statistics to support his contention. He noted that during the second half of 2004 only 6 out of fifteen leave applications were granted compared to 8 out of fifteen in the first half of 2005 and 11 out of fifteen during the second half of 2005. He argued that, whilst the raw figures provide only a rough guide, it appears that the Court has been more willing to grant leave as time has gone by.⁸²

6.2.3 Substantial Miscarriage of Justice

The second criterion, a substantial miscarriage of justice, is much less clear than public importance.⁸³ Nevertheless, extra-judicial comments and leave decisions reveal some of the principles that have guided the Supreme Court in its application of this criterion.

⁷⁵ *ibid*, p. 19-21.

⁷⁶ Blanchard, *Supra* fn 60, p. 5.

⁷⁷ Rt Hon Peter Blanchard, 'The early experience of the New Zealand Supreme Court'. An address commemorating the retirement of Sir Kenneth Keith, 2007b, p. 15.

⁷⁸ *ibid*, p. 15.

⁷⁹ Blanchard, *Supra* fn 60, p. 4.

⁸⁰ *Telecom Mobile Ltd v Commerce Commission* [2005] NZSC 73 (the case revolved around the relatively narrow issue of whether the facts of the case engaged s 12(2) of the Door to Door Sales Act 1967); *Wholesale Distributors Ltd v Gibbons* [2005] NZSC 78, (the case raised a question of contractual interpretation that appears to be chiefly of interest to the parties); and *Allen v CIR* [2005] NZSC 82 (the case involved technical interpretation of provision of the Tax Administration Act and an application to adduce further evidence).

⁸¹ Beck, *Supra* fn 12, p. 19.

⁸² *ibid*, p. 18. The issue of whether or not the Supreme Court has relaxed its approach to leave is considered further in **Chapter 6**.

⁸³ Blanchard, *Supra* fn 77, p. 15. In his extra-judicial writings Blanchard J has declined to expand on the meaning of this criterion because, at the time, the Court had not given it consideration and because 'its meaning and application in the context of s 13 is not without difficulty' (Blanchard, *Supra* fn 60, p. 5).

Firstly, in regards to criminal appeals, it appears that an application for leave would not meet this test unless it involves a significant and arguable question of law of general application or raises concerns about the fairness of the trial.⁸⁴ It follows that leave would be unlikely for a case that merely involves a factual assessment or the application of settled principle to particular facts. Justice Blanchard has pointed out that he is ‘unaware of any other jurisdiction where the final court of appeal is prepared to conduct an essentially factual review in a criminal (or civil) case’.⁸⁵ He also emphasised the improbability of Parliament contemplating such a role for the Supreme Court.⁸⁶

Finally, on its face the miscarriage ground applies to civil appeals, but only in very exceptional circumstances. In *Junior Farms v Hampton Securities Ltd (in liq)* the Leave Panel held that the miscarriage ground is of limited application in civil cases.⁸⁷ It was argued that it cannot have been the intention of Parliament that the Supreme Court should engage in second-level error-correction of a civil case that has already had the benefit of a first appeal. The Panel, citing the practice and jurisprudence of comparable courts overseas, emphasised that error-correction is simply not the role of a final appellate court. They concluded that:

‘the miscarriage ground must, in civil appeals, be taken to have been intended to enable the Court to review the decision of the Court of Appeal on questions of fact, or on questions of law which are not of general or public importance, in the rare case of a sufficiently apparent error, made or left uncorrected by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case’.⁸⁸

6.3 Summary

6.3.1 Civil Appeals: Privy Council

The Privy Council employed a mixed system of leave for civil appeals. Cases that exceeded the five thousand dollar threshold were heard as of right. Other civil cases and interlocutory appeals were granted leave at the discretion of the Court of Appeal. Finally, the Judicial Committee could grant special leave for any civil appeal within its jurisdiction.

The mixed system of leave may have had a number of consequences. Firstly, it has been suggested that the Privy Council was inclined to hear a relatively narrow range of cases. According to this view, the monetary threshold meant that those cases that involved significant amounts of money or property, namely commercial cases, tended to predominate, whereas other types of case where leave was discretionary, such as criminal appeals, tended to be overlooked. This hypothesis is further explored in **Chapter 7**.

Secondly, the Judicial Committee was also predisposed to hear appeals that had little precedential value or public significance. The emphasis, as far as leave was concerned, was on the financial significance of the case for the parties directly involved. Issues such as the public importance of

⁸⁴ Blanchard, *Supra* fn 77, p. 16.

⁸⁵ Blanchard, *Supra* fn 60, p. 16.

⁸⁶ *ibid*, p. 15.

⁸⁷ [2006] NZSC 60.

⁸⁸ *ibid*, at para 5.

the appeal or its potential value as a precedent were irrelevant. As a result, several of the appeals that were heard as of right involved straightforward legal questions or were primarily factual disputes.

Finally, it appears that the tendency to focus on the significance of the case for individual litigants, rather than wider justice objectives, may have extended to cover cases where leave was discretionary. For instance the central considerations in many leave and special leave decisions were issues such as the cost of the appeal to the parties, the value of the matters in dispute, and whether both parties consented to the appeal. Moreover, the monetary threshold became the standard that was applied, not just for appeals by way of right, but also where leave was at the discretion of the local courts and in some applications for special leave. For example, it was the deciding factor in applications to appeal directly from the High Court and in applications for special leave where the Court of Appeal had previously refused leave.

6.3.2 Civil Appeals: Supreme Court

In contrast to the Privy Council, cases can only be heard in the Supreme Court by the leave of that court. These arrangements, and the criteria for leave, especially the ‘public importance’ criterion, were explicitly linked to the Court’s primary role of clarifying and developing the law.⁸⁹ Moreover, the Court’s perception of its role subsequently influenced the interpretation and application of the leave criteria. For instance, even though subsection 2(c) required leave to be granted to hear matters of general commercial significance, the Supreme Court deemed this criterion to relate only to cases that would have an application as a precedent generally, rather than, as the drafters of the leave criteria perhaps envisaged, to the amount of money involved or to the commercial importance of the case. Similarly, the Court was reluctant to apply the miscarriage of justice ground to civil cases in anything other than exceptional circumstances. It was felt that it was not the role of the final court to engage in second-level error-correction. This was despite the fact that the Ministerial Advisory Group had identified error-correction as an importance secondary role.⁹⁰

There are three main consequences of this application of the s 13 leave criteria. Firstly, the Supreme Court has been unwilling to hear cases where the outcome of the dispute has little significance beyond the parties themselves, even where the appeal involves a considerable sum of money. Secondly, the Court is reluctant to hear appeals that are predominantly factual disputes. Thirdly, the roles of error-correction and obtaining justice for individual litigants were often secondary considerations in leave determinations. As Justice Blanchard noted extra-judicially, the Court would be unlikely to hear civil appeals that did not raise questions of public importance, even if the Leave Panel felt that the Court of Appeal had been in error.⁹¹

Finally, it is illuminating that the Supreme Court has been prepared to grant leave to hear appeals, such as *Gordon-Smith v R*,⁹² where there was no live issue whatsoever between the parties, in order to

⁸⁹ Ministerial Advisory Group, *Supra* fn 18, p. 45.

⁹⁰ *ibid.*, p. 19-21.

⁹¹ Blanchard, *Supra* fn 60, p. 5.

⁹² *Supra* fn 65.

decide some question of law deemed to be of sufficient importance to justify hearing a moot appeal. The Privy Council would have strongly eschewed such an unorthodox role.

6.3.3 Criminal Appeals

There were also significant differences between the Privy Council and Supreme Court in the determination of criminal leave applications. The Privy Council, despite its traditional reluctance to hear criminal appeals, was not bound by a set of statutory leave criteria. Instead the relevant principles were entirely judge-made and, as a consequence, evolved considerably over time and according to changing circumstances. In contrast, the Supreme Court can only grant leave for cases which meet the s 13 criteria.

This contributed to a second key difference. As with civil cases, the leave decisions of the two Courts were shaped by the role that each attempted to fulfil. The Supreme Court was guided by the function of developing and clarifying the law. In applying the miscarriage of justice criterion it observed that leave would be unlikely unless the case involved a significant and arguable question of law of general application. It is therefore questionable whether the Supreme Court would have been prepared to hear an appeal such as *Bain v R*⁹³ where the only issue raised by the, ultimately successful, appellant was the Court of Appeal's application of well-settled law.

In contrast, the Privy Council was traditionally reluctant to act as a court of criminal appeal and, therefore, adopted a test for leave that focused on a narrow range of grounds; namely jurisdiction, process, and procedural deficiency. In adopting a restrictive approach their Lordships aimed to discourage criminal appeals and help to ensure that punishment was not unnecessarily delayed after conviction. The potential significance of the case for the development of the law was an unimportant consideration in these early leave decisions.

However, over the past few decades the Judicial Committee has been more prepared to act as a court of criminal appeal. As a result, the number of successful applications for special leave from New Zealand has increased dramatically since the 1990s. Moreover, their Lordships were also prepared to hear appeals dealing with matters that lay outside of the narrow range of grounds set down by the early authorities. For example, one appeal, *Bain v R*,⁹⁴ involved the question of whether the jury would reach a different conclusion in light of evidence that was not before it. This case indicates the willingness of the Judicial Committee, on selected occasions, to grant leave to hear an appeal in order to do justice to the appellant, even when there was no issue of general importance that would serve wider justice interests such as developing the law.

⁹³ *Supra* fn 56.

⁹⁴ *ibid.*

Part Three:

The Consequences of the Patriation of the Final Court

The Consequences of the Patriation of the Final Court: *Section Overview*

In the previous section I compared the Privy Council and the Supreme Court in order to illustrate how the Supreme Court reform has reshaped New Zealand's final court, especially in regards to composition, role, and jurisdiction. The theme of the final part of this thesis is much broader. In the next three chapters we will assess the wider consequences of patriating the final court, both for litigants and for the legal system. Specifically, these chapters consider the effect of the Supreme Court reform on 'access to justice', on the doctrine of precedent, and on the development of the common law.

As in the previous chapters, the overall aim of this section is not simply to describe the consequences of patriation, but to evaluate whether or not the observed outcomes are consistent with the expectations and objectives that were articulated by the architects of the Supreme Court legislation. Once again the key benchmarks for this evaluation are the two main goals of improving access to justice and creating an indigenous justice system.

The Consequences of the Patriation of the Final Court: *Patriation and the Accessibility of the Final Court*

In the previous section we examined the differences between the Privy Council and the Supreme Court in regards to jurisdiction and leave arrangements. As part of this discussion we also considered the possible consequences that these differences may have had on the ability of litigants to access the final court. The specific predictions that emerged from this discussion were:

- a) that a relatively high proportion of Privy Council appeals would deal with commercial or property matters;
- b) that criminal appeals would comprise a relatively small proportion of the Privy Council's workload compared to the Supreme Court; and
- c) that the expanded civil jurisdiction of the Supreme Court would lead to higher numbers of appeals dealing with environment, employment and family law.

The current chapter further explores these issues by examining the leave decisions and the substantive judgments of the Privy Council and the Supreme Court. This inquiry has three objectives. In the first place, it further examines the Supreme Court's approach to leave. In particular, it evaluates the assertion that the Supreme Court has been more willing to grant leave over time.¹ Secondly, the present chapter considers whether the different jurisdictional and leave arrangements of the Privy Council and the Supreme Court have led to differences in the volume and type of appeals heard by each court. In other words, it will test the three hypotheses outlined above. Finally, the overall theme of this chapter is to evaluate whether the Supreme Court reforms have achieved the policy objective of 'improving access to justice'.²

7.1 Methodological Strategy

7.1.1 Part One: Analysis of Supreme Court Leave Decisions

7.1.1.1 Aim and Data Collection Method

The first part of this investigation was a document analysis of a sample of leave determinations made by the Supreme Court. The overall objective of this section was to identify whether there are any types of case that are systematically denied leave. It also examined whether there has been any patterns or changes in the approach of the Supreme Court to leave that have emerged over time.

¹ See Andrew Beck, 'Litigation', *New Zealand Law Journal*, Feb 2006, 18.

² Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p.1.

7.1.1.2 Sample

The sample employed in the first part of this investigation was the 713 leave applications that were decided by the Supreme Court between 2005 and 2011. The sample excluded those leave applications that were withdrawn by the applicants before the Court had reached a decision. Applications heard in 2004 were also excluded because this was a transitional period in which the Supreme Court sat for only half of the year.

7.1.1.3 Variables

The dependent variable used in this analysis of leave applications was whether the Supreme Court granted leave to appeal. Three independent variables were examined in this investigation:

1. The year in which the leave application was heard by the Supreme Court.
2. Whether the case is civil or criminal in nature
3. The main type of law or subject matter involved in the case. The categories of law employed in this analysis are listed in Table 7.1.

Table 7.1³

Categories of Law

Categories of Law	Brief Definition
Criminal Law	Criminal law is distinguished from other heads of law not by the type of situation dealt with, but on the basis of the proceedings that follow the action. Criminal proceedings are initiated by the state to punish offenders and protect the public.
Tax Law	Law that deals with the administration of New Zealand tax system.
Other Public Law	In the current study this includes constitutional, international, social welfare, administrative, and human-rights law.
Family Law	Law that specifies the rights and obligations of husbands, wives, parents and children.
Contract, Property, or Commercial Law	This category comprises property law, which governs people's rights and duties with regard to land, other real property, and chattels; contract law, which deals with self imposed obligations, especially in the commercial realm, and the enforcement of these promises; and commercial law.
Employment Law	Law that deals with contracts of employment and the relationship between employers and employees. Governed by the Employment Relations Act.
Equity	The principles relating to trusts and fiduciary relationships, including the rights and obligations of settlers, trustees, fiduciaries, and beneficiaries.
Tort Law	An area of law whereby citizens can sue other citizens for breaches of obligations owed to people as a whole. Tortious conduct includes nuisance, negligence, trespass, defamation, passing off, conversion, conspiracy, unfair trade practices, assault, and an emerging tort of breach of privacy.
Civil Practice and Procedure	An area of law dealing with court procedure and the rules of evidence.
Intellectual Property	Law that deals with copyright, trademarks and patents.
Company Law	Law dealing with the rights and obligations of separate corporate entities. Governed by the Companies Act 1993.
Other Civil Law	Types of law or case not encompassed in the above definitions.

³ These categories were adapted from R. Chisholm & G. Nettheim, *Understanding Law* (7th edition), Victoria: Lexis Nexis, 2007 and R. D. Mulholland, *Introduction to the New Zealand Legal System*, (10th edition), Wellington: Butterworths, 2001.

In identifying the type of law involved in each case two main caveats need to be mentioned. Firstly, most cases involve, at some level, principles derived from more than one head of law. In the present study I have categorised cases according to the main type of law raised by the leave grounds advanced by the appellate. Secondly, the distinction between different types or heads of law is often imprecise and is contested in the legal literature. Indeed, the Courts have even struggled to firmly delineate between criminal and civil cases at the margins.⁴ In order to mitigate this problem I have collapsed related fields of law into broader categories. This reduces the need to precisely distinguish between the related areas of law. However, the simplification of the categories of law has the drawback of reducing the meaningfulness and precision of the analysis of this variable.

7.1.1.4 Data Analysis

The main technique used to analyse leave decisions was time series analysis in which the dependent variable was compared over successive time periods. Linear regression analysis was the statistical tool employed to explore the impact of time on the other variables. This method of analysis uses the "least squares" method to estimate a line of best fit through a set of observations. It produces two key statistics: the regression coefficient (B), which measures the impact of the independent variable upon the dependent variable; and R^2 , which indicates how well the regression equation explains the relationship amongst the variables. The closer R^2 is to one, the more closely the data fits the estimated values on the regression line and the stronger the relationship between the variables.⁵ The F statistic was used to test the statistical significance of any relationships that were identified.

7.1.2 Part Two: Comparison of the Privy Council and Supreme Court

7.1.2.1 Aim and Data Collection Method

The second part of this investigation comprised a document analysis of a sample of the substantive judgments of the Privy Council and the Supreme Court. The overall objective was to compare the two courts on the volume and types of case that have received a hearing in order to identify any patterns or differences in the range of appeals that were being considered by each court.

7.1.2.2 Sample

The sample utilised for this part of the investigation was the 110 New Zealand appeals decided by the Privy Council between 1995 and 2004 and the 193 Supreme Court appeals decided between 2005 and 2011. Privy Council appeals that were heard after 2004 were excluded from this part of the research because the Privy Council shared appellate jurisdiction with the Supreme Court and, therefore, its

⁴ See, for example, *Mafart v TVNZ* [2006] 3 NZLR 18 (SCNZ).

⁵ See H. Coolican, *Research Methods and statistics in Psychology*, Bristol: Hodder Arnold, 2004, p. 458-464.

caseload was substantially reduced. Furthermore, Supreme Court appeals for 2004 were excluded because the Supreme Court sat for only half of the year.

7.1.2.3 Variables

Three dependent variables were examined in this investigation. These were:

1. The number of appeals disposed by each court.
2. Whether the case was civil or criminal in nature.
3. The main type of law or subject matter involved in the case.⁶

7.1.2.4 Data Analysis

The main techniques that were employed to uncover any relationship between the independent variable and the dependent variables were the comparison of means and bivariate analysis using cross-tables. In addition, a time series analysis was conducted on the number of appeals heard by each court. The aim of this analysis was to identify whether there was any patterns in the number of cases heard by each court over time. Linear regression analysis was used to identify whether these trends were statistically significant.

7.2 Results

7.2.1 Part One: Analysis of Supreme Court Leave Decisions

7.2.1.1 Overall Trends in Leave Decisions

Between 2005 and 2011 the Supreme Court decided 713 leave applications. It granted leave in 223 cases, or about 31.3 percent of all applications. A time series analysis was conducted on these data in order to test whether there was any relationship between the outcome of the leave decision and the year in which the decision was made. For the purpose of this analysis the dependent variable was expressed in two ways: **a)** the number of successful applications per year and **b)** the proportion of applications granted annually. The results of this analysis are presented graphically in Figure 7.1.

These data suggest several trends. Firstly, the total number of leave applications determined annually by the Supreme Court increased over time. Regression analysis identified a strong and statistically significant linear relationship between these variables.⁷ The regression equation estimated that the leave panel heard approximately eleven additional applications per year. Figure 7.1 indicates that the yearly increase in the number of applications was remarkably consistent after 2008.

⁶ The categories of the law employed in the current study were the same as those employed in the analysis of leave decisions summarised above (see Table 7.1).

⁷ $B = 10.7$, $R^2 = .8926$, adjusted $R^2 = .8712$, $F_{1,5} = 41.574$, $p = .0013$.

Secondly, a more modest, but still strongly linear, trend was found in the number of leave applications granted each year.⁸ The regression line (not shown in Figure 7.1) predicted an annual increase of 2.3 successful applications. Again it is interesting to note that the number of successful applications fluctuated until 2008, at which point a relatively stable pattern of yearly increase emerged.

Thirdly, no reliable trend was found in the percentage of leave applications that were granted annually. Regression analysis was used to test whether there was any linear relationship between the variables. The resultant regression line (see dashed line on Figure 7.1) predicted that the proportion of successful applications fell by approximately 1 percent per annum. However the data fit the regression line poorly and R for regression was not significantly different from zero.⁹ The low R² and non-significant result reflect the large yearly fluctuations observed between 2005 and 2008 and the small number of years under consideration.

Overall, these results do not support the assertion that the Supreme Court has become more willing to grant leave over time. The present study found that, until 2008, the percentage of successful applications fluctuated yearly and that, overall, the medium-term pattern has been the gradual decline in the proportion of successful applications, although this trend was not reliably confirmed by regression analysis. The results did indicate that the number of leave applications granted by the Leave Panel has been increasing annually. However, the trend was modest and was overshadowed by the more substantial annual increase in the total number of applications under consideration.

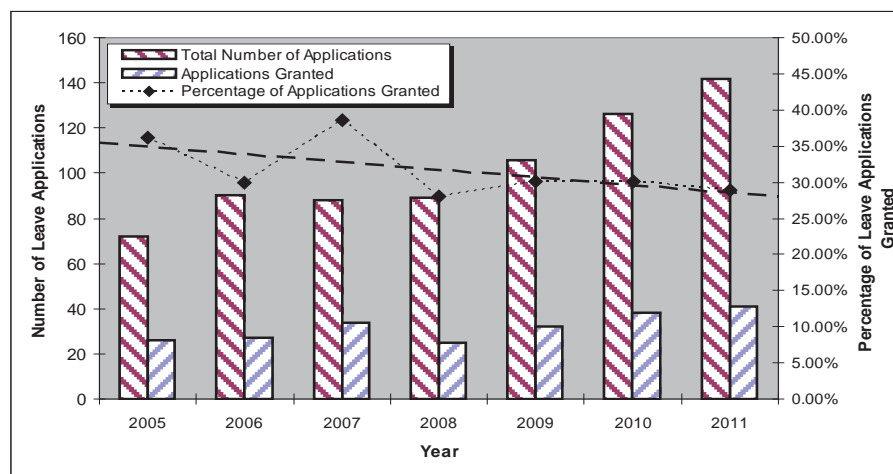


Figure 7.1 Supreme Court leave applications by year.

7.2.1.2 Subject Matter of Leave Applications

The current study also analysed leave applications in terms of their subject matter. These results are displayed in Table 7.2. Several observations can be gleaned from these data. Firstly, the Supreme Court has granted leave in a much higher proportion of civil cases than criminal cases. Less than 22 percent of criminal leave applications were successful, compared to almost 42 percent of civil applications. Secondly, it appears that the type of case that was most likely to obtain leave from the Supreme Court were those that involved employment law, intellectual property, equity or trust law, and

⁸ $B = 2.321$, $R^2 = .6536$, adjusted $R^2 = .5843$. R for regression was significantly different from zero, $F_{1,5} = 9.435$, $p = .028$.

⁹ $B = -0.0107$, $R^2 = .3309$, adjusted $R^2 = .197$, $F_{1,5} = 2.472$, $p = .177$.

tax cases. By contrast, the type of case that was least likely to proceed to a substantive hearing, aside from criminal cases, were civil appeals dealing with issues of court practice and procedure, followed by appeals dealing with company law and those involving family law.

Table 7.2
Proportion of Successful Applications for Different Types of Case.

Category of Law	Percentage of Leave Applications Granted
Tax law	52.38%
Other civil public law	42.11%
Family law	36.36%
Contract, property, or commercial law	46.07%
Employment law	60.00%
Equity or trusts	53.85%
Tort law	41.67%
Practice, procedure or costs	27.78%
Intellectual property	57.14%
Company law	33.33%
Other	33.33%
Civil law	41.43%
Criminal law	21.61%

Finally, a multivariate analysis was conducted to explore the relationship between whether the case is criminal or civil, the year of the decision, and the outcome of each leave decision. These results are displayed graphically in Figures 7.2 and 7.3 below.

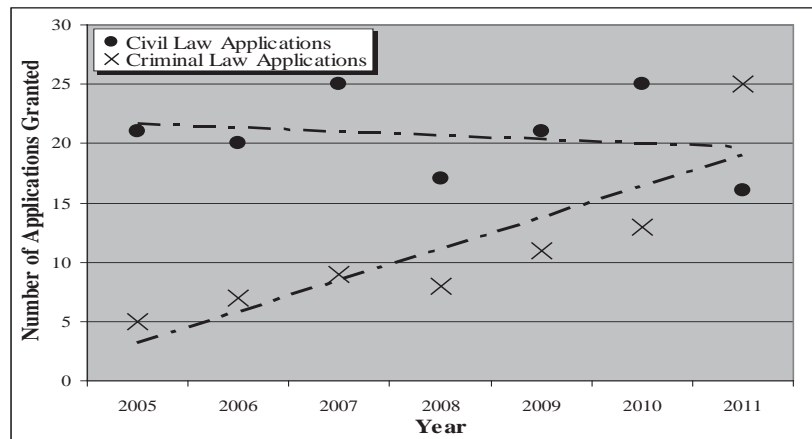


Figure 7.2 Number of civil and criminal leave applications granted by year.

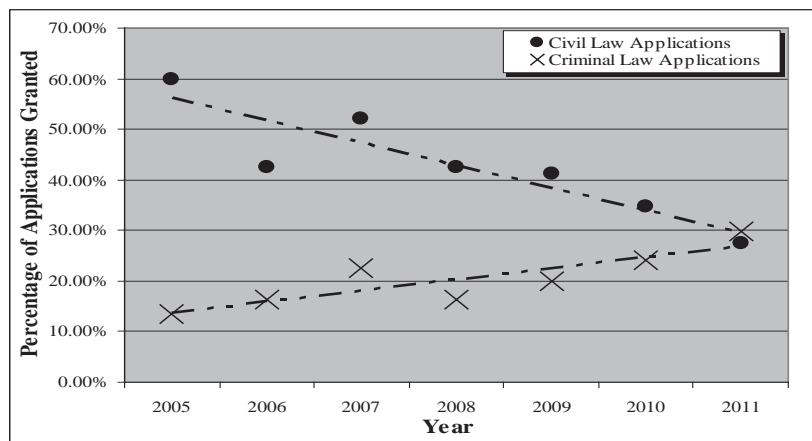


Figure 7.3 Proportion of civil and criminal leave applications granted by year

Several conclusions can be drawn from these data. Firstly, the results showed that the proportion of civil applications that are granted annually has declined over time (Figure 7.3). Regression analysis indicated that this trend was strongly linear and that the relationship was statistically significant.¹⁰ The predicted annual decrease in the proportion of successful civil applications was about 4.4 percent. However, a regression analysis of the data presented in Figure 7.2 found no reliable trend in the actual numbers of civil applications being granted per year.¹¹

Secondly, there has been a steady, though more modest, increase in the proportion of criminal applications being granted leave. Again the trend was broadly linear, with the regression line predicting an annual increase of about 2.2 percent.¹² In addition, a regression analysis of the data found a strong and statistically significant relationship between the number of successful criminal applications and the year of determination.¹³

7.2.2 Part Two: Comparison of the Privy Council and Supreme Court

7.2.2.1 Volume of Appeals

The current study found that the Supreme Court heard and decided upon an average of 27.57 appeals annually compared to 11 by the Privy Council. In other words the Supreme Court disposed of approximately 2.5 times the number of appeals per year compared to the Judicial Committee. A time series analysis was undertaken of this data in order to identify whether there were any trends in the numbers of appeals being heard by each court over time. These results are displayed in Figure 7.4.¹⁴

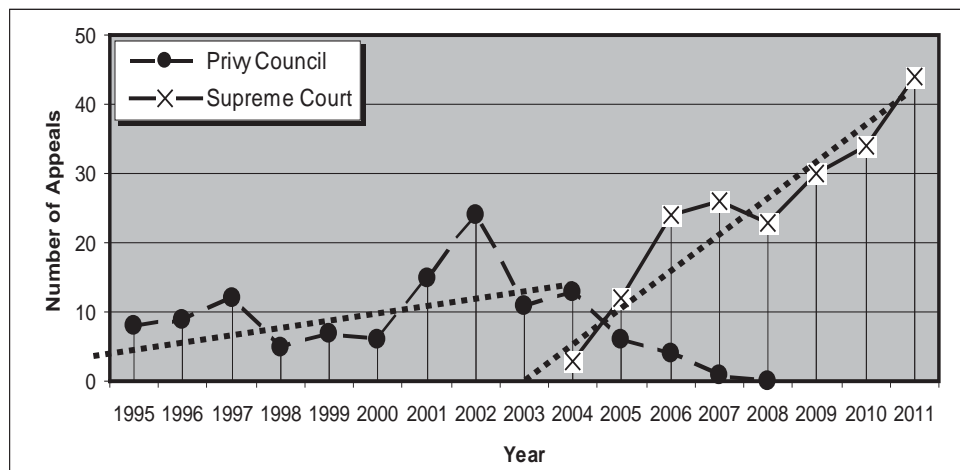


Figure 7.4 Privy Council and Supreme Court Appeals disposed by year.

¹⁰ $B = -0.0442$, $R = .8964$, $R^2 = .8035$, adjusted $R^2 = .7642$, $F_{1,5} = 20.442$, $p = .006$.

¹¹ $R^2 = .0394$, $F_{1,5} = 0.205$, $p = .667$.

¹² $B = 0.02208$, $R = .8552$, $R^2 = .7314$, adjusted $R^2 = .6777$. R was significantly different from zero, $F_{1,5} = 13.618$, $p = .014$.

¹³ $B = 2.643$, $R = .8593$, $R^2 = .7384$, adjusted $R^2 = .6861$. Again R for regression was significantly different from zero, $F_{1,5} = 14.113$, $p = .013$.

¹⁴ Figure 7.4 also displays the post-2004 Privy Council data. However, as noted above, these values were not employed in the statistical analyses or the calculation of trend lines.

Two main findings emerged from this analysis. Firstly, regression analysis of Privy Council appeals between 1995 and 2004 indicated that the number of appeals decided annually by the Privy Council tended to increase over time. The relationship was weak but statistically significant.¹⁵ Secondly, there was a much more substantial increase in the number of appeals decided annually by the Supreme Court. In 2005 the Court heard 12 appeals. By 2011 it was deciding 44 appeals per year, about four times the Privy Council average. Linear regression analysis found that the relationship between the number of appeals and the time variable was strong and statistically significant.¹⁶

7.2.2.2 Range of Appeals

Table 7.3 compares the Judicial Committee and the Supreme Court on the proportion of appeals that are civil versus those that are criminal. The results reveal that the Privy Council's workload comprised a much higher proportion of civil appeals than that of the Supreme Court. Conversely, only a small proportion of the cases heard by the Privy Council were criminal appeals, at just under 13 percent, whereas criminal appeals comprised around 40 percent of the Supreme Court's workload.

Table 7.3
Civil versus Criminal Appeals by Final Court of Appeal

Type of appeal	Final Court	
	Privy Council Cases	Supreme Court Cases
Civil	87.27%	59.59%
Criminal	12.73%	39.90%
Both	0.00%	0.52%
Total	100.00%	100.00%
(N=)	110	193

The final part of this investigation compared the Privy Council and Supreme Court on the distribution of appeals amongst the twelve categories defined in Table 7.1 above. The two courts were compared on **a)** the relative proportion of their total workload falling into each category and **b)** the average number of appeals heard annually from each category. These results are summarised in Tables 7.4 and 7.5, respectively.

Several findings were revealed by this data. Firstly, the largest component of the Supreme Court's workload was criminal appeals, at around 40 percent of all appeals (Table 7.4). This represented, on average, approximately 11 appeals per year, or nearly eight times the number of criminal appeals heard yearly by the Privy Council (Table 7.5). By contrast, the largest component of the Privy Council's workload was appeals involving contract, property, or commercial disputes, with these comprising 29 percent of all appeals (Table 7.4). However, in absolute terms the Judicial Committee heard an average of 3.2 commercial, property, or contract cases per year compared to 4.6 by the Supreme Court (Table 7.5).

The results also indicate that tax cases and company law cases each represented greater components of the caseload of the Privy Council than of the Supreme Court (Table 7.4). In absolute terms

¹⁵ $B = .897$, $R^2 = .2371$, adjusted $R^2 = .1417$, $F_{1,8} = 2.486$, $p = .015$.

¹⁶ $B = 4.286$, $R^2 = .8633$, adjusted $R^2 = .836$, $F_{1,5} = 31.579$, $p = .002$.

the Privy Council heard around the same number of tax cases and about 1.7 times the number of company cases per year as the Supreme Court (Table 7.5). A further finding was that only the Supreme Court heard any appeals that involved employment law.

Finally, according to the data presented in Table 7.4, the caseloads of the two courts comprised similar proportions of cases dealing with equity, tort law, intellectual property, and issues of civil practice and procedure. However, in an absolute sense this meant that the Supreme Court heard about 2.6 times the number of equity cases, 2.25 times the number of tort appeals, twice the number of intellectual property appeals and about 2.3 times the number of civil practice and procedure cases annually compared to the Privy Council (Table 7.5).

Table 7.4
Proportion of Appeals from Different Categories by Final Court

Type of Case	Final Court	
	Privy Council Cases	Supreme Court Cases
Tax law	12.7%	4.7%
Other public law	16.4%	14.0%
Family law	0.9%	2.6%
Contract, property, or commercial law	29.1%	16.6%
Employment law	0.0%	2.6%
Equity	4.5%	4.7%
Tort law	3.6%	3.1%
Civil practice and procedure	6.4%	5.7%
Intellectual property	2.7%	2.1%
Company law	4.5%	1.0%
Other	6.4%	2.6%
Criminal appeals	12.7%	40.4%
Total	100.00%	100.00%
(N=)	110	193

Table 7.5
Average Number of Cases per Year from Different Categories by Final Court

Type of Case	Final Court				Ratio (SC/PC)
	Privy Council		Supreme Court		
	Average	SD	Average	SD	
Tax law	1.4	1.17	1.3	1.8	0.93
Other public law	1.8	1.14	3.9	1.86	2.17
Family law	0.1	0.32	0.7	0.76	7.00
Contract, property, or commercial law	3.2	1.99	4.6	2.57	1.44
Employment law	0.0	0.00	0.7	0.49	-----
Equity	0.5	0.71	1.3	0.76	2.60
Tort law	0.4	0.52	0.9	1.21	2.25
Civil practice and procedure	0.7	0.67	1.6	1.27	2.29
Intellectual property	0.3	0.48	0.6	0.79	2.00
Company law	0.5	0.71	0.3	0.49	0.60
Other	0.7	0.95	0.7	1.5	1.00
Criminal appeals	1.4	4.09	11.1	7.97	7.93

7.3 Discussion

7.3.1 *The Supreme Court's Approach to Leave*

The results of the analysis of Supreme Court leave decisions provided mixed evidence for the supposition that the Supreme Court has become more willing to grant leave over time. Three main findings emerged from the data outlined above. Firstly, the current investigation found that, since 2005, there has been a gradual decline in the proportion of applications granted annually. As noted in the previous chapter, Andrew Beck observed that between 2004 and 2005 the proportion of applications granted every six months was increasing. As a result he suggested that the Supreme Court had become more lenient in determining leave applications.¹⁷ However, the current study found that this trend was not maintained long-term. Instead the trend that Beck identified was the beginning of a period of yearly fluctuation that characterised leave decisions during the first five years of the Court's operation.

Secondly, the current study found evidence that the Supreme Court has changed in its willingness to grant leave to certain categories of case. The present study found that the proportion of successful criminal leave applications more than doubled between 2005 and 2011. These results strongly suggest that the Supreme Court has become more prepared to grant leave in criminal cases over time. However, there is a caveat to these results. The Court granted more criminal leave applications in 2011 than in previous years, but the number of actual decisions had dropped considerably. This was because 19 of the 25 criminal applications granted in 2011 arose out of the Urewera firearms trial and were dealt with in two leave hearings.¹⁸

The picture is less clear with respect to civil cases. On the one hand, between 2005 and 2011 the percentage of civil applications granted annually fell from 60 percent to less than 30 percent. On the other hand, no reliable trend was found in the actual number of successful applications, which tended to fluctuate year-to-year. It appears that the declining proportion of successful applications is a consequence of the large yearly increases in the total number of leave applications, rather than any change in the approach of the Supreme Court per se.

Finally, the results of the current study provide some indications that, whilst the approach of the Supreme Court towards leave is still evolving, some trends or patterns in the Court's leave decision-making may have begun to crystallise. In particular, from about 2008 the percentage of applications granted each year stopped fluctuating and stayed relatively constant at about 30 percent. Moreover, by 2011 the proportion of criminal and civil applications granted each year also converged at around 28-29 percent, compared to 13.5 and 60 percent, respectively, in 2005.

However, the supposition that a more stable and consistent pattern of leave decision-making has emerged is tentative. The proportion of successful criminal and civil applications converged in 2011, but this was the consequence of medium-term trends of increase in the former and decrease for the latter. If these trends continue, as seems likely in the short term, then the proportion of successful criminal

¹⁷ Beck, *Supra* fn 1, p. 18-9.

¹⁸ Twelve appeals involved the admissibility of evidence and seven were against an order for the trial to be conducted by Judge alone.

applications will exceed the percentage of successful civil applications. Nevertheless, it is possible that the convergence noted in 2011 and the pattern of stability observed since 2008, may hint at the future pattern of Supreme Court leave decision-making. Future research is required in order to determine which patterns and trends are maintained in the longer term.

7.3.2 Comparison of the Privy Council and Supreme Court

7.3.2.1 Volume of Appeals

A further issue explored in this chapter was the difference between the Privy Council and the Supreme Court in the number of appeals decided per year. The results demonstrated that the Supreme Court heard considerably more appeals per annum than the Privy Council. Indeed, by 2011 the Court was disposing of four times the number appeals compared to the Judicial Committee.

There are several factors that may account for the difference. Firstly, the Supreme Court is able to hear appeals on a number of matters that were outside the jurisdiction of the Privy Council, for instance disputes originating in the inferior or specialist courts. Secondly, differences in the leave arrangements of the Supreme Court and the Privy Council may have also played a role. These factors are discussed more fully in the next section.

Thirdly, the relatively high volume of Supreme Court appeals may also reflect differences in appeal costs. Although the direct legal costs faced by litigants may be similar for both courts, litigants appealing to the Supreme Court do not face the same disbursement costs as a party appealing to the Judicial Committee. For instance, there are no costs stemming from the need to engage a United Kingdom-based Privy Council Agent and the costs involved in travel and accommodation are also much less. Advice provided to the Justice and Electoral Committee suggested that disbursement cost savings in the Supreme Court could be approximately \$24,000 per party.¹⁹

Interestingly the results also indicated that the disparity between the two courts continues to widen, with the Supreme Court granting leave to and disposing of more cases every year. Criminal appeals, in particular, account for most of this increase. It appears that the increasing number of appeals is, to a large extent, the result of the growing number of leave applications being submitted to the Court. This raises the question of why, since patriation, there has been such a substantial, and sustained, increase in the number of litigants wishing to pursue their grievances before the final court.

There are several possible explanations. Firstly, the Supreme Court's standards and approach to leave decisions are becoming more widely known, at least amongst legal advisors. This information may assist potential litigants and their advisors in determining whether or not to pursue an appeal. For example, the knowledge that the Supreme Court has been much more willing than the Privy Council to grant leave to hear criminal appeals may have been a factor that has encouraged a wider group of potential appellants

¹⁹ Justice and Electoral Committee, *Supra* fn 2, p 15-7. The advice provided by the Department for Courts was based on a study of 22 parties involved in 13 Privy Council cases that were heard between 1999 and 2001. The report was prepared for the Department in December 2001. See K Saville-Smith, *Private Litigant Cost of Pursuing Appeals at the Privy Council*, Centre for Research Evaluation and Social Assessment, 2001.

to seek leave to appeal. In addition, the general public profile of the Court may also be a contributing factor. A final court that is based locally, rather than overseas, may simply seem more accessible to potential litigants than the distant and, perhaps, unfamiliar Privy Council.

7.3.2.2 *Range of Appeals*

The current chapter also examined differences in the types of appeal heard by the Privy Council and the Supreme Court. Several findings emerged from this inquiry. Firstly, as hypothesised criminal appeals comprised a much larger proportion of the workload of the Supreme Court compared to the Privy Council. Secondly, the results also supported the prediction that cases involving commercial, property, or financial matters would comprise a higher proportion of the Privy Council's workload compared to the Supreme Court. Specifically, the current study found that tax appeals, cases involving company law, and disputes involving contract, property, or commercial matters each made up higher proportions of the workload of the Privy Council than they did for the Supreme Court.

These findings reflect the different leave arrangements for each court. The Privy Council operated a system of appeals by way of right. The sole criterion for leave was that the case involved a disputed matter that exceeded the value of \$ 5,000. As a result cases on appeal from the Court of Appeal that involved financial, property, or commercial matters were virtually always eligible to be appealed as of right. However, other types of case, most notably criminal appeals, where money or property was not in issue, had no automatic right to be heard by their Lordships. Instead such cases required leave from the Court of Appeal or, in the case of criminal appeals, from the Judicial Committee itself. As noted in the previous chapter, it appears that where a system of appeals by right operates alongside a system of appeals by leave the former have tended to leave little room for the latter.²⁰ Hence the relatively small number of criminal appeals heard by the Privy Council.

In contrast, the Supreme Court operates a system of discretionary leave for all appeals. Justice Kirby of the High Court of Australia has surmised, based on Australian judicial attitudes, that a system of discretionary leave tends to favour public law questions of general importance as opposed to private disputes that are largely of interest to the individual parties. Moreover, he noted that the abolition of appeals as of right to the High Court was associated with a subsequent increase in criminal appeals. It appears that the observations of the present research are consistent with the trends identified by Justice Kirby in Australia.²¹

There is an additional factor that contributed to the relatively low number of criminal cases heard by the Privy Council. Criminal appeals could only be heard by way of special leave. However, their Lordships were, for most of the Judicial Committee's history, reluctant to act as a court of criminal appeal. In the previous chapter I noted that this attitude has relaxed in recent years and that the number of criminal appeals from New Zealand had been increasing as a result. Moreover, the grounds on which their Lordships were prepared to grant appeals had also begun to broaden. However, the results presented in

²⁰ See also Rt Hon Dame Sian Elias, 'Something old, something new: Constitutional stirrings and the Supreme Court', *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 139-130.

²¹ Hon Michael Kirby, 'Why has the High Court become more involved in criminal appeals', *Australian Bar Review*, 2, 2002, p. 13.

the current chapter reveal that this change was gradual and that the increase in appeals was only modest in comparison to the rapid growth in criminal appeals since the establishment of the Supreme Court.

Public perceptions about the standards applied by each court may have also influenced the type of cases that were brought before the two courts. For instance, the assumption, based on past experience, that the Judicial Committee would be unlikely to grant criminal leave applications may have discouraged many potential appellants and their legal advisors from pursuing their cases before their Lordships. Conversely, as speculated in the previous section, a growing awareness that the Supreme Court is more prepared than the Privy Council to grant leave to criminal appeals may underlie the expanding number of criminal leave applications and, consequentially, the number of criminal appeals.

A third finding relates to the willingness of the Supreme Court to hear commercial appeals. On average, the Supreme Court heard more contract, commercial, and property disputes per year than the Privy Council. These types of appeal also comprised the second largest component of the Supreme Court's workload. It appears, therefore, that the s 13 leave criteria have not provided a barrier to the Supreme Court hearing commercial or contract appeals.

In some ways this finding was contrary to expectations. As discussed in **Chapter 6**, the way in which the leave criteria have been interpreted had raised the possibility that some of the commercial cases that would have previously gained access as of right to the Judicial Committee, would not receive leave to the Supreme Court. In particular, the Supreme Court had deemed that the words 'general commercial significance' in subsection 2(c) referred to the significance of the case as a precedent, rather than to the commercial significance of the dispute to the parties.

Although the present study demonstrated that the leave criteria have not restricted the numbers of contract and commercial appeals, it is likely that these criteria, with their emphasis on the precedential rather than the commercial importance of the case, have impacted upon the type of commercial case that reaches the final court. For example, commercial appeals that involve primarily factual disputes may not be granted leave to the Supreme Court, irrespective of the monetary value of the matters in issue. The extent that the leave criteria have impacted upon the type of commercial case that has access to the final court is a question that could be explored in a future inquiry.

Finally, the current study examined the implications of the expanded civil jurisdiction of the Supreme Court. As described more fully in **Chapter 5**, the patriation of the final court was associated with a series of statutory amendments that aimed to broaden the jurisdiction of the new final court to encompass appeals originating in the inferior and specialist Courts, including the District, Family, Youth, Environment, and Employment Courts. As expected, the present research found that the Supreme Court heard higher numbers of these types of appeal than the Judicial Committee. Specifically, the results showed that, on average, the Supreme Court heard more family cases per year than the Privy Council and that this type of appeal comprised a higher proportion of the Court's annual workload. Moreover, only the Supreme Court heard cases dealing with employment matters. This reflected the fact that a finality clause in the Employment Relations Act had barred any such appeals to the Privy Council.

7.3.3 International Comparisons

In its report on the Supreme Court Bill, the Justice and Electoral Committee presented the appeal statistics of the final courts of several jurisdictions in order to compare the Judicial Committee and the proposed Supreme Court to similar courts in comparable countries. In this section I will use these data and the estimated values for the proposed Supreme Court as a baseline against which to assess the actual performance of the Supreme Court.

The first set of data relates to the proportion of leave applications granted annually. Table 7.6 displays the data for the Supreme Court of New Zealand and the final courts in Australia, Canada, the United States, and Britain. It is interesting to note that the proportion of leave applications granted annually by the Supreme Court of New Zealand is high by international standards. According to these data only the Appellate Committee of the House of Lords granted leave at a rate similar to the Supreme Court. In contrast, the Supreme Court of Canada and the US Supreme Court granted leave for only a small fraction of cases.

Table 7.6
*International Comparison of the Proportion of Successful Leave Applications.**

Jurisdiction	Year	Proportion of Successful Applications
United States Supreme Court	2001/02	1.1%
High Court of Australia	2001/02	22.67%
Supreme Court of Canada	2002	9.64%
House of Lords	2002	34.31%
Supreme Court of New Zealand [†]	2005	36.11%
Supreme Court of New Zealand	2011	28.87%

[†] The data from overseas jurisdictions was derived from Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003.

[‡] The data in bold type were derived from the current study

A second set of international data compared the same final courts on the number of appeals disposed in a year per million of population. These data are reproduced in Table 7.7 below, along with values for the Supreme Court that were derived from the present study. In absolute terms, the workload of the Supreme Court is low by international standards. However, taking population size into consideration, the Supreme Court issued, on average, more appeal judgments per million people than the final courts in any of the other jurisdictions.

Table 7.7 also reveals that the Supreme Court has issued far fewer judgments per year than was projected by the Justice and Electoral Committee. Indeed, the number of appeal judgments per million people was only about half what was expected. There is a reservation to this conclusion, however. The data in Table 7.7 is based on the number of judgments per year, not the total number of appeals. As a result the values given in Table 7.7 underreport the actual numbers of appeals. For instance, the Supreme Court heard 44 appeals in 2011, not 23. This number was more in line with the number of judgments estimated by the select committee. Finally, it is interesting to note that, although the number of judgments issued by the Judicial Committee was low by international standards, the number per million of population was still higher than in most other jurisdictions.

Table 7.7
*International Comparison of the Number of Appeal Judgments by Final Court.**

Jurisdiction	Year	Number of Judgments ⁺	Population (Million)	Appeal Judgments per Million People
Australia (High Court)	2001/02	63	19.8	3.2
United States (Supreme Court)	2001/02	87	290.8	0.3
Canada (Supreme Court)	2002	88	31.5	2.8
United Kingdom (House of Lords)	2002	71	58.8	1.2
New Zealand (Privy Council)	2002	12	4	3
New Zealand (Supreme Court)	Estimate	40	4	10
New Zealand (Supreme Court) [£]	2005	12	4.1	2.9
New Zealand (Supreme Court)	2011	24	4.4	5.5
New Zealand (Supreme Court)	Average [#]	23	4.3	5.3

* The data from overseas jurisdictions and the estimates for the Supreme Court were derived from Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003.

⁺ Appeals heard together were counted as one judgment. These data underreport, sometimes considerably, the total number of appeals dealt with each year.

[£] The data in bold type were derived from the current study.

[#] The average was calculated from appeal data from 2005-2011.

7.3.4 Summary: *Patriation and the Accessibility of the Final Court*

In the introduction to this project I emphasised that the purpose of the Supreme Court legislation, as articulated by the select committee, was to enhance ‘access to justice’ by ‘improving the accessibility of New Zealand’s highest court’ and ‘broadening the range, and increasing the volume of appeals considered by New Zealand’s highest court’.²² The data presented in the current chapter demonstrates that the establishment of a local final court, together with the associated reforms to that court’s jurisdiction, has fulfilled many of the expectations of the architects of the Supreme Court Act.

The new final court hears considerably more appeals per year than the Privy Council and, although the Supreme Court has not yet reached the volume of judgments per year predicted by the Justice and Electoral Committee, the volume of appeals is growing yearly. Moreover, a comparison with final courts in other similar jurisdictions revealed that the new Supreme Court issues more judgments per head of population than comparable courts. The Court also hears a much wider range of cases compared to the Privy Council. In part this is a result of the expanded jurisdiction of the new court to hear appeals on disputes originating in the inferior and specialist Courts and on a wider range of family law matters.

However, the most visible improvement in regards to accessibility has been the substantial growth in the number of criminal appeals heard by the new final court. The Supreme Court has proven to be much more prepared than their Lordships to grant leave to hear criminal appeals. Moreover, it appears that public realisation of the Court’s willingness to hear criminal appeals, together with considerations such as financial cost, travel, and convenience, has led to a sustained growth in the number of leave applications being filed each year and, consequently, the number of appeals being heard by the Court. Thus criminal appeals, previously a rarity, now make up about two-fifths of the final court’s workload.

²² Justice and Electoral Committee, *Supra* fn 2, p. 1.

The Consequences of the Patriation of the Final Court *Patriation and the Doctrine of Precedent*

Prior to the establishment of the Supreme Court, the Privy Council acted as New Zealand's highest court and, as such, provided guidance to the local courts on matters of both substantive law and common law doctrine. The judgments of the Judicial Committee on appeals from New Zealand were authoritative statements of New Zealand law and were binding upon the New Zealand courts.¹ Often decisions on appeal from other jurisdictions were also considered authoritative, unless there were exceptional local circumstances, such as statutory differences, that rendered the Privy Council decision inapplicable or inappropriate.²

One of the objectives of patriating the final court was to create an 'indigenous justice system' in which the locally-based courts assume complete responsibility for the development of New Zealand law.³ Consistent with this goal, the establishment of a local Supreme Court has meant that it has fallen upon the new final court to provide leadership and direction on matters of common law doctrine and in the development of the law. It also meant that there has been a degree of adjustment by a judiciary that is now operating independently from the oversight of the Law Lords.

An important element of this adjustment process has been the examination, in light of the reforms, of the approach of that the courts would take to precedent. Three main issues presented themselves to the re-structured judiciary. Firstly, the new final court needed to determine whether it considered itself bound by Privy Council precedent. Secondly, the Supreme Court also needed to consider the extent to which it would respect its own past decisions. Finally, the judiciary also had to decide on the extent that the lower courts would continue to be bound by the decisions of the Privy Council made prior to patriation.

The present chapter examines how the New Zealand courts, especially the Supreme Court, have dealt with these three issues during the nine years since the Supreme Court reform. It is divided into two parts. The first part discusses the expectations of the architects of the reforms and, in particular, the approach to precedent recommended by Attorney-General Margaret Wilson and her advisors. It also briefly considers the experiences of the Australian courts in the years since the abolition of the Privy Council in that country. The second part then investigates the impact of patriation on the doctrine of precedent in New Zealand. Two primary methodology strategies are employed in this investigation. The first is a quantitative inquiry that compares the Supreme Court and the Privy Council on the citation of Privy Council decisions. The second is a series of case studies of selected Court of Appeal and Supreme Court judgments. The aim of these case studies is to identify and highlight the approach to precedent articulated by the New Zealand courts in the years since the patriation of the final court.

¹ Peter Spiller, 'Relationship with the Privy Council' in *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2002.

² *Breur v Wright* [1982] 2 NZLR 77 per Woodhouse P.

³ 'Attorney-General's Introduction' in Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000.

8.1 Precedent and Patriation: The Expectations of Academics, Officials, and Judges

8.1.1 Report of the Ministerial Advisory Group

Surprisingly, given the potential consequences for the stability and consistency of the law, the issue of precedent was largely overlooked during the policy debates over the Supreme Court proposal.⁴ In particular, no mention of precedent featured in the initial discussion document prepared by the government on the costs and benefits of abolishing the Privy Council⁵ and none of these issues were addressed by the select committee that reported on the Supreme Court Bill.⁶ However, precedent was briefly mentioned by an advisory group appointed by the Attorney-General to make recommendations on the structure and function of the proposed Supreme Court.⁷

The report of the Ministerial Advisory Group cited with approval the approach of the House of Lords enunciated in its 1966 Practice Note. In this Practice Note, their Lordships acknowledged the importance of precedent for certainty and as a basis for the orderly development of the law, but they also felt that a too rigid adherence to precedent could unduly restrict the development of the law or lead to injustice in individual cases. They, therefore, modified their practice, stating that while former decisions of the House would normally be treated as binding, they would depart from precedent ‘*if it appears right to do so*’.⁸

The Ministerial Advisory Group also emphasised that the creation of a local final court should not signal any departure from the common law as it stood at the time. Its report suggested that the Supreme Court should normally follow Privy Council decisions that were made whilst the Privy Council acted as New Zealand’s final court. However, in keeping with the approach set down by the House of Lords, the report also stipulated that the new Court should also be free to depart from existing authority when *it appears right to do so*. They argued that this would confirm the Supreme Court’s role as the highest court and allow legal developments that would take account of unique or special New Zealand circumstances.⁹

8.1.2 The Australian Experience

It appears, given the absence of any subsequent discussion, that the architects of the Supreme Court proposal were content to assume that the new final court would apply precedent along the lines envisaged by the Ministerial Advisory Group. However, some legal commentators felt that the impact of patriation on the status of Privy Council precedent may not be so clear cut.¹⁰ Instead, they warned, based

⁴ N. Wood and C. Tripp, ‘The proposed Supreme Court and precedent’, *New Zealand Law Journal*, October 2003, p. 359.

⁵ Office of the Attorney-General, *Supra* fn 3.

⁶ Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003.

⁷ Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report to Hon Margaret Wilson Attorney-General and Associate Minister of Justice*, Wellington: Office of the Attorney-General, 2002, p. 20.

⁸ Practice Note [1966] 3 All ER 77, emphasis added.

⁹ Ministerial Advisory Group, *Supra* fn 7, p. 20-1.

¹⁰ Wood and Tripp, *Supra* fn 4.

on the experiences of other countries that had abolished the Privy Council, that caution may be warranted in predicting the post-patriation attitude to Privy Council case law.

The Australian experience, in particular, is illustrative of the sorts of issues and complications that can emerge. In the first place, the different State Supreme Courts have developed different approaches to the application of Privy Council jurisprudence. On the one hand, the Supreme Court of Victoria held that all Privy Council decisions lost their binding force the moment that the Privy Council disappeared from the Australian hierarchy. In *R v Judge Bland, ex p Director of Public Prosecutions*, decided a year after the abolition of Privy Council appeals from the state courts, the Supreme Court had to decide between applying an earlier decision of the Full Supreme Court or a later, conflicting, Privy Council judgment. The court decided by a process of ‘subtraction’ that the Privy Council decision was no longer binding and that the earlier decision was revived.

In contrast, the Supreme Court of South Australia preferred a more deferential attitude toward Privy Council authority. For example, in *Barns v Barns*¹¹ the Full Court of the Supreme Court of South Australia was confronted with two inconsistent Privy Council judgments on appeal from other jurisdictions.¹² In the later judgment the Privy Council had explicitly departed from the former decision. In the absence of High Court authority on the point in issue, the Supreme Court felt obliged to apply the Privy Council decision that was later in time.

Secondly, the attitude of the Australian High Court to Privy Council jurisprudence has shifted considerably over time. Initially the High Court adopted a conservative approach.¹³ For instance, in *Viro v The Queen* Justice Gibbs stated that the High Court ‘will not differ from a decision of the Privy Council any more readily than we will depart from one of our own decisions.’¹⁴ In part, this conservative attitude reflected the fact that *Viro* was decided in 1978 when there was still an appeal to the Privy Council available from the state courts.

More recently the High Court has explicitly departed the approach spelled out in *Viro*. In *Barns v Barns*¹⁵ Justices Gummow and Hayne suggested that the statement of Justice Gibbs was too wide a proposition because it did not allow for cases where the Privy Council had failed to consider relevant High Court decisions. Instead they cited with approval the statement of Aitkin J that the High Court should depart from a Privy Council decision ‘if in the proper performance of its duty it feels it should do so’.¹⁶ Later in the judgment Justice Kirby noted that

‘although this Court continues to pay respect to the judicial reasons of the Privy Council, especially in respect of Australian appeals at a time when the Privy Council was a court within the Australian judicial hierarchy, we are not bound by such reasons. As the final court of the Australian judicature...this court is obliged to state its own conclusions’.¹⁷

Finally, in 2007 the Chief Justice of Australia, Murray Gleeson, spoke of a dismissive attitude toward Privy Council precedent within the High Court that has developed over time. This was particularly the case for constitutional jurisprudence where the High Court’s 1988 decision in *Cole v Whitfield* reinterpreted section 92 of the Constitution and rendered irrelevant the Privy Council jurisprudence

¹¹ (2001) 80 SASR 331.

¹² *Dillon v Public Trustee of New Zealand* [1941] AC 294 (PC) on appeal from New Zealand and the later *Schaefer v Schuhmann* [1972] AC 572 (PC) on appeal from Supreme Court of New South Wales.

¹³ Wood and Tripp, *Supra* fn 4.

¹⁴ (1978) 141 CLR 88 at 121.

¹⁵ (2003) 214 CLR 169

¹⁶ *ibid*, at 174.

¹⁷ *ibid*, at 210.

falling under that section. He also noted a tendency for the High Court to cite its own decisions when affirmed by the Privy Council, rather than the Privy Council judgments themselves.¹⁸

8.1.3 Extra-Judicial Comments in New Zealand

In October 2004 Justice Blanchard, a member of the newly established Supreme Court, presented a paper in a seminar for the New Zealand Law Society in which he offered guidance on a range of issues that would face the new final court.¹⁹ One of these challenges included the attitude that the new Court would adopt regarding the status of its own past decisions and the decisions of the Privy Council.²⁰ Three matters raised by Justice Blanchard are relevant to the succeeding discussion. Firstly, he noted that it will take time, possibly an extended period of time, for the Supreme Court to work out its approach to precedent.

Secondly, in regard to Supreme Court's attitude to its own prior decisions, Justice Blanchard tentatively suggested that the Court could find some guidance from the position adopted by the Australian High Court in *John v Federal Commission of Taxation*.²¹ In this case the High Court regarded itself as having the power to depart from its own earlier decisions, but also noted that such a course should not be undertaken lightly. The Court listed the following considerations that should be taken into account:

1. Whether there is already a principle carefully worked out in a significant succession of earlier cases
2. Whether in the earlier case there are differences between the reasons given by the judges who were in the majority
3. Whether the earlier case has led to considerable inconvenience in practice
4. Whether or not the earlier case has been acted on in a manner which militates against reconsideration
5. Whether (in cases of statutory interpretation) the Court is convinced that an interpretation previously given was clearly erroneous and that the precedent case therefore cannot be allowed to stand in the way of declaring the true intent of the statute.

Thirdly, Justice Blanchard commented on the approach to Privy Council precedent enunciated by the High Court in *Barnes v Barnes*.²² He noted that this decision confirms that the High Court no longer considers itself bound by Privy Council decisions, whether given before or after the abolition of appeals. Finally Justice Blanchard concluded by asserting that:

'any refusal of the Supreme Court to follow a Privy Council decision, particularly one given on appeal from New Zealand, will surely be a rare event. It would happen only where the Court was entirely convinced that the Privy Council was in error or inappropriate to New Zealand conditions in the 21st century. The Court would, even in such a case, have to consider whether people had been ordering their affairs in reliance upon the opinion of the Privy Council'.²³

¹⁸ M. Gleeson, 'The influence of the Privy Council on Australia', An address to the Anglo-Australasian Lawyers Society, 2007.

¹⁹ Rt Hon Peter Blanchard, 'New Zealand Supreme Court jurisdiction and practice', *Commonwealth Law Bulletin*, 33(1), 2007a, p. 3-14.

²⁰ *ibid*, p. 14.

²¹ (1989) 166 CLR 417.

²² *Supra* fn 16.

²³ Blanchard, *Supra* fn 20, p. 14.

8.2 The Consequences of Patriation for the Doctrine of Precedent

The remainder of this chapter considers how the patriation of the final court has impacted on the way that the New Zealand judiciary applies Privy Council jurisprudence. In conducting this inquiry I have focused on the role played by the Supreme Court in providing guidance on these issues to the lower courts. As a result much of the following discussion concentrates on the approach to precedent articulated by the Supreme Court. Firstly, however, I will briefly summarise the findings of a quantitative inquiry that compared the Supreme Court and Privy Council on the citation and application of Privy Council precedent.

8.2.1 Quantitative Data

8.2.1.1 Overview and Samples

The present study compared a selection of Privy Council and Supreme Court judgments in order to reveal whether there are any differences between the two courts in the citation and application of Privy Council jurisprudence. The sample employed in this investigation was the 104 Privy Council judgments issued between 1995 and 2007 and the 164 Supreme Court judgments decided between 2004 and 2011.²⁴

8.2.1.2 Variables

Judgments were coded and analysed according to four dependent variables. These were:

1. The number of cases cited in the judgment that were decided by the Privy Council.
2. Whether the judgment applied or adopted a past Privy Council decision.
3. Whether the judgment distinguished a past Privy Council decision.
4. Whether the judgment departed from a past Privy Council decision.

8.2.1.3 Results

The current study found that the Supreme Court cited Privy Council precedent in a higher proportion of its decisions than the Privy Council itself. Approximately 49 percent of Supreme Court judgments referred to at least one Privy Council case, compared to 30 percent of Privy Council judgments. Further analysis was undertaken to determine whether there was any differences between two courts in the numbers of Privy Council cases cited per judgment. These results are displayed in Table 8.1.

Overall two broad conclusions can be drawn from these data. Firstly, the Supreme Court has been referring to Privy Council precedent with greater frequency than the Judicial Committee. Secondly, the results in Table 8.1 suggest that in those cases where the Supreme Court has looked to the Privy

²⁴ Further details of the methodological strategies employed in the present research can be found in the introductory chapter.

Council for inspiration, it has tended to consider a broader spectrum of the available Privy Council jurisprudence.

Table 8.1
Citation of Privy Council Precedent by Final Court of Appeal

Number of Privy Council Cases Cited per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than three	1.92%	8.54%
Three	2.88%	4.27%
Two	7.69%	10.98%
One	17.31%	25.61%
None	70.19%	50.61%
Total (N=)	100.00%	100.00%
	104	164

The current study also compared the two courts on the degree that their judgments followed or rejected precedent. Overall the data showed that the Supreme Court applied Privy Council precedent in almost nine percent of the cases analysed, whereas the Privy Council applied its own jurisprudence about six percent of the time.²⁵ Both courts distinguished Privy Council decisions in approximately three percent of judgments.²⁶ Finally, the Supreme Court departed from the Privy Council in one of the 164 judgments analysed.²⁷ The Judicial Committee did not depart from any of its own decisions.

8.2.1.4 Summary

Overall the data outlined above indicates that Privy Council jurisprudence remains an important source of the case law being enunciated by the Supreme Court. The Supreme Court has been willing to cite and, where relevant apply, the past decisions of the Privy Council. There is little evidence of any rejection of Privy Council jurisprudence, notwithstanding the departure from the Privy Council in *Couch v Attorney-General*. The circumstances of this exception are explored more fully later in this chapter.

There is a caveat to these tentative conclusions, however. It appears that whilst Privy Council precedent has been cited and applied by the Supreme Court to a high level, its importance as a source of authority relative to decisions from other jurisdictions may have actually decreased. For example, Privy Council decisions comprised about ten percent of the total cases cited by the Privy Council, but only seven percent of the decisions cited by the Supreme Court.²⁸ Furthermore, Privy Council precedent represented eleven percent of the authority followed or applied by the Privy Council, but just over eight percent of the judgments followed by the Supreme Court.²⁹ As will be further discussed in the next chapter, there is considerable evidence that the Supreme Court draws upon case law from a wider number of jurisdictions than the Privy Council.

²⁵ The percentages were 8.54 percent and 5.77 percent, respectively.

²⁶ The percentages were 3.05 percent for the Supreme Court and 2.88 percent for the Privy Council.

²⁷ *Couch v Attorney-General (No 2)* [2010] 3 NZLR 149. See below for a case study on this judgment.

²⁸ The percentages were 9.67 percent and 6.75 percent, respectively.

²⁹ The percentages were 10.77 percent and 8.20 percent, respectively.

8.2.2 Court of Appeal Judgment: *R v Chilton*

This section considers the comments on precedent articulated by the Court of Appeal in the judgment *R v Chilton*.³⁰ In this case the main issue put to the Court was whether it should overrule one of its own previous decisions; *Nicholson v Department of Social Welfare*.³¹ After holding that *Nicholson* was correctly decided, the Court, out of deference to the arguments presented by counsel, also examined the issue of whether the patriation of the final court should impact on the Court of Appeal's position on stare decisis.

The first aspect of this issue was the question of when it would be appropriate for the Court of Appeal to reconsider or overturn its own previous decisions. Justice Glazebrook, speaking for entire Court, noted that before the Supreme Court reform, the Court of Appeal had adopted a flexible approach to precedent. Although normally bound by its own past decisions, the Court, in rare cases would review and either affirm, modify or overrule a past decision. The basic reason given for this approach to precedent was that, at the time, the Court of Appeal was in effect a de facto final court and so needed the flexibility to revisit its past decisions and to restate the law if social or legal developments required it. Moreover, the New Zealand Court of Appeal, in contrast to the English Court of Appeal, had resisted any temptation to set out in detail the precise circumstances in which it will depart from past decisions.

Justice Glazebrook then considered the impact of the establishment of the Supreme Court. He commented that New Zealand now has an indigenous final court that is able to articulate its own view on the direction of the common law in light of economic and social conditions and local practice. However, the Court did not see this as sufficient reason to alter its position on stare decisis, especially to move towards the more restrictive English approach. Glazebrook J argued that not all of the reasons for retaining a more flexible approach have disappeared. For instance, he noted that New Zealand is a small country so overseas legal developments should remain influential on the Court.

Moreover, citing Australian and Canadian attitudes, Justice Glazebrook observed that if access to the final court is by way of restrictive leave criteria then the intermediate court is essentially a court of last resort. He felt that it would create injustice if an intermediate court is bound to follow an obviously incorrect precedent, especially if an appeal is not available or unlikely to be taken to the final court. As an additional reason Glazebrook J noted that it would be advantageous for the Supreme Court, if it hears a case for reconsideration, to have a fully reasoned decision from the Court of Appeal as to why it considers the previous decision to be wrong.

Secondly, for the sake of completeness, Justice Glazebrook offered some obiter comments on the impact of patriation on the status of Privy Council decisions. He argued that, in their view, the Court of Appeal is still bound by Privy Council decisions on appeals from New Zealand until such time as the Supreme Court departs from them. This includes appeals decided during the transitional phase. Glazebrook J commented that it 'would be totally inappropriate for this Court to ignore a decision of the Privy Council and return to its own (overturned) decision or to overturn one of its decisions that had been expressly approved by a higher court'.³²

³⁰ [2006] 2 NZLR 341

³¹ [1999] 3 NZLR 50.

³² [2006] 2 NZLR 341 at para 111

Lastly, Justice Glazebrook notes that the position is less clear with respect to the status of Privy Council judgments on appeals from other jurisdictions. On the one hand, he cites the statement by Woodhouse P in *Breur v Wright*³³ that Judicial Committee decisions on appeal from other Commonwealth countries are indeed binding, save the exceptional need to consider local developments such as statutory reforms. On the other hand, he suggested that, despite the apparently clear statement, there may be doubt on the issue. In particular, he noted extra-judicial comments by Lord Cooke that there is a grey area as far as non-New Zealand Privy Council cases are concerned.³⁴ Beyond identifying this doubt, however, the Court made no attempt to further elucidate matters, except to comment that Privy Council decisions made on overseas cases after the establishment of the Supreme Court are of pervasive value only.

8.2.3 Supreme Court Judgments

The final part of this investigation briefly reviews a series of judgments in which the Supreme Court has had to directly grapple with the question of whether or not to depart from a previous Privy Council decision.

8.2.3.1 *R v Mist*

One of the first cases in which the Supreme Court had to deal with the issue of whether to apply a Privy Council decision was *R v Mist*.³⁵ In this appeal, which was a criminal appeal against sentence, the Court had to determine whether, for the purposes of applying a sentence of preventative detention, the age of threshold in s 75 of the Criminal Justice Act 1985 referred to the date of the offence or the date of sentencing. In determining the meaning of this provision, the Supreme Court considered a decision of the Privy Council in an appeal from Jamaica.

In *Baker v R*³⁶ the Judicial Committee had held that that s 29 of the Jamaican Juveniles Act 1951, which limits penalties for certain age groups of offenders, operated on the date of sentencing, not the date of the commission of the offence. Counsel for the appellant had invited their Lordships to construe a different meaning based on notions of fairness and rationality that he contended were so generally accepted that the legislature could be presumed to have not intended to act contrary to them. Their Lordships declined to do this on the basis that they lacked an appreciation of the relevant local social and policy conditions necessary to make such a determination. However, Lord Salmon dissented. He felt that the majority's interpretation would produce barbarous and absurd results and that this could not have been the legislature's intention.

The Supreme Court made several observations about *R v Baker*. Firstly, the Court preferred the dissent of Lord Salmon to the majority. They felt that it was fairer and better represented justice and

³³ [1982] 2 NZLR 77

³⁴ See Cooke, R. [1983] NZLJ 297.

³⁵ [2006] 3 NZLR 145

³⁶ [1975] AC 774.

principle. Secondly, Justice Keith argued that the reasons given by the majority for rejecting the appellant's interpretation of the Juveniles Act, based as they were on the Judicial Committee's lack of familiarity with the local situation, both reduced the precedential value of the judgment and were a basis for distinguishing the decision. Thirdly, Justice Tipping suggested that the decision was distinguishable on the basis that it was decided in terms of a statutory provision equivalent to s 4(1) of the Criminal Justice Act,³⁷ but without an equivalent to s 4(2).³⁸ Finally, Justice Tipping also observed that *Baker* represented a departure from the previous Judicial Committee decision in *Maloney (Gordon) v R*.³⁹

Two main conclusions can be drawn about the Supreme Court's approach to precedent in *R v Mist*. Firstly, the factors which detracted from the status of the Privy Council decision were the existence of a dissent, the fact that *Baker* departed from a previous Privy Council decision, and the fact that the Board cited lack of familiarity with local conditions in their reasons. Secondly, despite disagreeing with the approach of the Privy Council, the Supreme Court preferred to distinguish the decision, citing statutory differences and issues of local policy.

8.2.3.2 *Couch v Attorney-General*

*Couch v Attorney General (No 2)*⁴⁰ has been the only appeal to date in which the Supreme Court has opted to depart from a decision of the Privy Council. The decision departed from was *Bottrill v A*⁴¹ in which the Judicial Committee had overturned the majority of the Court of Appeal on the question of the availability of exemplary damages in cases of negligence. Their Lordships had held that the Court's jurisdiction to award exemplary damages was not rigidly confined to cases where the defendant intended to cause harm or was consciously reckless as to the risks involved.⁴² In contrast, the Court of Appeal,⁴³ and ultimately the Supreme Court in *Couch*,⁴⁴ preferred the availability of exemplary damages to be conditional on a finding that the defendant consciously ran the risk of harm to the plaintiff.

General Approach to Precedent

In their discussion of *Bottrill* the members of the Supreme Court each articulated their own view on the status of Privy Council precedent and the conditions under which it would be appropriate for the Supreme Court to depart from such authority. I will review these general comments before discussing issues more particular to the *Bottrill* case.

Firstly, in her dissent the Chief Justice observed that it is open to the Supreme Court 'to depart from a decision of its own or of the Privy Council...if it is right to do so because a rigid adherence to precedent would lead to injustice in the particular case or would unduly restrict the proper development of

³⁷ This section provides that offenders are not liable to any altered maximum between commission date and conviction date.

³⁸ This section provides that no Court can sentence an offender, except with their consent, to a sentence that could not have been imposed when the offending took place.

³⁹ [1969] 15 WLR 359.

⁴⁰ *Supra* fn 27

⁴¹ [2003] 2 NZLR 721 (PC).

⁴² per Lord Nicholls, Lord Hope, and Lord Rodger; Lord Hutton and Lord Millett dissenting

⁴³ *Bottrill v A* [2001] 3 NZLR 622 (CA) per Richardson P, Gault, Blanchard, Tipping JJ; Thomas J dissenting.

⁴⁴ per Blanchard, Tipping, McGrath and Wilson JJ; Elias CJ dissenting.

the law to meet the needs of New Zealand society'.⁴⁵ However, she also emphasised that Privy Council decisions on New Zealand appeals are binding on all the New Zealand courts, except the Supreme Court, and felt that 'departure from such authority is warranted only for good reason'.⁴⁶ The Chief Justice added that judges in final appellate courts in all common law jurisdictions accept this level of discipline, even when they disagree with an earlier decision. She pointed out that respect for precedent is an aspect of the rule of law and that no judicial system could adequately serve society if it reconsidered each issue afresh in every case that raised it.

Secondly, Justice Blanchard, citing the High Court of Australia, felt that the Court should depart from a Privy Council decision 'if in the proper performance of its duty it feels that it should do so'.⁴⁷ However, he also emphasised that the Supreme Court should be slow to overturn a Privy Council decision. He argued that it would be unsettling for New Zealand law if lawyers and litigants thought that the Court would be easily persuaded to depart from Privy Council authority. Thus he concluded that '[i]n my view, it should not do so unless it is satisfied that the Privy Council decision was not only in error but also inappropriate for the proper development of New Zealand law in New Zealand conditions'.⁴⁸ Finally, as in his extra-judicial commentary, Justice Blanchard looked to the considerations listed in *John v Commissioner of Taxation in the Commonwealth of Australia* for guidance on when it is appropriate to depart from precedent.⁴⁹

Thirdly, Justice Tipping also observed that the Supreme Court is not bound by Privy Council precedent. He argued that the Supreme Court now performs the same role as that previously undertaken by the Privy Council and, therefore, that it is logical to consider a decision of the Privy Council to be, for precedent purposes, the same as a previous decision of the Supreme Court. He asserted that it would not be appropriate for the Court to consider itself to be absolutely bound by its own previous decisions. However, he added that it is desirable for the stability of the law that previous decisions of a final appellate court, whether those of the Privy Council or of the Supreme Court itself, be departed from only in compelling circumstances. He suggested that:

'All in all the touchstone should be caution, often considerable caution when it comes to suggestions that [the Supreme Court] should depart from one of its own decisions or a decision of the Privy Council. It must usually be evident that the previous decision was or has become clearly wrong, rather than simply representing a preferred choice with which the current Bench does not agree'.⁵⁰

Justice Tipping mentioned an additional consideration in cases where the decision in question is a decision of the Privy Council. He noted that there may be circumstances in which the Supreme Court may conclude that the Privy Council has made a policy choice which was not the right policy choice for New Zealand conditions. In justifying this stance, Tipping J observed that a 'principle reason for the establishment of [the Supreme Court] was to enable New Zealand law to be settled by New Zealand

⁴⁵ *Couch v Attorney-General (No 2)*, *Supra* fn 27 at 171, emphasis added. The Chief Justice cited ss 3(1) and 13 of the Supreme Court Act 2003 in support of this position.

⁴⁶ *ibid*, at 171.

⁴⁷ *ibid*, at 177 quoting from *Barns v Barns* (see *Supra* fn 15).

⁴⁸ *ibid*, at 177.

⁴⁹ The considerations were:

1. Whether there is already a principle carefully worked out in a significant succession of earlier cases.
2. Whether in the earlier case there are differences between the reasons given by the judges who were in the majority
3. Whether the earlier case has led to considerable inconvenience in practice
4. Whether or not the earlier case has been acted on in a manner which militates against reconsideration

⁵⁰ *Couch v Attorney-General (No 2)*, *Supra* fn 27, at 191-2.

judges, they being more familiar with New Zealand society, its legal system and its social conditions and aspirations than English and Scottish judges could ever be'.⁵¹

Fourthly, Justice McGrath made two main points on the status of Privy Council precedent. Firstly, he observed that the Supreme Court has succeeded the Judicial Committee at the apex of New Zealand's court system and, as such, it is not bound by previous Privy Council decisions. Secondly, he noted that Privy Council decisions on appeal from New Zealand are still binding on the lower courts, subject to the position of the Supreme Court. Thus if the lower courts perceive any inconsistency between decisions of the Privy Council and those of the Supreme Court it must follow the latter.

However, McGrath J, like the other members of the Court, emphasised that just because the Supreme Court has the power to depart from a decision of the Privy Council, does not mean that it should take an unrestrained approach when invited to do so. He points out that

...'[t]he fact that this Court has power to depart from the Privy Council's decisions does not mean that it should do so merely because, if the matter were being decided afresh, the Court might take a different view. On the contrary, a policy in this Court of general adherence to precedent in respect of Privy Council judgments, even though it is not bound to do so, will have beneficial force in achieving stability, consistency, orderly development and a degree of certainty in the law...

[S]tatements of the law of New Zealand by the Privy Council should stand as authoritative unless this Court considers there are cogent reasons for reconsideration of and departure from them.⁵²

Like Tipping J, Justice McGrath felt that awareness of local conditions was an important factor in determining whether or not to apply a precedent. He observed that, in determining the content of New Zealand law, the Supreme Court has to decide whether to follow the decisions of other courts, both in New Zealand and overseas. In undertaking this role the Court is guided by the policy set out in s 3 of the Supreme Court Act which provides that important legal matters are to be resolved with an understanding of New Zealand history, traditions and conditions. He stated that '[t]he knowledge and appreciation that members of the Court have of these matters must be brought to bear in articulating and applying New Zealand law, whether its source is the common law or statute'.⁵³

Finally, Justice Wilson made similar comments about the relationship between s 3 and the approach of the Supreme Court to precedent. He considered that in order to fulfil the purposes of the Supreme Court Act the 'judges of the Supreme Court must be prepared to depart, if they think it right to do so, from a position taken by judges on the other side of world whose understanding of New Zealand conditions is necessary limited'.⁵⁴ Wilson J suggested that whilst the Supreme Court will always have regard to the value of certainty and consistency in the law and will give great weight to a relevant Privy Council decision, ultimately they are free to depart from it.

Justice Wilson also made some general comments on the status of Privy Council decisions in New Zealand. He observed that the judgments of the Privy Council in New Zealand appeals are binding on the lower Courts. He added that Privy Council decisions on appeals from other jurisdictions made before the establishment of the Supreme Court are probably also binding, although the point is not free from doubt.⁵⁵

⁵¹ *ibid* at 192, citing the s 3 of the Supreme Court Act.

⁵² *ibid* at 219.

⁵³ *ibid* at 219.

⁵⁴ *ibid*, at 228.

⁵⁵ *ibid*, at 228; noting the comments of the Court of Appeal in *R v Chilton* [2006] 2 NZLR 341.

Specific Considerations Applied to Bottrill

In deciding that the Court should depart from *Bottrill* the majority listed several specific considerations that, together, suggested that a reconsideration of the law was appropriate. Firstly, Blanchard J contended that *Bottrill* was actually out of step with New Zealand case law and with the law of other jurisdictions with which New Zealand compares itself. Indeed he noted that it appeared to be the only decision of a senior court, directly addressed to the issue, which expressly endorsed exemplary damages for inadvertent conduct.⁵⁶ Similarly, Justice Tipping argued that the Supreme Court was bringing New Zealand law back into line with Australian and Canadian law and with the conceptual underpinnings of the relevant House of Lords cases.⁵⁷

Secondly, Blanchard, Tipping, McGrath, and Wilson JJ⁵⁸ noted that the persuasive force of *Bottrill* was reduced because of the strong dissent of two Law Lords who endorsed the approach of the New Zealand Court of Appeal. Justice Wilson also pointed out that because of the divergence of judicial thought in this area the views of both the majority and minority were each supported by persuasive authority.⁵⁹

Thirdly, the majority observed that in New Zealand the question of the scope of exemplary damages, which internationally has generally been seen as an question for determination in the context of local conditions, has a particular local dimension because of the unique accident compensation scheme. Moreover, Tipping and McGrath JJ argued that their Lordships in *Bottrill* had failed to appreciate the likely impact of their decision.⁶⁰ The Privy Council had concluded that allowing exemplary damages for inadvertent negligence would not lead to an increase in the number of awards because of the restraint traditionally shown by New Zealand judges in making awards for exemplary damages.⁶¹ However, Justices Tipping and McGrath felt that the strictures of the regime of limited statutory compensation, especially after the abolition of lump sum payments in 1992, together with the impreciseness of the test in *Bottrill*, would inexorably lead to an increase in claims.⁶²

Finally, the Court contended that *Bottrill* does not appear to have been acted upon in a way which would militate against reconsideration. Justice Blanchard argued that no one had arranged their affairs on the basis of it, except through the taking out of insurance which, in line with the accident compensation scheme should be unnecessary.⁶³ Similarly, Justice Tipping did not see the issue as the sort of subject-matter where citizens would have ordered their affairs on the basis of *Bottrill*.⁶⁴ Furthermore, Justice Wilson observed that *Bottrill* had not yet been relied on as a precedent to any significant degree, in part because the hearing of any proceedings in which it would have been relevant would have been deferred pending the outcome of the *Couch* appeal.⁶⁵

The Chief Justice dissented from the majority. Not only did she prefer the approach to exemplary damages articulated by Lord Nicholls and Thomas J, but she felt that there was no sufficient

⁵⁶ *ibid*, at 184

⁵⁷ *ibid*, at 209-210.

⁵⁸ *ibid*, at 184, 192, 220, 228.

⁵⁹ *ibid*, at 228

⁶⁰ *ibid*, at 192, 226.

⁶¹ *Bottrill v A*, *Supra* fn 41, at 736

⁶² *Couch v Attorney-General (No 2)*, *Supra* fn 27, at 192, 226.

⁶³ *ibid*, at 184.

⁶⁴ *ibid*, at 192.

⁶⁵ *ibid*, at 228.

basis upon which to depart from a New Zealand decision of recent high authority. She made a number of points in reply to the majority. Firstly, she criticised the contention that *Bottrill* was a deviation from New Zealand law as it had previously stood. She argued that the application of an established principle of general application to a new circumstance is not a deviation.⁶⁶ Moreover, she argued that *Bottrill* was not out of step with other Commonwealth jurisdictions because the final courts in Canada and Australia have not yet been called on to decide whether conscious appreciation of risk is a necessary precondition for an award of damages in negligence.⁶⁷

Secondly, Elias CJ argued there was no occasion to reassess *Bottrill* on the basis that there was a misunderstanding about the operation of New Zealand's accident compensation scheme because this scheme operates outside the exemplary principle. She felt that it was wrong to suggest that the accident compensation scheme provided distinctive local context that the Privy Council was not well-placed to assess. Finally, Elias CJ argued that it has not been shown that in the eight years since the Privy Council decision there have been practical problems that would prompt a reassessment. She dismissed the argument put forward by Blanchard, Tipping and McGrath JJ about the potential for unmeritorious or extravagant claims as a floodgates argument that was based more on impression than reality.⁶⁸

Reconsideration of Privy Council Authority during a Preliminary Hearing

A further issue raised by the *Couch* appeal was whether it was appropriate for the Supreme Court to reconsider *Bottrill* in the context of a failed strike-out application. Two points were raised in regard to this matter.

The first issue was whether the Court should revisit *Bottrill* notwithstanding the fact that the claim would proceed regardless of whether the law was changed. In reply to this point the majority felt that, although the Court had ruled that exemplary damages are available for subjective recklessness and the claim could proceed on that basis, the Crown was still entitled to a decision on whether the alternative basis on which the claim was framed was also capable of giving rise to exemplary damages. It was the Court's responsibility to provide an answer.⁶⁹ Moreover, the Court felt that it was desirable for the parties and, especially, the jury, to know where they stand before going to trial. Blanchard, for instance, suggested that it would be unfortunate, if the matter came back to the Supreme Court after trial and the Court declined to follow *Bottrill*, for the Court to have to order a new trial because the jury had not been asked to say whether it found for the plaintiff on the basis of advertent or inadvertent conduct.⁷⁰

The second point was whether the *Bottrill* issue was suitable for determination before the completion of the pleadings, before discovery, and without finding of facts at trial. In her dissent the Chief Justice opined that this issue should not be determined before trial. She argued that, according to the method of the common law, any reconsideration of the law should be in the context of actual facts whenever possible. In contrast, preemptory determination, where a Court identifies legal principles for the future exercise of jurisdiction without factual context, is risky, especially in developing or disputed areas of the common law. She suggested that such attempts generally end in confusion. Thus the Chief Justice

⁶⁶ *ibid*, at 157 and 159.

⁶⁷ *ibid*, at 161.

⁶⁸ *ibid*, at 158 and 172.

⁶⁹ *ibid*, at 186.

⁷⁰ *ibid*, at 177.

felt that the claim for exemplary damages should be allowed to proceed and that any questions of law should then be considered after the facts have been found.⁷¹

The remainder of the Court, however, had few reservations about taking the opportunity to reconsider a Privy Council decision in a strike-out application. For instance, Justice Blanchard saw neither refinement of pleadings nor a wider factual context as required for the resolution of the issue. His approach was to assume that there had been gross negligence and then to query whether, no matter how gross the negligence, it is nevertheless insufficient for an award of exemplary damages if the defendant had no subjective appreciation of risk.⁷² Similarly, Tipping J noted that in a strike-out application the facts as alleged are taken to be established. He also suggested that what is essentially a point of legal principle and policy is not or should not be influenced by the particular circumstances in which the issue arises.⁷³

Summary

The *Couch* decision reveals several points of unanimity between the members of the Supreme Court. Firstly, it was held that the Supreme Court, succeeding the Privy Council as final court, is not bound to follow the past decisions of the Privy Council. Nor is it bound to follow its own. It is interesting to note that, in outlining these points, Elias CJ and Wilson J borrow the language from the 1966 Practice Statement of the House of Lords that the Court should be prepared to overturn precedent “*if it is right to do so*” whereas, Justice Blanchard prefers the, albeit similar, wording “*if in the proper performance of its duty it feels that it should do so*” used by the High Court of Australia.

Secondly, in regards to the lower Courts, the past decisions of the Privy Council, at least on New Zealand appeals, are held to be authoritative statements of the law and must be followed unless overturned by the Supreme Court. Thirdly, all members of the Supreme Court spoke about the need for the Court to respect Privy Council precedent and to be slow in departing from it in the interests of stability, consistency, and certainty. Elias CJ, Blanchard, Tipping, and McGrath JJ all emphasised that the Supreme Court will not depart from the Privy Council as a matter of preference. Instead there must be some good reason for not following a decision of Judicial Committee.

Fourthly, all members of the Court view the unsuitability of a Privy Council decision for New Zealand conditions as a reason for reconsidering it. Blanchard J, in particular, felt that Privy Council authority should only be departed from if it is inappropriate for the development of New Zealand law in New Zealand conditions. Tipping, McGrath, and Wilson JJ also gave this consideration special emphasis. In addition, it is interesting to note that Elias CJ, Tipping, McGrath and Wilson JJ, citing s 3 of the Supreme Court Act, all mentioned that enabling legal issues to be resolved by local judges who have a better understanding of New Zealand circumstances was the reason for the establishment of the Supreme Court.

Finally, there was also considerable agreement amongst the majority for why it would be appropriate to reconsider *Bottrill*. Most significantly all four Judges held that the dissent of two Law Lords provided a strong reason in favour of reconsideration. Moreover, three Judges, Blanchard, Tipping

⁷¹ *ibid*, at 172-3.

⁷² *ibid*, at 176.

⁷³ *ibid*, at 186.

and Wilson JJ, argued that the lack of reliance on the *Bottrill* decision pointed towards reconsideration. Tipping, McGrath and Wilson JJ, also argued that this was an area of law where local policy considerations were a relevant factor and the Board did not have an adequate appreciation of New Zealand's accident compensation scheme. Tipping and McGrath JJ, believed that this lack of appreciation led the Board to draw an incorrect conclusion in regard to the likely impact of its decision.

The dissent of Elias CJ in *Couch* may suggest that she is less willing to reconsider a Privy Council decision than the remainder of the Court. However, it is important to recall that the Chief Justice personally favoured the approach in *Bottrill*, whereas Blanchard and Tipping JJ had been part of the Court of Appeal that was subsequently overruled by the Privy Council. Thus, despite comments to the contrary, it appears that preference, rather than an overwhelming argument one way or the other, may have ultimately been the chief determining factor in whether or not to reconsider *Bottrill*.

8.2.3.3 *North Shore City Council v Body Corporate 188529*

Nine months after the *Couch* decision, the Supreme Court was again invited to depart from an important Privy Council decision. In *North Shore City Council v Body Corporate 188529*⁷⁴ counsel for the appellant challenged the proposition, confirmed by the Privy Council in *Invercargill City Council v Hamlin*,⁷⁵ that the Building Act 1991 contained nothing that abrogated or amended the existing common law in New Zealand whereby local councils owed a duty of care with respect to their inspection role to owners of premises designed to be used as homes.

In refusing to depart from the Privy Council, the Supreme Court found two issues decisive. Firstly, the Supreme Court asserted that the key issue was the reliance of people on the law as affirmed by Privy Council in *Hamlin*. Justice Tipping, speaking for Blanchard, McGrath and Anderson JJ, observed that people had been entitled to take the view that this decision was a correct statement of the law. They suggested that hundreds, if not thousands, of people must have relied upon the proposition that the 1991 Act had not affected the common law position.

'For this Court to defeat that reliance retrospectively by holding that the true position was otherwise would represent an inappropriate use of our ability to depart from a previous decision of the Privy Council. That would be the position even if, as [counsel for the appellant] submitted, the determination of the Privy Council was erroneous'.⁷⁶

Secondly, the Supreme Court also held that *Hamlin* was not wrongly decided.

8.2.3.4 *Westpac Banking Corporation v CIR*

Finally, in *Westpac Banking Corporation v Commission of Inland Revenue*,⁷⁷ the success of the appellate depended upon counsel persuading the Supreme Court that the reasoning of the Privy Council in *Commissioner of Inland Revenue v Thomas Cook*,⁷⁸ was wrong and that the reasoning of the New Zealand Court of Appeal should be preferred. The Supreme Court held that they were satisfied that the

⁷⁴ [2011] 2 NZLR 289.

⁷⁵ [1996] 1 NZLR 513.

⁷⁶ *North Shore City Council v Body Corporate 188529*, *Supra* fn 74, at 307.

⁷⁷ [2011] 2 NZLR 726.

⁷⁸ [2005] 2 NZLR 722.

approach taken to the Unclaimed Money Act 1971 by the Privy Council in *Thomas Cook* was the correct approach. Justice McGrath, speaking for the entire Court, added that:

‘[if] we favoured the appellants’ approach to this difficult question of construction, it would have been necessary to consider whether our preference for that different view was sufficient to justify departure from the meaning which had been adopted by the Privy Council. That would have raised questions concerning, on the one hand, desirability of stability in the law and respect for the principle of stare decisis and, on the other, whether there are cogent reasons for reconsideration of, and departure from, that judgment’.⁷⁹

It is also worthwhile to note that during the course of the *Westpac* litigation both the Court of Appeal and the High Court had taken the view that they were bound by the Privy Council judgment.

8.3 Discussion

The present chapter explored three primary questions in regards to the impact of patriation upon the approach to the New Zealand courts to precedent. These were **a)** the approach of the new Supreme Court to its own past decisions and the past decisions of the Privy Council; **b)** how patriation impacted upon the attitude of the lower courts to Privy Council precedent; and **c)** whether the approach of the Supreme Court was consistent with the expectations of the architects of the Supreme Court legislation. I will now summarise the findings in respect of these three issues.

8.3.1 Approach of the Supreme Court to Precedent

The focus of this chapter has been the approach of the Supreme Court towards its own past decisions and towards the past decisions of the Privy Council. Several broad themes emerge from the above discussion. Firstly, the Supreme Court has held that it is not bound to follow its own judgments nor, by extension, those of the Privy Council. Secondly, the Supreme Court has adopted a relatively conservative approach towards precedent. In the cases reviewed above, most of the members of the Supreme Court have indicated that the Supreme Court will be slow to depart from either its own past decisions or those of the Privy Council. As Justice McGrath noted in *Couch*, the Supreme Court has a general policy of respect for Privy Council precedent. Any reconsideration of a Privy Council decision will only be for a ‘good reason’, not as a matter of preference.

The findings of the quantitative investigation confirm that, in practice, the Supreme Court has acted in accordance with the conservative attitude expressed in the judicial dicta. The Judicial Committee and the Supreme Court distinguished Privy Council decisions in about the same proportion of cases and only once, in *Couch*, did the Supreme Court actually choose to depart from the Privy Council. Moreover, the Supreme Court applied Privy Council precedent in a higher proportion of cases than the Judicial Committee itself.

The current study also found that the Supreme Court cited Privy Council precedent more frequently than the Judicial Committee. This suggests that the Supreme Court has been prepared to

⁷⁹ *Westpac Banking Corporation v Commission of Inland Revenue*, *Supra* fn 77, at 743.

engage with and, perhaps, draw upon this body of jurisprudence even when no Privy Council case was directly applicable to the matter under consideration. The only reservation on these findings is that the data also indicated that the importance of Privy Council precedent compared to jurisprudence from other jurisdictions may have decreased. There is no doubt, however, that Privy Council precedent remains, for the time being, a major source of the common law being espoused by the new final court.

Finally, in developing their attitude to precedent, the members of the Supreme Court have been influenced by the approach of other jurisdictions, especially the United Kingdom and Australia. In particular, the reasons of Elias CJ, Tipping and Wilson JJ in the *Couch* case contain echoes of the House of Lord's 1966 Practice Note on Precedent, especially the idea that the final court should depart from precedent when '*it appears right to do so*'. In contrast, Justice Blanchard seems to have been largely influenced by the Australian approach. Both in his extra-judicial writings and again in *Couch* he cited with approval the leading High Court cases dealing with issues of stare decisis. In particular, he clearly views *John v Federal Commission of Taxation*, a case where the High Court was considering the attitude they should adopt towards their own past decisions, to be an important guidepost in signalling how the Supreme Court should deal with its own and with Privy Council decisions.

The Australian influence evident in Justice Blanchard's comments raises the question of whether, over time, the Supreme Court will tend to adopt a less deferential attitude to Privy Council decisions, in line with the Australian approach. In connection with this issue, there are already indications of emerging differences in approach within the Supreme Court. For instance, Justice Tipping, in *Couch*, argued that it is logical, for the purposes of precedent, for the Supreme Court to consider past Privy Council decisions to be the same as its own past decisions and vice-versa. This approach is similar to the deferential attitude to precedent articulated by Justice Gibbs in the *Viro* case. In contrast, Blanchard has preferred the approach of Justice Aickin, later affirmed in *Barns v Barns*, that the Court should depart from the Privy Council '*if in the proper performance of its duty it feels that it should do so*'. This wording, in the context of *Barns v Barns*, signalled a rejection of the deferential attitude displayed by Justice Gibbs.

8.3.2 Attitude of the Lower Courts to Privy Council Authority

The present research also found that the abolition of the appeal to the Privy Council has had little impact upon the attitude of the lower courts to Privy Council authority. The High Court and Court of Appeal have, as indicated by the comments of the Court of Appeal in *R v Chilton*, continued to consider themselves to be bound by the past decisions of the Privy Council, at least where such decisions were given on appeal from New Zealand. The Supreme Court has affirmed this approach by issuing explicit guidance that Privy Council judgments on New Zealand appeals are authoritative statements of New Zealand law and should be followed by the lower courts unless reconsidered by the Supreme Court.

Overall, therefore, the New Zealand courts have, in the first decade since the ending of Privy Council appeals, adopted a position that is akin to that exhibited by the Supreme Court of South Australia in *Barns v Barns*. Privy Council jurisprudence remains an authoritative statement of New Zealand law.

There has been no evidence of the sort of rejection of Judicial Committee precedent that was displayed by the Supreme Court of Victoria in *R v Judge Bland, ex p Director of Public Prosecutions*.

However, one area of uncertainty remains. Since 1983 the Courts have periodically expressed doubt as to whether the decisions of the Privy Council in appeals from jurisdictions outside New Zealand are binding upon the New Zealand courts.⁸⁰ In *R v Chilton* the Court of Appeal acknowledged these doubts, but did not take the opportunity to clarify the matter. Similarly, the Supreme Court has not yet given definitive guidance to the Courts below on the status of non-New Zealand Privy Council decisions. Indeed it appears that there may be differences of opinion within the Supreme Court on this matter. In *Couch* Justice Wilson tentatively commented that Privy Council decisions on appeals from jurisdictions other than New Zealand are *probably* authoritative statements of New Zealand law, although he ultimately left the matter unresolved.⁸¹ In contrast, the Chief Justice has commented extra-judicially that ‘the courts of New Zealand are bound *only* by decisions of the Privy Council in *New Zealand* cases’.⁸²

8.3.3 Summary: Expectations of the Architects of the Supreme Court Act

Overall the approach to precedent by the Supreme Court has been broadly in line with the recommendations of the Ministerial Advisory Group. Firstly, the architects of the Supreme Court recommended that the new final court should be free to depart from Privy Council decisions when ‘*right to do so*’.⁸³ They felt that this would be consistent with the role of the new Court and that it would be necessary to enable the Court to develop the law in ways that take account of unique local circumstance.⁸⁴

In line with these expectations the Supreme Court has held that, as New Zealand’s final court, it is neither bound to follow its own decisions, nor the previous decisions of the Privy Council. Moreover, the members of the Court spoke about the Supreme Court’s role in developing New Zealand law and, especially, the purposes behind patriation expressed in s 3 of the Supreme Court Act. For example, in *Couch* Justice McGrath observed that, in determining the content of New Zealand law, the Court is guided by the policy set out in s 3 of the Supreme Court Act which provides that important legal matters are to be resolved with an understanding of New Zealand history, traditions and conditions⁸⁵

Secondly, the Attorney-General’s advisors suggested that patriation of the final court should not signal a departure from the common law as it existed at the time, including the law as articulated by the Privy Council.⁸⁶ The Supreme Court’s conservative approach to precedent is consistent with this recommendation. The Court has held in several decisions that, although it is not bound by the Privy Council, it would adopt a policy of general adherence to Privy Council precedent in the interests of stability, consistency, and certainty. In addition, as noted above, the quantitative analysis of court

⁸⁰ See Cooke (1983) and Taggart, ‘The Binding Effect of Decisions of the Privy Council’ *New Zealand Universities Law Review*, 11, 1984, p. 66.

⁸¹ *Supra* fn 27, at 228.

⁸² Rt Hon Dame Sian Elias, ‘Transition, stability and the New Zealand legal system’, *Otago Law Review*, 10(4), 2004a, p. 489, emphasis added.

⁸³ Citing the House of Lords’ 1966 Practice Note on Precedent.

⁸⁴ Ministerial Advisory Group, *Supra* fn 7, p. 20-1.

⁸⁵ *Couch v Attorney-General*, *Supra* fn 27, at 219.

⁸⁶ Ministerial Advisory Group, *Supra* fn 7, p. 20-1.

judgments has confirmed that the Court acted in accordance with this policy. Finally, the Court has unambiguously held that, in regards to the lower Courts, the past decisions of the Privy Council, at least on New Zealand appeals, are authoritative statements of the law and must be followed. This explicit direction avoids any uncertainty about the status of Privy Council jurisprudence, at least as far as the lower courts are concerned.

The Consequences of the Patriation of the Final Court *Sources of the Common Law*

The preceding chapter examined the extent that the patriation of the final court has altered the status of Privy Council decisions. Overall, it was found that this body of law has been respected by the new Supreme Court. However, the data also indicated that patriation has led to a decline in the citation of Privy Council authority relative to jurisprudence from other jurisdictions. In other words, in relative terms, Privy Council precedent may be declining in importance as a source of the law being espoused by the new final court. With these results in mind the current chapter further explores the impact that patriation has had on the range of sources upon which the New Zealand courts have been drawing inspiration.

One of the primary goals of the Supreme Court reform was to create a locally-based final court that would be better able than the Judicial Committee to articulate law that is responsive and appropriate to New Zealand circumstances.¹ One of the concerns raised by the Attorney-General was that there was a divergence between the authority cited by the Privy Council and the sources of inspiration preferred by the New Zealand courts.²

On the one hand, it was argued that the Privy Council drew most of its inspiration from English case law and that this prevented the New Zealand courts from seeking alternate perspectives on legal issues. Moreover, the Attorney-General emphasised that English law is increasingly influenced by European law. She queried whether this English-European legal perspective adequately met the needs of a country such as New Zealand whose commercial and foreign policy interests are increasingly switching from Europe to the Asia-Pacific region.³

In contrast, the government noted, with obvious approval, that the New Zealand courts draw on legal developments in a whole range of countries and international arenas when judging New Zealand cases.⁴ In endorsing this practice, the Ministerial Advisory Group specifically recommended that the decisions of other final courts, including the High Court of Australia, Supreme Court of Canada, and House of Lords, should remain 'highly persuasive' for the proposed Supreme Court.⁵ Thus it appears that, in establishing an indigenous final court, the government hoped that the New Zealand courts would continue to draw on appropriate legal developments from a range of overseas jurisdictions, whilst limiting the influence of English law and any indirect influences from continental Europe that were perceived to be less well suited to New Zealand needs.

The remainder of this chapter has three main sections. The first section briefly surveys global trends in legal development, especially in the wake of the diminishing role of the Privy Council. The

¹ 'Attorney-General's Introduction' in Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000.

² Margaret Wilson, 'From Privy Council to Supreme Court: A rite of passage for New Zealand's legal system', *Waikato Law Review*, 18, 2010, p. 5. See also the parliamentary debates on the Supreme Court Bill, especially Margaret Wilson's speech during the first reading debate (Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002).

³ Office of the Attorney-General, *Supra* fn 1, p. 2-3; Wilson, *Supra* fn 2, p.5 and 8. See also the parliamentary debates on the Supreme Court Bill (Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002).

⁴ Office of the Attorney-General, *Supra* fn 1, p. 3.

⁵ Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report to Hon Margaret Wilson Attorney-General and Associate Minister of Justice*, Wellington: Office of the Attorney-General, 2002, p. 21.

second section then outlines the results of an investigation into the extent that the Supreme Court and the Privy Council cite cases from different jurisdictions. This inquiry also considered differences between the two courts in non-judicial citations. Finally, the chapter concludes with an overall assessment of the extent that the objectives of the Supreme Court reform, including the creation of an indigenous justice system, have been fulfilled.

9.1 Legal Development: International Trends

This section briefly surveys extra-judicial and academic commentary on the sources of the common law. Three main interrelated themes emerge from the literature: that the Englishness of the common law has been progressively diminishing over the past several decades; that common law courts are increasingly referring to non-traditional sources including civil law jurisprudence and international law; and that, in some areas, there is a trend towards uniformity of law on a global basis. The discussion concludes with a brief account of the impact of the Privy Council on legal development in Australia and New Zealand.

9.1.1 Diminishing Englishness of the Common Law

For most of the 20th Century the English courts exerted a pervasive influence on the development of the common law throughout the British Empire/Commonwealth. In countries such as Canada, Australia, and New Zealand this influence reflected the strong English foundations of the legal system. These foundations included English common law;⁶ an accompanying judicial philosophy that emphasised judicial restraint, formalism, and the benefits of certainty; and a legal profession imbued with the professional practice, ethics, and techniques of their English counterparts. Moreover, even well into the 20th Century, a substantial number of lawyers and judges were born in England and many had received English legal training or experience.⁷

Britain's legal influence was reflected in the extreme deference that the local courts accorded the decisions of the House of Lords.⁸ However, this deference progressively declined throughout the post-war period. At the same time the citation of English authority fell dramatically. For example, the citation of English cases by the New Zealand Court of Appeal fell from 69 percent of total citations in 1969 to 35 percent by 1990. Similar trends were also evident in the Australian and Canadian Courts.⁹

The reduced influence of English authority reflected several developments. Firstly, it was associated with the decline of the British Empire and the resultant weakening of political and economic

⁶ English common law applied automatically, initially subject only to local statutory differences.

⁷ Hon Robert Fisher, 'New Zealand legal method: Influences and consequences', in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p. 27-8.

⁸ *ibid.*, p.27; Murray Gleeson, 'The influence of the Privy Council on Australia'. An address to the Anglo-Australasian Lawyers Society, 2007, p. 13.

⁹ Rt Hon Sir Ivor Richardson, 'Trends in judgment writing in the New Zealand Court of Appeal' in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p. 264.

ties between Britain and the Dominions. It also reflected accompanying social and demographic changes, including a relative decline in the proportion of immigrants from Britain.¹⁰ Moreover, from the 1960s a growing number of Australian and New Zealand statutes diverged, sometimes markedly, from the English equivalents.¹¹ These statutory differences reduced the importance of English statutory interpretations and encouraged further differences in the common law.¹² Finally, during the 1960s and 1970s the Privy Council, cognisant of its lack of familiarity with local conditions, recognised that there could be national variations in some areas of law, especially in matters of domestic significance or cases involving a high policy component.¹³ Significantly, the Law Lords also observed that legal influence could flow from any direction, not just from the English courts.¹⁴

Nevertheless, despite growing legal innovation and a less slavish attitude to English case law, the British influence remained strong. For instance, Lord Cooke of Thorndon argued, in 1996, that there was nothing unnatural in speaking about the House of Lords changing the course of the law for most of the English speaking world. He suggested that, although the time had long passed when the Commonwealth courts treated the decisions of the Appellate Committee as automatically binding, there was an aura and degree of leadership that still attached to the Lords.¹⁵

However, with the advent of the 21st Century, it appears that the remaining vestige of the instinctual deferment to the House of Lords has further eroded. Lord Cooke, for instance, has argued that since the mid-1990s there has been a subtle, but significant, change in attitude toward English jurisprudence by Judges throughout the Commonwealth. He contended that now courts in Canada, Australia and New Zealand avowedly, if respectfully, abjure the British primacy in any sense.¹⁶ This erosion in English influence has been attributed to the widespread movement towards a common law of the world in areas such as human rights and commercial law and the fact that English law itself is becoming less English as a result of influences by Europe, the U.S, and the Commonwealth.¹⁷ It may also reflect a growing confidence by indigenous judges in local traditions and experience.¹⁸

9.1.2 Unity of Law

Despite the growing divergence that has developed between English common law and the common law in other Commonwealth countries, there are nevertheless countervailing forces which tend to pull together and encourage uniformity between different jurisdictions. For example, Lord Cooke has suggested that there is a gradual evolution towards a common law of the world, especially in human

¹⁰ Fisher, *Supra* fn 7, p. 41.

¹¹ For an outline of distinctive New Zealand statutes see Sir Kenneth Keith, 'The unity of the common law and the ending of appeals to the Privy Council', *International and Comparative Law Quarterly*, 54(1), 2005, p. 207. For an Australian perspective see Gleeson, *Supra* fn 11, p.20-1.

¹² Fisher, *Supra* fn 7, p.41.

¹³ Keith, *Supra* fn 11, p. 206.

¹⁴ See, for instance, *Australian Consolidated Press v Uren* [1969] 1 AC 590, at 641.

¹⁵ Rt Hon Lord Cooke of Thorndon, 'The road ahead for the common law', *International and Comparative Law Quarterly*, 53, 2004, p. 273-4.

¹⁶ *ibid*, 273-4.

¹⁷ Rt Hon Dame Sian Elias, 'Something old, something new: Constitutional stirrings and the Supreme Court', *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 128; Thorndon, *Supra* fn 15, p. 273-4

¹⁸ Elias, *Supra* fn 17, p. 126-7.

rights and commercial law.¹⁹ Interestingly he also emphasised that the major contributors to this body of jurisprudence have been the South African Constitutional Court and the Canadian Supreme Court, rather than the House of Lords.

In a similar vein Sir Kenneth Keith²⁰ has argued that over the past 50 years there has been an increased 'unity of law' in certain areas. He asserted that various international instruments and an underlying body of customary international law both create and reflect a broadening unity of law. Moreover, this body of law is increasingly supported by international methods of dispute resolution, arbitration, negotiation, and adjudication.²¹ Justice Keith suggested that the drive towards uniformity is a response to various factors including technology, ideological and policy changes, and various global and regional challenges, such as threats to environment, to health, to human dignity, and to survival.²²

9.1.3 International Law and Non-Common Law Influences

A further trend, associated with both de-Anglicisation and international uniformity, is that the common law is increasingly being exposed to a wider variety of non-traditional influences, including international law and civil law. For example, Justice Fisher,²³ speaking of the New Zealand experience, noted that the reduced citation of English cases has encouraged influences from other sources, including indigenous perspectives, other Commonwealth countries, the United States, and a plethora of international treaties, covenants, and declarations.²⁴ Similarly, the Rt Hon Sir Ivor Richardson²⁵ has argued that the declining influence of English law was associated with an increase in the amount of Australian and New Zealand jurisprudence cited by the New Zealand Court of Appeal. These trends are consistent with developments in other Commonwealth countries, such as Australia and Canada.²⁶

In addition to de-Anglicisation, several other factors facilitate the exposure of the common law to other influences. Firstly, the common law system itself encourages an interchange of approaches and ideas between different jurisdictions. For instance, Lord Bingham of Cornhill²⁷ emphasised that throughout its history the common law has been an avid importer and exporter of ideas. He predicted that in the future the process of different jurisdictions 'learning from each other' will continue and that this exchange of ideas will inevitably not be confined to common law countries.²⁸

A third factor is the rising influence of European law in the United Kingdom. Lord Bingham has noted that the English courts have been increasingly exposed to European legal thinking and jurisprudence, especially human rights law developed under the European Convention.²⁹ Moreover, he

¹⁹ Thorndon, *Supra* fn 15, p. 273.

²⁰ A member of the New Zealand Supreme Court until his appointment to the International Court of Justice in 2006.

²¹ Keith, *Supra* fn 11, p. 209.

²² *ibid* p. 201.

²³ A Judge of the New Zealand High Court since 1989.

²⁴ Fisher, *Supra* fn 7, p. 41-2.

²⁵ President of the New Zealand Court of Appeal from 1996-2002.

²⁶ Richardson, *Supra* fn 9, p. 264-5.

²⁷ At the time Lord Bingham was Lord Chief Justice of England and Wales; later he was Senior Law Lord.

²⁸ Lord Bingham of Cornhill, 'The common law: Past present and future', *Commonwealth Law Bulletin*, 25(1), 1999, p. 24 and 28.

²⁹ More recently Lord Bingham's remarks have been reiterated by the Chief Justice of New Zealand (see Elias, *Supra* fn 17, p. 127-8).

²⁹ Cornhill, *Supra* fn 28, p. 28.

noted that Britain further submitted to these European influences when domestic force was given to the Convention by the Human Rights Act 1998 (UK). This statute includes an adjuration that the English courts are to take into account the decisions of the European Court of Human Rights and various other European bodies.³⁰

Furthermore, the increasing internationalisation of law has also encouraged the common law courts to draw upon outside influences. In the English context, Lord Bingham has argued that English judges are increasingly referring to the International Convention on Civil and Political Rights and other international instruments. This international outlook, he suggested, is reinforced by the harmonising effect of international trade and finance, increasing international arbitration, and globalisation in general.³¹ A similar point is made by Justice Keith in his discussion on 'unity of law'. Not only are the courts increasingly engaging with international law, but in the application of these laws, they are seeking to reach an interpretation of implementing legislation that is consistent with the interpretation given by courts in other countries.³²

Finally, the diminished role of the Privy Council, especially its abolition in many jurisdictions, has been linked to a broadening of the sources of the common law. For instance, Australian Chief Justice, Murray Gleeson, has argued that it was the end of Privy Council appeals that opened Australia to a wider range of international influences. He pointed out that, since abolition, the High Court often consults the case law of New Zealand, Canada, and the US and, much less frequently, jurisprudence from some civil-law countries. Overall he believed that the main consequence of ending Privy Council appeals has been to allow Australian courts to look directly to non-British jurisdictions for guidance, while still allowing the Australian judiciary to benefit from the work of the United Kingdom courts.³³

9.1.4 The Privy Council and Legal Development

9.1.4.1 The Australian Experience: 'Australianisation'

The Privy Council had a significant impact on Australian law, both in restricting local developments and in ensuring a continuing English influence. For instance, Justice Hutley of the New South Wales Court of Appeal argued that:

'the existence of a superior court has a constricting effect upon a lower court, and this type of constriction by a foreign court offends nationalistic sentiments. On the other hand, the forcible hitching of the legal system of a small State to one of the great legal systems of the world has provided stimulus to us. The development of the law of torts and contracts in so far as it has been effected by the judiciary has largely been guided by English leadership. That leadership would have operated without the existence of the Privy Council, but its existence guaranteed its success...the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distance exemplar, but as a continual force for change'³⁴

Twenty six year later Chief Justice Gleeson agreed with this assessment. He suggested that until the 1980s the British leadership on matters of common law doctrine was palpable. Moreover, he argued

³⁰ Thorndon, *Supra* fn 15, p. 273-4.

³¹ Cornhill, *Supra* fn 28, p. 28

³² Keith, *Supra* fn 11, p. 201.

³³ Gleeson, *Supra* fn 8, p. 19.

³⁴ Hutley, 'The legal traditions of Australia as contrasted with those of the United States', *Australian Law Journal*, 55 p. 69 cited by Gleeson, *Supra* fn 8, p. 12.

that the ‘constricting effect’ identified by Hutley was not only a product of the Privy Council’s ability to reverse decisions of the High Court, but the ability of litigants to bypass the High Court altogether and appeal directly to London. He asserted that this ‘greatly limited the capacity of the High Court to develop a distinctively Australian common law’.³⁵

It follows that the limitation and subsequent abolition of appeals to the Privy Council removed a major constraint on Australian legal development.³⁶ One Federal Court Judge, Justice Finn, has emphasised that severing ties to London meant that the Australian courts gained control of the ‘common law’s density’ and could shape it to ‘Australian circumstances, needs, and values’. He suggested that the courts took this opportunity, resulting in the ‘Australianisation’ of the law.³⁷

The process of Australianisation has three defining features. Firstly, it was associated with a greater acceptance of the law-making function of the courts. During the Dixonian era³⁸ the High Court had espoused a restrictive view of its law-making role. Strict legalism prevailed whereby any change in legal principles had to be generated from existing doctrine.³⁹ Furthermore, it was asserted that a Judge could not abandon established legal principle for reasons of justice, or out of social necessity or for social convenience.⁴⁰ In contrast, the Mason era⁴¹ was characterised by a greater recognition of the law-making role of Judges. In particular, the High Court now accepted that changes in social circumstances could warrant judicial law-making.⁴² However, the less restrictive approach did not mean that legal development was invariably driven by social needs. Indeed, many legal adjustments were designed simply to produce greater unity and coherence in principle and doctrine.⁴³

A second feature of the post-patriation landscape was a broadening of the sources of Australian law. Justice Finn noted that the High Court, now embracing a more explicit law-making role, cast its net far more widely for inspiration. The result was that ‘[i]f the authority of English law waned, the more systematic and persuasive use of the decisions and legal literature of other, particularly common law, jurisdictions developed’.⁴⁴ As noted above, Chief Justice Gleeson drew similar conclusions about the impact of patriation on the sources of Australian law.

Finally, although Australianisation involved an increased divergence between Australian and English law, the growing use of international jurisprudence also ensured that Australian developments were not completely idiosyncratic. Sir Anthony Mason, for example, suggested that, although legal developments were distinctive in the sense that they had no precise counterpart in English law, ‘it would be quite another thing to say that we are bringing into existence...a body of law...which has definite characteristics that set it apart from the law as it exists elsewhere. Our common law is, despite variations, very similar to the common law as it exists elsewhere’.⁴⁵

³⁵ Gleeson, *Supra* fn 8, p. 12.

³⁶ The Privy Council appeal was abolished in stages: federal jurisdictions in 1968 (Privy Council (Limitation of Appeal) Act); all remaining appeals from the High Court in 1975 (Privy Council (Appeals from the High Court) Act); and appeals directly from the state Courts in 1986 (Australia Acts).

³⁷ Hon Paul Finn, ‘Justice Compared’, in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p.225.

³⁸ The period when Chief Justice Sir Owen Dixon presided over the High Court.

³⁹ Hon Justice MH McHugh ‘The Judicial Method’ *Australian Law Journal*, 73, 1999, p. 38, cited in Finn, *Supra* fn 37, p. 223.

⁴⁰ Sir Owen Dixon, ‘Concerning Judicial Method’ in *Jesting Pilate*, 1965, p. 158, cited in Finn, *Supra* fn 37, p.223.

⁴¹ The period when Chief Justice Sir Anthony Mason presided over the High Court.

⁴² See *R v L* (1991) 174 CLR 379.

⁴³ Finn, *Supra* fn 37, p. 225.

⁴⁴ *ibid*, p. 225.

⁴⁵ Sir Anthony Mason, ‘Changing Law in a Changing Society’, *Australian Law Journal*, 67, 1993, p. 573.

9.1.4.2 The Privy Council in New Zealand

The Privy Council has influenced the development of New Zealand law in a number of ways. Firstly, the Judicial Committee shaped the law directly through its decisions on appeals. However, the overall significance of Privy Council determinations is debateable.⁴⁶ One legal researcher, Peter Spiller,⁴⁷ has noted several instances in which the Privy Council steered New Zealand law in different directions by reversing the Court of Appeal,⁴⁸ by substituting its own reasons,⁴⁹ and by affirming the approach of the local courts.⁵⁰ However, he also conceded that the opportunities for the Privy Council to directly shape New Zealand law were limited by the fact that only a very small proportion of cases were appealed to the Judicial Committee.⁵¹

However, the Privy Council also influenced the law through more subtle means. For instance, the practice of senior New Zealand judges sitting on the Privy Council, and thereby having increased exposure to overseas cases and judgments, may have encouraged the local courts to cite a wider range of Privy Council jurisprudence.⁵² Moreover, until the appeal was abolished New Zealand lawyers were required to refer to English authorities in the lower courts in order to predict the result if an appeal was eventually taken to the Judicial Committee.⁵³ Finally, the mere anticipation that the Privy Council could reverse the Court of Appeal may have inhibited the choices of local judges.⁵⁴ Sir Thomas Eichelbaum, for example, noted that any Court of Appeal decision which consciously departed from 'English law' did so at the risk of reversal. He pointed out that there were only a small number of cases in which the Court deliberately decided to take this risk.⁵⁵

There is some evidence that changes in the role of the Privy Council reduced its influence on legal development. During the 1960s and 1970s the Judicial Committee acknowledged that there could be national variations in some areas of the common law, especially if the matter required an assessment of local conditions.⁵⁶ In the ensuing decades the scope of 'local conditions' was widened, devolving a greater responsibility for legal development upon the local courts.⁵⁷ This evolution in role, together with the declining jurisdiction of the Judicial Committee, led Lord Bingham of Cornhill to suggest that the greatly diminished role of the Privy Council has given the courts in New Zealand, Australia, and other Commonwealth countries a greater freedom to develop their own approach to judicial problems.⁵⁸

⁴⁶ See, for example, Sir Thomas Eichelbaum, 'Brooding Inhibition or Guiding Hand? Reflections on the Privy Council Appeal' in P. A. Joseph, (ed) *Essays on the Constitution*, 1995, p. 112-128. The former Chief Justice reviewed a number of cases and found that there was little evidence that the Privy Council had stifled the development of New Zealand law. In contrast, the current Chief Justice, citing several reversals of the Court of Appeal, has argued that the freedom of the New Zealand courts to develop the law has, in practice, been limited by the Judicial Committee (Elias, *Supra* fn 17, p. 127-8).

⁴⁷ For a more comprehensive discussion see 'Relationship with the Privy Council' in Peter Spiller, *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2002.

⁴⁸ For instance, *Haldane v Haldane* [1976] 2 NZLR 715 (PC), *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513; *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513; *O'Connor v Hart* [1985] 1 NZLR 159; and *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513.

⁴⁹ *Elders Pastoral Ltd v BNZ* [1991] 1 NZLR 385 (PC).

⁵⁰ *NZ Stockexchange v CIR* ([1992] 3 NZLR 1 (PC)).

⁵¹ Spiller, *Supra* fn 47. Spiller notes that between 1958 and 1996 less than 0.9 percent of cases heard by the Court of Appeal were appealed to the Board.

⁵² *ibid.*

⁵³ Fisher, *Supra* fn 7, p. 27.

⁵⁴ *ibid.*, p. 70.

⁵⁵ Eichelbaum, *Supra* fn 46, p. 127-8.

⁵⁶ Keith, *Supra* fn 11, p. 206.

⁵⁷ Fisher, *Supra* fn 7, p. 70.

⁵⁸ Cornhill, *Supra* fn 28, p. 24 and 28.

However, other commentators have emphasised that, notwithstanding its diminished role, the mere presence of an appeal to the Privy Council acted as a restraint.⁵⁹ For example, Chief Justice Elias,⁶⁰ in response to Lord Bingham's comments, argued that the retention of the Privy Council meant that any divergence from England depended more upon differences in local conditions, especially statutory differences, than differences in legal reasoning. Moreover, the Chief Justice asserted that the Privy Council has been more encouraging of diversity at some times than it has at others. Thus, in practice, the freedom of the New Zealand courts to go their own way had been limited. She argued that whilst there have been a few notable exceptions,⁶¹ in many other cases interesting developments were arrested.⁶²

9.2 A Comparison of Privy Council and Supreme Court Judgments

9.2.1 Overview

The current investigation compared a selection of judgments from the Supreme Court and the Privy Council in order to uncover any differences between the two courts in the citation of case law and the citation of academic and parliamentary material.⁶³ The sample of court decisions employed for this inquiry was the 104 judgments of the Privy Council on New Zealand appeals since 1995 and the 164 Supreme Court judgments issued between 2004 and 2011. The sample of judgments was coded according to twenty-eight dependent variables. These variables are listed in Table 9.1 below.

Table 9.1
Dependent Variables

Judicial Citations:	
Judgments were coded in terms of the citation of case law from nine different jurisdictions. These were the Privy Council (all jurisdictions), the UK (excepting the Scottish courts), the New Zealand courts (including the Supreme Court), the Australian courts, the Canadian courts, courts in other Commonwealth countries, the US courts, European courts (Continental Europe), and international courts or tribunals. Two level of measurement were utilised in data gathering, yielding a total of 18 variables.	
Variables 1-9	The number of cases from each of the nine jurisdictions that were cited in the judgment.
Variables 10-18	Whether the judgment cited one or more cases from each of the nine jurisdictions.
Substantive Impact of Cases from Different Jurisdictions:	
Variable 19	Whether the judgment followed, approved or adopted the approach of one or more UK judgments.
Variable 20	Whether the judgment did not follow or disapproved the approach of one or more UK judgments.
Variable 21	Whether the judgment approved or adopted the approach of one or more Australian or Canadian judgment.
Variable 22	Whether the judgment disapproved the approach of one or more Australian or Canadian judgment.
Variable 23	Whether the judgment approved the approach of one or more judgment from a New Zealand court.
Variable 24	Whether the judgment overruled one or more New Zealand case.
Non-Judicial Citations:	
Variable 25	Whether the judgment referred to academic articles or books.
Variable 26	Whether the judgment referred to parliamentary, departmental, or international reports.
Variable 27	Whether the judgment cited Hansard or parliamentary proceedings.
Variable 28	Whether the judgment referred to international instruments or intergovernmental agreements.

⁵⁹ Sir Thomas Eichelbaum warned that the effect of restraint by the mere existence of the right to appeal to the Judicial Committee should not be underestimated, despite a lack of overt evidence that the Privy Council has stifled the development of New Zealand law (Eichelbaum, *Supra* fn 46).

⁶⁰ Elias, *Supra* fn 17, p. 127-8.

⁶¹ For instance, *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* (2000) 1 NZLR 257 (PC).

⁶² See, for example, *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*, *Supra* fn 48; *Takaro Properties Ltd v Rowling*, *Supra* fn 48; *Downsview Nominees Ltd v First City Corporation Ltd*, *Supra* fn 48; *O'Connor v Hart*, *Supra* fn 48; and *Aotearoa International Ltd v Scancarriers A/S*, *Supra* fn 48.

⁶³ Further details of the methodological strategy can be found in the introductory chapter.

9.2.2 Results

9.2.2.1 Case Citations

The Privy Council and the Supreme Court were compared on the proportion of judgments that cited case law from nine different jurisdictions and on the average number of citations from each jurisdiction per judgment. These results are displayed in Tables 9.2 and 9.3, respectively.⁶⁴ Overall it was found that Supreme Court referred to case law from each of the selected jurisdictions in a higher proportion of its judgments than the Privy Council. Furthermore, each Supreme Court judgment contained, on average, three times the amount of case law compared to the written reasons of the Privy Council.

Table 9.2
Comparison between the Privy Council and Supreme Court on the Proportion of Judgments Citing Case Law from Selected Jurisdictions.

	Privy Council	Supreme Court
Judgments citing New Zealand cases	56.73%	91.46%
Judgments citing English or Welsh cases	64.42%	70.73%
Judgments citing Australian cases	25.96%	51.22%
Judgments citing Canadian cases	9.62%	30.49%
Judgments citing cases from other Commonwealth jurisdictions	3.85%	11.59%
Judgments citing European cases	1.92%	10.37%
Judgments citing United States cases	6.73%	20.12%
Judgments citing cases from international tribunals	0.00%	2.44%
Percentage of judgments citing any case law	87.50%	94.51%

Table 9.3
Average Number of Case Citations per Judgment by Final Court

	Privy Council	Supreme Court
Privy Council cases	0.50	1.07
New Zealand cases	1.22	5.93
English and Welsh cases	2.37	4.52
Australian cases	0.69	1.71
Canadian cases	0.15	1.12
Cases from other Commonwealth jurisdictions	0.04	0.21
European cases	0.04	0.44
United States cases	0.17	0.72
Cases from international tribunals	0.00	0.08
All Citations	5.17	15.08

Four main conclusions can be drawn from this data. Firstly, it was found that the Supreme Court cited more English jurisprudence than the Judicial Committee. The proportion of judgments citing English or Welsh law was substantial for both courts, at around 71 percent for the Supreme Court and 64 percent for the Privy Council (Table 9.2). However, the Supreme Court decisions contained, on average, almost twice the number of English citations (Table 9.3).

Secondly, the Supreme Court referred to much more New Zealand case law than the Privy Council. In particular, the Supreme Court cited New Zealand jurisprudence in over 91 percent of its decisions, whereas their Lordships referred to New Zealand jurisprudence in less than 57 percent of their

⁶⁴ The data on the citation of Privy Council precedent was excluded from Table 9.2. This was presented in **Chapter 8** (see Table 8.1, p 95).

judgments (Table 9.2). In addition, the average number of citations per judgment was approximately 5 times higher for the Supreme Court (Table 9.3).

Thirdly, the Supreme Court cited more Canadian and Australian case law than the Privy Council. For instance, Canadian cases were cited in about 30 percent of Supreme Court decisions, compared to less than 10 percent of Privy Council judgments (Table 9.2). Also the results in Table 9.3 reveal that the average number of Canadian citations per judgment was about 7.5 times higher for the Supreme Court.

Fourthly, the Supreme Court cited more jurisprudence from outside the Commonwealth. For example, European case law was referred to in over 10 percent of Supreme Court judgments, as opposed to less than two percent of Judicial Committee decisions (Table 9.2). It is also interesting to note that the Supreme Court cited US jurisprudence in over 20 percent of its decisions and that it was the only Court to cite a decision of an international tribunal.

Finally, the current project explored whether there were any differences between the Supreme Court and the Privy Council in the proportion of total citations that were from each jurisdiction. Overall it was found that approximately 55 percent of the jurisprudence cited by the Privy Council was either from the United Kingdom⁶⁵ or the Judicial Committee. In contrast, judgments from these sources comprised only around 35 percent of the case law referred to by the Supreme Court. It was also found that European jurisprudence comprised less than one percent of all Judicial Committee citations, but almost three percent of the jurisprudence referred to by the Supreme Court. Finally, New Zealand case law comprised almost 38 percent of total Supreme Court citations, but only about 24 percent of the cases considered by the Judicial Committee.

9.2.2.2 Importance of Case Citations

A bivariate analysis was undertaken to determine whether there was any difference between the Supreme Court and the Privy Council in the extent that each court followed, approved, or disapproved of English and non-English case law. Four main findings emerged from this analysis. Firstly, it was found that English common law was an important influence on the decisions of both the Privy Council and Supreme Court. The results displayed in Table 9.4 show that the Supreme Court followed English or Welsh court decisions in twenty percent of its judgments compared to fifteen percent by the Privy Council. Moreover, as illustrated in Table 9.5, very few judgments from either Court disapproved or refused to follow relevant United Kingdom authority.

Table 9.4
Approval of English Case Law by Final Court

Number of English or Welsh Cases Approved per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than one	7.69%	7.32%
One	7.69%	12.80%
None	84.62%	79.88%
Total	100.00%	100.00%
(N=)	104	164

⁶⁵ Not including the decisions of the Scottish courts.

Table 9.5
Disapproval of English Case Law by Final Court

Number of English or Welsh Cases Disapproved per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than one	1.92%	0.00%
One	0.96%	3.66%
None	97.12%	96.34%
Total (N=)	100.00%	100.00%
	104	164

The second major finding was that case law from jurisdictions such as Canada and Australia were more likely to be cited with approval by the Supreme Court than the Privy Council. As shown in Table 9.6 the Supreme Court approved Australian or Canadian decisions in 11 percent of its judgments, whereas the Privy Council approved jurisprudence from these jurisdictions in fewer than five percent of the judgments analysed. The data also showed that, as was the case with English decisions, it was uncommon for either the Privy Council or the Supreme Court to disapprove an Australian or Canadian judgment (Table 9.7).

Table 9.6
Approval of Australian and Canadian Case Law by Final Court

Number of Australian or Canadian Cases Approved per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than one	1.92%	3.66%
One	2.88%	7.32%
None	95.19%	89.02%
Total (N=)	100.00%	100.00%
	104	164

Table 9.7
Disapproval of Australian and Canadian Case Law by Final Court

Number of Australian or Canadian Cases Disapproved per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than one	0.96%	0.00%
One	0.00%	1.83%
None	99.04%	98.17%
Total (N=)	100.00%	100.00%
	104	164

Thirdly, the results revealed that almost no judgments from either court cited case law from jurisdictions outside of Australia, Canada, New Zealand, or the UK with either approval or disapproval. The exceptions were three judgments issued by the Supreme Court. One of these judgments adopted a US decision.⁶⁶ The other two each refused to follow an applicable US case.⁶⁷

Fourthly, it was found that the Supreme Court approved the approach of the New Zealand courts more frequently than the Privy Council. The Supreme Court approved at least one New Zealand decision in almost 38 percent of the judgments analysed, whereas the Privy Council approved New Zealand case

⁶⁶ *Cropp v Judicial Committee* [2008] 3 NZLR 774.

⁶⁷ *Jason John Cumming v The Queen* [2010] 2 NZLR 433; *Hamed v R* [2012] 2 NZLR 305.

law in about 16 percent of their decisions (Table 9.8). Interestingly, however, the Privy Council was also much less likely to overrule the decisions of the New Zealand courts. Only once in the sample 104 judgments did the Judicial Committee decide to overrule a New Zealand court. In contrast, the Supreme Court rejected the approach of the lower courts in more than nine percent of its decisions (Table 9.9).

Table 9.8
Approval of New Zealand Case Law by Final Court

Number of New Zealand Cases Approved per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than one	2.88%	12.20%
One	13.46%	25.61%
None	83.65%	62.20%
Total	100.00%	100.00%
(N=)	104	164

Table 9.9
Disapproval of New Zealand Case Law by Final Court

Number of New Zealand Cases Overruled per Judgment	Final Court	
	Privy Council Judgments	Supreme Court Judgments
More than one	0.00%	1.83%
One	0.96%	7.32%
None	99.04%	90.85%
Total	100.00%	100.00%
(N=)	104	181

9.2.2.3 Non-Judicial Sources

Finally, the present study compared the Supreme Court and the Privy Council on the extent that they referred to non-judicial sources in their judgments. These results are summarised in Table 9.10. Overall it was found that the Supreme Court cited non-judicial sources in a greater proportion of its judgments than the Privy Council. For instance, almost two-thirds of Supreme Court judgments cited at least one piece of academic commentary and 38 percent cited a departmental or parliamentary report. In contrast, references to academic commentary or to official reports were found in only 18 percent and 10 percent of Privy Council judgments, respectively. Furthermore, it was very rare for a Privy Council judgment to cite Hansard or to discuss intergovernmental treaties or conventions.

Table 9.10
Comparison of the Supreme Court and Privy Council on the Proportion of Judgments Containing Non-judicial Citations

	Privy Council Judgments	Supreme Court Judgments
Proportion of judgments citing academic commentary	18.27%	64.63%
Proportion of judgments citing official reports	9.62%	38.41%
Proportion of judgments citing parliamentary proceedings	0.96%	16.46%
Proportion of judgments citing intergovernmental conventions or treaties	1.92%	18.29%

9.3 Discussion

One of the primary reasons for patriating the final court was to create an ‘indigenous legal system’ and to ensure that the judges who are responsible for shaping New Zealand common law live in New Zealand and are familiar with New Zealand needs and concerns.⁶⁸ More specifically, the architects of the Supreme Court legislation hoped that replacing the Privy Council with a local final court would decrease the influence of English law and prevent the indirect, and apparently undesirable, importation of legal ideas from Europe, whilst also allowing the new final court to draw on legal developments and case law from a wide range of sources. The following sections summarise the extent that the Supreme Court has fulfilled each of these objectives. It will be shown that, on the whole, the patriation of the highest court has seen only the partial realisation of these hopes.

9.3.1 English Authority and the Supreme Court

In contrast to the expectations of the Labour-led Government, the current study has found little evidence to indicate that patriation, in of itself, has diminished the influence of English law on the New Zealand legal system. In the first place, the results indicate that, in the preparation of its reasons, the Supreme Court continues to engage with English case law at a level that is broadly similar to that of the Privy Council. Indeed, the data showed that the Supreme Court referred to English and Welsh jurisprudence in a higher proportion of its judgments than their Lordships and, on average, cited more UK cases per judgment.

Secondly, the present research found that English case law continues to have a major influence on the content of the law articulated by the final court. The results reveal that over one-fifth of all Supreme Court judgments followed or adopted the approach of one or more English cases. Indeed the Supreme Court was found to follow English case law in a higher percentage of its decisions than the Judicial Committee. Furthermore, it was uncommon for the Supreme Court to disapprove of or decline to follow an applicable English decision. These findings suggest that, in those cases where English authority supplies an answer or part of an answer to a legal problem, the Supreme Court has generally opted to apply the English approach. Only in a small fraction of cases has it expressly declined to do so.

However, there is a caveat to the above finding. Although the Supreme Court cited more jurisprudence from traditional sources, such as the UK, it also referred to a wider variety of non-traditional sources. Consequently, the present research found that the amount of non-traditional citations has increased relative to English citations. This finding mirrors the results presented in the previous chapter with respect to the citation of Privy Council precedent.

The question of whether or not the increase in non-traditional citations has impacted on the law being espoused by the final court is further addressed at the end of the next section. As this juncture it is sufficient to note that, despite the increased diversity of the case law drawn upon in judgment preparation,

⁶⁸ Office of the Attorney-General, *Supra* fn 1, p.2-3.

English authority remains a major influence on the approach taken by the new highest court in a substantial proportion of its judgments.

9.3.2 Diversity in the Sources of the Common Law

As noted above, the current study found evidence that patriation has helped to diversify the range of sources upon which the final court draws inspiration. The results reveal that, on average, Supreme Court judgments refer to a higher number of cases from a wider range of jurisdictions than those issued by the Judicial Committee. In addition, a higher proportion of these citations are from non-English, even non-Commonwealth, jurisdictions. Furthermore, it was found that the Supreme Court referred to non-judicial sources, such as academic commentary, official reports, and Hansard, in a higher percentage of its judgments than their Lordships. Finally, the Supreme Court cited intergovernmental treaties and international law with greater frequency than the Privy Council. Indeed, only the Supreme Court cited a decision from an international tribunal or court.

The willingness of the Supreme Court to engage with a board range of judicial and non-judicial material is also evident in extra-judicial comments made by Justice Blanchard. In a seminar paper for the New Zealand Law Society in October 2004, Blanchard J issued the followed advice to counsel in regard to the preparation of an argument for an appeal to the Supreme Court:

‘The court will want to hear more than a narrow argument. It will want to understand a proposition of law in its full legal, social and, where appropriate, economic context. It will want to hear something about the history of how the law has been developing in New Zealand and about how the legal problem may have been resolved in other jurisdictions....In some cases, the Court will need to be offered guidance about how the result in a case measures up against New Zealand’s international obligations under conventions and treaties’.⁶⁹

Moreover, in regard to citations, he also advised that:

‘...there should be no reluctance to tender academic articles and commentary or Law Commission materials bearing on the point in issue. Where the case involves statutory interpretation, Hansard or other parliamentary materials may sometimes be helpful, although experience to date in New Zealand courts suggests this will be in a minority of cases’.⁷⁰

According to the findings of the present study, the Court has been prepared to engage with, and cite when relevant, the additional materials that Justice Blanchard recommended counsel should submit.

However, there is a major reservation to the finding that the Supreme Court draws inspiration from a broad range of sources. It appears that the greater diversity in case citations has not translated into a greater willingness by the Supreme Court to adopt legal approaches stemming from these new sources. The exception was Australian and Canadian jurisprudence. Case law from these jurisdictions was adopted by the Supreme Court in a higher proportion of its judgments than the Privy Council. Overall, however, it seems that the Supreme Court has been slow to endorse the legal reasoning of the overseas cases that it has considered. Only once in the sample of 164 judgments did the new final court actually adopt or follow a decision from a court outside Australia, Canada, New Zealand, or the UK. And this was a US decision. Thus, despite the evidence that the Supreme Court considers a wider range of case law than the Judicial

⁶⁹ Rt Hon Peter Blanchard, ‘New Zealand Supreme Court jurisdiction and practice’, *Commonwealth Law Bulletin*, 33(1), 2007a, p. 13.

⁷⁰ *ibid.*

Committee, it appears that, in terms of the law ultimately being espoused by the new final court, the more traditional English-Commonwealth legal approaches still tend to prevail in the resulting contest of ideas.

9.3.3 European Influences

As noted in the introduction to this chapter, part of the rationale cited by the Attorney-General for abolishing the Privy Council was that the existence of an appeal to London would expose the New Zealand legal system to European influences that are inappropriate for a country whose commercial interests are switching from Europe to the Asia-Pacific region. It was argued that the Privy Council draws much of its inspiration from English law and that English law is increasingly influenced by European law.⁷¹

In evaluating the success of patriation in stemming the flow of European legal influences four points are worth mentioning. Firstly, the present study found little evidence to support the contention that the Privy Council was a conduit for European legal ideas. The results indicate that their Lordships very rarely referred to European case law, at least explicitly, when deciding New Zealand appeals. Less than two percent of Judicial Committee decisions referred to European case law and European decisions comprised less than one percent of all Privy Council case citations.

Furthermore, contrary to the predictions of the Attorney-General, it appears that the establishment of the Supreme Court may have actually facilitated the potential influence of European law. For instance, the present study found that the Supreme Court has been engaging with European jurisprudence to a much greater extent than the Privy Council. Moreover, in appeals dealing with human rights, especially criminal appeals, the Court has deliberately sought guidance from cases decided under the European Convention.⁷²

Thirdly, the Attorney-General's desire to encourage diversity in the sources of the common law, whilst simultaneously insulating the New Zealand legal system from allegedly inappropriate European legal influences, is inherently contradictory. The current study has overwhelmingly revealed that, of the two possibilities, it has been diversity, rather than insularity, that has characterised the first decade of the Supreme Court's tenure as final court.

Finally, it should also be emphasised that not all of the supporters of patriation viewed the growing influence of European law in England and in other common law countries with trepidation. Chief Justice Elias, for instance, felt that the common law, both in New Zealand and overseas, will be enriched by the insights from Europe. Instead her primary concern was that any ideas and approaches imported from Europe (and from other jurisdictions) should be adopted on their own merits, rather than being imposed on the New Zealand courts by the Judicial Committee or adopted simply because England adopts them.⁷³ These comments reiterate the notion that the primary objective of patriating the final court was not simply to reduce the influence of European (or English) legal approaches, but to emancipate the New

⁷¹ Office of the Attorney-General, *Supra* fn 1, p. 2-3.

⁷² Rt Hon Peter Blanchard, 'The early experience of the New Zealand Supreme Court'. An address commemorating the retirement of Sir Kenneth Keith, 2007b, p. 23.

⁷³ Elias, *Supra* fn 17, p. 128.

Zealand courts and ensure that, irrespective of the precise sources of inspiration, the development of New Zealand law is exclusively in the hands of New Zealand judges.

9.3.4 Engagement with New Zealand Jurisprudence

The current study also made important findings with respect to the citation of New Zealand case law. Firstly, the Supreme Court referred to New Zealand jurisprudence much more frequently than the Privy Council. Moreover, it approved the approach of the New Zealand courts in a larger proportion of its decisions. However, contrary to expectations, the Supreme Court also overruled the New Zealand courts much more frequently than the Privy Council. Indeed, the Judicial Committee only rejected the approach of a New Zealand court in one of the judgments analysed in the present study.

One explanation for these findings is that the Supreme Court may be more willing than the Judicial Committee to consider and, if appropriate in the circumstances, to approve or disapprove the approaches of the lower courts. This, in turn, may reflect differences in the role undertaken by each Court. On the one hand, the primary role of the Supreme Court, as articulated by the Attorney-General's advisors⁷⁴ and affirmed by s 3 of the Supreme Court Act, is to clarify and develop the law. The apparent willingness of the Supreme Court to engage with New Zealand jurisprudence and either affirm or reject individual cases may indicate that the new final court has embraced this role.

In contrast, several factors may account for the reluctance of the Judicial Committee to consider and make pronouncements on New Zealand law. Firstly, the Law Lords have traditionally refused to determine any legal questions that are not necessary in order to resolve the case before them.⁷⁵ Secondly, their Lordships were increasingly cognisant of the superior knowledge that the local courts have in apprehending local values, interests, and circumstances. As a result the Privy Council has often refused to decide a case, or part of a case, where this would require an assessment of local policy considerations.⁷⁶ The Law Lords were also often unwilling to challenge the view of the Court of Appeal on issues that were seen to be within its particular expertise, for instance the growing judicial recognition of the principles of the Treaty of Waitangi.

Finally, the Privy Council has, since the 1960s, progressively abandoned the goal of maintaining legal uniformity and instead accepted that there can be national variation in the common law.⁷⁷ For instance, in *Invercargill City Council v Hamlin*⁷⁸ the Board, after explaining that New Zealand law had deviated from English law, observed that they had 'an opportunity...as final appellate court for New

⁷⁴ Ministerial Advisory Group, *Supra* fn 5, p. 20.

⁷⁵ Rt Hon Lord Haldane of Cloan 'The work for the Empire of the Judicial Committee of the Privy Council', *Commonwealth Law Journal*, 1(2), 1922, p. 152. See, for example, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 1)* [2004] 1 NZLR 289. In this case their Lordships refused to decide two legal questions raised by the appellant because there was another ground upon which the appeal could be determined.

⁷⁶ See, for instance, *Australian Consolidated Press v Uren*, *Supra* fn 14, where the Board held that 'where the policy of the law in a particular country was fashioned so largely by judicial opinion the Board should not substitute its own views (if different) for those of the national Court'; *Reid v Reid* [1982] 1 NZLR 147 (PC); and *Lange v Atkinson* (2000) 1 NZLR 257 (PC) where their Lordships acknowledged that for some years they have 'recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy'

⁷⁷ *Australian Consolidated Press v Uren*, *Supra* fn 14.

⁷⁸ *Supra* fn 61.

Zealand, to put New Zealand law back on the correct path'.⁷⁹ However, they declined to do so. Instead the Law Lords explained that, in circumstances where the Court of Appeal is purporting to apply settled principles of English common law, then it is the function of the Privy Council to ensure that those principles are correctly applied. But if the New Zealand Court of Appeal was consciously departing from English law on the basis that conditions are different in New Zealand, then they are entitled to do so.⁸⁰

9.3.5 Summary: The 'New Zealandisation' of the Law?

The preceding discussion indicates that the Supreme Court reform has had consequences that are broadly similar to what has occurred in other countries that have abolished appeals to the Privy Council. Indeed some parallels can be drawn between post-patriation legal development in New Zealand and the 'Australianisation' process discussed earlier. In the first place, the Supreme Court, like the High Court of Australia, cites a wide range of overseas case law, academic commentary, and international law. The extra-judicial writings of Justice Blanchard reveal that this engagement with non-traditional sources is a deliberate policy on the part of the Supreme Court. Moreover, the Supreme Court engages with more New Zealand jurisprudence than the Privy Council. Finally, references to English cases, although still a major source of law, have diminished relative to cases from these other jurisdictions.

On the other hand, the current study did reveal that the Supreme Court still follows English approaches in a large proportion of its cases. Moreover, it rarely adopted case law from non-Commonwealth sources. However, these observations are not necessarily inconsistent with a 'New Zealandisation' of the law. In Australia Chief Justice Gleeson argued that the consequence of patriation was to allow the Australian courts to continue to draw upon British decisions, whilst also opening up the legal system to wider influences.⁸¹ More importantly, the defining feature of 'Australianisation' is that fact the High Court now has ultimate control over the 'density' of Australian law.⁸² The precise content of that law is less important than the fact that an indigenous final court has the unencumbered freedom to develop the law in light of local needs and values. The Supreme Court reform has ensured that the New Zealand courts now enjoy a similar freedom to shape the destiny of New Zealand law.

⁷⁹ The case involved the question of whether a local authority owes a duty of care in respect of building inspectors. Their Lordships noted that the New Zealand courts had followed an approach based on an English case that was later held to be wrongly decided.

⁸⁰ *Invercargill City Council v Hamlin*, *Supra* fn 61, at 519.

⁸¹ Gleeson, *Supra* fn 8, p. 19.

⁸² Finn, *Supra* fn 37, p.225.

The purpose of this thesis has been to examine the legal and constitutional consequences of the Supreme Court Act 2003. As noted in the introductory chapter, the research focused on two main questions. Firstly, it evaluated the Supreme Court reform and its consequences in terms of the objectives and expectations of the architects of the legislation, especially the two main goals of improving ‘access to justice’ and affirming New Zealand’s independence and national identity. Secondly, throughout this project I have highlighted the constitutional significance of the Supreme Court legislation. With these research objectives in mind, the following discussion briefly summarises the overall findings of this project.

10.1 Consequences of the Supreme Court Reform

10.1.1 Jurisdiction, Leave Arrangements, and Access to Justice

According to the Justice and Electoral Committee, the primary objective of the Supreme Court Act was to improve ‘access to justice’ by ‘improving the accessibility of New Zealand’s highest court’ and ‘broadening the range, and increasing the volume of appeals considered by New Zealand’s highest court’.¹ Overall, the present study has confirmed that the decision to patriate the final court, together with the associated jurisdictional reforms, has, to a substantial extent, achieved these goals. In particular, it was found that the Supreme Court hears a wider range and greater volume of appeals compared to the Judicial Committee. Interesting the most substantial difference between the two courts was in regard to criminal appeals. It was found that criminal cases are the single largest component of the Supreme Court’s workload, but comprise a relatively insignificant proportion of the appeals that were heard by the Judicial Committee.

Two main factors underpin these results. In the first place, the Supreme Court has a much broader jurisdiction compared to the Privy Council. As noted in **Chapter 5**, a number of statutory provisions, especially s 144 of the Summary Proceedings Act 1957 and s 67 of the Judicature Act 1908, imposed severe restrictions on the jurisdiction of the Privy Council. However, the Supreme Court Act, and subsequent amendments to the Judicature Act, removed many of these jurisdictional barriers. Consequently, the Supreme Court, unlike the Privy Council, is able to hear appeals on matters arising in the District Court, the Youth Court, the Environment Court, and the Employment Court. This expanded jurisdiction has enabled a large group of litigants, who would have previously been prevented from taking an appeal to the Privy Council, the opportunity to access the final court.

¹ Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003, p.1.

Secondly, leave arrangements were also an important determinant of court accessibility. In **Chapter 6** we discussed how the different systems of leave employed by the Privy Council and the Supreme Court were a major factor in determining the range and content of the appeals that were heard by each court. On the one hand, it appears that the mixed system of leave employed by the Privy Council contributed to the relatively narrow range of cases that were heard by that court. Specifically, appeals that were heard as of right, namely commercial appeals or those that involved substantial sums of money or property, tended to take precedence over other types of case, particularly criminal appeals, where leave was discretionary.

In contrast, all Supreme Court appeals are heard at the discretion of the Supreme Court itself. It appears that this system of leave, especially the removal appeals by way of right, was one of the main factors that have resulted in the new final court hearing a much broader range of appeals compared to the Judicial Committee. Furthermore, the current research also explored whether the abolition of appeals as of right has acted as a barrier to commercial appeals reaching the Supreme Court. Overall, it was found, contrary to expectations, that the leave arrangements for the Supreme Court have not restricted the number of commercial cases that are being heard by the new final court. Indeed, the results of the present study found that commercial, contract and property disputes comprised the second largest component of the Supreme Court's workload after criminal appeals.

10.1.2 An Indigenous Legal System?

The second major objective of the Supreme Court legislation was to establish an indigenous justice system in order to affirm New Zealand's independence and to help to ensure that the law articulated by the final court is responsive to New Zealand's circumstances and needs. The current investigation has highlighted two major ways in which the Supreme Court reform has contributed to this goal. Firstly, the patriation of the final court has ensured that the responsibility for determining New Zealand law is now completely in the hands of New Zealand judges, rather than the British-dominated Privy Council. Secondly, the creation of a local final court appears to have had major implications for the development of New Zealand law. In particular, the current study has found evidence that patriation has helped to diversify the sources of the common law. Furthermore, it appears that the establishment of a locally-based final court may have given impetus to the development of an independent New Zealand legal identity. The following sections outline these findings in more detail.

10.1.2.1 The Composition of the Final Court

One of the major goals of the creation of the Supreme Court was to 'ensure that final decisions are made by judges who live in New Zealand and who are familiar with New Zealand society'.² In **Chapter 4** we discussed how, although nominally a Commonwealth court, the Privy Council was essentially a British tribunal. In particular, most Privy Council appeals were heard by British Law Lords,

² Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000, p. 1.

although some diversity was provided by the presence of Commonwealth judges, including senior New Zealand judges, on many Judicial Committee panels. In contrast, the new Supreme Court, based in Wellington, is entirely composed of New Zealand judges. Initially there had been some support, especially amongst the Justice and Electoral Committee, for the idea of employing overseas judges, including retired Law Lords, on the Supreme Court. But, the proposal ultimately came to nothing. Thus the establishment of the Supreme Court has meant that the responsibility for determining New Zealand law is now completely vested in the New Zealand courts and in New Zealand judges, without oversight by the Law Lords.

10.1.2.2 The Legal Consequences of Patriation

The present research also examined the legal consequences of patriating New Zealand's highest court. Three central findings emerged from this investigation. Firstly, it was found that the creation of a local final court has helped to diversify the range of sources upon which the final court draws inspiration. In particular, the new Supreme Court has been more willing than the Judicial Committee to engage with and cite a broader range of overseas case law in its judgments. This has included decisions from jurisdictions not traditionally cited by the New Zealand or British courts, such as cases from civil law jurisdictions and decisions from international tribunals. Moreover, the citation of English jurisprudence, although still substantial, has declined relative to the citation of cases from these other jurisdictions. Finally, the Supreme Court has engaged much more strongly with non-judicial sources, such as academic commentaries, official reports and Hansard, compared to the Judicial Committee. Notably, many of the reports and commentaries cited by the Supreme Court were authored by New Zealanders, whereas it was rare for the Privy Council to cite New Zealand publications.³

Secondly, the current study has found evidence that the Supreme Court is more willing to engage with New Zealand jurisprudence than the Privy Council. In particular, the Supreme Court cites considerably more New Zealand decisions in its judgments and approved a higher proportion of these decisions. Interestingly, the new Supreme Court also overruled more New Zealand jurisprudence than the Judicial Committee. Overall, it appears that, whereas the Privy Council was sometimes reluctant to make pronouncements on New Zealand law, the new Supreme Court has been much more willing to consider and, if appropriate in the circumstances, to affirm or reject the approaches of the lower courts. This willingness to engage with and critically examine New Zealand jurisprudence may indicate that the Supreme Court has embraced the role of clarifying and developing the law of New Zealand.

Finally, the findings recounted above, when considered together, suggest that the patriation of the final court may have given impetus to the development of an independent New Zealand legal identity. In **Chapter 9** I noted that the abolition of the Privy Council in Australia was associated with an 'Australianisation' of the law in that country. The key features of this process included a greater acceptance of the law-making function of the courts, a broadening of the sources of Australian law, and a

³ In 2001 Lord Cooke noted that he was aware of only one occasion in which the Judicial Committee had cited the work of a New Zealand academic ('Forward' in P. A. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edition, Wellington: Brookers, 2001).

divergence between Australian and English law. The findings of the present study indicate that a similar process may have begun to occur in this country.

However, there is a caveat to this conclusion. Overall, the patriation of the final court does not appear, at this early stage, to have resulted in a dramatic change to the content of New Zealand law. Seventy percent of Supreme Court decisions still cite English jurisprudence and a substantial number of judgments continue to follow English decisions. In addition, the Supreme Court has upheld the precedential status of Privy Council jurisprudence. Specifically, although the Court has observed that it is not bound by Judicial Committee decisions, it has also adopted a general policy of adherence to Privy Council precedent. Indeed, there has only been one occasion⁴ where the Supreme Court has actually decided to depart from a decision of the Judicial Committee.

10.2 The Supreme Court Act and the Constitution

Finally, one of the major aims of this research project has been to highlight the constitutional significance of the Supreme Court Act. The constitutional facets of this reform have not always been acknowledged. To some extent this reflects that fact that constitutional reform has traditionally engendered very little public or political interest in New Zealand. Moreover, in the case of the Supreme Court reform, this constitutional apathy was compounded by the deliberate attempt by the Labour-led Government to downplay the constitutional significance of the reform. It is therefore ironic that the Supreme Court legislation actually engendered more public interest than is typically the case for a constitutional measure. Furthermore, constitutional concerns were central in most public submissions on the proposal. Indeed, the Justice and Electoral Committee, in response to these submissions, even recommend a separate inquiry into New Zealand's constitutional arrangements.⁵

The Supreme Court legislation has introduced a number of constitutionally significant changes. Firstly, as noted above, the patriation of the final court has severed the institutional link between the New Zealand courts and the British legal system. Secondly, the Supreme Court reform has completely transformed the structure, nature, and composition of the final court. Thirdly, it has also resulted in changes to the role of the Chief Justice, including the appointment of a Chief High Court Judge to assume the Chief Justice's former responsibilities for administering the operations of the High Court.

Furthermore, patriation has also had major consequences for the function of the final court. From the 1970s the Privy Council had increasingly devolved responsibility for legal development to the New Zealand courts. In particular, their Lordships were reluctant intervene in cases that involved an assessment of local policy considerations. In contrast, the explicit role of the Supreme Court is the development and clarification of New Zealand law, with a secondary concern with error correction. This role is affirmed by s 3(a)(ii) of the Supreme Court Act and is reflected in the s 13 leave criteria. As discussed above, the Supreme Court's high level of engagement with New Zealand jurisprudence may

⁴ *Attorney-General v Couch (No 2)* [2010] 3 NZLR 149

⁵ Justice and Electoral Committee, *Supra* fn 1, p. 52-3.

indicate that it has embraced its responsibility for developing the law in a way that was not possible for the Judicial Committee.

Finally the legal autarky afforded by the Supreme Court Act can be situated within the broader political and constitutional context of decolonisation. The major steps in this process were the progression towards full responsible government during the interwar years⁶ and the adoption of the Statute of Westminster in 1947. Thereafter constitutional reform was characterised by a number of piecemeal and incremental reforms that aimed to perfect or affirm New Zealand's independent status. Examples include the Royal Titles Act 1974, which restyled the Queen as the Sovereign in Right of New Zealand; the 1983 Letters Patent, which patriated the Office of the Governor-General; and the Constitution Act 1986, which repealed the New Zealand Constitution Act 1852 (Imp) and removed the vestigial powers of the British Parliament to legislate for New Zealand. This gradual process of constitutional change meant that, by the end of 20th Century, the Privy Council was left as New Zealand's most enduring colonial relic. Thus the Supreme Court Act, by replacing the Privy Council with an indigenous final court, can be seen as completing the century-long process of updating, consolidating, and patriating the major elements of New Zealand's constitution.

⁶ As noted in **Chapter 3** landmarks included the grant of Dominion Status in 1907; the Balfour Declaration in 1926; and the appointment, in 1940, of a United Kingdom High Commissioner to act as the channel of communication between the British and New Zealand governments rather than the Governor-General.

References

- Armstrong, John, 'Perfect time for the axe to swing', *The New Zealand Herald*, October 9th, 2003.
<http://io.knowledge-basket.co.nz>.
- Babbie, E., *The Practice of Social Research*, 10th edition, Belmont: Wadsworth/Thomson Learning, 2004
- Beck, A., 'Litigation', *New Zealand Law Journal*, Feb 2006, p 17-20.
- Belich, J., *Paradise Reforged: A History of New Zealanders from the 1880s to the Year 2000*, Auckland and London, 2001.
- Blanchard, Rt Hon Peter, 'New Zealand Supreme Court jurisdiction and practice', *Commonwealth Law Bulletin*, 33(1), 2007a, p. 3-14.
- Blanchard, Rt Hon Peter, 'The early experience of the New Zealand Supreme Court'. An address commemorating the retirement of Sir Kenneth Keith, 2007b.
- Cameron, B. J. 'Appeals to the Privy Council-New Zealand', *Otago Law Review*, 1970 p 172-184.
- Chieveley, Lord Goff of, 'The future of the common law', *International and Comparative Law Quarterly*, 46, 1997, p. 745-760.
- Chisholm, R. & Nettheim, G. *Understanding Law* (7th edition). Victoria: Lexis Nexis, 2007.
- Cloan, Rt Hon Lord Haldane of, 'The work for the Empire of the Judicial Committee of the Privy Council', *Commonwealth Law Journal*, 1(2), 1922, p. 143-155.
- Coolican, Hugh, *Research Methods and statistics in Psychology*, Bristol: Hodder Arnold, 2004.
- Cornhill, Lord Bingham of, 'The common law: Past present and future', *Commonwealth Law Bulletin*, 25(1), 1999, p. 18-30.
- Cooke, Sir Robin. 'International Commission of Jurists Seminar', Wellington, 10 May 1985.
- Cooke, Sir Robin, 'The New Zealand national legal identity' *Canterbury Law Review*, 3, 1987, p. 171-183.
- Cox, N., 'The abolition or retention of the Privy Council as the final court of appeal for New Zealand: Conflict between nationalism and legal pragmatism' *New Zealand Universities Law Review*, 20(2), 2002, 220-238.
- Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, CP 11/03 July 2003.
- Eichelbaum, Sir Thomas, 'Brooding Inhibition or Guiding Hand? Reflections on the Privy Council Appeal' in Joseph, P. A. (ed) *Essays on the Constitution*, 1995, p.112-128.
- Elias, Rt Hon Dame Sian, 'Transition, stability and the New Zealand legal system', *Otago Law Review*, 10(4), 2004a, p. 475-491.
- Elias, Rt Hon Dame Sian, 'Something old, something new: Constitutional stirrings and the Supreme Court', *New Zealand Journal of Public and International Law*, 2(2), 2004b, p. 121-137.
- Finn, Hon Paul, 'Justice Compared', in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p.221-235.
- Fisher, Hon Robert, 'New Zealand legal method: Influences and consequences', in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p. 25-74.

- Gleeson, M., 'The influence of the Privy Council on Australia'. An address to the Anglo-Australasian Lawyers Society, 2007.
- Joseph, P. A., 'Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights', *Canterbury Law Review*, 2, 1985, p. 273-297
- Joseph, P. A., *Constitutional and Administrative Law in New Zealand*, 2nd edition, Wellington: Brookers, 2001.
- Justice and Electoral Committee, *Report on the Supreme Court Bill*, Wellington: New Zealand House of Representatives, 2003.
- Keith, Sir Kenneth., 'The unity of the common law and the ending of appeals to the Privy Council', *International and Comparative Law Quarterly*, 54(1), 2005, p. 197-210.
- Kelly, Maurice, 'Leaving Their Lordships: The Commonwealth experience', *New Zealand Law Journal*, 1994, p. 101-109.
- Kirby, Hon Michael, 'Why has the High Court become more involved in criminal appeals', *Australian Bar Review*, 2, 2002, p. 4.
- Law Commission, *The Structure of the Courts*, Wellington: Law Commission, 1989.
- Logan, B. & McNeil, J., 'Supreme Court Act: Radical constitutional change', *Evidence*, summer 2004, p. 8-10.
- Macrae, Arahia, 'The declining Relevance of the Privy Council in Maaori Claims', *Auckland Universities Law Review*, n.d. p. 949-975.
- Mason, Sir Anthony, 'Changing Law in a Changing Society', *Australian Law Journal*, 67, 1993, p. 568
- McCarthy, Sir Thaddeus, *New Zealand Law Journal*, 1976, p. 376.
- McCurdy, D. What should replace the Privy Council?, *The Dominion Post*, 11 Apr 2003, p. 5
- Miller, R., & Cox, N., 'Monarchy', in Miller, R. (Ed), *New Zealand Government and Politics*, (2nd edition), Auckland: Oxford University Press, 2001, p. 48-60.
- Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report to Hon Margaret Wilson Attorney-General and Associate Minister of Justice*, Wellington: Office of the Attorney-General, 2002.
- Mulholland, R.D. (2001). *Introduction to the New Zealand Legal System*. (10th edition). Wellington: Butterworths.
- Nevill, P., 'New Zealand: The Privy Council is replaced with a domestic Supreme Court', *International Journal of Constitutional Law*, 3(1), 2005, p. 115-127.
- Normand, Lord 'The Judicial Committee of the Privy Council-Retrospect and Prospect' [1950] 3 CLP 1.
- Office of the Attorney-General, *Discussion Paper: Reshaping New Zealand's Appeal Structure*, Wellington: Office of the Attorney-General, 2000.
- O' Leary, Z., *The Essential Guide to Doing Your Research Project*, second edition, London: Sage Publications Ltd, 2010.
- Rennie, B., Tide Against Abolition, *The Press*, 3 May 2003, p., 1
- Richardson, Megan, 'The Privy Council and New Zealand', *The International and Comparative Law Quarterly*, 46(4), Oct 1997, p. 908-918.

- Richardson, Rt Hon Sir Ivor, 'Trends in judgment writing in the New Zealand Court of Appeal' in Rick Bigwood, *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, p. 261-282.
- Roberts-Wray, Sir Kenneth, *Commonwealth and Colonial Law*, London: Stevens, 1966.
- Roland, A., 'Appeals to the Judicial Committee of the Privy Council: A Canadian perspective', *Commonwealth Law Bulletin*, 34(4), 2006, p. 569-583.
- Saville-Smith, K., *Private Litigant Cost of Pursuing Appeals at the Privy Council*, Wellington: Centre for Research Evaluation and Social Assessment, 2001.
- Schaefer, W. V., 'Precedent and policy', *The University of Chicago Law Review*, 34(1), 1966, p. 3-25.
- Sharp, A., 'Constitution', in Miller, R. (Ed), *New Zealand Government and Politics*, (2nd edition), Auckland: Oxford University Press, 2001.
- Solicitor-General, *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure*, Wellington: Crown Law Office, March 1995.
- Spiller, P., *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thompson Brookers, 2002.
- Stout, Sir Robert, 'Appellate Tribunals for the Colonies', *Commonwealth Law Review*, 2, 1904, p 3-13.
- Supreme Court Bill: First Reading, *Hansard*, 17th December, 2002 <http://gphansard.knowledge-basket.co.nz>.
- Supreme Court Bill: Second Reading, *Hansard*, 7th October, 2003. <http://gphansard.knowledge-basket.co.nz>.
- Supreme Court Bill: Third Reading, *Hansard*, 14th October 2003. <http://gphansard.knowledge-basket.co.nz>.
- Taggart, 'The Binding Effect of Decisions of the Privy Council' *New Zealand Universities Law Review*, 11, 1984, p. 66.
- Thorndon, Rt Hon Lord Cooke of, *Final Appeal Courts: Some Comparisons*, New Zealand Centre for Public Law, Occasional Paper No 7, Victoria University of Wellington, Dec 2001.
- Thorndon, Rt Hon Lord Cooke of, 'The road ahead for the common law', *International and Comparative Law Quarterly*, 53, 2004, p. 273-286.
- Wilkinson, Bert 'Jamaica to assert independence by abandoning British appeals court', *New York Amsterdam News*, 103(3), 2012, p. 16.
- Wilson, Margaret, 'From Privy Council to Supreme Court: A rite of passage for New Zealand's legal system', *Waikato Law Review*, 18, 2010, p. 1-14.
- Wood, N. & Tripp, C., 'The proposed Supreme Court and precedent', *New Zealand Law Journal*, October 2003, p. 359-361.

Table of Cases

Australian Cases

Barns v Barns (2001) 80 SASR 331.
Barns v Barns (2003) 214 CLR 169 (HCA).
John v Federal Commission of Taxation (1989)
166 CLR 417 (HCA).
R v L (1991) 174 CLR 379 (HCA).
Viro v The Queen (1978) 141 CLR 88 (HCA).

Canadian Cases

Borowski v A-G Canada [1989] 1 SCR 342.

New Zealand Cases

Allen v CIR [2005] NZSC 82.
Bognuda v Upton and Shearer Ltd [1972]
NZLR 741 (CA).
Bottrill v A [2001] 3 NZLR 622 (CA).
Boyd v Colby (1918) GLR 333 (SC).
Breur v Wright [1982] 2 NZLR 77 (CA).
Chiu v Richardson (No 2) [1983] NZLR 522
(CA).
Collier v Elders Pastoral Ltd (1991) 3 PRNZ
478 (CA).
Corbett v Social Security Commission [1962]
NZLR 878 (CA)
Couch v Attorney-General (No 2) [2010] 3
NZLR 149 (SCNZ).
Cropp v Judicial Committee [2008] 3 NZLR
774 (SCNZ).

De May v R [2005] NZSC 27 (SCNZ).

Finnigan v NZRFU Inc (No 3) [1985] 2 NZLR
190 (CA).

Franck v Stead 1 NZLR SC 112 (SC).

Gillies v The Gane Milking Machine Co Ltd
(1916) 17 GLR 313 (SC).

Gordon-Smith v R [2008] NZSC 56.

Hamed v R [2012] 2 NZLR 305 (SCNZ).

Jason John Cumming v The Queen [2010] 2
NZLR 433 (SCNZ)

Junior Farms v Hampton Securities Ltd (in liq)
[2006] NZSC 60.

Levave v Immigration Department [1979] 2
NZLR 74 (CA).

Mafart v TVNZ [2006] 3 NZLR 18 (SCNZ).

Nicholson v Department of Social Welfare
[1999] 3 NZLR 50 (CA).

North Shore City Council v Body Corporate
188529 [2011] 2 NZLR 289 (SCNZ).

Palmer v Palmer [2004] NZSC 16 (SCNZ).

Pranfield Holdings Ltd v The Minister of
Fisheries and Ors [2008] NZSC 86.

Prime Commercial Ltd v Wool Board
Disestablishment Co Ltd (2007) 18 PRNZ
424 (SCNZ).

R v Child [1935] NZLR 186 (CA).

R v Chilton [2006] 2 NZLR 341 (CA).

R v Clark [2005] 2 NZLR 747 (SCNZ).

R v Mist [2006] 3 NZLR 145 (SCNZ).

R v Thompson [2006] 2 NZLR 577 (SCNZ).

Re Ashman and Best [1985] 2 NZLR 224

Re Chase (No 2) [1989] 1 NZLR 345 (CA).

- Re New Zealand Midland Railway Co. Ltd; Ex P Coates* (1898) 17 NZLR 596 (SC).
- Shardy v Circa Holdings Ltd* CA250/98, 24 February 1999 (CA).
- Siemer v Heron* [2012] 1 NZLR 325 (SCNZ)
- Simpson v Kawerau District Council* [2004] NZSC 13 (SCNZ).
- Southbourne Investments Ltd v Greenmount Manufacturing Ltd* [2008] 1 NZLR 30 (SCNZ).
- Telecom Mobile Ltd v Commerce Commission* [2005] NZSC 73.
- Westpac Banking Corporation v Commission of Inland Revenue* [2011] 2 NZLR 726 (SCNZ).
- Wholesale Distributors Ltd v Gibbons* [2005] NZSC 78.
- Woolworths Ltd v Wynne* [1952] NZLR 496 (CA).
- Privy Council Cases**
- Akerele v R* [1943] AC 255 (PC).
- Annie Brown v A-G for New Zealand* (1897) NZPCC 106 (PC).
- Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 (PC).
- Australian Consolidated Press v Uren* [1969] 1 AC 590 (PC).
- Bain v R* [2007] UKPC 33 (PC).
- Baker v R* [1975] AC 774 (PC).
- Bell v Director of Public Prosecutions of Jamaica* [1985] 2 All ER 585 (PC).
- Bottrill v A* [2003] 2 NZLR 721 (PC).
- British Coal Corporation v The King* [1935] AC 500 (PC).
- Chung Chuck v The King* [1930] AC 244 (PC).
- Commissioner of Inland Revenue v Thomas Cook* [2005] 2 NZLR 722 (PC).
- Commonwealth of Australia v Bank of New South Wales* [1950] AC 235 (PC).
- Contact Energy Ltd v A-G* [2005] UKPC 13.
- Databank Systems Ltd v Commissioner of Inland Revenue* [1989] 1 NZLR 422 (PC).
- De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC).
- Dillon v Public Trustee of New Zealand* [1941] AC 294 (PC).
- Downsview Nominees Ltd v First City Corporation Ltd* 1993 1 NZLR 513 (PC).
- Elders Pastoral Ltd v Bank of New Zealand* [1990] 3 NZLR 129 (PC).
- Ernest John Fifield v W and R Jack Ltd* [2000] 3 NZLR 129
- Gilrose Finance Ltd v Ellis Gould* [2000] 2 NZLR 129 (PC).
- Grant Adams v The Queen* [1995] 1 WLR 52 (PC).
- Haldane v Haldane* [1976] 2 NZLR 715 (PC).
- Ibralebbe v The Queen* [1964] AC 900 (PC).
- Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).
- Kaitamaki v R* [1984] 1 NZLR 385 (PC).
- Kuruma v R* [1955] AC 197 (PC).
- Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC).
- Lange v Atkinson* (2000) 1 NZLR 257 (PC).
- Lawrence v R* [1933] AC 699 (PC).
- Lesa v Attorney-General* [1982] 1 NZLR 165 (PC).
- Maloney (Gordon) v R* [1969] 15 WLR 359 (PC).
- McDonald v R* [1983] NZLR 252 (PC).
- Muhammad Nawaz v R* (1941) LR 68 IA 126 (PC).
- Nadan v The King* [1926] AC 482 (PC).

Nakhla v R [1975] 1 NZLR 393 (PC).

Nippon Credit Bank Ltd v Air NZ Ltd [1997] UKPC (PC).

Nireaha Tamaki v Baker (1902) NZPCC 371 (PC).

Norbrook Laboratories Ltd v Bomac Laboratories Ltd [2006] UKPC 25 (PC).

Norwich Union Life Insurance Society v Attorney-General [1995] UKPC (PC).

NZ Stockexchange v CIR ([1992] 3 NZLR 1 (PC).

O'Connor v Hart [1985] 1 NZLR 159 (PC).

Opua Ferries Ltd v Fullers Bay of Islands Ltd [2003] 3 NZLR 740 (PC).

Petrocorp Exploration Ltd v Minister of Energy [1991] 1 NZLR 27 (PC).

Pratt v Attorney-General for Jamaica [1993] 4 All ER 769 (PC).

Prince v Gagnon (1882) LR 8 App Cas 103 (PC).

R v Howse [2006] 1 NZLR 433 (PC).

R v Karpavicius [2004] 1 NZLR 156 (PC).

R v Taito [2003] 3 NZLR 577 (PC).

R v Thomas [1978] 2 NZLR 1 (PC).

Ramstead v R [1999] 1 NZLR 513 (PC).

Ras Behari Lai v RI (1933) LR 60 IA 354 (PC).

Reid v Reid [1982] 1 NZLR 147 (PC).

Robins v National Trust Co Ltd [1927] AC 515 (PC).

Robinson v R [1985] 2 All ER 594 (PC).

Sambasivan v Public Prosecutor of Federation of Malaya [1950] AC 458 (PC).

Schaefer v Schuhmann [1972] AC 572 (PC).

Stemson v AMP General Insurance (NZ) Ltd [2007] 1 NZLR 289 (PC).

Strathmore Group v Fraser [1992] 3 NZLR 385 (PC).

Takaro Properties Ltd v Rowling [1987] 2 NZLR 700 (PC).

Tangiara v Wellington District Legal Services Committee [2000] 1 NZLR 17 (PC).

The Contradictors v Attorney-General [2001] 3 NZLR 301 (PC).

Walker v The Queen [1994] 2 AC 36 (PC).

Wislang v Medical Council of NZ & Ors [2004] UKPC 59 (PC).

United Kingdom Cases

Hunt v Allied Bakeries Ltd [1956] 1 WLR 1326 (CA).

Practice Note [1966] 3 All ER 77 (HL).

R v Secretary of State for Foreign and Commonwealth Affairs; Ex p Indian Association of Alberta [1982] QB 892.

R v Secretary of State for the Home Department ex Salem [1999] 1 AC 450 (HL)

Sun Life Assurance Co of Canada v Jervis [1944] AC 111 (HL).