



REPORT OF THE ADVISORY GROUP

REPLACING THE PRIVY COUNCIL: A NEW SUPREME COURT

A REPORT TO HON MARGARET WILSON
ATTORNEY-GENERAL
AND ASSOCIATE MINISTER OF JUSTICE

APRIL 2002

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FOREWORD

In November 2001, I established an Advisory Group to advise me on the purpose, structure, composition and role of a final court of appeal. The purpose of the Advisory Group was to provide sufficient detail of a model final court of appeal to assist Cabinet's consideration of the future of appeals to the Judicial Committee of the Privy Council.

A strong theme in public submissions on my discussion paper – Reshaping New Zealand's Appellate Structure, issued in December 2000 – is the need for two-tiers of appeal to be maintained in the event that the Government decides to abolish the right of appeal to the Privy Council. A final court of appeal, based in New Zealand and sitting above the existing Court of Appeal could fulfil that expectation. Most similar jurisdictions allow the opportunity for at least two tiers of appeal.

The Advisory Group was chaired by the Solicitor-General, Mr Terence Arnold QC, and comprised senior legal practitioners – experienced in a wide range of the law, including commercial and litigation practice – and leaders of the Māori community. In addition, Sir Ivor Richardson, President of the Court of Appeal, shared his considerable knowledge of appellate Court processes, as a Special Advisor.

On 13 March 2002 I received the Advisory Group's report. The Advisory Group has carefully examined the issues and has achieved a remarkable degree of unity in its conclusions. In particular I note the Advisory Group's conclusion that

If recommendations of the type made in this report are implemented, the Advisory Group believes that replacing the Privy Council with the Supreme Court should:

- improve accessibility to New Zealand's highest court;
- increase the range of matters considered by New Zealand's highest court;
- improve the understanding of local conditions by judges on New Zealand's highest court.

This report will enhance the quality of the public debate and will aid the Government's decision-making. I congratulate the Advisory Group on its achievement and I thank all those associated with the preparation of this report.

A handwritten signature in black ink, appearing to read 'Margaret Wilson'.

Hon Margaret Wilson
Attorney-General and Associate Minister of Justice

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EXECUTIVE SUMMARY

1. *New Zealand's Highest Court:*

- 1.1 The Advisory Group was not asked to comment on the desirability of abolishing or retaining access to the Judicial Committee of the Privy Council.¹ It was asked to comment on how a court of final appeal above an intermediate appellate court might be structured.
- 1.2 If recommendations of the type made in this report are implemented, the Advisory Group believes that replacing the Privy Council with the Supreme Court should:
- improve accessibility to New Zealand's highest court;
 - increase the range of matters considered by New Zealand's highest court;
 - improve the understanding of local conditions by judges on New Zealand's highest court.

The group expresses no view on whether these considerations provide a sufficient justification for abolition of the right to appeal to the Privy Council.

- 1.3 As the highest court in New Zealand's justice system, the Court of Final Appeal should be called the Supreme Court of New Zealand.²

2. *Role and Nature of the Supreme Court:*

- 2.1 The Supreme Court should perform the roles that superior appellate courts traditionally perform – error correction and clarification and development of the law. As with other final appellate courts, the Supreme Court will be involved in the clarification and development of the law, consistent with the limits of judicial decision-making. The Court will determine the law in the context of deciding the particular cases that come before it.
- 2.2 In keeping with the need for certainty and uniformity, the Supreme Court should normally follow decisions of the Privy Council delivered when it was New Zealand's final court of appeal. However, the Supreme Court should be able to depart from previous decisions of the Privy Council when it appears right to do so, particularly in light of features unique to

¹ For ease of reference, referred to as "the Privy Council" throughout this report.

² For ease of reference, the Court of Final Appeal will be referred to as the Supreme Court throughout this report.

New Zealand society, including the fundamental importance of the Treaty of Waitangi.³

- 2.3 The decisions of other final appellate courts from relevant jurisdictions, such as the High Court of Australia, the House of Lords and the Supreme Court of Canada, should continue to be highly persuasive.

3. *Recognising Te Ao Māori:*

- 3.1 The Supreme Court should better reflect the diversity of New Zealand society than the Privy Council. Accordingly, the overall composition of the Court should be such as to ensure a wide range of skills and experience, including a sound knowledge of tikanga Māori.
- 3.2 There should be a convention that at least one member of the Court should be well versed in tikanga Māori. This will make it more likely that at least one member of the Court will be of Māori ancestry.
- 3.3 In addition, a more transparent and formal process, involving effective consultations with, among others, Māori, is needed for judicial appointments generally.
- 3.4 The statutory criteria for leave to appeal to the Supreme Court should allow an appeal on a matter that raises a significant issue concerning the Treaty of Waitangi or tikanga Māori.

4. *Jurisdiction of the Supreme Court: Two-Tier Appellate System:*

- 4.1 There should be a minimum of two opportunities for appeal from all substantive court proceedings. From the High Court, the first opportunity for appeal from a substantive decision should be as of right, while the second should be by leave.
- 4.2 This principle does not preclude there being more than two opportunities for appeal from some decision-making bodies. Consistent with its position as New Zealand's highest court, the Supreme Court should hear appeals over the full range of cases whether they originate in a specialist court or a court of general jurisdiction. This includes the ability to hear appeals in relation to matters originating in tribunals.
- 4.3 However, given the opportunities for review or appeal through intermediate appellate courts, the number of third appeals reaching the Supreme Court is unlikely to be significant.

³ The Advisory Group notes that Lord Woolf observed:

“The Treaty records an agreement executed by the Crown and Maori, which over 150 years later is of the greatest constitutional importance to New Zealand.” (*New Zealand Maori Council v The Attorney-General* [1994] 1 NZLR 513, Privy Council at 516.)

At various points throughout the Report, the Advisory Group has referred to the Treaty as being a matter of “fundamental importance” to New Zealand society. Two members of the group recorded a preference to avoid the use of the adjective “fundamental” in this context on the basis that it may misrepresent that there was consensus within the group as to the current or preferred future common law status of the Treaty.

4.4 As the Court of Appeal is currently the final appeal court under numerous statutes, an analysis should be carried out of those statutes to determine whether any exceptions to the general principle, articulated in paragraph 4.2 above, are justified.

4.5 The Advisory Group did not address the issue of appeal rights for interlocutory or other pre-trial matters. In the interim, the same appeal rights as currently exist for interlocutory matters to the Privy Council should continue. However, further analysis is required in this area.

5. *Potential Workload of the Supreme Court:*

5.1 It is estimated that the Supreme Court will hear between 40 and 50 appeals per year, excluding applications for leave.

6. *Composition of the Supreme Court:*

6.1 The Court would normally sit as a bench of five judges, except on leave applications where a lesser number should be able to sit. Further, parties may agree to a bench of fewer than five judges in emergency situations.

6.2 At the outset, five permanent appointments (including the Chief Justice – see below) should be made to the Supreme Court. In order to accommodate conflicts of interest, sabbatical leave entitlements and absences through illness, an additional permanent member may be required, but that can be assessed after some experience of the Supreme Court's operations.

6.3 Provision should be made for the most senior available judge of the intermediate appellate court (referred to below as the Court of Appeal) to sit on the Supreme Court where for some reason insufficient permanent members are available. However, frequent recourse to a temporary judge from the Court of Appeal is not desirable, so the number of permanent appointments may need to be kept under review.

6.4 It may be that the Court's working year can be arranged in a way that will minimise the disruption caused by leave entitlements and sabbaticals. Consideration should be given to this.

7. *Role of the Chief Justice:*

7.1 The Chief Justice is the head of the New Zealand judiciary and should be the head and normally the presiding judge of the Supreme Court. The five permanent appointments to the Supreme Court should accordingly include the Chief Justice.

7.2 All but two of the members of the Advisory Group believe that the Chief Justice should not sit on any other court.

7.3 A new head of the High Court should be appointed to undertake the role currently performed by the Chief Justice specifically in relation to that court.

8. *Overseas Judges:*

- 8.1 Given the legal talent available in New Zealand, the importance of collegiality in the Supreme Court, the practical difficulties in both selecting overseas judges and operating a court involving such judges, the difficulties in expecting overseas judges to have any significant impact on the Court's decisions and the availability of other mechanisms for taking advantage of the experience of overseas jurisdictions, it is not desirable that judges be appointed from overseas jurisdictions.
- 8.2 Overseas perspectives will be available to the Court by counsel introducing relevant material from comparable overseas jurisdictions in proceedings.
- 8.3 The group considers that it is important in this context that there be a robust, inclusive and transparent judicial appointment process to ensure that confidence in the Supreme Court is maintained. As a whole, the Supreme Court bench should reflect an understanding of New Zealand society and its special features, including the fundamental importance of the Treaty of Waitangi and tikanga Māori.

9. *Specialist or Expert Judges or Advisors:*

- 9.1 The Court should consist of five permanent judges. There is no need to provide for temporary specialist judges to assist the bench.
- 9.2 The current provision for technical advisors for the Court of Appeal should be applied to the Supreme Court. The opportunity for interveners and the appointment of an amicus in particular cases would also be available.

10. *Judicial Appointments:*

- 10.1 Appointment process:
- 10.1.1 The issue of judicial appointments is fundamental. The group considers that all judges should be appointed by a transparent process, with clear criteria, and adequate and appropriate consultation.
- 10.1.2 Further work should be undertaken on the judicial appointment process to ensure a more transparent and inclusive process.
- 10.2 Judicial skills:
- 10.2.1 Individual judicial appointments to the Supreme Court should be based on excellent legal skills, legal acumen, and personal integrity. The Court, as a whole, should better reflect the diversity of New Zealand society than the Privy Council. Accordingly, the composition of the Court should be such as to ensure a wide range of skills, qualities and experiences, such as sound knowledge of tikanga Māori, social awareness, understanding of gender issues and willingness to consider new

ideas. Consideration will have to be given to the age range of judges on the Court.

10.2.2 There should be a convention that at least one member of the Court should be well versed in tikanga Māori, making it likely that at least one member of the Court will be of Māori ancestry.

10.3 Retirement age:

10.3.1 The group, with one exception, considers that judges of the Supreme Court should, in principle, be subject to the same retirement age as judges of other courts.

10.3.2 Two issues arose out of the group's discussion concerning length of tenure which, although not endorsed by the group, warrant further consideration. These are:

- (a) Should judges of the Supreme Court be appointed for a fixed term on the Court (say, 12 years, unless they first reach retirement age)?
- (b) Should the current judicial retiring age of 68 be raised generally?

11. *General Appeal:*

11.1 Given that the Supreme Court will have an error correction role, appeals to the Court should, in principle, be available on issues of fact as well as law. Accordingly, there should be a general appeal, but restrictions of the type applied in the Court of Appeal are likely to apply.

12. *Appeals by Leave or by Right:*

12.1 All appeals to the Supreme Court should be by leave of that court only.

12.2 Second appeals on issues of fact are unlikely to be granted leave where there have been concurrent findings of fact in lower level courts.

12.3 In exceptional cases, the Supreme Court may grant parties leave to appeal to enable them to leapfrog the intermediate appellate process. However, an intermediate appellate court should not have the right to refer a matter directly to the Supreme Court.

12.4 All but one member of the group consider that the main criteria for leave should be set out in legislation.

12.5 The criteria for leave should include:

12.5.1 Whether the proceedings raise a significant issue involving the Treaty of Waitangi or tikanga Māori; or

12.5.2 Whether the proceedings involve a matter of general or public importance; or

- 12.5.3 Whether the proceedings involve a matter of commercial significance; or
- 12.5.4 The need to resolve differences of opinion between different courts, or within one court, as to the state of the law; or
- 12.5.5 Whether the proceedings raise the risk of a substantial miscarriage of justice; or
- 12.5.6 Where the circumstances are such that in the interests of justice, the Court should consider the matter.

13. *Nature of Appeal:*

- 13.1 Generally, the Supreme Court should hear matters on the basis of the evidence from the court below, but may hear further evidence at its discretion, on a similar basis to the current Court of Appeal.

14. *Original Jurisdiction:*

- 14.1 As the statute would provide for the granting of leave, the Supreme Court should not have original jurisdiction.
- 14.2 On appeal, the Court should have the same powers as to relief as the relevant court of first instance.

15. *Jurisdiction to issue advisory opinions or consider reference questions:*

- 15.1 The Supreme Court should only consider matters which are raised in cases before it.
- 15.2 There should be no jurisdiction to give advisory opinions or consider reference questions.

16. *Location of the Supreme Court:*

- 16.1 The Supreme Court should be located in Wellington.
- 16.2 In terms of accommodation, the principal consideration should be a proper work environment. Subject to that, there is a preference for the Court to be located in the former High Court premises in Ballance Street.
- 16.3 Consideration could be given to a different physical layout for the Supreme Court, for example, along the lines of the current layout of the Privy Council. The layout should reflect that it is a New Zealand court.

17. *Composition and Location of the Intermediate Court of Appeal:*

- 17.1 The Court of Appeal should continue to have permanent members. Although it should retain the ability to sit as a court of five, it should generally sit as a court of three and rarely as a court of five. It should no longer sit as a bench of seven judges to hear cases.
- 17.2 The President of the Court of Appeal will be the head of bench.

- 17.3 The Criminal and Civil Appeals Divisions of the Court of Appeal should continue to operate with the participation of High Court Judges.
- 17.4 It should be possible for the number of permanent members of the Court of Appeal to be reduced from seven to six given that there will be a significant reduction in the number of five judge courts, with the Court augmented by High Court judges as presently.
- 17.5 The Court of Appeal should also be based in Wellington, operating a single registry, but with the ability to sit in other centres on a regular basis.

INTRODUCTION

18. In early 2000, the Government signalled a willingness to consider the role of the Privy Council in New Zealand's court structure.

Publication of the Discussion Paper

19. In December 2000, Cabinet approved the release of a discussion paper, entitled *Reshaping New Zealand's Appeal Structure*, and invited public comment on three options to replace the Privy Council:
- 19.1 *Option 1*: One level of appeal to the Court of Appeal;
 - 19.2 *Option 2*: Two levels of appeal within the Court of Appeal; and
 - 19.3 *Option 3*: Two levels of appeal, the first to an appeal division within the High Court, the second to the Court of Appeal.
20. Approximately 70 submissions were received from the legal profession, Māori, the business sector and members of the public. Of the submissions, 32 supported ending appeal rights to the Privy Council, while 32 were opposed. Six other submissions were neutral on this issue.
21. Of those who supported ending appeals, there was no support for Option 1, and only modest support for Options 2 and 3. The main criticism of these options was that judges of equivalent status would continue to hear appeals from their colleagues. According to the submissions, this did not promote independent and robust decision-making. The submissions preferred a separate and distinct court of final appeal which would guarantee independence, essential to public confidence.
22. Public submissions on the discussion paper, as well as a series of consultations undertaken by the Attorney-General with the legal profession, Māori and the business community, identified a fourth option for reform of New Zealand's appeal structure.
23. The fourth option proposed a stand-alone court, sitting above the Court of Appeal, to provide a second appeal, by leave only. Some submissions, including those from the New Zealand Māori Council and the New Zealand Law Society, also proposed that the court should include one or two overseas judges, from Commonwealth common law jurisdictions.
24. In addition, the Māori Council recommended the establishment of a Pacific Court of Human Rights.⁴

⁴ The concept of a Pacific Court of Human Rights is to be considered separately from matters addressed by the Advisory Group.

Further Consultation

25. On 13 August 2001, Cabinet invited the Attorney-General to consult further with coalition Ministers, representatives of the judiciary, the legal profession, Māori and the business sector, on the likely structure and processes of the proposed Court of Final Appeal.
26. In addition, Cabinet directed officials from the Ministry of Justice, Department of Prime Minister and Cabinet, Crown Law Office, Department for Courts, Te Puni Kōkiri and Treasury to develop details of the structure, processes and resource implications of the proposed Court of Final Appeal.
27. Following the Attorney-General's consultation with interested groups and meetings with departmental officials, a model of the Court was developed, which contained the following features:
 - 27.1 A superior court of record, sitting above the Court of Appeal;
 - 27.2 A stand-alone court, with its own judges and operating from separate premises;
 - 27.3 Comprised of a core of permanent judges (possibly five) led by a President, assisted by temporary judges;
 - 27.4 Able to hear a larger number of appeals than those currently heard in the Privy Council;
 - 27.5 An estimated workload of 30-50 hearings annually; and
 - 27.6 Appeals heard by leave, granted by that court.
28. Further work was undertaken by the Department for Courts on the accommodation and other associated costs of this proposal.⁵

Establishment of the Advisory Group

29. On 8 October 2001, Cabinet invited the Attorney-General to establish an Advisory Group of representatives of key stakeholder organisations (including legal, Māori and business interests) to develop a detailed proposal on the key elements of the Court of Final Appeal and its costs.
30. The Ministerial Advisory Group, chaired by the Solicitor-General, Mr Terence Arnold QC, comprises members of the legal profession, representing a range of interests including commercial and litigation, and Māori representatives.⁶

⁵ This work is continuing and was not available to the Advisory Group prior to finalising this report.

⁶ See Appendix A for full list of members.

31. In addition, Sir Ivor Richardson, President, Court of Appeal, attended the meetings of the group as a special advisor on matters relating to the current workload and structure of the Court of Appeal.
32. Background research and administrative support was provided by officials from the Crown Law Office and Ministry of Justice.
33. The Advisory Group's terms of reference included providing advice on the details of the purpose, role and jurisdiction of the Court of Final Appeal, how it will reflect te ao Māori, the composition of the Court and the role and responsibility of the head of the Court. The terms also required consideration of the location of the Court of Final Appeal.⁷ The issue of the cost of the Court was to be addressed by another group, working in parallel.

⁷ The terms of reference are set out in full in Appendix B.

THE SUPREME COURT

New Zealand's Highest Court

34. The Advisory Group was asked simply to consider how a court of final appeal above the Court of Appeal might be structured. It was not asked to comment on the desirability of abolishing or retaining access to the Privy Council. Against that background, the group notes that replacing the Privy Council with the Supreme Court should improve:

- 34.1 Accessibility to New Zealand's final appeal court;
- 34.2 Coverage, in that the Court would consider a wider range of matters than the Privy Council traditionally has; and
- 34.3 The understanding by judges of local conditions and the special features of New Zealand society.

Whether these considerations are sufficient to justify abolition of the right to appeal to the Privy Council is a matter on which the group expresses no opinion.

35. The Advisory Group considered a range of titles for New Zealand's highest court. Among possible options, the group considered:

- 35.1 The Court of Final Appeal; and
- 35.2 The Supreme Court of New Zealand.

36. The group rejected the first option on the basis that it was simply a description of the functions of that court and preferred the second option.

37. The title, "Supreme Court", is used by the United States of America and Canada for their highest courts. It was agreed by the Advisory Group that use of the title would aid international recognition of the status of the court.

Summary:

The Advisory Group was not asked to comment on the desirability of abolishing or retaining access to the Privy Council. It was asked to comment on how a court of final appeal above an intermediate appellate court might be structured.

If the recommendations in this report are implemented, the Advisory Group believes that replacing the Privy Council with the Supreme Court should:

- improve accessibility to New Zealand's highest court;
- increase the range of matters considered by New Zealand's highest court;
- improve the understanding of local conditions by judges on New Zealand's highest court.

The group expresses no view on whether these considerations provide a sufficient justification for abolition of the right to appeal to the Privy Council.

As the highest court in New Zealand's justice system, the Court of Final Appeal should be called the Supreme Court of New Zealand.

Role and Nature of the Supreme Court⁸

38. New Zealand’s appellate procedures and institutions have evolved over more than 160 years. As a consequence, depending on the particular context, appellate rights terminate across all levels of New Zealand’s courts of general jurisdiction – the District Court, the High Court, the Court of Appeal, and the Judicial Committee of the Privy Council. There is no single final appellate court.
39. Based in New Zealand, the Supreme Court would be an important, visible and relatively accessible institution, which, in its membership, should better reflect the diversity of New Zealand society than the Privy Council.
40. The opportunity to appeal is an important mechanism for maintaining public confidence in the integrity of the judicial process. It is generally accepted in New Zealand that there should be at least two opportunities for appeal (i.e. by right or leave) on substantive matters to distinct and independent judicial bodies (i.e. a two-tier appellate structure), although this does not preclude the possibility of an additional opportunity for appeal in some cases.
41. The purposes of appeals in the judicial system are:
- 41.1 **Error correction:** To provide a mechanism for correcting errors that occur at the court of first instance. These may be errors of fact or of law. For example, the judge may have drawn a conclusion of fact that is not supported by the evidence, or misunderstood or misapplied a legal principle.
 - 41.2 **Law clarification and development:** Appellate cases often concern uncertainties or gaps in the law, deal with issues where there are conflicting decisions of lower courts, or raise questions about the continuing relevance of earlier authorities. In dealing with such matters, an appellate court plays an important role in the clarification and development of the law.
42. While all appellate courts perform these functions to some extent, the balance between them varies from appellate court to appellate court.
43. Some commentators believe that in a two-tier appellate system, the Supreme Court should focus on the law clarification and development function with the intermediate appellate court focussing on error correction, even though each court may have some responsibility for the other function. As noted by the Auckland District Law Society in its submission on the Attorney-General’s discussion paper:
- “The role of the New Zealand Court of Appeal is that of a first appeal court, and is available as of right, to correct errors that occur in the trial courts. This workload will continue to increase with population growth and the appeal right must not be limited by cost and leave requirements.

⁸ Based on the recommendation of the Advisory Group, the term “Supreme Court” is used throughout this report to refer to the Court of Final Appeal.

A second tier of appeal is necessary for development of the law, to consider the larger and wider legal questions of public interest, and keep the law in step with applicable international developments.”

44. Another view is that the Supreme Court should always have the power to remedy serious miscarriages of justice whether they arise from factual or legal error. This suggests a general appeal, with no particular emphasis as to function one way or the other.
45. The Advisory Group notes that as the Supreme Court would be situated at the apex of our justice system, it is appropriate that it should focus on the clarification and development of law, within the context of New Zealand society and the limits of judicial decision-making.
46. The House of Lords recognised the importance of this role in 1966, when it considered the use of precedent:

“Their lordships regard the use of precedent ... as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.”⁹

47. The Advisory Group agrees that the Supreme Court should perform the roles that superior appellate courts traditionally perform – error correction and clarification and development of the law, with particular responsibility for the latter function. This does not mark a departure from, but rather confirms, the traditional judicial decision-making role. That is, the Court will determine the law in the context of deciding cases that come before it.
48. In addition, the group recognises that the establishment of the Supreme Court should not signal a departure from the common law as it currently stands. In order to ensure consistency in the law, particularly in the commercial context, Privy Council decisions, made while the Privy Council was New Zealand’s final appellate court, should normally be followed. However, the Supreme Court should be free to depart from existing authority when it appears right to do so. This would confirm the Supreme Court’s role as our highest court and allow a New Zealand perspective on issues that are special or unique to this country, such as the Treaty of Waitangi.

⁹ Practice Note [1966] 3 All ER 77.

49. The group also notes that decisions of other final appellate courts in common law jurisdictions should continue to be highly persuasive, thus ensuring consistency in the application of the common law. This is particularly important for commercial transactions where the interested parties may come from different common law jurisdictions.

Summary:

The Supreme Court should perform the roles that superior appellate courts traditionally perform – error correction and clarification and development of the law. As with other final appellate courts, the Supreme Court will be involved in the clarification and development of the law, consistent with the limits of judicial decision-making. The Court will determine the law in the context of deciding the particular cases that come before it.

In keeping with the need for certainty and uniformity, the Supreme Court should normally follow decisions of the Privy Council delivered when it was New Zealand's final court of appeal. However, the Supreme Court should be able to depart from previous decisions of the Privy Council when it appears right to do so, particularly in light of features unique to New Zealand society, including the fundamental importance of the Treaty of Waitangi.

The decisions of other final appellate courts from relevant jurisdictions, such as the High Court of Australia, the House of Lords and the Supreme Court of Canada, should continue to be highly persuasive.

Recognising Te Ao Māori

The Discussion Paper

50. The discussion paper outlined a number of options to better recognise Māori values and interests including “the possibility of greater representation of Māori within the justice system and processes to give the Court of Appeal access to expert advice on Māori values”. The discussion paper also noted the need to acknowledge Māori values within the substantive law. It considered the option of overseas judges on the bench of the Court of Final Appeal as a mechanism to address concerns raised by Māori about the detachment of a wholly-New Zealand bench. Finally, the discussion paper queried whether appeals from the Māori Appellate Court should go direct to a final New Zealand appellate court.

Public Consultations

51. As well as receiving responses to the discussion paper from Māori, the Attorney-General conducted a series of consultations with Māori in 2001. There was general support for changes to the existing appellate structure, provided there was clarity on key issues including:
- 51.1 The recognition of the Māori view concerning the need to protect the Treaty of Waitangi principles; and
 - 51.2 The alternative structure being proposed.
52. Māori wanted to be consulted on developing the new appellate structure. According to Māori, key elements of change were:
- 52.1 The Supreme Court would be independent;
 - 52.2 Treaty of Waitangi rights and the fundamentals of Waitangi jurisprudence would be protected; and
 - 52.3 Māori would be represented in all courts.
53. Māori generally supported the submissions of the New Zealand Māori Council. They were that the Council was not opposed, in principle, to the abolition of appeals to the Privy Council, but believed that an alternative structure must be well defined and developed with the co-operation of Māori. The Council preferred a two-tiered appeal system, with the power to appoint foreign judges. Substantial reform of the judicial system should be undertaken, including providing independent advice for judges on issues concerning Māori and the incorporation of Māori principles into substantive law. According to the Council, the Government must also undertake to develop a Court of Human Rights in the Pacific.

The Advisory Group

54. The Māori members led the Advisory Group's discussion on the importance of the Treaty of Waitangi. The Māori members considered that the Privy Council's judgment in *Hoani Te Heuheu v Aotea District Māori Land Board* [1941] NZLR 590 that the Treaty has no legal effect in New Zealand unless expressly incorporated by domestic legislation, was no longer credible and consistent with the recognition and protection of the Treaty in modern-day New Zealand.
55. The Advisory Group felt that questions about the relationship between the Treaty and legislation and the powers of the court in terms of giving effect to the Treaty were beyond its terms of reference. Nevertheless, the group recognises that the fundamental importance of the Treaty and tikanga Māori in New Zealand society should be reflected in, for example, judicial appointment processes and leave criteria.¹⁰
56. The Advisory Group acknowledges the developments in Treaty jurisprudence since the mid-1980s, noting that these cases related to specific legislative provisions requiring the courts to focus on the principles of the Treaty.
57. The leading case in the Court of Appeal is the *Lands* case:

“... the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field ... there is every reason for attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow from the nature of the compact and its continuing application in the life of New Zealand and from its provisions.” (Richardson J, *The New Zealand Māori Council v The Attorney-General* [1987] 1 NZLR 641 at 682)

- 57.1 Referring to that case, Sir Robin Cooke later stated:

“It was held unanimously by a court of five judges, each delivering a separate judgment, that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards each other.” (*Te Rūnanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 at 304)

- 57.2 The Privy Council in *The New Zealand Māori Council v The Attorney-General* [1994] 1 NZLR 513 (“The Broadcasting Assets case”), stated at 516:

“The Treaty records an agreement executed by the Crown and Māori, which over 150 years later is of the greatest constitutional importance to New Zealand.”

¹⁰ See footnote 3.

58. The Advisory Group considers that the Supreme Court should better reflect the diversity of New Zealand society than the Privy Council. Accordingly, the overall composition of the court should be such as to ensure a wide range of skills and experience, including a sound knowledge of tikanga Māori.
59. The Advisory Group considers that a convention should be developed to ensure that at least one member of the Supreme Court is well-versed in tikanga Māori. The likelihood is that that will be a person of Māori ancestry.
60. In addition, the Advisory Group identifies the need for a more transparent judicial appointments process, involving formal consultations with a wider range of groups, including Māori.
61. By “transparent appointment process”, the group means a process which has the following features:
 - 61.1 Clearly-articulated appointment procedures;
 - 61.2 Clearly-articulated criteria;
 - 61.3 Clearly-articulated mechanisms for identifying a broad range of candidates; and
 - 61.4 Assessment of candidates in accordance with a formal process involving appropriate consultation.
62. The Advisory Group believes that the statutory criteria for leave to appeal to the Supreme Court should include a provision to allow an appeal on a matter that raises a significant issue concerning the Treaty of Waitangi or tikanga Māori.
63. These recommendations are addressed more fully in the relevant sections of this report.

Summary:

The Supreme Court should better reflect the diversity of New Zealand society than the Privy Council. Accordingly, the overall composition of the Court should be such as to ensure a wide range of skills and experience, including a sound knowledge of tikanga Māori.

There should be a convention that at least one member of the Court should be well-versed in tikanga Māori. This will make it more likely that at least one member of the Court will be of Māori ancestry.

In addition, a more transparent and formal process, involving effective consultations with, among others, Māori, is needed for judicial appointments generally.

The statutory criteria for leave to appeal to the Supreme Court should allow an appeal on a matter that raises a significant issue concerning the Treaty of Waitangi or tikanga Māori.

Jurisdiction of the Supreme Court

Two-Tier Appellate System

64. The Advisory Group considers that there should be at least two opportunities to appeal a judicial decision on a substantive matter. This recommendation accords with the majority view expressed in submissions on the Privy Council discussion paper and in consultations with the Attorney-General.
65. Currently, appeal rights from different courts and quasi-judicial bodies vary significantly, often with little apparent justification. If the Supreme Court is to focus on law clarification and development the Advisory Group considers that the opportunity to appeal to that court should, in principle, be available in the full range of cases, whether from specialist or general courts. In other words, the Supreme Court should be the court which has the ultimate responsibility for the judicial clarification and development of the law in New Zealand.
66. At present, the Court of Appeal acts as the final appeal court in certain matters. For example, a Court of Appeal decision is final in appeals from:
- 66.1 The Employment Court;
 - 66.2 Family Court proceedings and appeals from the District Court's summary jurisdiction; and
 - 66.3 Where a party appeals directly to the Court of Appeal from an inferior court (District Court level), bypassing the High Court.¹¹
67. In addition, some appeals bypass the Court of Appeal and go directly to the Privy Council. For example, in the past, appeals from the Māori Appellate Court have been heard in the Privy Council.
68. This raises issues concerning the relationship between the Supreme Court, the Court of Appeal and specialist courts such as the Māori Appellate Court, Courts Martial Appeal Court, the Family Court, the Environment Court and the Employment Court. Although there is general agreement in New Zealand that there should be a two-tier appellate structure, if the Supreme Court has jurisdiction to hear appeals from any court, there will be cases where three appeals are potentially available.
69. The Advisory Group notes that if appeals to the Supreme Court were regulated by leave requirements, there would be no need to provide for a limit on the number of appeal opportunities.
70. If a decision of the District Court is appealed to the High Court and Court of Appeal and is unsuccessful on both occasions, it would be unlikely that the Supreme Court would grant leave for a third appeal. In reality, most appeals would end at the Court of Appeal. However, if a case is one of exceptional importance, it would be irrelevant that it had had two appeals before reaching the Supreme Court.

¹¹ See Appendix C for a general overview of New Zealand's appellate structure.

71. The group considers that the various statutes limiting appeals to the Court of Appeal and other courts should be analysed to determine whether there should be any exceptions to the general principle that any matter should be able to be appealed to the Supreme Court with the leave of that Court.
72. The Advisory Group did not address the issue of appeal rights for interlocutory or other pre-trial matters. These matters also require a separate and more detailed analysis. However, in the interim, the same appeal rights as currently exist for interlocutory matters to the Privy Council should continue.

Summary:

There should be a minimum of two opportunities for appeal from all substantive court proceedings. From the High Court, the first opportunity for appeal from a substantive decision should be as of right, while the second should be by leave.

This principle does not preclude there being more than two opportunities for appeal from some decision-making bodies. Consistent with its position as New Zealand's highest court, the Supreme Court should hear appeals over the full range of cases whether they originate in a specialist court or a court of general jurisdiction. This includes the ability to hear appeals in relation to matters originating in tribunals.

However, given the opportunities for review or appeal through intermediate appellate courts, the number of third appeals reaching the Supreme Court is unlikely to be significant.

As the Court of Appeal is currently the final appeal court under numerous statutes, an analysis should be carried out of those statutes to determine whether any exceptions to the general principle articulated above, are justified.

The Advisory Group did not address the issue of appeal rights for interlocutory or other pre-trial matters. In the interim, the same appeal rights as currently exist for interlocutory matters to the Privy Council should continue. However, further analysis is required in this area.

Potential Workload of the Supreme Court

73. The Advisory Group estimates that the Supreme Court would hear between 40 and 50 appeals per year, excluding applications for leave.
74. Previously, concern was expressed that a new Supreme Court would be under-utilised, based on the number of Privy Council appeals from New Zealand per year. Currently, the Privy Council hears approximately eight substantive appeals from New Zealand annually (excluding petitions). In the years 1997-2001 there were 41 appeals, 21 of which came from five-judge benches and 20 from three-judge benches.
75. In 2001, the Court of Appeal determined 593 appeals, including 48 appeals which were heard by five-judge benches. In the majority of cases, the Court of Appeal has become our final appellate court.
76. Having the Court of Final Appeal in New Zealand is likely, of itself, to improve accessibility. But, more importantly, the recommendations of the Advisory Group as to the jurisdiction of the Supreme Court will, if accepted, considerably increase the coverage of the final appellate court. It is likely that there will be more criminal appeals to the Court. In addition, the potential exists for appeals from District Court level and below, and from specialist courts such as the Employment Court. This represents a significant broadening of the current appeal rights to the Privy Council. In addition, the number of five-judge benches in the Court of Appeal will decrease, which may increase the likelihood of appeals to the Supreme Court. Further, developments in the law, in relation to human rights for example, are likely to see an increase in the number of matters going to the Supreme Court.
77. Accordingly, it is estimated that the Supreme Court will hear significantly more appeals than those currently considered by the Privy Council. The annual total of substantive hearings is likely to be in the region of 40 to 50. This number is similar to the annual workload in final appellate courts in Australia, Canada and the United Kingdom. In addition, the determination of applications for leave will also form part of the Court's workload.

Summary:

It is estimated that the Supreme Court will hear between 40 and 50 appeals per year, excluding applications for leave.

Composition of the Supreme Court

Submissions in response to Discussion Paper

78. The submissions in support of a new Supreme Court made the following points on composition and appointment of judges of the Supreme Court:

- 78.1 *Composition of the Court:* The Court should consist of five to seven permanent judges (Auckland District Law Society and the New Zealand Law Society). Although it would normally sit as a bench of five, on important issues, it could choose to sit as a full court of seven judges. There should be no temporary judges (New Zealand Law Society, Ngāti Ranginui Iwi and the Institute of Chartered Accountants). According to the Institute of Chartered Accountants, permanent appointments would remove any conflict of interest that might exist where a judge is passing judgment on a colleague. However, there was concern that the judges may be under-utilised (Sir Ivor Richardson, Te Rūnanga o Ngāi Tahu and the Business Roundtable). The Wellington District Law Society supported allowing judges of the Supreme Court to sit on the Court of Appeal.
- 78.2 *Role of the Chief Justice:* The New Zealand Law Society supported the current role of the Chief Justice, whereby the Chief Justice would continue to be able to sit in the High Court, Court of Appeal and Supreme Court. The submission noted that the Chief Justice's role as head of the judiciary required the Chief Justice to sit on the other courts. The Wellington District Law Society observed that logically, the Chief Justice should preside over the highest court.
- 78.3 *Overseas judges:* There was general support for the use of overseas judges in the Supreme Court. Some submissions considered that such judges would bring an impartial perspective to legal issues, enhance the quality of the bench, assist in maintaining the harmony of the common law and maintain business confidence (Te Hunga Rōia Māori o Aotearoa, New Zealand Māori Council, Auckland District Law Society, New Zealand Law Society, Institute of Chartered Accountants and Human Rights Commission). Some submissions opposed the use of overseas judges (members of the judiciary and the Combined Beneficiaries Union).
- 78.4 *Specialist or Expert Judges or Advisors:* Submissions were mixed on the use of temporary expert judges or advisors. Ngāti Ranginui Iwi and the New Zealand Māori Council supported the use of such experts. However, the New Zealand Law Society and Te Rūnanga o Ngāi Tahu noted that it should be left to the parties to adduce evidence on such matters. Te Rūnanga o Ngāi Tahu recommended that where both parties agreed, an amicus could be appointed to assist the Court.

78.5 *Appointment of judges*: The appointment of judges should be based on merit (Te Rūnanga o Ngāi Tahu and the New Zealand Law Society). The Law Society noted that a criterion of sensitivity to New Zealand's social issues was sufficient to ensure that the judiciary comprehend the plurality of cultural, social and economic values in New Zealand society. Both the New Zealand Māori Council and Te Hunga Rōia Māori o Aotearoa observed the need for greater representation of Māori in the appellate structure.

79. Each of these issues is considered in turn.

Composition of the Supreme Court

80. Obviously the role that a court is expected to play affects the way in which it is constituted. In personnel terms, a court hierarchy works on the basis of an inverted pyramid. Typically, there will be a single judge sitting at first instance, three or five judges sitting in the intermediate appeal court, and five or seven judges sitting in the final court of appeal.
81. Consultations to date have suggested that a New Zealand Supreme Court should sit as a bench of five judges on substantive matters. This is the normal practice of the Privy Council.
82. The Advisory Group considers that the Supreme Court should sit as a full bench of five permanent judges, including the Chief Justice (see below), on substantive matters. This is consistent with the inverted pyramid judicial model. Although seven judges may allow greater diversity on the bench, a five-judge bench is likely to be more collegial, continues the tradition of the Privy Council and better reflects the legal resources available in New Zealand. The Court would sit as a smaller bench to consider leave applications.
83. The Advisory Group notes that to ensure the availability of a permanent bench of five judges, more than five judges may need to be appointed to the Supreme Court so as to cover absences arising from illness or other leave.
84. However, concern was expressed within the Advisory Group that six or seven permanent judicial appointments to the Supreme Court might result in under-utilisation, at least in the short term. As noted above, currently, the Privy Council hears approximately eight substantive appeals from New Zealand per year (i.e. excluding petitions). This workload would not provide sufficient work for a permanent court of seven judges. On the other hand, as has been noted, the various changes recommended by the group are likely to result in a workload of 40-50 cases annually for the new court.
85. The Advisory Group concludes that at the outset, five permanent appointments, including the Chief Justice, should be made to the Supreme Court. In order to deal with conflicts of interest and leave entitlements, an additional member may be required, but this should be assessed once the Supreme Court is in operation. In addition, the Court's working year could be arranged in such a way as to minimise the disruption caused by leave entitlements. For example, the Court could hear appeals in two formal terms with no scheduled sittings in June and July, except in cases of urgency. This may accommodate sabbatical entitlements.

86. A permanent bench would enhance the independence of the Supreme Court, as the judges would not be required to pass judgment on the decisions of their colleagues. In addition, it would improve the Court's ability to act collegially and to develop its own approach.
87. The group places considerable emphasis on the concept of "collegiality" in relation to the Supreme Court. The group believes that, if the full benefit is to be derived from the establishment of the Supreme Court, the Court must act collegially. The judges will come from diverse backgrounds and may have widely-differing views on particular issues. It is important that the judges do not make their decisions in isolation, but follow a process of discussion in which differing views are articulated, analysed and tested. Ultimately, agreement may not be possible, but a collegial process should ensure that judges are able to take advantage of the experiences and perspectives of their colleagues, that points of agreement are identified and expounded, and that there is proper engagement on the points of difference. Collegiality takes time to develop, and the understandings that come from it can properly be seen as part of the "intellectual capital" of the Court.
88. Where a member is prevented from sitting by conflict of interest or illness, two options are available:
 - 88.1 Use of temporary judges; and
 - 88.2 Allowing the Court to sit with fewer than normal judges.
89. Appeal courts in comparable jurisdictions are generally made up in one of three ways:
 - 89.1 Judges are permanently assigned to them;
 - 89.2 The appeal court judges come from the general pool of lower court judges and sit in rotation;
 - 89.3 There is a combination of permanently-appointed judges and judges from the lower courts sitting in rotation.
90. Although in most overseas jurisdictions there is some degree of movement between the lower courts, membership of the highest court is confined to permanent appointments and there is no provision for temporary appointments, specialist or otherwise. Apart from the Privy Council and some smaller Pacific Island nations, Hong Kong is the only comparable jurisdiction that regularly utilises temporary judges on its final appeal court.¹²
91. The principal argument against lower court judges sitting on the Supreme Court is that judges on that final court should be independent of the judges of the courts whose decisions they review. In addition, the use of temporary judges may adversely affect the operation of the Supreme Court, and in particular its ability to act collegially and to develop its own approach.

¹² See Appendix D on overseas jurisdictions.

92. The principal arguments in favour of involving judges from lower courts in the work of the final court are that it:
- 92.1 Provides flexibility, enabling temporary absences from the Supreme Court to be covered;
 - 92.2 May facilitate the best use of limited judicial resources;
 - 92.3 Assists in the “education” of judges at both levels about the concerns of judges at the other level;
 - 92.4 Adds a dimension to the work of lower court judges that may assist in recruitment and retention; and
 - 92.5 Would allow specialist judges in the lower courts to provide expert assistance to the final court.
93. Where issues of conflict of interest or ill health arise in the short term, the use of temporary judges would be acceptable on a limited basis. The basis for selection of the temporary judge should be set out in legislation. The group recommends that the most senior judge of the Court of Appeal who had no earlier involvement in the matter under appeal should sit. However, frequent recourse to a temporary judge would not be desirable and the number of permanent appointments will need to be kept under review.
94. As well, the Court should be able to sit as a bench of fewer than five in emergency situations if the parties agree. The Advisory Group recommends that if on the day of a hearing, for example, a Supreme Court judge fell ill or some other emergency arose, the parties to the hearing could elect to have the appeal heard before a reduced bench.

Summary:

The Court would normally sit as a bench of five judges, except on leave applications where a lesser number should be able to sit. Further, parties may agree to a bench of fewer than five judges in emergency situations.

At the outset, five permanent appointments (including the Chief Justice – see below) should be made to the Supreme Court. In order to accommodate conflicts of interest, sabbatical leave entitlements and absences through illness, an additional permanent member may be required, but that can be assessed after some experience of the Supreme Court’s operations.

Provision should be made for the most senior available judge of the Court of Appeal to sit on the Supreme Court where for some reason insufficient permanent members are available. However, frequent recourse to a temporary judge from the Court of Appeal is not desirable, so the number of permanent appointments may need to be kept under review.

It may be that the Court’s working year can be arranged in a way that will minimise the disruption caused by leave entitlements and sabbaticals. Consideration should be given to this.

Role of the Chief Justice

95. Under the Judicature Act 1908, the Chief Justice of New Zealand is the head of the Judiciary (ss 4(1), (3) and 57(2)(a), (6)).
96. Although the work of the Chief Justice has, to a large degree, been determined by whoever holds that position, it is commonly accepted that the Chief Justice has a number of responsibilities including:
- 96.1 Upholding judicial independence;
 - 96.2 Managing the relationship between the courts and other branches of government;
 - 96.3 Providing leadership for the judiciary; and
 - 96.4 Administering the operations of the High Court.
97. Upholding judicial independence:
- 97.1 Judicial independence is the capacity of the courts to perform their constitutional function free from actual or apparent interference by others.
 - 97.2 Judicial independence comprises both individual and institutional elements.¹³ The individual independence of a judge is reflected in such matters as security of tenure. The institutional independence of the court is reflected in its relationship to the executive and legislative branches of government. The administrative functions which are the responsibility of the Chief Justice help to ensure that the courts operate without unnecessary interference. The independence of the judiciary requires a level of judicial autonomy in the internal management of the courts.
98. Relationship between the courts and government:
- 98.1 Under the Letters Patent, in the absence of the Governor-General, the Chief Justice acts as administrator of the Government of New Zealand.
 - 98.2 In addition, it is the role of the Chief Justice to speak for the whole of the judiciary in dealings with the government.¹⁴
 - 98.3 Finally, the Chief Justice provides assistance to the Executive in relation to certain appointments. For example, the Attorney-General, with the concurrence of the Chief Justice, recommends barristers for appointment as Queen's Counsel by the Governor-General. In addition, the Chief Justice undertakes a consultative role in respect of judicial appointments to the High Court and Court of Appeal.

¹³ As noted in the Canadian Supreme Court decisions, *Valente v The Queen* [1985] 2 SCR 673 and *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick* 2002, SCC 13.

¹⁴ As noted by the Law Commission in its 1989 report on the structure of the courts.

99. Providing leadership for the judiciary:
 - 99.1 The Chief Justice works with the Heads of Bench to address any issues or problems common to all judicial officers that may arise.
 - 99.2 The Chief Justice represents and speaks on behalf of the judiciary publicly.
100. Administering the operations of the High Court:
 - 100.1 Under a number of statutes and regulations, the Chief Justice is responsible for certain operational matters concerning the High Court. For example:
 - 100.1.1 The Chief Justice, and at least three other permanent High Court judges, certify the need for a temporary or acting judge of the High Court.
 - 100.1.2 The Chief Justice is responsible for nominating High Court judges to sit in either the Criminal Appeals Division or Civil Appeals Division of the Court of Appeal.
101. In addition, the Governor-General in Council acts with the concurrence of the Chief Justice when making rules regulating the practice and procedure of the High Court, Court of Appeal, and Courts Martial Appeal Court.
102. Currently, the Chief Justice is a member of both the High Court and Court of Appeal. In addition, like other New Zealand Privy Counsellors who are members of the Court of Appeal, the Chief Justice has sat on the Privy Council.
103. However, in many comparable overseas jurisdictions the Chief Justice presides only on the final appellate court.¹⁵
104. The Advisory Group notes that the current ability of the Chief Justice to sit on a number of courts simply reflects the way in which the New Zealand court system has evolved. As the court system expanded to include a Court of Appeal with permanent members, it was appropriate for the head of the judiciary to have the ability to sit as a member of that court.
105. The group considers that as the head of the judiciary, the Chief Justice should preside at the apex of the court system. In addition, the majority considers that the Chief Justice should no longer sit on the bench of any other court but should be a permanent member of the Supreme Court, enabling it to develop collegiality, independence and a separate judicial approach from the lower courts. The Chief Justice would continue to have the responsibilities of upholding judicial independence, managing the relationship between the judicial and the other branches of government and providing leadership. However, as the Chief Justice would no longer administer the operations of the High Court, a new head of the High Court would be required to undertake the role currently performed by the Chief Justice specifically in relation to that court.

¹⁵ See Appendix D on overseas jurisdictions.

106. Two members of the Advisory Group consider that the Chief Justice should retain the ability to sit as a member of the High Court and Court of Appeal in order to preserve the Chief Justice's contact with the judiciary and to avoid any perception that the Chief Justice is removed from them. Enabling the Chief Justice to sit at first instance hearings was thought to be important because such hearings are often the only contact that the community has with the court system.

Summary:

The Chief Justice is the head of the New Zealand judiciary and should be the head and normally the presiding judge of the Supreme Court. The five permanent appointments to the Supreme Court should accordingly include the Chief Justice.

All but two of the members of the Advisory Group believe that the Chief Justice should not sit on any other court.

A new head of the High Court should be appointed to undertake the role currently performed by the Chief Justice specifically in relation to that court.

Overseas Judges

107. Some respondents to the Discussion Paper, including the New Zealand Law Society, the Bar Association and Māori, supported the use of overseas judges on the bench of the Supreme Court. According to their submissions, the presence of overseas judges would maintain foreign commercial confidence in our Supreme Court and provide a link with other common law jurisdictions. In addition, it would provide an opportunity for New Zealand judges to benefit from some international experience.
108. In contrast, some commentators noted that the use of overseas judges is contrary to the underlying reason for abolishing appeals to the Privy Council, namely giving full recognition to our national identity and independence. In addition, temporary judges will not, they said, enhance the collegiality of decision-making necessary in the Supreme Court.
109. The Advisory Group considered a number of issues which arise concerning the use of overseas judges:
- 109.1 The practicality of judges being able to attend New Zealand hearings for any length of time;
 - 109.2 The mode of selection of the judges, particularly for individual cases;
 - 109.3 What age limit would apply to overseas judges;
 - 109.4 What cases would require the participation of overseas judges; and
 - 109.5 How suitable overseas judges could be attracted.

110. Overseas judges who are Privy Counsellors sit on the Privy Council, although this practice has decreased in recent years. As the Privy Council is the final appeal court for a number of different countries, it was considered appropriate that judges from those jurisdictions sit.
111. Apart from the Privy Council and some smaller Pacific Island nations, Hong Kong also allows for the appointment of overseas judges on its final court. The unique political context arising from the “hand-over” of Hong Kong from Britain to China in part gave rise to the inclusion of overseas judges on the bench of the final appeal court.
112. The Advisory Group debated the issue of overseas judges extensively. Some members of the group initially supported their use, as a transitional measure to be reviewed after five years, in part to limit the concerns of the commercial sector. In addition, Māori members expressed concern regarding the small pool of judicial talent in New Zealand which would be capable of understanding indigenous issues or tikanga Māori. In the absence of New Zealand judges with such knowledge, Māori considered that overseas judges (particularly from Canada) were necessary to enhance the Court’s understanding.
113. Ultimately, however, the group was unanimous in concluding that there should be no overseas judges on the Supreme Court for the reasons set out below.
114. It is necessary to begin by considering what function overseas judges might be expected to perform on the Supreme Court. If the objective was to add expertise which local judges lacked, presumably the overseas judges selected to sit on particular cases should have that expertise. It has been suggested that judges from the final courts of appeal in Canada, Australia and England might be called upon. But judges from the Supreme Court of Canada may have had little exposure to commercial issues; English judges are unlikely to have expertise in indigenous rights issues; Australian judges will not have had experience in interpreting and applying a Bill of Rights. If this is so, to obtain the necessary expertise, it will be necessary for suitably-qualified judges from the available pool of overseas judges to be selected on a case-by-case basis.
115. However, allowing the selection of overseas judges to occur on a case-by-case basis (for example, Canadian judges for Treaty issues and English judges for commercial matters) could lead to accusations of engineering the composition of the bench in order to achieve a certain result in a particular case. It would diminish the fundamental constitutional principle of judicial independence. But using overseas judges who have limited or no experience on some of the issues likely to be heard by the Court provides no additional benefit to New Zealand.
116. If the objective is to place some form of “check” on the New Zealand members of the Supreme Court, or to add in some general sense to the Court’s “wisdom”, or to maintain confidence in the Court, the group does not accept that the presence of one overseas judge, or even two, on the Court for particular cases would achieve that. Any overseas judge is likely to sit on the Supreme Court irregularly. The New Zealand judges will sit permanently. In those circumstances it is difficult to see how overseas judges could have a significant impact on the decisions of the Court, and therefore how their presence could provide significant reassurance or confidence. As is noted below, there are other ways of taking advantage of overseas experience.

117. Nor does the group believe that the presence of overseas judges is justifiable on the ground that New Zealand does not itself have sufficient resources to maintain final and intermediate courts of appeal. The group considers that there are sufficient suitably-qualified people available, although it accepts that that is a matter of judgment.
118. Accordingly, the group does not believe there is any significant advantage to having overseas judges on the Court. In addition, there are practical difficulties. The Privy Council and the Hong Kong Court of Final Appeal are currently able to utilise overseas judges only for short periods of time (three to four weeks). It is impractical for countries to allow sitting judges to sit on courts in other jurisdictions for extended periods, and it is unlikely that suitable retired overseas judges would be available for extended periods. The presence of overseas judges for short periods would have a negative impact on the ability of the Supreme Court to develop collegiality, and such a frequent turnover on the bench would discourage reflective judicial decision-making.
119. In relation to Māori concerns regarding a lack of judicial knowledge on indigenous issues and therefore the need to augment the bench with experienced overseas judges, the group considers that the remedy lies in an appropriate appointment process, which would ensure the availability of local judges on the bench of the Supreme Court who had an appreciation of tikanga Māori. In addition, it is the responsibility of counsel, when presenting a case before the Court, to ensure that the judges are sufficiently informed on overseas jurisprudence concerning indigenous issues.
120. On balance, the Advisory Group was not convinced that there were any significant advantages in the appointment of overseas judges to the Supreme Court. By contrast, the group was convinced that there were significant disadvantages, in particular the practical difficulties of selecting judges from overseas as well as the negative impact such selection would have on the collegiality and decision-making ability of the Court.
121. The Advisory Group recommends against the appointment of overseas judges and considers that arguments regarding the quality of the bench and other such concerns could be addressed by a reformed appointment process.

Summary:

Given the legal talent available in New Zealand, the importance of collegiality in the Supreme Court, the practical difficulties in both selecting overseas judges and operating a court involving such judges, the difficulties in expecting overseas judges to have any significant impact on the Court's decisions and the availability of other mechanisms for taking advantage of the experience of overseas jurisdictions, it is not desirable that judges be appointed from overseas jurisdictions.

Overseas perspectives will be available to the Court by counsel introducing relevant material from comparable overseas jurisdictions in proceedings.

The group considers that it is important in this context that there be a robust, inclusive and transparent judicial appointment process to ensure that confidence in the Supreme Court is maintained. As a whole, the Supreme Court bench should reflect an understanding of New Zealand society and its special features, including the fundamental importance of the Treaty of Waitangi and tikanga Māori.

Specialist or Expert Judges or Advisors

122. The group saw no need for the use of temporary specialist judges to assist the bench in particular classes of cases. Sufficient assistance would be provided by the litigants and judgments of the lower courts. In addition, the current provision for technical advisors for the Court of Appeal should be applied to the Supreme Court.¹⁶ The opportunity for interveners and the appointment of an amicus in particular cases would also be available.

Summary:

The Court should consist of five permanent judges. There is no need to provide for temporary specialist judges to assist the bench.

The current provision for technical advisors for the Court of Appeal should be applied to the Supreme Court. The opportunity for interveners and the appointment of an amicus in particular cases would also be available.

Judicial Appointments

123. The Supreme Court will be expected to deliver high-quality decisions. Those who sit as judges in this court should meet the highest standards in relation to legal ability and personal character. In addition, they will need an appreciation of the social, commercial and political contexts in which legal issues arise.

¹⁶ Sections 99B-D of the Judicature Act 1908.

124. It is important to note that the issue of membership of the Court cannot be viewed in isolation but must be considered against the background of the concept of judicial independence, which is fundamental to the operation of New Zealand's constitutional structure.
125. As noted earlier, judicial independence is central to maintaining the proper balance between Parliament, the executive power of the Government and the delivery of justice through the courts. It ensures public confidence in the integrity of the justice system by requiring that judges be able to decide matters according to law, free from inappropriate pressures. It is therefore essential that the restructuring process does not erode this principle.
126. Judicial independence includes three crucial aspects: security of tenure, financial security and institutional security. As stated by the Canadian Judicial Council in *A Place Apart: Judicial Independence and Accountability in Canada* (1995) at p 2:
- “If judges do not have security of tenure, then there is a danger they will tailor their rulings to please the person who can terminate their position. If judges do not have financial security, then they may be tempted to accept favours or the promise of future favours from those who have an interest in the litigation. And if judges do not have a measure of institutional independence over at least the exercise of the judicial function, then the government can, for example, control which judges will hear which cases.”
127. In addition to these three aspects, the need to maintain judicial independence is reflected in the judicial appointment process. It is important that appointments be merit-based. Weak appointments lower the status of the judiciary in the eyes of the public and create a climate for interference with their independence. The appointment of judges who are not highly skilled can undermine public confidence in the administration of justice.
128. The Advisory Group considered three issues:
- 128.1 The appointment process;
 - 128.2 Judicial skills; and
 - 128.3 Retirement age.
129. Each of these issues will be considered in turn.
130. Appointment Process:
- 130.1 The appointment process is important as overtly political appointments may cause public concern over the independence and impartiality of the bench.
 - 130.2 Currently, appointments to the High Court are made by the Governor-General, following a recommendation by the Attorney-General. Consultation with various interest groups is conducted on an informal basis.

- 130.3 The Advisory Group recommends that further work should be undertaken to increase the transparency and robustness of the current judicial appointment process for all courts. The group is aware that some work is currently being undertaken on this matter.
- 130.4 The Advisory Group observes that it is important for the Supreme Court to better reflect the diversity of New Zealand society than the Privy Council. The appointment process is critical to that objective. Maintenance of the New Zealand tradition of non-political judicial appointments is important for all courts, and particularly in relation to the Supreme Court. In addition, there is a particular need for a transparent appointment process for the initial appointments to the Supreme Court as all the judges, other than the Chief Justice, will be appointed at the same time.
- 130.5 The Advisory Group recommends that for all judicial appointments, including those to the Supreme Court, there should be effective consultation with the judiciary, the legal profession, Māori, women lawyers and other relevant groups.
- 130.6 In addition, the group supports the need for clear criteria to be applied when considering appointments.
- 130.7 The group considers that appointments to the Supreme Court could be made from either within or outside the judiciary. That is, the holding of judicial office should not be a prerequisite for appointment. However, as with other final courts, most appointees are likely to have significant judicial experience.
- 130.8 The Advisory Group notes the need for the legal profession to foster and encourage young lawyers, and in particular young Māori lawyers and those of minority ethnic groups, in their professional development, to ensure that the pool of available judicial talent broadens to draw on all sectors of New Zealand society.

Summary:

The issue of judicial appointments is fundamental. The group considers that all judges should be appointed by a transparent process, with clear criteria, and adequate and appropriate consultation.

Further work should be undertaken on the judicial appointment process to ensure a more transparent and inclusive process.

131. Judicial skills:

- 131.1 If the Supreme Court is to have a broad responsibility for clarification and development of the law, it is necessary to ensure that people of the highest calibre are appointed to the Court and that they have available to them the skills and material necessary to enable them to make appropriate decisions.

- 131.2 As noted above, various submissions stated that the appointment of judges should be based on merit, which includes a sensitivity to New Zealand's social issues. This criterion was said to be necessary to ensure that the judiciary comprehends the plurality of cultural, social and economic values in New Zealand society. However, there was also concern about the lack of women and Māori in the appellate structure.
- 131.3 The Advisory Group agrees that the starting point for appointment is legal qualifications and experience. Individual judicial appointments to the Supreme Court should be based on excellent legal skills, legal acumen and personal integrity.
- 131.4 The group notes that the Supreme Court, as a whole, should also reflect society's diversity. The overall composition of the bench should contain a wide range of skills, qualities and experiences, such as knowledge of tikanga Māori, social awareness, understanding of gender issues and a willingness to consider new ideas. Consideration should also be given to the range of ages of the judges on the Court.
- 131.5 The focus of appointment should remain on the composition of the bench as a whole. That is similar to the approach set out in legislation for appointment to the Human Rights Commission. It is not necessary for one individual judge to fulfil all of the criteria. Rather, the bench as a whole should have a range of experiences which reflect the diversity of New Zealand society as broadly as possible. However, the group observes that in order to maintain a degree of flexibility, the criteria should not be contained in legislation.
- 131.6 The Advisory Group recommends that a convention should be developed to ensure that certain skills are always represented on the bench. Most importantly, the group recommends that knowledge of tikanga Māori should be reflected on the bench. The group observes that such a practice is common overseas. For example, in England there is a convention that two Scottish judges be appointed to the House of Lords. In addition, in Canadian legislation, three judges from Quebec must be appointed to the bench of the Supreme Court.
- 131.7 Finally, the Advisory Group notes the importance of continuing judicial access to skills-based training during their tenure in office.

Summary:

Individual judicial appointments to the Supreme Court should be based on excellent legal skills, legal acumen, and personal integrity. The Court, as a whole, should better reflect the diversity of New Zealand society than the Privy Council. Accordingly, the composition of the Court should be such as to ensure a wide range of skills, qualities and experiences, such as sound knowledge of tikanga Māori, social awareness, understanding of gender issues and willingness to consider new ideas. Consideration will have to be given to the age range of judges on the Court.

There should be a convention that at least one member of the Court should be well-versed in tikanga Māori, making it likely that at least one member of the Court will be of Māori ancestry.

132. Retirement age:

- 132.1 The final issue arising from judicial appointments was whether Supreme Court judges should retire on reaching the current judicial retiring age of 68 years.
- 132.2 Some members of the Advisory Group noted that by increasing the age of retirement, either generally or for Supreme Court Judges, the available pool of judicial talent in New Zealand would increase.
- 132.3 However, the majority of the group support a younger age range on the bench and the importance of appointees having an attitude of mind which is receptive to new ideas.
- 132.4 The group, with one exception, concludes that judges of the Supreme Court should be subject to the same retirement age as judges of other courts.
- 132.5 However, two issues arose out of this discussion on which the group expresses no view but which should be investigated further. These are:
 - 132.5.1 Should judges of the Supreme Court be appointed for a fixed term on the court (say, 12 years subject only to reaching the compulsory retirement age)?
 - 132.5.2 Should the current retiring age of 68 be raised generally?
- 132.6 As to the fixed term option, the group expresses no view but simply notes both the advantages and disadvantages. Fixed term appointments permit a range of ages on the bench and prevent the possibility of lengthy tenure when younger judges are appointed. Given the need to ensure judicial independence, there could be no reappointments if a fixed term were to be introduced. However, a difficulty with fixed term appointments is what happens when the term ends. Issues such as security of tenure and independence may accordingly arise.

Summary:

The group, with one exception, considers that judges of the Supreme Court should, in principle, be subject to the same retirement age as judges of other courts.

Two issues arose out of the group's discussion concerning length of tenure which, although not endorsed by the group, warrant further consideration. These are:

- a) Should judges of the Supreme Court be appointed for a fixed term on the Court (say, 12 years, unless they first reach the retirement age)?
- b) Should the current judicial retiring age of 68 be raised generally?

Procedure of the Supreme Court

General Appeal

133. Should appeals to the Supreme Court be confined to questions of law or should a general appeal be available (which would allow the possibility of an appeal on issues of fact)?¹⁷
134. The Advisory Group agrees that a general appeal should be available in the Supreme Court. This would allow exceptional cases to be addressed at the highest level. However, in reality, where a party has been unsuccessful on questions of fact before two courts, it is unlikely that the Supreme Court would give leave to appeal to enable a third assessment of the facts.
135. The group left open the possibility that limits on appeals in existing statutes should be amended. The group recommends further analysis of these statutory provisions to determine whether exceptions to a general appeal should remain.

Summary:

Given that the Supreme Court will have an error correction role, appeals to the Court should, in principle, be available on issues of fact as well as law. Accordingly, there should be a general appeal, but restrictions of the type applied in the Court of Appeal are likely to apply.

Appeals by Leave or by Right

136. The role of the Supreme Court also impacts on the question whether an appellant's access to the courts should be by leave or by right.
137. As noted in the Australian Institute of Judicial Administration's publication, *Appellate Courts and the Management of Appeals in Australia* (March 2001), there are various relevant considerations:
- 137.1 For litigants:
- 137.1.1 Appeals are the only means whereby judicial decisions can be reviewed and corrected;
- 137.1.2 An appeal will prolong the litigation, delay determination of the issues and impede the successful party's ability to take the fruits of their success; and
- 137.1.3 Appeals are expensive. It is unfair to put litigants to that expense unless the circumstances warrant it.

¹⁷ See Appendix D for appeal rights in overseas jurisdictions.

137.2 In the public interest:

137.2.1 Correction of errors promotes justice in individual cases;

137.2.2 Public confidence in the justice system is maintained if there are mechanisms to correct errors;

137.2.3 Appeals are necessary for the clarification and development of law; and

137.2.4 Appellate courts are expensive to maintain, in terms of judicial salaries, court staff, public buildings, etc.

138. Where the principal concern of the Supreme Court is clarification and development of the law, it can be argued that there should be a right of appeal only to the intermediate appellate court, and review by the Supreme Court should be by leave. According to R Martineau in *Fundamentals of Modern Appellate Advocacy* at p 23:

“To give a right of appeal from the intermediate appellate court to the Supreme Court is to do nothing more than provide a double appeal and compound rather than alleviate the problems that resulted in the creation of the intermediate court.”

139. In addition, a requirement for leave to appeal allows an appellate court to control both the volume and content of appeals. At the same time, however, there is a burden on the court in hearing applications for leave.

140. In overseas jurisdictions the majority of final appeal courts hear appeals by leave.¹⁸

141. Currently in New Zealand, appeals to the Privy Council may be either by right or by leave. In all civil disputes there is a right of further appeal from the Court of Appeal to the Privy Council where the matter in dispute amounts to NZ\$5,000 or more. In addition, the Court of Appeal may in its discretion grant leave to appeal to the Privy Council in cases where the question on appeal does not meet that monetary threshold but is one which “by reason of its great general or public importance, or otherwise” ought to go to the Privy Council. Special leave to appeal may also be sought directly from the Privy Council in its discretion in situations not otherwise provided for.¹⁹

142. In criminal proceedings, special leave to appeal against Court of Appeal decisions must be sought directly from the Privy Council. This has been granted rarely over the years.

143. The Advisory Group believes that, in accordance with overseas practice, access to the highest court should be by leave only. A general leave requirement would enable the Supreme Court to regulate its workload and prevent unmeritorious appeals. Leave would be required for all civil and criminal appeals and would be determined by the Supreme Court itself.

¹⁸ Refer to Appendix D for overseas jurisdictions.

¹⁹ Refer to Rule 2(a) and (b). The NZ (Appeals to the Privy Council) Order 1910 (Imp).

144. A second issue is “leap-frogging”, that is, whether an intermediate stage of appeal could be bypassed so as to give immediate access to the Supreme Court. This raises issues of principle. For example:
- 144.1 Does the opportunity for “leap-frogging” unduly diminish the role of the bypassed appellate court?
 - 144.2 Which intermediate appellate court would be bypassed? and
 - 144.3 Would the process be satisfactory from the perspective of the Supreme Court?
145. It also raises issues of practice. For example:
- 145.1 On what basis would cases be identified for “leap-frogging”?
146. The Advisory Group considers that:
- 146.1 “Leap-frogging” should occur only on the application of a party to the litigation. This recognises party autonomy; and
 - 146.2 The only court with the power to give leave to leap-frog should be the Supreme Court. This is because it is that court which will be best placed to determine whether it needs the assistance of a judgment from the court below and to assess whether the issues raised in the particular case are suitable for its adjudication. It is likely that the Court would grant leave rarely.

Criteria for Leave

147. The majority of the Advisory Group recommends that criteria for leave should be set out in legislation, albeit on a non-exclusive basis. Over time, the Supreme Court would develop principles which set out the Court’s approach to the statutory criteria.
148. The majority considers that it is important that the criteria be set out in legislation for two reasons:
- 148.1 The statement of criteria will provide a public affirmation of the importance of the matters to which they refer; and
 - 148.2 The criteria will provide useful guidance to the Court and will help to define its role.

The majority recognise, however, that it is important that the criteria not be framed in such a way as to unduly limit the scope of the Court’s work.

149. The group considered a range of criteria and expressed a preference for the Australian and Canadian leave provisions, which provide for matters of public importance, miscarriage of justice or conflict between lower courts.
150. However, the Advisory Group also noted criticism in Canada and the United States of America that their leave provisions favoured constitutional issues at the expense of commercial cases.

151. Concern was expressed within the Advisory Group that as a result of removing the current civil appeal right to the Privy Council (where matters in dispute amount to \$5,000 or more), few commercial cases might be heard in the Supreme Court. The Advisory Group agrees that removal of the civil appeal right could be ameliorated by the addition of a leave criterion which expressly recognises cases of commercial significance, regardless of the amount of money in dispute.
152. In addition, the Advisory Group recommends the inclusion of the Treaty of Waitangi within the legislative criteria. Such inclusion would give explicit recognition to the importance of the Treaty in contemporary New Zealand society.
153. One member of the group opposes the inclusion of criteria in legislation, preferring to minimise the relevant statutory provisions and to allow the Court to develop its own criteria, perhaps with the assistance of the discussion in this Report.

Summary:

All appeals to the Supreme Court should be by leave of that court only.

Second appeals on issues of fact are unlikely to be granted leave where there have been concurrent findings of fact in lower level courts.

In exceptional cases, the Supreme Court may grant parties leave to appeal to enable them to leapfrog the intermediate appellate process. However, an intermediate appellate court should not have the right to refer a matter directly to the Supreme Court.

All but one member of the group consider that the main criteria for leave should be set out in legislation.

The criteria for leave should include:

- Whether the proceedings raise a significant issue involving the Treaty of Waitangi or tikanga Māori; or
- Whether the proceedings involve a matter of general or public importance; or
- Whether the proceedings involve a matter of commercial significance; or
- The need to resolve differences of opinion between different courts, or within one court, as to the state of the law; or
- Whether the proceedings raise the risk of a substantial miscarriage of justice; or
- Where the circumstances are such that in the interests of justice, the Court should consider the matter.

Nature of Appeal

154. The role of the appellate court impacts on the standard of appellate review. There are two alternative standards by which appellate courts commonly review the decisions of lower courts. Each involves a different degree of deference to the decision of the court appealed from. They are:
- 154.1 **Strict appeal:** the appellate court decides whether the judgment under appeal is correct on the basis of the same material as was before the lower court. The appellate court cannot receive new evidence;
 - 154.2 **Rehearing:** the appellate court hears the matter on the basis of the evidence from the court below, but is entitled to receive further evidence and determines the legal rights and obligations of the parties as at date of rehearing.
155. No final appellate court hears the matter afresh, that is, rehears all of the evidence.
156. In Australia the High Court treats appeals as strict appeals and has held that new evidence is not admissible. This is consistent with the High Court's focus on the development of the law. The Australian state and territory appellate courts tend to allow for appeals by way of rehearing. This permits the admission of new evidence and broadens the courts' ability to correct errors.
157. The standard of review to be adopted depends on the primary role of the Supreme Court and the basis on which appeals can be brought to that court. For example, if the primary role is law clarification and development and the basis for appeal is limited to questions of law, it might be argued that the standard of review should be that of strict appeal. It might also be argued, however, that in that situation the Supreme Court should be entitled, like the lower courts, to allow interveners to be heard and to receive evidence going to any relevant policy or similar consideration.
158. The Advisory Group notes that the Court of Appeal currently conducts appeals by way of rehearing. Such appeals are also consistent with the Supreme Court's jurisdiction to hear a general appeal on questions of fact and law. As New Zealand's highest court, the Supreme Court will have the power to remedy serious miscarriages of justice whether they arise from factual or legal error. In order to do this, the Court should conduct appeals by way of rehearing, on a similar basis to the current practice in the Court of Appeal.

Summary:

Generally, the Supreme Court should hear matters on the basis of the evidence from the court below, but may hear further evidence at its discretion, on a similar basis to the current Court of Appeal.

Original Jurisdiction

159. The Court of Appeal has, rarely, been given limited original jurisdiction by statute, for example, s 17 of the National Development Act 1979 (now repealed).

160. As the statute will provide that all matters will require leave before they can be heard in the Supreme Court, the Advisory Group sees no need for the Supreme Court to have original jurisdiction. However, on appeal, the Court should have the same powers as to relief as the court of first instance whose decision is ultimately under appeal.

Summary:

As the statute would provide for the granting of leave, the Supreme Court should not have original jurisdiction.

On appeal, the Court should have the same powers as to relief as the relevant court of first instance.

Advisory Opinions or References

161. Should the Supreme Court have jurisdiction to issue advisory opinions or to deal with references? In Canada, the Supreme Court may provide advisory opinions on questions referred directly to the Court by the Governor in Council. This reference procedure has been primarily used for constitutional questions. In Australia, the High Court has refused to issue advisory opinions on the basis that it is a non-judicial function.
162. In 1912, the reference jurisdiction of the Canadian Supreme Court was challenged in the Privy Council.²⁰ The Privy Council upheld the jurisdiction, finding that the function was not judicial but merely advisory, with no more effect than the opinions of the law officers. As a consequence, the Court's answer on reference questions was non-binding.
163. The ability to provide answers to reference questions means that the Canadian Supreme Court exercises original rather than appellate jurisdiction. As noted in Hogg, P, *Constitutional Law of Canada*,²¹ one of the difficulties of the reference procedure is that the Court is often presented with a relatively abstract question divorced from the factual setting which would be present in a specific case. It has been a common complaint that some of the opinions rendered in references have propounded doctrine that was too general and abstract to provide a satisfactory rule.
164. The Advisory Group notes that unlike the executive and legislative branches of government, the courts cannot initiate an issue. Rather, they must respond to cases which are brought before them.
165. Accordingly, the Advisory Group considers it is not appropriate for the Supreme Court to have jurisdiction to issue advisory opinions or consider reference questions.

²⁰ See *Reference Appeal* [1912] AC 571.

²¹ 4ed, 1997, Carswell at 228.

Summary:

The Supreme Court should only consider matters which are raised in cases before it.

There should be no jurisdiction to give advisory opinions or consider reference questions.

Location

166. The Advisory Group supports establishing the Supreme Court in Wellington. This both reflects the symbolic importance of the Court, by situating it in the capital city, close to the centre of government, and acknowledges the practicality of having the Court near to government entities (which are likely parties in a significant portion of the Court's business).
167. The Advisory Group expressed a preference for the Supreme Court to be located in the former High Court premises in Ballance Street, so long as working conditions were not compromised.
168. The Advisory Group recommends that careful consideration be given to the layout for the Supreme Court, for example, along the lines of the current layout of the Privy Council. That is, judges and counsel sit on a single level with the judges seated in a semi-circle. This would facilitate discussion between counsel and the bench. However, issues concerning security and adequacy of working space for judges and counsel would require further examination. In addition, the layout should reflect that it is a New Zealand court.

Summary:

The Supreme Court should be located in Wellington.

In terms of accommodation, the principal consideration should be a proper work environment. Subject to that, there is a preference for the Court to be located in the former High Court premises in Ballance Street.

Consideration could be given to a different physical layout for the Supreme Court, for example, along the lines of the current layout of the Privy Council. The layout should reflect that it is a New Zealand court.

THE COURT OF APPEAL

The Composition and Location of the Intermediate Court of Appeal

Workload of the Current Court of Appeal

169. Situating the Supreme Court in New Zealand may increase the number of appeals throughout the judicial system. This will impact on the Court of Appeal.
170. In 2001, the Court of Appeal determined 593 appeals in the following divisions:
- 170.1 Five-judge bench: 48 (30 civil and 18 criminal) appeals;
 - 170.2 Three-judge bench: 150 civil appeals (86 by permanent court and 64 by the Civil Appeals Division (CID));
 - 170.3 Three-judge bench: 309 criminal appeals (24 by permanent court and 285 by the Criminal Appeals Division (CAD)); and
 - 170.4 86 criminal abandonments, etc.²²
171. The Court of Appeal sits in regular monthly cycles: during the first two weeks the Court sits as a five-judge bench, then for the remainder of the month, the Court sits as a three-judge court either with permanent members or in the criminal and civil divisions (which comprise High Court judges sitting with permanent judges).
172. In order to manage this workload, the total judicial resources employed for the Court of Appeal have been equivalent to a little under ten judges (seven permanent judges, the Chief Justice and 2.5 High Court judges).
173. Several issues arise from the current workload of the Court of Appeal:
- 173.1 Whether the Court should sit in benches of three judges or should retain the ability to sit as a bench of five;
 - 173.2 Whether the Court should continue to use High Court judges on a temporary basis; and
 - 173.3 Where the Court should be located.

Bench Size

174. As noted above, it is customary for the number of judges dealing with a matter to increase the higher one goes in the judicial hierarchy.
175. In Australia, an appeal from a decision of a trial judge will usually be heard by a bench of three in an intermediate appellate court and an appeal from that decision by a bench of five or seven in the High Court.

²² Where the appellant has notified the Court that the appeal is abandoned. The notice is read out in open court.

176. Intermediate appellate courts may sit with more than three judges in special circumstances, such as to address apparent conflicts between earlier decisions of the Court.²³
177. In New Zealand, the Court of Appeal can sit in divisions of three judges. However, it may also sit as a full court of five to seven judges, to determine:
- “(a) Cases that are considered, in accordance with the procedure adopted under section 58E, to be of sufficient significance to warrant the consideration of a Full Court;
 - (b) Any proceeding, case, or question referred under section 58(6) for hearing and determination by a Full Court;²⁴
 - (c) Any appeal from a decision of the Courts Martial Appeal Court under section 10 of the Courts Martial Appeals Act 1953.”²⁵
178. In those situations, the number of judges on the intermediate court may equal or surpass those on the Privy Council, which normally sits as a bench of five judges.
179. However, the bulk of appellate work is currently undertaken by divisions of the Court, including the Criminal and Civil Appeal divisions. In 2001, the full court of five judges or more heard 48 cases. The divisions determined 459 appeals.
180. This raises the question whether the Court of Appeal should be limited to a bench of three judges at all times. Overseas examples and New Zealand’s current practice allows a degree of flexibility for cases with special circumstances. However, the use of a three-judge bench allows more cases to be heard in the intermediate appellate court and is, arguably, a better use of limited judicial resources. It enables the Court to run concurrent appeal benches more frequently.
181. The Advisory Group notes that the current workload of the Court of Appeal could be managed by three divisions of the Court of Appeal, sitting concurrently for three weeks per month, with permanent judges also sitting as required in a fourth week.
182. The group wishes to retain a strong Court of Appeal as it would continue to be, in practical terms, New Zealand’s primary appeal court. However, it considers that there would be less need for the Court to sit as a five-judge bench.
183. Accordingly, the Advisory Group recommends that although the Court of Appeal should retain the ability to sit as a bench of five judges, it should rarely do so and in the majority of cases, it should sit as a bench of three.
184. The Advisory Group also recommends that the President of the Court of Appeal be the head of bench.

²³ Opeskin, *Appellate Courts and the Management of Appeals in Australia*, 2001.

²⁴ Under s 58(6), a division of the Court of Appeal may refer any proceeding, state any case or reserve any question for consideration by the full Court.

²⁵ Section 58D(4) of the Judicature Act 1908.

Temporary Use of High Court Judges

185. As it is the immediate appellate courts which bear the brunt of appeals, they have the most to gain from the appointment of additional judges of appeal. In general terms, the greater the number of panels capable of sitting simultaneously, the greater the court's capacity to dispose of appeals.
186. Prior to 1957, the New Zealand appellate structure was staffed entirely by Supreme (now High) Court judges. At that time, the lack of a Court of Appeal with permanent members gave rise to a number of difficulties:
- 186.1 Judges who were regularly performing both trial and appeal duties found that there was insufficient time allowed for either, resulting in delays in the delivery of judgments; and
 - 186.2 Judges doing appeal work were required to undertake circuit trial work, making it difficult for the judges who heard particular appeals to discuss the cases.
187. The 1957 legislation established a court of three permanent judges, together with the Chief Justice as an ex officio member. Provision was made for temporary judges from the Supreme (now High) Court to sit on the Court of Appeal when necessary.
188. The legislation now provides expressly for criminal and civil divisions of the Court of Appeal to include High Court judges, enabling a division to sit with one permanent Court of Appeal member and two High Court judges or two judges of the Court of Appeal and one judge of the High Court. High Court judges are nominated by the Chief Justice, after consulting with the President of the Court of Appeal, either for a specific case or cases, or for every case to be heard by the Court of Appeal during a specified period not exceeding three months. In practice, each such divisional court is constituted for a week's sitting.
189. The use of first-instance trial judges as temporary members of an intermediate appellate court is not unusual and occurs in both Australia and Hong Kong.²⁶
190. This raises an issue whether the Court of Appeal should consist of a permanent bench only or allow for the rotation of High Court judges to assist the permanent Court.

²⁶ See Appendix D on overseas jurisdictions.

191. The advantages of utilising High Court judges include:
- 191.1 Ensuring that judges currently experienced in trial work are available to bring that experience to appellate work;
 - 191.2 Reducing the costs of maintaining the permanent members of the Court of Appeal;
 - 191.3 Assisting in the recruitment and retention of High Court judges, as it adds another dimension to their work; and
 - 191.4 Providing High Court judges with appellate experience and an overview of High Court proceedings.
192. The disadvantages of utilising High Court judges include:
- 192.1 A “B-team” perception;
 - 192.2 Reduced collegiality, making it more difficult for the Court to develop a consistent approach; and
 - 192.3 A perception of lack of independence where judges are sitting on appeals from their colleagues.
193. In keeping with the recommendation to retain a strong intermediate Court of Appeal, the Advisory Group agrees that the Court should retain a base of permanent judicial members, rather than simply become a division of the High Court.
194. Permanent members can be expected to provide consistency and overall collegiality. However, the issue of collegiality may not be as important to an intermediate appeal court as it is to the Supreme Court, given the former court’s likely focus on error correction rather than law development. There are also advantages in having currently-experienced trial judges on the bench of an intermediate appeal court.
195. The Advisory Group agrees that the Court of Appeal should sit in divisions of three judges and recommends the continued inclusion of High Court judges as members of CID and CAD.
196. As the Court would no longer sit regularly as a bench of five judges, there should be no need to provide for seven permanent members of the Court. The Advisory Group considers that a reduction in the number of permanent members to six judges should be possible.

Location

197. The Advisory Group also considered the location of the appellate court. As a substantial amount of litigation now originates in the Auckland area, the Advisory Group suggests that the intermediate Court of Appeal consider increasing the circuit work it currently undertakes.
198. Given that the intermediate appellate court would rarely sit as a bench of five judges, more panels could be constituted simultaneously and the scope for circuits should increase.

199. However, the Advisory Group considers that the Court should maintain a central registry in Wellington, due to the proximity of central government, and for reasons of collegiality and focus.

Summary:

The Court of Appeal should continue to have permanent members. Although it should retain the ability to sit as a court of five, it should generally sit as a court of three and rarely as a court of five. It should no longer sit as a bench of seven judges to hear cases.

The President of the Court of Appeal will be the head of bench.

The Criminal and Civil Appeals Divisions of the Court of Appeal should continue to operate with the participation of High Court judges.

It should be possible for the number of permanent members of the Court of Appeal to be reduced from seven to six given that there will be a significant reduction in the number of five-judge courts, with the Court augmented by High Court judges as presently.

The Court of Appeal should also be based in Wellington, operating a single registry, but with the ability to sit in other centres on a regular basis.

Appendix A**Membership of the Ministerial Advisory Group**

- Chairperson: Terence Arnold QC (Solicitor-General)
- Members: Richard Clarke (Chairperson of Legislation Advisory Committee);
 David Collins QC (President, Wellington District Law Society);
 Christine Grice (President, New Zealand Law Society);
 Stuart Grieve QC (President, New Zealand Bar Association);
 Cheryl Gwyn (Deputy Secretary for Public Law, Ministry of Justice);
 Jack Hodder (Partner, Chapman Tripp Sheffield Young);
 Shane Jones (Ngāi Takoto, Te Aupōuri, Chairperson, Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission);
 Dr Ngatata Love (Te Atiawa, member of the Law Commission and Professor of Māori Business at Victoria University of Wellington);
 Adrian More (President, Otago District Law Society);
 Joanne Morris (Member of the Waitangi Tribunal and member of the Board of the Legal Services Agency);
 Hon Justice Bruce Robertson (President of the Law Commission);
 Maui Solomon (Moriōri, Kati Huirapa (Ngāi Tahu), Solicitor and member of Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission); and
 Archie Taiaroa (Te Atihaunui a Paparangi, Ngāti Tū Wharetoa, Ngāti Apa, Ngāti Maru (Taranaki); Convenor, the Māori Congress and member of Te Ohu Kai Moana – Treaty of Waitangi Fisheries Commission).
- Alternate
 Members: Robert Dobson QC (Barrister)
 Jacqui Te Kani (President, Māori Women’s Welfare League)
- Special
 Advisor: Rt Hon Sir Ivor Richardson (President, Court of Appeal)
- Observer: Lorraine Skiffington (Office of the Attorney-General)
- Officials: Patrick McCabe (Senior Policy Advisor, Ministry of Justice)
 Leigh Tauakipulu (Legal Advisor, Ministry of Justice)
 Tania Warburton (Assistant Crown Counsel, Crown Law Office)

Appendix B

The Advisory Group: Court of Final Appeal

Terms of Reference

- 1) The purpose and role of the Final Appeal Court in New Zealand.
- 2) How the Court will reflect te ao Māori in its establishment, structure and processes.
- 3) The jurisdiction of the Court.
- 4) The composition and number of judges appointed to the Court, including whether judges from different jurisdictions should be appointed.
- 5) The role and responsibilities of the Head of the Final Appeal Court.
- 6) Where the Court should be located.
- 7) Any other matter that is relevant to advise on the model for the Final Appeal Court.

Once the basic details of the model are agreed by the Advisory Group, an Officials Group will advise on the costings associated with the establishment and operation of the Court.

The Advisory Group is required to report to the Attorney-General by 28 February 2002. It would be useful if the final costings paper could be ready around the same time as the Advisory Group report.

Appendix C

Overview of Appeals from New Zealand Courts

District Court

1. In civil proceedings, there is an initial appeal to the High Court. Generally an appeal may be taken to the Court of Appeal from a determination of the High Court on appeal from a District Court, but only with leave of the High Court or, if that is refused, of the Court of Appeal (s 67 of the Judicature Act 1908). The decision of the Court of Appeal is final.
2. In criminal proceedings, generally where a decision in a summary matter was made by a District Court judge, there is a first right of appeal to the High Court and then to the Court of Appeal. If a decision was made by a Community Magistrate, the first right of appeal is to a District Court judge and then to the High Court. In the latter case, the decision of the High Court is final. Where the appeal concerned a decision of a District Court judge, the decision of the Court of Appeal is final (s 114A, 114B, 115 and 144 of the Summary Proceedings Act 1957).
3. In criminal proceedings concerning indictable matters, generally an appeal from the District Court is heard directly in the Court of Appeal, bypassing the High Court (s 28D of the District Courts Act 1947 and Part 13 of the Crimes Act 1961).

High Court

4. Appeals from the High Court in civil matters are heard in the Court of Appeal, and then the Privy Council:
 - 4.1 As of right – civil proceedings where the matter in dispute is \$5,000 or more;
 - 4.2 At the discretion of the Court of Appeal – where the question involved is one which by reason of its great general or public importance or otherwise, ought to be submitted to the Privy Council.
5. In criminal proceedings, there is a right of appeal from the High Court against conviction and/or sentence. Special leave to appeal against Court of Appeal decisions must be sought directly from the Privy Council.

Family Law Proceedings

6. Decisions of the Family Court or District Court may be appealed to the High Court. There is then a limited appeal to the Court of Appeal under the following legislation:
 - 6.1 Guardianship Act 1968 (ss 31 and 31B)
 - 6.2 Protection of Personal and Property Rights Act 1988 (ss 82-85)
 - 6.3 Child Support Act 1991 (s 120)
 - 6.4 Family Proceedings Act 1980 (s 174)
 - 6.5 Domestic Violence Act 1995 (s 93)

6.6 Children, Young Persons, and Their Families Act 1989 (s 347).

7. Any decision of the Court of Appeal is final. However, s 15 of the Family Protection Act 1955, s 5A of the Law Reform (Testamentary Promises) Act 1949, and s 39 of the Matrimonial Property Act 1976²⁷ allow appeals from the Family Court or District Court to proceed to the High Court, Court of Appeal and Privy Council.

Environment Court

8. Any party to proceedings before the Environment Court may appeal to the High Court against its decision, report or recommendation on a point of law.
9. An appeal to the Court of Appeal may be brought against a decision of the High Court on a question of law with the leave of the High Court, or if that is refused, with the special leave of the Court of Appeal. Leave or special leave may be granted if in the Court's opinion the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.
10. The decision of the Court of Appeal is final (s 308 Resource Management Act 1991, applying s 144 Summary Proceedings Act 1957).

Employment Court

11. Section 214(1) of the Employment Relations Act 2000 allows an appeal to the Court of Appeal from the Employment Court on a point of law, provided it is not a decision on the construction of an individual or collective employment agreement. Section 214(7) provides that the decision of the Court of Appeal is final.

Courts Martial Appeal Court

12. Section 10 of the Courts Martial Appeals Act 1953 allows an appeal to the Court of Appeal from the Courts Martial Appeal Court on a question of law, provided that the appellant has obtained a certificate from the Attorney-General. The decision of the Court of Appeal is final.

Māori Appellate Court

13. Whether a right of appeal exists from the Māori Appellate Court to the Privy Council is not clear. There is however authority for the proposition that any appeal from the Māori Appellate Court goes directly to the Privy Council, bypassing the Court of Appeal. (See *In re the Will of Wi Matua* (1908) NZPCC 522 and also *De Morgan v Director-General Social Welfare* [1997] 3 NZLR 385.)

Youth Court

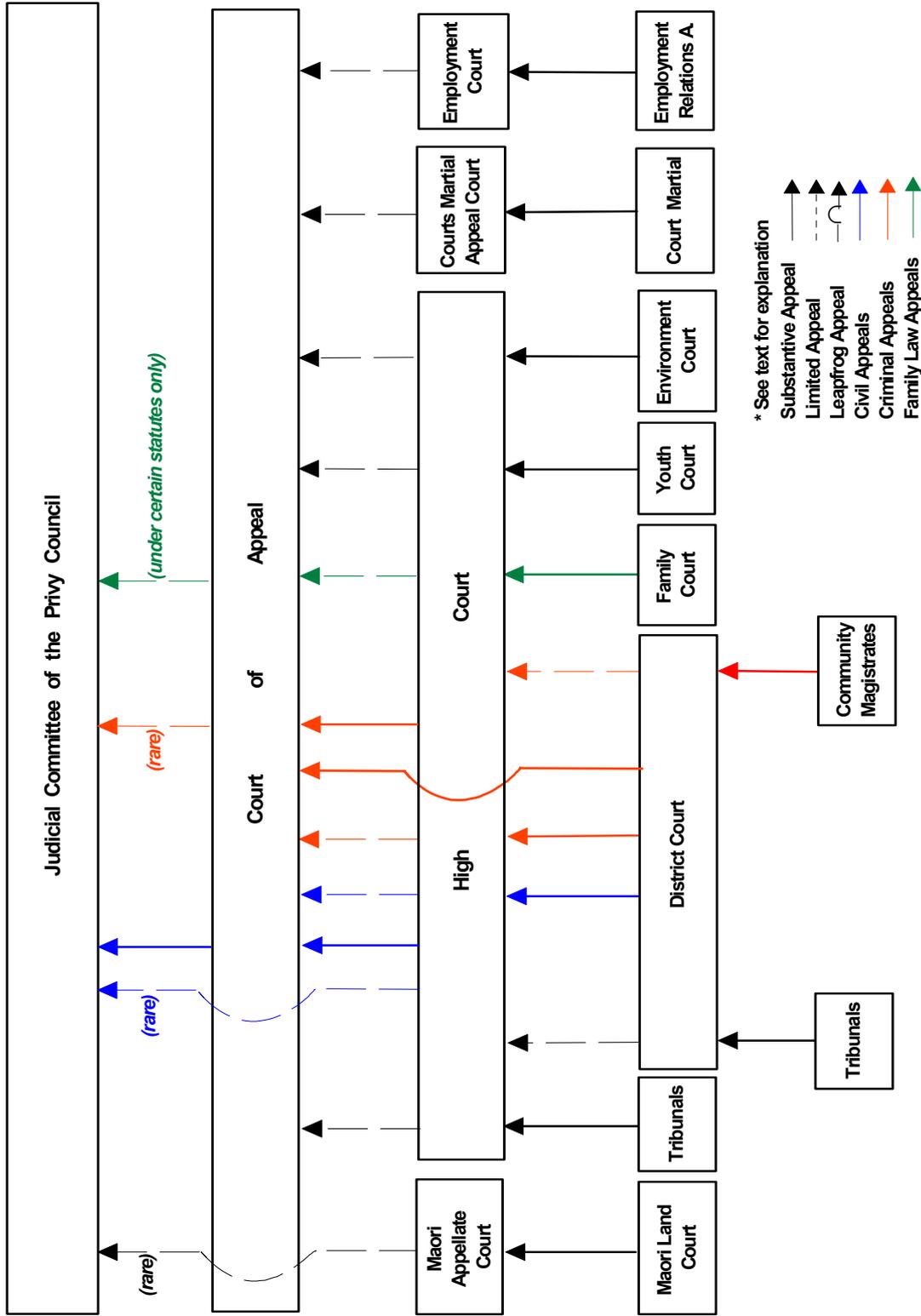
14. Appeals from the Youth Court are heard in the High Court. Leave is required for a further appeal to the Court of Appeal on a question of law (ss 351-355 of the Children, Young Persons, and Their Families Act 1989, and s 144 of the Summary Proceedings Act 1957). The decision of the Court of Appeal is final.

²⁷ Under s 39B of the new Property (Relationships) Act 1976 preserves access to the Court of Appeal and Privy Council.

Tribunals

15. A number of tribunal decisions can be appealed to the High Court, with a final limited appeal to the Court of Appeal. These include the Commerce Commission (ss 75(e), 91 and 97 of the Commerce Act 1986), the Film and Literature Board of Review (ss 58 and 70 of the Films, Videos, and Publications Classification Act 1993), the Human Rights Complaints Review Tribunal (ss 123 and 124 of the Human Rights Act 1993), the Legal Aid Review Panel (ss 59 and 60 of the Legal Services Act 2000), the Removal Review Authority (ss 115A and 116 of the Immigration Act 1987), the Securities Commission (s 26 of the Securities Act 1978 and s 144 of the Summary Proceedings Act 1957), and the Taxation Review Authorities (ss 26 and 28 of the Taxation Review Authorities Act 1994).
16. Other tribunal decisions can be appealed to the District Court, with limited appeal rights to the High Court and Court of Appeal. For example, the Tenancy Tribunal (ss 117-120 of the Residential Tenancies Act 1986).

OVERVIEW OF NEW ZEALAND APPELLATE STRUCTURE *



This chart does not reflect the present hierarchy of New Zealand Courts.

Appendix D

Overseas Jurisdictions

Canada

Jurisdiction

1. The Supreme Court hears appeals from federal and provincial courts in both civil and criminal matters. It may also hear and determine important questions of law or fact at first instance if they are referred by the Governor in Council for consideration. Such matters are the interpretation of the Constitution Acts, the use of the powers of Parliament and the constitutionality or interpretation of federal or provincial legislation.

Appeals by Leave or by Right

2. Most civil appeals to the Supreme Court require leave. The only exceptions are:
 - 2.1 An appeal from the decision of a provincial Court of Appeal on a “reference” by the provincial government; and
 - 2.2 An appeal from a decision of the Federal Court of Appeal in the case of controversy between Canada and a province or between two or more provinces.
3. In criminal cases, a right of appeal exists:
 - 3.1 On any question of law where a judge of the provincial Court of Appeal has dissented;
 - 3.2 Denial of habeas corpus; and
 - 3.3 Reversal of verdict of acquittal.

In all other criminal cases, leave is required to appeal. Although leave can be granted by a provincial Court of Appeal or the Federal Court of Appeal, it is sparingly used. The power to grant leave is exercised by the Supreme Court.

Composition of the Court

4. The Supreme Court of Canada consists of a Chief Justice and eight puisne judges (s 4(1) Supreme Court Act 1985). At least three of the judges are appointed from Quebec (s 6), the remaining judges are appointed from the other provinces. (Although not formally required, there is a convention that appointments from the remaining provinces will consist of three from Ontario, two from the Western provinces and one from the Atlantic provinces.) A judge must retire on attaining the age of 75 years.
5. Appointments to the Supreme Court are made by the Governor-General in Council. The federal Minister of Justice recommends candidates to Cabinet. There is no formal consultation process with the judiciary or legal profession. Other federal judicial appointments are subject to a formal appointment process. Nominations or applications are made to the Office of the Commissioner for Federal Judicial Affairs and independent advisory committees have been established in each province to

assess applications for appointment. The committees include representatives of the relevant law society, bar association, Chief Justice, provincial Attorney-General and federal Minister of Justice. Appointments are then made by the Governor-General on the advice of the federal Cabinet.

6. The composition of the bench for the Supreme Court for any appeal is within the discretion of the Chief Justice. Under the provisions of the Act, five judges constitute a quorum, however appeals can be heard by panels of seven or nine justices. Any four judges may constitute a quorum with the consent of both parties.
7. Where there is no quorum available, the Chief Justice may request the attendance of a judge from the Federal Court or Provincial Superior Court to sit on an appeal (however, since 1949, this provision has not been utilised).
8. The Chief Justice, or in his or her absence, the senior puisne judge, presides.
9. There is no provision for judges from specialist lower courts or for advisors to sit on the bench. However, in matters heard only by a bench of three judges, preference is given to Supreme Court judges from the province in which the dispute arose, especially in relation to Quebec.
10. Applications for leave are determined by three judges on the basis of written submissions. The Court considers approximately 500 applications for leave to appeal each year. In 2000, the Court considered 640 applications and heard 78 appeals.

Australia

Jurisdiction

11. The High Court is an ultimate general court of appeal for Australia in all matters, federal, constitutional or otherwise. Under s 73 of the Constitution, subject to regulations prescribed by Parliament, the High Court has jurisdiction to hear appeals from all judgments of any judge exercising original jurisdiction of the High Court or any Federal Court or any Supreme Court of any State or any other court of any State from which an appeal lies to the Queen in Council. The High Court has original jurisdiction to hear all matters arising under the Constitution and all trials of indictable offences against the laws of the Commonwealth, as well as jurisdiction to hear matters arising under any treaty, affecting a consul or representative from another country, where the Commonwealth is a party, between States or residents of different States and where remedies available for judicial review are sought against an officer of the Commonwealth.

Appeals by Leave or by Right

12. Where the High Court acts as a Supreme Court from a decision of an intermediate appellate court, the appeal can only be brought with special leave of the High Court. This applies to both civil and criminal appeals. The special leave requirement is bypassed where the Full Court of the Family Court grants a certificate declaring that an important question of law or public interest is involved. This power is exercised infrequently. Where the High Court exercises its original jurisdiction, a right of appeal exists to the appellate High Court.

Composition of the Court

13. The High Court of Australia consists of the Chief Justice and six other justices (s 5 High Court of Australia Act). A judge must retire on reaching the age of 70 years.
14. Under s 72 of the Commonwealth Constitution, Justices of the High Court and other federal courts are appointed by the Governor-General in Council. In practice, the Attorney-General recommends the appointment of a judge to Cabinet. The federal Attorney-General is required to consult with the Attorneys-General of the States when considering appointments. Informal consultation also takes place with the Chief Justice and relevant law organisations.
15. On appeals, a full court may be constituted by any two or more judges. Appeals usually concern decisions of the Supreme Courts of the states and territories, of the Federal Court of Australia and of the Family Court of Australia. In certain cases, where the High Court exercises its original jurisdiction, the matter is heard by a single judge. Cases concerning the interpretation of the constitution, where the court may be invited to depart from one of its previous decisions or where the court considers the principle of law involved to be one of major public importance, are normally determined by a full bench of all seven judges.
16. In 1999-2000 there were approximately 400 applications for leave and the Court decided 62 appeals.
17. There is no provision to allow judges from specialist lower courts or technical advisors to sit on the High Court bench. However, trial judges with particular expertise are occasionally appointed to the State Appellate Courts. For example, due to his commercial experience, Rogers J was temporarily appointed to the New South Wales Court of Appeal to hear an early case on the availability of the Mareva Injunction in Australia.

Temporary Judges

18. The Federal Court of Australia exercises both original and appellate jurisdiction. Panels of three or more permanent judges sit on appeals from decisions of a single Federal Court Judge. There is no division between appellate and first instance judges.
19. In Western Australia, South Australia, the Northern Territory and Tasmania, the Court of Appeal sits as a division of the Supreme Court. There are no permanent appellate judges. Trial judges rotate onto the appellate bench.
20. In Victoria, New South Wales and Queensland, the Court of Appeal sits as a division of the Supreme Court. Permanent judges are appointed to the Court of Appeal, but there is also provision to temporarily appoint trial judges to the appellate bench.
21. In 1997, the New South Wales Supreme Court reported that nine months of additional sitting time had been added to the capacity of the Court of Appeal through the temporary appointment of seven acting judges of appeal.
22. In addition, three interstate judges were appointed as acting judges of appeal of the NSW Supreme Court to hear a particular appeal where one of the parties was a permanent judge of that court.

United Kingdom

Jurisdiction

23. The House of Lords may hear civil appeals from any judgment of the Court of Appeal, decisions of the High Court (where the trial judge grants a certificate for this purpose and leave is granted by the House) and civil appeals from Scotland. In criminal matters, the House of Lords may hear appeals from decisions of the Criminal Division of the Court of Appeal, divisional Court of the Queen's Bench Division and Courts Martial Appeal Court.

Appeals by Leave or by Right

24. Leave to appeal to the House of Lords is required in all appeals, both civil and criminal. Applications are made to the Lower Court and, if refused, by petition to the House.

Composition of the Court

25. Appeals to the House of Lords are determined by not less than three of the following persons:
- 25.1 The Lord Chancellor of Great Britain;
 - 25.2 The Lords of Appeal in Ordinary; and
 - 25.3 Such Peers of Parliament who hold or have held high judicial offices.
26. The maximum number of Lords of Appeal in Ordinary is twelve. Appointments are made by the Queen on the recommendation of the Prime Minister. The Lord Chancellor advises on these appointments. Appointment to the senior judiciary are largely by promotion. Appointment to the lower courts are administered by the Judicial Group within the Lord Chancellor's department which undertakes formal consultation with the judiciary and specialist Bar and Solicitor Associations.
27. The Lords of Appeal in Ordinary must retire on reaching the age of 70 years (subject to a discretionary power on the part of the Lord Chancellor to retain their services until they reach the age of 75 years).
28. The Lord Chief Justice ranks second only to the Lord Chancellor. He or she heads the Queens Bench Division of the High Court, presides over the Court of Appeal (*ex officio*) and may sit in the House of Lords.
29. Usually appeals are heard by five judges but in exceptional cases seven judges may sit.
30. Applications for leave to appeal, where necessary, are referred to an Appeal Committee consisting of three Lords of Appeal.
31. There is no provision for the use of expert lower court judges or advisors on the bench.

Hong Kong

Jurisdiction

32. The Supreme Court hears appeals on all civil matters. It also hears appeals in criminal matters from any final decision of the Court of Appeal or any final decision of the Court of First Instance (apart from a finding or verdict by a jury) from which no appeal lies to the Court of Appeal. It has no jurisdiction over acts of state such as defence and foreign affairs. The Court has no original jurisdiction.

Appeals by Leave or by Right

33. In civil matters, there is a right of appeal where the amount in dispute exceeds \$1,000,000. Any other civil matter may be appealed with leave from either the Court of Appeal or the Supreme Court where the question involved is one of great general or public importance. In criminal cases, leave to appeal must be obtained from the Supreme Court.

Composition of the Court

34. The Supreme Court is constituted by the Chief Justice, three permanent judges and one non-permanent Hong Kong judge or one judge from another common law jurisdiction. The Court must sit as a full court with five judges. Permanent members must retire on reaching 65 years but may be reappointed for two further terms of three years each. There is no retirement age for non-permanent judges who are appointed for a term of three years.
35. The same procedure governs the appointment of High Court, Court of Appeal of the High Court and Supreme Court judges in Hong Kong. The Chief Executive appoints the judges, according to the recommendation of the Judicial Officers Recommendation Commission. The Commission is composed of the Chief Justice, the Secretary for Justice, two senior judges, a solicitor and a barrister (selected by their respective organisations), and three eminent lay persons. Any recommendation of the Commission must have the approval of seven of its members.
36. Under s 9 of the Hong Kong Supreme Court Ordinance, the Chief Executive, on advice from the judicial officers of the Recommendation Commission, compiles a list of judges from other common law jurisdictions. The list currently comprises nine judges. There is also a set list of non-permanent Hong Kong judges.
37. Applications for leave to appeal are decided by the Appeal Committee, which consists of the Chief Justice and two permanent judges or three permanent judges nominated by the Chief Justice.

Temporary Judges

38. The judges of the Court of Appeal of the High Court are permanently appointed. The Chief Justice, who presides, also sits in the Court of First Instance. Where it is necessary, temporary judges may be appointed to the appellate bench from the Court of First Instance. Appellate Judges are also able to sit at first instance 'whenever the business of the Court of First Instance so requires'.

Appendix E

New Zealand Appeals to the Judicial Committee of the Privy Council

The following table lists all substantive appeals decided by the Judicial Committee (up to and including 28 February 2002). Recent substantive decisions made in 2001 or 2002 have yet to be reported but are available from the Privy Council website (see below).

The table lists 268 decisions of which 94 (35%) were allowed and 168 (63%) were dismissed. Six appeals were withdrawn by consent. Where several appeals (or an appeal and a cross-appeal) are dealt with in the same judgment, these have been treated as one appeal for statistical purposes.

Table One: A Chronological List of Decisions on New Zealand Appeals

Year	Case Name and Citation	Type of Law	Decision
1851	The Queen (by her Attorney-General for New Zealand) v Clarke (1849-51) NZPCC 516	Land claims and Crown Prerogative	Allowed
1857	Bunny v Hart (1857) NZPCC 15	Bankruptcy – adjudication	Withdrawn
1862	Bunny v The Judges of the Supreme Court of New Zealand (1862) NZPCC 302	Law Practitioners – suspension	Dismissed
1874	Maclean & another v MacAndrew & others (1874) NZPCC 349	Mining – cancellation of pastoral lease	Dismissed
1876	Bell v Receiver of Land Revenue of Southland (1876) NZPCC 216	Application to purchase rural land	Dismissed
1879	Pearson & others, Commissioners of the Waste Lands Board of Southland, & others v Spence (1879) NZPCC 222	Application to purchase rural land	Dismissed
1881	Daniell v Sinclair (1881) NZPCC 140	Reopening of accounts under mortgage	Dismissed
1882	Rhodes v Rhodes & others (1882) NZPCC 708	Construction of Will	Allowed
1883	Ward v National Bank of New Zealand Ltd (1883) NZPCC 551	Guarantee – release of surety	Dismissed
1884	The Queen v Williams (1884) NZPCC 118	Crown suit – negligence	Dismissed
1884	Plimmer & another v Wellington City Corporation (1884) NZPCC 250	Compensation for public taking of land	Allowed
1890	Shaw Savill & Albion Co. Ltd v Timaru Harbour Board (1889 – 90) NZPCC 180	Liability of Harbour Board	Dismissed
1891	Donnelly & others v Broughton (1891) NZPCC 566	Validity of Will	Dismissed
1892	Buckley (Attorney-General for New Zealand) v Edwards (1892) NZPCC 204	Power to appoint Supreme Court Judges	Allowed
1893	Cameron & another v Nystrom (1893) NZPCC 436	Negligence – employer’s liability	Dismissed
1893	Ashbury v Ellis (1893) NZPCC 510	Validity of Supreme Court Code rule	Dismissed
1893	Black v Christchurch Finance Co. Ltd (1893) NZPCC 448	Negligence – liability of principal	Allowed

Year	Case Name and Citation	Type of Law	Decision
1894	Union Steam Ship Co. Ltd v Claridge (1894) NZPCC 432	Negligence – employer's liability	Dismissed
1895	Barre Johnston and Co. v Oldham (1895) NZPCC 101	Contract	Dismissed
1897	Annie Brown v Attorney-General for New Zealand (1897) NZPCC 106	Criminal law – party to offence – defence of marital control	Dismissed
1898	Eccles & others v Mills & others (1897-8) NZPCC 240	Landlord and tenant – Lessor's Covenant	Allowed
1898	Southland Frozen Meat & Produce Export Co. Ltd v Nelson Bros Ltd (1898) NZPCC 77	Contract, construction	Dismissed
1898	Union Bank of Australia Ltd v Murray-Aynsley (1898) NZPCC 9	Banking, knowledge of character of customer's trust account	Allowed
1898	Barker v Edger & others (1898) NZPCC 422	Jurisdiction to rehear case under Native Land Court Act 1886	Allowed in part & judgment varied accordingly
1898	Dilworth & others v Commissioner of Stamps, Dilworth & others v Commissioner for Land & Income Tax (1898) NZPCC 578	Tax, exemption from death duties & land tax	Both appeals allowed
1900	Allan v Morrison & others (1900) NZPCC 560	Probate of lost Will	Dismissed
1900	Coates (Receiver for Debenture-Holders of the New Zealand Midland Railway Co. Ltd) v R (1900) NZPCC 651	Railways debentures – construction	Dismissed
1900	Wasteneys v Wasteneys (1900) NZPCC 184	Deed of separation – provision for annuity	Allowed
1900	Fleming v Bank of New Zealand (1900) NZPCC 525	Principal and Agent	Allowed
1900	Jellicoe v Wellington District Law Society (1900) NZPCC 310	Law practitioners – suspension of solicitor	Dismissed
1901	Nireaha Tamaki v Baker (1900-01) NZPCC 371	Native Land Court – cognisance of Māori Customary Law	Allowed
1901	Te Teira Te Paea & others v Te Roera Tareha & another (1901) NZPCC 399	Native lands – confiscation by Crown	Dismissed
1902	Wellington City Corporation v Johnston & others, Wellington City Council v Lloyd & another (1902) NZPCC 644	Public works – compensation for taking land	Both appeals dismissed
1902	Commissioner of Trade and Customs v R Bell & Co. Ltd (1902) NZPCC 146	False trade description – forfeiture by Customs	Allowed
1903	Wallis & others v Solicitor-General (1902-03) NZPCC 23	Charitable trust	Allowed
1903	Jackson v Commissioner of Stamps (1903) NZPCC 592	Tax, death duties	Dismissed
1904	D. Henderson & Co. Ltd (in liquidation) v Daniell & others (1904) NZPCC 48	Company law – arrangement with creditors	Dismissed
1904	Smith v McArthur & others (1904) NZPCC 323	Licensing, polls and elections	Allowed

Year	Case Name and Citation	Type of Law	Decision
1904	Lodder & another v Slowey (1904) NZPCC 60	Termination of Contract - power of re-entry and seizure - quantum meruit	Dismissed
1904	Wellington City Corporation v Lower Hutt Borough (1904) NZPCC 354	Municipal Corporations Act 1900, contribution to cost of bridge	Dismissed
1904	Heslop v Minister of Mines (1904) NZPCC 344	Compensation for lands injured by mining	Dismissed
1904	Riddiford v R (1904-05) NZPCC 109	Surrender of lands to Crown, adverse possession	Dismissed
1905	Assets Co. Ltd v Mere Roihi (1904-05) NZPCC 275 (consolidated appeals)	Irregularities in Native Land Court. Effect on registration under Land Transfer Act	All appeals allowed
1905	Graham & others v Callaghan (1905) NZPCC 330	Licensing laws, regulation of local elections	Allowed
1905	New Zealand Loan & Merchantile Agency Co. Ltd v Reid (1905) NZPCC 82	Contract – fraud	Allowed
1905	Clouston and Co. Ltd v Corry (1905) NZPCC 336	Master and servant, wrongful dismissal	Allowed – new trial ordered
1906	Commissioner of Taxes v Eastern Extension Australasia & China Telegraph Co. Ltd (1906) NZPCC 604	Income tax	Dismissed
1907	Ward Bros v Valuer-General of Land for New Zealand (1907) NZPCC 174	Power of Supreme Court to control Valuer-General	Dismissed
1907	Lyttelton Times Co. Ltd v Warners Ltd (1907) NZPCC 470	Nuisance, construction of building resulting in noise	Allowed
1907	Lovell and Christmas Ltd v Commissioner of Taxes (1907) NZPCC 611	Income tax, profits from goods sold in London	Allowed
1909	Commissioner of Stamps v Townend, In re Moore (deceased) (1909) NZPCC 597	Tax, death duties	Dismissed
1910	Hamilton Gas Co. Ltd v Hamilton Borough (1910) NZPCC 357	Purchase of gasworks and plant by Borough Council, price	Allowed
1910	Greville & another v Parker (1910) NZPCC 262	Lease, option for renewal	Allowed
1911	Allardice & another v Allardice & others (1911) NZPCC 156	Family Protection	Dismissed
1912	Massey v New Zealand Times Co. Ltd (1912) NZPCC 503	Defamation	Dismissed
1912	Samson v Aitchison (1912) NZPCC 441	Negligence, employer's liability	Dismissed
1913	Manu Kapua & others v Para Haimona & another (1913) NZPCC 413	Native lands, title	Dismissed
1913	Kauri Timber Co. Ltd v Commissioner of Taxes (1913) NZPCC 636	Income Tax, deduction of capital	Dismissed
1914	Equitable Life Assurance Society of the United States v Reed (1914) NZPCC 190	Life insurance policy, surrender value	Dismissed, subject to a variation in the order appealed from.

Year	Case Name and Citation	Type of Law	Decision
1915	Union Steam Ship Co. of New Zealand Ltd v Wellington Harbour Board (1915) NZPCC 176	Exemption from Harbour Board duties	Dismissed, with variation of the judgment appealed from
1915	Rutherford v Action-Adams (1915) NZPCC 688	Vendor and Purchaser	Dismissed
1915	R v Broad (1915) NZPCC 658	Railways - negligence - effect of statutory restriction on public right of way	Dismissed
1916	Mangaone Oilfields Ltd v Herman & Weger Manufacturing & Contracting Co. Ltd (1916) NZPCC 21	Building Contract	Dismissed
1916	Ridd Milking-Machine Co. Ltd v Simplex Milking-Machine Co. Ltd (1916) NZPCC 478	Patent - infringement	Dismissed
1916	Gillies v Gane Milking-Machine Co. Ltd (1916) NZPCC	Patent - infringement	Dismissed
1917	McCaul v Fraser (1917) NZPCC 152	Family arrangement, trust to divide estate	Dismissed
1917	Attorney-General for New Zealand v Brown & others, In re Knowles (deceased) (1917) NZPCC 698	Construction of Will	Dismissed
1918	Marsh & another v St Leger (1918) NZPCC 232	Lands Act 1892	Dismissed
1919	Hineiti Rirerire Arani v Public Trustee of New Zealand (1919) NZPCC 1	Māori Adoption	Dismissed
1920	Tarbutt & others v Nicholson and Long (1920) NZPCC 703	Construction of Will	Allowed
1920	Union Steam Ship Co. of New Zealand Ltd v Robin (1920) NZPCC 131	Death by Accident, amount recoverable by dependant	Dismissed
1920	Gerrard v Crowe & another (1920) NZPCC 691	Riparian owners, right to erect embankment against flood	Dismissed
1922	Thornes v Brown (1922) NZPCC 534	Principal & agent - exchange of land – negligence of agent acting for both parties	Dismissed
1922	Ward and Co. Ltd v Commissioner of Taxes (1922) NZPCC 625	Income tax	Dismissed
1922	A.Hatrick & Co. Ltd v R (1922) NZPCC 159	Government railways – Minister's power to exact sorting-charges	Allowed
1923	Snushall v Kaikoura County (1923) NZPCC 670	Control by County Council of paper roads	Dismissed
1923	Smallfield v National Mutual Life Association of Australasia Ltd (1923) NZPCC 197	Life insurance – truth of statements forming basis	Allowed
1923	Auckland Harbour Board v R (1923) NZPCC 68	Constitutional law – authority for payment out of consolidated fund	Dismissed
1925	Waimiha Sawmilling Co. Ltd (in liquidation) v Waione Timber Co. Ltd (1925) NZPCC 267	Land Transfer Act 1915 – unregistered interest	Dismissed

Year	Case Name and Citation	Type of Law	Decision
1925	Peddle v McDonald (1925) NZPCC 138	Easement - Assignment of right to use tram line	Dismissed
1926	Wright v Morgan & others (1926) NZPCC 678	Trusts – assignment of option given under Will to Co-trustee	Judgment varied
1926	Bisset v Wilkinson & another (1926) NZPCC 93	Contract for sale of land – misrepresentation	Allowed
1926	Gardner v Hirawanu & others (1926) NZPCC 365	Native land – covenant by lessee to cultivate	Allowed
1927	Doughty v Commissioner of Taxes (1926-27) NZPCC 616	Income tax	Allowed
1927	Crown Milling Co. Ltd. & others v R (1926-27) NZPCC 37	Commercial Trusts Act 1910	Allowed
1927	Watson v Haggitt & others (1927) NZPCC 474	Construction of deed of partnership	Dismissed
1929	Finch v Commissioner of Stamp Duties (1929) NZPCC 600	Tax – death duties	Allowed
1929	Wanganui Sash & Door Factory & Timber Co. Ltd v Maunder (1929) NZPCC 484	Patent – infringement	Allowed
1929	Burnard v Lysnar (1929) NZPCC 538	Principal and surety	Allowed
1931	Scales v Young & others (1931) NZPCC 313	Licensing districts	Dismissed
1932	Aspro Ltd v Commissioner of Taxes (1932) NZPCC 630	Income tax	Dismissed
1932	Benson v Kwong Chong (1932) NZPCC 456	Negligence – function of jury	Allowed
1933	New Plymouth Borough v Taranaki Electric-Power Board [1933] NZLR 1128	Municipal Corporations Act 1920	Dismissed
1933	Brooker v Thomas Borthwick & Sons (Australasia) Ltd (and others) [1933] NZLR 1118	Workers compensation	Appeals allowed
1933	Gould & others v Commissioner of Stamp Duties [1934] NZLR 32	Tax – death duties	Dismissed
1935	Lysnar v National Bank of New Zealand Ltd [1935] NZLR 129	Contract – formation	Allowed
1935	Barton & others v Moorhouse & others [1935] NZLR 152	Construction of a Private Act	Allowed
1935	Trickett v Queensland Insurance Co. Ltd & others [1936] NZLR 116	Motor vehicle insurance policy – construction	Dismissed
1935	Public Trustee v Lyon [1936] NZLR 180	Life insurance	Dismissed
1936	Attorney-General of New Zealand v New Zealand Insurance Co Ltd & others [1937] NZLR 33	Validity of Will	Dismissed
1936	Vincent v Tauranga Electric-Power Board [1936] NZLR 1016	Breach of implied contract and statutory duty	Dismissed
1937	Auckland City Corporation & Auckland Transport Board v Alliance Assurance Co. Ltd [1937] NZLR 142	Local authority debentures - currency of payment	Dismissed
1937	Macleay v Treadwell & another, in re Macleay (deceased) [1937] NZLR 230	Construction of Will	Allowed
1937	Mt Albert Borough v Australasian Temperance & General Mutual Life Assurance Society Ltd [1937] NZLR 1124	Local Body loan – application of Victorian statute	Dismissed

Year	Case Name and Citation	Type of Law	Decision
1938	De Bueger v J Ballantyne and Co. Ltd [1938] NZLR 142	Contract – currency of payment	Allowed
1939	Wright & others v New Zealand Farmers' Co-operative Association of Canterbury Ltd [1939] NZLR 388	Mortgage – mortgagee's obligations on sale	Dismissed
1940	Stewart v Hancock [1940] NZLR 424	Negligence – evidence	Allowed
1941	Te Heuheu Tukino v Aotea District Māori Land Board [1941] NZLR 590	Legal effect of Treaty of Waitangi	Dismissed
1941	Dillon v Public Trustee & others, In re Dillon (deceased) [1941] NZLR 557	Family Protection Act 1908	Allowed
1942	Guardian, Trust, & Executors, Co. of New Zealand Ltd. v Public Trustee [1942] NZLR 294	Will – withdrawal of probate	Dismissed
1944	Sidey v Perpetual Trustees, Estate, & Agency Co. of New Zealand Ltd & another [1944] NZLR 891	Construction of Will	Allowed
1946	Auckland Electric Power Board v Public Trustee, and another [1947] NZLR 279	Electrical Supply Regulations 1935, Electrical Wiring Regulations 1935, ultra vires	Allowed
1947	Australian Provincial Assurance Association Ltd v E.T Taylor & Co. Ltd [1947] NZLR 793	Contract – formation	Allowed
1956	National Mutual Life Association of Australasia Ltd v Attorney-General [1956] NZLR 422	Government debentures – currency of payment	Dismissed
1956	Ward & others v Commissioner of Inland Revenue [1956] NZLR 367	Death duties	Dismissed
1956	Commissioner of Stamp Duties v NZ Insurance Co Ltd [1956] NZLR 335	Death duties	Dismissed
1956	McKenna & another v Porter Motors Ltd [1956] NZLR 845	Tenancy – landlord's possession	Dismissed
1958	Māori Trustee v Ministry of Works, In re Whareroa 2E Block [1959] NZLR 7	Public works – compensation of land taken	Dismissed, judgment of the Court of Appeal varied
1958	Perkowski v Wellington City Corporation [1959] NZLR 1	Negligence – liability of local authority	Dismissed
1958	Mouat v Betts Motors Ltd [1959] NZLR 15	Customs and price control restrictions on sale of imported car	Dismissed
1960	Truth (NZ) Ltd v Holloway [1961] NZLR 22	Defamation – jury verdict	Dismissed
1960	Lee v Lee's Air Farming Ltd [1961] NZLR 325	Company law	Allowed
1961	Australian Mutual Provident Society v Commissioner of Inland Revenue [1962] NZLR 449	Income tax	Dismissed
1963	Truth (NZ) Ltd v Howey [1963] NZLR 775	National Expenditure Adjustment Act 1932	Dismissed
1963	Miller v Minister of Mines [1963] NZLR 560	Land transfer – mining privilege	Dismissed

Year	Case Name and Citation	Type of Law	Decision
1964	Morgan v Khyatt [1964] NZLR 666	Nuisance – encroachment of roots	Dismissed
1964	Attorney-General ex rel Lewis & another v Lower Hutt City [1965] NZLR 116	Municipal corporation's powers	Dismissed
1964	Farrier-Waimak Ltd v Bank of New Zealand [1965] NZLR 426	Land transfer – respective priorities of mortgage and contractor's liens	Allowed
1964	J. M. Construction Co. Ltd v Hutt Timber & Hardware Co Ltd [1965] 1 WLR 797	Mutual trading – rebate as creditor	Allowed
1966	Jeffs & others v New Zealand Dairy Production & Marketing Board & others [1967] NZLR 1057	Administrative law	Allowed
1966	Frazer v Walker & others [1967] NZLR 1069	Land transfer registration	Dismissed
1967	Boots the Chemists (New Zealand) Ltd v Chemists' Service Guild of New Zealand (Inc.) & another [1969] NZLR 78	Statutory limitations on persons owning or controlling pharmacy business	Appeal allowed, cross appeal dismissed
1969	Loan Investment Corporation of Australasia v Bonner [1970] NZLR 724	Contract – specific performance	Dismissed
1970	Mangin v Commissioner of Inland Revenue [1971] NZLR 591	Income tax – interpretation	Dismissed
1970	Commissioner of Inland Revenue v Europa Oil (NZ) Ltd [1971] NZLR 641	Income tax – deductions	Allowed
1970	Commissioner of Inland Revenue v Associated Motorists Petrol Co. Ltd [1971] NZLR 660	Income tax – assessable income	Dismissed
1971	Bateman Television Ltd (in liquidation) & another v Coleridge Finance Co. Ltd [1971] NZLR 929	Company law – hire purchase agreements	Dismissed
1972	Hansen & others v Commissioner of Inland Revenue [1973] 1 NZLR 483	Income tax – assessable income	Dismissed
1972	Furnell v Whangarei High Schools Board [1973] 2 NZLR 705	Administrative law – natural justice	Dismissed
1973	New Zealand Netherlands Society “Oranje” Inc. v Kuys & The Windmill Post Ltd [1973] 2 NZLR 163	Secretary of an association - fiduciary obligations	Dismissed
1974	New Zealand Shipping Co Ltd v A. M Satterthwaite & Co. Ltd [1974] 1 NZLR 505	Shipping – contract between shipper and carrier - stevedores rights	Allowed
1974	Holden v Commissioner of Inland Revenue, Menneer v Commissioner of Inland Revenue [1974] 2 NZLR 52	Income tax – assessable income	Both appeals allowed
1974	Fahey v M.S.D. Speirs Ltd [1975] 1 NZLR 240	Guarantee and indemnity	Dismissed
1975	Nakhla v R [1975] 1 NZLR 393	Criminal law – Police Offences Act 1927	Allowed
1975	Ashton & another v Commissioner of Inland Revenue [1975] 2 NZLR 717	Income tax – interpretation	Dismissed
1976	Europa Oil (NZ) Ltd v Commissioner of Inland Revenue [1976] 1 NZLR 546	Income tax – assessable income	Allowed; cross-appeal dismissed
1976	Hannaford & Burton Ltd v Polaroid Corporation [1976] 2 NZLR 14	Trademark – rectification of register	Allowed

Year	Case Name and Citation	Type of Law	Decision
1976	Haldane v Haldane [1976] 2 NZLR 715	Matrimonial property	Allowed
1977	Taupo Totara Timber Co. Ltd v Rowe [1977] 2 NZLR 453	Company law – payment to a retiring director	Dismissed
1977	Goode v Scott [1977] 2 NZLR 466	Sale of land	Dismissed
1977	Ross v Henderson [1977] 2 NZLR 458	Sale of land	Dismissed
1978	Dickens v Neylon [1978] 2 NZLR 35	Sale of land	Dismissed
1981	Lilley v Public Trustee [1981] 1 NZLR 41	Testamentary promises	Dismissed
1982	Reid v Reid [1982] 1 NZLR 147	Matrimonial property	Appeal and cross appeal dismissed
1982	Lesa v Attorney-General [1982] 1 NZLR 165	New Zealand Citizenship	Allowed
1983	Wiseman v Canterbury Bye-Products Co. Ltd [1983] NZLR 184	By-law and rule-making power – Meat Act 1939	Dismissed
1983	McDonald v R [1983] NZLR 252	Criminal law – murder, offer of immunity	Dismissed
1983	Mahon v Air New Zealand Ltd, Re Erebus Royal Commission [1983] NZLR 662	Administrative law – powers of Royal Commissions of inquiry, judicial review	Dismissed
1983	Lowe v Commissioner of Inland Revenue [1983] NZLR 416	Income tax	Dismissed
1984	Kaitamaki v R [1984] 1 NZLR 385	Criminal law – rape	Dismissed
1985	Hart v O'Connor [1985] 1 NZLR 159	Contract for sale of land	Allowed
1985	Scancarriers A/S v Aotearoa International Ltd [1985] 1 NZLR 513	Contract – formation	Allowed, cross-appeal dismissed
1986	Commissioner of Inland Revenue v Challenge Corporation Ltd [1987] 2 WLR 24	Income tax – tax avoidance	Allowed
1987	Brown v Heathcote County Council [1987] 1 NZLR 720	Local authority – negligence	Dismissed
1987	Taylor v Rotowax Trading Ltd [1988] 1 NZLR 674	Contract – restraint of trade	Dismissed
1987	Rowling (Minister of Finance) & Attorney-General v Takaro Properties Ltd [1987] 2 NZLR 700	Negligence – duty of care	Allowed
1989	Barber v Barber [1989] 2 NZLR 641	Property law	Dismissed
1989	Vujnovich v Vujnovich [1989] 3 NZLR 513	Company law	Dismissed
1989	Cheah Theam Swee v Equiticorp Finance Group Ltd [1989] 3 NZLR 1	Practice and procedure	Dismissed
1989	Green v Broadcasting Corp of New Zealand [1989] 3 NZLR 18	Copyright	Dismissed
1989	Money v Ven-Lu-Ree Ltd [1989] 3 NZLR 129	Contract	Dismissed
1990	Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 NZLR 513	Company law	Allowed
1990	Meates and Rowe & Co. (New Zealand) Ltd v Westpac Banking Corporation Ltd and Attorney-General [1991] 3 NZLR 385	Guarantee – indemnity	Dismissed

Year	Case Name and Citation	Type of Law	Decision
1990	Re Welch [1990] 3 NZLR 1	Testamentary Promises	Dismissed
1990	Databank Systems Ltd v Commissioner of Inland Revenue [1990] 3 NZLR 385	G.S.T.	Allowed
1990	Holt v Holt [1990] 3 NZLR 401	Matrimonial Property	Dismissed
1990	Republic Resources Ltd v NZI Leasing Corporation Ltd PC19/90	Contract, Company insolvent	Dismissed
1990	Elders Pastoral Ltd v the Bank of New Zealand [1991] 1 NZLR 385	Property Law	Dismissed
1991	Minister of Energy v Petrocorp Exploration Ltd [1991] 1 NZLR 641	Administrative Law	Allowed
1991	DFC Financial Services Ltd v Coffey & Roberts [1991] 2 NZLR 513	Company Law	Allowed
1991	Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1992] 2 NZLR 1	Income Tax	Allowed
1991	New Zealand Stock Exchange and the National Bank of New Zealand Ltd v Commissioner of Inland Revenue [1992] 3 NZLR 1	Income Tax	Dismissed
1991	Cheah Theam Swee v Equiticorp Finance Group Ltd and another [1992] 1 NZLR 641	Company Law	Dismissed
1991	Earthquake and War Damage Commission v Waitaki International Ltd [1992] 1 NZLR 513	Insurance	Allowed
1992	Downsview Nominees Ltd and J G Russell v First City Corporation Ltd and First City Finance Ltd [1993] 1 NZLR 513	Negligence	Dismissed, cross appeal allowed in part
1993	Hadlee & Sydney Bridge Nominees Ltd v Commissioner of Inland Revenue [1993] 2 NZLR 385	Income Tax	Dismissed
1993	Deloitte Haskins & Sells v National Mutual Life Nominees Ltd [1993] 3 NZLR 1	Negligence	Allowed
1993	Clark Boyce v Dorothy Dean Mouat [1993] 3 NZLR 641	Negligence	Allowed
1993	Attorney-General for Hong Kong v C W Reid and J M Reid and Marc Molloy [1994] 1 NZLR 1	Constructive Trust, Judicial precedent	Allowed
1993	Citibank N A v Stafford Mall Ltd (unreported)	Banking	Allowed
1993	New Zealand Māori Council and Ors v Attorney-General and Ors [1994] 1 NZLR 513	Constitutional Law, Treaty of Waitangi - Māori language & broadcasting	Dismissed
1994	Mercury Energy Ltd (successor company of the former Auckland Electric Power Board) v Electricity Corporation of New Zealand [1994] 2 NZLR 385	Administrative Law	Dismissed
1994	Mossman v Chilcott, Chatfield & Bank of New Zealand (unreported)	Banking – debenture security	Dismissed
1994	Re Goldcorp Exchange Ltd (in receivership): Kensington v Liggett [1994] 3 NZLR 385	Sale of Goods	Allowed
1994	Richard William Prebble v Television New Zealand Limited [1994] 3 All ER 407, [1994] 3 WLR 970	Parliamentary Privilege	Allowed

Year	Case Name and Citation	Type of Law	Decision
1994	Telecom Corporation of New Zealand Ltd & Ors v Clear Communications Ltd [1995] 1 NZLR 385	Commerce Act – telecommunications interconnection	Allowed
1994	Grant Adams v The Queen [1995] 1 WLR 52	Crime	Dismissed
1994	Masport Ltd v Morrison Industries Ltd [1995] BCC 496	Commercial – sale of business	Dismissed, Cross appeal allowed in part
1994	Motor Vehicle Dealers Institute Incorporated v UDC Finance (1991) Ltd (1995) 5 NZBLC 105, 583	Commercial law – fidelity guarantee fund	Allowed
1994	Mosgiel Ltd v Mutual Life and Citizens Assurance Company Ltd and Brierley Investments Ltd (unreported)	Company law – preference shares	Allowed
1994	The New Zealand Guardian Trust Company Ltd v K S Brooks, N Geary, K N Goodall, R W Jones, D M Leitch and D J Steel [1995] 1 WLR 96	Vicarious Liability	Dismissed
1995	Rama v Millar [1996] 1 NZLR 257	Fiduciary relationship, Damages	Allowed
1995	Pupuke Service Station v Caltex Oil (unreported)	Arbitration	Dismissed
1995	Commissioner of Inland Revenue v Mitsubishi Motors NZ Ltd [1995] 3 NZLR 513	Taxation	Dismissed
1995	Colonial Mutual General Insurance Co. Ltd v ANZ Banking Group [1995] 3 NZLR 1	Mortgages	Dismissed
1995	Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 NZLR 7	Securities	Dismissed
1995	New Zealand Forest Products v Accident Compensation Corporation [1995] 3 NZLR 257	Accident Compensation	Allowed
1995	Amax Gold Mines New Zealand Ltd v Moore (unreported)	Contract	Dismissed
1995	Norwich Union Life Insurance Society v Attorney-General (unreported)	Leases	Dismissed
1996	Invercargill City Council v Hamlin [1996] 1 NZLR 513	Negligence	Dismissed
1996	Collier v Creighton [1996] 2 NZLR 257	Fiduciary duty	Dismissed
1996	Lion Nathan Ltd and others v CC Bottlers Ltd and others [1996] 2 NZLR 385	Company Law - Liability of vendor of shares	Dismissed
1996	Goss v Chilcott [1996] 3 NZLR 385	Contract	Dismissed
1996	Board of Trustees of the National Provident Fund v Brierley Investments Ltd [1997] 1 NZLR 1	Property Law – Leases	Dismissed
1996	Brannigan and Ors v Davison [1997] 1 NZLR 140	Evidence	Dismissed
1996	Rangatira v Commissioner of Inland Revenue [1997] 1 NZLR 129	Taxation	Allowed
1996	Culverden Retirement Village Ltd v Registrar of Companies [1997] 1 NZLR 257	Commercial Law – Securities Act 1978	Dismissed

Year	Case Name and Citation	Type of Law	Decision
1996	Melanesian Mission Trust Board v Australian Mutual Provident Society [1997] 1 NZLR 391	Leases	Allowed; Application for declaration dismissed; referred back to the High Court
1997	Treaty Tribes Coalition, Te Rūnanga o Ngāti Porou, & Tainui Māori Trust Board v Urban Māori Authorities & others [1997] 1 NZLR 513	Treaty of Waitangi - fisheries allocation	Allowed in part: matter remitted to trial Judge
1997	Sunflower Services v Unisys New Zealand Ltd [1997] 1 NZLR 385	Leases	Allowed
1997	Pen Aun Lim v McLean & Wiley [1997] 1 NZLR 641	Contract law – fisheries	Allowed (3:2)
1997	NZ Forest Products Ltd v NZ Insurance Co Ltd [1997] 3 NZLR 1	Insurance	Allowed
1997	Lewis v Hyde [1998] 1 NZLR 12	Company law – bankruptcy	Dismissed
1997	BNZ Finance v Commissioner of Inland Revenue [1998] 1 NZLR 1	Income tax	Dismissed
1997	Madden v UDC Finance (unreported)	Commercial law	Dismissed
1997	Cussons (NZ) Pty Ltd v Unilever Plc and Unilever NZ Ltd [1998] 1 NZLR 396	Intellectual property– trademark	Dismissed
1997	Taylor v Vogel (unreported)	Wills	Withdrawn
1997	Countrywide Banking Corp v Dean [1998] 1 NZLR 385	Company law – winding up	Dismissed
1997	Nippon Credit Bank Ltd v Air NZ Ltd (unreported)	Contract law	Dismissed
1998	Auag Resources Ltd v Waihi Mines Ltd (unreported)	Contract law	Dismissed
1998	Roussel UCLAF Australia Pty Ltd v Pharmaceutical Management Agency Ltd [2001] NZAR 476	Administrative law	Dismissed
1998	Golden Bay Cement Co Ltd v Commissioner of Inland Revenue [1999] 1 NZLR 385	Income Tax	Dismissed
1998	Commissioner of Inland Revenue v Wattie and Lawrence [1999] 1 NZLR 529	Income tax	Dismissed
1998	Ramstead v R [1999] 1 NZLR 513	Criminal law	Allowed
1999	W v W; J v Bell [1999] 2 NZLR 1	Practice & proceedings; Exemplary Damages	Dismissed
1999	Attorney-General v Horton and Campbell [1999] 2 NZLR 257	Administrative law – Public Works Act	Dismissed
1999	Guinness Peat Group International Insurance Ltd v Tower Corporation (unreported)	Company law	Withdrawn
1999	Manukau City Council v Ports of Auckland Ltd & others [2000] 1 NZLR 1	Administrative Law	Allowed
1999	Tangiora v Wellington District Legal Services Committee [2000] 1 NZLR 17	Legal Aid	Dismissed

Year	Case Name and Citation	Type of Law	Decision
1999	Lange v Atkinson [2000] 1 NZLR 257	Tort – defamation	Allowed & remitted to the Court of Appeal for a rehearing
1999	Arklow Investments Ltd and Christopher Mark Wingate v I D Maclean & others [2000] 2 NZLR 1	Equity – fiduciary duty	Dismissed
2000	Auckland Gas Co Ltd v Commissioner of Inland Revenue [2000] 3 NZLR 6	Income Tax	Dismissed
2000	Gilrose Finance Ltd. v Ellis Gould [2000] 2 NZLR 129	Practice and Procedure	Dismissed
2000	Robert Francis Phipps v Royal Australasian College of Surgeons [2000] 2 NZLR 513	Judicial Review	Allowed in part
2000	Commissioner of Inland Revenue v New Zealand Forest Research Institute Ltd [2000] 3 NZLR 1	Tax	Allowed
2000	Ernest John Fifield and another v W & R Jack Ltd [2000] 3 NZLR 129	Arbitration	Dismissed
2000	Far Eastern Shipping Company Public Ltd v Scales Trading Ltd. & another [2001] 1 NZLR 513	Commercial Guarantees	Allowed
2001	The Commissioner of Inland Revenue v Auckland Harbour Board [2001] 3 NZLR 289	Income tax	Dismissed
2001	Dilworth Trust Board v (1) Counties Manukau Ltd. and (2) Attorney-General	Commercial – compulsory acquisition of land	Dismissed
2001	Valentines Properties Ltd v Huntco Corporation Ltd [2001] 3 NZLR 305	Contract, specific performance	Allowed
2001	(1) Brian Andrew O’Neil (2) Moira O’Neil (3) Lyndon Lee McDougall and (4) John James McDougall v Commissioner of Inland Revenue [2001] 3 NZLR 316	Income tax	Dismissed
2001	(1) Raylee Patricia Harley v Robert McDonald (2) Glasgow Harley v Robert McDonald [2002] 1 NZLR 1	Law Practitioners – Cost awards against counsel	Allowed
2001	Wrightson Ltd. v Fletcher Challenge Nominees Ltd. [2001] 1 NZSC 40.532	Company Superannuation schemes	Dismissed
2001	(1) Richard Dale Agnew and (2) Kevin James Bearsley v (1) The Commissioner of Inland Revenue and (2) Official Assignee for the estate in the bankruptcy of Bruce William Birtwhistle and Mark Leslie Birtwhistle [2002] 1 NZLR 30	Company law	Dismissed
2001	(1) Manukau Urban Māori Authority & Others v Treaty of Waitangi Fisheries Commission & Others; and (2) Reuben Brian Perenera v Treaty of Waitangi Fisheries Commission & Others	Māori Fisheries Act 1989	Dismissed
2001	(1) M A McGuire & (2) F P Makea v (1) Hastings District Council & (2) The Māori Land Court of New Zealand [2001] NZRMA 557	Resource management	Dismissed
2001	Kena Kena Properties Ltd v Attorney-General	Statutory interpretation – GST the nature of government subsidies	Dismissed

Year	Case Name and Citation	Type of Law	Decision
2001	Commissioner of Inland Revenue v Colonial Mutual Life Assurance Society Ltd [2002] 20 NZTC 17,440	Interpretation of tax legislation	Dismissed
2001	Hosick v Parshel 45 Ltd	Tort	Dismissed by order of the Privy Council for non-prosecution
2001	Isbey v Herberger	Contract	Dismissed by Order in Council for non-prosecution
2001	Port Gisborne v Smiler	Public Works Act 1982	Withdrawn
2001	Attorney-General v Peter Abe Hull	Public Works Act 1982	Withdrawn (after part hearing)
2001	(1) John Andrew Bagnall and (2) Andrew John Maher v Mobil Oil New Zealand Ltd	Contract – liability of guarantors	Dismissed
2001	(1) Colin Joseph Brazier and (2) Brazier Scaffolding Ltd v (1) Bramwell Scaffolding (Dunedin) Ltd (2) Bruce Harvey and (3) Bramwell Scaffolding Ltd	Restraint of trade covenant	Dismissed
2002	Christchurch Pavilion Partnership No.1 and Ors v Deloitte & Touche Tohmatsu Trustee Company Ltd	Securities Act 1978 – duties of statutory supervisors	Dismissed
2002	Rewa v R	Criminal Law	Withdrawn
2002	Ancare New Zealand Ltd v (1) Fort Dodge New Zealand Ltd and (1) Nufarm Ltd	Patent law, application to revoke patent	Dismissed
2002	Hamilton v (1) Papakura District Council and (2) Watercare Services Ltd	Claims in contract and negligence against local council for contaminated water supply	Dismissed

Sources

- 1840 - 1932 New Zealand Privy Council Cases
- 1933 - 2002 New Zealand Law Reports
- 1840 - 1987 Law Commission (1988) Preliminary Paper on the Structure of the Courts
- 1999 - 2002 Privy Council website at www.privacy-council.org.uk/judicial-committee/

Table Two: Reported Privy Council Decisions on Petitions for Special Leave

In recent years there has been a number of petitions for special leave to appeal. Between 1981 and 1990 there were 27 petitions of which three were granted, and between 1991 and 2000, there were 40 petitions of which seven were granted. Even though a petition may be granted, a petitioner does not always proceed with the appeal to a formal hearing.

The following list on petitions for leave is not exhaustive, as the Judicial Committee is not required to give reasons in deciding petitions for leave.

Case Name and Citation	Type of Law	Decision
Mitchell v New Zealand Loan & Mercantile Agency Ltd & others (1903) NZPCC 495	Practice – appeals to the Court of Appeal	Leave refused
Badger v R, Ex Parte Badger (1907) NZPCC 501	Criminal law, petition for special leave	Leave refused
In re The Will of Wi Matua (deceased), Ex Parte Reardon & Te Pamoā (1908) NZPCC 522	Native Land Court Act 1894, petitions for special leave to appeal from Native Appellate Court	Leave refused
Duffield v Police [1974] 1 NZLR 416	Criminal law – petition for special leave to appeal	Leave refused
McKewen v R [1977] 2 NZLR 95	Criminal law – petition for special leave to appeal	Leave refused
Taylor v Attorney-General [1977] 2 NZLR 96	Criminal law – petition for special leave to appeal	Leave refused
Roulston v Attorney-General [1977] 1 NZLR 365	Criminal law – petition for special leave to appeal	Leave refused
Thomas v R [1978] 2 NZLR 1	Criminal law – petition of special leave	Leave refused
Chiu v Richardson [1984] 1 NZLR 757	Criminal law – petition for special leave to appeal	Leave refused
New Zealand Rugby Football Union Inc v Finnigan [1986] 1 NZLR 13	Powers of incorporated society – standing – petition for special leave to appeal	Leave refused
Elders Pastoral Ltd v Bank of New Zealand [1990] 3 NZLR 129	Practice and Procedure	Dismissed
Strathmore Group v AM Fraser, CY Todd & Durafoot Investments Ltd [1992] 3 NZLR 385	Negligence	Granted
De Morgan v Social Welfare [1997] 3 NZLR 385	Jurisdiction of the Privy Council	Dismissed
Sears v Attorney-General [1997] 3 NZLR 385	Jurisdiction of the Privy Council	Dismissed
(1) The Contradictors v (1) The Attorney-General of New Zealand (2) The Public Trustee (1) Marion Anne Pritchard and (2) Barbara Joan Wright v (1) The Attorney-General of New Zealand (2) The Public Trustee [2001] 3 NZLR 301	Public Trust Assets, application for special leave	Dismissed