Discussion Paper:
Reshaping New Zealand's Appeal Structure

Office of the Attorney-General
Te Toa Ture Tianara

DECEMBER 2000

Submissions can be sent to:

Reshaping New Zealand's Appeal Structure
Crown Law Office
PO Box 5012
DX SP 20208
WELLINGTON

Or you can email it to:
asreview@crownlaw.govt.nz

An electronic copy of the discussion document can be downloaded from:
http://www.crownlaw.govt.nz

Submissions close on **30 April 2001**

RESHAPING NEW ZEALAND'S APPEAL STRUCTURE: A DISCUSSION PAPER

Introduction by the Attorney-General

Appeals to the Privy Council have been part of New Zealand's appeal structure for almost 160 years and were appropriate at a time when New Zealand was a British colony governed directly from London. Since then, New Zealand has progressed to become a fully independent nation with a unique national identity. As our country has developed and changed, it now seems inappropriate to rely on a British court, which is largely unfamiliar with our own society, to be our final legal decision-maker.

Historically it is acknowledged that the link between our judicial system and England has been invaluable. However it is time to move on. Ending appeals to the Privy Council now seems inevitable. In reality only a small number of appeals are actually heard by the Privy Council each year. The Court itself has recognised that the law in New Zealand is best developed by New Zealand courts and has recently referred decisions back to our own Court of Appeal. It is a matter of common sense to have our highest appeal court located in our own land, amongst our own people.

Ending the right of appeal to the Privy Council represents an important next stage in the development of our national independence. It provides us with an opportunity to create an indigenous justice system, which truly represents our values and meets our needs. Our focus must be on the future and developing an inclusive and enduring appeal structure that will provide access to justice for all New Zealanders.

Proposals to end appeals to the Privy Council are not new. Previous governments have undertaken extensive consultation on the subject over a period of several years. This issue has been the subject of consideration by the Royal Commission on the Courts in 1978, the Law Commission in 1986 and again by the Government in 1995 on the basis of a report from the former Solicitor-General.

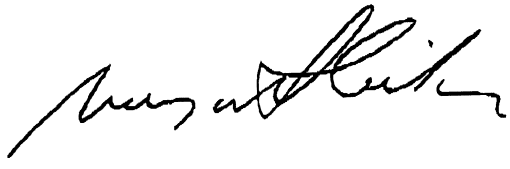
This Government acknowledges the reports and consultation that have been undertaken over the years and has sought to incorporate the principles of reform recommended by the Royal Commission and Law Commission into the discussion paper. It is now time to move forward and focus our attention on securing necessary and desirable changes in our appeal structure.

As a first step, this paper has been developed to promote discussion on ending appeals to the Privy Council and options for reshaping the appeal structure. The paper sets out arguments for and against abolition of the right of appeal to the Privy Council. It then outlines a number of options for reform.

The Government extends an invitation to all New Zealanders to discuss these important issues. Earlier discussions indicate that Maori have particular issues. The Government is committed to working with Maori to ensure that any changes to the appeal structure will adequately address their issues. Maori interests will be acknowledged and respected.

I encourage all New Zealanders to participate in the discussion and invite you to make submissions on the paper. Submissions will close on 30 April 2001 and should be forwarded to:

Reshaping New Zealand's Appeal Structure
Crown Law Office
PO Box 5012
WELLINGTON



Hon Margaret Wilson
Attorney-General

Contents

1 It's time for change

Introduction

1 Earlier this year the Government signalled that ending appeals to the Privy Council seems an inevitable next step in the development of New Zealand's national identity and independence.

2 As Lord Cooke of Thorndon has noted:

> "… New Zealand law … has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook. Common sense dictates the inevitable result. The differences have reached the stage when the last say in the decisions of our case law … cannot sensibly be left to a remote body with little real connection with New Zealand or touch for New Zealand issues …. We must accept responsibility for our own national legal destiny and recognise that the Privy Council appeal has outlived its time. Not to take the obvious decision now would be to renounce part of our nationhood."[1]

3 During previous discussions on this issue Maori have raised concerns about the effect that ending appeals to the Privy Council may have on the relationship established between the Crown and Maori under the Treaty of Waitangi. This Government is committed to working with Maori to ensure that any change to the appeal structure of the courts will not change the protection of Maori interests under the Treaty of Waitangi.

4 This discussion paper invites all interested parties to work with the Government to develop a modern, inclusive and enduring New Zealand appeal structure that will promote effective and fair access to justice.

Why change?

5 There are several reasons to support ending the right of appeal to the Privy Council.

National identity and independence

6 The first set of reasons relates to matters of national identity and the desirability of having all parts of the judicial system located in New Zealand. It is argued that ending appeals to the Privy Council will:

- recognise New Zealand's constitutional status as an independent nation;
- reinforce New Zealand's confidence in its judiciary;
- ensure that final decisions are made by judges who live in New Zealand and who are familiar with New Zealand society.

---

[1] Sir Robin Cooke (as he was then), *The New Zealand National Legal Identity*, an address delivered at the New Zealand Law Conference, October 1987, *Canterbury Law Review* 3 [1987] 171, 182-83.

7 In recent times the Privy Council itself has acknowledged that final decisions on matters of important legal policy are best made in New Zealand by referring cases back to the Court of Appeal. [2]

Many Commonwealth countries have abolished appeals to the Privy Council

8 Most other Commonwealth countries have already abolished the right of appeal to the Privy Council. For example:

- Canada abolished criminal appeals in 1933 and civil appeals in 1949.
- South Africa ended appeals in 1950.
- Australia terminated all appeal rights between 1975 and 1986.
- Hong Kong severed its ties with the Privy Council in 1997.
- Other countries that have abolished the right of appeal to the Privy Council include Pakistan, Ireland, India, Malaysia and Singapore.
- Caribbean nations have discussed plans to replace the Privy Council with a Regional Court of Appeal.

Few New Zealand cases are heard by the Privy Council

9 In practice only a small number of appeals from New Zealand are made to the Privy Council each year. Even fewer are successful.

- Between 1990 and 1994 the Privy Council heard 33 appeals from New Zealand. Seventeen were successful.
- Between 1995 and 1999, those figures dropped to 11 out of 48 appeals being successful.
- In 1999 the Court of Appeal heard and decided approximately 508 appeals. In the same year only 10 appeals went to the Privy Council. Eight of those 10 were dismissed.

New Zealand's changing international relationships

10 The changing nature of our society brought about by regionalisation and changes in New Zealand's commercial interests have shifted New Zealand's focus from Europe to Asia and the Pacific. New Zealand is increasingly forming trade links with countries that have no link with the Privy Council. The ending of the right of appeal to the Privy Council is therefore unlikely to have a significant impact on business.

11 Removing the Privy Council as New Zealand's final appeal court will not isolate New Zealand from the international scene. On the contrary, while English law is increasingly focused on Europe, New Zealand is participating more in international legal processes. For example, at a government level, New Zealand takes cases to the International Court of Justice and the World Trade Organisation. Individuals can take cases to United Nations bodies such as the

---

[2] See *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 and *Lange v Atkinson* [2000] 1 NZLR 257.

Human Rights Committee or use private arbitration processes such as those run by the International Centre for the Settlement of Investment Disputes. New Zealand also actively participates in the international processes for developing new laws, including UN committees, UNCITRAL on international trade law, WTO negotiations and the Hague Conference on private international law. Most importantly, the courts of New Zealand draw on legal developments in a whole range of countries and international areas when making decisions on New Zealand cases.

Cost and accessibility

12 Issues of cost and access to justice arise because of the physical distance between New Zealand and the Privy Council in London. Many litigants simply cannot afford to take a case to the Privy Council and so in practice they are unable to exercise their full appeal rights.

13 At present the average cost for the Crown to take a civil appeal to the Privy Council is approximately $100,000 compared with $20,000 to take a similar case to the Court of Appeal. Typically the costs incurred by private litigants in these Courts will be higher, probably double.

14 While the United Kingdom pays for the Privy Council, the New Zealand taxpayer pays for legal aid for appeals and the costs of a New Zealand Court of Appeal judge sitting on the bench of the Privy Council. Legal aid costs can become significant. For example, in 1998/99 the Legal Services Board provided legal aid to five clients, totalling $281,400, and five clients in 1999/2000, totalling $103,800. Payments per case ranged from approximately $30,000 to slightly more than $100,000.

Arguments for retention of appeals to the Privy Council

15 Over the years two main arguments have been developed for retaining appeals to the Privy Council. These include the cost and the quality of decision-making.

Cost

16 As New Zealand pays few of the costs of running the Court, it is suggested that retaining appeals to the Privy Council is a cost-effective way of obtaining an extra level of appeal. For individual litigants however, the cost of taking a case to the Privy Council is often prohibitive and therefore a less effective appeal option. Similarly, as noted above, there are significant legal aid costs paid by the New Zealand taxpayer.

Quality of decisions

17 Some commentators have suggested that Privy Council decisions are of better quality than those made by New Zealand courts. There is simply no evidence to support this suggestion. Cases that reach the Court of Appeal and Privy Council usually involve complex issues over which able judges can and do differ. This bears no reflection on the quality of decision-making at those levels. It is important to note that New Zealand Court of Appeal judges sit on other courts alongside members of the Privy Council and take their place at the Privy Council bench when it hears New Zealand appeals. As already noted, the Privy Council itself increasingly refers matters back to the New Zealand courts for decision.

18 A further reason for retaining appeals to the Privy Council that has sometimes been put forward by both Maori and business groups, is that the Privy Council provides detachment in decision-making because it is removed from the pressures of the local environment and therefore makes decisions that are favourable to those groups. As previously noted, distance from New Zealand can also be seen as detrimental, as the judges making final decisions are largely unfamiliar with New Zealand society. To ensure the integrity of the justice system, any decisions on whether to reform the appeal system cannot be based on the outcome of individual cases. The Government intends to adopt a principled approach to resolving such important issues.

Issues for Maori

19 In previous discussions Maori have indicated that ending the right of appeal to the Privy Council raises several important issues.

The symbolic link to the Sovereign

20 The Government acknowledges and respects the views held by Maori that the Privy Council provides a means of direct access to the Sovereign as guaranteed under the Treaty of Waitangi. In recent times however, the Privy Council itself has recognised that the link between indigenous people and the Crown is no longer maintained through the Monarch's English representatives (*New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513).

Favourable hearing

21 There is a perception amongst some Maori that they receive a more favourable hearing from the Privy Council than the Court of Appeal. This perception seems to have arisen from two cases in the early 20th century, *Wallis v Solicitor-General* [1902-1903] NZPPC 23 and *Nireaha Tamaki v Baker* [1900-1902] NZPCC 371 and one recent case, *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513. Another two cases heard by the Privy Council involving significant Maori rights and interests, were either dismissed or involved issues that did not concern the Crown.[3]

The practical relevance of appeals to the Privy Council

22 Throughout the 20th century there have been approximately 13 cases appealed to the Privy Council which were of significance to Maori. Only two cases to the Privy Council considered issues relevant to the Treaty of Waitangi and only five cases were significant in terms of Maori rights and interests. In contrast it is the New Zealand courts that have mainly dealt with matters affecting Maori.[4] These cases suggest that the right to appeal to the Privy Council is perhaps of more symbolic rather than practical legal value to Maori. In real terms, it is the New Zealand courts that have made the most substantial contributions to the development of the law on Maori issues.

---

[3] *Hoani Te HeuHeu Tukino v Aotea District Maori Land Board* [1941] AC 308 and *Tainui Maori Trust Board v Waitangi Fisheries Commission* [1997] 1 NZLR 513.

[4] For example, *R v Symonds* [1847]; *Re the Bed of the Wanganui River* [1960] NZLR 673; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682; *Huakina Development Trust v Waikato Valley Authority* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; and *Ngai Tahu Maori Trust Board & Ors v Director of Conservation & Ors* [1995] 3 NZLR 553.

Recognising Maori interests and values

23 The Government is committed to ensuring that Maori interests and values are appropriately reflected in the legal system. During earlier consultations Maori have made several suggestions. These included:

- greater representation of Maori within the justice system;
- acknowledgment of Maori values within the substantive law;
- processes to give the Court of Appeal access to expert advice on Maori values;
- overseas judges to sit on the Appeal Court bench.

24 These suggestions are discussed in further detail in Section Three. The Government welcomes discussions of these and any other suggestions on how best to reflect Maori values within the New Zealand court system.

2 Taking a principled approach: Options

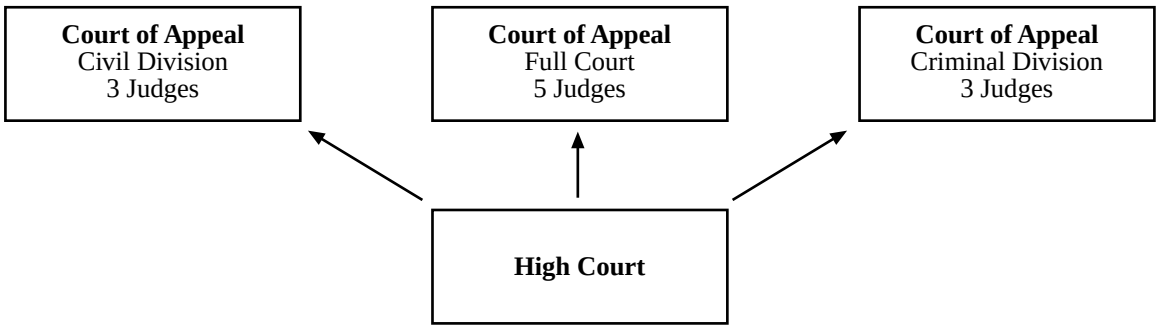
25 A set of guiding principles has been developed to assist the discussion about appeals to the Privy Council and reshaping the appeal structure. These principles are discussed in Appendix 1 and in summary are:

- recognising the Court of Appeal as New Zealand's final appellate court;
- promoting reflective development of the law;
- recognising Maori values and the interests of Maori under the Treaty of Waitangi;
- reflecting the nature of New Zealand society;
- economic viability;
- meeting the needs of the community;
- maintaining the independence of the judiciary;
- the effective use of resources;
- simplicity;
- efficient administration;
- access to justice.

26 These principles should be considered when discussing the options for reform set out in this section.

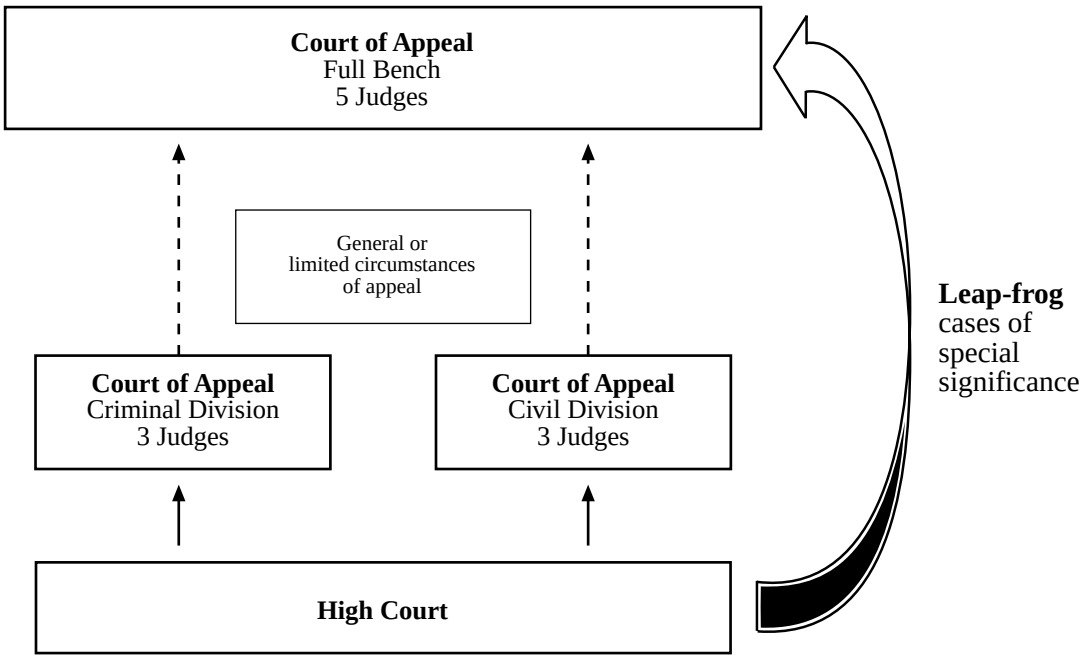
Option One: One level of appeal to the Court of Appeal

27 The first option is simply to enact legislation that removes all rights of appeal to the Privy Council. The legislation would make the Court of Appeal New Zealand's final appeal court. In effect the structure of the New Zealand courts would not change. The Court of Appeal, as the final appeal court, would decide whether cases are heard by a panel of five permanent judges or a division of three judges. In the latter, one or two judges could be High Court Judges appointed to sit on the divisions by the Chief Justice.



28 Central to this option is the issue of whether New Zealand needs one or two tiers of appeal. The argument for a second tier is that it allows legal arguments to develop and refine, and also promotes better decision-making and more reflective development of the law. It also reduces the risk of errors and so promotes public confidence in the justice system. But a second level of appeal could delay final decisions and increase costs for litigants. In principle there is no reason why lawyers cannot present a full and properly developed case at the first appeal. A single level of appeal might also make better use of the country's judicial resources. The Government invites comment on whether New Zealand needs one or two levels of appeal from High Court decisions.

Option Two: Two levels of appeal within the Court of Appeal



Appeal structure

29 This option allows a right of appeal from the High Court to a division of the Court of Appeal. There would be a criminal and a civil division and each case would be heard by three judges.

30 A second level of appeal would be available from a division to a full bench of the Court of Appeal. The judges from the division bench would not be able to sit on the appeal to the full court.

Leap-frog

31 In exceptionally important or urgent cases, provision could be made to leap-frog the divisions of the Court of Appeal and proceed straight to a full court. The Judicature Act already directs the Court of Appeal to sit as a full court to hear and determine cases it considers are of "sufficient significance to warrant the attention of a full Court". The Court's current procedure for determining which cases are of special significance to warrant the consideration of a full court is published in the New Zealand Gazette.

Procedural choices

32 Within this option there is a choice to be made on the grounds for taking a second appeal. A second appeal usually requires the leave or permission of the court. The question is how widely to frame the grounds for giving leave. It could be restricted to cases of special significance, or where difficult questions of law are raised, that would make a second appeal desirable in the interests of justice. Or a second appeal could be available on a much wider set of grounds. This is an issue on which the Government welcomes discussion.

33 The detail of the procedures for giving leave or permission to appeal would also need to be developed. Issues include how many judges should be involved in that decision and whether they can be judges who heard the original appeal or will hear the second appeal.

Advantages

34 This option has several advantages. It:

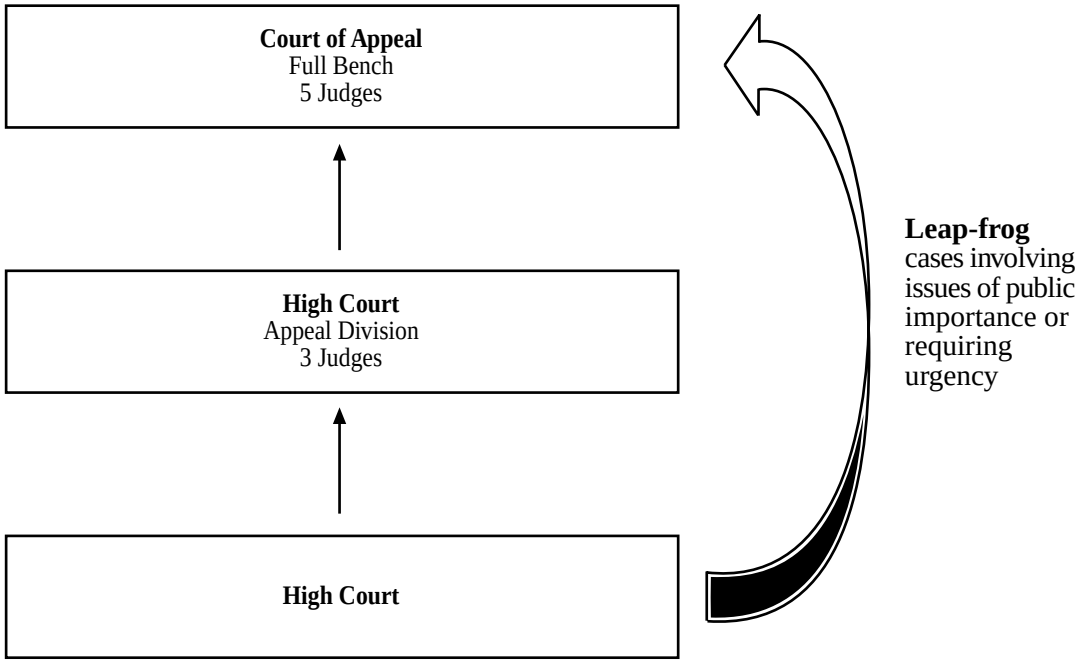
- requires little legislative change because divisions of the Court of Appeal already exist;
- uses our existing court structure and allows the Court of Appeal to control the allocation of its judicial work and the extent of its caseload;
- may reduce the number of appeals to the full court and allow more time for reflective law making.

Disadvantages

35 This option may have resource implications, as the workload of the Court of Appeal would increase. There is a risk, inherent in any two-tier appeal structure, that the best judicial minds may be under-utilised. More Court of Appeal Judges or more High Court Judges on the Court of Appeal bench, may be necessary to manage the case load and to ensure that judges do not sit on appeals from their own decisions. The extent of any increase in workload would depend on the scope of the second appeal right.

36 A related issue is whether High Court Judges should continue to sit on the divisions, or if those divisions should be limited to Court of Appeal Judges only. If only Court of Appeal Judges were used, more judges would need to be appointed at this level.

Option three: Appeal Division within the High Court



Appeal structure

37 Under this option an appeal division of the High Court would hear all appeals brought against first instance High Court and District Court decisions. Appeals to the Court of Appeal would require leave. Again the grounds of appeal could be wide or narrow. A 'leap-frog' appeal would operate for cases of significant public importance or urgency.

38 Court of Appeal Judges would play no part in first appeals. The workload of the Court of Appeal would be transferred to the High Court Appeal Division, requiring additional judicial resources at that level.

39 A law change would be required to replace the current provision for civil and criminal divisions of the Court of Appeal with the new appeal structure for the High Court.

Advantages

40 The Court of Appeal would operate as a self-contained final appeal court, similar to final courts in Australia and Canada. Court of Appeal Judges would only sit on second appeals, which may promote reflective development of the law at this level. The Court of Appeal would also be able to focus on legal policy, rather than correcting errors.

Disadvantages

41 The resources of the Court of Appeal may be under-utilised, as its workload will be reduced. The extent of any reduction would depend on how narrowly the grounds for obtaining leave to appeal were framed, and on any changes in legal practice resulting from a more practicable second appeal at the High Court. In addition, there is a risk of inconsistencies in decision-making at the first level of appeal, as Court of Appeal Judges will cease to sit on the first appeal level hearings. Such inconsistency may be addressed by the ability to have a second appeal.

3 Options to address Maori issues

42 With all three options just outlined, there is a need to consider how the justice system might better recognise Maori values and interests. This section outlines a number of possibilities, which could be combined with any of the structural options.

Greater representation of Maori within the justice system

43 In 1995 the Maori Committee of the Law Commission recommended greater representation of Maori within the justice system by increasing the number of Maori appointed to the benches of all courts.

44 It may be appropriate when considering appointments to New Zealand's final appellate Court to reassess the current appointment process.

45 The appointment process for members of the judiciary is set out in the booklet *High Court Judges Appointments*. People seeking appointment to the High Court and Court of Appeal are assessed in relation to four criteria: legal ability; qualities of character; personal technical skills; and reflection of society. The last criterion states:

> "This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness." (p.7)

46 It is noted that s 174(2) of the South African Constitution Act 1996 states:

> "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

47 In New Zealand, when considering appointments to the High Court bench, the Attorney-General consults members of the legal professional community, including the Chief Justice, President of the Court of Appeal, Secretary for Justice, President of the Law Commission, New Zealand Bar Association and President of the New Zealand Law Society. Nominations are sought from the Ministers of Justice, Women's Affairs and Maori Affairs. Other organisations which may be consulted include the District Law Societies, women lawyers' associations and the Maori Law Society. Further enhancements of this process to increase the participation of Maori in the judiciary may be appropriate. When considering appointments to the Court of Appeal, there may be other community, Maori or legal organisations that the Attorney-General could consult.

Processes to give the Court of Appeal access to expert advice on Maori values

48 In cases involving the Treaty of Waitangi or constitutional issues, or substantial questions of Maori culture and values, it might be appropriate for the Court of Appeal to have direct access to expert advice on Maori values and tikanga Maori.

49 The 1999 amendment to the Judicature Act included provisions for the Court of Appeal to appoint technical advisers to provide advice on scientific, technical or economic matters, or other matters arising from expert evidence. This provision reflected concerns expressed in the commercial community that the Court of Appeal could find such assistance of value in particular cases. A similar process may address Maori concerns in relation to the ability of the courts to deal with Treaty issues or matters involving Maori values. It has also been suggested that in cases involving the relationship between Maori and the land, it may be appropriate for the Court to access the expertise of the Maori Appellate Court.

Acknowledging Maori values within the substantive law

50 In 1995, the Maori Committee of the Law Commission noted that acknowledging Maori values within the substantive law is an important issue. There are an increasing number of provisions where these issues have been incorporated into the law. For example:

- Section 16 of the Criminal Justice Act 1985 allows an offender appearing for sentence to call witnesses to speak about his or her cultural background, the way it may relate to the commission of the offence, and the positive effects it may have in avoiding further offending.

- The Children, Young Persons and Their Families Act 1989 provides for Youth Courts to appoint lay advocates to appear in support of those charged with offences. Their principal function is to ensure that the Court is made aware of all cultural matters that are relevant to the proceedings and to represent the interests of the young person's whanau, hapu and iwi as necessary.

- In the area of restorative justice, traditional Maori values are also being brought to bear.

Appeals from the Maori Appellate Court

51 It may be appropriate to provide for appeals from the Maori Appellate Court, which presently go to the Privy Council, to be heard in the Court of Appeal. This appeal route was provided for in the 1996 Court Structures Bill but never enacted. This option could be revived. Such appeals could be made by leave from the Maori Appellate Court or the Court of Appeal.

Overseas judges on appeal bench

52 This option was also raised by the Maori Committee and would enable judicial officers from outside New Zealand to sit on the Court of Appeal bench. For example, the Chief Justice of Samoa or judicial members of the Privy Council, the Canadian Supreme Court and the Australian High Court could be included. This option could address concerns raised by Maori about the detachment of a wholly New Zealand bench.

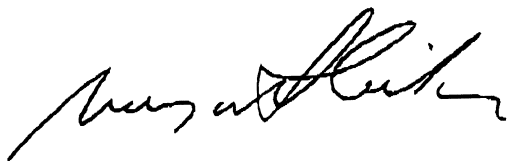
53 Hong Kong has adopted a similar model and has invited judges from other common law jurisdictions to sit on the bench of its final appeal court. These include Lord Cooke of Thorndon (NZ), Sir Edward Somers (NZ), and Lord Hoffman (UK).[5] Earlier this year Lord Cooke suggested that the Hong Kong model should be seriously considered as an alternative for New Zealand if appeals to the Privy Council are abolished. This suggestion could be seen to be at odds with New Zealand's independence. But it can also be viewed as a practical way for a small country to make the most of its own and international judicial talent.

4 Conclusion

54 Working towards ending appeals to the Privy Council and reshaping New Zealand's appeal structure raises profound and complex issues. This paper provides a framework for consultation and discussion by setting out:

- principles that may guide reform of the appeal system;
- three broad options for new appeal structures; and
- a number of options for addressing issues for Maori.

55 The Government looks forward to working with you to progress the discussion on this important issue.



Hon Margaret Wilson
Attorney-General

[5] For further detail see Appendix 3.

Appendix 1: Guiding principles for restructuring the appeal system

The majority of these principles were developed by the Royal Commission on the Courts in 1978 and the Law Commission in 1986.

Recognising the Court of Appeal as New Zealand's final appellate court

Consistent with New Zealand's independence, our final court of appeal should be located in New Zealand.

Reflective development of the law

Any restructuring of the New Zealand appeal system should provide for the presentation of more developed and refined arguments, ensuring overall quality of decision-making and more reflective development of law. This, in turn, maintains public confidence in the justice system by ensuring that parties' concerns have been fully addressed and by reducing the possibility of error.

Recognising Maori values and interests protected by the Treaty of Waitangi

Maori are the indigenous people of New Zealand and are entitled to protection of their culture and interests under the Treaty of Waitangi. The New Zealand judicial system should be structured to allow proper consideration of Maori values.

Reflecting the nature of New Zealand society

The shape of the New Zealand judicial system should be in harmony with the essential nature of the society it serves. New Zealand's small scattered population requires a carefully considered balance of centralised and regional judicial services. Appropriate recognition of the diversity in New Zealand society within the structure of the judicial system is important. Similarly the judicial system should be structured to deliver justice in a manner that reflects New Zealand values.

Economic viability

Financial cost is an important factor to consider in any restructuring. Expenditure on administration, accommodation and other costs associated with changes to the judiciary should be carefully assessed against short and long term benefits.

Meeting the needs of the community

Any restructuring of the court system should give particular consideration to meeting the needs of the communities it serves. In this regard any restructuring must ensure that services are readily accessible, not unduly expensive, and are provided in a timely manner.

Maintaining the independence of the judiciary

Judicial independence is a fundamental constitutional principle, which is central to maintaining the proper balance between the executive power of the government and the delivery of justice through the courts. Maintaining judicial independence is essential to ensuring public confidence and integrity of the justice system. It is therefore essential that the restructuring process does not erode this principle.

Effective use of resources

As a small country with a diverse and geographically dispersed population it is important to maximise the use of limited judicial resources. As a general premise, disputes should be dealt with at the lowest appropriate level. In practice this means that the District Court should deal with the bulk of judicial work. In contrast, judges of the Court of Appeal should be free from routine matters and provided with the resources to focus on leading the development of the common law.

Simplicity

The judicial system should be as simple as possible. Judicial processes should not be unnecessarily complex and the proliferation of courts should be avoided. Members of the public should be able to understand the justice system, assess their options and access justice without undue delay.

Efficient administration

Any restructuring of judicial services should ensure efficient administration. Inefficient administration may lead to injustices. The smooth running of judicial services is essential to the delivery of justice.

Access to justice

Every person has a right to access legal remedies and is entitled to fair and equal treatment before the law in accordance with the principles of natural justice.

Appendix 2: Countries which have retained the right of appeal to the Privy Council

Countries and dependant territories that have retained the right of appeal to the Privy Council

Antigua and Barbuda	Dominica	St Helena
Auguilla	Falkland Islands	St Kitts and Nevis
Bahamas	Gibralta	St Lucia
Barbados	Grenada	St Vincent and the Grenadines
Belize	Jamaica	Trinidad and Tobago
Bermuda	Kiribati	Turks and Carcos Islands
British Virgin Islands	Mauritius	Tuvalu
Brunei & Maldives	Montserrat	
Cayman Islands	New Zealand (Tokelau, Cook Islands, Niue)	

Countries that have abolished the right of appeal to the Privy Council

Australia	India	Singapore
Canada	Ireland	South Africa
Cyprus	Lesotho	Sri Lanka
Fiji	Malaysia	Tanzania
Ghana	Malta	Zambia
Guyana	Pakistan	Zimbabwe
Hong Kong	Sierra Leone	

Appendix 3: Reforms in countries which have ended the right of appeal to the Privy Council

Federal Systems

Canada

The Supreme Court of Canada was established in 1875. However, it was not until 1949 that all rights of appeal to the Privy Council were abolished.

Currently within the Canadian Federal justice system, each province has a separate hierarchy of courts, with jurisdiction to hear federal, provincial and constitutional law. Tiers within the provinces include a first-level provincial court, a superior provincial court and a provincial Court of Appeal. The superior court level also includes the Tax Court of Canada and the Federal Court of Canada, which comprises a Trial Division and the Federal Court of Appeal. The Federal Court's jurisdiction encompasses any matter falling within the competence of the Federal Government.

The Supreme Court of Canada hears appeals from the provincial courts of appeal and the Federal Court of Appeal. Although most civil appeals require leave to appeal, in criminal cases an appeal may be brought as of right where there is a dissenting opinion in the provincial court of appeal.

The jurisdiction of the Supreme Court also includes the provision of 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. In 1912, the reference jurisdiction of the Supreme Court was challenged in the Privy Council, *Reference Appeal* [1912] AC 571. The Privy Council held that although the function was not judicial but merely advisory, with no more effect than the opinions of the law officers, it upheld the jurisdiction. As a consequence, the Court's answer on reference questions is non-binding.

As noted in Hogg, *Constitutional Law of Canada*, a second objection to the reference question concerns the exercise of original jurisdiction. Section 101 of the Constitution Act authorised the establishment of a Court of Appeal. In the United States, an attempt to confer original jurisdiction on the Supreme Court was held to be unconstitutional. This objection has never been lodged against the reference jurisdiction of the Canadian Supreme Court.

The Supreme Court of Canada considers approximately 500 applications for leave to appeal each year and hears 120 appeals. A quorum consists of five members for appeals, but most appeals are heard by a panel of seven or nine judges. There are nine permanent appointments to the bench. Although the Court normally adheres to its prior decisions, it is not absolutely bound to do so.

Australia

Like Canada, the Australian judicial system is federal. Each state has a separate three-tier hierarchy of courts from Magistrate level to Court of Appeal. In addition, the Federal Court of Australia exercises appellate jurisdiction over certain State Supreme Courts in proceedings concerning federal jurisdiction. The High Court is Australia's highest appellate court.

There is no automatic right for an appeal to the High Court and parties seeking to appeal State Court and Federal Court decisions must apply for leave to appeal. The High Court also has original jurisdiction to hear matters, which arise under any Treaty, or affect representatives of other countries. It can also hear matters in which the Commonwealth is a party or matters between states. In addition, it considers matters where an injunction is sought against an officer of the Commonwealth. The High Court also has a broad original jurisdiction to determine matters arising under the Constitution or involving its interpretation. The High Court is not bound by its previous decisions.

There are seven permanent members of the High Court. A full court of five or seven judges hears constitutional cases and appeals that raise important questions of law. In 1998-1999, the High Court considered 328 matters, only one of which was heard by the full Court.

Malaysia

Between 1978 and 1985, Malaysia abolished all rights of appeal to the Privy Council. The Federal Court of Malaysia is now the highest judicial authority.

Within the court structure, there are two High Courts relating to the two Malaysian provinces. A single Court of Appeal has appellate jurisdiction to hear civil and criminal cases originating from them. The Federal Court has both appellate and original jurisdiction.

In its original jurisdiction, the Court may determine disputes between states and the validity of laws made by Parliament. It also has an advisory jurisdiction and may provide an opinion to the King on matters concerning the Constitution. In addition, the High Court may refer constitutional questions directly to the Federal Court. Finally, the court exercises its appellate jurisdiction, determining appeals from the Court of Appeal.

The Federal Court consists of the Chief Justice, President of the Court of Appeal, the two Chief Judges of the High Courts and three Federal Court judges. A full court comprises three judges on the bench, but on constitutional matters the bench can increase to include five or seven judges.

Unitary Systems

Singapore

In 1994 Singapore abolished appeals to the Privy Council. The court structure now comprises District Courts and the Supreme Court, which includes the High Court and the Court of Appeal, Singapore’s final court. The High Court exercises both original and appellate jurisdiction, similar to New Zealand’s High Court, and the Court of Appeal hears appeals from the High Court. The President of Singapore may also refer to a tribunal consisting of not less than three judges of the Supreme Court for its opinion on any question as to the effect of any provision of the Constitution.

The Court of Appeal usually consists of three judges. However, on request of the Chief Justice, a judge of the High Court can sit on the bench and five judges may consider important cases. The Court of Appeal is not bound by its own previous decisions.

Hong Kong

In 1997 appeals to the Privy Council from the Hong Kong courts were abolished. Hong Kong now has a four tier judicial system.

The District Court hears civil claims up to $120,000 and criminal cases, apart from murder, manslaughter and rape. The High Court is divided into two levels, the Court of First Instance of the High Court and the Court of Appeal of the High Court. The former has unlimited jurisdiction in both civil and criminal matters and the latter hears appeals from the Court of the First Instance and the District Court.

The Court of Final Appeal is the highest appellate court in Hong Kong. In civil matters, appellants can appeal as of right the final judgment of the Court 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 Court of Final Appeal where the question involved is one of great general or public importance. In criminal matters, leave to appeal must be obtained from the Court of Final Appeal. The Court of Final Appeal has no jurisdiction over acts of state such as defence and foreign affairs.

The Court of Final Appeal is constituted by the Chief Justice, three permanent judges and one non-permanent Hong Kong judge or one judge from another common law jurisdiction. Under section 9 of the Hong Kong Court of Final Appeal 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 current list of judges includes the Rt Honourable the Lord Cooke of Thorndon, the Rt Honourable Sir Edward Somers and the Honourable Lord Hoffman.

In 1998, the Court of Appeal of the High Court heard 653 criminal appeals and 184 civil appeals. During that same year, the Court of Final Appeal dealt with 24 criminal and 21 civil applications for leave to appeal, three substantive criminal appeals and 14 substantive civil appeals.

First published in December 2000 by
the Office of the Attorney-General,
Parliament Buildings, Wellington,
New Zealand.

© Crown Copyright

ISBN 0-478-04450-X