



The Privy Council – A Lost Cause?



Do we want to keep our right of appeal to the Privy Council? Alan Stuart, a partner of the Auckland and Warkworth Lawlink firm of Webster Malcolm & Kilpatrick, outlines the debate and argues that perhaps we should not dispense with overseas input into the final level of appeal in our court system.

In a letter to the Auckland District Law Society newsletter one correspondent argued recently that those who opposed the abolition of the right of appeal to the Privy Council are fighting a lost cause. The message is that they should get real, get their feet on the ground, pull their heads out of the sand, wake up and smell the flowers and stop beating their heads against a brick wall. The change is inevitable, he suggests – we should all just accept it and get on with ensuring we have the best alternative. Well, call me Canute, but perhaps the tide for abolition is not irresistible.

How have things changed since the first appeal was taken from New Zealand to the Privy Council in 1849? What makes something that was sensible then now so offensive? The changes are innumerable and vast, but they make extra-territorial input into our judicial decision-making more, rather than less, relevant. Let us count the ways, but in doing so look at the arguments for abandonment. The main ones are listed in the report of the Solicitor-General to the Cabinet Strategy Committee in May 1995:

1. Retaining the right of appeal to an overseas court is inconsistent with New Zealand's

independence and reflects adversely on our confidence in our own judiciary.

2. The Privy Council's distance from New Zealand means that final decisions are made by judges largely unfamiliar with New Zealand society. It is important that judges' social thinking is attuned to that of those they judge.
3. The right of appeal to an overseas court inhibits the development of case law tailored to New Zealand conditions.
4. (In answer to the suggestion that Privy Council judges are better) "The legal quality of the Court of Appeal is very high. That the Privy Council often differs from the Court of Appeal does not reflect on the quality of that court. Able judges can, and often do differ as to the preferred result of difficult cases."
5. The cost of a Privy Council appeal is prohibitive for most people involved. As a result, the threat of an appeal to the Privy Council means that people with limited means who have been successful in the Court of Appeal might be forced into compromises which negate the benefits of that success.
6. The benefits to be gained from New Zealand judges sitting (at the Privy Council) with top UK judges can be duplicated through other means, such as attending legal conferences.
7. "There is no need for a two-tier system of appeals. By the time a second appeal is heard (as by the Privy Council), there is usually a difficult choice to be made between valid competing arguments."

This last point can now be disregarded; it is now accepted that there must be a two-tier appeal system; the only debate is how that system should be structured.

Of the other factors listed, cost is a more complex issue than the report

suggests. At present the Privy Council costs the state nothing, but the cost of setting up and running a new Supreme Court in New Zealand will exceed enormously the total amount the litigating parties will save through no longer having to go to London. The major component of a participant's cost is the amount paid to its lawyers for their time to prepare for and attend the appeal hearing. The need to travel to London certainly adds to that cost, but not by enough to deter an appellant who is willing and able to contemplate an appeal. Of course for some the cost of an appeal can be a real obstacle, but this is true at all levels of the court system; any threat of appeal at any level can force those with limited means into compromises.

Some of the listed arguments seem to be based on the notion that we are isolated and unique and should continue to be so (points 2 and 3 above). Yet if we compare today's ease of travel, our ability to communicate quickly and comprehensively and our knowledge and understanding of other cultures (and our willingness to learn from them) with what prevailed in 1840 we can see that these arguments have never been weaker. There is no reason today why a judge sitting in London, New York, Brussels, Geneva (or even Canberra) cannot understand broad cultural principles enough to qualify him or her to rule on New Zealand cases. Indeed, at the levels of principled policy-making at which such final appellate courts operate – and with the trend towards globalisation of human rights, politics and economics – one could argue that an understanding of world trends is a more important qualification than local knowledge.

For some years now the Privy Council has deferred to the Court of Appeal on matters of policy that are truly unique to New Zealand. This deference is not unusual between courts, particularly in relation to matters that are discretionary or relate to social

policy, rather than strictly matters of law. Furthermore, courts often decline to interfere with discretions exercised by specialist tribunals working within their areas of expertise. These practices do not mean that the general courts should be abolished, or that we should be without the supervisory role of the superior courts.

One view of the various arguments is that they are merely rationalisations for what is essentially each individual's political opinion about the merit or otherwise of appeals to the Privy Council. The motivation for those in favour of abolition may be variously a dislike of colonisation and its relics, dislike of England or the monarchy, preference for a republic, mistrust of foreigners or a desire for change. On the other hand, those supporting retention may merely be conservative, afraid of change, or suffering from cultural cringe (*we're not good enough to do it ourselves*).

My partner, Gerry Kilpatrick, observed in an article on the Privy Council in a 1995 Lawlink magazine, that in principle *Almost everyone agrees that our court of final appeal should be one that is resident in New Zealand . . . How can we be a complete state when one of the functions of government is exercised outside our country?* Gerry Kilpatrick also states that notwithstanding developments in our constitutional status the overriding principle must always be whether retaining the right of appeal to the Privy Council is in the interests of the administration of justice. If New Zealand becomes a republic and has a written constitution, he sees abolition of the right of appeal to the Privy Council as inevitable.

As an issue on its own, it may not matter whether New Zealand retains the right of appeal to the Privy Council. What is of concern is that the move for its abolition is part of a trend to isolation that is already reflected in other policies, some well established and some new (eg the nuclear-free policy, changes in defence policy and to the armed services, immigration and refugee policies, the pressure to ban genetically engineered organisms). No man is an island, and a state is even less so. Economically and in every other sense New Zealand **is** dependent on the rest of the world

and cannot exist by itself. Are we extending the ideal of self-sufficiency too far? Perhaps trusting overseas judges as the final arbiters on our disputes is a small part of buying into the idea that we are all in this world together.

It is a final irony that, as a result of a progressive ceding of jurisdiction to the European Court of Justice, the United Kingdom itself has (for some purposes) an offshore court of final appeal.

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