Preliminary Paper No. 4

THE STRUCTURE OF THE COURTS

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised

by Friday, **1 April 1988**

These should be forwarded to:
The Director, Law Commission, P.O. Box 2590, Wellington

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The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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C O N T E N T S

TERMS OF REFERENCE

PURPOSE OF REFERENCE

1. To determine the most desirable structure of the judicial system of New Zealand in the event that the Judicial Committee of the Privy Council ceases to be the final appellate tribunal for New Zealand.

2. In any event, to ascertain what changes, if any, are necessary or desirable in the composition, jurisdiction and operation of the various courts in order to facilitate further the prompt and efficient despatch of their criminal, civil and other business.

3. Similarly, to ascertain what further changes, if any, are desirable to ensure the ready access of the people of New Zealand to the courts to determine their rights and resolve their grievances.

REFERENCE

With these purposes in mind you are asked to review the structure of the judicial system of New Zealand, including the composition, jurisdiction and operation of the various courts, having regard among other matters to any changes in law and practice consequent upon the recommendations of the Royal Commission on the Courts, and to make recommendations accordingly.

PREFACE

The Minister of Justice, acting under s.7 of the Law Commission Act 1985, asked the Commission in the terms indicated on p.viii of this paper to review the structure of the judicial system of New Zealand, including the composition, jurisdiction and operation of the various courts. Following some initial informal consultation the Commission in an advertisement published throughout the country in September and October 1986 sought (1) an indication of interest from those who wished to receive the material prepared for the inquiry, and (2) proposals about the methods which the Commission might use in carrying out its inquiry.

This paper is being distributed to the more than 150 people and organisations who responded to that notice and to many others who we think may be interested. We have also had several suggestions about the procedures we should continue to follow. And we have already received some submissions to which we shall give further attention.

Suggestions about our procedures stressed first the importance of wide and effective consultation (generally on the basis of statements of the relevant facts and of the issues that appear to require consideration). Some also emphasised the need to gather Maori opinion in appropriate ways. Small seminars with those particularly affected were proposed as well. The Commission itself has already benefited in the preparation of the discussion paper and its appendices from consultation with individuals closely involved in the court system. It is grateful for the assistance, information and suggestions that it has had from Judges, lawyers, court staff and others. We have for instance had some instructive visits to District Courts. We will widen such contacts in the course of the next few months. We have also identified further information which we shall try to assemble.

The Commission as well has taken some advantage of parallel and related inquiries and developments some of which are mentioned in para. 3 of the discussion paper. Obviously our inquiries and proposals may continue to be affected by some of those matters. One significant development is the announcement by the Minister of Justice at the beginning of October that the Government will move to remove the right of appeal to the Judicial Committee of the Privy Council in the course of the present government.

The discussion paper is principally about the structure of the judicial system of New Zealand, the matter central to the terms of reference. That is, it is about –

- the range of the courts and related bodies
- the various people who make up each of them

- their areas of power and
- the relationships between them (for instance by way of appeal).

But the structure of the judicial system is not an end in itself. Courts exist for a purpose. They serve a critical social function in our land. For 750 years our law has promised that we are not to be imprisoned, passed upon or condemned but by lawful judgment of our equals and in accordance with due process of law; nor is justice or right to be denied or deferred to us. The old promise gives emphasis to the question whether there are delays in the court process which are not acceptable. The delays may involve waiting for hours on the day of decision for a hearing of just a few minutes, or several appearances when only one or two would suffice, or a wait of months before a relatively simple defended criminal prosecution is heard. The often related complaint is of cost. Is the cost such that litigation is wrongly discouraged?

Due process of law has many parts. The structure of the courts is a necessary part, as are prompt and real access, but by themselves they are not sufficient. Other matters of importance which have been mentioned to us, which are relevant in a broad way to the reference, but which are not discussed in any detail in the paper include:

- the methods for the selection and education of judges
- the use of part–time judges
- the relationship between the judiciary and the executive government in the administration of the courts (what is the role of "partnership"? What provision should there be for the deployment of judicial resources?)
- the role in relation to such matters of a judicial commission, and the relevant functions of the Courts Consultative Committee
- the relationship in such matters between the independence of the judiciary and the responsibility of the state to provide the relevant resources and ensure they are used efficiently
- the relevance of technological developments (to be seen for instance in computer assisted management of case flow, and in teleconferences)

Some matters in such a list can appear to be small but may nevertheless be significant for the fair and independent

operation of our judicial system and for the perception of that fairness and independence. An instance is the replacement of police orderlies by civilian court attendants in some District Courts. The perception of a police court is removed, in part at least.

The Commission calls for comment on the paper, on the questions raised by it or implicit in it, and on other matters which you consider relevant to the terms of reference. If you wish to meet members of the Commission, could you please indicate that as well and outline the matters you would wish to discuss. In the light of the replies the Commission will determine what meetings or consultations are to be held and where.

Could you please forward your submissions to –

The Director
Law Commission
P.O. Box 2590
WELLINGTON

by Friday, 1 April 1988. Any proposals about meetings or consultations should be made by Friday, 12 February 1988. For further information, you may in the first instance inquire from Megan Richardson ((04) 733–453).

INTRODUCTION

1. Each working day of the year courts and related bodies sit in about 150 courtrooms and make decisions affecting the rights and interests of all New Zealanders. They make many decisions. For example, each year about 650,000 civil and criminal proceedings are filed in our courts (many, we stress, do not go to trial), about 350,000 convictions for criminal offences (the great bulk of them for minor and traffic offences) are entered, and 10,000 disputes are referred to Small Claims Tribunals. Some of these matters are of major importance to the individuals immediately affected (as with prosecutions for serious crimes) or to the country as a whole (as with disputes about the extent of basic human rights). Others, such as minor traffic offences, may appear to be of little consequence but might be important to those involved. Some cases deal with difficult family matters such as disputes about custody, guardianship and the division of matrimonial property. And others deal with matters of wide national consequence such as the principles of the Treaty of Waitangi.

2. The terms of reference require the Law Commission to review the structure of the New Zealand courts, their composition, jurisdiction and operation. This is a large challenge. It is one that comes only nine years after the major inquiry into the courts undertaken by the Royal Commission on the Courts (the Beattie Commission). The report of that Commission led to important changes in our court structure. We must attempt in the course of our inquiry to assess those changes and especially their consequences.

3. We should have regard as well to other inquiries into aspects of our justice system. The topics and inquiries include access to law, including the instructive process which led to the report *Te Whainga i Te Tika – In Search of Justice* (1986) and the recent response by the Department of Justice; the revision of the law relating to children resulting in the Children and Young Persons Bill currently before Parliament; commercial causes resulting in the establishment on an experimental basis of the Commercial List in the Auckland High Court (1987); the business of the High Court by a Working Party of High Court Judges (1985–1986) leading to the introduction of Masters in that Court (a matter also proposed by the Royal Commission in 1978); the study of small claims tribunals leading to the Disputes Tribunal Bill now before Parliament; the community mediation system which operated in an experimental way in Christchurch and was evaluated in 1986; pre–trial conferences in the Christchurch District Court (1987); an inquiry by the Audit Office (1987); a study report on the Maori and the Criminal Justice System (1987); and violent offending (1987) leading to changes in the criminal law made recently by Parliament. The Law Commission has also begun a study of arbitration. These processes (mentioned in part in the bibliography in Appendix A) mean that much information and opinion relevant to our inquiry has already been gathered. We have access to

much, if not all, of it. We appreciate the danger of repetitive consultation.

4. The Law Commission inquiry, as we shall sketch later in this introduction, is to be seen even more widely than the terms of reference and those inquiries suggest. One of the things that courts and related bodies do is settle disputes. New Zealand society has other ways of settling disputes and we need to have regard to them as well. We need to have regard also to other ways of handling the things that courts do in addition to settling disputes.

5. This paper considers –

- the matters which appear to require emphasis in this inquiry
- the current business of the courts
- the current distribution of that business
- the possible future distribution of original jurisdiction
- the possible future distribution of appeal jurisdiction

Questions about access to the courts and their administration arise throughout the paper.

WHAT SHOULD THE EMPHASIS OF THE REVIEW BE?

6. The terms of reference, the valuable responses we have already had to our first notice about this inquiry, the Law Commission Act 1985, our work in other areas of the law, and informal discussions and inquiries suggest a number of matters to which we might give primary attention. We welcome comment on the following list.

APPEALS

7. A first matter, emphasised by the terms of reference themselves, is the system of appeals, or more particularly the consequences for the overall court system of the removal of the right of appeal to the Judicial Committee of the Privy Council. This aspect is given greater emphasis by the Government's decision, announced in October, to remove the right of appeal within the term of this Government. This matter involves questions about the purpose and nature of rights of appeal, including the final appeal. To quote John Milton, writing 350 years ago, we can never expect that "no grievance ever should arise ...; but when complaints are finally heard, deeply considered, and speedily reformed there is the utmost bound of civil liberty attained that wise men look for" (*Areopagitica* (1644)). (Those who think that Milton was not discussing a right of appeal will agree that his statement is relevant to the next more general heading.) In more modern dress, the right of appeal for those convicted of criminal offences can be seen affirmed in the International Covenant on Civil and Political Rights by which New Zealand became bound in 1978. The relevant provision is quoted in para.39 below.

ACCESS TO JUSTICE

8. The terms of reference identify a second matter which again runs back deep in our constitutional heritage and which other recent developments also emphasize – the ready access of New Zealanders to the courts to determine their rights and to resolve their grievances, and the prompt and efficient despatch by the courts of that business. The courts after all are there to serve the people who come to them. King John at Runnymede in Magna Carta and his successors in its reaffirmations promised that no-one was to be condemned but by lawful judgment of their peers and according to due process of law; neither justice nor right were to be denied or deferred. The International Covenant entitles everyone in the determination of criminal charges against them and of their rights and obligations in a suit at law to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 14(1)). Rules of Court emphasise the just, speedy and inexpensive determination of proceedings. Law and practice have given increasing emphasis to State supported legal aid to those involved in court proceedings. The creation of new institutions and processes, for instance in the small

claims and tenancy areas, gives further weight to such matters. The issue is as well a severely practical one: are there delays and costs (including the costs of distance) which deny justice? This is not a matter of interest only to the individuals immediately involved. The State has a general interest in the peaceful settlement of disputes and orderly compliance with the law.

9. The new institutions and processes are sometimes also created because they are seen as more appropriate for the particular type of dispute. Thus legislation relating to the family requires attempts by way of negotiation, counselling and mediation to reconcile the parties or if that is not possible to produce a settlement of the issues in dispute. A similar emphasis is found in legislation relating to unlawful discrimination which also provides for a special tribunal composed of persons with expert knowledge and experience. That is to say, the institutions and processes established or recognised by legislation to resolve or handle disputes and related matters take a great variety of forms depending on the nature of the dispute. Those affected will sometimes have a choice between the methods; and the methods may relate to one another in other ways.

SYSTEMATIC REVIEW OF THE LAW

10. A third matter arises from the Law Commission Act. One of the Commission's principal functions is to take and keep under review in a systematic way the law of New Zealand. That means that we should have regard to areas related to the particular ones we are examining. In the present case we must, to be specific, have regard to the inquiry which we have begun into our arbitration law; to the review of the law and practice relating to access to the courts; to the inquiry being undertaken by the Legislation Advisory Committee into administrative tribunals; and to the inquiries of the Economic Development Commission into the need for and form of regulation (including institutions such as tribunals or courts). Our inquiry into legislation is also relevant. Better prepared legislation can, in some circumstances, help the courts by simplifying disputed legal issues or even avoiding them altogether. Simpler forms can help those affected by court process.

TE AO MAORI

11. A fourth important matter arises from the terms of our own statute. The Law Commission Act 1985 requires the Commission to "take into account te ao Maori (the Maori dimension)". It is also to "give consideration to the multicultural character of New Zealand". This provision, like legislative references to the Treaty of Waitangi, relates to other examinations of the place of the Treaty in our legal, constitutional and political systems.

THE ROLE OF THE COMMUNITY

12. Magna Carta requires trial by one's peers. What is the appropriate community involvement in our justice system? The question relates not to the immediate parties to a proceeding but rather to those who decide the cases or help present them. The courts are in part composed of professional judges usually aided by lawyers. That is also true of many tribunals. At the same time there is a large involvement by members of the community who are not lawyers in the decision-making side of the courts and tribunals, for example as jurors, Justices of the Peace, Small Claims referees, and non-lawyer members of courts and tribunals. Non-lawyers also make significant contributions in community care and sentencing and in the Family Courts.

SENTENCING

3. A sixth issue arises out of current public concerns about a major aspect of the work of the courts, particularly the District Courts - sentencing in criminal matters. We do not propose in the present context to re-examine matters already closely and recently considered by other bodies and by Parliament. But we should be thinking about the institutional consequences. What is the role of the court in sentencing both in respect of serious matters and minor ones? Are there some at the minor offences end of the scale which should no longer be subject to criminal prosecution through the courts? What is the role of the community in sentencing and in later reassessing the position of a person subject to a sentence of imprisonment?

THE INTERNATIONAL ENVIRONMENT

14. Our legal system is increasingly to be seen in an international context. In a way this has always been so given our colonial, imperial and Commonwealth heritage with the particular consequences that the law of England as at 1840 and later Imperial legislation, as applicable, is part of the law of New Zealand and that the Judicial Committee of the Privy Council is our final court of appeal. The international context increasingly includes other elements. A large number of treaty obligations affect the body of our law in an enormous variety of ways. They have or raise consequences for our court system and for related means for the settlement of disputes. Thus the further development of the agreement for closer economic relations between New Zealand and Australia is considered by some to require the development of trans-Tasman courts or tribunals to handle the commercial matters arising under it. Certain international investment disputes involving the Government can be referred to the International Centre for the Settlement of Investment Disputes for mediation or arbitration. Human rights questions can arise before International Labour Organisation and United Nations bodies. And foreign judgments and arbitral awards are to be enforced in New Zealand courts.

EFFICIENCY OF RESOURCE USE

15. The final matter is another State interest. The State, the taxpayer, directly provides the court system with about 1,100 staff and $170,000,000 each year. One calculation puts the overall cost to the State for a day's hearing in the Court of Appeal at $5,000 and in the High Court at $2,000. Other direct costs of the justice system (such as legal aid) and the indirect costs of litigation are also to be added. Are those resources of people, buildings and money being efficiently and effectively used? For instance could court rooms be in use for more hours each day? Are there matters which the public purse is funding that it should not? Or, on the other hand, are there aspects of the whole enterprise of handling disputes in our society that the State is currently not funding and supporting but should?

16. The eight matters we have just listed grow out of or reflect principles in our constitutional and political system. Other relevant principles such as the independence of the judiciary, equality before the law, and individual autonomy are also to be taken into account.

WHAT IS THE BUSINESS OF THE COURTS?

17. The judicial oath indicates the general task of the courts. Judges swear that they will well and truly serve Her Majesty, her heirs and successors according to law, in their judicial office. The oath continues:

> I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will. So help me God.

(The oath is to be taken by some but not all tribunal members, and separate oaths are provided for some, but not all, other tribunals.) Section 3 of the Judicature Act, as enacted in 1908 in wording that is little changed in its 1979 version, provided that –

> "There shall continue to be in and for New Zealand a High Court of Justice ... for the administration of justice throughout New Zealand."

And, under s.16, the High Court –

> "... continues to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand."

While in form the statement of jurisdiction is legislative, in real terms the reference is to the historical development and to the powers of the English courts of general jurisdiction as they were in the mid 19th century. That reference to the general jurisdiction of the courts of common law and equity was explicit in the 1841 and 1844 Ordinances. The jurisdiction of the District Courts by contrast is specifically statutory. They have those powers conferred by particular statutes.

A COURT MODEL

18. The jurisdiction of the courts can be viewed in several different ways. We must look at what the legislation says. Appendix B gives a summary of it. We must look as well at what the courts actually do. Appendix C gives some statistics. And we should inform that examination by using comparative and theoretical material about adjudication. We need to do the last since the existing situation should not be judged simply in its own terms. One model of a court based on experience and drawing on some comparative and theoretical material is as follows:

- a judge (usually legally qualified) independent of the parties, appointed and supported by the State but independent of it

- exercising compulsory and coercive jurisdiction over the parties

- passively receiving the evidence and reasoned argument presented by the parties to a dispute, through a formal adversary process

- resolving the dispute between the parties by making a binding decision about past facts and claims of right, given in accordance with law which limits the power of decision and

- usually giving the dissatisfied party a right of appeal

The features of the model can be emphasised by contrasting it with other methods for the settlement or handling of disputes such as –

special tribunals
arbitration
mediation and conciliation
inquiry
contract
legislation
voting and lot.

Some of these methods are included in Appendix D. The table is somewhat simplified in not including gradations between the columns. It also does not indicate the matters which the processes could best handle and those they could not handle. Thus adjudication, it is often said, can best handle disputes about right or fault arising from past facts in which one party is the winner and the other the loser. By contrast it is not as apt to handle wider ranging, future-looking, differences of values in which there is a multiplicity of possible answers. The court model can be further elaborated and contrasted with some of the other methods of dispute settlement by emphasising its public character: courts apply and enforce the law, they clarify and develop the law, and they have the constitutional function of protecting individual liberty against the state (see paras. 32–35).

THE SCOPE OF "COURTS"

19. What do we mean by "courts" in the present inquiry? We prefer at this stage not to give a definitive answer; relevant material should not be prematurely excluded. The tentative answer begins with the courts of general jurisdiction – the Judicial Committee of the Privy Council, the Court of Appeal, the High Court, and the District Courts. It extends easily to the related courts – the Family Courts and Children & Young Persons Courts – and to the Small Claims Tribunals, because the first and the last are divisions of District Courts and the first and the second are composed of District Court Judges (as the third may be as well). Two "courts of record" called "courts", operated principally by officers called "Judges", and giving

decisions subject to appeal to or review in the general courts, shouldbe borne in mind as well – the Labour Court and the Maori Land Court. The Courts Martial Appeal Court can also be included here. In addition several tribunals are closely connected with the court system in various ways, including their membership. Thus District Court Judges sit on the Planning Tribunal, the Land Valuation Tribunal, the Taxation Review Authority, the Accident Compensation Appeal Authority, the War Pensions Appeal Board, the Indecent Publications Tribunal, the Licensing Control Commission, and the Social Security Appeal Authority. In some cases, but not all, the law requires this. The connection between the courts and particular tribunals sometimes arises because they have jurisdiction in common; and sometimes because there is a right of appeal from tribunal to court.

20. The Planning Tribunal is in addition a "court of record". The newly established Tenancy Tribunals are administered by District Court registries and appeals lie to the ordinary courts. In addition a large number of appeal bodies in such areas as licensing and registration consist of District Court Judges or a practising lawyer with or without additional members (sometimes named by the parties). Many of these tribunals resolve important matters and disputes between individual and individual, or the State or a public body and individuals. For that reason, as well as their connections to the court system, we tentatively include them within the scope of our inquiry. Many are also being considered in the course of the work of the Legislation Advisory Committee on administrative tribunals.

21. In the following discussion of the business of the courts we consider –

(1) The subject matter of the business of the courts.

(2) Whether there is a dispute between parties to be resolved or handled.

(3) The preliminary, final or appellate character of the work.

(4) The number of parties – one, two or more.

(5) The role of applying and enforcing the law.

(6) The role of clarifying and developing the law.

(7) The constitutional role of the courts.

(8) The public or private character of the matter.

(9) The appeal role.

We then discuss the ways in which the work is distributed.

SUBJECT MATTER

22. The legislation and the practice of the courts suggest the following subject matter may be dealt with in court proceedings (tribunal matters can also be added):

(1) Prosecutions for criminal offences – some serious, others of a minor character including traffic offences.

(2) Civil proceedings (see also (3)–(5)).

(3) Company law matters.

(4) Insolvency.

(5) Other commercial matters, including debt collection.

(6) Family proceedings – including the custody and status of children, dissolution of marriage, matrimonial property, maintenance, family protection and domestic protection.

(7) Other proceedings relating to children – for their care and supervision, and prosecutions against them for offences.

(8) Probate and administration of estates; trusts.

(9) Administrative law matters.

(10) Industrial and intellectual property.

(11) Admiralty.

23. Such a list requires much elaboration and explanation. One way of expanding it is to make some assessment, however rough, of the amount of judge time spent in each area. The following assessment based on Appendix C *is* rough. For one thing it is based in large measure on ***sitting*** time and takes little account of time out of court. It does not include related work of Judges on parole and prison boards, as visiting justices, or on mental health matters, nor the part played by New Zealand Judges in various Pacific Island courts. For another some of the categories are large and ill–defined. (Thus the appendix does not separate out children and young persons work.) No doubt the statistics can and should be improved. But something like the appendix and the following discussion are needed, we think, if the issues are to be seen in a comprehensive manner.

24. In round terms the appendix shows that we have included 164 Judges, judicial officers and judge equivalents in our calculations. About half that judge time is spent on criminal matters, about one–sixth on civil matters, about one–eighth on tribunal matters, about one–twelfth in the Family Courts and about one–twentieth on appeals.

25. Divisions within the particular courts are also of interest. The work of the High Court is roughly one-third crime, one-third civil, one-third other original jurisdiction, and one-twelfth appeals.

26. Within the District Court a distinction is first to be made between the work done by District Court Judges and other judicial officers. Justices of the Peace and Small Claims referees each contribute about one-sixth of the total sitting time of the District Courts. Indeed the sitting time of referees exceeds the combined sitting time of the High Court and District Courts in civil matters. This is a major change in the last few years.

27. About one-tenth of the District Court Judges are tribunal judges, generally on a full time basis. The sitting time of the remainder divides roughly as follows: about 70% on criminal matters, about 18% family, and about 12% on civil and other matters. Those average percentages are misleading in that they do not take account of the fact that two other groups of District Court Judges (additional to the tribunal group) have particular tasks – the Judges who are members of the Family Court and those who have warrants to do criminal jury trials. When the family and jury work is withdrawn from the calculation, the other proportions of course grow. About 85% of the remaining work is criminal and equates to the sitting time of about 53 District Court Judges. That criminal work is divided between the more serious matters dealt with summarily (about 40 judge equivalents), traffic cases (11), minor offences (1), and preliminary hearings (1).

RESOLVING DISPUTES OR NOT?

28. That large judicial effort in the criminal area is directed at matters of varying importance. Some is of great significance, especially sentencing in serious matters. But much of the decision making is not as important (although it might still be of significance to the party immediately affected) – in many cases because there is no dispute (the bulk of cases involve a guilty plea) and decisions are being made in a sense by consent, and in others because the matter itself is in objective terms not important. Much of the time too, especially in the major criminal court, is not in fact taken up with decisions. To quote a District Court Judge, the Judges in that court for much of the time do not decide or give judgments or impose sentences: rather they advise on rights of representation, they take and record elections and pleas, they record fixtures determined by others (often the prosecution staff), and they remand ("and remand and remand"). "As a variation, they from time to time make orders which the parties concur in or do not oppose, frequently by one party failing to come at all."

29. The court model set out earlier has as one central feature the resolution of disputes. In much of the very large area of the work of the criminal courts just mentioned (including traffic, minor offences and children and young persons) there is no dispute about guilt and

only rarely about sentence. Sentencing departs in other ways from the model, as we shall see later (paras. 54–55). Company and trusts work in the High Court can also be non–contentious.

FINAL OR NOT?

30. The criminal area also helps make the point that much court work does not – to mention another aspect of the model – finally resolve the matter before the court; the proceedings are frequently of a preliminary character. The decision will of course sometimes be definitive of the issues or some of them, in some cases originally, in others at a rehearing, and in yet others on appeal. There are other ways in which a decision of a court may not finally resolve a matter. A matter may not be capable of being finally disposed of by way of a single proceeding and a single judgment. Thus the Family Court might be concerned with the problems of a particular family group over a lengthy period and through several proceedings. The same may occasionally be true of the High Court concerned with the affairs of an insolvent company. And relief by way of injunctions and public law remedies can be forward–looking and subject to adjustment.

ONE OR TWO OR MORE PARTIES?

31. In the criminal court area two parties (at least) are before the court: the prosecutor and the defendant. The victim's interests are increasingly recognised as well. In practice however only the defendant will generally remain a significant party. In some other proceedings there may be only a single party (for instance in the case of certain applications for licences or approvals). In those cases there may be others who, while not parties, have a part to play by way of the provision of information, comment or objection. If there is another party there may not in fact be any dispute between the parties or there may be a dispute which the court has to handle in some way. Parties are usually concerned only with their own specific rights and interests but in some circumstances may represent a class of persons or be seeking to protect a wider public interest.

APPLYING AND ENFORCING THE LAW

32. The application of the law to particular matters and disputes emphasises another central judicial function: the courts enforce the law as made through the established law–making systems (which at bottom are democratic or capable of democratic correction). In that they support essential features of the public order. "Enforce the law" is in fact an overstatement of what the courts usually do. They usually sanction, after the event, those who have not complied with the law. Most (but not all) court proceedings are based on a claim that someone has *already* breached the law, and that an appropriate remedy, such as damages or a penalty, should be imposed. Only occasionally is the law directly and fully enforced through court process: the equitable and public law remedies can have that effect.

And indeed the sanction itself – the judgment for a debt, the penalty by way of fine – might not always be effective. The law acknowledges this situation by making separate provision for the enforcement of judgment debts, the enforcement (and remitting) of fines, and by allowing for bankruptcy and the consequent avoiding of obligations.

CLARIFYING AND DEVELOPING THE LAW

33. Along with the resolution of the dispute (or indeed even without it) and with the application of the law, the court might also have the task of reaffirming, clarifying or developing the law in issue. That is seen as another principal judicial function, at least for the more senior courts in the hierarchy. That clarification – stressed in a general way in the Law Commission Act – is a public function of the courts. It should of course reduce the need for potential litigants to go to court and make it easier for their lawyers to advise them. It also helps with the important principle of the equal application of the law to all subject to it.

34. The last two paragraphs assume a body of law which is to be applied, enforced, clarified and developed. The law is not of course always a single homogeneous set of rules applicable to all without distinction. Extensive parts of the law are personal in their application as family law and the laws governing professions and employment demonstrate. The law confers broad discretions in such areas. We mention this matter later in a discussion of sentencing (para.55).

CONSTITUTIONAL ROLE

35. The courts make their decisions about what the law is and its application to the matters before them in proceedings between individuals, or between individuals and the State or its agents. The latter aspect of their function highlights the constitutional role of the courts, especially the High Court as the court of unlimited general and original jurisdiction. They decide what the law is; they decide precisely what it is that Parliament has decreed; they supervise basic features of the constitution, and they decide whether actions taken or threatened by the State are lawful. They uphold the law against the State. In this they are the heirs to Sir Edward Coke who as Chief Justice told King James I in 1607 that the King was under God and the law; and it was for the King's Judges and not for the King himself to decide what that law was (*Prohibitions del Roy* (1607) 12 Co. Rep. 63). It is that aspect of the courts' function that makes especially critical the Judges' independence from executive interference.

PUBLIC OR PRIVATE?

36. The law–declaring or law–making functions and the enforcing

of the law against the State are pre-eminently public functions. In a more general way the whole of the court function is public: it is established and supported by the State, it helps enforce the law of the State, it prevents private disputes from disturbing public order, it meets the entitlement of citizens to justice. But a court or tribunal proceeding can also be seen as having a private character. To characterise the matter as either private or public might have consequences, for instance in respect of –

- whether the court sits in public or not (and whether its proceedings are reported or not)
- whether other parties (including the State) can intervene
- whether the parties can waive certain rights (for instance to have access to the court at all, to appeal, or in respect of time limits)
- the removal of the case to another court
- the referral of the case to a less formal method of dispute settlement
- judicial control of the proceedings
- the grant of leave to appeal
- costs (including the costs to the State of the proceedings).

37. The matters just listed may appear to be rather technical. That is partly so. Some also relate however to broader aspects of the role of the court. Thus, courts might order the removal of cases from a lower jurisdiction to a higher one (when there is such a power) or grant leave to appeal (when appeal is only by leave) on the ground that the case presents a far reaching question of law or a matter of dominant public interest. Parliament or the courts themselves state such tests. Even apparently more technical matters, such as the purported waiver of time limits and attempts to withdraw appeals once lodged, might also be treated by the courts as not being completely within the control of the relevant party or parties, because a broader public interest is seen to be involved in the particular case. It is for the court, as the agent of the law, to protect that public interest.

DECIDING APPEALS

38. The statistics in Appendix C show that about one-twentieth of the judicial sitting time is spent on appeals in the courts. That consists mainly of the work of the Court of Appeal and the equivalent of two High Court Judges who sitting separately are on average hearing appeals. To that might be added the appeal work of District Court Judges and the Maori Appellate Court (which we have not

separately identified) and perhaps the work of the Planning Tribunal and other administrative tribunals hearing appeals. The reference to the District Court at this stage makes the point that all the courts of general jurisdiction hear appeals – as indeed they all exercise original jurisdiction. We shall be gathering more information about the categories of appeal work (especially that handled in the Court of Appeal). Later in the paper we raise more specific questions about appeal arrangements. At this stage we ask a general question: why do we have appeals?

39. Sometimes it is said that appeals are wasteful. The execution of the original judgment is delayed. The parties and the State are put to extra cost. The common law indeed had an aversion to appeals. One great Judge, speaking for the United States Supreme Court, said that the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, *Cobbledick* v. *United States* (1940) 309 U.S. 323. And yet a right of appeal is taken for granted. As Appendix B indicates, appeals are now an established feature of our legal system and of others like it. (There is an exception, considered later, of cases which are dealt with by the highest court in the system originally and therefore finally.) A right of appeal or something like it is now indeed required of New Zealand for persons convicted of criminal offences:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed in a higher tribunal according to law." (International Covenant on Civil and Political Rights, article 14(5)).

40. What are the purposes of appeals? A clearer idea of function might help us with the form. The Covenant provision just quoted indicates one reason for appeals. Only the defendant can appeal, and the provision relates only to crime. The clear implication is of the danger to that individual of an incorrect decision in the particular case. That is to say a basic, probably the original, reason for appeals is the correction of the decision at the request of a person seriously aggrieved by it. The decision on appeal is expected to be better.

41. The second reason for appeal (emphasised in the grounds for leave to appeal as stated by Parliament and the courts (e.g. para.37 above)) is the clarification and development of the law. As the Secretary for Justice put it to the Beattie Commission of the Court of Appeal, "its unique role ... is to act as a custodian of the spirit of the common law and to develop that law in a harmonious, consistent and rational way" (para.282). This role appears to be an increasingly challenging one as the Court is faced, in the words of its President, with a continuing surfacing of policy cases; bringing home how many fundamental issues remain unsettled or reassessable in these restless years, creating a constantly strengthening awareness that our responsibility must be to aim at solutions best fitting the particular national way of life and ethos (Cooke J. [1983] NZLJ 297). It is to be expected that the two purposes of correction and of clarification and development of the law will often be pursued and obtained in the one

case. But that is not always so. A case on appeal might raise no general question of law at all and might turn entirely on its own facts or on the exercise of discretion. On the other hand, the parties to the original proceedings might no longer have any real interest in the matter when it gets to its final examination in the courts, as with the famous case of *M'Naghten* (1843) 10 Cl. and Fin. 200 and its modern version in the United Kingdom, the Attorney-General's reference following acquittal in criminal cases, Criminal Justice Act 1972, s.36.

HOW IS THE BUSINESS DISTRIBUTED?

42. The business of the courts is distributed among a number of different bodies and then within those bodies it is in some cases exercisable by different people. The distribution may be made by decision of Parliament, the parties, or the courts.

(1) By Parliament; thus by law certain offences can be dealt with only by a District Court or by the High Court.

(2) By the parties; thus the plaintiff might initiate a civil case involving say $5,000 before either the District Court or the High Court and if in the High Court might or might not seek a jury trial; and the prosecutor and defendant in serious criminal prosecutions have options about the kind of trial.

(3) By the courts; thus a District Court might refer a civil matter brought before it to a Small Claims Tribunal, an arbitrator or a referee, or a choice might be made administratively within the court office to allocate minor offence proceedings to Justices of the Peace.

43. The allocation by Parliament and by the courts (and presumably in some cases also by the parties) relates, at least in the best of all possible worlds, to three matters –

(1) the character of the issues to be resolved;

(2) the qualifications and responsibilities of the decision maker; and

(3) the procedure followed by the particular decision–maker.

Thus the more important the matter – if it involves the prospect of lengthy imprisonment for a defendant in a criminal matter for example – the more likely it is that the decision will be made by a jury and the procedure will be formal and designed to protect individual liberties. Or if the matter is one involving special knowledge, or demanding consistent treatment or the development of a nationwide policy, a special court or tribunal or selected judges might be used. Consider the Family Courts, Labour Court and the Indecent Publications Tribunal. The example of the Family Court shows that there may also be good procedural reasons for the choice of a particular forum: the emphasis, as there, might be on informality (the jury trial for serious criminal matters with its careful safeguards provides a contrasting example).

44. With the Family Court the procedural point also goes further into the heart of the jurisdiction: the emphasis now is on reaching agreement – with the assistance of State conciliation and court mediation processes and expert professional input – rather

than on public independent decision according to rather strict laws policed by the court and the State. The flavour of the change can be captured by comparing the rules about the public character of matrimonial proceedings as seen by the House of Lords in 1913:

> "... where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude ..." *Scott* v. *Scott* [1913] AC 417, 436.

Accordingly there was no general power for that Court to sit in private. The ground for the dissolution of marriage is now by contrast essentially in the hands of the parties; and the proceedings are private and generally not reported.

45. The procedural emphasis might be not only on informality and on promoting agreement. It might also be on expedition and on reducing cost as with the establishment of the Small Claims Tribunals and the Tenancy Mediators and Tribunals. Costs can also be reduced by the exclusion of lawyers from the proceedings and the narrowing of rights of appeal.

46. In a general way the legislature establishes differences in jurisdiction between institutions – for instance, between the High Court and the District Court, or between the Courts and the Indecent Publications Tribunal. But it is too simple merely to emphasise the differences between different decision makers. First, distinctions may be drawn within a single court between different decision makers. That matter is discussed next. Secondly, two or more bodies may have shared jurisdiction over a particular subject matter. And, thirdly, rights of appeal tend to further remove or at least blur the jurisdictional lines. Those two matters are taken up later.

DIFFERENCES WITHIN COURTS

47. Legislation contains the following range of ways of establishing differences within the court and judicial system.

(1) A court is given or has power. The individuals within it exercising that power may vary, thus –

(a) all members of the court (usually sitting individually but there is often power for more than one to sit) will be able to exercise the power;

(b) the legislation may require more than one judge to exercise the power (as usually in the Court of Appeal, or in the High Court hearing petitions under the Electoral Act);

(c) the court might consist of a judge and jury;

(d) the court might consist of a judge and lay members or lay assessors;

(e) the judge might be specially designated to handle the particular case;

(f) the principal judge in the jurisdiction might issue a general warrant to individual judges to handle a category of cases (such as the Commercial List in the High Court); or

(g) the executive might issue a general warrant to individual judges to handle a category of cases (such as criminal jury cases in the District Courts). (It is probable that an executive warrant will be permanent, while a warrant by the senior judge might be subject to withdrawal.)

(2) Within the court there might be –

(a) a separate division (such as the Administrative Division of the High Court);

(b) a separately named court (such as the Family Courts which as well are divisions within each District Court);

(c) a tribunal (possibly with members with different qualifications as in the case of the Small Claims Tribunals which are divisions of the District Courts).

(3) There might be persons with different qualifications and holding different offices within the court. Thus within our present system there are Justices of the Peace, Registrars, Referees, and Masters with particular powers, either by law, by decision of a judge of the court, by decision of one or other or both of the parties to the proceedings, or by some combination of the foregoing.

(4) A separate court or tribunal might be established. The separation might be reduced by a requirement that its members be judges of the District Court or High Court, as with the Planning Tribunal and the Copyright Tribunal respectively (or that may be so in fact), or by a court registrar of the District Court providing the registry of the tribunal.

(5) The power in question might be conferred on a particular judicial officer and not on a court or tribunal as such; this is so of some powers to issue warrants and various other ad hoc jurisdictions. This can have consequences for administrative support to the officer and for rights of appeal.

48. That is to say there is no necessary or exclusive coincidence between the judicial officers and the particular court or tribunal. It may be that judicial officers primarily associated with a court, particularly the District Courts, have functions as members of other tribunals or courts either because of the requirements of the law or in fact. It may be, on the contrary, that some of those exercising part of the authority within a particular court will not be judges of that court but will have some lesser office. It may be too that the distinctions in function made within a particular court between individual judicial officers of the same status are made more or less firmly. Thus a comparison can be drawn between the creation of a court with a distinctive name and jurisdiction conferred, even while it belongs as a division to the District Court, on the one hand, and on the other, the case of a judge, a member of a court, who is designated to undertake a particular task within the jurisdiction of that court.

49. This profusion of methods means that a simple dichotomy between one court and another or between general court and special tribunal is misleading. It is the more misleading when the points reserved above about concurrent jurisdiction and rights of appeal are brought into the discussion. In the former situation a market is at work. The legislature has given a choice to the parties (usually the plaintiff, but not always) and sometimes subject to the control of the courts or tribunals (the original or that to which the matter might be referred or both). This choice in fact is very widely available. So almost all criminal matters which can go to a jury can be dealt with, at the election of the defendant, by a District Court Judge alone. Next all civil claims up to $1,000 can be commenced in the Small Claims Tribunal, the District Court or the High Court and up to $12,000.00 in either the District Court or the High Court. (There is a costs sanction which will usually influence such a choice.) In addition a matter begun in the High Court can be removed by court order into the Court of Appeal and dealt with originally there. And matrimonial property claims can be brought in the Family Court or the High Court with the respondent able to request that the matter be removed. (The Court of Appeal in refusing to order removal in a recent case has referred to the impressive record of work of the Family Courts in this field, *Selkirk* v. *Selkirk* CA.94/86, 16 March 1987.) Those examples relate to choices ***within*** the court system. Such choices can also arise ***between*** a court and a tribunal, for example in the areas of taxation and unlawful discrimination.

50. Those two areas show as well that the distinction between different courts or between courts and tribunals may be further blurred by Parliament allowing a general appeal from the special court or tribunal to the regular courts. In many other cases the

distinction between the different institutions is by contrast sharpened by allowing an appeal only on a point of law – a recognition that there is a specialised area for the expert tribunal, which is perhaps to be left to develop policy, to make decisions following a consistent pattern, or both. That point gets a particular emphasis in the provisions regulating appeals from the Labour Court to the Court of Appeal. The Court of Appeal is to have regard to the special jurisdiction and powers of the Labour Court.

51. The sense of gradation rather than bright lines of distinction between different bodies appears as well from a closer consideration of one aspect of the subject matter in respect of which the court or tribunal is to decide: the extent to which the decision is controlled or guided or affected by rules, standards and policies. Recall the basic proposition that courts decide according to law. At one end are hard controlling rules – the speed limit is 50 kilometres per hour. At the other, the broadest of policies – the tribunal in deciding whether to grant a licence is to have regard to the public interest. The latter function may in effect require a tribunal to develop the law and the policy as it handles its cases. It might do this, though, with close attention to the policies of government: the relevant statute might indeed require compliance (even perhaps by a court hearing an appeal) with government policy as stated by the relevant Minister.

52. The role of government can be significant in other ways. Thus the court or tribunal might have only a power of recommendation rather than a power of decision, the power of decision remaining with the government. In addition the government appoints members of the bodies, and may have relevant powers in respect of renewal or revocation of their appointment.

DIFFERING PROCEDURES

53. A critical variable touched on at various points in the foregoing is the procedure to be followed by the court. How does it go about its task? The usual model of a court sketched earlier in this paper (para.18) is of the parties to a dispute bringing before the passive judge, through the adversary process, their evidence presented by way of witnesses who are sworn and subject to cross-examination, and argument presented by counsel, in which the parties attempt to make out their own and counter their opponents' claims. The court's task is to resolve the claims between the parties by a decision which binds them (and usually advantages one to the symmetrical disadvantage of the other) and which is made according to law. Questions are increasingly being raised about the efficacy and efficiency of the adversary system especially in some civil litigation.

SENTENCING

54. The role of the sentencing court in criminal cases also helps illuminate some of the foregoing points and other limits

of the traditional adversary model of the court. There is usually no dispute about sentencing, the prosecution taking no part. Next the court is not passive. Following procedures which have their origins well over a century ago, the court in the case of offenders liable to imprisonment usually directs the preparation of reports about the social and personal circumstances of the offender, the offender's means, reparation, or the psychiatric state of the defendant or offender. These reports come primarily from State officials and not from the parties. They are to be given to the offender and the offender's lawyer, and the offender can call evidence to challenge them. In that unusual event there may be an adversary process – but, in response to the ***court's*** process of inquiry. The Criminal Justice Act emphasises this inquisitorial role by empowering the court to adjourn proceedings "for the purpose of enabling enquiries to be made or of determining the most suitable method of dealing with the case". The Act makes no general provision for the disclosure of those documents to the prosecution. The process moreover can involve agreement between those directly affected rather than third party decision. This is so in respect of reparation – if possible, both the value of the property in issue and the amount to be repaid should be agreed – and in respect of the sentence of community care. The different character of the process is emphasised further by the new provision in the Act enabling the presentation of a community view about the offender's background, a provision that has been interpreted as authorising a more flexible approach to the introduction of material to the court than the Anglo–Saxon traditions of the common law might allow, *Wells* v. *Police* (Auckland Registry AP.206/86, judgment 6 March 1987).

55. Sentencing too can involve very broad discretions in judgment with different judges seeing similar matters quite differently: within wide limits many sentences are possible, and the matters to be weighed, while determinate, are potentially many and their relative weight is often not indicated; the judgment moreover in large measure involves speculation and opinion about the future as much as or more than findings of fact about the past. That last point appears in the willingness of appeal courts to take account of events subsequent to the original sentence, thereby departing from the rule that appeals are generally limited to the case as originally decided.

SMALL CLAIMS AND TENANCY MATTERS

56. The elements of wide discretion, non–adversary inquisitorial processes, consensual as well as third party decision–making and differing composition of the court or tribunal appear as well in other jurisdictions. Thus the members of Small Claims Tribunals (although the tribunal is a division of the District Court) and of the Tenancy Tribunals (although administered through the District Courts) need not be lawyers. Relevant knowledge and experience are the alternative qualifications. The Small Claims Tribunals and the tenancy mediators have as primary functions bringing the parties to a dispute to an agreed settlement. Tenancy mediators are to consider matters

with a view to settlement before the matters are referred to the tribunal. Both Tribunals are free from the rules of evidence and are given the power to depart from strict legal rights and obligations and legal forms and technicalities. Both are to decide according to the substantial justice and merits of the case. Lawyers are in general not to appear.

FAMILY MATTERS

57. The Family Courts legislation and practice make the same and related points. The Courts (although again divisions of District Courts) are specially constituted of District Court Judges who by reason of training, experience and personality are suitable people to deal with matters of family law. The law and practice emphasise, in part through a team approach, methods of settlement additional to third party adjudication - legal advisers are under a duty to promote reconciliation or conciliation, counselling is to be made available, a Family Court Judge is to chair a mediation conference if requested by a party to applications for separation, maintenance, custody or access, and is to try to obtain agreement between the parties on the matters in dispute. If matters do have to be resolved by the court the rules and criteria for decision provide illuminating contrasts. At one end is the ground for dissolution of marriage: the exclusive rule is living apart for two years immediately before the application (a rule which in practice will often give effect to the agreement of the parties). At the other is the direction in the guardianship legislation that the welfare of the child is the first and paramount consideration. That legislation, consistent with that broad direction and the traditional responsibility of the courts in this area, also confers wide powers on the courts to call witnesses, to receive evidence whether it would be admissible in court or not, and to seek and receive reports from the Director-General of Social Welfare and from others in respect of the medical, psychiatric or psychological aspects of the case. The court is also empowered to arrange legal representation of the child and to appoint counsel to assist it. Consistently with all these matters, Family Court proceedings are to be conducted in such a way as to avoid unnecessary formality.

EQUITY AND GOOD CONSCIENCE

58. Differing standards for judgment and differing procedures associated with them have been part of the jurisdiction of the District Courts and their predecessors for at least 120 years. The present provision, the wording of which goes back at least to the Resident Magistrates Act 1867, is that if the claim does not exceed $500 the court can receive such evidence as it thinks fit whether the same be legal evidence or not and may give such judgment between the parties as it finds to stand with equity and good conscience. The parties can appeal in such cases only with leave, and such matters might now of course be referred to the Small Claims Tribunal which also is directed to decide according to the substantial merits and justice of the case.

THE COURT MODEL RECONSIDERED

59. The picture that emerges differs in part from the model of the court set out in para.18. Thus for much court business –

- the members of the court or tribunal may not be legally qualified judges; recall the very large contribution of Justices of the Peace, juries, and Small Claims referees and also the lay members of courts and tribunals

- the jurisdiction may be at least partly dependant on the consent of the parties

- the court procedures might be active and inquisitorial (as with much criminal work) and they might, as with tribunals, stress informality and relax the usual rules of evidence

- there may be no dispute between the parties but rather a matter to be handled and processed; this may be so for as much as a third of the whole sitting time of the courts

- the proceedings might be ongoing (as in the Family Courts) rather than dispositive

- the rules and criteria for decision might be in very broad terms and look less to findings of past fact and breach of the law but rather more to the future and to community standards and community institutions

- the procedures may be aimed at facilitating settlement between the parties rather than at achieving binding third party decision and the enforcement of the general public law; there may not even be a power of decision

60. We must however keep the discussion in balance. The original model is accurate for much court work. This is so of some of the most important judicial business – contested criminal and civil trials, appeals, and some tribunal work for example. And the assessment should not be purely quantitative, counting only judge sitting time for example. In particular, the Commission emphasises the constitutional role of the court which fits closely with the original model. That role has a much greater significance in our system of government and in the protection of our rights and liberties than its relatively occasional (although increasing) appearance in litigation might suggest.

61. The standard model is also more accurate for the Court of Appeal and the High Court than for the District Court and for some tribunals. A much higher proportion of the matters in the High Court is contested, and sentencing constitutes a much smaller proportion of

the whole. The discussion suggests another important difference between the High Court and the District Courts: on the whole the High Court has fewer divisions within it and is much more a general court. Juries of course sit in almost all criminal matters; there is the Administrative Division and the experimental Commercial List; in a few cases lay members or assessors sit with the Judge; and Masters and Registrars exercise some of the court's powers. But the differences in function in the District Courts are greater and more significant. First, they have Justices of the Peace and Small Claims Tribunal referees exercising (in terms of time) about one-third of the total District Court jurisdiction and, second, their judges have fairly distinct groupings – those who do tribunal work, Family Court Judges, judges with criminal jury warrants, and the remainder. (There is of course overlap, with most of those in the specific groups undertaking work in the general area.)

THE ISSUES

62. We should now be able to identify the principal questions and in some cases suggest possible answers. We begin, for chronological and other reasons, with the original, first instance jurisdiction and then consider appeals.

HOW SHOULD THE ORIGINAL JURISDICTION BE DISTRIBUTED?

63. Courts and related bodies have jurisdiction to make decisions over a vast range of human activity. At the outset we raise broad questions, first, about the scope of the law administered by the courts and, second, the general distribution of public authority to make decisions. They are, we think, a necessary part of the context of the more confined (although still large) matters that we must consider.

THE SIGNIFICANCE OF THE SUBSTANTIVE LAW AND OF CHANGES TO IT

64. The present inquiry is of course into the institutions that administer the law rather than into the substantive law itself. Substantive changes (occurring in the courts as well as through Parliament) can however have important consequences for the role and working of the courts. Consider for example the consequences of the changes in the last twenty years in family law, accident compensation, and the handling of minor offences, and the growth of administrative law. (We have already noted the possible significance of better prepared legislation, para.10.) We should accordingly raise in a general way the following very large question.

Question 1 **What changes (if any) in substantive law which would have major significance for the working of the courts and related bodies are likely? Are there any changes which should be made in the interests of the more just and effective operation of the courts?**

Our purpose is partly to alert those considering changes in the substantive law to the need to consider the institutional consequences of such changes.

COURT, TRIBUNAL OR GOVERNMENT

65. The next question is about the distribution of authority to make the relevant decisions between the courts and other bodies. On what basis and by what means should that authority be allocated? The question is addressed in part in Appendix E. It is also being considered by the Legislation Advisory Committee in its work on administrative tribunals. Another aspect is the choice between bodies and processes provided and supported by the state and those established by the parties themselves, especially arbitration, a matter the Commission is separately considering.

Question 2.1 **What should the criteria be for the allocation of decision-making power between courts, tribunals and the executive?**

2.2 In the light of such criteria and other relevant matters, should any particular powers of decision-making be differently distributed?

2.3 Should the relationship (or lack of it) of special courts and tribunals to the general court system be examined with a view to altering it? If so what alterations should be made?

66. The questions arise particularly in respect of the bodies such as the Labour Court, Planning Tribunal and Maori Land Court mentioned early in this paper (para.19) because they are called "courts" or "courts of record", they have jurisdiction in common with the general courts, their members are required to be or are in fact judges, their functions are analogous to those of the general courts or even overlap, or appeals from their decisions go to the general courts. No doubt the answers to the questions would be sensitive to the reasons for the establishment of the separate bodies.

DISTRIBUTION WITHIN THE COURT SYSTEM

67. We now come to the more specific but still very large questions of the distribution of authority within the court system. What are the relevant principles of distribution or allocation and how is the distribution to be effected?

68. Those questions of course assume that there are differing bodies or decision-makers, with particular characteristics in terms of their qualifications and responsibilities, their powers and procedures as indicated earlier in the paper and in Appendices B and C. The distribution among them might be made by Parliament, the executive, the parties or the courts themselves. And the law and practice gives some indication of the principles of distribution.

69. Parliament and the courts have stated the rules or criteria for the allocations which they make. (Those which the parties apply are of course more various and subjective and less public.) The statutory rules are in terms of subject matter (such as "claims ... founded on contract" or "claims in tort for damage to property resulting from negligence in the use, care, or control of a motor vehicle"), or monetary amounts (such as $1,000 for Small Claims Tribunals, $3,000 for Motor Vehicle Disputes Tribunals and $12,000 for the District Courts), or penalty (as with the right of the defendant to elect a jury trial if the penalty is more than three months' imprisonment). The criteria governing the discretionary allocation by courts under statutory powers – as stated in statutes or in court judgments – are more general, such as the extraordinary importance or difficulty of the matter, the interests of justice, or the more appropriate forum. Such criteria may also be relevant when there is a choice to be made outside the court system: between a court and tribunal, or court and arbitration, or a court in New Zealand and a court elsewhere.

70. A guiding principle in the law and practice just mentioned is the importance and seriousness of the matters – to the parties and in some cases to the public at large. The other critical matter is the aptness of the qualifications, abilities and procedures (including expedition, informality, cost and ease of access) of the decision-makers to the matters in issue. Those two principles have obviously governed the development of courts and related bodies and the allocation to them of jurisdiction. The allocation is made by general statute or other general decision or by the parties or the court in particular cases. Our whole experience – like that of others – is that notwithstanding the strong push at various times to having just one or two courts of general jurisdiction, there will be some division of the business, some specialisation, some matching of form to function. Accordingly, we come to important central questions –

Question 3.1 **What should be the rules and criteria for allocation, in the various areas of jurisdiction with which the courts are concerned? For instance are the numerical limits of monetary amounts (especially in the civil area) or maximum penalties appropriate reflections of the underlying principles?**

3.2 **Who should make the allocation? Should it always be predetermined by Parliament or should the parties or the court or some combination have the power to make the decision in particular cases?**

3.3 **Do we need each of the present separate groups of decision-makers in respect of civil and criminal jurisdictions? Should any be abolished or combined? What groups do we need?**

3.4 **How should the jurisdiction be divided among those groups of decision-makers that we do or should have? What have been the consequences of the statutory reallocations made in the 1980s (especially of some criminal jury trials and of family matters)?**

3.5 **What provision, if any, should there be for overlapping jurisdiction and the reallocation of a particular matter?**

71. Each of those questions is large. We raise further questions about 3.3 now and about 3.4 in paras. 82–83. The reference in the former is to decision-makers rather than to courts since there is no necessary correspondence between them. Different people *within* a single "court" may have such different functions that the court may in fact no longer be a single body. Some suggest that that is happening within the District Court and the question can be asked whether that is a desirable development. The reality of the actual people doing particular jobs may be quite different from the simple legislative form. The reality can also blur the lines *between* different courts as

perhaps with criminal jury trials in High Court and District Courts, or with the common practice in a number of jurisdictions of judges from one court being assigned to a higher one for particular purposes or being able to sit in lower courts.

A SINGLE COURT OF ORIGINAL JURISDICTION?

72. The points just made are relevant to the suggestion made to the Beattie Commission and on other occasions and repeated to us that we should have a single court of original jurisdiction. A single court would presumably have within it a range of judicial officers with different jurisdictions and responsibilities – as do both the District Courts and (to a lesser extent) the High Court at the moment. Some for instance would continue to exercise the original inherent powers of the Queen's Judges and of the High Court of general jurisdiction; others would deal with minor offences; others would preside over important jury trials of criminal matters; and some would decide major commercial claims. What would be the practical consequence of a change to a single court?

Question 4 **How would a single court of original jurisdiction exercise its jurisdiction? How would it be organised? How would its work be allocated? What advantages and disadvantages are there in such an arrangement?**

73. A much more limited version of that set of questions would focus on the registry and court rules. That particular question is usually raised, for instance recently in the United Kingdom, in respect of civil process (Civil Justice Review, General Issues (1987) paras. 84–91). (It is of course already the case that, with few exceptions, all criminal process is initiated in the District Court and is allocated by law or by the decision of the parties or of the court to the Children and Young Persons Court, Justices of the Peace, District Court Judges.)

Question 5 **Is the balance of advantage in favour of a single set of rules and combined registries for the initiation of civil process?**

SPECIALISATION: ITS LIMITS

74. The foregoing questions raise the issue of specialisation within the general court or courts and among the general judges. (None appear to reject the proposition that within those courts some work will be done by members of the public as in juries and by other officers of the court such as Masters and Registrars.)

75. Specialisation has increased in the last thirty years with the establishment of a permanent Court of Appeal, the Administrative Division of the High Court, and of the Commercial List in Auckland,

the use (required by law in some cases) of District Court Judges in tribunals, the establishment of the Family Courts, and the selection of some District Court Judges to take criminal jury trials. That has consequences of course for the court of which such Judges are members.

Question 6 **What is the appropriate place for, and extent of, such specialisation? Have the recent reforms taken it too far? What if any are its dangers?**

LAY PARTICIPATION: COMMUNITY INVOLVEMENT ESPECIALLY IN SENTENCING

76. Another set of questions about the decision-makers moves away from lines drawn between various groups of the professional judges to other participants in the court process – juries, Justices of the Peace, Small Claims referees, and lay members of courts and tribunals. Their possible roles are addressed for instance in the addendum to the Report of the Beattie Commission pp.337–341.

Question 7 **What is the appropriate lay or community role in our justice system? Should it have a wider function than it now does?**

Those questions can and should be asked in particular areas, as they have been in recent years with the development of small claims, tenancy, and minor offences legislation. We also raise them in the context of sentencing, especially of Maori offenders. Is there an appropriate larger role for the community in sentencing? What are we to make of the much larger involvement in Britain of lay people in that field? Can we learn from the experience elsewhere (and to a limited degree here) of teen courts? The questions take us back in part to the reference in our Act to *te ao Maori* and to the principles of the Treaty of Waitangi (para.11 above). Can they give relevant guidance?

77. It is important to mention a principle emphasised by the New Zealand Law Society. The Society in response to proposals in the report of the Advisory Committee on Legal Services, *Te Whainga i Te Tika – In Search of Justice* (1986), contended that –

> "it is essential for the health of the community that there be one law for all before it."

Equality of all before the law should be, it says, the governing principle (*Law Talk*, March 1987, 9, 11). *The Report of the Ministerial Committee into Violence* (March 1987) (the Roper Committee) responded to proposals about the modification of the justice system or even a new jurisprudence more suitable to the special needs of the Maori by saying:

> "Crime is not a private issue, nor the private business

> of any one group in a community, and there can be no warrant for the establishment of any form of separate justice for particular individuals or groups.
>
> Having said that there can be no doubt that there is plenty of scope for Maori involvement within the present system." (p.46)

78. We are back with fundamental questions arising in part from the Treaty of Waitangi, the signing of which, it has recently been said, marked the beginning of constitutional government in New Zealand and recognised the special position of the Maori people. (Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* (1986) para. 3.102.) What is its present day significance? The Roper Committee also drew on conclusions of a Bicultural Commission of the Anglican Church which examined the principles of partnership and bicultural development to be found, in its view, in the Treaty. On partnership, the Church Commission concluded as follows:

> "... we think that the Treaty – its context, words, structure and spirit – recognised and established the principle of partnership. The Treaty as well, though, incorporated a tension.
>
> The principle and tension were reflected in at least four elements:
>
> - The Crown has sovereignty – or at least governorship, including the power to bring and maintain law and order and to make laws.
>
> - The Maori have a continuing role in the working out of those powers.
>
> - The Maori have as well interests to be respected or even given a certain priority.
>
> - And they themselves have authority and a position in respect of the regulation of some matters."
>
> (*Te Kaupapa Tikanga Rua – Bicultural Development* (1986) 19)

The Court of Appeal has more recently given great emphasis to the partnership signified in the Treaty, to the obligation of partners to act with the utmost good faith, to the duty of co–operation, and to the honour of the Crown underlying treaty obligations, *New Zealand Maori Council* v. *Attorney–General* (1987) 6 NZAR 353.

79. How are these elements to be balanced in the criminal justice system? Is it possible to have some autonomy in our justice arrangements? Our history provides some positive answers. For instance the Maori Community Development Act 1962 empowers Maori Committees (unless the person charged elects trial in the District Court) to impose fines on a Maori who, they are satisfied, has committed certain offences. And, as the Roper Committee notes,

some of the general sentencing provisions to the Criminal Justice Act 1985 can have a particular application in the Maori community. Experiments are already testing some of these ideas. We all take for granted in many areas of our activities the application of personal law rather than (or usually in addition to) territorial law.

Question 8.1 **Do these various ideas (and similar ones from elsewhere) suggest further ways of handling the sentencing of Maori offenders? Is the principle of equality before the law – a great principle without doubt – so obviously determinative of the issues in this most challenging area?**

8.2 **Is there a greater role for the community in sentencing especially for serious offences?**

80. The questions are not of course limited to Maori offenders. We recall the character of the sentencing function, sketched earlier. Should there be a different relationship between the convicting court, the sentencing function and the prisons and parole boards?

DISTRIBUTION OF PARTICULAR JURISDICTION

81. Question 3.4 was about the allocation of particular areas of jurisdiction (para.70). We have of course already touched on aspects of that in the discussion of different decision-makers. They cannot be separated from their tasks.

82. The question can however be pursued further, for example –

Question 9.1 **How should the lines between summary jurisdiction and the right to jury trial be drawn? Should the present line be adjusted? How should the line *within* the summary area be drawn?**

9.2 **Should the line between jury trials presided over by a High Court Judge and those presided over by a District Court Judge be maintained? If so where should it be drawn? What should the governing principles or rules be?**

9.3 **Is there a significant part of minor and ancillary criminal work that can be better handled by Justices of the Peace or Registrars (and Masters)? If so, in what areas? Can some of that jurisdiction be exercised outside the court system?**

9.4 **Should some of the more serious traffic offences be the subject of standard fines? Consider for example some breaches of transport licensing and road user charges law.**

9.5 Should there be further reallocation to the Family Courts? What is the experience of retaining some original jurisdiction in family matters in the High Court?

83. The distribution and organisation of the business of the courts also of course has important consequences for the use of resources – the time of judges and other judicial officers and, of court staff, and the provision of court buildings. Any reduction of the work of the courts (as could result from some answers to Questions 1, 9.3 and 9.4), or its reallocation (for instance of the essentially administrative work of the District Court Judges sitting in the criminal court, paras. 28 and 82 (Question 9.3), or, more importantly of sentencing, paras. 76, 79 (Questions 7 and 8)) could be significant. So too could the more effective deployment of judicial time. Thus the average sitting time each year of District Court Judges appears to be about 600–700 hours or about 3 hours each sitting day. The *Report of the Ontario Courts Inquiry* – Hon. T. G. Zuber (1987) recommended daily sitting times of between 4 and 6 hours for Ontario Judges, the provincial court figure being 5 and the superior court figure 4½. Questions arise here about the constitutional and administrative arrangements of and for the courts.

WHAT ARRANGEMENTS SHOULD BE MADE FOR APPEALS?

84. The Commission earlier recalled the two functions of appeals – correction of error and the clarification and development of the law (paras.38–41). What form is appropriate to those functions? On the face of it the first appeal appears to relate rather more to the corrective, private function, the second to the law declaring, public one. But there plainly will often be an overlapping of functions in the one appeal. We consider first and second appeals in turn.

FIRST APPEALS

85. The law sometimes fails to confer a first right of appeal. This may be inadvertent, for example when a power of decision conferred on a judicial officer is held not to fall within the scope of a general appeal provision (in say the Judicature Act 1908 or the District Courts Act 1947). In other cases it may reflect a clear policy choice in favour of individual liberty – as with the denial (or limitation) of prosecutors' appeals in criminal cases. In others the reason may be the need for early finality (as perhaps in respect of petitions under the Electoral Act 1956). In still others, the more appropriate course may be a further application in the original jurisdiction (when the original decision is not conclusive). The relatively unimportant character of the issues and the need to save costs may be a reason for denying or limiting appeals in respect, say, of small claims. The relevant statute may enable the parties to agree not to appeal, such an agreement not being seen in those cases to be contrary to public policy. And the efficiency of litigation may be helped by reserving appeals to final decisions and in general denying them in respect of interlocutory matters. Thus the District Courts Act allows interlocutory appeals or appeals where the amount in issue is less than $500 only with leave, and it expressly enables the parties to agree not to appeal. The Summary Proceedings and Crimes Acts in general allow for an appeal as of right only after the information or complaint has been determined. The need for the prompt and orderly conduct of the original hearing is thereby recognised.

Question 10 **In what general circumstances should a first right of appeal be denied or be available only with leave? In what specific cases should that be so?**

86. How is the power to correct for error to be set up and exercised? How can an appeal system lead to a better quality decision in the particular case? (There are of course two answers short of appeal: the first is to try to ensure to the greatest extent possible that the personnel and processes at first instance are competent and apply their competence successfully; the second is to provide, where appropriate, for a re-hearing at first instance where there is some justification for that (particularly in the case where the matter was not properly handled at the first hearing usually because of the incomplete presentation of the case).)

87. The answers relate to at least three matters –

- the range of issues in dispute on appeal;
- the make up of the appeal body; and
- the procedure followed on appeal.

In some circumstances appeals are limited to questions of law alone. How is that to be justified? The justification varies, from the case of the unsuccessful prosecutor where the reason presumably is in terms of a bias in the system towards defendants who have been acquitted in criminal cases, to other situations in which the expertise of the tribunal of first instance is thought to require it to be given preference over the generalist court. That reasoning is also reflected in the direction in the broadcasting, immigration and indecent publication statutes that the appeals under them are to be as if from the exercise of a discretion.

Question 11 **In what general circumstances should the first right of appeal be limited to points of law? In what specific cases should that be so?**

88. Even if the right of appeal is not limited by statute and is general and by way of "rehearing", courts often, of course, indicate that they will be reluctant to overturn findings of fact (or at least findings of primary fact) or exercises of discretion. Why should there be this sensitivity to those initial findings? Does it continue inappropriately to reflect the role of the jury, a role which is now greatly reduced in civil cases? What is the justification in respect of the exercise of a discretion? Is there not a danger in these practices of the right of appeal becoming empty?

89. The extent of appeal depends secondly on the composition of the appeal tribunal. What is the justification in some cases for having an appeal from one judge to one judge? This is of course the usual case for appeals from a District Court to the High Court. Should there not, at least as a general proposition, be a larger number of judges in the appeal court? In what circumstances should the matter go on appeal not to a higher court but rather to a full court of the court which originally dealt with the matter? Lord Evershed once warned against full courts sitting on appeal: "It is said that judges sitting temporarily on appeal over their brethren may think over much of what may happen later when their own cases come up for review." He went on to indicate that there were arguments against this and that it depended very much on numbers. He had a more substantial argument. The constant change in the membership of the appeal court would defeat the build up of the essential quality of a combined judicial operation. That operation he thought required a new effort of mind and a new kind of application. Appeal work, in that very experienced Judge's mind, was not quite the same as first instance work (25 ALJ 386). But the volume of work and especially the character of the issues might argue for the use of full courts for appeal. Is that ever appropriate for appeals from a Family Court judge for example?

Question 12 **Is it ever appropriate to have an appeal from one judge to one judge. If so, in what circumstances? In particular should appeals from the District Court in general be heard by one High Court Judge? In what circumstances is an appeal to the Full Court of the court in question appropriate?**

90. A few statutes require that appeals be dealt with by more than one High Court Judge, e.g. Medical Practitioners Act 1968 s.59A, Law Practitioners Act 1982 s.118(2), Indecent Publications Act 1963 s.19(4).

Question 13 **Assuming that appeals to the High Court are regularly dealt with by one Judge is there any reason for this differential treatment? Should similar special provision be made in other cases?**

91. The procedure to be followed on appeal will depend substantially on the answers to the questions about the extent of the appeal and the composition of the appeal body. If the appeal goes beyond questions of law, then attention must obviously be given to whether the case is actually to be reheard or is to be dealt with simply on the notes of evidence and other documentary material. The New Zealand experience over the last forty years is plain that moving from a real rehearing to a rehearing on the papers does have a major consequence for the extent of an appeal right. Should the appeal right be narrowed in law and in practice in that way?

Question 14 **Does the law and the related practice about general appeals deny at least in some cases the reality of what is thought of as a right? Should the appellant be entitled to a rehearing? If so, should there be a control by way of costs?**

SECOND APPEALS

92. The discussion so far has been mainly about an appeal aimed primarily at correcting the decision taken at first instance. Such appeals may often also clarify and develop the law. Is a second appeal needed for that further function? Sheer volume of work may require a second appeal to clarify the law if first appeals are of such volume that they have to be dealt with by different courts or distinct groups of judges within a single court. This is for the reason that such courts and judges may decide inconsistently from one another and that the law should be settled with authority by a single group of judges. Accordingly the question of a second appeal from a judgment in the High Court – where there is some prospect of different decisions being made by the several Judges – is to be seen differently from a second appeal from the Court of Appeal if that Court is able to handle its whole caseload (at least in areas of difficulty) as a single bench. This practical aspect of the matter requires closer examination of the actual and anticipated appeal work.

93. The argument is also a more general one – that a second appeal is important, perhaps essential, to the clarification and development of the law. The clarification and development of the issues through these hearings should, the argument runs, enhance the quality both of argument by counsel and of adjudication by the highest court. The link between the second appeal and the more public character of such an appeal is emphasised by two common aspects of the appeal. The first is that in systems like ours the second appeal is usually not a matter of right; the litigants get to the final court by leave only, leave now quite often granted only by that final court and not by lower courts. The second is that the matters which can be taken on appeal are usually limited either by statute or by the practice of the court granting leave. The legislative limit may be to questions of law of general importance. The practice of courts in granting leave is often similarly confined to cases raising either a far reaching question of law or a matter of dominant public importance.

94. To quote Chief Justice Taft of the United States Supreme Court (speaking in 1922 of the three level federal court system there):

> "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among intermediate courts of appeal." (Quoted in Bator and others (ed.), *Hart and Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 1603–1604.)

95. In the case of the Federal Courts in the United States, the volume of appeal work became such that about a century ago it was necessary to insert the intermediate courts of appeal. But if the volume is such that intermediate courts of appeal are not required, is there still a justification for a second appeal? The report of the Royal Commission on the Courts says:

> "It is suggested that [a two tier appellate system] is a significant advantage in that a second right of appeal is necessary to provide the opportunity for legal argument to develop and mature, with the issues being crystallised and refined." (para. 267)

96. How persuasive is this argument? What has been the experience of cases of a complex kind which have been dealt with twice on appeal? What has been the experience of the Court of Appeal in dealing with large cases or of the Judicial Committee (see Appendix F)? How does that experience relate to that of other complex matters which are dealt with originally and finally by the highest court in a system? Recall too that the United Kingdom a

century ago very nearly had only a single appeal system, and consider the provision there for leap-frogging appeals which avoid the intermediate court. And what significance can in any event be given to the cases of reversal by final courts of intermediate appellate courts? Justice Jackson of the United States Supreme Court is often quoted: "We are not final because we are infallible, but we are infallible only because we are final" *Brown* v. *Allen* (1953) 344 US 443, 540.

97. The facts are also largely against having two appeals in respect of serious matters: in criminal cases of a more serious kind, those which begin with a jury trial, there is in reality only one right of appeal; the Privy Council has granted leave in only a handful of criminal cases from New Zealand. And only one or two percent of the decisions of the Court of Appeal in civil matters are actually affected by Privy Council appeals. It might be said that the New Zealand experience of second appeal is not typical since on the civil side the Privy Council appeal is usually as of right; and that costs are a more important control than leave.

98. On the other hand some cases are heard three times. In addition to those just mentioned, there are those – principally regulatory offences – which begin in the District Court, are heard on appeal in the High Court, and with leave in the Court of Appeal. Next perhaps are the cases which begin in a tribunal and proceed by appeal or review to the High Court and then to the Court of Appeal. Cases in the Taxation Review Authority provide an example. Other such tribunal matters might not however be seen as involving three hearings since the issues raised at the court stages may not have been in question in the tribunal. The cases which actually have three hearings require closer careful analysis by the Commission, and comparison with those which do not.

Question 15 **In what circumstances, if any, should there be a second appeal? What are the specific cases when that should be so? Should that appeal ever be of right?**

99. If the final court is to produce decisions of better quality on the points of law, that better quality presumably will result, as indicated in the earlier context of appeal for correctness, from the composition of the body hearing the appeal, the processes followed both in the final court and in the lower courts, and the selection of the issues to be argued. How is the quality to be enhanced?

Question 16 **How is the process of the final appeal court to be supported? Are questions of costs, for example, to be seen differently on the basis that the appeal process is principally or substantially aimed at the clarification and development of the law? Does the public element prevail over the private?**

100. So far as the process of decision is concerned, should the final court limit itself to only those matters which have been

examined below? This would, on its face, seem to be a central feature of the process of better and more careful examination of the issues raised in a case. The final court is not getting the advantage of the full court process if it comes upon a matter fresh. And indeed the frequent, if not unvarying, practice of final appeal courts is to limit themselves to issues clearly raised at the earlier stages.

101. Should the method of argument have a different character, given the wider scope and significance of the judgment and the greater challenges presented to the court? An affirmative answer to that question seems to conflict in some ways with the previous point, and yet if the final court does have an identifiably different function, as also indicated for example in the endorsement by the Beattie Commission of the submission of the Secretary for Justice (para.41 above), such a change of emphasis may be appropriate.

APPEALS TO THE HIGH COURT

102. In the light of the foregoing, how should the appeal business of the courts in fact be organised? To repeat, the appeal work, in broad terms, involves about three different groups of judges in the general courts at any one time – two High Court Judges sitting separately and hearing appeals from the District Court, and the Court of Appeal sitting in a single panel (see Appendix C and para.38). The figure might be larger given that the Judicial Committee should be included, more than one panel of the Court of Appeal may be operating at the same time, the High Court figure is an approximation, and some appeal work is done in the District Court. But the figure is useful in a general way. One immediate significance of the High Court figure is that if all that work went immediately to the Court of Appeal (as it does in some Commonwealth jurisdictions) that Court would have to be significantly larger. Another is that if the High Court was composed for appeals of two or three judges rather than one, the judge time required for appeals would be increased. The increase would not however be by a factor of two or three since presumably one of the judges would take major responsibility for reserved work.

Question 17.1 Should there be any reallocation of the appeal work of the High Court? Should any of it go directly to the Court of Appeal?

17.2 For instance, if there were a Criminal Appeal Division of the Court of Appeal or perhaps a separate Court of Criminal Appeal, should there be direct appeals to it (on conviction or sentence) from the District Court dealing summarily with criminal matters? (See also Question 21.)

17.3 What powers should there be to provide for the leap-frogging of appeals?

We take it that present arrangements in respect of appeals from jury

trials – that they all go to the one court (at the moment, the Court of Appeal) – should be maintained to ensure the consistent handling of the law in that important area.

103. About thirty statutes provide for appeals, both general and on points of law, to the Administrative Division of the High Court.

Question 18 **Is the allocation of that appeal work appropriate?**

104. The general rule is that decisions of the High Court on appeal are subject to a further appeal, with leave, to the Court of Appeal, Judicature Act ss.66 and 67, and Summary Proceedings Act 1957 s.144 (question of law only). There are exceptions in both directions – the Immigration Act 1987 s.116, allowing an appeal as of right on law to the Court of Appeal to the parties to an appeal in the High Court, and the general ban on appeals to the Court of Appeal from decisions of the Administrative Division given on appeal: Judicature Act s.26(4); see similarly the Indecent Publications Act 1963 s.19(6).

Question 19 **Should the general rule be that decisions of the High Court given on appeal be subject to a further appeal to the Court of Appeal with leave and usually only on points of law?**

At the moment the leave, when provided for, may be granted by the High Court or, if refused, by the Court of Appeal. If the rationale for the further appeal is the clarification of the law (say in the event of differences between High Court Judges) or its development, by the Court of Appeal, it may be that only the Court of Appeal should grant leave (aided perhaps by a certificate from the High Court). A related matter is whether the criteria for the grant of leave should be included. They are in some cases, e.g. Summary Proceedings Act s.144, but not all.

APPEALS BEYOND THE HIGH COURT

105. We have already discussed second appeals which are dealt with by the Court of Appeal. The remaining case is of first appeals heard in the Court of Appeal because the matter was dealt with originally either by the High Court or by a District Court jury trial, or because a first appeal has been removed into (or made directly to) the Court of Appeal, see Judicature Act ss.64 and 68 (but their applicability is doubtful) and Summary Proceedings Act s.113.

106. The prospect of the removal of the Privy Council first takes us back to the question, one appeal or two (paras. 92–98)? If there is to be only one appeal (in respect, that is, of matters originating in the High Court or in District Court jury trials), the only questions are about the organisation of the work of the Court of Appeal. Is it able to ensure, as the final court, consistency of decision making? In organisational terms, it could do this by always sitting as a full court or, while still sometimes sitting in panels, coming together as a full

court where that is required for that purpose. Its ability so to do is obviously affected by the volume and complexity of the cases it must deal with.

Question 20 **Is the volume and complexity of the work of the Court of Appeal such that it is able to clarify and develop the law in a harmonious, consistent and rational way?**

A related question is whether the existing arrangements ensure that to the extent possible can continue to act in that manner. At the moment they include –

(1) the provisions relating to the membership of the Court, including the powers of appointment of additional judges

(2) the ability of the Court to sit in panels or as a full Court

(3) the requirement in some situations that leave be granted if an appeal is to be heard; this requirement can be applied in practice in different ways

(4) the general powers to control the method and scope of written and oral argument

(5) the practices relating to the preparation of judgments.

In appropriate circumstances the Court of Appeal, sitting as the supreme New Zealand court, should be able by using such powers to give special attention to those cases which appear to require it. This already happens. Thus the Court in a significant number of leading cases has sat as a court of five or more – sometimes in fact as a court of first (and last) instance. That process appears to be well known and extablished. Is there any need for the procedures for such special treatment be further developed? Should cases which turn out to be more generally important than first imagined be reargued before a larger bench?

107. More substantial measures than using and perhaps developing such powers within the Court would include –

- removing some of the jurisdiction to existing courts (such as a full High Court; compare for example appeals from the Labour Court with appeals from the Indecent Publications Tribunal);

- establishing a new appellate court; the principal (so far as we are aware the only) suggestion of this type relates to criminal appeals.

A proposal for such a separate court of criminal appeal should also of course be assessed in its own terms. Our law already indicates the variety of forms (in membership and relationship to the other courts)

it could take. On the one side such a proposal promises efficiency, consistency and the development of expertise in that area. On the other it may mean that the law in that area will develop inconsistently with the general law subject to the general court. The general final court would also be disadvantaged by not having a regular run of such cases and an oversight in that area. Establishing such a court could also be seen as a downgrading of the criminal law and of the rights of those subject to it. The first argument might be met by providing in appropriate cases either for an appeal (presumably with leave) from the Court of Criminal Appeal or for removal of the matter directly into the Court of Appeal. Some such provision would appear to be required if there is to be a single court with final judicial authority in respect of the law of New Zealand.

Question 21 **Should a Criminal Appeal Division of the Court of Appeal or perhaps a separate Court of Criminal Appeal be established? If so, what jurisdiction should it have** (see question 17.2)**? How should it be composed? What relationship should it have to the Court of Appeal?**

108. The foregoing discussion has proceeded on the basis that in some major cases at least – major civil matters in the High Court and (subject to the question just raised) criminal jury trials – there would be just one appeal in the event of the appeal to the Judicial Committee being removed. The Court of Appeal (possibly renamed as the Supreme Court of New Zealand) would be the general final court.

109. If however the general argument for two appeals in respect of such business prevails, the question of replacing the Judicial Committee arises. Various possibilities have already been raised and discussed, and accordingly we can treat the matter somewhat briefly. We have noted that certain disputes can be handled in international tribunals. This method might, for instance, be used to resolve some matters arising under the Closer Economic Relations Agreement with Australia. That issue is separate from the question of law the highest court in the New Zealand system should be constituted.

110. The simple addition to the present system of a New Zealand Supreme Court is generally thought to face the double difficulty of finding in a small profession the additional judges of the quality required and the small volume of work. Some see practical, political and constitutional difficulties standing in the way of the use of the High Court of Australia or the establishment of a regional Court in the South Pacific. Some would meet the difficulties of staffing and limited volume by having a New Zealand version of the Judicial Committee: a part–time court which would include senior judges chosen by the New Zealand Government from New Zealand and elsewhere in the Commonwealth. Recent proposals for Hong Kong provide a possible model. Such a court would meet – as does the Judicial Committee and somewhat similarly composed courts elsewhere in the Commonwealth (including the Pacific) – when required. The question would arise whether such a

court could, especially when compared with the permanent Court of Appeal, clarify and develop the law in a harmonious, consistent and rational way.

Question 22 **If there is to continue to be a second appeal beyond the Court of Appeal how should the appeal body be composed and what jurisdiction should it have?**

THE ORIGINAL JURISDICTION OF THE COURT OF APPEAL

111. The Court of Appeal can and does deal originally with important matters. If it were the final court it would also deal with them finally – there would not be even one right of appeal. This would not be unprecedented: the Judicial Committee of the Privy Council, the Supreme Court or Canada, the High Court of Australia and the United States Supreme Court all have and exercise original (and final) jurisdiction (the first and second by way of advisory opinions only). This is in recognition of the importance of the issues, the character of the parties, or the need for an early authoritative ruling. Such a process does however present major challenges to the parties, counsel and the Court. They do not have the advantage of the earlier argument and judgment. As with the appeal work of the Court of Appeal and Judicial Committee, we are left with matters of judgment and balance. What arrangements relating to our final court will best ensure in a practical way the harmonious, consistent and rational clarification and development of our law? The more specific question might also be put:

Question 23 **In what circumstances, if any, should the Court of Appeal have original jurisdiction?**

SUMMARY

112. This paper describes the present business of the courts and of related bodies, and the allocation of that business, both originally and on appeal, between them. That description provides a basis for questions about how that business should be organised in the future. Which groups of decision-makers should have what authority in respect of what business?

113. The answers to that question must relate to the central purposes of our courts. New Zealanders have the right to a fair and public hearing by a competent, independent and impartial court or tribunal established by the State for the determination of their rights and duties in civil matters and of criminal charges brought against them. That right to due process depends on several matters. Among them are –

- the range of the courts and other related bodies
- the various people who make up each of them
- their areas of jurisdiction
- their interrelationships
- the ways they are administered
- the law and practice relating to access to them
- the procedures they follow
- the legal and financial assistance given to those who wish to use them
- the substantive law they apply
- the remedies they administer and
- the enforcement of their decisions

The paper touches on all those matters and others as well. It gives primary attention to the first four of them, that is, to the matters which make up the structure of the judicial system of New Zealand, to use the main phrase in the terms of reference. As appropriate, especially having regard to the responses to this paper and to the further development of other related reviews mentioned in the introduction to the paper, the Commission may take some of the other matters further.

ORIGINAL JURISDICTION

114. At the moment the original jurisdiction within the court system and related bodies is distributed between different groups of decision-makers. The broadest distinction is between court, tribunal and executive with consequences, among others, for the independence and accountability of the decision-maker. Within the judicial system, jurisdiction is allocated between legally qualified members of courts and tribunals, lay members, and various combinations of them. Two main distinctions are drawn within the group of professional judges. The first is that some judges (principally those in the superior courts)

have general jurisdiction in all principal areas of adjudication, while others, the majority of judges (including many of those in the District Court), have a specialist jurisdiction, either by exercising power within a special tribunal or court or by having only part and not all of the authority of a general court. The second distinction is in terms of the position in the judicial hierarchy of the court to which the particular judges belong.

115. Parliament, the parties, or the court or tribunal itself allocate the jurisdiction. In general Parliament allocates according to a precise rule (such as a monetary limit or penalty) and the court according to a standard (such as the public importance of the matter or the appropriateness of one decision-making method against another). The parties will of course have their own reasons for the choice they may be able to make between different jurisdictions and decision-makers.

116. The powers of courts and parties to decide where many matters are to be handled mean that the significance of some of the distinctions appearing in a simple chart of the courts is not what it seems. Such a chart may also be misleading in not indicating the division of power within a single court between different decision-makers. Another aspect of those points is that some changes in the basic structure of the courts might be no more than cosmetic: within the apparently changed system there would continue to be distinct groups of decision-makers with different powers (or, by their or the parties' decision, concurrent powers). That is one reason that the paper focuses on what individual groups of decision-makers do rather than on what their courts do, especially in respect of a major part of the original jurisdiction.

117. The first questions look to the courts in their wider context. Are there likely or desirable changes to their business that will have important consequences for their structure and operation? Substantive changes to the law may increase or decrease their work or change its character (Question 1 para.64). In particular, standard fines or administrative penalties might be used on a broader basis (Questions 9.3 and 9.4 para.82), or there might be a reallocation of work between courts, tribunals and the executive government (Question 2 para.65). And some matters might be handled by different methods outside the judicial system, including private methods (such as arbitration) established by the parties.

118. The form of the overall judicial structure depends on answers to interrelated questions about the range of decision-makers and the allocation of business between those groups. How, if at all, should either be altered (Question 3 para.70)?

119. That broad question might be considered in terms of possible major changes to the simple hierarchical structure, but again attention is drawn to the question whether such a change would necessarily be significant in practice (see para.116). The main version of such a change is a single court of original

jurisdiction. In one sense that largely exists for criminal matters in that almost all criminal proceedings are begun in the District Court. But we have heard no suggestion for basic change in the present system of different bodies deciding them according to the seriousness of the offence (usually as determined by the maximum penalty) and to the parties' choices. The differences are between administrative procedures, lay decision-makers (Justices of the Peace), legally qualified judges sitting alone, and legally qualified judges sitting with juries. There might of course be questions about exactly where the lines are to be drawn, for instance in respect of the right to be tried by jury (Question 9.1, para.82). The question of a unified court arises principally in respect of the civil jurisdiction of the High Court and District Courts (Question 4, para.72). How would such a court operate? How would the work be allocated? What would be its advantages and disadvantages? Some administrative advantages might be gained not by unifying the court or the judges but rather by unifying the registries and court rules. Might they be brought together (Question 5, para.73)?

120. The broad question about the range of decision-makers and the allocation of business between them asked in para.118 is to be pursued in specific contexts. An important range of judicial powers is now exercised within or in connection with the District Court but not by District Court Judges. The significance of this work has developed markedly in recent years with the growth in the business of the Small Claims Tribunals and the establishment of the Motor Vehicles and Tenancy Tribunals. Justices of the Peace exercise a significant proportion of the minor criminal jurisdiction of the courts. And Registrars have some relatively routine judicial functions. Is there justification for each group of decision-makers? Might there be some rationalisation? What changes might be made in the jurisdiction in these areas? (See e.g. Question 7 para.76, and Questions 9.3 and 9.4 para.82, and the proposed trebling of the monetary limit on the jurisdiction of Small Claims Tribunals.)

121. One particular area of lay or community involvement in the work of the District Courts is sentencing. Should that function be enhanced? Can greater community, especially Maori, involvement be introduced consistently with the principle of equality before the law (Question 8 para.79)?

122. The original jurisdiction exercised by professionally qualified judges is divided, as recalled in para.114, between generalists and specialists with a very large number of the latter in the District Courts. Those District Court Judges who do not have warrants as Family Court Judges or for criminal jury trials and who are not administrative tribunal members can also be seen as specialising in summary criminal proceedings - in large part in sentencing. That function is relevant to the question, just repeated in para.121, about greater community involvement in that area. Has that specialisation been successful? What is its consequence for criminal jury trials (Questions 3.4 para.70, and 9.2 para.82)? Should changes be made in those areas, or for the Family Courts (Question 9.5 para.82)?

123. All the courts of general jurisdiction in our system (including the Judicial Committee) have both original and appellate jurisdiction. The question arises whether the Court of Appeal should continue to have original jurisdiction and, if so, in what circumstances and by reference to what principles (Question 23 para.111)?

124. To recapitulate, the recurring issues in respect of the organisation of original jurisdiction are lay or community decision-making as against determination by professional judges, generalist or specialist judges, and the principles or rules for the allocation of the business among those different groups (with the related issue of who makes the allocation).

APPELLATE JURISDICTION

125. The issues in respect of appeals might be seen to be within easier bounds. The right of appeal is available to correct error in the particular case, and for the reaffirming, clarification and development of the law. One function can be seen as principally private, the other as public. The first question is in what circumstances, if any, should the right of appeal not be conferred or be available only with leave (Question 10 para.85)? In what circumstances should the appeal be limited to questions of law (Question 11 para.87)?

126. Can a second appeal be justified on any ground other than the need for the consistent and uniform clarification and development of the law by the final court in the system? (Correction of error in the particular case at first instance might be another ground.) Should such an appeal ever be as of right (Question 15 para.98)? In what circumstances might the intermediate stage be avoided (Question 17 para.102)? Should the second appeal usually be limited to questions of law (Question 19 para.104)? Is the second appeal to be seen differently in other respects (for instance for costs), given its more public character (Question 16 para.99)?

127. If an appeal is provided for, to what body should it go? In what circumstances, if any, should the appeal be from one Judge to one Judge or to a full court of the court of original jurisdiction (Questions 12 and 13, paras. 89 and 90)? Are there other ways (additional to the use of a full court) in which greater specialisation can with advantage be achieved on appeal (see Question 18 para.103)? Are the procedural arrangements on appeal and the perception of the scope of appeal apt for the purpose of correction for which the appeal is brought (Question 14 para.91)?

128. More specifically, should appeals from the District Court and other courts go as a general rule to the High Court? (One present exception to that is the appeal from a District Court criminal jury conviction. The appeal to the Court of Appeal in that case is presumably to be justified by the need for consistency and by the essential similarity of the proceedings whether in the District Courts

or the High court in this area.) How should the High Court be composed in hearing appeals from the District Court (Question 12 para.89)?

129. The Court of Appeal has a critical role in clarifying, reaffirming and developing the law of New Zealand in a harmonious, consistent and rational way. It must have adequate opportunity to do that. Is the volume and complexity of its work such that it cannot? What additional measures might be taken within the Court to help (Question 20 para.106)? How might it identify those matters to which it should give major attention (para.106)? A more radical step is to remove some of its jurisdiction, a matter raised mainly, although not solely, in respect of criminal appeals.

130. Should provision be made for a Criminal Appeal Division of the Court of Appeal or perhaps a separate Court of Criminal Appeal? If so, how should it be composed? What jurisdiction should it have? And how would it relate to the Court of Appeal? (Question 21 para.107)?

131. If there is to continue to be an appeal beyond the Court of Appeal, how is that jurisdiction to be handled? How would the court be composed and what jurisdiction would it exercise (Question 22 para.110)? How would it relate to the Court of Appeal and to the other courts in the New Zealand system?

APPENDIX A

THE COURTS - A SELECT BIBLIOGRAPHY

This bibliography lists some of the more significant recent writing relating to courts in general and to the New Zealand courts in particular. It includes official reports, books and articles, and contains some material about other methods of dispute settlement. In general each item is mentioned only once; it might of course be relevant under other headings. The Report of the Royal Commission on the Courts (1978) 43-53 refers to several earlier inquiries in New Zealand and elsewhere.

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APPENDIX B

COURTS OF GENERAL JURISDICTION
A SUMMARY OF THE LEGISLATION*

INTRODUCTION

1. The courts of New Zealand comprise -

   (1) the courts of general jurisdiction - the District Courts, the High Court, the Court of Appeal, and the Judicial Committee of the Privy Council; and

   (2) a number of courts of special jurisdiction such as the Labour Court, the Maori Land Court and Maori Appellate Court, and the Courts Martial Appeal Court.

2. Within the District Courts and High Court, the courts of general original jurisdiction, there are special divisions, differing groups of Judges, and others who have some of the courts' powers. That variety is indicated later.

3. The courts of special jurisdiction are not capable of precise definition especially if, as should be the case, they are considered along with administrative tribunals from some of which they are not easily distinguishable. The tribunals exercise statutory powers and make decisions affecting the rights and interests of particular individuals. They are not in general called courts - although a principal one, the Planning Tribunal, is expressly established as "a Court of record". Their functions are similar to those of the courts, and they often link into the court system through common membership, overlapping jurisdiction, and rights of appeal. The work of the Legislation Advisory Committee on tribunals is bringing together some of the relevant material. To be added to the courts and tribunals are other dispute resolution mechanisms such as arbitration, mediation and conciliation which may be set up by statute or agreement and which may operate largely independently of, or at a time before, court process. This appendix summarises the principal legislation relating to the courts of general jurisdiction.

DISTRICT COURTS

4. The District Courts are constituted under the District Courts Act 1947 (formerly the Magistrates' Courts

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* Part I of the Report of the Royal Commission on the Courts (1978) provides a valuable history of the New Zealand Courts.

Act 1947), and came into existence on 1 April 1980, replacing the Magistrates' Courts. Unlike the High Court and Court of Appeal, which are each one court for New Zealand, District Courts are established as separate entities in various localities throughout New Zealand as determined by the Governor-General. The Act currently provides for the appointment of up to 96 permanent District Court Judges to exercise jurisdiction within New Zealand. The statutory qualifications for appointment are (1) to hold a practising certificate as a barrister or solicitor for at least seven years; or (2) to be continuously employed as an officer of the Department of Justice for at least ten years including at least 7 years as a Registrar, and to be a barrister or solicitor and admitted or qualified to be admitted as such for at least seven years. One District Court Judge is appointed as the Chief District Court Judge. Acting Judges can also be appointed.

5. Some District Court Judges are appointed by the Governor-General -

- as Family Court Judges to exercise the jurisdiction of Family Courts
- to exercise jurisdiction in Children and Young Persons Courts
- as trial Judges to exercise the criminal jury jurisdiction of the District Courts

The family and children legislation set out express criteria of suitability for those to be appointed. Also a number of District Court Judges, as a matter of law or in fact, are members of or constitute administrative tribunals - the Planning Tribunal, the Taxation Review Authority, Land Valuation Tribunals etc. In addition there are a number of other persons who exercise functions within the District Courts. These include Small Claims Tribunal Referees who exercise jurisdiction over small civil claims, Justices of the Peace who exercise some of the District Courts' minor criminal jurisdiction, members of juries in some criminal matters, and Registrars who can, for instance, enter judgment by default in civil proceedings.

Civil Jurisdiction

6. District Courts have a wide-ranging civil jurisdiction with a monetary limit, in general, of $12,000. The jurisdiction is not conferred in a general way, but under specific headings including (1) actions founded on contract, tort, or statute; (2) actions for the recovery of land where the yearly rent does not exceed $6,000 or the value of the land $50,000 (if no rent is payable); (3) building society disputes; and (4) equity, including specific enforcement and rectification of agreements

relating to property, and proceedings for the enforcement of liens. In the specified areas the District Courts and their Judges may also grant the relief, redress and remedies available to the High Court.

7. Some of this jurisdiction is concurrent with that of the Small Claims Tribunals established under the Small Claims Tribunals Act 1976 as divisions of the District Courts. They may deal with claims in contract, quasi-contract, and damage resulting from the negligent use of a motor vehicle involving in each case not more than than $1,000. District Court Judges may exercise the jurisdiction of a Tribunal. However normally the Tribunals' powers are exercised by Referees appointed under the Act, who need not be qualified lawyers, provided they have the special knowledge or experience necessary to perform their functions. Also, the procedural and evidential rules for Tribunals are more informal than for District Courts. The parties are not allowed legal representation, and are normally expected to present the case themselves. The Tribunals are first to attempt to bring the parties to the dispute to an agreed settlement. If that fails, they are to decide according to the substantial merits and justice of the case having regard to the law but without being bound to give effect to the strict legal rights or obligations or the legal forms or technicalities. The Tenancy Tribunals, established under the Residential Tenancies Act 1986, and the Motor Vehicle Disputes Tribunals, established under the Motor Vehicle Dealers Act 1975, should also be mentioned here. They exercise significant first instance civil jurisdiction (limited to a maximum of $3,000 in the second case) within their scope of activity, which in substantial part was previously exercised by the District Courts.

8. District Courts are also given civil jurisdiction under various specific statutes (sometimes concurrently with the High Court or Small Claims Tribunals or both). These include the Shipping and Seamen Act 1952, Electoral Act 1956, Insolvency Act 1967, Minors Contracts Act 1969, Illegal Contracts Act 1970, Hire Purchase Act 1971, Admiralty Act 1973, Contractual Mistakes Act 1977, and Contractual Remedies Act 1979.

9. A District Court's jurisdiction can be extended beyond the statutory monetary limits, either by the plaintiff abandoning part of the claim or by agreement between the parties. Also, High Court proceedings which come within the District Court jurisdiction can be transferred to a District Court on application of a party to the High Court or alternatively the parties can agree that the District Court shall have jurisdiction.

Family Jurisdiction

10. The family law jurisdiction of the District Courts is principally exercised by the Family Courts which were

introduced by the Family Courts Act 1980. The Courts are established as a division of every District Court. Family Court Judges are District Court Judges who are appointed by the Governor-General and who by reason of their training, experience, and personality are suitable to deal with matters of family law. A principal Family Court Judge is also appointed.

11. The Family Courts have jurisdiction under the principal family law statutes - the Marriage Act 1955 (consent to marriage and related matters), Adoption Act 1955, Guardianship Act 1968 (guardianship and custody), Domestic Actions Act 1968 (property disputes arising out of agreements to marry), Matrimonial Property Act 1976 (disputes about matrimonial property on separation and dissolution of marriage), the Family Proceedings Act 1980 (separation, dissolution of marriage, paternity and maintenance), the 1980 amendments to the Social Security Act 1964 (relating to the liable parents scheme), and the Domestic Protection Act 1982 (providing for non-violence orders and non-molestation orders, etc.)

12. In some cases the jurisdiction is concurrent with that of the District Courts (as with liable parent schemes and domestic protection) or the High Court (Domestic Actions Act and Matrimonial Property Act). The High Court also retains its inherent powers. In addition the Family Courts have a general power under the Family Courts Act to transfer proceedings to the High Court because of their complexity. There is a similar more specific power in the Guardianship Act 1968; and the two property statutes give an additional power to the High Court to order the removal of the proceedings.

13. The Family Courts Act (as well as the statutes which confer jurisdiction on the Family Courts, in particular the Family Proceedings Act) places considerable emphasis on counselling, conciliation, and mediation. Provision is made for the appointment within the Justice Department of counsellors to facilitate the work of the Family Courts. The Act also requires Family Court proceedings to be conducted in such a way as to avoid undue formality. The particular legislation conferring jurisdiction takes that emphasis further by providing generally that the hearings are to be in private, the proceedings are not to be published, and evidence can be received even although not usually admissible in court proceedings

Criminal Jurisdiction

14. The criminal jurisdiction of the District Courts is regulated principally by the Summary Proceedings Act 1957 and for jury trials by the District Courts Act and Crimes Act 1961. This jurisdiction can be divided into four categories. First are minor offences, minor traffic

offences and other summary offences which can be dealt with by a District Court Judge sitting alone. They are offences for which the maximum penalty is not more than a $500 fine. If the defendant does not seek a hearing, the court can deal with minor offence matters on the basis of the prosecution's summary of facts as if the defendant had pleaded guilty. Two Justices of the Peace sitting together can exercise much of this minor jurisdiction.

15. Second are the more serious summary offences and most indictable offences (with the exceptions indicated in para.17) prosecuted summarily which can be dealt with by District Court Judges sitting alone subject to the right of the defendant to elect trial by jury if the maximum penalty for the offence exceeds three months imprisonment. Subject to the maximum penalties in the particular area, the maximum penalty under this head is three years imprisonment or a $4,000 fine. The Judge may commit the defendant charged with an indictable offence to the High Court for sentencing (if the defendant has pleaded guilty or been convicted) or treat the matter as an indictable offence not triable summarily.

16. Third, if the defendant chooses trial by jury for a summary offence or if the prosecution in the case of indictable offences requires such a trial, the District Court holds a preliminary hearing to determine whether there is sufficient evidence to put the defendant on trial. With the exception of cases involving sexual violation when a District Court Judge must preside, two Justices of the Peace may preside over preliminary hearings.

17. Fourth, jury trials in respect of all but the most serious indictable offences (such as murder, manslaughter, sexual violation and serious drug offences) and summary offences proceed in selected District Courts with a jury chosen in the same way as in the High Court and in general subject to the same rules and with the same sentencing powers. The Governor-General appoints the trial Judges from among the District Court bench. In the case of indictable prosecutions either party can ask the High Court to remove the matter to that Court. The District Court Judge can commit to the High Court for sentence a defendant to such a proceeding who pleads guilty or is convicted.

Children and Young Persons Courts

18. Special provision is made for dealing with offences committed by children and young persons and with related matters. The Children and Young Persons Act 1974 provides for the establishment of Children and Young Persons Courts to deal with alleged offences by, and complaints about the care of, children (under the age of 14) and young persons (between the ages of 14 and 17). The jurisdiction is exercised by District Court Judges appointed by the

Governor-General for their "special interest, experience, or qualifications".

19. The Courts deal with complaints relating to the care, protection and control of children and young persons. The catalogue of possible complaints includes allegations that (1) a child's or young person's development is being avoidably prevented or neglected; (2) its physical or mental health, or emotional state, is being avoidably impaired or neglected; (3) its behaviour is beyond the control of its parent or guardian or the person for the time being having care of it and is of such a nature and degree as to cause concern for its well being or social adjustment, or for the public interest.

20. The Children and Young Persons Act further provides that young persons charged with summary offences, or indictable offences punishable summarily (where they do not elect trial by jury), must normally be dealt with in a Children and Young Persons Court, and that children cannot be charged with criminal offences other than, for children of or over 10 years, murder or manslaughter. In the case of young persons charged with indictable offences not punishable summarily, and children of or over the age of 10 years charged with murder or manslaughter, the preliminary hearing must take place in a Children and Young Persons Court, and (except in the case of a charge of murder or manslaughter) the accused may be given the right to forgo trial by jury and to have the matter dealt with in a Children and Young Persons Court as if the offence were punishable summarily.

21. The Children and Young Persons Courts are to follow special evidential and procedural provisions. The proceedings are not open to the public, there are restrictions on the publication of reports of the proceedings, the informant (or a person acting on its behalf) is to consult with a social worker prior to charging a young person with an offence other than murder or manslaughter, and the Courts are in all proceedings to have access to a social worker's report. In addition the Act provides for preliminary enquiries to be made by a Children's Board before a Court deals with the matter.

22. The Courts have wide powers to make orders in respect of complaints which are made out or charges which are proved. They include - (1) admonishment; (2) discharge without further order or penalty; (3) placing the child or young person under the guardianship or supervision of the Director General of Social Welfare; (4) ordering the child or young person (or parent or guardian as the case may be) to pay compensation; and (5) (in the case of offences committed by young persons) ordering the young person to pay a fine.

Appellate Jurisdiction of District Courts and District Court Judges

23. District Courts and their Judges (sometimes sitting with additional members) have appeal jurisdictions under a number of statutes. The Courts can hear appeals from Small Claims Tribunals on the limited ground that the manner in which the matter was handled was unfair and prejudiced the result. There is a full right of appeal from Motor Vehicle Disputes Tribunals (consisting of three members) if the amount in issue is over $500 and on law alone if it is not. That decision on that appeal is final. There is also a full appeal from decisions of Tenancy Tribunals (if the amount involved is $1,000 or more), in this case with further appeals on matters of law to the High Court and, with leave, to the Court of Appeal.

24. Many decisions made by local authorities are subject to appeal to a District Court - such as those relating to the licensing of public and residential buildings the removal of unsafe buildings, drainage, and the removal of overhanging trees, of nasella tussock and of scrub which might cause fires. The decisions of a large number of trade and occupational licensing bodies and officials are subject to appeal to a District Court Judge usually sitting with additional members. The legislation relates to such matters as dairy factory management, fertiliser registration, electricity linemen certificates of competency, the registration of electricians, physiotherapists, pharmacists, occupational therapists, clerks of works, engineers, engineers associates and quantity surveyors, and construction certificates of competency.

HIGH COURT

25. The High Court (whose name dates from 1 April 1980) was first created as the Supreme Court in 1841. It is now constituted under the Judicature Act 1908. Although there is only one High Court of New Zealand, it sits in various centres (the Judges are stationed in Auckland, Hamilton Wellington and Christchurch, and travel on circuit to the other localities). The statutory qualification for appointment as a High Court Judge is to hold a practising certificate as a barrister or solicitor for at least 7 years. The Judicature Act empowers the Governor-General in the name and on behalf of Her Majesty to appoint the Chief Justice of New Zealand (the principal judicial officer of New Zealand) and 31 other permanent High Court Judges. (Judges of the Court of Appeal are also High Court Judges and are included within that number.) Provision is also made for the appointment of temporary Judges. Although normally one Judge may exercise the powers of the Court, more than one judge *may* sit, and some statutes require more than one; so under the Electoral Act 1956, the trial of an election petition must take place before three Judges.

Almost all criminal trials are by judge and jury, and very wide provision is made for jury trials in civil cases (although they are rarely called). And lay members and assessors sit with the Judge in a few cases.

26. Recently, provision has been made in the Judicature Act for the appointment of up to three Masters of the High Court (with the legal qualifications and experience necessary for appointment as a Judge) to exercise certain of the High Court's powers concurrently with High Court Judges. These include dealing with applications for summary judgment, certain company and land transfer matters, the assessment of damages where liability has been determined, and the trial of proceedings in which only the amount of the debt or damage is disputed. Registrars are also some given powers under the Act and the High Court Rules. These include the power to hear and determine applications to enlarge or abridge the time for filing a statement of defence or a notice of interlocutory application, to adjourn a trial (reserving the question of costs to the Court), to order a stay of proceedings pending the disposition of an application, and to make consent orders on interlocutory applications in proceedings.

Civil Jurisdiction

27. The original jurisdiction of the High Court in civil matters is virtually unlimited. The Judicature Act provides that the Court has "all judicial jurisdiction which may be necessary to administer the laws of New Zealand". Any case which is outside the jurisdiction of the District Courts may be commenced in the High Court as well as cases which are within the District Courts' jurisdiction (subject to their removal to a District Court on a party's application under the District Courts Act). Also, under the District Courts Act, a case which has been commenced in a District Court may, on application of the defendant, be removed to the High Court if the amount at stake is more than $3,000. Further, a High Court Judge can, on application of a party, order the removal of proceedings commenced in a District Court if the Judge thinks it desirable that the proceedings should be heard and determined in the High Court.

28. Some High Court civil jurisdiction is explicitly provided for by a range of statutes, dealing with contracts, sale of goods, hire purchase, dispositions of land, insolvency, trusts and wills, companies, partnership, admiralty matters, and so on. In addition the High Court has powers to issue declaratory judgments under the Declaratory Judgments Act 1908, supplementing its normal common law and equitable remedies of damages, injunction, specific performance, restitution, etc.

29. Jury trials are available in the High Court for certain civil matters. This is a matter of right if the

debt or damage or value of chattels claimed exceeds $3,000 (although the Judge may refuse on the basis that the case involves difficult questions of law, or will require prolonged examination of documents or accounts, or that difficult questions regarding scientific, technical, business or professional matters are likely to arise). In addition the Judge has a discretion in other cases to decide that proceedings would be more conveniently tried with a jury.

30. In 1968 the Administrative Divison of the High Court was established. Its membership of up to seven High Court Judges is assigned from time to time by the Chief Justice. Its jurisdiction is partly appellate - about 30 statutes provide for appeals to the Division - and partly deciding applications for judicial review which can be referred to it by the Chief Justice. Lay members and assessors are provided for in some of the appeal provisions. The 1972 amendment to the Judicature Act regulates aspects of the remedies available in review applications.

31. A recent development in the High Court is the establishment in 1987 of a Commercial List at the Auckland Court on a trial basis. The aim is to enable a range of commercial matters to be dealt with speedily and efficiently at all stages up to the substantive hearing by High Court Judges who are assigned from time to time by the Chief Justice.

Criminal Jurisdiction

32. The High Court exercises jurisdiction over criminal matters of the most serious kind. (It will be recalled that selected District Court Judges sitting with juries deal with the next most serious category: para.17 above.) The Court deals principally with cases which have been referred to it for a full hearing after a preliminary hearing in a District Court, as well as cases which have been heard in a District Court where the accused has pleaded guilty or has been found guilty and which are referred to it for sentencing.

33. A 1979 Amendment to the Crimes Act maintained trial by jury as the general rule in High Court criminal proceedings. In the case of offences where the maximum penalty is death or imprisonment for life or a term of 14 years or more, the accused must be tried by jury. In other cases the 1979 amendment allows the accused to apply for trial before a Judge alone and the Judge to consent to that.

Appellate Jurisdiction

34. The High Court has power to hear appeals from the District Courts in civil and criminal matters. The District Courts Act provides for a right of appeal in civil cases

where the amount of the claim or the value of the property or relief claimed or in issue exceeds $500, and with leave of the District Court for lesser amounts and in respect of interlocutory decisions. All such appeals are by way of rehearing but, under the High Court Rules, the evidence is normally produced by way of written record from the Court below (although the High Court may rehear evidence if it thinks the record is materially incomplete, and has the discretion to receive further evidence on questions of fact, by oral evidence or by affidavit). Similar appeal rights exist from the Family Courts under the statutes which confer jurisdiction on them. The High Court's appellate power in the administrative law area - largely exercised in the Administrative Division - was mentioned earlier (para.30).

35. Regarding criminal appeals from District Courts, the Summary Proceedings Act provides that either the defendant or the informant may appeal on a question of law by way of case stated. The defendant has a general right of appeal against conviction or sentence or both. The informant also has the right to appeal against sentence, provided the consent of the Solicitor-General is obtained. The District Courts Act further provides for a right of appeal from *sentence* given in a District Court jury trial. (Appeals relating to *conviction* are to the Court of Appeal.) All general appeals are to be dealt with by way of rehearing, which takes the same form as the rehearing in civil cases.

36. The High Court also has jurisdiction to hear appeals from the Children and Young Persons Courts, provided for in the Children and Young Persons Act. These include general appeals by children and young persons, in some cases parents, and (in more limited circumstances) other persons (including a complainant), against the Court's findings, sentence or order. Also there is provision for appeal on a point of law to the High Court by an informant as well as by the persons entitled to make a general appeal.

37. The District Courts and a number of tribunals have, in areas specified by statute, the power to seek the opinion of the High Court on a question of law arising in the course of the proceedings. This power is, for instance, conferred on the District Courts in summary criminal cases, the Family Courts, the Maori Land Court and Maori Appellate Court, and the large number of administrative tribunals which have the power of commissions of inquiry under the Commission of Inquiry Act 1908. This power is comparable to an appeal in that it leads to a higher court considering the matter. But it is different in that (1) the power is exercised before the lower court or tribunal has decided the case and that (2) whether the question is to be referred and the form of the question is determined by the court or tribunal and not by the parties. In the latter respect it might be compared to an appeal by leave.

COURT OF APPEAL

38. The Court of Appeal has existed in one form or another since 1846, but until 1957 was not a permanent Court. The present Court is constituted under the Judicature Act principally as amended in 1957. It is based in Wellington and almost invariably sits there. The Court consists of the Chief Justice of New Zealand, the President of the Court of Appeal and six permanent Court of Appeal Judges, all of whom are also Judges of the High Court. Additional Judges of the Court may be appointed on a temporary basis. The powers of the Court must normally be exercised by three or more Judges except that any two Judges may deliver a judgment or hear an application for leave to appeal to the Privy Council. Following a 1977 amendment to the Judicature Act, the Court can now sit in divisions.

39. The Court of Appeal is principally an appeal court. It does however have some original jurisdiction. The Judicature Act empowers the High Court on the ground of extraordinary importance or difficulty to order the removal of a criminal prosecution into the Court of Appeal for it to be tried at bar by the Court of Appeal with a jury. A case stated on a question of law in a summary criminal matter by the District Court for the opinion of the High Court can also be removed into the Court of Appeal for the original determination of that matter. Some cases stated under the Commissions of Inquiry Act 1908 are also dealt with originally in the Court of Appeal. For certain civil proceedings the Judicature Act empowers the High Court or Court of Appeal to remove the matter from the High Court to the Court of Appeal. In practice this is the most significant area of original jurisdiction.

Civil jurisdiction

40. In its civil appeal jurisdiction (provided for in the Judicature Act) the Court of Appeal determines appeals from the High Court. However in the case of High Court decisions on appeals from District Courts or other inferior courts, leave to appeal must be granted by the High Court or the Court of Appeal before the Court of Appeal can hear the appeal. In some cases particular statutory provisions will prevent any further appeal. Thus in general the decisions of the Administrative Division on appeal are final. The Court of Appeal Rules provide that appeals are to be by way of rehearing. However, although the Court has the discretion to receive further evidence on questions of fact by oral examination or by affidavit or depositions, it is only in exceptional cases that such evidence is admitted, and the appeal is usually dealt with on the record of the proceeding below.

41. The Court of Appeal also has a limited jurisdiction to hear appeals from certain specialist courts, such as the

Labour Court established under the Labour Relations Act 1987 (replacing the Arbitration Court). Any party who is dissatisfied with any decision of the Court (other than a decision on the construction of an award or agreement) as being erroneous in point of law, may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law. The Court of Appeal is to have regard to the special jurisdiction and powers of the Labour Court.

Criminal jurisdiction

42. In its criminal jurisdiction the Court hears appeals from both the High Court and District Courts. Under the Crimes Act any person who is convicted either in a High Court or District Court jury trial may appeal against the conviction, without leave on questions of law alone, or with the leave of a High Court Judge or the Court of Appeal on questions of fact or questions of mixed law and fact or "any other ground which appears to the Court of Appeal to be sufficient ground of appeal". Also, a person convicted in the High Court may appeal, with the leave of the Court of Appeal, against the sentence unless it is fixed by law. (And the Solicitor-General may, with leave of the Court of Appeal, appeal against a sentence passed in the High Court unless the sentence is one fixed by law.). The Court of Appeal normally relies on the record of the trial in the Court below, but it has supplemental powers to reexamine witnesses and to receive new evidence.

43. Under the Summary Proceedings Act, criminal appeals to the High Court on questions of law by way of case stated may be removed to the Court of Appeal by order of the High Court, and the Court of Appeal then has the same power to adjudicate on the proceedings as the High Court had. Criminal appeals on questions of law from High Court decisions on appeal from District Courts are also possible where leave is given by the High Court or (failing that) the Court of Appeal, in which case again the Court of Appeal has the same power to adjudicate on the proceedings as the High Court had.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

44. The Judicial Committee of the Privy Council is technically not a court at all but an adviser to the Queen in her Privy Council. It evolved out of the old Committee of Trade and Plantations which originally heard petitions from British overseas possessions which were made to the Crown. Its position, membership and powers were formalised by the Judicial Committee Act 1833, and for many years it remained the final appeal court for the Empire and later for independent Commonwealth countries. It still has that function for New Zealand, although most other Commonwealth countries, including Canada and Australia, have now

abolished the appeal. The Privy Council sits in London and in practice comprises mainly the English and Scottish Law Lords. Judges or former judges of the superior courts of certain Commonwealth countries may also be appointed to the Privy Council. For instance the Chief Justice and some of the Judges of the Court of Appeal of New Zealand are Privy Councillors and from time to time sit on the Judicial Committee.

45. Civil appeals from New Zealand courts to the Privy Council are currently regulated by an Order in Council made in 1910, as amended in 1972. An appeal from the Court of Appeal lies as of right from any final judgment where the value of the amount involved, directly or indirectly, is $5,000 or more. Appeals from other judgments of the Court of Appeal, final or interlocutory, are at the discretion of that Court. Leave may be granted if the Court considers that the question involved is one which by reason of its great general or public importance, or otherwise, ought to be submitted. Appeals are also possible directly from final judgments of the High Court, if that Court considers that the question is one which by reason of its great general or public importance or of the magnitude of the interests affected or for any other reason, ought to be submitted. The Privy Council may also, under its prerogative powers, grant special leave to appeal. In criminal matters appeal is only by special leave of the Privy Council and this will not normally be granted unless there is a major point of law involved.

46. Although the Judicial Committee has the power to take new evidence on appeal it does so very rarely. It generally gives a joint opinion (but dissents may be published separately) which is transmitted to the Queen, and given effect to by means of an Order in Council. A list of New Zealand Privy Council Cases is included in Appendix F.

APPENDIX C

THE COURTS: SOME STATISTICS

The following figures are mainly based on the Department of Justice Annual Reports and the Courts Division's Consolidated Annual Returns for High Court and District Court business. In some cases figures from the Justice Statistics prepared by the Department of Statistics are taken into account (and it is indicated where this is done). A substantial amount of the work has already been done by the Audit Office in preparation for its Report on the Administration of the Courts and this is gratefully acknowledged.

The primary focus is on the number of Judges and Judge-equivalents occupied in each jurisdiction. This is largely based on sitting hours of Judges, Small Claims Referees and Justices of the Peace as recorded in the above reports and figures. For the High Court, it also takes account of recorded time spent in Chambers. For the High Court Judges and District Court Judges the total number of Judges (based on the list in the New Zealand Law Register) is divided between the various categories of work in proportion to the sitting time. The Judge-equivalent figures in the District Court for Justices of the Peace and Small Claims Referees are determined simply by dividing the actual sitting hours (about 10,000 each) by the average sitting time of District Court Judges (about 650 hours/year). The figures for the number of Judges in the Court of Appeal and for the tribunals and special courts are based on the actual appointments to the bodies (with the Chief Justice's ex officio membership of the Court of Appeal indicated in brackets).

The figures do not reflect vacancies for part of the year in the courts, leave, special assignments or temporary appointments. They do not distinguish those tasks for which the time out of court is substantial and those for which it is not. Closely related functions such as parole and prisons board work are not included. In some cases the figures are approximations. In some cases (such as Other in the High Court) the information should be further refined. In others there are definite possibilities of error, either in the collection or analysis of the data. In general, however, they give a clear indication of the overall balance of the work of the courts.

We would welcome comment (including comment by way of correction and addition) on the statistics.

COURT BUSINESS - NUMBER OF JUDGES AND JUDGE EQUIVALENTS OCCUPIED IN EACH JURISDICTION

	1982	1986
Criminal		
High Court	6	8
District Court jury trials	7	5
Preliminary hearings -		
District Court Judge	1	1
Justice of the Peace	5	4
General -		
District Court Judge	33	40
Justice of the Peace	1	1
Traffic Court -		
District Court Judge	10	11
Justice of the Peace	3	4
Minor Offences -		
District Court Judge	1	1
Justice of the Peace	5	7
Total High Court	6	8
Total District Court Judges	52	58
Total JP (Judge equivalents)	14	16
Total (Combined)	72	82
Civil		
Civil - High Court	7	7
Civil - District Court	7	6
Small Claims referees (Judge equivalents)	7	16
Total	21	29

Family		
Family - Family Court (District Court Judges)	12	15
Total	12	15
Other First Instance		
Other - High Court	7	8
Other - District Court	2	3
Total	9	11
Appeals		
Court of Appeal	5(/6)	5(/6)
High Court	2	2
Total	7	7
Tribunal - Special Court		
Planning, Taxation, Accident compensation, Licensing Control - District Court Judges	5	9
Labour - Arbitration Court	3	4
Maori Land - Maori Land Court and Maori Appellate Court	6	7
Total	14	20
GRAND TOTAL	135*	164**

* comprising 5 Court of Appeal Judges, 22 High Court Judges, 78 District Court Judges, 21 Judge equivalents (J.P's, Small Claims Tribunal Referees), 3 Arbitration Court Judges and 6 Maori Land Court (and Maori Appellate Court) Judges

** comprising 5 Court of Appeal Judges, 25 High Court Judges, 91 District Court Judges, 32 Judge equivalents (J.P's, Small Claims Tribunal Referees), 4 Arbitration Court Judges, and 7 Maori Land Court (and Maori Appellate Court) Judges

COURT BUSINESS - SITTING HOURS PER YEAR

	1982	1986
Criminal		
High Court	3773	4932
District Court jury trials	4558	3249
Preliminary Hearings -		
District Court	480	636
Justice of the Peace	3154	2847
General -		
District Court	22266	25777
Justice of the Peace	531	720
Traffic Court -		
District Court	7129	7227
Justice of the Peace	1746	2372
Minor Offences -		
District Court	793	553
Justice of the Peace	3484	4468
Total High Court	3773	4932
Total District Court Judges	35226	37442
Total JP	8915	10407
Total (Combined)	47914	52781
Civil		
Civil - High Court	4630*	4272
Civil - District Court	4762	4242
Small Claims - referees	4653	10566
Total	13595	19080

* estimate based on assumption that relationship of civil/other/appeal work the same in 1982 as in 1986 (where more precise figures given)

Family		
Family - Family Court (District Court Judges)	8122	9946
Total	8122	9946
Other First Instance		
Other - High Court	4700*	4336
Other - District Court	1524	2125
Other - JP	14	21
Total	5780	6482
Appeals		
Court of Appeal	771 days	597 days
High Court	1487 hours*	1372 hours
Average Sitting Hours/Judge		
	1982	1986
High Court Judges	663	596
District Court Judges	680	656

Note: for Court of Appeal, average sitting days/Judge varies depending on whether counted as 5 or 6 Judges.

* estimate based on assumption that relationship of civil/other/appeal work the same in 1982 as in 1986 (where more precise figures given)

COURT BUSINESS - CASES

	1982	1986
Criminal		
High Court jury trials -		
number of trials	323	544
trials held		409
District Court jury trials -		
number of trials	505	824
trials held		682
District Court cases -		
summary cases	462,833	540,749
traffic offences (incl.)	312,787	370,463
Civil		
High Court -		
proceedings	3297	4213
cases tried	436*	(417)**
judgments	709*	(700)**
District Court -		
plaints	118,445	150,933
judgments	61,103*	(45,247)**
(We have been given estimates of 500-800 for number of cases tried)		
Small Claims applications	4104	9114
Family		
Applications for dissolutions	9828	9000
Other applications	10,315	13,225
Appeals		
Court of Appeal -		
appeals lodged	525	57
appeals heard	410	465
High Court -		
appeals heard	1,728*	(1,734)**
family appeals (incl.)	113*	(83)**

* 1982 figure from Justice Statistics 1982
** 1985 figure from Justice Statistics 1985

1977 FIGURES

1. Judges/Judge equivalents

Criminal -	
Magistrates	39
Justices of the Peace	10
Civil - Magistrates	10
Criminal, Civil, Chambers, etc. -	
Supreme Court	19
Appeals - Court of Appeal	3(4)
Accident compensation	1
Labour - Industrial Court	1
Maori Land - Maori Land Court	6
Total	89*

2. Hours

Criminal -	
Magistrates	27,185
Justices of the Peace	6,790
Civil - Magistrates	7186
Criminal, Civil, Chambers, etc. -	
Supreme Court	16,585
Appeals - Court of Appeal	459 days

Average Sitting Hours/Judge

Supreme Court Judges	873**
Magistrates	701

* comprising 3 Court of Appeal Judges, 19 Supreme Court Judges, 49 Magistrates, 10 Judge equivalents (J.P.s), 1 Industrial Court Judge, 1 Accident Compensation Appeal Authority Judge, 6 Maori Land Court (and Maori Appellate Court) Judges.

** compare with 731 hrs/J for 1976 and 826 hrs/J for 1978

3. Cases

Criminal - Supreme Court jury trials	662
Criminal - Magistrates' Courts -	
summary Cases	509,369
traffic offences (incl.)	21,554
Civil - Supreme Court -	
civil proceedings	3,593
cases tried	(498)*
Civil - Magistrates' Courts -	
plaints	144,626
judgments	(84,388)*
Appeals - Court of Appeal -	
appeals lodged	338
appeals heard	218
Appeals - Supreme Court -	
appeals heard	(1,304)*

* 1976 figures from Tables 37, 44 & 45, Department of Justice submissions to Royal Commission on the Courts, Appendix to Part I, 1977.

PRINCIPAL DISPUTE RESOLUTION PROCESSES

Characteristics	Adjudication	Special Tribunal	Arbitration	Mediation/ Conciliation	Ombudsman	Negotiation/ Contract
Compulsory/ optional	Compulsory	Compulsory	Usually optional	Sometimes compulsory	Compulsory	Optional
Third party	Imposed neutral-state provided generalist	specialist	Chosen by parties usually specialist	Imposed neutral when compulsory; otherwise party choice	Imposed neutral	No third party
Parties participation	Adversary presentation of evidence and argument			Unfettered negotiation; consent	Provision of information; hearing before adverse comment	Unfettered negotiation; consent
Nature of Process	Formalised passive decider	Possibly less formal	Usually less formal	Usually informal; neutral	Investigative; wide powers of access to information	Usually informal; unstructured
	Conditions of impartial adjudication (natural justice : varying application)					
Third party role	Assessment of arguments; declaration of principles		Assessment of decision on particular facts; sometimes compromise	Fostering harmonious interaction of parties	Finding facts etc; proposing resolutions according to principle	-
Outcome	Impartial decision based on facts, and according to law and defensible principle	Like adjudication; possibly larger policy or discretionary element	Impartial decision - see point above	Harmonious settlement social peace	Action in accordance with fairness and administrative principle	Mutually acceptable agreement
Binding non/ binding	Binding (subject to appeal)	Binding (usually subject to appeal)	Binding (subject to limited review)	If agreed, binding contract	Recommendation to public agency	If agreed, binding contract
Public/private	Public	Public (usually)	Private	Private	Private (possibility of public report)	Private

Based on Goldberg, Green and Sander, Dispute Resolution (1985) 8-9,and Winston (ed), The Principles of Social Order : Selected Essays of Lon L Fuller (1981) 34

APPENDIX E

COURT, TRIBUNAL, GOVERNMENT - CRITERIA FOR CHOICE

THE CHOICES

1. The basic choice is of course between court, tribunal and the executive government. But as with choices within the court system, the choice can be more complex, taking account of differences *within* each body, of *overlaps* of both people and jurisdiction between them, and of *relationships* of direction, advice and appeal between the bodies:

(a) within each body, different decision makers are or may be available - one person or several, a special judge, a judge with additional members, an independent statutory officer: e.g. the Labour Court Judge sitting alone or with assessors, the Administrative Division Judge, that Judge with lay members in commerce matters, or the Commissioner of Patents.

(b) by contrast to the division involved in (a), a member of a court or tribunal might be a member of the other, especially the tribunal member who is required by law to be a Judge or is in fact one; e.g. the Planning Tribunal and the Taxation Review Authorities respectively.

(c) as with (b) there might be an overlap, but of jurisdiction rather than people; the litigants might be able to have the matter dealt with in one of a number of bodies; those bodies may also be able to control where the matter is considered; e.g. a small claim relating to a motor vehicle might come within the jurisdiction of a Small Claims Tribunal, a Motor Vehicle Disputes Tribunal, or the courts.

(d) one body may be able to give directions to another affecting the way in which that other exercises the power of decision: the Minister of Broadcasting can give directions to the Broadcasting Tribunal.

(e) one body may give advice or recommendations to another which decides: the Commerce Commission to the government on price control.

(f) there might be a right of appeal from one body to another which can vary greatly -

- full consideration as if the matter were being dealt with originally (the Planning Tribunal on appeal from a local body)

- a general appeal (air services licensing appeals to the High Court)

- an appeal as if from the exercise of a discretion (indecent publication appeals to the High Court)

- an appeal on law alone

- an appeal on the ground that the proceedings were conducted in an unfair manner which prejudiced the proceedings (small claims).

THE CRITERIA FOR CHOICE

2. The reasons or criteria for choice of a particular method of decision-making can be organised under three headings -

(1) the characteristics of the function of power, together with the issues to be resolved and the interests affected;

(2) the qualities and responsibilities of the decision-maker; and

(3) the procedure to be followed.

They can be put more shortly: *what* is to be done, *who* is to do it, and *how*? (The material in the table in Appendix D may also help.)

(1) The power

3. How confined is the power? Does it mainly involve the finding of past facts and the application of precise rules to those facts? Or does it require the making of broader judgments or the exercise of wide discretions looking to the future and to elements of public interest? Does it have a high policy making content?

4. The broader the policy element the more appropriate it may be for the matter to be settled by Ministers who are responsible to Parliament, and ultimately to the electorate. Such a political process might be complemented by a tribunal or even a court, for instance, (a) by Ministers determining the general policy by direction and the tribunal applying the policy to particular cases, or (b) by a tribunal or a commission of inquiry having a power to investigate a matter and make recommendations to Ministers. The latter power of recommendation is to be found for instance in the environmental area. It is most unusual for a recommendatory power to be conferred on a court. In general that is contrary to the constitutional function of a

court of *deciding* - especially in disputes between the Crown and individuals.

5. A more common procedure will be for Parliament to settle the broad policy and decide that a single or small number of specialist bodies, independent of the executive and with power of decision, are best able to develop and apply the policy consistently, on a country wide basis and, where appropriate, develop it by reference to a changing perception of the public interest. Such a function might be thought better suited to a specialist tribunal with a multidisciplinary and changing membership than to the judges of a court of general jurisdiction. (That is not to deny a role for the courts in respect of questions of law and related matters arising from the exercise of such functions, see para.114 of the report of the Legislation Advisory Committee on *Legislative Change* (1987).)

6. The preceding paragraphs look at the matter from the point of view of the state, of those in authority seeing to it that policy is properly elaborated and applied. It is critical as well to consider it from the other end, from the point of view of the individuals affected by the exercise of the power. How important are the individual rights and interests which may be affected by the exercise of the power? Is personal liberty involved? Do the rights justify or require elaborate and careful protections by a formal process supervised and applied by a body which is clearly independent of the government? Against that may be important public interests which suggest that the state should have a substantial or final power of decision. In general however the more serious the consequence of the decision for individual rights and interests (for example in terms of the possibility of imprisonment) the greater the protection for the person affected - in terms of:

- the independence of the decider (court or tribunal rather than executive) or the seniority of the decider (Minister or even Governor-General rather than officials)

- the procedure to be followed (a right to be heard and to call witnesses etc. rather than no express procedural protections at all)

- the specificity of standards and criteria for decision, and

- rights of appeal and review.

7. A large volume of relatively routine matters might provide a quite different reason for using a special tribunal rather than a general court. In some cases, this tribunal might be a public servant acting as an independent officer and usually subject to a full right of appeal to the

Courts. (Consider many registration and intellectual and industrial property functions.) This relates to the third of the general matters noted in para. 2 above - the procedure to be followed.

(2) The qualities and responsibilities of the decision-maker

8. This matter ties back into the characteristics of the issues and the function and, indeed, forward into the procedure. Thus the nature of the issues might require special expertise (which the tribunal members might have on appointment or might acquire by concentrating in that field), possibly across several areas (thereby justifying multimember panels); consider for example the statutory provisions about members of the Indecent Publications Tribunal and the Commerce Commission, and the nature of the decisions to be made about medicines, poisons and pesticides. The issues on the other hand might be such that Judges in courts of general jurisdiction, with the traditional independence and other attributes of that office, are the appropriate people to determine them, or there might be a case for specialisation within the general court. Another possibility, again seen in the Commerce Act, is to add expert members to the general court. A further variation in an appeal context is to limit the issues which a general court can consider. By contrast to the foregoing, the character of the issues and of the function might be such that Ministers should take responsibility. This could be so, for instance, if the policy and public interest components of the decision are significant. They might be such that elected Ministers accountable to the electorate should have the power of decision.

(3) The procedure to be followed

9. The three categories of decision-makers - courts, tribunals, and the executive - of course have their standard procedures. Those procedures, it can quickly be seen, are more apt for dealing with some issues than with others. A court process is designed, for example, to resolve, through adversary presentation and testing of evidence and argument, disputes about facts and law. Tribunal procedure is usually less formal, with the law of evidence being relaxed for instance. Tribunals are sometimes expected to take an active inquisitorial role in contrast to a more passive court which is dependent on the parties to bring the relevant material before it. The less structured processes of Ministerial decision-making, extending as they can out to the relevant sources of information and opinion (expert and political) in the community, are better able to determine, say, the nature and characteristics of a new taxation regime. Procedures *within* courts and *within* tribunals can

of course vary greatly, and that is even more true within the executive. They can be more or less formal, more or less speedy and more or less costly. Those considerations may also justify the use or establishment of a tribunal instead of a court. Thus the Small Claims Tribunal was established to deal in an expeditious, informal, private and less costly way with small claims which otherwise come within the regular court jurisdiction. The issues might by contrast be so significant or difficult that a more elaborate and formal process is required.

10. Tribunals are often perceived to be more accessible and less costly and to allow a greater range of individual and public participation. In the courts a party who wishes to be represented usually is required to engage a lawyer. Tribunals frequently operate without the assistance of lawyers and indeed the use of lawyers is prohibited or limited in some tribunals concerned with private law matters in the interests of informality and lower costs.

APPENDIX F

A CHRONOLOGICAL LIST OF APPEALS FROM NEW ZEALAND DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The following list is based on the *New Zealand Privy Council Cases 1840-1932*, the *New Zealand Law Reports* and *The Weekly Law Reports*. For purposes of standardisation some changes have been made to the citations used in the Reports. No doubt there are gaps - for instance of unreported cases and in particular of unsuccessful petitions for leave. We would be grateful for any additions or corrections.

The Queen v. Clarke (1849-51) NZPCC 516. Prerogative of Crown - Land Claims Ordinance. Appeal allowed.

Bunny v. Hart (1857) NZPCC 15. Bankruptcy - adjudication. Appeal withdrawn by consent.

Bunny v. The Judges of the Supreme Court of New Zealand (1862) NZPCC 302. Law practitioner - suspension. Appeal dismissed.

Maclean v. MacAndrew (1874) NZPCC 349. Cancellation of lease under Goldfields Act 1866, Otago Waste Lands Act 1866. Appeal dismissed.

Bell v. Receiver of Land Revenue of Southland (1876) NZPCC 216. Application to purchase rural land - price. Appeal dismissed.

Pearson v. Spence (1879) NZPCC 222. Application to purchase rural land - price. Appeal dismissed.

Daniell v. Sinclair (1881) NZPCC 140. Reopening of accounts under mortgage. Appeal dismissed.

Rhodes v. Rhodes (1882) NZPCC 708. Construction of will. Appeal allowed.

Ward v. National Bank of New Zealand Ltd (1883) NZPCC 551. Guarantee - defence of release of co-surety without knowledge and consent. Appeal dismissed.

The Queen v. Williams (1884) NZPCC 118. Crown suit - negligence. Appeal dismissed.

Plimmer v. Wellington City Corporation (1884) NZPCC 250. Compensation for public taking of licensed land. Appeal allowed.

Shaw Savill & Albion Co. Ltd v. Timaru Harbour Board (1889-90) NZPCC 180. Liability of Habour Board for actions of harbourmaster as pilot. Appeal dismissed.

Donnelly v. Broughton (1891) NZPCC 566. Validity of Maori will. Appeal dismissed.

Buckley (Attorney-General for New Zealand) v. Edwards (1892) NZPCC 204. Power to appoint Supreme Court Judges. Appeal allowed.

Cameron v. Nystrom (1893) NZPCC 436. Negligence - employer's liability. Appeal dismissed.

Ashbury v. Ellis (1893) NZPCC 510. New Zealand Constitution - validity of Supreme Court Code rule authorising proceedings against defendant absent from New Zealand. Appeal dismissed.

Black v. Christchurch Finance Co. Ltd (1893) NZPCC 448. Negligence - liability of principal for agent. Appeal allowed.

Union Steam Ship Co. Ltd v. Claridge (1894) NZPCC 432. Negligence - employer's liability. Appeal dismissed.

Barre Johnston and Co. v. Oldham (1895) NZPCC 101. Contract - subcontractor's obligations. Appeal dismissed.

Annie Brown v. Attorney-General for New Zealand (1897) NZPCC 106. Criminal law - party to offence - defence of marital control. Appeal dismissed.

Eccles v. Mills (1897-8) NZPCC 240. Landlord and tenant - lessor's covenant. Appeal allowed.

Southland Frozen Meat & Product Export Co. Ltd v. Nelson Bros Ltd (1898) NZPCC 77. Contract - construction. Appeal dismissed.

Union Bank of Australia Ltd v. Murray-Aynsley (1898) NZPCC 9. Bank - trust fund - knowledge of character of customer's account. Appeal allowed.

Barker v. Edger (1898) NZPCC 422. Jurisdiction to rehear case under Native Land Court Act 1886. Appeal allowed in part and judgment varied accordingly.

Dilworth v. Commissioner of Stamps, Dilworth v. Commissioner for Land & Income Tax (1898) NZPCC 578. Tax - exemption from death duties, land tax. Appeals allowed

Coates (Receiver for Debenture-Holders of the New Zealand Midland Railway Co. Ltd) v. R. (1900) NZPCC 651. Railways debentures - construction. Appeal dismissed.

Wasteneys v. Wasteneys (1900) NZPCC 184. Deed of separation - provision for annuity. Appeal allowed.

Fleming v. Bank of New Zealand (1900) NZPCC 525. Principal and agent - agent's authority. Appeal allowed.

Allan v. Morrison (1900) NZPCC 560. Probate of lost will. Appeal dismissed.

Jellicoe v. Wellington District Law Society (1900) NZPCC 310. Suspension of solicitor. Appeal dismissed.

Nireaha Tamaki v. Baker (1900-01) NZPCC 371. Native Land Court - cognizance of Maori customary law. Appeal allowed.

Te Teira Te Paea v. Te Roera Tareha (1901) NZPCC 399. Native lands - confiscation by Crown. Appeal dismissed.

Wellington City Corporation v. Johnston, Wellington City Corporation v. Lloyd (1902) NZPCC 644. Public works - compensation for taking. Appeals dismissed.

Commissioner of Trade and Customs v. R. Bell & Co. Ltd (1902) NZPCC 146. False trade description - forfeiture by Customs. Appeal allowed.

Wallis v. Solicitor-General (1902-03) NZPCC 23. Charitable trust. Appeal allowed.

Jackson v. Commissioner of Stamps (1903) NZPCC 592. Tax - death duties (estate duty). Appeal dismissed.

Mitchell v. New Zealand Loan & Mercantile Agency Co. Ltd, Ex parte Michell (1903) NZPCC 495. Petition for special leave to appeal in forma pauperis. Leave refused.

D. Henderson & Co. Ltd (In liquidation) v. Daniell (1904) NZPCC 48. Company law - arrangement with creditors. Appeal dismissed.

Smith v. McArthur (1904) NZPCC 323. Licensing - polls and elections. Appeal allowed.

Lodder v. Slowey (1904) NZPCC 60. Termination of contract - power of re-entry and seizure - quantum meruit. Appeal dismissed.

Wellington City Corporation v. Lower Hutt Borough (1904) NZPCC 354. Municipal Corporations Act 1900 - contribution to cost of bridge. Appeal dismissed.

Heslop v. Minister of Mines (1904) NZPCC 344. Compensation for lands injured by mining. Appeal dismissed.

Riddiford v. R. (1904-05) NZPCC 109. Surrender of lands to Crown - adverse possession. Appeal dismissed.

Assets Co. Ltd v. Mere Roihi (1904-05) NZPCC 275. Consolidated appeals - irregularities in Native Land Court proceedings - effect on registration under Land Transfer Act. Appeals allowed.

Graham v. Callaghan (1905) NZPCC 330. Licensing laws - regulation of local elections. Appeal allowed.

New Zealand Loan & Merchantile Agency Co. Ltd v. Reid (1905) NZPCC 82. Contract - fraud. Appeal allowed.

Clouston and Co. Ltd v. Corry (1905) NZPCC 336. Master and servant - wrongful dismissal. Appeal allowed.

Commissioner of Taxes v. Eastern Extension Australasia & China Telegraph Co. Ltd (1906) NZPCC 604. Income tax - profits from transmission of messages from New Zealand for part of route outside New Zealand. Appeal dismissed.

Ward Bros v. Valuer-General for New Zealand (1907) NZPCC 174. Power of Supreme Court to control Valuer-General. Appeal dismissed.

Lyttleton Times Co. Ltd v. Warners Ltd (1907) NZPCC 470. Nuisance - construction of building resulting in noise. Appeal allowed.

R. v. Badger, Ex Parte Badger (1907) NZPCC 501. Criminal law - Petition for special leave to appeal. Leave refused.

Lovell and Christmas Ltd v. Commissioner of Taxes (1907) NZPCC 611. Income tax - profits from goods sold on commission in London. Appeal allowed.

In re The Will of Wi Matua (deceased), Ex Parte Reardon & Te Pamoa (1908) NZPCC 522. Native Land Court Act 1894 - petitions for special leave to appeal from decision of Native Appellate Court. Leave refused.

Commissioner of Stamps v. Townend, In re Moore (deceased) (1909) NZPCC 597. Tax - death duties (gift duty). Appeal dismissed.

Hamilton Gas Co. Ltd v. Hamilton Borough (1910) NZPCC 357. Purchase of gasworks and plant by Borough Council - price. Appeal allowed.

Greville v. Parker (1910) NZPCC 262. Lease - option for renewal. Appeal allowed.

Allardice v. Allardice (1911) NZPCC 156. Family protection. Appeal dismissed.

Massey v. New Zealand Times Co. Ltd (1912) NZPCC 503. Defamation - grounds for new trial. Appeal dismissed.

Samson v. Aitchison (1912) NZPCC 441. Negligence - employer's liability. Appeal dismissed.

Manu Kapua v. Para Haimona (1913) NZPCC 413. Native lands - title of "loyal inhabitants". Appeal dismissed.

Kauri Timber Co. Ltd v. Commissioner of Taxes (1913) NZPCC 636. Income tax - deduction of capital. Appeal dismissed.

Equitable Life Assurance Society of the United States v. Reed (1914) NZPCC 190. Life insurance policy - surrender value. Appeal dismissed.

Union Steam Ship Co. of New Zealand Ltd v. Wellington Harbour Board (1915) NZPCC 176. Exemption from Harbour Board dues. Appeal dismissed.

Rutherford v. Acton-Adams (1915) NZPCC 688. Vendor and purchaser - compensation for deficiency. Appeal dismissed.

R. v. Broad (1915) NZPCC 658. Railways - negligence - effect of statutory restriction on public right of way. Appeal dismissed.

Mangaone Oilfields Ltd v. Herman & Weger Manufacturing & Contracting Co. Ltd (1916) NZPCC 21. Building contract - construction. Appeal dismissed.

Ridd Milking Machine Co. Ltd v. Simplex Milking Machine Co. Ltd (1916) NZPCC 478. Patent - infringement. Appeal dismissed.

Gillies v. Gane Milking Machine Co. Ltd (1916) NZPCC 490. Patent - infringement. Appeal dismissed.

McCaul v. Fraser (1917) NZPCC 152. Family arrangement - trust to divide estate. Appeal dismissed.

Attorney-General for New Zealand v. Brown, In Re Knowles (deceased) (1917) NZPCC 698. Construction of will. Appeal dismissed.

Marsh v. St Leger (1918) NZPCC 232. Lands Act 1892 - construction of provisions regarding renewal and rental. Appeal dismissed.

Hineiti Rirerire Arani v. Public Trustee of New Zealand (1919) NZPCC 1. Maori adoption. Appeals dismissed.

Tarbutt v. Nicholson and Long (1920) NZPCC 703. Construction of will. Appeal allowed.

Union Steam Ship Co. of New Zealand Ltd v. Robin (1920) NZPCC 131. Death by accident - amount recoverable by dependant. Appeal dismissed.

Gerrard v. Crowe (1920) NZPCC 691. Riparian owners - right to erect embankment against flood. Appeal dismissed.

Thornes v. Brown (1922) NZPCC 534. Exchange of land - negligence of agent acting for both parties. Appeal dismissed.

Ward and Co. Ltd v. Commissioner of Taxes (1922) NZPCC 625. Income tax - deductibility of money expended on propaganda for licensing poll. Appeal dismissed.

A. Hatrick & Co. Ltd v. R. (1922) NZPCC 159. Government railways - Minister's power to exact sorting-charges. Appeal allowed.

Snushall v. Kaikoura County (1923) NZPCC 670. Control by County Council of "paper roads". Appeal dismissed.

Smallfield v. National Mutal Life Association of Australasia Ltd (1923) NZPCC 197. Life insurance - truth of statements forming basis. Appeal allowed.

Auckland Harbour Board v. R. (1923) NZPCC 68. Constitutional law - authority for payment out of Consolidated Fund. Appeal dismissed.

Waimiha Sawmilling Co. Ltd (in liquidation) v. Waione Timber Co. Ltd (1925) NZPCC 267. Land Transfer Act 1915 - unregistered interest. Appeal dismissed.

Peddle v. McDonald (1925) NZPCC 138. Assignment of right to use tram line. Appeal dismissed.

Wright v. Morgan (1926) NZPCC 678. Trusts - asssignment of option given under will to co-trustee. Judgment varied.

Bisset v. Wilkinson (1926) NZPCC 93. Contract for sale of land - misrepresentation. Appeal allowed.

Gardiner v. Hirawanu (1926) NZPCC 365. Native land - covenant by lessee to cultivate. Appeal allowed.

Doughty v. Commissioner of Taxes (1926-27) NZPCC 616. Income tax - value of partner's share on conversion of partnership into a company. Appeal allowed.

Crown Milling Co. Ltd v. R. (1926-27) NZPCC 37. Commercial Trusts Act 1910. Appeal allowed.

Watson v. Haggitt (1927) NZPCC 474. Construction of deed of partnership. Appeal dismissed.

Finch v. Commissioner of Stamp Duties (1929) NZPCC 600. Tax - death duties (gift duty). Appeal allowed.

Wanganui Sash and Door Factory & Timber Co. Ltd v. Maunder (1929) NZPCC 484. Patent - infringement. Appeal allowed.

Burnard v. Lysnar (1929) NZPCC 538. Principal and surety - validity of arrangement with creditor. Appeal allowed.

Scales v. Young (1931) NZPCC 313. Licensing districts. Appeal dismissed.

Benson v. Kwong Chong (1932) NZPCC 456. Negligence - function of jury. Appeal allowed.

Aspro Ltd v. Commissioner of Taxes (1932) NZPCC 630. Income tax - deduction for sums voted as director's fees. Appeal dismissed.

New Plymouth Borough v. Taranaki Electric Power Board [1933] NZLR 1128. Municipal Corporations Act 1920. Appeal dismissed.

Brooker v. Thomas Borthwick & Sons (Aust.) Ltd [1933] NZLR 1118. Workers compensation. Appeal allowed.

Gould v. Commissioner of Stamp Duties [1934] NZLR 32. Tax - death duties. Appeal dismissed.

Lysnar v. National Bank of New Zealand Ltd [1935] NZLR 129. Contract - formation. Appeal allowed.

Barton v. Moorhouse [1935] NZLR 152. Construction of a private Act. Appeal allowed.

Trickett v. Queensland Insurance Co. Ltd [1936] NZLR 116. Motor vehicle insurance policy - construction. Appeal dismissed.

Public Trustee v. Lyon [1936] NZLR 180. Life insurance. Appeal dismissed.

Attorney-General of New Zealand v. New Zealand Insurance Co. Ltd [1937] NZLR 33. Validity of will. Appeal dismissed.

Vincent v. Tauranga Electric Power Board [1936] NZLR 1016. Breach of implied contract and statutory duty - limitation of action. Appeal dismissed.

Auckland City Corporation & Auckland Transport Board v. Alliance Assurance Co. Ltd [1937] NZLR 142. Local authority debentures - currency of payment. Appeal dismissed.

Macleay v. Treadwell, In re Macleay (deceased) [1937] NZLR 230. Construction of will. Appeal allowed.

Mt Albert Borough v. Australasian Temperance & General Mutual Life Assurance Society Ltd [1937] NZLR 1124. Local body loan - application of Victorian statute. Appeal dismissed.

De Bueger v. J Ballantyne and Co. Ltd [1938] NZLR 142. Contract - currency of payment - construction. Appeal allowed.

Wright v. New Zealand Farmers' Co-operative Association of Canterbury Ltd [1939] NZLR 388. Mortgage - mortgagee's obligations on sale. Appeal dismissed.

Stewart v. Hancock [1940] NZLR 424. Negligence - evidence. Appeal allowed.

Te Heuheu Tukino v. Aotea District Maori Land Board [1941] NZLR 590. Legal effect of Treaty of Waitangi. Appeal dismissed.

Dillon v. Public Trustee, In re Dillon [1941] NZLR 557. Family Protection Act 1908 - effect on distribution under a contract to make a will. Appeal allowed.

Guardian Trust & Executors Co. of New Zealand Ltd v. Public Trustee [1942] NZLR 294. Will - withdrawal of probate - liability of executor for payments made. Appeal dismissed.

Sidey v. Perpetual Trustees, Estate, & Agency Co. of New Zealand Ltd [1944] NZLR 891. Construction of will. Appeal allowed.

Auckland Electric Power Board v. Public Trustee [1947] NZLR 279. Electric Supply Regulations 1935 - Electric Wiring Regulations 1935 - ultra vires. Appeal allowed.

Australian Provincial Assurance Association Ltd v. E. T. Taylor & Co. Ltd [1947] NZLR 793. Contract - formation. Appeal allowed.

National Mutual Life Association of Australia Ltd v. Attorney-General [1956] NZLR 422. Government debentures - currency of payment. Appeal dismissed.

Ward v. Commissioner of Inland Revenue [1956] NZLR 367. Death duties (estate duty). Appeal dismissed.

Commissioner of Stamp Duties v. New Zealand Insurance Co. Ltd [1956] NZLR 335. Death duties (estate duty). Appeal dismissed.

McKenna v. Porter Motors Ltd [1956] NZLR 845. Tenancy - landlord's possession. Appeal dismissed.

Maori Trustee v. Ministry of Works, In re Whareroa 2E Bock [1959] NZLR 7. Public works - compensation for land taken. Appeal dismissed.

Perkowski v. Wellington City Corporation [1959] NZLR 1. Negligence - liability of local authority. Appeal dismissed.

Mouat v. Betts Motors Ltd [1959] NZLR 15. Customs and price control restrictions on sale of imported car. Appeal dismissed.

Truth (New Zealand) Ltd v. Holloway [1961] NZLR 22. Defamation - jury verdict. Appeal dismissed.

Lee v. Lee's Air Farming Ltd [1961] NZLR 325. Company law - separate corporate personality - governing director's ability to become employee of company. Appeal allowed.

Australian Mutual Provident Society v. Commissioner of Inland Revenue [1962] NZLR 449. Income tax - assessment. Appeal dismissed.

Truth (NZ) Ltd v. Howey [1963] NZLR 775. National Expenditure Adjustment Act 1932. Appeal dismissed.

Miller v. Minister of Mines [1963] NZLR 560. Land transfer - mining privilege. Appeal dismissed.

Morgan v. Khyatt [1964] NZLR 666. Nuisance - encroachment of roots. Appeal dismissed.

Attorney-General ex rel Lewis v. Lower Hutt City [1965] NZLR 116. Municipal corporation's powers. Appeal dismissed.

Farrier-Waimak Ltd v. Bank of New Zealand [1965] NZLR 426. Land transfer - respective priorities of mortgage and contractors' liens. Appeal allowed.

J. M. Construction Co. Ltd v. Hutt Timber & Hardware Co. Ltd [1965] 1 WLR 797. Mutual trading - rebate as creditor. Appeal allowed.

Jeffs v. New Zealand Dairy Production & Marketing Board [1967] NZLR 1057. Administrative law - powers of New Zealand Dairy Production and Marketing Board. Appeal allowed.

Frazer v. Walker [1967] NZLR 1069. Land transfer registration - indefeasibility of title. Appeal dismissed.

Boots the Chemists (New Zealand) Ltd v. Chemists' Service Guild of New Zealand (Inc.) [1969] NZLR 78. Statutory limitations on persons owning or controlling pharmacy business. Appeal allowed and cross appeal dismissed.

Loan Investment Corporation of Australasia v. Bonner [1970] NZLR 724. Contract - specific performance. Appeal dismissed.

Mangin v. Commissioner of Inland Revenue [1971] NZLR 591. Income tax - interpretation. Appeal dismissed.

Commissioner of Inland Revenue v. Europa Oil (NZ) Ltd [1971] NZLR 641. Income tax - deductions. Appeal allowed.

Commissioner of Inland Revenue v. Associated Motorists Petrol Co. Ltd [1971] NZLR 660. Income tax - assessable income. Appeal dismissed.

Bateman Television Ltd (in liquidation) v. Coleridge Finance Co. Ltd [1971] NZLR 929. Company law - hire purchase agreements. Appeal dismissed.

Duffield v. Police [1974] 1 NZLR 416. Criminal law - petition for special leave to appeal. Leave refused.

Hansen v. Commissioner of Inland Revenue [1973] 1 NZLR, 483. Income tax - assessable income. Appeal dismissed.

Furnell v. Whangarei High Schools Board [1973] 2 NZLR 705. Administrative law - natural justice. Appeal dismissed.

New Zealand Netherlands Society "Oranje" Inc. v. Kuys & The Windmill Post Ltd [1973] 2 NZLR 163. Secretary of an association - fiduciary obligations. Appeal dismissed.

New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd [1974] 1 NZLR 505. Shipping - contract between shipper and carrier - stevedore's rights. Appeal allowed.

Holden v. Commissioner of Inland Revenue, Menneer v. Commissioner of Inland Revenue [1974] 2 NZLR 52. Income tax - assessable income. Appeals allowed.

Fahey v. M.S.D. Speirs Ltd [1975] 1 NZLR 240. Guarantee and indemnity - liability of surety. Appeal dismissed.

Nakhla v. R. [1975] 1 NZLR 393. Criminal law - Police Offences Act 1927. Appeal allowed.

Ashton v. Commissioner of Inland Revenue [1975] 2 NZLR 717. Income tax - interpretation. Appeal dismissed.

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.

Europa Oil (NZ) Ltd v. Commissioner of Inland Revenue [1976] 1 NZLR 546. Income tax - assessable income. Appeal allowed and cross appeal dismissed.

Hannaford & Burton Ltd v. Polaroid Corporation [1976] 2 NZLR 14. Trade mark - rectification of register. Appeal allowed.

Haldane v. Haldane [1976] 2 NZLR 715. Matrimonial property. Appeal allowed.

Roulston v. R. [1977] 1 NZLR 365. Criminal law - petition for special leave to appeal and for legal aid. Leave refused.

Taupo Totara Timber Co. Ltd v. Rowe [1977] 2 NZLR 453. Company law - payment to retiring director. Appeal dismissed.

Goode v. Scott [1977] 2 NZLR 466. Sale of land - Land Settlement Promotion and Land Acquisition Act 1952. Appeal dismissed.

Ross v. Henderson [1977] 2 NZLR 458. Sale of land - Land Settlement Promotion and Land Acquisition Act 1952. Appeal dismissed.

Thomas v. R. [1978] 2 NZLR 1. Criminal law - petition for special leave to appeal - jurisdiction. Leave refused.

Dickens v. Neylon [1978] 2 NZLR 35. Sale of land - waiver of contract deadline. Appeal dismissed.

Lilley v. Public Trustee [1981] 1 NZLR 41. Will - testamentary promises. Appeal dismissed.

Reid v. Reid [1982] 1 NZLR 147. Matrimonial property. Appeal and cross appeal dismissed.

Lesa v. Attorney-General [1982] 1 NZLR 165. New Zealand citizenship. Appeal allowed.

Wiseman v. Canterbury Bye-Products Co. Ltd [1983] NZLR 184. Bye-law and rule-making power - Meat Act 1939. Appeal dismissed.

McDonald v. R. [1983] NZLR 252. Criminal law - murder - offer of immunity. Appeal dismissed.

Mahon v. Air New Zealand Ltd, Re Erebus Royal Commission [1983] NZLR 662. Administrative law - powers of Royal Commissions of inquiry - judicial review. Appeal dismissed.

Lowe v. Commissioner of Inland Revenue [1983] NZLR 416. Income tax - profit derived from land. Appeal dismissed.

Kaitamaki v. R. [1984] 1 NZLR 385. Criminal law - rape. Appeal dismissed.

Chiu v. Richardson [1984] 1 NZLR 757. Criminal law - petition for special leave to appeal. Leave refused.

Hart v. O'Connor [1985] 1 NZLR 159. Contract for sale of land - capacity and fairness. Appeal allowed.

Scancarriers A/S v. Aotearoa International Ltd [1985] 1 NZLR 513. Contract - formation. Appeal allowed and cross appeal dismissed.

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.

Commissioner of Inland Revenue v. Challenge Corporation Ltd [1987] 2 WLR 24. Income tax - tax avoidance. Appeal allowed.

Christchurch Drainage Co. v. Brown, September 1987 (not yet reported). Local authority - negligence. Appeal dismissed.

Rowling v. Takaro Properties Ltd. (in receivership) 1987 (not yet reported). Ministerial negligence. Appeal allowed.

The following figures - drawn from the above list - may be of interest. Note - where several appeals are dealt with in the same judgment, these are treated as one appeal for statistical purposes.

	Appeals allowed	Appeals dismissed	Other*	Total
1840-1899	8	15	2	25
1900-1909	12	14	3	29
1910-1919	2	16	0	18
1920-1929	10	9	1	20
1930-1939	6	11	0	17
1940-1949	5	2	0	7
1950-1959	0	7	0	7
1960-1969	5	7	0	12
1970-1979	7	13	5	25
1980-	5	8	2	15
	60	102	13	175

* appeal withdrawn by consent, judgment varied, petition for special leave to appeal refused.