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WHO CUT THE APRON STRINGS AND WHEN? ADOPTING THE STATUTE OF WESTMINSTER IN NEW ZEALAND IN 1947

ANDREW LADLEY AND ELINOR CHISHOLM

Abstract: *New Zealand's 'independence' from the United Kingdom can be seen as a process with a number of key steps, including Dominion Status in 1907, the various Imperial Conferences post World War I, the Statute of Westminster 1931, its adoption in New Zealand in 1947, and the New Zealand Constitution Act in 1986. Central in this process was the Statute of Westminster. But of all the Dominions, New Zealand was the last to adopt the Statute in 1947. This article takes a fresh look at the archival records to ask why. The conventional thesis is of 'reluctance to cut the apron strings'. It is indeed the case that in the late 1920s and leading to the 1931 passage by the UK parliament of the Statute, New Zealand did not want to change its constitutional arrangements. But in 1931 the UK Parliament passed the Statute anyway. For New Zealand, this was a fundamental breach of the convention that the UK parliament would not legislate for a Dominion without its 'advice and consent'. The breach of that convention caused anger in Wellington, but was hushed up to avoid political trouble in Westminster. It also caused a significant legal problem that needed the UK Parliament to fix – and this could not be done until 1947.*

Keywords: *Statute of Westminster, independence, New Zealand*

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INTRODUCTION

When did New Zealand become *independent* from the United Kingdom? The answer is not simple. British rule was formally established in 1840. From then, until the passing of the New Zealand Constitution Act in 1986 by the New Zealand parliament, law-making and governing authority was shared in varying degrees between a government in New Zealand and the distant United Kingdom Crown-in-Parliament. Rather than finding a single midnight at which flags were lowered and raised, it is clear that for New Zealand *independence* 'progressed': legal powers to make law and govern were steadily 'exchanged' – i.e., granted from Westminster and acquired locally. That progression took place in UK law, in conventions shared by the UK and other Dominions and Commonwealth countries, and in law and practice in New Zealand.

The standard landmarks in the progression towards independence include:

- the establishment of a Lieutenant Governor in Residence following the 1840 Treaty of Waitangi;
- the passing by the UK Parliament of the 1852 New Zealand Constitution Act and the 1857 Constitutional Amendment Act and the establishment of local legislatures;
- the passing of the 1856 Colonial Laws Validity Act, to clarify which UK law applied in self-governing colonies;
- the emergence of 'conventions' which progressively established agreed rules that Westminster would no longer legislate for or govern the self-governing colonies without their consent;
- the consolidation of those conventions into 'Dominion status', which for New Zealand occurred in 1907;
- the Balfour Declaration and various other statements that emerged from meetings of Dominion and UK leaders after World War I;
- the participation by New Zealand and other Dominions in international debates and organisations after World War I;
- the passing by the UK Parliament of the Statute of Westminster in 1931;
- the participation by New Zealand and other Dominions in World War II and in the post-war formation of the United Nations and other international agreements;
- the joint passage in 1947 of legislation between the New Zealand and UK parliaments by which New Zealand 'adopted the Statute of Westminster'; and
- the passing by New Zealand of the 1986 Constitution Act.

The year 2007 marked the 100th and 60th anniversaries of what historians would probably agree were the two most significant of these landmarks, namely Dominion status and the passage of the Statute of Westminster Adoption Bill 1947 in New Zealand (and a companion statute passed in the UK). On its face, the Statute of Westminster ('the Statute') should be the centrepiece of the independence progress. Its fundamental purpose was to grant legislative equality between the UK Parliament and the Dominions – or what is sometimes called 'legislative independence' to the Dominions.

This article re-examines the historical steps by which the Statute was adopted in New Zealand. As is so often the case, a re-examination of the archival records suggests a more complicated story than that conventionally conveyed. In particular, this article reassesses at least two common views about New Zealand and the Statute:

- that the Statute did not apply to New Zealand until 1947, and
- that the New Zealand government was reluctant to adopt the Statute from the late 1920s all the way through to its eventual adoption in 1947.

As regards the non-applicability of the Statute to New Zealand, contrary to the explicit demand from New Zealand that its 'Dominion status' be respected and the Statute exclude *all* reference to New Zealand at that time, actually the United Kingdom Parliament legislated to apply some of the Statute to New Zealand, whilst excluding other key parts.[1] This infuriated the New Zealand Cabinet and led to angry secret telegrams to London. It was only after a plea from the UK that New Zealand should put up with the situation, rather than cause major political problems for the UK government, that the New Zealand government reluctantly kept quiet.

[1] The full Statute is set out in the Appendix. The key section for the purposes of this discussion is section 10.

As regards the 'reluctant adoption' that has become apparently settled history, again the record is more complicated. A better summary would be that New Zealand (like Australia) was indeed content, in the 1920s and early 1930s, with the gradual evolution of executive, international and legislative independence, and sought no change. However, times changed, and so did views about the Statute across the 1930s on both sides of the Tasman. By the outbreak of war, it seems that the leadership in both Australia and New Zealand had set their minds on accepting the Statute. During the war, issues of legal uncertainty loomed large for both Australia and New Zealand. But for New Zealand at least, the unintended application of the Statute to it in 1931 had caused a somewhat complex legal problem which could ironically only be solved by further UK legislation – and that took until 1947 to arrange.

PASSING THE STATUTE IN BREACH OF NEW ZEALAND'S DOMINION STATUS

The origins of the 1931 Statute of Westminster go back to the first quarter of the 20th century, when the former British colonies, the Dominions – New Zealand, Australia, South Africa, Canada, Newfoundland and the Irish Free State[2] – had been gaining something resembling independence. They had declared wars. They had been independent signatories to the Treaty of Versailles, and members of the League of Nations. They were sending diplomats abroad and negotiating their own treaties. Britain, aware that in her weakened state the Dominions were valuable as partners rather than children, accepted the new assertion of status and even encouraged it.[3] During the war, it was agreed that a conference would be held to discuss what these changes meant to the Empire. When these discussions did finally occur, in the Imperial Conference of 1926, their conclusion on the status of the Dominions was far-reaching and significant.

Of the Dominions, the conference representatives agreed, in what became known as the Balfour Declaration, that:

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

Such a statement of independence had been won through the efforts of South Africa, Canada and the Irish Free State, whose populations were pushing for change.[4] In contrast, New Zealand and the equally conservative Australia, to quote Beaglehole, 'drew rather prim and maidenly skirts about them, as at the sight of sisters overbold poking into the drains, or even –the

[2] Newfoundland, despite being on paper at the time a Dominion like the rest, is firstly by its lack of substantive status, and later by its absorption into Canada, its own special case.

[3] John Darwin, *Britain and Decolonisation: the retreat from Empire in the post-war world* (Basingstoke: Macmillan, 1988), p. 147.

[4] Ireland was a new and unwilling member of the British empire; Canada was unhappy with its status due to recent events such as its Governor-General refusing a request from the Prime Minister for the dissolution of Parliament, and the Privy Council ruling that Ottawa's legislation was repugnant to UK law; in South Africa, the new Prime Minister General Smuts had campaigned for Prime Minster on South African independence within the British Commonwealth. See W. J. Hudson and M. P. Sharp, *Australian Independence: Colony to Reluctant Kingdom* (Melbourne: Melbourne University Press, 1988).

implication was unmistakable – deliberately flirting on the streets with vice'.[5] New Zealand's delegates had been sent to the conference with the instruction from Parliament that New Zealand desired no change in its relationship with Britain. Unhappy with the 'rotten formula' of the Balfour declaration, they pushed hard for the inclusion in the declaration of that word so beloved to them, 'empire', as well as the new-fangled term of 'commonwealth'.[6] New Zealand chose to think that this new statement of inter-imperial relations need not affect them. In 1927, the Solicitor General in a private letter to the Attorney-General quoted Professor Berriedale Keith:

> ... do not for a moment contemplate that the Dominions shall possess sovereign independence. To bring this about no mere declaration of an Imperial Conference would avail.[7]

The clear view was thus that only legislation from the Parliament of the United Kingdom could complete this independence. New Zealand opposed this idea, arguing that it would

> deprive the constitutional position and the relations between the constituent parts of the flexibility and adaptability that has been a matter of almost universally favourable comment and a valuable factor in preserving harmony in the past. [8]

Moreover, the Solicitor-General predicted darkly, putting Balfour's formula into statute

> would facilitate and perhaps inspire independent and probably conflicting action on the part of the Dominions ... and incidentally tend to divide the Empire or embroil it with foreign states.[9]

It was with no small amount of apprehension therefore that New Zealand gathered with the United Kingdom and the other Dominions at the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation in 1929. Here, delegates discussed the effect of Balfour's lofty statement on practical matters: reservation and disallowance by the crown; extra-territorial legislative competence; the Colonial Laws Validity Act; and merchant shipping legislation. New Zealand, in commenting on the Conference's final report, observed that it came to 'its logical conclusion in definite terms the undoubtedly (and probably intentionally) vague declarations of the 1926 Imperial Conference'.[10] In a repeat of that conference, its report noted that

> with the pressure applied ... by Ireland, South Africa and (to a less degree) Canada the more moderate tendencies of Australia and especially New Zealand have carried and can carry little weight. One might as well attempt to stay the tides as oppose the recommendations of the Report at this stage ...[11]

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[5] J. C. Beaglehole, 'The Statute and Constitutional Change', pp. 33-64, in J. C. Beaglehole (ed.), *New Zealand and the Statute of Westminster: Five Lectures* (Wellington: Victoria University College (Whitcomb and Tombs), 1944), p. 53.
[6] James Belich, *Paradise Reforged* (Auckland: Penguin, 2001), p. 245.
[7] Letter from Solicitor General to Attorney-General, 2 May, 1927, EA1, 159/1/5 Part 1.
[8] Ibid.
[9] Ibid.
[10] New Zealand General Comments on the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, EA1, 159/1/5 Part 1.
[11] Ibid.

New Zealand was consoled, however, by the fact that 'the actual adoption of the recommendations is to be left largely on the discretion of the individual Dominions'.[12] New Zealand, it was understood by the delegates, could remain in its contented position while its overbold sisters cut their British ties. The conference delegates felt, nevertheless, a deep sense of doom as regards to the future of the Empire:

> It is not perhaps too much an exaggeration to point out however that once these recommendations have been carried into effect the British Empire will have disappeared and will have been replaced by a loose alliance of six nations under one titular head, an alliance that will continue just so long as the 'national' interest and goodwill of its component parts warrant its continuance.[13]

The following year, at the Imperial Conference, it was agreed that the recommendations of the 1929 report should be formalised in a statute to be enacted at the request of the Dominions at Westminster in 1931. This was a victory for the 'radical' states, and an unhappy result for Australia and New Zealand, the 'conservatives' when it came to changes in the Empire. Yet the latter's efforts in arguing the opposite side – for a maintenance of the traditional, of being subsumed under Britain, of the value of constitutional change coming via convention rather than statute – have been described as 'verg[ing] on the pathetic'.[14] In New Zealand's defence, however, prior to the conference the New Zealand Parliament had instructed its representatives to participate with the view that 'Empire united should be the guiding principle of the Conference.'[15]

In the 1930 Imperial Conference the recommendations of that previous conference were accepted and it was decided that they would be put into statutory form. At this time, in strict constitutional theory the United Kingdom Parliament could legislate for the Dominions and this would bind a Dominion if the clear intention of the statute was that it applied to that Dominion. However, since 1907 the convention had been settled that no such legislation affecting a Dominion would be contemplated without that Dominion *asking for such*, or, as the language put it, 'requesting and consenting' to legislation from the UK Parliament. Accordingly the Dominion parliaments were required to pass resolutions in their Parliaments requesting and consenting for that legislation to be made by the UK Parliament.

Thus the New Zealand Parliament found itself in the odd position of approving a resolution whose preamble declared the unity of the Commonwealth under the Crown and the relinquishing of the UK's Parliament's ability to make laws for the other Dominions, and whose operative clauses increased Dominion powers in regard to repugnancy and extraterritorial legislating. But the New Zealand government had by then repeatedly stated that New Zealand wanted no such law to apply to itself. However, as well as being firmly attached to Britain, New Zealand was equally committed to the idea of Empire united by agreement and was loathe to deny the other Dominions what they clearly wanted. A clear summary of the reasons was set out in *The Dominion* in 1930, quoting Hansard debates:

> The Government of this Dominion, whatever their political doctrines, and the people of New Zealand, would, I think, have been quite content to leave things as they were. We have not in any way been embarrassed by the terms of our association with his Majesty's Government in the UK, nor have we been restricted in the control of our own affairs ...

[12] Ibid.
[13] Ibid.
[14] Hudson and Sharp, *Australian Independence*, p. 117.
[15] Sir Thomas Sidey, Legislative Council, 23 July 1931, vol. 228, p. 635.

> [W]e should have been content with the existing structure of the Empire and we had no desire to press for change ... [However] in a political organisation whose most marked characteristic is it depends entirely upon the goodwill of its component parts, it is obvious that its continuance in the future must depend on a basis acceptable to all. We do not propose in the meantime to take any active steps in respect of the report ... [W]e do not wish to make any alteration in the present powers in regard to New Zealand legislation that would affect the very high standing of New Zealand credit on the London market.[16]

This last sentence, referring to the loans on the London market, adds an important perspective to the New Zealand position. A worldwide Depression was in full swing and the last thing that a government (or its electorate) wanted was any nervousness about New Zealand's constitutional status that might have affected the government's access to loans at favourable rates.

The New Zealand way out of the dilemma was to approve the resolution while excluding itself from all its effects. The resolution, therefore, also included a specific exclusion:

> *No provision of this Act* shall extend to the Dominion of New Zealand as part of the law thereof unless that provision is adopted by the Parliament of that Dominion, and any Act of the said Parliament adopting any provision of this Act may provide that the adoption shall have effect either as from the commencement of this Act or as from such later date as may be specified by the adopting Act.[17] (emphasis added)

The debates of the day make it clear that the inclusion of this provision was fundamental to its passing. In the Legislative Council, Sidey considered it 'evidence that those who represented this country were so inspired; and were solicitous that nothing would be done ... which might not be in accord with the aspirations and the traditional sentiment of New Zealand.' To Bell, 'but for the reservation that [the Attorney-General] and the Prime Minister so patriotically provided in the draft statute, I could not have given any other than a silent vote.'[18] Garland equally 'could not have been found supporting the measure myself unless the proviso has been inserted.'[19] In the House of Representatives, Downie Stewart thought that the Government

> took the proper course ... in maintaining that New Zealand did not wish to commit herself to adopting the wide powers of the proposed Statute of Westminster without the matter being discussed in her own Parliament.[20]

The Prime Minister, Forbes, agreed that because of the provision, 'there is no necessity to consider this question now'.[21]

Speaking in the Upper House, Garland made this view explicit:

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[16] Prime Minister Forbes, 'Imperial Conference: Ministerial Statement', Transcript of Hansard in *The Dominion*, 12 August 1930.*The Dominion*, 12 August 1930.

[17] Motion put forward by Prime Minister Forbes, *New Zealand Parliamentary Debates*, vol. 228, 24 July 1931, pp. 685-6. In the resulting Statute, Newfoundland would also be included in this clause, as would Australia. The former was thought to be too small to cope with full legislative powers, and the latter's representative at the 1930 Conference had been the conservative John Latham, who 'mounted a last and almost single-handedly defensive action against the planned Statute'. See Hudson and Sharp, *Australian Independence*, p. 118.

[18] Mr Bell, Legislative Council, *New Zealand Parliamentary Debates*, vol. 228, 23 July 1931, p. 638.

[19] Mr Garland, Legislative Council, *New Zealand Parliamentary Debates*, vol. 228, 23 July 1931, p. 688.

[20] Mr Downie-Stewart, House of Representatives, *New Zealand Parliamentary Debates*, vol. 228, p. 551.

[21] Ibid, p. 549.

> all these dominions will be in exactly the same position ... with the exception of New Zealand, which stands where she is, owing to the proviso which ... has been wisely put into the motion before us.[22]

Given the strength of this feeling, the New Zealand government was 'not amused' to see that when the United Kingdom's draft Statute of Westminster, otherwise known as 'An Act to give Effect to certain Resolutions passed by Imperial Conferences held in the years 1926 and 1930', was returned to the New Zealand Parliament, this reservation was not included.

For the New Zealand Government, it was expected that *no provision* would extend to New Zealand unless adopted by its Parliament. The draft Statute of Westminster presented to the UK Parliament did contain some exclusions in section 10, for New Zealand, Australia and Newfoundland. But rather than exclude New Zealand entirely from the terms of the Statute until its Parliament should choose to adopt it, section 10 effectively stated that some key parts of the Statute (sections 2-6) were to apply to New Zealand only on adoption by its Parliament.[23] A note explained that 'altered wording has been adapted in view of substance of clauses 8, 9, and 10 in order to make it clear that preamble and clauses 1 and 11 are of general application'.[24]

Crucially, this meant that by the preamble being of 'general application', New Zealand was subject to the clause that stated that:

> it is in accord with the established constitutional position that no law hereafter made by the Parliament of the UK shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and consent of that Dominion.

Moreover, it stated that New Zealand had, along with the other Dominions,

> requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid.

Behind the scenes correspondence shows that the New Zealand government was extremely annoyed at the idea of such independence and immediately began a frantic cable exchange with the Secretary of State for Commonwealth Affairs in the United Kingdom Government.

The New Zealand Government contended that the proposed draft, which absented the preamble and section 8 from the saving provisions of Article 10, was different to that requested and consented to by New Zealand. Moreover the New Zealand Government was 'convinced that the resolutions of the New Zealand Parliament requesting the passing of this legislation would not have been obtainable on any other terms'[25] than those originally stated. Put simply, the New Zealand Government made it absolutely clear that its Parliament had demanded complete exclusion from the Statute of Westminster, not merely from some key sections.

In reply, the British government argued that clause 10 had been reworded only to better reflect what New Zealand's wishes were thought to be. The British counter-attack widened as the New Zealand government refused to budge. From the perspective of the UK government,

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[22] Mr Garland, Legislative Council, *New Zealand Parliamentary Debates*, vol. 228, 23 July 1931, p. 689.

[23] This is a fact usually unacknowledged by commentators. For example, Currie states '...the Statute of Westminster 1931, not differing materially from the form set out in the resolutions, became law on December 11, 1931.' (A. E. Currie, *New Zealand and the Statute of Westminster 1931* (Wellington: Butterworth and Company, 1944), p. 7).

[24] Quoted in "Controversy between the NZ and the UK governments over the Statute of Westminster Bill (Imperial)", Dept. of External Affairs, 5 April 1944, EA1 159/1/5 part 2.

[25] Telegram 195, Governor-General to Secretary of State for Dominion Affairs, 21 November 1931, EA1 159/1/5, part 1.

excluding New Zealand from the preamble of the Statute was impossible as it would mean excluding it from the paragraph which spoke of the unity of the Commonwealth under the Crown:

> There was not ... any suggestion at any time that these should apply otherwise than to all Dominions or that any Dominion should be placed in the position where it might adopt important operative provisions for enlarged constitutional powers and not adopt the preambles especially that relating to the Crown.[26]

One 'secret and personal' telegram stated:

> The PM has asked that a personal message be conveyed from him to Mr Forbes urging upon the latter not to allow the impression to get abroad that New Zealand attached so little value to the preamble about the Crown that she did not think it necessary to be associated with it.[27]

Thirdly, New Zealand was asked to let the issue go in order to save the British government embarrassment. At the start of the controversy this was because of the 'considerable difficulty ... being experienced in parliament here particularly in relation to the Irish Free State position in connection with the Statute,' and by its end it was because the Statute had already 'now passed the House [of Lords] after a somewhat difficult debate.' Continued the UK Government representative, 'If I had to go to the House of Commons again with a clause which made it appear New Zealand disassociated itself entirely from the Statute my position would be embarrassing in the extreme ... Would not this also be the position in New Zealand at time of general election?'[28]

Even the Governor-General was involved, noting a few days after being briefed of the controversy (on 20 November 1931) that the New Zealand Parliament's position was:

> the exact reverse of that stated therein as the 'established' constitutional position, namely, that laws hereafter made by the Parliament of the UK shall (not 'shall not') continue to extend to the Dominion of New Zealand as part of the laws of that Dominion unless that Dominion decides otherwise.[29]

This intention was explicitly confirmed by another secret telegram (but marked 'not sent') composed for the New Zealand Prime Minister to the UK Prime Minister. This stated that his Parliamentarians' 'attitude in respect of this preamble is based solely upon their reluctance to accept any extension of constitutional power.'[30]

Thus the lines were drawn: the New Zealand government making it perfectly plain that it would never have got a resolution through its Parliament approving the introduction of the Statute of Westminster into the UK Parliament, had there been the intention to apply *any* of the Statute to New Zealand; the UK Government indicating, in addition to some 'unity of the

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[26] Confidential telegram no.118 from Secretary of State for Dominion Affairs to New Zealand Government, 23 November 1931, EA1 159/1/5, part 1.
[27] Secret and personal telegram from the Secretary of State for Dominion Affairs to the Governor General of New Zealand, 27 November 1931, EA1 159/1/5, part 1.
[28] Secret and personal hand-written note, from UK Government to New Zealand Government, 17 November 1931, EA1 159/1/5, part 1.
[29] Impressions of the Governor-General after reading telegram of the 20th November 1931 from the Secretary of State for Dominion Affairs, EA1 159/1/5, part 1.
[30] Confidential Memo from Prime Minister Forbes (Signed) for UK Prime Minister MacDonald, 27 November 1931 (in pencil, marked 'not sent'), EA1 159/1/5, part 1.

Crown' arguments, that it was in a political fix regarding the Irish Free State and its own forthcoming general election.

The New Zealand Government backed off. Its last resort, going public, would have caused a major political furore in both countries. The New Zealanders informed the UK Government that while they were 'unable to agree in entirety' they 'would not wish to jeopardise the passing of the Statute.' Thus they had

> decided with considerable reluctance not to press the objections they have expressed provided that a statement is made on their behalf to the Parliament of the United Kingdom apprising that Parliament ... that the paramount desire of His Majesty's Government in New Zealand is to maintain unaltered the existing relations between this Dominion and the United Kingdom.

The UK obliged – but in terms that were only half true, stating in the House of Commons that while

> New Zealand has joined with the other Dominions in asking for the submission of the Statute Bill to Parliament ...[,] New Zealand does not wish that her position be affected as the result of the passing of this Bill.[31]

Thus the Statute of Westminster was passed on 11 December 1931, quite clearly *without* the request and consent of the Parliament of New Zealand, despite what it says in its text.

This sequence has of course been commented on by some historians. J. C. Beaglehole regarded New Zealand as having been 'an accomplice' and likened the process to 'extortion':

> ... New Zealand was an unwilling accomplice. The Statute was passed by its 'request and consent', as was stated in the preamble, but never was request and consent more painfully extorted.[32]

The preamble and section 8 of the Statute applied directly to New Zealand. As a result, the effect was the reverse of what the New Zealand Parliament had agreed to: namely, the maintenance of the status quo until New Zealand requested to the contrary.[33]

The fact that certain parts of the Statute applied to New Zealand from 1931[34] is not often acknowledged, with most historians seeing 1947 as the year the Statute became relevant to New Zealand. Yet Peter Fraser, who as Prime Minister (effectively from 1939) would eventually see the adoption of the remaining sections of the Statute through the New Zealand Parliament in 1947, certainly accepted the application of the Statute prior to this time. In the debates on the

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[31] As relayed to the House of Commons by the Secretary of State for Dominion Affairs, Telegram no. 124 from the Secretary of State for Dominion Affairs to the Governor-General of New Zealand, 8 December 1931, EA1 159/1/5, part 1.

[32] J. C. Beaglehole, 'The development of New Zealand nationality,' *Journal of World History*, vol. 2 (1954-55), p. 6.

[33] Some will argue that a preamble is not considered substantive law. However to the New Zealand government of the time, it certainly was. As they explained by telegram during the controversy, they were 'exceedingly reluctant to accept the principle set out in the preamble as applying directly to this dominion. Indeed, if that preamble is so applied it would seem inconsistent not to apply at the same time Clause 4.' (Clause 4 stated that no law of the UK could apply to New Zealand without its request and consent.) Confidential memo from Prime Minister to Governor-General, EA1 159/1/5, part 1.

[34] 'The remaining parts of the Statute (including the preamble) have applied to Australia, New Zealand and Newfoundland from the time of the passing of the Statute ...': Statute of Westminster Adoption Explanatory memorandum, Mr Adams, Law Drafting Office, 8 February 1944, EA1 159/1/5 part 2.

estimates for New Zealand's expenditure on the League of Nations in 1934, he stated that the Imperial Conference had agreed that 'the nations comprising the British Commonwealth should be regarded ... as independent nations.'[35] In the House in 1938, he was explicit in stating that 'under the Statute of Westminster ours is a sovereign country.'[36] Following the war, he explained the status of the Dominions to the Commission which adopted the trusteeship part of the United Nations Charter in the following terms:

> To us of the British Commonwealth it is very difficult to distinguish between self-government and independence, for to the self-governing sovereign States of the British Commonwealth, self-government is independence and independence is self-government.[37]

And to India, encouraging its acceptance of Dominion status on the eve of its independence, he explained that

> the people of the British Dominions do not regard Dominion status as an imperfect kind of independence. On the contrary it is independence with something added and not independence with something taken away. It carries with it membership of a free and powerful association from which every element of constraint has vanished, but one in which a way has been found for the practice of mutual confidence and co-operation in the full respect for the independence, sovereignty and individuality of each member.[38]

The crux of the matter was set out clearly by a Member from the other side of the House during the debates for the adoption of the remaining sections of the Statute in 1947. According to Mr Oram:

> That preamble set out clearly that each part of the British Empire was absolutely independent ... [B]y the Statute of Westminster 1931, whatever severance of the individual portions of the Empire took place, took place then, and is not taking place now. That is the position, and when we talk about adopting the Statute by this Bill we are entirely misleading the people, because the Statute was enacted on 11th December 1931, and does not require adoption by this Parliament or by any other Parliament ... . The position was legalised, so far as the relationship between the Dominion was concerned by the Statute, in December, 1931, but there were five unimportant matters referred to in the Statute that were not adopted by this country...All that remains for us to do is not adopt the Statute ... but to adopt those five sections of the Statute of Westminster.[39]

Australia, by being also subject to section 10, was in the same position as New Zealand after 1931, and has also been given that date as the birth of its independence. According to Hudson and Sharpe:

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[35] Mr Fraser, House of Representatives, *New Zealand Parliamentary Debates*, vol. 240, 26 September 1934, p. 152 (quoted in W. D. McIntyre, 'Peter Fraser's Commonwealth: New Zealand and the Origins of the New Commonwealth in the 1940s' in *New Zealand in World Affairs* (Wellington: New Zealand Institute of International Affairs, 1977), p. 62).

[36] Mr Fraser, House of Representatives, *New Zealand Parliamentary Debates*, vol. 251, 1 July 1938, p. 133 (quoted in McIntyre, p. 62).

[37] Quoted in McIntyre, 'Peter Fraser's Commonwealth', p. 55.

[38] Fraser, quoted in 'New Zealand would welcome India in new empire status', *The Dominion,* 5 June 1947, p. 7.

[39] Mr Oram, House of Representatives, New Zealand Parliamentary Debates, vol. 279, 7 November 1947, p. 558.

> The Statute of 1931 was an instrument of solemn abdication by the UK of control over her dominions, including Australia. It was enacted with Australian consent and on Australian advice. That most Australian governments of the 1920s and 1930s, for sentimental and material reasons, did not want independence, and especially did not want its public solemnisation, and that for various reasons the impact of the Statute on Australia was muddied, is beside the point. In 1931 the United Kingdom, even if hounded by dominions which did not include Australia, gave the dominions the final instalment of their independence.
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> It is true that the Statute was as framed not to apply to Australia until Australia chose to adopt it, but this was a formal response to the realities of Australian federal politics and the unwillingness of conservative elements in Australia to be seen to accept independence. Nor was it of practical significance. From the proclamation of the Statute on 11 December 1931, no UK government would or could treat Australia as a dependency ...[40]

Similarly, to the Attorney-General at the time of Australia's adoption of the final sections,

> Adoption ... is quite independent of any general question of the constitutional status of the Commonwealth. I have always regarded that status as having been initially laid down by the Imperial Conferences of 1917 and 1926.[41]

In commenting on the events of 1931, overseas authors consider the Statute as applying from 1931 to New Zealand and Australia, as much as to the other Dominions. In John Darwin's work on the Commonwealth, the five Dominions are all said to have 'enjoyed constitutional equality with Britain. They shared a common sovereign but in every other respect were formally independent of any British control.'[42] Australia and New Zealand, in his analysis, were not excluded from the Statute: 'Strategic and economic inter-dependence, racial and cultural sympathy, were the bedrock of Anglo-dominion relations and, in British eyes, far outweighed the formal independence conceded in 1931.'[43] This is far from a new view. As the *Washington Post* put it in 1943:

> By virtue of the Statute of Westminster, the self-governing dominions and Eire are co-equal with Great Britain, and like Great Britain, free and sovereign states.[44]

Similarly, to the New Zealand constitutional lawyer McGechan,

> Dominion status is a descriptive term denoting that the country having it has that bundle of capacities possessed by each member of the British Commonwealth ... [W]hatever our status is, it is the same for NZ, Australia, Canada, South Africa and Eire.[45] ... [W]hether or not any dominion adopts the Statute of Westminster, it was in fact passed with the consent of all, and thereby made its contribution to dominion status.[46]

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[40] Hudson and Sharp, *Australian Independence*, p. 137.
[41] Evatt, Extract from Current Notes on International Affairs: Statute of Westminster – 16 Nov 1942 (Circulated to members by Attorney-General) EA1 159/1/5 Part 2.
[42] Darwin, *Britain and Decolonisation*, pp. 45-46.
[43] Ibid p. 145.
[44] 'What-Is-It', Editorial in *Washington Post*, 27 October, 1943, EA1 159/1/5 Part 2.
[45] R. O. McGechan, 'Status and Legislative Inability' in J. C. Beaglehole (ed.), *New Zealand and the Statute of Westminster: Five Lectures* (Wellington: Victoria University College (Whitcomb and Tombs), 1944), pp. 66-67.
[46] Ibid, p. 112.

As we have seen, in the case of New Zealand, consent was only given retrospectively, and against the wishes of Parliament.

DRAGGING HEELS? THE FINAL SECTIONS

There is thus a clear and simple argument that New Zealand was subject to parts of the Statute and in terms of international law and practice 'independent' from Britain from 1931.

However, while according to convention New Zealand possessed full legislative powers (minus the ability to amend the 1852 constitution), several restrictions remained by virtue of the unadopted sections of the Statute. These were:

- section 2, which said that the Colonial Laws Validity Act shall no longer apply, and, to clarify, that no law of a Dominion should be considered void or inoperative on the ground that it is repugnant to the law of England;
- section 3, which declared that the Dominion had full power to make laws having extraterritorial operation;
- section 4, which said that no United Kingdom law should extend to the Dominion except at their request and consent (of course, it can be said that New Zealand had already obtained this by virtue of the preamble);
- section 5, which said that the English Merchant Shipping Act 1894 should no longer refer to the Dominion; and
- section 6, that certain laws should no longer be reserved for the King's assent as laid out in the Colonial Courts of Admiralty Act, 1890.

These final sections were adopted in 1947. As we have seen, the delay till then is often argued as evidence of New Zealand's attachment to Britain across all of the 1930s and 1940s. In McDowell and Webb's words, the 'political inertia was not broken until 1947'.[47] Or, from McIntyre's perspective,

> New Zealand was so satisfied with its position, cosseted in the imperial structure, the statutory embodiment of equality enacted in 1931 was not adopted until 1947.[48]

In similar vein, Bryce Harland noted that New Zealand was in no hurry to

> free itself from Britain's apron strings. The Statute, adopted in 1931 to recognise the equality of the dominions with Britain in status, was not ratified by New Zealand until after the War, in 1947.[49]

Going somewhat further in terms of group psychology, Robert Patman regarded New Zealand at that time as having

[47] Morag McDowell and Duncan Webb, *The New Zealand legal system: structures, processes and legal theory* (Wellington: LexisNexis Butterworths, 2002), p. 107.
[48] W. D. McIntyre, ' A Review of the Commonwealth Factor in Foreign Policy Making, 1943-1993', in Ann Trotter (ed.), *Fifty Years of New Zealand Foreign Policy Making* (Dunedin: University of Otago Press, 1993), p. 39.
[49] Bryce Harland, *On our own: New Zealand in the Emerging Tripolar World* (Wellington: Institute of Policy Studies, 1992), p. 14.

> ... a psychological dependence on London. For example, New Zealand did not adopt in full the Statute of Westminster passed by the British Parliament in 1931 which confirmed the status of Britain's self-governing dominions as 'autonomous communities...until 1947...[50]

Michael King summarises the view thus:

> When the Balfour Definition was recast in the Statute of Westminster and passed by the British House of Commons in 1931 . . . New Zealand, unlike Canada, The Irish Free State and the Union of South Africa, declined to ratify it. This persistent reluctance to accept the growing independence on offer from Britain has been linked by some historians to a 'withering of the country's spirit.'[51]

It would be surprising if this view, so consistently expressed, was completely off the mark. Nevertheless, the archives do suggest that there is more complexity to the 'reluctance' thesis. In reality, New Zealand should not be thought of as falling so far behind its siblings. Efforts to adopt the final sections of the Statute began in 1942 and were thwarted by the twin obstacles of the United Kingdom governments of 1931 and of the 1940s.

New Zealand began to assert a more independent stance soon after the election of the Labour Government of 1935. New Zealand used its membership of the League of Nations to criticise British appeasement of fascism – speaking strongly against, for example, its reaction to the Italian invasion of Ethiopia in 1935 and the rebellion in Spain in 1936.[52] Independence, however, by no means meant separation from Britain. On the outbreak of war in 1939, New Zealand affirmed its unconditional support of Britain with Prime Minister Michael Joseph Savage's famous 'where she stands, we stand' speech. With the loss of the Singapore base, however, New Zealand saw that for defence it would have to look for protection from other quarters, making treaties with Australia (the Canberra Pact 1944) and the United States (the ANZUS Pact 1951). Times had changed and it would seem logical for New Zealand to cut its final links – even if they had been overtaken by convention – by adopting the final sections of the Statute. The story generally told, by the Prime Minster at the time, Peter Fraser, and by historians, is that New Zealand was indeed keen to adopt the Statute, but decided against doing so in case the action could be misinterpreted as a step away from Britain and thus used by the enemy as propaganda.[53]

However, Australia managed to adopt the remaining sections of the Statute with no such problems in 1942. Fraser's story was certainly not the full one. As we have seen, Fraser had been a supporter of the Statute since the early 1930s. After its passing by the United Kingdom government in 1931, he saw it as applying in New Zealand. As Prime Minister during World War II, he watched carefully the passing of the Australian Act, cabling immediately for a copy of the debates[54] and the Act passed.[55] On receiving the Act, he forwarded these to the Law Draftsman, H. F. C. Adams, to draft a similar one. As he explained,

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[50] Robert G. Patman (ed.), *New Zealand and Britain: A Special Relationship in Transition*, The Dunmore Press, Palmerston North, 1997 p. 12.
[51] Michael King, *The Penguin History of New Zealand* (Auckland: Penguin, 2003), p. 318.
[52] James Belich, *Paradise Reforged* (Auckland: Penguin, 2001), p. 65.
[53] Prime Minister Fraser, House of Representatives, *New Zealand Parliamentary Debates*, vol. 279, 7 November 1947.
[54] Memorandum from H.G.R. Mason (Attorney-General) to H. Adams (Law Draftsman), 30 November 1943, EA1 159/1/5 Part 2.
[55] Telegram from Prime Minister Fraser to External Affairs Department Canberra, 6 Oct 1942, 4pm, EA1 159/1/5 Part 2.

> Shortly, my view of the matter is that the constitutional position has been so clear in New Zealand for so long a time that the adoption or non-adoption is merely a legal technicality... I have refrained from raising the question hitherto only because it might be misconstrued as an indication of some weakening of cohesion and thus give some slight comfort to our enemies in this war. Australia, however, has adopted the Statute without fear being realised, which may be taken as a sufficient indication that we need not fear.[56]

Meanwhile, outside of Parliament, others had noticed that since Australia's passing of the Act, and as Newfoundland had ceased to exist as a separate Dominion, New Zealand alone was left with the sections unadopted – or, as was popularly understood, the entire Statute unadopted. In 1943, under the title 'N.Z. STILL CLINGS TO MOTHER'S APRON STRINGS', the newspaper *New Zealand Truth* wrote,

> One solitary New Zealander ... has remembered the existence of the Statute, 1931 – the unavailed gift of the mother of Parliaments to New Zealand, which has been quoted incorrectly as an independent nation standing legally on her own two feet.

That solitary New Zealander was Miss Annie Roberts, a long time resident in the United Kingdom, who, when called up for national service, declared that under the Statute she was not subject to the laws of the United Kingdom. According to *New Zealand Truth*, 'The Uxbridge magistrates decided that Miss Roberts had forgotten something' – that the Statute, 1931, had not yet been adopted by New Zealand. More probably, Miss Roberts, as British taxpayer and voter, had no leg to stand on, regardless of the Statute, but this gave the newspaper the opportunity to state that:

> THANKS TO NEW ZEALAND'S FAILURE TO ADOPT THE STATUTE OF WESTMINSTER – THE IMPERIAL PARLIAMENT MAY STILL LEGISLATE FOR NEW ZEALAND!

The article admitted that the 'conventional position was different from the legal one' but stated that New Zealand must join Australia in its adoption 'to take part in post-war international affairs with the fullest legal validity and standing as a nation.'[57]

New Zealand's non-adoption also managed to hit the headlines – and the airwaves – in the United States. This was much to the consternation of the New Zealand legation in Washington, D. C., who immediately cabled its government explaining:

> In Senate debate on October 25th on USA participation in post-war organisation there was discussion whether the British dominions could be classed as 'free and sovereign nations'. These words were being used to define those countries with which the USA could join in the establishment and maintenance of international authority. [Senator] Gillette objected on the grounds that they might exclude the Dominions. New Zealand was specifically mentioned as a country with limitations. There has been a good deal of press and radio discussion on this and we have been questioned as to why we have not passed the Statute. In reply we have stated that New Zealand certainly considers itself 'free and sovereign.'[58]

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[56] Memorandum from H. G. R. Mason (Attorney-General) to H. Adams (Law Draftsman), 1942, EA1 159/1/5 Part 2.
[57] *New Zealand Truth*, 29 December 1943, EA1 159/1/5 Part 2.
[58] Secret 'T' telegram No.729 from the Charge d'Affaires, NZ Legation, Washington to the Ministry of External Affairs, Wellington, 27 Oct 1943, EA1 159/1/5 Part 2.

The New Zealand view of its status, or, more correctly, how the government wanted its status to be perceived, is summarised in the material provided to a radio commentator on this event, which was broadcast as follows:

> The Statute of Westminster, which created the Dominions and the Commonwealth in 1931, had to be adopted by the parliaments of the Dominions to have full legal effect. All the Dominions have taken this action except New Zealand, which simply has not got round to it ... So it has not finished with the formalities, though it no doubt will do so some day quite soon. On the other hand New Zealand happens to have a particularly independent record in its foreign policy, which is what demonstrates sovereignty as well as anything else.[59]

A memorandum prepared by Adams in response to the Senator's remarks concluded that despite the fact that 'adoption of the Statute would not affect the existing powers of New Zealand to exercise its constitutional rights in relation to external or internal affairs', events such as these made its adoption crucial. He went on to explain:

> [t]he mere fact that New Zealand alone of the self-governing Dominions has not adopted the Statute is likely to prejudice New Zealand in her international political relations, and since international legal position ultimately on recognition, in her relations at international law.[60]

The 1944 Canberra Pact is a case in point. Government official Foss Shanahan wrote to Adams that

> when we were discussing with the Prime Minister certain of the questions which will come up for consideration at the Conference which is being held next week in Canberra between representatives of the Australian and New Zealand governments, reference was made to the possibility of NZ in relation to the Statute ... The Prime Minister said that he felt that we should adopt the statute.[61]

It is clear that New Zealand's reputation – or 'the misunderstanding that existed in the USA, possibly also other countries, and the undesirable consequences of this'[62] – was of paramount importance in bringing about this adoption.

Soon after, Adams forwarded a draft of such an adoption Bill, adding that the Bill 'could be passed at the session of Parliament to be held this month.'[63] This was quickly made public, in the Governor-General's speech to Parliament:

> During this session my Ministers propose to place before Parliament the question of the adoption of the Statute, the enactment of which would bring New Zealand into line with the other self-governing Dominions. The adoption of this measure will remove doubts in the eyes of foreign powers regarding the sovereign status of New Zealand, and will at the same

[59] Top secret telegram no.729 from G. C. Cox (Charge D'Affaires, NZ Legation, Washington) to the Minster of External Affairs, 28 October 1943, EA1 159/1/5 Part 2.
[60] Memorandum from H. Adams to C. Aikman (Dept of EA): 'On the International and Constitutional Status of NZ', December 1944, EA1 159/1/5 Part 2.
[61] Letter from Foss Shanahan (DEA) to H. Adams (Law drafting office), 12 January 1944, EA 1 159/1/5 Part 2.
[62] Confidential letter from Shanahan to McIntosh, 3 October 1946, EA1 159/1/5 Part 3.
[63] Memorandum from H. Adams (Law Draftsman) to the Prime Minister, 8 February 1944EA1 159/1/5 Part 3.

> time have the practical effect of removing existing legal drafting and administrative difficulties both in New Zealand and in the United Kingdom.[64]

This announcement brought about a certain amount of interest from academic quarters. Two books published that year, by Currie and by Beaglehole (the latter including an important essay by law expert McGechan), informed the process by which the Government proceeded. Several years later, Beaglehole wrote that

> Adoption, announced in 1944, was postponed for reasons never satisfactorily explained and in was not till 1947 that, with careful explanation to a supposedly worried public, the Statute of Westminster at last became effective.[65]

Actually, the archives show that the delay is explained by the work of these legal experts and the strange case of section 8.

NEW ZEALAND'S CONSTITUENT POWERS

The legal argument was that only the combination of adopting the Statute in 1947 *and* the passage of an accompanying statute by the UK government would give New Zealand full constituent powers – that is, the ability to change its constitution, previously denied to it by the Constitution Acts of 1852 and 1857.[66] The argument was that the precise wording of the 1931 Statute meant that if New Zealand adopted the Statute without an accompanying UK statute, New Zealand would not thereafter be able to amend the UK 1857 New Zealand Constitution Amendment Act. In other words, adoption of the Statute of Westminster would have actually *decreased* New Zealand's constituent powers.

For other Dominions, the Statute in 1931, by allowing legislation that was (in the then terminology) 'repugnant' (i.e. contradictory) to Acts of the UK Parliament, increased their constitutional powers, as it allowed them to delete the limitations imposed on their ability to amend their own constitutions.[67] However, this was not the case for Canada (by section 7), New Zealand and Australia (by section 8).

Section 8, as it was not included in those sections of the Act to be excluded until adoption by the New Zealand Parliament, had applied to New Zealand from 1931. Those two sections protected the constitutions (or equivalent acts) of the three countries. The part relevant to New Zealand states that:

> Nothing in this Act shall be deemed to confer any power to repeal or alter the ... Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.[68]

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[64] Governor-General's speech to the Legislative Council, *New Zealand Parliamentary Debates*, vol. 204, 25 February 1944, p. 7.

[65] J. C. Beaglehole, 'The development of New Zealand nationality,' p. 15.

[66] It has been argued, however, that it did indirectly give New Zealand this power: according to McDowell and Webb (*The New Zealand Legal System*, p. 8), 'the powers were achieved by adopting the Statute 1931 (Imp) and invoking the request and consent procedure contained within it.' However, this was not necessary: it is clearly established that request and consent was already an established and necessary feature and that New Zealand could have requested such an act prior to the Statute's passing. It was not a procedural necessity, but a necessity to preclude the decreasing of New Zealand's constituent powers contained in the Statute. In any case, the latter was requested before the former was passed.

[67] McGechan, 'Status and Legislative Inability', p. 98.

[68] New Zealand Statutes 1947, p. 350.

The reason for section 8's existence has perplexed several authors. Says McGechan,

> The provision for Canada and Australia is understandable, because these dominions have federal constitutions, constitutions preserving a balance between federal and state or provincial powers. What was secured was existing machinery for amendment which kept that balance ... But New Zealand has a unitary, not a federal, constitution. She has no such balance of power to preserve; and she should never have been grouped with Australia and Canada as she is in S.8.[69]

While Hudson and Sharp assert that this was so because 'there was some doubt about the right of a New Zealand parliament to amend some parts of the New Zealand constitution',[70] according to Zines it was probably more a case of New Zealand 'not wanting to appear more radical'[71] than the other Dominions mentioned. The real explanation, however, appears simple. Section 8 had indeed been drafted as a safeguard against 'alteration by the New Zealand Parliament of the [entrenched] provisions' of its constitution.'[72] However, as the then Prime Minister Forbes wrote at the time of the drafting controversy,

> Clause 8 being one of the operative clauses of the draft Statute there can be no question whatsoever that its direct application to New Zealand was neither contemplated nor approved by the resolution of the New Zealand Parliament ...[73]

It is no surprise, then, that the difficulties that developed did so because this section had been adopted when others had not been.

New Zealand's constitution – that is, the rules that govern the way it forms a government and thus makes laws – was made up of Acts of the British Government that gave it certain legislative powers. The Constitution Act of New Zealand, passed in 1852, was the first of these laws. It gave the New Zealand Parliament power to legislate 'for the peace, order and good government of New Zealand' – but not, however, the power to alter the Act itself. Five years later, the UK Parliament passed the Constitutional Amendment Act 1857, giving the New Zealand Parliament the power to amend the Constitution Act, excepting certain 'entrenched' sections. New Zealand's legislative powers, and those of other Dominions, were increased again with the passing by the Imperial Parliament of the Colonial Laws Validity Act 1865, which endowed Parliament with, by section 5, 'full power to make laws respecting the constitution, powers and procedure of such legislature.' Constitutional lawyers are divided on how the 1865 Colonial Laws Validity Act affected the 1857 Constitutional Amendment Act. To Wheare, for example, restrictions on constitutional amendment probably remained as they had been before 1865, whereas to McGechan, local law-making powers had probably increased.[74]

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[69] McGechan, 'Status and Legislative Inability', pp. 99-100.
[70] Hudson and Sharp, *Australian Independence*, p. 110.
[71] Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge: Cambridge University Press, 1991), p.7
[72] Letter from the Solicitor-General to the Attorney-General, 4 August 1930: Agenda for the Imperial Conference, EA1, 159/1/5 Part 1.
[73] Confidential Memo from Prime Minister Forbes (Signed) for UK Prime Minister MacDonald, 27 November 1931 (in pencil, marked 'not sent'), EA1 159/1/5, part 1.
[74] On this subject, Wheare wrote that 'it was doubtful whether this endowment of power was sufficient to remove completely the restrictions imposed by the Act of 1857.' (K. C. Wheare, *The Statute of Westminster and Dominion Status* (Oxford: Oxford University Press, 1949), p. 228). McGechan, on the other hand, thought instead 'the better view that the Colonial Laws Validity Act, S.5, adds something to our powers of amendment' (McGechan, 'Status and Legislative Inability', p. 102).

When it came to adopting the final sections of the Statute, this issue was of paramount importance. If Wheare was right, restrictions on the New Zealand government's power to amend its constitution would remain because the 1857 Act was protected by section 8. And if McGechan was right, the powers obtained by the New Zealand Parliament in 1865 were repealed by section 2 (1), which stated that 'the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.'[75] As Currie warned, 'the immediate effect of adoption of the Statute would on this point be to narrow, rather than enlarge, the powers of the General Assembly.'[76] It was agreed by all in academia – contributing to and prompting similar thought in the government[77] – that before or simultaneous to the Statute being passed, the UK Parliament would have to pass an act amending the 1857 Act and explicitly granting New Zealand powers to amend its constitution.

It was for this reason that, a mere month after the announcement of New Zealand's intentions to the world, that Prime Minister Fraser privately expressed

> ... some reluctance to proceed immediately, as had been originally contemplated ... [and] the view that any action ... should be withheld until the constitutional questions had been discussed with the UK Government.[78]

The Ministry of External Affairs informed the Secretary of State for Dominion Affairs that the

> ... original intention was to introduce an adopting Bill during the short sitting of Parliament which has just terminated but an examination of the law has indicated that even if the Statute were adopted certain difficulties principally with respect to our ability to amend the Constitutional Act would still exist.[79]

Accordingly a memorandum on the issue was prepared for Fraser to take to the Premier's Conference in May 1944 and discuss with his counterparts,[80] and drafts of a possible constitution bill were prepared.[81] Adams also visited the Dominion Office in London, writing home that

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[75] Note that McGechan states that: 'Subsection (1) of Section 2 reads thus: "The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion." Taken by itself, this provision would put the General Assembly back in the more restricted position it was in before 1865. Taken with what follows, however, it is merely a technical introduction to the wider emancipations set out in subsection (2) of section 2 and in section (3)'. However, he concludes that this is not clear: 'It has been suggested that the Colonial Laws Validity Act strikes off the fetters retained by the Constitution Amendment Act. It may be observed, however, (1) that section 2 of the Statute of Westminster, if adopted, will in effect repeal the whole of the Colonial Laws Validity Act – unless section 8 of the Statute inferentially revives it; (2) that even if it is regarded as so revived, 'manner and form required by any Act of Parliament' may, when applied to the intendment of the Constitution Act and Constitution Amendment, mean that the manner and form required are those of an Act of the UK Parliament.' McGechan, 'Status and Legislative Inability', p. 102.

[76] A. E. Currie, *New Zealand and the Statute of Westminster 1931*, p. 29.

[77] While this dilemma had previously been noted by Adams, he had been of the opinion that legislation could be requested of the UK Government after the Statute of Westminster Adoption Bill's passing. See: '... the consideration of these matters need not delay the adoption of the Statute.' (Memorandum from H. Adams (Law Draftsman) to the Prime Minister, 8 February 1944), EA1 159/1/5 Part 3.

[78] 'Statute of Westminster': Notes of discussion between H. Adams (Law Draftsman) and McIntosh (Secretary, Dept of External Affairs) and Foss Shanahan (Dept of External Affairs), 9 March 1944 EA1 159/1/5 Part 3.

[79] Secret telegram from External Affairs to Secretary of State for Dominion Affairs, 6 April 1944, EA1 159/1/5 Part 3.

[80] Memo from Mason to Prime Minister, 5 April 1944, for Premiers Conference, EA1 159/1/5 Part 3.

[81] Telegram from Dept of External Affairs to Secretary of State for Dominion Affairs, 5th April 1944, EA1 159/1/5 Part 3.

> They were surprised and interested to know that Section 8 took away with one hand what it gave with another. They were introduced to the 1857 amendment and informed of our doubts regarding the Colonial Laws Validity Act. Points were well taken and they recognised the need for constitutional amendment to clarify the powers of the New Zealand Parliament. ... The law draftsman ... felt as I did ... that all we wanted was a simple Act amending the 1857 amendment.[82]

There was no problem from the legal side, in other words. However, as McIntosh wrote the following month,

> I anticipate some difficulty on the political side. The Secretary of State for Dominion Affairs is likely to be particularly cagey about introducing a constitutional amendment which would precipitate a debate on Dominion status and inter-Commonwealth affairs.[83]

Indeed, it would be two years, and further pleas, before Adams was able to write to Fraser with good news:

> You will remember that, when you were here in February 1946, you mentioned the possibility that, if New Zealand were to adopt sections 2 to 6 of the Statute, you might wish to ask for legislation from the United Kingdom Parliament giving New Zealand full power to amend its own constitution ... The matter has been considered by Cabinet, and I am glad to inform you that there will be no objection to the New Zealand government stating, when introducing legislation for the adoption of the sections of the Statute mentioned above, that, if New Zealand should ask the United Kingdom for legislation giving New Zealand complete power to amend its own constitution, the United Kingdom government would be prepared to introduce such legislation in parliament here. In view of the congested legislative programme, I am afraid that there would be no possibility of such legislation being passed ... [until] ... the next session which would probably begin about October [1947].[84]

Thus, the Constitutional Amendment Bill 1947 was introduced to the New Zealand Parliament (and passed by the United Kingdom Parliament several weeks later) at the same time as the Statute of Westminster Adoption Bill, namely, on the 19th of September 1947. The significance of this was belittled as far as possible. At its second reading, Attorney General Mason explained that the Statute

> ... puts into statutory form what was previously a convention. One cannot become emotional over that circumstance; it does not provoke anything in the nature of a revolution.[85]

The Bill passed easily, several members expressing the view that they had no strong thoughts on the matter either way. While some members of the opposition expressed their opposition to the Bill on the grounds that it would 'cut the painter' with Britain, the bill passed

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[82] Letter from Adams (at War Cabinet, London) to McIntosh (Dept of External Affairs), 24 May 1944, EA1 159/1/5 Part 3.
[83] Letter from McIntosh (at War Cabinet, London), to Shanahan (Dept of External Affairs), 20 June 1944, EA1 159/1/5 Part 3.
[84] Letter from Adams (Dominions Office, Downing St) to Fraser 28 March 1947, EA1 159/1/5 Part 3.
[85] Mr Mason, *New Zealand Parliamentary Debates,* vol. 279, 7 November 1947, p. 540.

easily. This is perhaps surprising, given that the National Party's election manifesto of the previous year had stated that the party 'wished to retain all links binding the empire together and therefore did not propose to adopt the Statute of Westminster at the present juncture.'[86] The matter becomes clearer when one of National's other proposals for that election, that the Legislative Council – the second house of Parliament - be abolished, is considered.

From meeting with National MPs to discuss the government's intentions to adopt the Statute of Westminster and the Constitutional Amendment Bill, Shanahan and Adams understood it to be that the Opposition were 'cool to the proposal' and 'feel that it would be untimely to deal with the Statute or our Constitution this session.'[87] However, Shanahan and Adams, having pondered constitutional matters for several years now, possessed certain important information. The 1857 Constitution Act, as we have seen, gave New Zealand the power to change the 1852 Constitution Act: all save certain entrenched sections. One of these entrenched sections stated that New Zealand's legislature consisted of two houses of parliament. Therefore New Zealand could not change this without the full constituent powers already sought by the Government alongside the final sections of the Statute.

According to Shanahan, the pair

> discussed beforehand the desirability or otherwise in referring to the fact that unless we altered our Constitution Act, the Opposition would not be able, as they have stated they would, to abolish the Legislative Council should they become the Government. However, we decided that this might be too provocative, and omitted it.[88]

Thus the Opposition was surprised with this information when National's proposal to abolish the Legislative Council came before the House of Representatives. The debates on this bill allowed the government to casually enlighten the National members, while linking the constitutional powers required with the need for full legislative powers.[89]

> It was almost as if Holland had fallen into a trap, since the National members had brought up the matter of the 1852 Act and the Statute of Westminster, not the Government. Fraser could now go ahead without any chance of disloyalty.[90]

Fraser put forward, and the House approved, a motion to amend the National Party's bill, that

> ... prior to any change being made in the constitution of the legislature, the Statute of Westminster be extended to this Dominion, and that a bill to adopt the Statute be introduced during the present session of Parliament legislature.[91]

Thus, Fraser secured the support of the Opposition as well as the government by appealing to their own interests, a point not lost in the debates on the New Zealand Constitution Amendment

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[86] *The Dominion*, 22 October 1946, p. 8.
[87] Confidential letter from Shanahan to McIntosh, 3 Oct 1946, EA1 159/1/5 Part 3.
[88] Ibid.
[89] According to McDowell and Webb, the adoption of the remaining sections of the Statute of Westminster 'occurred in response to a Private Member's Bill seeking the abolition of the second chamber in the General Assembly (the Legislative Council)' (*The New Zealand Legal System*, p. 107). This is not really accurate: as we have seen, the process of agreeing to and preparing for the adoption had gone on for several years and had only been prevented earlier by the United Kingdom's lack of co-operation regarding New Zealand's constituent powers.
[90] W. D. McIntyre, 'Peter Fraser's Commonwealth', p. 67.
[91] Mr Fraser, *New Zealand Parliamentary Debates*, vol. 276, 11 July 1947, p. 210.

(Request and Consent) Bill later that year. Despite the Prime Minister's admonition to 'not introduce such a controversial matter!',[92] Webb said that

> ... the result of the adoption of the Statute of Westminster and the passing of the measure before us will result in the Imperial Parliament passing a bill to give us power to amend our Constitution in a way some of us, at any rate, desire that it be amended. Not only some honourable members on this side of the House, if not all of them, but also some honourable members on the other side, desire that to be done.[93]

In 1951, the freedom to amend the 1852 Constitution Act was duly exercised, with the abolition of the Legislative Council. Several other amendments followed, leaving New Zealand with only the shell of the 1852 Constitution Act and no discernible 'constitution' setting out the framework of government and power. Had it not been for the crisis caused by Prime Minister Muldoon breaching another convention (in the process of handing over power after losing the 1984 election), it is possible that New Zealand would have continued with its constitutional skeleton for much longer. But the Muldoon breach helped spur the 1986 Constitution Act, which finally did what the 1947 process had heralded, namely, repeal the entire 1852 Constitution Act, terminate the ability of the UK parliament to legislate for New Zealand, and 'confirm' (rather than establish) the framework of the allocation of power in New Zealand. In the gradual progression that moved legislative authority from the UK to New Zealand, the adoption of the New Zealand Constitution Act 1986 is the final cut.

CONCLUSION

Marking 60 years since the adoption of the Statute is thus an opportunity to clarify its place in the progression to New Zealand's independence and modern identity. Why did New Zealand take from 1931 until 1947 to adopt the remaining sections of the Statute? The answer is, as might have been expected, more complex than the 'reluctance to cut the apron strings' thesis. The record does show considerable reluctance in some sectors, even in 1947, but this should be carefully qualified. Even for ardent advocates of continuity, it was not that New Zealand wanted to stay subordinate (*mother's* apron). The view was rather that people were comfortable that the then-existing arrangements were working well – and allowed as much legal freedom as might be required. The records thus show that the negotiating messages were for 'no change' from the late 1920s and leading to the 1931 passage by the UK Parliament of the Statute. Apart from the legal arrangements working well, the sentiment may also have been that in the storms around the Great Depression, the relationship with the UK was a solid economic and emotional anchor. Dominion status had been working for decades, and apparently already offered essentially full self-government in a free association of equals. However, the notion that nothing needed changing received something of a shock from the passage of the Statute itself – a nice irony.

In 1931, the UK government, behind the scenes, accepted that it had breached a fundamental convention of Dominion status in the way that it referred to New Zealand in the 1931 Statute *without its advice and consent* (and indeed, against its explicit instructions). It also seems to have come as a complete surprise to the UK government that the Statute had also tied New Zealand into the constitutional restrictions applying to the federations of Canada and Australia by making section 8 of the Statute apply to New Zealand (again, *without its advice*

[92] Mr Fraser, *New Zealand Parliamentary Debates*, vol. 279, 11 November 1947, p. 565.
[93] Mr Webb, *New Zealand Parliamentary Debates*, vol. 279, 11 November 1947, p. 565.

and consent) – and that adoption of the Statute by New Zealand could have created further legal uncertainty without supporting legislation to remove the doubt.

What started as a wish simply for things to stay as they were thus changed in several respects between 1929 and 1947.

First, New Zealand changed its initial position as set out at the 1926 Imperial Conference. Instead of opposing the Statute completely, New Zealand accepted the 'consensus' in order to preserve unity in the Commonwealth by satisfying those 'radical members' who were demanding greater legal independence.

Secondly, what might have been a significant constitutional issue between the UK and New Zealand over the breach of convention was avoided only because New Zealand agreed to hush up its anger to spare government embarrassment at Westminster. The political crisis thus passed. But the point had been made: the convention was not unbreakable and the 'status quo' was not as comfortable a place to remain as had appeared.

Thirdly, making some parts of the Statute of Westminster apply to New Zealand in 1931 created some legal confusion in New Zealand. The argument, essentially, was that section 8 of the Statute explicitly restricted New Zealand's legal powers to amend the UK New Zealand Constitution Amendment Act 1857. This could only be fixed, lawyers opined, by a special UK statute which should be passed at the same time as New Zealand adopted the Statute of Westminster.

Fourthly, the international world had 'moved on' and New Zealand increasingly needed to clarify its international status, even with allies such as the United States of America. It seems likely that New Zealand leaders would also have found problematic any remaining ambiguity about the country's legal independence from the UK amongst the emerging 'new Commonwealth', where no such ambiguity existed. New Zealand was by then playing an independent role in post-war developments, especially in the formation of the United Nations. That said, the relationship with the UK remained critical to New Zealand identity and to its economy for many years after this, not least because of access to UK markets.[94]

Fifthly, public opinion and, increasingly, parliamentary opinion, appears to have been steadily changing after 1931. There were still powerful forces for 'no change' after the war. But the parliamentary conservatism was in some measure undone by the clear connection between the accompanying UK legislation and the National Party's intended goal to abolish the moribund Legislative Council (which was entrenched in the UK Constitution Amendment Act 1857).

So as regards the New Zealand government at least, a re-examination of the records suggests a somewhat revised history of the adoption of the Statute.

Intending to clarify legal and international status and advance legislative independence, the UK Parliament achieved something closer to the opposite for New Zealand.

Intending to codify and advance Dominion status, the Statute of Westminster breached the core convention of that status, for New Zealand at least.

It is a measure of the flexibility of the constitutional arrangements that the situation remained mostly behind closed doors in the years that followed. Obviously, a world-wide Depression, followed by a World War, were circumstances hardly conducive to sorting out the situation in the terms requested by New Zealand. That was only possible in 1947.

Finally, the 60th anniversary is also an opportunity to think more broadly about the place of the Statute in constitutional evolution. Most constitutional lawyers will know that the Statute is a key step in the evolution of the Commonwealth as a whole. This was most obvious for Ireland,

[94] That relationship was in the end dramatically changed not by New Zealand, but by the UK's entry to the European Community in the 1970s – causing a major crisis of identity for New Zealand.

which shortly thereafter cut all historical constitutional linkages and established a completely home-grown constitution. And for South Africa the Statute of Westminster paved the way for the amendment of its 1910 Constitution, and the abolition of the non-racial franchises in Natal and the Cape. Apartheid followed. The peculiar history of New Zealand's adoption is probably the reason that the Statute has never acquired any significant historic status here. Indeed, amongst key government people the adoption in 1947 was thus less of a celebration of 'independence', than the confirmation of historical evolution.

But constitutional development, including the gradual severing of other links with the United Kingdom, did not of course stop in 1947. The 1986 Constitution Act ended all legislative power, even with 'advice and consent'. It was only in 2003 that new appeals to the Judicial Committee of the Privy Council were finally abolished in New Zealand. Looking ahead from 2007, ongoing development of constitutional issues is inevitable. Forthcoming issues surely include republicanism, or the possible removal of the Crown as Head of State; the constitutional place of the Treaty of Waitangi and of the Bill of Rights; and the relationships between New Zealand and its neighbours, especially in the Pacific.

In other words, New Zealand is likely to be looking constitutionally *inwards* at its own peoples and *outwards* towards others. As that happens, the Statute of Westminster may in time be revisited as a marker of the possible. Putting aside the New Zealand complexities, the Statute offered an historically unique (at that time) relationship with a former colonial power that was at once both free and deeply connected. This represented independence by agreement – essentially to the extent that any Dominion wished to assert it. Canada returned to the UK Parliament in 1982 to 'patriate' its constitution and Charter of Rights – and cut the legal powers of Westminster, finally.

Given the violence of independence struggles before and since, the remarkably flexible and peaceful association which the Statute of Westminster allowed might be seen as a very major advance in the evolution of government. Alas, the lesson was lost on most other colonial powers, or it might have changed the course of the twentieth century. Fortunately, the lesson was not lost on New Zealand itself. There is surely a direct connection between the evolution of New Zealand's independence from the UK and the consensual processes by which Samoa became independent, the Cook Islands and Niue each acquired their own special status, and by which the three atolls of Tokelau have been exploring their own identity and relationship with New Zealand.

The remarkable evolution of the United Kingdom's own constitutional development, especially within the European Union, may also have lessons for Pacific regionalism. It seems reasonably possible that in time New Zealand and other states may consider reverse-processes of the Statute of Westminster: re-tied relationships, by consent, amongst self-governing peoples of equal status.

APPENDIX: THE STATUTE OF WESTMINSTER, 1931

22 George V, c. 4 (U.K.)

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December, 1931]

WHEREAS the delegates to His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

NOW, THEREFORE, BE IT ENACTED by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--

1. In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5. Without prejudice to the generality of the foregoing provisions of this Act, section seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9. (1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia, in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not

being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and government of the Commonwealth.

10. (1) None of the following sections of this Act, that is to say, sections two, three, four, five, and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in sub-section (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand, and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression 'Colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute, 1931.