NEW ZEALAND CITIZENSHIP REDEFINED

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Introduction

Until the enactment of the Citizenship Act 1977 the casual inquirer might well have admitted to some uncertainty concerning the status of New Zealand citizenship and its relationship to British nationality. Was New Zealand citizenship a secondary and derivative status, according precedence to, and possibly arising from, the rather vague concept of "British subject"? After all, the very title of the pre-1978 legislation — the British Nationality and New Zealand Citizenship Act 1948 — appeared to establish an unmistakable, if not natural, order; and the first part of that statute was assigned specifically to "British Nationality". Or was New Zealand citizenship the primary status from which issued the indeterminate common status of "British subject"?

In fact, the scheme of the pre-1978 New Zealand legislation was the creation of a two-tiered structure of local citizenship — expressing the basic juridical relationship of the New Zealander to his state — and common status. For the first time, New Zealand defined its own citizenship and recognised that its citizens, and those of other Commonwealth countries, also enjoyed the secondary status of "British subject" or "Commonwealth citizen", the two terms being synonymous.[1]

In the three decades since, New Zealand citizenship has assumed an increasing importance. Rights which originally attached to possession of the common status are now held, in New Zealand, by local citizens only. Until recently, the entry of British subjects to New Zealand was unrestricted. However, changes in New Zealand's immigration policies since 1974 have impressed a new value on citizenship status — a value that is reflected in the sudden and continuing increase in applications for New Zealand citizenship in the last few years. At present, only New Zealand citizens enjoy the rights of unrestricted entry to, and residence in, New Zealand.

The Citizenship Act 1977,[2] which entered into force on 1 January 1978, signals an interesting change of emphasis. While the Act does not depart from the basic design of local citizenship and common status, it establishes New Zealand citizenship in terms that properly reflect the increased importance of local rather than common status in the relations of Commonwealth countries *inter se*. The title, which avoids any implied deference to the concept of British nationality, evidences this loosening of the British connection.

The Citizenship Act presents a number of further significant changes in its revision and redefinition of New Zealand citizenship. It adopts the

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1 British Nationality and New Zealand Citizenship Act 1948, s.3.

2 The new legislation, originally introduced as the Citizens and Aliens Bill 1977, repeals the British Nationality and New Zealand Citizenship Act 1948 and ss. 3-13 of the Aliens Act 1948.

principle of gender-based equality — notably by removing the distinction between the rights of men and of women to pass on New Zealand citizenship to their children born abroad; it limits the entitlement to citizenship by descent to the first generation born outside New Zealand; it standardises the qualifications for citizenship required of prospective New Zealanders and abolishes the anachronistic aliens registration system; and it includes provisions that will enable New Zealand to ratify international conventions relating to both the status of stateless persons and the reduction of statelessness.

This article will briefly examine the principal changes alongside similar developments in the citizenship legislation of several other Commonwealth countries.

Acquisition of Citizenship

1. Citizenship by Birth: the Territorial Principle

The Citizenship Act retains the fundamental common law principle according to which citizenship is acquired by the fact of birth within the territory of the state (*jus soli*). Section 6(1) provides that every person born in New Zealand on or after 1 January 1949 (the commencement date of the British Nationality and New Zealand Citizenship Act 1948) shall be a New Zealand citizen.[3] Since the Act does not prescribe any parental residential qualification, a child born in New Zealand to foreigners in transit will acquire New Zealand citizenship under this provision.

Two well recognised exceptions are specified. The first denies the application of the territorial principle to any person born in New Zealand if (1) at the time of his birth, his father or mother was entitled to jurisdictional immunity because of diplomatic or consular agency or other exemption from the local jurisdiction; and (2) neither parent was a New Zealand citizen.[4] The extension of this exception to include children born of non-New Zealand females corrects the discriminatory effect of the previous provision which was confined to the male parent only.[5]

The second, and rather limited, exception excludes children born of enemy aliens in hostile occupation of New Zealand. It has also been modified by the requirement that both parents must be enemy aliens.[6]

2. Citizenship by Descent: the Hereditary Principle

The new legislation introduces two important changes to the operation of the principle that citizenship can be transmitted by descent, irrespective of the place of birth (*jus sanguinis*).

In the first place, section 7 removes a palpably discriminatory provision from New Zealand statute law by equalising the rights of men and women to pass on New Zealand citizenship to their children born

3 The territorial principle is extended to persons born aboard either ships or aircraft registered in New Zealand or unregistered ships or aircraft of the New Zealand Government: Citizenship Act 1977, s.2(3)(a),(b).

4 Citizenship Act 1977, s.6(2)(a).

5 British Nationality and New Zealand Citizenship Act 1948, s.6(a), as amended by the British Nationality and New Zealand Citizenship Amendment Act 1969, s 2, and the Consular Privileges and Immunities Act 1971, s.14(2).

6 Citizenship Act 1977, s.6(2)(b). Under s.6(b) of the British Nationality and New Zealand Citizenship Act 1948, this exception applied only where the male parent was an enemy alien.

abroad. With one exception,[7] under the previous regime only male New Zealand citizens were entitled to transmit New Zealand citizenship to their foreign-born children. As one commentator has recently observed,[8] this situation unfairly discriminated against female New Zealand citizens married to non-New Zealand citizens: the law denied citizenship by descent to their children born abroad while recognising its application to children born overseas to male New Zealand citizens married to non-New Zealand citizens.[9] Under the new legislative scheme, both males and females may transmit their citizenship by descent in the same circumstances.[10] Together with the prohibition on sex-based discrimination in the Human Rights Commission Act 1977, the removal of this legal disability further implements the general recommendations of the 1975 parliamentary select committee on women's rights.[11]

Section 10 of the Citizenship Act is intended to make corrective provision for cases of non-succession to citizenship by descent through the female line before the commencement of the Act. Any person whose mother was, at the time of his birth, a New Zealand citizen "otherwise than by descent"[12] is entitled, as of right upon application, to a grant of citizenship. As originally formulated in the Citizens and Aliens Bill, this provision conferred a discretion on the Minister of Internal Affairs to grant or refuse citizenship. The removal of the discretion will extend the availability of grants of citizenship in such cases; and the requirement that application must be made for a grant will avoid the risk of conferring New Zealand citizenship on people who do not want it. As the Statutes Revision Committee realised,[13] automatic attribution of New Zealand citizenship might, under the laws of some countries, prejudice existing citizenship rights.

A registration requirement is imposed by section 7(2): citizenship by descent will lapse if the birth of the person concerned is not registered within two years of his attaining the age of majority.[14]

The second modification to the operation of the hereditary principle restricts the entitlement to transmission of citizenship by descent. The qualification in section 7 that the father or mother of a person born abroad must be a New Zealand citizen "otherwise than by descent" confines transmission of citizenship under the hereditary principle to the first generation born to a New Zealand citizen outside New Zealand. By contrast, under the previous legislation citizenship descended automatically to the first foreign-born generation and, subject only to the require-

7 As amended in 1969, s.7 of the British Nationality and New Zealand Citizenship Act 1948 provided for the transmission of citizenship by descent through the female line in the case of a child born since 1970 if his parents were not married at the time of his conception or birth or at any subsequent time: Status of Children Act 1969, s.12(2).

8 Elkind, "Thoughts on the Human Rights Commission Bill 1976" [1977] N.Z.L.J. 123, 124.

9 British Nationality and New Zealand Citizenship Act 1948, s.7(a).

10 Citizenship Act 1977, s.7(1).

11 *Report of the Women's Rights Committee, June 1975* (1975) IV A.J.H.R. I 13.

12 In most cases this will mean citizenship acquired by birth, registration or naturalisation.

13 (1977) 415 N.Z.P.D. 4378.

14 The manner in which applications are to be made for registration under s.7(2) is prescribed by the Citizenship Regulations 1978 (S.R. 1978/181) reg.3.

ment of consular registration of births, it could be passed on to successive generations born overseas.[15]

Clearly, this "first generation" rule is an attempt to prevent the indefinite transmission of nominal New Zealand citizenship to successive foreign-born generations which have no real identification or connection with New Zealand. From this perspective, the new limitation (also proposed in suggested changes to British nationality law[16]) is a realistic recognition that the legal bond of citizenship with its attendant rights and duties should not attach to persons whose interests and sentiments are more closely associated with states other than New Zealand. Moreover, it will have the effect of reducing the incidence of acquisition of dual, or indeed plural, citizenships by children born to New Zealand citizens overseas. As often occurs, the intersection of the laws of two or more states can result in the attribution of multiple citizenships through the unrestricted extension of the hereditary principle to persons born in states applying the territorial principle.

The limitation also attaches to the provision that operates retrospectively in favour of children born abroad to female New Zealand citizens before the commencement of the Citizenship Act.[17]

While it seems eminently reasonable that citizenship should not be acquired without restriction by successive foreign-born generations, an absolute "first generation" rule might operate to disadvantage the families of certain groups, e.g. missionaries, academics and members of the diplomatic corps, which often retain a close association with their native country even when abroad for long periods. For this reason the Statutes Revision Committee[18] recommended the addition of paragraph (c) to section 9(1), permitting the Minister to grant citizenship to any person "[w]hose father or mother was, at the time of that person's birth, a New Zealand citizen by descent." The object of this modification is to enable the Minister to deal with second generation cases on criteria that are not as rigid as the "exceptional circumstances" of the general humanitarian provision contained in section 9(1)(d): in considering whether to authorise a grant of citizenship under section 9(1)(c), the Minister may

15 British Nationality and New Zealand Citizenship Act 1948, subpara. (ii) of proviso to s.7. Subparas (i) and (iii) provided for transmission beyond the first generation, without the requirement of consular registration, where the birth occurred in a place where the British Crown enjoyed jurisdiction over British subjects or where the New Zealand parent was, at the time of birth, in Crown service under the New Zealand Government.

16 *British Nationality Law: Discussion of Possible Changes* (1977: Cmnd. 6795). The Green Paper suggests that the transmission of the proposed new status of "British citizenship" should be confined to the first generation born abroad. Although a "first generation" limitation was introduced by the British Nationality and Status of Aliens Act 1914 (U.K.), it was gradually relaxed by amendments in 1922 and 1943. At present, British nationality may be transmitted to successive foreign-born generations, subject to the condition of consular registration of births: British Nationality Act 1948 (U.K.), s.5.

17 An amendment to this effect was moved before the Committee of the Whole. The words "otherwise than by descent" were added to cl.9A of the Citizens and Aliens Bill (enacted as s.10 of the Citizenship Act): Supplementary Order Paper No. 28, 15 September 1977.

18 See the statement of Hon. J. K. McLay, presenting the Report of the Statutes Revision Committee on the Citizens and Aliens Bill: (1977) 412 N.Z.P.D. 1582-1583.

have regard to such of the requirements, prescribed for the normal grant of citizenship, as he thinks fit. To this extent, therefore, the discretion makes some accommodation for the second foreign-born generation. An alternative approach, employed in the recent revision of Canadian citizenship legislation,[19] might have been adopted: this would have created a conditional entitlement to citizenship for the second generation, dependent on the establishment of a close connection with New Zealand.

The Statutes Revision Committee made a further adjustment to the proposed design of citizenship by descent. The inclusion in sections 8 and 9 of the phrase "notwithstanding that he may be a New Zealand citizen by descent" makes it clear that any person claiming citizenship by descent may "perfect" his status by applying for a grant of citizenship. If successful, such a person would cease to have the status of citizenship by descent from the date specified in the certicate of New Zealand citizenship issued to him.[20] In practical terms this means that a New Zealand citizen by descent, who is contemplating a prolonged absence abroad, can convert his citizenship status and thereby acquire the capacity to pass on his citizenship to any child born to him while outside New Zealand. In this way he is able to overcome the disability imposed by the "first generation" rule.

3. Citizenship by Grant

A new procedure — "citizenship by grant" — replaces the twin modes of obtaining citizenship by "registration"[21] (British subjects) and by "naturalisation" (aliens)[22] under the British Nationality and New Zealand Citizenship Act 1948. This restructuring follows the direction of change in other Commonwealth countries: in 1973, for example, Australia introduced the common form of "grant of citizenship" in place of citizenship by "registration", "naturalisation" and "notification".[23]

But more important than the terminological change is the removal of a legal distinction, increasingly difficult to justify, between British subjects and aliens. In recent years the principal ground of differentiation between the two categories has been the residential qualification for New Zealand citizenship: a minimum of three years (reducible to one year in special circumstances) for British subjects and a minimum of five years

19 Before attaining the age of 28 years, a person of the second extra-territorially-born generation must apply to retain his citizenship, register as a citizen, and either satisfy a residential qualification or establish a close connection with Canada: Citizenship Act 1976, S.C. 1974-75-76, c.108, ss.3(1)(b), 7.

20 Citizenship Act 1977, s.12(3).

21 Under the previous regime, the registration procedure was available to citizens of Commonwealth countries and the Republic of Ireland, female British protected persons and female aliens married to New Zealand citizens, and minor children of New Zealand citizens: British Nationality and New Zealand Citizenship Act 1948, ss.8,9. Until 1959 citizenship by registration was generally available to British subjects as of right. However, by amendment in 1959 provision was made for a ministerial discretion to grant registration and applicants were subject to all the requirements for the naturalisation of aliens apart from that of filing "first papers" i.e. giving notification of an intention to apply for citizenship: British Nationality and New Zealand Citizenship Amendment Act 1959, s.4(1).

22 "Alien" was defined to mean "a person who [was] not a British subject, a British protected person, or an Irish citizen": British Nationality and New Zealand Citizenship Act 1948, s.2.

23 Australian Citizenship Act 1948-1973 (Cth.), ss.12-15.

for aliens.[24] By prescribing a common three-year residential requirement for all applicants for New Zealand citizenship,[25] the Government has implemented its 1975 election commitment to standardise the conditions of citizenship for all prospective New Zealanders, irrespective of their countries of origin.[26] This displacement of preferential treatment for British subjects is a creditable amendment consonant with other legislative equalisation in New Zealand[27] and similar change elsewhere in the Commonwealth.[28] Nevertheless, it remains to be seen whether the retention of a discretion to reduce the three-year period to one year in cases of "undue hardship"[29] will still allow British subjects to preserve their traditionally favoured position.

The introduction of a uniform residential qualification should expedite the process by which many prospective New Zealanders will gain their citizenship. In practice, however, the waiting period for a grant of citizenship has been protracted in recent years by delays in administrative processing of applications. In 1976, for example, the time lapse between receipt of an application and a recommendation to the Minister increased from an average of four to over eighteen months.[30] To a large extent, the delays were attributable to the marked and continuing increase in the number of citizenship applications since the changes in New Zealand's immigration policy in 1974:[31] from an annual average of 2157 in the period 1967-1973 to 9121 since 1974.[32] Fortunately, the allocation of additional staff to the Department of Internal Affairs in 1977 to deal with the substantial backlog of citizenship applications has reduced the average time between an application for and a grant of citizenship to an acceptable level. In 1977 the Department reported that the waiting period had been reduced from eighteen to six months and that 17,278 persons had been granted citizenship[33] — a dramatic increase over the average approval rate of 5524 in the period 1974-1976.[34]

24 British Nationality and New Zealand Citizenship Act 1948, ss.8(1)(a), 12(1)(b), (c).

25 Citizenship Act 1977, s.8(2)(a).

26 *National Party 1975 Election Policy* (1975) Policy No. 8.

27 The requirement that an applicant for registration as an elector in New Zealand must be a British subject has now been abolished: Electoral Amendment Act 1975, s.16(5). New deportation procedures are now applied equally to all persons who are not New Zealand citizens, regardless of whether they are British subjects or not: Immigration Amendment Act 1978, Part IV.

28 In Australia the former differential residence requirement has been standardised at three years for both British subjects and aliens: Australian Citizenship Act 1948-1973 (Cth.), s.14(1)(c). Under the recent revision of citizenship legislation in Canada the residential qualification for both British subjects and aliens has been reduced from five to three years: Citizenship Act 1976, S.C. 1974-75-76, c.108, s.5(1)(b).

29 Citizenship Act 1977, s.8(4).

30 *Report of the Department of Internal Affairs for the Year Ended 31 March 1977* (1977) A.J.H.R. G.7.

31 See generally *Review of Immigration Policy: Policy Announcements of 2 October 1973-7 May 1974* (1974) III A.J.H.R. E.21.

32 *Reports of the Department of Internal Affairs for the Years Ended 31 March 1968-1972* (1968-1972) A.J.H.R. H.22.

33 *Report of the Department of Internal Affairs for the Year Ended 31 March 1978* (1978) A.J.H.R. G.7. One would also expect that the abolition of the requirements that an applicant for citizenship must supply the names of referees and give public notice of his intention to apply for citizenship will expedite the process.

34 *Reports of the Department of Internal Affairs for the Years Ended 31 March 1975-1977* (1975-1977) A.J.H.R. G.7.

A new precondition, requiring every applicant for New Zealand citizenship to be entitled to reside permanently in New Zealand,[35] has been added to those already established under the former registration and naturalisation procedures: knowledge of the English language (subject to the dispensation provision of section 8(5)), knowledge of the responsibilities and privileges attaching to New Zealand citizenship, and future residence or employment in New Zealand. However, the re-enactment of the "good character" requirement in section 8(2)(c) cannot be accepted uncritically. Although the Department of Internal Affairs has reported that most deferrals or refusals of applications for citizenship have been on the ground of insufficient knowledge of English, and rarely because of "bad character",[36] the retention of such an open-ended qualification, subject to no explicit standards, unduly broadens the executive discretion to grant citizenship. Of course, it will be argued that a character requirement provides a necessary screening procedure for "undesirable" applicants for citizenship. But "undesirable" according to what criteria? A better course, it is suggested, would have been to have abolished this vague and impalpable prerequisite, as it is now formulated, or to have articulated the criteria on which "good character" is to be assessed. As Canadian experience has demonstrated, an unqualified "good character" condition resists consistent definition and application.[37]

For some, the major inadequacy of this part of the Citizenship Act will be the absence of any specific provision for review of decisions to refuse or defer citizenship applications. One might have expected that a thorough remodelling of the fomer legislative structure would have included some review procedure. Indeed, in debate on the passage of the new legislation[38] and in submissions before the Statutes Revision Committee[39] there was considerable support for the provision of a right of appeal to the constituted courts or to a special administrative tribunal.

The Citizenship Act does make a clear distinction between deprivation of an existing right to citizenship and refusal to grant citizenship: in the former case, section 19 makes provision for appeal to the Administrative Division of the Supreme Court. Nevertheless, an unsuccessful applicant for citizenship status has several courses of action available to him. First, since refusals or deferrals of citizenship applications are made without prejudice, he can submit a fresh application — in all probability, to no avail. Secondly, he can pursue his normal public law remedies, although once again the chances of success appear remote: if previous administrative practice is followed, refusals or deferrals of citizenship applications will be taken without reasons being given to the applicants and the courts' traditional reluctance to review the exercise of policy-based executive discretion[40] will be compounded in these circum-

35 Citizenship Act 1977, s.8(2)(b).
36 *Report of the Department of Internal Affairs for the Year Ended 31 March 1969* (1969) III A.J.H.R. H.22.
37 This condition has been deleted from the Citizenship Act 1976, S.C. 1974-75-76, c.108. According to the Canadian State Secretary, "character has proved almost impossible to define": *National*, Vol. 3, No. 6, June 1976, 9.
38 See especially (1977) 415 N.Z.P.D. 4380-4381.
39 In a joint submission the Committee on Women and the National Council of Women proposed a right of review of refusals to grant citizenship: (1977) 412 N.Z.P.D. 1747.
40 See e.g., *Pagliara* v *Attorney-General* [1974] 1 N.Z.L.R. 86; *Tobias* v *May* [1976] 1 N.Z.L.R. 509.

stances. And thirdly, he can lodge a complaint with the Ombudsman who, in the past, has examined a number of refusals or deferrals of citizenship applications.[41]

In Canada the effect of recent legislation has been to make citizenship a qualified right rather than a privilege. Applicants for the grant, retention or resumption of citizenship have been afforded a right of appeal from specially constituted citizenship courts to the Federal Court.[42] Ministerial discretion has been restrained and the new citizenship judges may make recommendations relating to the exercise of that discretion.[43] The Australian Government has also recently stated that it will shortly announce a decision, dependent on recommendations by the Royal Commission on Intelligence and Security, as to whether or not it will establish a tribunal to hear appeals from persons who have been denied Australian citizenship.[44]

While one hesitates to endorse the proliferation of new tribunals and jurisdictions, it does not seem unreasonable to afford an unsuccessful applicant for citizenship some avenue of appeal from the exercise of an executive discretion. The inclusion of an appeal procedure in the Act itself would have achieved this. Alternatively, the enactment of a statutory requirement obliging the Minister to assign reasons for refusal or deferral of a citizenship application would have given an unsuccessful applicant at least the prospect of meaningful judicial review of the exercise of the discretion.

Section 9, pertaining to the grant of citizenship in special cases, further evidences the implementation of the principle of sex equality. Unlike the discriminatory provisions under the former registration and naturalisation procedures which accorded special consideration to females married to New Zealand citizens,[45] section 9 applies to "any person" who satisfies both the requirements of section 8(2)(c) to (e) and the new condition that he or she has established and will maintain some association with New Zealand, other than marriage to a New Zealand citizen.

Provision for the grant of citizenship to minors is preserved in the new legislation subject to two changes: (1) applicants need no longer be children of New Zealand citizens; and (2) applications may be made by minors themselves.[46] Moreover, in considering whether to make a

41 A notable instance is Case No. 8289. The Ombudsman investigated the reasons for the refusal of citizenship to an applicant who had been resident in New Zealand for thirty years. The applicant had arrived in New Zealand in 1944 in a draft of Polish refugee children. He had been convicted of several criminal offences in this country. When he applied for naturalisation his application was rejected and, in accordance with normal procedure, no reasons were given. If the grant of naturalisation had been withheld the applicant would have been rendered stateless as a direct result of the action of the New Zealand Government in accepting him as a permanent New Zealand resident. In the result, through the intercession of the Ombudsman, the Department of Internal Affairs agreed to interview the applicant again—with a view to satisfying the statutory "good character" requirement. Since the matter was apparently settled to the satisfaction of the applicant, the Ombudsman took no further action. *Report of the Ombudsman for the Year ended 31 March 1974* (1974) I A.J.H.R. A.3.

42 Citizenship Act 1976, S.C. 1974-75-76, c.108, s.13(5). The Act creates 21 citizenship judges, with 300 officials, in 15 citizenship courts.

43 Ibid., s.14(1).

44 (1977) 3 C.L.B. 246.

45 British Nationality and New Zealand Citizenship Act 1948, ss.8(2), 9(1)(a), (1A).

46 Citizenship Act 1977, s.9(1)(a).

special grant to a minor, the Minister is given an overriding discretion to have regard to such of the requirements set out in section 8(2) as he thinks fit.[47]

The minimum age limit for grants of citizenship has been established at eighteen years: following submissions from the National Council of Women and the Committee on Women the Statutes Revision Committee amended the original proposal for an age limit of sixteen years.[48]

Finally, the Citizenship Act adapts the oath of allegiance to changed circumstances. The British Nationality and New Zealand Citizenship Act 1948 differentiated between the registration and naturalisation procedures for the purposes of oaths of allegiance. Presumably because British subjects already owed allegiance to the Sovereign, the Minister enjoyed a discretion to require any person to take the oath of allegiance.[49] For aliens, however, the oath was mandatory.[50] Section 11 of the Citizenship Act removes the distinction by authorising the Minister, in any case or class of case, to make a grant of New Zealand citizenship conditional upon the applicant(s) taking a restyled oath of allegiance. In conformity with the Royal Titles Act 1974 the oath now refers to "Her Majesty . . . Queen of New Zealand."[51] However, since British subjects or Commonwealth citizens living in New Zealand do not now owe their allegiance to the Sovereign as "Queen of New Zealand", it would have been quite proper to have required all applicants for grants of citizenship to take the new oath. This, it would appear, was the unanimous view of the Statutes Revision Committee. Nonetheless, the Department of Internal Affairs considered it to be administratively impractical and, in the result, a discretionary provision was favoured. As a matter of policy, it has been indicated that all persons who do not, by reason of birth, owe allegiance to the Queen will be required to take the prescribed oath while all others will be required to subscribe to some appropriate declaration at the time of application.[52]

Loss of Citizenship

1. Renunciation

Section 15 of the Citizenship Act provides for the voluntary renunciation of New Zealand citizenship. Although it no longer makes separate provision for Commonwealth and non-Commonwealth countries, it re-enacts the substance of the corresponding provision under the former legislation[53] by confining renunciation to formal acts and cases of dual citizenship or nationality. The Minister retains a discretion to withhold registration of a declaration of renunciation if (1) the declarant is ordinarily resident in New Zealand; or (2) New Zealand is at war with another state.[54]

47 Ibid., s.9(3).
48 See the statement of Hon. J. K. McLay, presenting the Report of the Statutes Revision Committee on the Citizens and Aliens Bill 1977: (1977) 412 N.Z.P.D. 1582.
49 British Nationality and New Zealand Citizenship Act 1948, s.9A.
50 Ibid., s.14.
51 Citizenship Act 1977, First Schedule.
52 See the statement of Hon. D. A. Highet, Minister of Internal Affairs, during the second reading of the Citizens and Aliens Bill 1977: (1977) 415 N.Z.P.D. 4378.
53 British Nationality and New Zealand Citizenship Act 1948, s.21.
54 Citizenship Act 1977, s.15(3) (a), (b).

2. Deprivation

The grounds for deprivation remain basically similar to those specified in the British Nationality and New Zealand Citizenship Act 1948. In general, loss of citizenship under both sections 16 and 17 of the Citizenship Act follows as a consequence of voluntary conduct by a New Zealand citizen.

Under section 16, which applies to all New Zealand citizens, acquisition of a new citizenship or nationality or exercising privileges or performing duties of another citizenship or nationality do not, in themselves, provide sufficient grounds for deprivation. In both cases the deprivee must also have acted "in a manner that is contrary to the interests of New Zealand." This phrase, which replaces the former rubric — "that it is not conducive to the public good that [a person] should continue to be a New Zealand citizen" — appears vague in the extreme. Nevertheless, this type of general qualification is expressly recognised by the 1961 Convention on the Reduction of Statelessness which contemplates deprivation where a person "has conducted himself in a manner seriously prejudicial to the vital interests of the State."[55] Although this provision is cast in more restrictive terms than the New Zealand domestic formulation, the Convention does offer some indication of what is contrary or prejudicial to state interests: it specifies forms of conduct that constitute grounds for deprivation of citizenship or nationality, viz., taking an oath or formal declaration of allegiance to another state and rendering services to, or receiving emoluments from, another state. One can also look speculatively towards state practice which has established, pursuant to general or specific legislative formulae, further examples of prejudicial conduct, e.g. service in the armed forces of another state and enjoyment of the benefits of a foreign citizenship or nationality while resident abroad for long periods.

Section 17, applicable only to New Zealand citizens by registration, naturalisation or grant, adds mistake to fraud, false representation and wilful concealment of relevant information in the acquisition of citizenship as a ground for deprivation of citizenship.

The Act establishes a new procedure for judicial review of the grounds for deprivation of citizenship. On the face of it, the new scheme appears to extend ministerial accountability by including cases that were dealt with formerly by ministerial fiat alone and by granting an unqualified right of judicial review before the Administrative Division of the Supreme Court.

Under the previous procedure, which was confined to the fraud and false representation cases, the Minister was required to give written notice to every person, against whom a deprivation order was proposed, informing him of the ground on which the order was to be made; if that person so applied, the Minister was obliged to refer the case for inquiry and report either to the Supreme Court or to a committee of inquiry which he himself could constitute.[57]

The new procedure applies to cases under both sections 16 and 17 of the Citizenship Act. The Minister must now advise any person, against

55 U.N. Doc. A/CONF. 9/15 (1961), Art. 8(3)(a)(ii).
56 Ibid., Art. 8(3)(a)(i).
57 British Nationality and New Zealand Citizenship Act 1948, s.23(6),(7); Citizenship Deprivation Rules 1949 (1949/121).

whom a deprivation order is proposed, of his right to have the matter reviewed by the Supreme Court; and the Court may, upon application, declare that there are insufficient grounds to justify a deprivation order.[58]

Common Status: Commonwealth Citizen

Until 1948 everyone who owed allegiance to the British Crown enjoyed the status of "British subject".[59] This shared imperial status formed the underpinning of fthe common code system of British nationality which, except for naturalisation and the status of married women, was recognised in substantially identical legislation throughout the Empire.

However, as the constitutional status and autonomy of Commonwealth countries developed, the common code system became increasingly inconsistent with the desire to create separate national regimes as the primary indices of citizenship rights and duties. Although the idea of distinct national citizenships was first introduced by Canada in 1921 and by South Africa in 1927, the major agency in the breakdown of the common code was the Canadian Citizenship Act of 1946. This legislation signalled the need for revision of the common code by defining local citizenship as the primary status for Canadians and assigning only secondary significance to the status of British subject.

Following a conference of Commonwealth experts in 1947 a new plan was developed to accommodate both the desire for new and independent citizenships and the general wish to retain some form of common bond throughout the Commonwealth. As formulated in the British Nationality Act 1948 (U.K.), the new arrangement allowed each member state of the Commonwealth to pass legislation defining its own citizens who, together with those of other members of the Commonwealth, would also be recognised as British subjects.[60] Thus, this two-tiered structure of local and common status represented a compromise between perpetuation of the old common code and complete severance of the historical umbilicus that had linked both Empire and Commonwealth. As de Smith describes it, the scheme "transplant[ed] citizenship from imperial to local roots but includ[ed] a substantial common element."[61] Local citizenship became the gateway to the derivative common status of British subject or Commonwealth citizen, the two terms being synonymous. Moreover, by contrast with the former common code, each member state of the Commonwealth could modify its citizenship laws without first having to consult with and secure agreement among other Commonwealth countries.

The basic mechanism of the new plan was to be a uniform "common clause" whereby persons defined as citizens would also enjoy the common status of British subject. But from the very outset, considerable divergence appeared in Commonwealth state practice. Britain, Austra-

58 Citizenship Act 1977, s.19(1),(2).

59 Originally a common law concept, the status was incorporated in the British Nationality and Status of Aliens Acts 1914-1923 (U.K.). As Roberts-Wray, *Commonwealth and Colonial Law* (1966) 4 reports, at the Imperial Conference of 1937 it was placed on record that the status did not mean "subject of Great Britain" but denoted generally "all subjects of His Majesty, to whatever part of the British Commonwealth they belong."

60 For a discussion of this restructuring see Wilson & Clute, "Commonwealth Citizenship and Common Status" (1963) 57 Am. J. Int. L. 566.

61 de Smith, *Constitutional and Administrative Law* (3rd ed. 1977) 460.

lia, Canada and New Zealand adopted the "common clause" in unmodified form; India enacted a substantially modified version which, while recognising that citizens of other Commonwealth countries possessed the status of "Commonwealth citizen in India", did not confer the status on its own citizens; and neither Ceylon, Pakistan nor South Africa adopted the clause at all, although the basic objective of the new arrangement was achieved indirectly by defining the status of "alien" to exclude holders of local citizenships and/or assigning to the terms "British subject" or "Commonwealth citizen" the same meaning found in the British Nationality Act 1948 (U.K.). Nonetheless, "[d]espite these differences no citizen of any country of the Commonwealth [was] an alien in any other, and in all cases citizens of the country concerned still possess[ed] the status of British subjects (or Commonwealth citizens) under United Kingdom law."[62]

Quite apart from these differences in the formal implementation of the "common clause", there appeared significant variation in the rights of British subjects in the practice of Commonwealth states *inter se*. There can be little doubt that the practical importance of this secondary status has been markedly eroded in the post-1948 period. Until 1962, for example, a British subject enjoyed the unqualified common law right to enter and remain in Britain.[63] Subsequently, however, the "right" has been substantially restricted, initially by the Commonwealth Immigrants Acts of 1962 and 1968 (U.K.) and latterly by the introduction of the concept of "patriality" to British immigration law.[64] Even more recently, the Labour Government has published a Green Paper containing suggestions for possible changes to British nationality law;[65] if these proposals to replace the present status of "citizenship of the United Kingdom and Colonies" with the two categories of "British citizenship" and "British overseas citizenship" are implemented (and citizenship rights are equated with rights of entry to Britain) the status of British subject may be further relegated.

Furthermore, the declining importance of the common status has been underscored in the immigration policies of other Commonwealth countries.[66] Indeed, it has always been evident, even under the common code system, that individual state immigration policies have taken precedence over the common status.

Against this background, one detects a consolidation of the transfer of emphasis from common to local allegiance in the Citizenship Act 1977. When the Citizens and Aliens Bill was first introduced in 1977 it contained a "common clause" in terms that were substantially similar to the original provision in the British Nationality and New Zealand Citizenship Act 1948. However, although the clause was deleted from the Citizenship Act itself,[67] the effect of the split-level structure of local and common status has been sustained in other legislation — the Commonwealth Countries Act 1977 and consequential amendments to the Acts

62 *Nationality and Citizenship Laws of Countries of the Commonwealth,* British Information Service R. 5024/67 at 31: quoted in Wilson, *International Law and Contemporary Commonwealth Issues* (1971) 150.
63 See *D.P.P.* v *Bhagwan* [1972] A.C. 60 (H.L.), per Lord Diplock at 74, 78.
64 Immigration Act 1971 (U.K.). The Act entered into force on 1 January 1973.
65 Supra n. 16.
66 See e.g., the recent changes in New Zealand's immigration policy: supra n. 31.
67 An amendment to this effect was introduced by Supplementary Order Paper No. 28, 15 September 1977.

Interpretation Act 1924. This somewhat convoluted rearrangement[68] achieves much the same result as the indirect implementation of the "common clause" by some Commonwealth countries after 1948. The Commonwealth Countries Act incorporates a schedule of Commonwealth countries to which the new definitions of "Commonwealth citizen" and "Commonwealth country" (inserted in section 4 of the Acts Interpretation Act) refer. Thus, under the new scheme of interlocking statutory provisions, any person recognised by the law of a Commonwealth country as a citizen of that country is also recognised as a "Commonwealth citizen" under New Zealand law.

The deletion of the "common clause" impresses the new legislation with a thoroughly local signature. More significant, however, is the preference for the term "Commonwealth citizen" rather than for the formerly favoured expression "British subject". The new definition in section 4 of the Acts Interpretation Act makes no reference to "British subject" and the definition of "alien" in the Citizenship Act itself refers only parenthetically to "British subject". Together with the abbreviation of the title of the new citizenship legislation, which no longer refers to "British nationality", this change in terminology will accelerate the demise of the expression "British subject" in New Zealand legal parlance. It is a commendable advance. The expression with its sense of erstwhile days of Empire and veiled implication of dependence bears little relevance to contemporary New Zealand.

It has been suggested that an analogy may be drawn between the concept of "British subject" and sterling currency:[69] both were expressions of Imperial and Commonwealth unity and both ceased to perform a unifying function when individual Commonwealth countries began to exercise autonomy in these areas. Recasting and extending the analogy, one is tempted to suggest that both the concept and substance of "British subject" have been substantially devalued, if not entirely debased.

Abolition of Aliens Registration System

Aliens registration was first introduced in New Zealand by the Registration of Aliens Act 1917 as a security measure. Although the system was discontinued in 1923,[70] a similar scheme was reinstituted during the Second World War[71] and preserved, after the War, in Part II of the Aliens Act 1948.

It is clear that the original rationale for the system — state security — has been eclipsed in modern times; and there appears no compelling justification for retaining an arrangement, initially administered by the

68 It would appear that the rearrangement may have introduced a problem of competing definitions—albeit of limited dimension. The provisions relating to the status of "British subject"/"Commonwealth citizen" and listed states in the British Nationality and New Zealand Citizenship Act 1948 expired on 1 January 1978, the commencement date of the Citizenship Act 1977. However, the new definitions of "Commonwealth citizen" and "Commonwealth country" (with the revised schedule of Commonwealth countries) in the Commonwealth Countries Act 1977 came into force on 6 October 1977. Although the last-mentioned enactment has an application beyond citizenship matters, a neater effect might have been achieved by synchronising its entry into force with that of the Citizenship Act.

69 Fawcett, *The British Commonwealth in International Law* (1963) 176.

70 Registration of Aliens Suspension Act 1923.

71 Alien Control Emergency Regulations 1939 (1939/132); Aliens Emergency Regulations 1940 (1940/273).

Police Department and latterly by the Department of Internal Affairs, that has set aliens apart, despite the fact that many have been granted permanent residence in New Zealand. Moreover, as an indicator of the number of aliens in New Zealand the registration system has appeared rather unreliable.[72] Certain categories of people have not been required to register: these included (1) children under sixteen years of age; (2) persons holding diplomatic or consular status and employees of embassies, legations and consulates who were resident in New Zealand solely for the purpose of performing official duties; (3) some temporary visitors to New Zealand; and (4) citizens of the Republic of Ireland who have not been classified as either British subjects or aliens.[73] In addition the number of aliens registered has fluctuated according to increases in immigrants over sixteen years of age, departures abroad, and naturalisations.

Originally it was proposed to re-enact the registration system in Part III of the Citizens and Aliens Bill. Although the Statutes Revision Committee proposed no amendments to Part III of the Bill, the draft provisions relating to the system were deleted following Cabinet approval.[74] The abolition of the registration system is a welcome improvement that removes an anachronistic, and somewhat xenophobic, legislative relic.

Statelessness and Hardship/Humanitarian Provisions

The Citizenship Act contains two new provisions which are designed to accommodate international obligations under the 1954 Convention relating to the Status of Stateless Persons[75] and the 1961 Convention on the Reduction of Statelessness.[76] These provisions synchronise New Zealand municipal law with international law and will permit ratification of the Conventions.

Pursuant to section 6(3), any person, born in New Zealand after the commencement of the Act, who does not qualify for citizenship according to the territorial principle shall be a New Zealand citizen by birth if he would otherwise be stateless. Similarly, the Minister is also authorised, upon application, to issue a special grant of citizenship to any person born outside New Zealand who would otherwise be stateless.[77]

The introduction of the new common procedure of acquisition of citizenship by grant has also produced a restructuring of the hardship and humanitarian provisions. In place of the former miscellany of exceptions to residential and language qualifications and special circumstances provisions, two general hardship provisions have been enacted. The first, section 8(4), authorises the Minister to reduce the standard three-year residential qualification to a minimum of one year where the applicant for citizenship would otherwise suffer "undue hardship". The corre-

72 In the period 1968-1976 the number of registered aliens has ranged from 28300 to 33177. The largest nationality groups have consisted of persons from the Netherlands, the United States of America, China, Yugoslavia, Switerland, Greece and the Federal Republic of Germany: *Reports of the Department of Internal Affairs for the Years Ended 31 March 1968-1977* (1968-1977) A.J.H.R. H.22/G.7.

73 Aliens Act 1948, ss.2,5. The system did not apply to persons entitled to immunity under the Diplomatic Privileges and Immunities Act 1968 and the Consular Privileges and Immunities Act 1971.

74 An amendment to this effect was moved before the Committee of the Whole: Supplementary Order Paper No. 28, 15 September 1977.

75 360 U.N.T.S. 117. The Convention entered into force on 6 June 1960.

76 Supra n.55. The Convention entered into force on 13 December 1975.

77 Citizenship Act 1977, s.9(2).

sponding provision in the British Nationality and New Zealand Citizenship Act 1948, though not framed as a hardship provision, was limited to persons entitled to citizenship by registration.[78] The second hardship provision creates a dispensation from the language requirement of section 8(2)(e) where the applicant would suffer "undue hardship" if compliance with that requirement were insisted upon.[79] Under the previous regime, the language dispensation was narrowly circumscribed and applied mainly to female British subjects and aliens married to New Zealand citizens.[80]

A general humanitarian provision is contained in section 9(1)(d): the Minister may grant citizenship to any person if, because of "exceptional circumstances of a humanitarian or other nature", he is satisfied that a grant would be in the public interest.

Special Provisions Relating to Parentage and Marriage

Section 3 of the Citizenship Act prescribes a number of special rules relating to paternity and to adopted and posthumous children. It conveniently aggregates provisions that were formerly found in several enactments.[81]

The effect of marriage upon existing citizenship rights is undisturbed by the new legislation. Since 1946,[82] New Zealand law has recognised the principle, adopted by the 1957 Convention on the Nationality of Married Women,[83] that marriage has no automatic effect on the acquisition or loss of citizenship.

Transitional and Miscellaneous Provisions

The new legislation protects existing rights of citizenship under the British Nationality and New Zealand Citizenship Act 1948; it also makes specific transitional provision for the transmission of citizenship by descent to persons born after the commencement date of the British Nationality and New Zealand Citizenship Act 1948 but before the commencement date of the new regime.[84]

Section 14 allows applications for registration or naturalisation, lodged before the commencement of the Citizenship Act, to be dealt with under the new procedure for the grant of New Zealand citizenship.

Part II, related to miscellaneous matters, contains a provision that re-enacts, *mutatis mutandis,* a provision formerly found in the Aliens Act 1948:[85] section 23 states that, subject to specified limitations, all persons who are not New Zealand citizens enjoy the same capacities to acquire, hold and dispose of property as New Zealand citizens.

Conclusion

Only rarely is new legislation received without criticism, be it at the hands of the captious commentator or the perplexed practitioner.

78 British Nationality and New Zealand Citizenship Act 1948, s.8(1)(a).
79 Citizenship Act 1977, s.8(5).
80 British Nationality and New Zealand Citizenship Act 1948, provisos to ss.8(2)(c), 9(IA)(c).
81 British Nationality and New Zealand Citizenship Act 1948, ss.2(2), 26, 27; British Nationality and New Zealand Citizenship Amendment Act 1959, s.9; Status of Children Act 1969, s.12(2).
82 British Nationality and Status of Aliens (in New Zealand) Amendment Act 1946, s.2.
83 309 U.N.T.S. 65; N.Z.T.S. 1961, No. 11.
84 Citizenship Act 1977, s.13(3), (4).
85 Aliens Act 1948, s.3.

Assuredly, the Citizenship Act 1977 will also attract objection and reservation.

Nevertheless, the Act does improve the rules for acquiring New Zealand citizenship. It has substantially revised, and generally liberalised, these rules by removing discrimination on the grounds of sex and country of origin and by standardising the qualifications and procedures for granting citizenship to prospective New Zealanders. The Act has also introduced a new scheme of judicial review of the grounds for deprivation of citizenship and abolished that obsolete procedure, the aliens registration system.

As well, the substantive changes have produced a structural improvement. The Citizenship Act is less complex than its predecessor. No longer will the interpreter contend with the separate rules, dispensations and special circumstance provisions of the former registration and naturalisation procedures. One common procedure now governs.

"New Zealand citizenship" is a relatively new concept. The Citizenship Act 1977 gives it a revitalised and contemporary exposition.