The Law of Arms in New Zealand: A Response

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Noel Cox has written that "If any laws of arms were inherited by New Zealand, it was the Law of Arms of England, in 1840",[1] and that in England and New Zealand today "the Law of Arms is the same in each jurisdiction",[2] The statements cannot both be true; each is individually mistaken; and the English law of arms is in any case unworkable in New Zealand.

In England, the laws of arms may be defined as the law governing "the use of arms, crests, supporters and other armorial insignia [which] is to be found in the customs and usages of the [English] Court of Chivalry",[3] "augmented either by rulings of the [English] kings of arms or by warrants from the Earl Marshal [of England]".[4]

There are several standard reference books in English heraldry, but not even one revised and edited by a herald may, in his own words, be considered "authoritative in any official sense",[5] and a definitive volume detailing the law of arms of England has never been published. A basic difficulty exists, therefore, in knowing precisely what the content of the law is that is being discussed. Even in England there are some extraordinary lacunae. For instance, the English heralds seem not to know who may legally inherit heraldic badges.[6]

If the English law of arms of 1840 had been inherited by New Zealand it would have come within the ambit of the English Laws Act 1858 (succeeded by the English Laws Act 1908). The central provision of the 1858 Act was that "The laws of England as existing on the fourteenth day of January one thousand eight hundred and forty, so far as applicable to the circumstances of the colony of New Zealand, and in so far as the same were in force immediately before the commencement of this Act, shall be deemed to continue in force in New Zealand".

There is no evidence that the English law of arms was in any practical or demonstrable sense in force in New Zealand before 1858. The first English grant of arms to a New Zealand resident was not made until 1864,[7] and questions from New Zealand in 1855 about precedence were answered by Downing Street,

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1 N.Cox, The law of arms in New Zealand, *New Zealand Universities Law Review*, vol. 18 (December 1998) 238.

2 N. Cox, *op. cit.* 252.

3 *Halsbury's Laws of England*, vol. 35 (4th edn, reissue 1994) 599.

4 J.P. Brooke-Little (then Norroy and Ulster King of Arms), in *A New Dictionary of Heraldry* ed. S. Friar (1987) 212.

5 J.P. Brooke-Little (then Richmond Herald), in foreword to *Boutell's Heraldry* (1978) vii.

6 J.P. Brooke-Little (then Norroy and Ulster King of Arms), *An Heraldic Alphabet* (1985) 41.

7 Grant of arms to Andrew Hamilton Russell, 5 September 1864 (College of Arms Register of Grants vol. 55, fol. 218).

not the Earl Marshal.[8] Moreover, "the circumstances of the colony" included the fact that it was not settled solely by Englishmen. Colonists also came in large numbers from Scotland and Ireland, where the law of arms was and is different from in England; indeed, James Busby was a Scot and William Hobson was Irish, and of course the Otago settlement was founded by Scots in 1848. Nor were all colonists from the United Kingdom; considerable numbers also came from continental Europe where there was an even wider variety of heraldic practice. Arms from various sources appear to have been borne, but there was no regulation of their use or enforcement of their registration at the College of Arms.

It is also not possible for the current law of arms to be the same in England and New Zealand, even if that could have been the case in 1840 or 1858. The reason is twofold. Firstly, general New Zealand law has diverged from English law in a number of significant ways. For instance, in New Zealand the Status of Children Act 1969 has abolished the status of illegitimacy; the Act does not exclude arms or hereditary dignities from its provisions and so those parts of the English law of arms which preclude a bastard from inheriting his father's arms are clearly of no effect in New Zealand. Secondly, the law of arms has not remained unchanged in England since 1840, and none of the changes made since then by warrants issued by the Earl Marshal (*e.g.* concerning ecclesiastical hats in 1967 and 1976 and the use of paternal arms by married women in 1995) has ever been incorporated into New Zealand law. Such warrants are a "species of delegated legislation"[9] and as such are instruments issued under the royal prerogative which, if they were intended to apply to New Zealand, should have been both laid before the House of Representatives for Parliamentary scrutiny[10] and also "printed and sold" or "printed and published" in New Zealand in terms of the Regulations Act 1936 or its successor the Acts and Regulations Publication Act 1989.[11]

There is a further relevant Act which makes it impossible to accept that even a divergent form of the English law of arms is in force in New Zealand: the Imperial Laws Application Act 1988. This act repealed the English Laws Act 1908 — the slate was wiped clean, and the only laws inherited from the United Kingdom which were retained and which remain in operation in New Zealand are the enactments and subordinate legislation expressly specified in the schedules to the 1988 Act together with the common law of England, insofar as it was already part of the law of New Zealand.

Noel Cox has claimed that the 1988 Act does not affect "any special laws such as the Law of Arms".[12] All of his conclusions hang on this claim, but it is a baseless assertion, for which he has supplied no corroborating footnote or reference; the Act makes no such exceptions. None of the United Kingdom statutes listed in the schedules to the 1988 Act is relevant to the law of arms.

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8 Despatch to the Acting Governor dated 27 November 1855, in *Votes and Proceedings of the Legislative Council*, Auckland, 1856 (not paginated).

9 N. Cox, *supra* 242.

10 Section 2 of the Regulations Amendment Act 1962 and section 4 of the Regulations (Disallowance) Act 1989.

11 Section 3 of the 1936 Act and section 4 of the 1989 Act.

12 N. Cox, *supra* 239.

Nor does the common law affect or govern the conduct of the Court of Chivalry or the law of arms in England.[13] Instead, they are the concern of the civil law, a separate branch of the law of England, which by the 1988 Act was clearly deleted from New Zealand law (if it is assumed to have been in any way in force previously). It is impossible for the law of arms of England to have been preserved as part of the law of New Zealand and the English law of arms and the mechanism for its administration to have no force or status as far as this country is concerned.

What was not affected by the 1988 Act was the power of the Sovereign of New Zealand to regulate armorial matters, to grant coats of arms, and to create officers of arms. This is recognised as a royal prerogative (like the power to create and grant honours).[14] The separation of the Crowns of the United Kingdom and New Zealand had developed over the years, by a mixture of constitutional evolution and legislation, and was certainly complete by 1988. New Zealand has only one sovereign, the Queen in right of New Zealand, and the Queen of the United Kingdom has no authority here. An ineluctable corollary of the separation of the Crowns is the division of the royal prerogative, and it is this division which makes the practical application of the English law of arms impossible in New Zealand.

Most prerogative powers in a modern constitutional monarchy are exercised only with ministerial advice, and not at the personal discretion of the Sovereign. Unless there is specific authority to the contrary, Ministers of the Crown of the United Kingdom can advise only the Sovereign of the United Kingdom, and Ministers of the Crown of New Zealand can advise only the Sovereign of New Zealand,[15] and the prerogative powers of each Sovereign are irrelevant to the subjects of the other. Were it not so, neither country would be a fully independent nation. This concept has, however, been slow to be accepted in the New Zealand Cabinet Office and at the English College of Arms.

The Cabinet Office Manual asserts that the Queen's "Lieutenants, in exercising this [armorial and heraldic] prerogative, are the Earl Marshal [of England] and the Kings of Arms (College of Arms)",[16] and the internet website of the College of Arms recently claimed of the English King of Arms that "their writ extends to Australia, New Zealand and certain other countries of which the Queen is Sovereign."[17] For these claims to be true, both the ministerial authority of the Earl Marshal of England and the prerogative powers of the Sovereign of the United Kingdom would have to extend to New Zealand.

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13 *Halsbury's Laws of England*, vol. 35, 476; G.D. Squibb, *The High Court of Chivalry* (1997) 162; G.D. Squibb, *The Law of Arms in England* (1967) 2 - "The Common Law had no concern with matters armorial."

14 P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) 568-9.

15 The Statutes of various United Kingdom orders of chivalry provide for Ministers of the Crowns of other monarchical realms in the Commonwealth to recommend to the Sovereign of the United Kingdom that citizens of their countries be appointed to the orders; it was never legally possible for the Queen *of New Zealand* to appoint members of United Kingdom orders.

16 http://www.dpmc.govt.nz/cabinet/manual/7.html, section 7.13. Noel Cox's claim (in The law of arms in New Zealand, 243, note 129) that this constitutes official recognition of a role in New Zealand for these gentlemen is based on a remarkable circularity of authority. The Manual is merely a compendium of relevant legislation and guidelines for practice, compiled by Cabinet Office staff,

The College of Arms also has a representative in New Zealand, known as New Zealand Herald of Arms Extraordinary, who apparently holds office by virtue of a curious warrant of the Queen of New Zealand, issued in 1978 on the advice of the Prime Minister of New Zealand but addressed to the Earl Marshal of England.[18] How this warrant can have any constitutional validity is a mystery yet to be explained.[19] If New Zealand Herald were appointed by the Sovereign of New Zealand, why does he wear the insignia of an English herald and take part in purely English royal ceremonies in England?[20] If he were appointed by the Sovereign of the United Kingdom, what possible status can he have under New Zealand law? If he were appointed by the Queen in both roles, why does the warrant not say so?

If his appointment can be considered as a joint appointment of the Sovereign of the United Kingdom and the Sovereign of New Zealand, was care taken that all subsequent appointments of officers of arms were approved by the Queen in both roles (although any such joint appointment would seem to be a constitutional novelty)? How is the College of Arms answerable to the Queen of New Zealand? Does the Cabinet Office or the Government of New Zealand wish to confirm explicitly and publicly that an English peer,[21] resident in England and not a New Zealand citizen, holds an hereditary office with legal powers in and over New Zealand and New Zealanders with the power to amend and create New Zealand law? Does New Zealand's Official Information Act 1982 apply to the College of Arms? Is the setting of official fees charged by the College of Arms subject to New Zealand law and scrutiny? Is the rule of law not important for some State matters?

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the members of which include New Zealand Herald. A lack of understanding in the Cabinet Office about the separation of the Crowns and the division of the prerogative was also demonstrated in the 1995 report of the Prime Minister's Advisory Committee on Royal Honours which at least three times affirmed that the statutes of United Kingdom orders of chivalry "are not ours to change" yet contrived to recommend both that appointments to United Kingdom orders should cease and also that appointments to certain United Kingdom orders should continue as part of an indigenous New Zealand honours system. The most recent evidence of this confusion is in the Royal Warrant establishing the Victoria Cross for New Zealand (SR 1999/318) which ordains that "Our Royal Crest" (necessarily of the Sovereign of New Zealand) shall appear in the centre of the decoration. What actually appears is not an emblem of the Sovereign of New Zealand at all but the Royal Crest of England from the Royal Arms of the Sovereign of the United Kingdom.

17 http://www.kwtelecom.com/heraldry/collarms/#T1(1999).

18 The warrant may not be published without New Zealand Herald's permission.

19 For an examination of the issues involved see M.R. Innes of Edingight, NZ Herald of Arms Extraordinary (1979) 13(1) *Heraldry in Canada* 34-36.

20 In England he wears the tabard of an English herald and has taken part in the ceremonies of the Order of the Garter; in New Zealand he wears a neck badge of the arms of the Sovereign of the United Kingdom.

21 Successive Dukes of Norfolk have held office as Earl Marshal and Hereditary Marshal of England since 1672.

In English law, it would appear that (with rare exceptions) the only arms which may be lawfully borne are those which have been granted by the English kings of arms or otherwise recorded at the College of Arms.[22] If that is also the case in New Zealand, then the arms of twenty local bodies, two universities, numerous schools, several rugby unions, the Alexander Turnbull Library, and the entire Roman Catholic hierarchy are unlawful, having been simply designed and adopted by the users without any external advice or approval.[23] Even with a representative in Wellington for more than twenty years, the College of Arms has not acted to rectify the situation. Evidently the English law of arms is unworkable, ineffectual, and unenforceable in New Zealand.

Does any of this really matter? Do the issues that have been raised have any relevance to real life?

Some, perhaps, might wish to dismiss heraldry as being of interest only to antiquarians, cranks and snobs, but it is in fact part of the fabric of daily life in New Zealand. Coats of arms and heraldic flags and devices are seen every day in our courts and on police uniforms, school blazer pockets, rugby jerseys, every branch of the Bank of New Zealand, naval vessels, local authority and university vehicles, buildings, and letterheads — in literally thousands of applications. Personal heraldry is also used but is less often seen in public.

Heraldry is widely used and popular because it is a highly effective means of identification, in a format that has worked successfully for more than seven hundred years. There is, however, no consistent legal status accorded to coats of arms in New Zealand. There is some piecemeal protection given to certain official devices[24] and to the coats of arms of local bodies[25] but in general there is no automatic copyright or trademark protection given by the Crown of New Zealand to coats of arms. A sense of equity would demand that all lawful arms should be given equal protection, and in particular there would appear to be a moral duty to protect those which have been expensively granted with the advice and assistance of New Zealand Herald.[26]

Virtually all officially granted arms in New Zealand emanate from the United Kingdom,[27] and there is no central record maintained in New Zealand of heraldry in this country. The nation is officially mishandling and neglecting its heraldic heritage, and allowing a purely English institution (the College of Arms) to dominate an aspect of our national life and to obtrude its agent into State ceremonial here in what is in reality an affront to our national sovereignty.[28]

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22 G.D. Squibb, *op. cit.* 162-190.

23 On the other hand, section 684(1)(7) of the Local Government Act 1974 permits a local council to "Define the Coat of Arms of the council", so perhaps such assumed arms are beyond reproach, no matter how execrable their design.

24 Flags, Emblems, and Names Protection Act 1981.

25 Section 696 of Local Government Act 1974.

26 At 1 January 2000 the fees for a grant of arms and crest from the English Kings of Arms were £2,925 for an individual, £6,400 for an corporate body such as a city council, and £9,600 for a commercial firm, with additional fees for supporters and badges (http://www.college-of-arms.gov.uk/about/8.htm).

27 A handful of New Zealanders have been granted personal arms by the Chief Herald of the Republic of Ireland.

28 New Zealand Herald takes a prominent role in the State Opening of the New Zealand Parliament.

The remedy is not difficult and need not be expensive. The royal prerogative is probably not the best basis for creating a new body of law, and a preferable approach would be for the Parliament of New Zealand to pass an act to establish an heraldic executive for New Zealand, and to give legal protection to all officially recorded arms. Such an act would also be consistent with the present Government's policies concerning national identity and culture.

An heraldic executive for New Zealand need not be large; Scotland, with a population of five million, manages with two full-time officers of arms plus secretarial staff and contract artists, and such an arrangement would probably suit New Zealand too. A Chief Herald and a Registrar could be the two key officers. It would be important to have additional part-time or honorary heralds to act as regional representatives and advisers and to ensure that Maori and Pacific Island matters are given proper attention.

The Scottish and Canadian concept of a *public* register of arms is also essential.[29] New Zealand already has public registers of vital information (births, deaths, and marriages), land and company ownership, and trademarks, and a similar register of heraldic rights, maintained in this country, would make considerably more sense than a semi-private record in London.

The English law of arms is not part of New Zealand law. The English Kings of Arms have no jurisdiction here and, despite his title, New Zealand Herald is not a herald of New Zealand. Official heraldic practice in New Zealand is currently based on a fundamental misunderstanding of its legal and constitutional bases. It is anachronistically and improperly anglocentric and gives fitting service neither to the Crown of New Zealand nor to New Zealand citizens.

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[29] Scotland has maintained such a public register since 1672, and Canada since 1988.