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JAMES PRENDERGAST AND THE NEW ZEALAND PARLIAMENT: ISSUES IN THE LEGISLATIVE COUNCIL DURING THE 1860s

*Grant Morris**

During the mid to late 19th century, the New Zealand Legislative Council played an integral role in New Zealand's constitutional framework. One of the Council's most productive periods was during the 1860s. This paper analyses the Legislative Council by looking closely at the actions of one councillor, James Prendergast. The role of Attorney-General Prendergast in the Council during the 1860s provides insights into many of the important issues of the time including the New Zealand wars, Maori representation in Parliament, the debate over the provinces and the regulation of the legal profession. Studying Prendergast also highlights the fierce political rivalries of the time. Prendergast was an able councillor at a time when the Council provided a check on the power of the House of Representatives and acted as an influential forum for the discussion of major national issues.

I INTRODUCTION

The New Zealand Legislative Council was abolished in 1950. At that point in history, it had long been an anachronism. After the Liberal Party "stacked" the Council during the 1890s to guarantee the passage of controversial legislation, the Council ceased to play an integral role in New Zealand's constitutional framework. Before the 1890s, the Council was an effective check on the House of Representatives and a forum for important discussions. This paper analyses the Council's actions during one of its most productive periods, the 1860s. To make this task more manageable, the workings of the Council are analysed through the experience of one specific councillor, James Prendergast.

James Prendergast is primarily remembered for his contribution in two public roles, Attorney-General (1865–75) and Chief Justice (1875–99). Prendergast was appointed Attorney-General of New Zealand only three years after arriving in the colony and held that position

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for ten years. The nature of the position at that time was different from its nature in the present day. These differences directly affected the influence and actions of Prendergast while Attorney-General and Legislative Councillor.

For the first two years of Prendergast's career as Attorney-General, he was also a member of the Legislative Council. Prendergast's speeches and political movements during these two years provide insights into his political views and key historical issues that were occurring during the late 1860s and early 1870s. The issues facing the Legislative Council at this time included the Maori political representation, the New Zealand Wars and the regulation of the legal profession. Prendergast was also a pivotal figure in the controversial political debate pitting provincialists against centralists.

II THE RISE AND RISE OF JAMES PRENDERGAST

James Prendergast was born in London in 1826, the son of a leading Queen's Counsel. Prendergast trained as a lawyer and specialised in the area of special pleading. After the death of his father in 1859, Prendergast began to consider moving to the colonies to increase his career opportunities. In 1862, he arrived in Dunedin. Before taking up the position of Attorney-General in 1865, Prendergast had been in practise as a lawyer in Dunedin for three years.¹

With regard to many aspects of Prendergast's life and career, the secondary material available is contradictory and confusing. Terms such as "Solicitor-General" and "Attorney-General" become interchangeable, with little description provided as to what these roles entailed. At the beginning of 1865, Prendergast was practising as a lawyer in Dunedin and also filled the role of Crown Solicitor for Otago. On 8 July 1865, Prendergast became a member of the Legislative Council "representing" Otago.² Members for the Legislative Council were appointed by the Governor and Prendergast's appointment states that "he shall [hold] his seat therein for the term of his life subject to the provisions of the said Act contained for vacating the same." Prendergast was appointed by George Grey, who was empowered to "summon to the said Legislative Council from time to time such person or persons as he the said Sir George Grey shall deem to be prudent and discreet men."³ Grey's opinion of Prendergast was not so positive 10 years later when Prendergast aided the passing of the Abolition of the Provinces Act 1875.

1 Grant Morris *Chief Justice James Prendergast and the Administration of New Zealand Colonial Justice, 1862–1899* (PhD thesis, University of Waikato, 2001).

2 "Appointment" (8 July 1865) *New Zealand Gazette* Wellington 221; James Prendergast Papers, MS-Papers 730-B, Hocken Library, Dunedin.

3 "Appointment" (8 July 1865) *New Zealand Gazette* Wellington 221; James Prendergast Papers, MS-Papers 730-B, Hocken Library, Dunedin.

Prendergast's work as Crown Solicitor for Otago had brought him to the attention of politicians in Wellington, and Henry Sewell, the Attorney-General in Frederick Weld's 1865 ministry, arranged for Prendergast's appointment as Solicitor-General and Legislative Councillor. Henry Sewell was known for his fierce attacks on opponents in Parliament and he later referred to a ministry, of which Prendergast was a key part, as a group of "respectable dummies."⁴ When Weld's ministry fell soon after Prendergast's appointment, Sewell attempted to retain personal power by undermining Prendergast's position:⁵

[T]his discontented man who so craved power, offered his help by informing Stafford that Prendergast was not intending to continue in office as Solicitor-General after the session, 'and of course, by inference, who more fit than himself.'

Prendergast did not have the slightest intention of stepping down from his new position of influence and Sewell was not seriously considered as a minister in the government of his rival, Edward Stafford. Prendergast was intent on cementing his position in the New Zealand political and legal establishment, a position he would hold until his retirement in 1899.

III INTRODUCTION TO PRENDERGAST'S ROLE IN THE LEGISLATIVE COUNCIL AS ATTORNEY-GENERAL

In the New Zealand Parliamentary Debates, Prendergast is recorded as holding the post of Attorney-General from 20 October 1865.⁶ The Weld ministry ended on 16 October 1865, meaning that Prendergast took his post during Stafford's time as premier. Before 16 October, the Attorney-Generalship was held by Prendergast's benefactor, Sewell. The Stafford ministry of 1865 has been described in unflattering terms: "The Ministry he patched up was a strange one: Colonel A. H. Russell from Napier and James Prendergast, the Otago lawyer, both Legislative Councillors, Colonel Haultain from Auckland and James Paterson from Otago."⁷ One of the members of Stafford's ministry was John Hall, who would work closely with Prendergast in 1881 during the Parihaka invasion. Being a part of the New Zealand Parliament at that time also exposed Prendergast to other influential figures in his future career, including John Bryce, Donald McLean, Julius Vogel (whom Prendergast knew from Dunedin) and Frederick Whitaker.⁸

4 Raewyn Dalziel *Julius Vogel: Business Politician* (Oxford University Press, Auckland, 1986) 66.

5 Edmund Bohan *Edward Stafford: New Zealand's First Statesman* (Hazard Press, Christchurch, 1994) 211.

6 (20 October 1865) NZPD 607.

7 Dalziel, above n 4, 66.

8 See 1865–66 NZPD.

No Solicitor-General for Weld's ministry appears in the official records, and this may be explained by a contemporary report:⁹

In 1865 he [Prendergast] was, upon the suggestion of Mr. Sewell, invited to the Legislative Council, with a place in the Weld Administration, as Solicitor-General. He was sworn in as a member of the Upper House; but we believe that ere he took the oath of office as Solicitor-General, Mr. Weld resigned. Mr. Stafford succeeded Mr. Weld, and one of his first overtures was to Mr. Prendergast to become Attorney-General. This offer he accepted, and the appointment was formally announced on the 20th October, 1865.

Yet in a parliamentary debate on 25 August 1865, Prendergast is referred to as the Solicitor-General.¹⁰ Therefore, it is unclear whether Prendergast ever actually served as Solicitor-General, though it is certain that he replaced Sewell as Attorney-General three months after joining the Legislative Council.

Prendergast served as political Attorney-General for only two years. In 1866, the Attorney-General's Act was passed, making the post non-political (outside parliament) and vested with life tenure. This Act came into effect in March 1867, resulting in Prendergast leaving his seat in the Legislative Council and giving up his Dunedin practice and position as Crown Solicitor of Otago. Prendergast's brief career as a "politician" was at an end, but his influence in Wellington's power elite would continue to grow. In offering Prendergast the permanent position in 1866, Stafford suggested an annual salary of 1200 pounds and assistance with removal costs from Dunedin to Wellington. Stafford was intent on a fast process: "I have to request that you will come to Wellington as soon as possible."¹¹ Stafford also offered Prendergast the first "vacancy occurring in the office of Judge of the Supreme Court in the Colony."¹² Prendergast was unsure about Stafford's ability to bind future governments, and, sure enough, in 1870 William Fox qualified Stafford's earlier statement:¹³

The late Government [Stafford's] seems to have exceeded its power in attempting to bind a future Government ... But ... the present Government will be prepared to offer to you the first puisne judgeship which may fall vacant during your tenancy of the non-political office of Attorney-General, and their own tenure of office as a Ministry. In case of the Chief Justiceship falling vacant, the Government would hold itself free from all previous pledges.

9 Colonial Law Journal 1865-75, Part 2, 25-26.

10 Julius Vogel (25 August 1865) NZPD 354.

11 "Correspondence relative to the appointment of the present Attorney-General" (1870) AJHR D-32.

12 "Correspondence relative to the appointment of the present Attorney-General", above n 11.

13 "Correspondence relative to the appointment of the present Attorney-General", above n 11.

The Chief Justiceship was one of the several judicial positions to fall vacant in 1875. By this stage, Vogel had replaced Fox and offered Prendergast the coveted position of head of the judiciary.

Prendergast was not impressed with the frenetic and ever-changing nature of the Attorney-Generalship. On 3 October 1866, during the passage of the Attorney-General's Bill, Prendergast wrote a detailed opinion on the matter to the Colonial Secretary. Prendergast argued that the Bill should remain in its present shape, "with an amendment excluding the officer only from the House of Representatives, and also, I am disposed to think from practising as a Solicitor, except in Crown business. I think the chief permanent officer should be termed Attorney General."¹⁴ Prendergast also argued for the creation of a new political position, one suitable for non-practising lawyers, such as Sewell or Fox: "These persons would more properly hold an office to be termed "Minister of Justice".¹⁵

Prendergast's seat in the Legislative Council, which would be taken away by the Act, was very dear to the ambitious lawyer: "I do not think it necessary to exclude the officer from the Legislative Council. In all Acts of the Imperial Parliament applying to permanent officers the officers are excluded only from the House of Commons."¹⁶ The successful Dunedin practice held by Prendergast would also be lost under the new Act, with Prendergast reluctant to experience a drop in income:¹⁷

[T]he officer should be excluded from practising as a Solicitor except for the Crown, but not as a Barrister ... as the salary allotted is insufficient to remunerate such a person as ought to fill the office, he ought to conduct the Crown Prosecutions in Wellington and be paid in addition for that.

Prendergast argued for a more secure and lucrative political office, but most of his suggestions were not accepted.

Prendergast's position as Attorney-General was akin to the present role of Solicitor-General, and, with Hart, the Assistant Law Officer, they effectively comprised the "Crown Law Office". The office was called by the rather confusing title "the Judicial Branch of the Colonial Secretary's Office" but changed to the "Department of Justice" in 1872 under the control of a new Minister of Justice. By this time, the lack of legal expertise in Parliament which led to the need for a permanent Attorney-General was not so apparent. Calls were

14 James Prendergast to the Colonial Secretary (3 October 1866) Letter AG 67/3311, National Archives, Wellington.

15 James Prendergast to the Colonial Secretary (3 October 1866) Letter, above n 14.

16 James Prendergast to the Colonial Secretary (3 October 1866) Letter, above n 14.

17 James Prendergast to the Colonial Secretary (3 October 1866) Letter, above n 14.

made for the disestablishment of the non-political post of Attorney-General. The problem was resolved when Prendergast moved to the Bench in 1875. One year later, the Attorney-General Act 1876 was passed, again making the position political as it is to this day.¹⁸

While Prendergast was appointed to the Legislative Council in July 1865, it seems that he did not become part of a ministry until appointed Attorney-General in Stafford's ministry during August 1865. New Zealand politics from the time of responsible government in 1856, to the Liberal's victory in 1891, was fluid, ever-changing and based more on personality and local interests than party loyalty.¹⁹ Parliamentary politics during this period were markedly different to that of more recent times.²⁰ The "first" Premier of New Zealand was Sewell, whose office lasted only a few weeks, during 1856. From 1856 to 1861, the Premier was Edward Stafford, who must rank as New Zealand's most powerful Parliamentary politician from 1856 to the early 1870s, at which point Vogel began to dominate Parliament.²¹ Beyond Parliament was the important figure of Governor George Grey, who eventually entered Parliament as a member in the 1870s. The New Zealand Wars which raged throughout the early 1860s saw a succession of brief Ministries led by William Fox, Alfred Domett, Frederick Whitaker and Frederick Weld. It was Weld's ministry of 24 November 1864 to 16 October 1865²² that provided Prendergast with his political opening.

When Weld's ministry collapsed on 16 October 1865, Edward Stafford, with experience and influence, was the obvious choice for Premier. Stafford's ministry of relatively unknown politicians lasted until 28 June 1869, an impressive length by the standards of mid to late 19th century New Zealand politics. Prendergast owed his newly-founded position of power to Henry Sewell and Edward Stafford, but he eventually angered both men. Sewell, as mentioned earlier, hoped to serve as Stafford's Attorney-General in place of Prendergast. By enabling Prendergast's rise to power, Sewell effectively created a rival who would replace him, though it could be argued that Stafford would never have desired Sewell in his ministry in any case.

18 Information in Justice Department Records Finding Aid, National Archives, Wellington.

19 Raewyn Dalziel "The Politics of Settlement" in Geoffrey W Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 87-111.

20 For more information on the world of Parliament during this period (in particular, the House of Representatives), see the recent publication, John E Martin *The House: New Zealand's House of Representatives 1854-2004* (Dunmore Press, Palmerston North, 2004).

21 See Bohan, above n 5.

22 W David McIntyre and W J Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 468.

Prendergast's relationship with Stafford was harmonious until Stafford lost power in 1869. Stafford was pleased with his choice as Attorney-General, "who, although new, 'has won golden opinions from all who have come in contact with him', and his legal opinions were received with a respect and influence which Sewell never could acquire."²³ But in 1869, Stafford attempted to obtain the house currently occupied by the Governor. Stafford had leased the house as Colonial Secretary but was now demanding it as a private citizen.²⁴

He [Fox] would get the Attorney General [Prendergast] to scrutinize the lease and other papers. The comedy lasted a fortnight. Attorney General Prendergast ruled that Stafford had signed the lease as Colonial Secretary and had no rights as a private citizen to claim Clifford's house from the Governor ... Stafford finally refused to accept the Attorney General's ruling ... He was patently in the wrong.

The matter was laid before both Houses of the General Assembly in a battle of wills between Fox and Stafford.²⁵ As non-political Attorney-General, Prendergast was in the difficult position of having to be totally neutral. His opinion was brief and blunt, Stafford was totally in the wrong.²⁶ While in situations such as the invasion of Parihaka in 1881, Prendergast provided strong support for dubious political action,²⁷ the Stafford incident demonstrates political integrity with Prendergast willing to risk offending a powerful leader who was attempting to abuse his power.

New Zealand politics during the late 19th century did not feature obvious political parties or labels such as "conservative" and "liberal". During 1865–69, when Prendergast served in the Stafford ministry, a key debate was "centralism" versus "provincialism". The capital city had been transferred from Auckland to Wellington in 1865 and moves were afoot to dismantle the provincial system set up by Grey's 1852 Constitution. Wellington, as the most central New Zealand city, was the perfect site for a central government. Stafford was an outspoken centrist, and Prendergast's speeches in the Legislative Council reveal him to be a supporter of strong central government. During the early days of Prendergast's Attorney-Generalship, New Zealand was recovering from the wars between Maori and Pakeha based in the Taranaki and Waikato regions. While armed resistance continued from groups such as the Hauhau, Te Kooti and Titokowaru, the open warfare period was at an end by 1865 and Maori were suffering under the weight of drastic land confiscations.

23 Bohan, above n 5, 212.

24 Bohan, above n 5, 291–292.

25 "Papers Relative to Occupation of Ministerial Residences" [1869] I AJHR D-26.

26 "Papers Relative to Occupation of Ministerial Residences", above n 25, 9.

27 Prendergast authorised the invasion of Parihaka while acting as Administrator of New Zealand during the temporary absence of Governor Gordon.

During the latter half of Prendergast's term as Attorney-General, the borrowing schemes of Julius Vogel dominated the political scene. Vast amounts of overseas money was borrowed to finance the immigration and large-scale building of a national infrastructure. The early 1870s were a boom time for New Zealand settler society and during this period Prendergast finally cemented his position of power by "rising" from Attorney-General to Chief Justice. Prendergast's beginnings in Wellington though, were relatively reserved and restrained.

In 1865, the government ministry consisted of seven portfolios: Premier, Colonial Secretary, Colonial Treasurer, Attorney-General, Postmaster-General, Minister for Colonial Defence and Minister for Native Affairs. In Stafford's ministry, Prendergast took the position of Attorney-General, while Theodore Haultain received Colonial Defence and Andrew Russell, Native Affairs. Stafford took the other four portfolios, an impressive achievement for one man. Prendergast was a new and little-known political quantity, in a ministry dominated completely by Edward Stafford. In the fast-moving world of 19th century New Zealand politics, ministers were rapidly appointed, rapidly replaced, and often appointed again soon after. By late August 1866, the Stafford ministry was almost completely changed, but Prendergast remained. A new appointment, James Crowe Richmond as Commissioner of Customs, further strengthened Prendergast's connection with the Richmond-Atkinson families and the conservative elements in New Zealand politics. As Chief Justice, Prendergast would be a close and loyal ally of Richmond's elder brother, Christopher William.

IV PRENDERGAST AS LEGISLATIVE COUNCILLOR

Prendergast's service as a Legislative Councillor lasted from July 1865 to October 1866. Prendergast was considered by several commentators to be a poor public speaker²⁸ and did not distinguish himself as a political orator. But his speeches in the Council were succinct and lucid, and generally treated with respect by his peers. Most 19th century New Zealand politicians were effectively "part-timers" with other occupations and independent incomes. This meant that Parliament could only sit for part of the year as the rest of the time was needed to attend to private business interests. The Parliamentary term began in late June and ended in early October, a period of little more than three months. During the 1865 term, Prendergast delivered nine recorded speeches and, during the 1866 term, 15 recorded speeches.²⁹ Most of Prendergast's speeches were legal comments on legislation under consideration. This legislation ranged from land issues to Parliamentary dissolution to codification of the criminal law. By analysing the New Zealand Parliamentary Debates of 1865–66, the nature of Prendergast's political involvement can be gauged.

28 For example, William Gisborne *New Zealand Rulers and Statesmen from 1840 to 1897* (Sampson Law, London, 1897).

29 See 1865–66 NZPD.

A *Maori Issues*

The first recorded parliamentary speech made by the Honourable James Prendergast, Otago, was on 1 August 1865, approximately one month after entering the Council. James Crowe Richmond, Colonial Secretary and younger brother of Richmond J, opened the debate, which concerned Maori representation in Parliament. After outlining the Weld ministry's achievements up to August 1865, Richmond introduced the issue of Maori representation, arguing that his ministry fully supported it:³⁰

[T]he present movement was a corollary to the Native Lands Act. The two were essentially the abandonment of the system of protectorate, or dry-nursing. The Colonial and Home Governments confessed alike that they had failed. They were throwing the Maori on the world to take his lot with other subjects, and they must remove all disabilities ... [T]here was certainly a sense of wrong existing in their minds which we should remove. Now was the time, when we were getting the upper hand of them, to do it, and thus show them that we had none but friendly intentions towards them.

James Menzies, from Southland, took a less approving view of Maori enfranchisement:³¹

[H]e saw very grave objections to the passing of any clause which would provide any different qualification for Maori electors or members from that of the European population. He apprehended that it was absolutely necessary for us to maintain a power over the Maoris. They had but a very imperfect acquaintance with our laws, and paid but an extremely imperfect obedience to them.

Another South Islander, Henry Tancred, believed Maori would be more effectively represented by their own political structure:³²

He wished to give the Natives a voice, but was opposed to so far amalgamating the two races as to allow them a seat in Parliament. Everybody must recognize that the Maoris and the Europeans were two distinct races, and therefore he thought that the only system would be to organize the former as a separate body, and not have half the House composed of Natives and the other half of Europeans.

Prendergast stated simply:³³

30 J C Richmond (1 August 1865) 1864–66 NZPD 206–207.

31 J Menzies (1 August 1865) 1864–66 NZPD 206–207.

32 H Tancred (1 August 1865) 1864–66 NZPD 207.

33 Hon J Prendergast (1 August 1865) 1864–66 NZPD 208.

[T]here could be no doubt that, in the minds of all our friends at Home, the Natives have an inborn right, as British subjects, to the privileges of this country ... the Natives, who were the largest landholders in the colony, and he considered it was unjust that they should exist under such disabilities.

Prendergast argued that Maori should have parliamentary representation, a view that appears at odds with his general disparaging attitude towards the Maori. His argument that Maori were British subjects corresponds with Article Three of the Treaty of Waitangi.

B The New Zealand Wars

On 28 August 1866, the New Zealand Wars dominated debate in the Legislative Council. An Indemnity Bill, drawn up by Prendergast was about to have its second reading. When passed, the long title of the Act read: "An Act for indemnifying persons acting in the suppression of the Native Insurrection."³⁴ Walter Mantell, an outspoken supporter of Maori, attempted to prevent the second reading, arguing that the Bill was poorly written and that Parliament should not protect leading military leaders such as Major-General Chute and Colonel Whitmore from answering for their actions during the Wanganui expedition. Mantell cited a list of accusations against the British army:³⁵

[F]riendly Natives being pillaged of their horses, which were afterwards sold at Taranaki; the forcing of a number of friendly Natives to act as guides, and marching them in front of the column without arms and without rations, to attack their own friends ... a spear which was taken from the body of a chief, and which a soldier - to use the language of the letter accompanying the gift - "had pierced through fifteen dead Maori bodies, to be certain that life was quite extinct."

The ex-military officers residing in the Legislative Council leapt to the defence of the British Army, including Major Coote, Colonel Whitmore, Colonel Peacocke and Colonel Russell. Whitmore argued that the abuse of "friendly Natives" was unavoidable:³⁶

It was difficult to distinguish a friendly from a hostile Native: his (Colonel Whitmore's) experience had taught him that most Natives were enemies when possible, and many friends when they dared not be enemies. At any rate, it was so in India and the Cape of Good Hope.

Prendergast also defended his legislation but refused to comment on the "[n]ative part of the Hon. Mr. Mantell's argument, but at what he thought he had wished to be considered the funny part."³⁷ Many of Prendergast's speeches in the Legislative Council displayed an

34 Indemnity Act 1866. This Act was later repealed and replaced by the Indemnity Act 1868.

35 Walter Mantell (28 August 1866) 1864-66 NZPD 901.

36 Colonel Whitmore (28 August 1866) 1864-66 NZPD 901.

37 Hon J Prendergast (28 August 1866) 1864-66 NZPD 902.

avoidance of controversy and support of the majority. Prendergast continued and taunted Mantell, challenging him to write a better piece of legislation if he could. Mantell was unsuccessful in his bid to prevent the Bill from passing.

Two days later, Mantell sought revenge for Prendergast's dismissive treatment of his views. After Prendergast moved to introduce the Innkeeper's Liability Bill based on a recent Imperial Act, Mantell criticised Prendergast's speech, the only voice raised against it.³⁸ Mantell continued to upset the Council with his calls for justice regarding Maori. On 18 September 1866, Prendergast sided with the conservative majority in Council to question Mantell's inquiry into the legitimacy of certain Crown grants.³⁹ Prendergast, along with other Councillors such as Alfred Domett and Colonel Whitmore, repeatedly found himself in opposition to Mantell.⁴⁰ Prendergast was not always successful in his challenges to Mantell. On 5 October 1866, Mantell successfully moved to decline entertaining any more Bills for that session, other than those introduced by the Colonial government. Prendergast protested vehemently, but the Hon Dr Menzies "thought that the objection of the Hon. the Attorney-General had no weight with it".⁴¹ The Council agreed.

C English Law

As a representative of Otago, Prendergast was closely connected with the gold-rush of the 1860s. On 7 August 1865, James Crowe Richmond moved the second reading of the Goldfields Acts Amendment Bill. During the discussion in the Legislative Council, Prendergast supplied legal advice.⁴² His three years of experience as an Otago lawyer had provided Prendergast with a comprehensive knowledge of mining law. The main focus of the debate was land use and ownership, a major issue during 19th century New Zealand history. The following debate focused upon the Leases and Sales of Settled Estates Bill. Prendergast was responsible for this Bill as Attorney-General and had based it completely on an English model.⁴³

The Bill he was now asking them to read a second time was a transcript of a Bill introduced in the House of Lords by Lord Cranworth ... The Council might rely on it that the Bill was as perfect as legal skill could make it ... Bill read a second time, and passed through all its remaining stages without amendment.

38 (30 August 1866) 1864–66 NZPD 909.

39 Hon J Prendergast (18 September 1866) 1864–66 NZPD 974.

40 Hon J Prendergast (18 September 1866) 1864–66 NZPD 974, Marine Board Debate.

41 Hon Dr Menzies (5 October 1866) 1864–66 NZPD 1043.

42 Hon J Prendergast (7 August 1865) 1864–66 NZPD 255.

43 Hon J Prendergast (7 August 1865) 1864–66 NZPD 255.

The successful passing of this Bill demonstrated Prendergast's heavy reliance upon English statute law and the faith shown in him by the Council. Prendergast later demonstrated this reliance on English law in his judgments as Chief Justice from 1875 to 1899.⁴⁴

Prendergast had only been in New Zealand for three years before rising to the position of Attorney-General. This meant that he had more recent experience with English legal developments than many other politician-lawyers such as Henry Sewell or William Fox, who had been in New Zealand since the earlier days of settlement. When introducing the Printing and Publishing Regulation Bill on 22 August 1865, Prendergast again referred to English legislative precedents, "stating that a number of provisions with respect to publishing existed in England, but it was doubtful whether the law was in force in the colony."⁴⁵

D Provincial Issues

An interesting debate took place in the Legislative Council on 10 October 1865, only six days before the collapse of the Weld ministry. John Hall of Canterbury, who in later times would work with Prendergast to destroy Parihaka, introduced a motion to increase the customs revenue of Canterbury, without the same provision for any of the other provinces.⁴⁶ Several of the Councillors, including Prendergast, spoke against Hall's motion, arguing that its provincial bias would undermine "equality" between the different provinces. The provincial debate was still very much at the centre of New Zealand political discussion in 1865 and "pork-barrel" politics were common. Prendergast often sided with the majority view in the Council, which did no harm to his support network and future career opportunities. If he did disagree with an influential figure, such as John Hall, he always used moderate and non-confrontational language.

One of the most controversial political issues of the mid-1860s was the location of the nation's capital. In 1864, it was decided that Wellington should be the seat of government. The Wellington members of the Legislative Council spoke in support of retaining their home as the permanent capital. Prendergast, who would soon shift his geographic allegiance from Dunedin to Wellington, supported them. Dr Menzies stated the case for Wellington:⁴⁷

He could not see, geographically speaking, that any advantage could arise if the next session of the Assembly were held in any other part of the colony. Wellington, being central, possessed many advantages over any of the other cities, and its communication with other places was more regular and frequent.

⁴⁴ See Morris, above n 1, ch 6.

⁴⁵ Hon J Prendergast (22 August 1865) 1864-66 NZPD 333.

⁴⁶ J Hall MP (10 October 1865) 1864-66 NZPD 667.

⁴⁷ Hon Dr Menzies (3 October 1866) 1864-66 NZPD 1029.

Colonel Peacocke of Auckland disagreed with Menzies, demonstrating the Auckland-Wellington rivalry which has permeated New Zealand's history over the last 150 years. Peacocke's argument was rebutted by Mantell, another Wellingtonian. Prendergast stated that the matter was one for the Governor alone but "proceeded to speak of the expense and inconvenience that would be felt by a removal of the Legislature".⁴⁸ Wellington's political dominance was becoming difficult to challenge and the Council supported the Wellingtonians (six out of 35). This debate demonstrated the continuing tension over movement towards centralisation, supported by Prendergast and his premier, Stafford.

E Parliamentary Dissolution

On 25 and 26 October 1865, the Legislative Council faced the issue of parliamentary dissolution. On 16 October, Weld's ministry had fallen. It was replaced by a ministry led by Stafford. Weld's supporters were outraged and prepared to make Stafford's position as difficult as possible. A rumour circulated that Stafford had secretly met with Governor Grey and obtained a promise that Parliament would be dissolved even if Parliament refused supplies to Stafford. Stafford desired a dissolution to allow him to seek an election to secure his position. The Legislative Council, led by Tancred, moved the adoption of an address to the Governor seeking clarification on the controversy.⁴⁹ Prendergast was unsure about the course of action proposed by the Council. The evidence was insufficient and lacked credibility:⁵⁰

[H]e had already expressed his opinion that this taking notice of an unknown document was a highly improper course to take ... His Excellency himself was perfectly aware whether or not he had made this promise to Mr. Stafford. If this statement affected any place it affected the other branch of the Legislature[.]

In this case, Prendergast spoke out unsuccessfully against the majority of the Council and supported Stafford in his actions. Stafford had only ten days earlier "promoted" Prendergast to the position of Attorney-General. Prendergast's reasoning was that the Council's actions were effectively *ultra vires*. This dismissal of an issue on the basis of lack of jurisdiction would also be used in *Wi Parata v Bishop of Wellington*,⁵¹ when Prendergast claimed that the courts had no ability to question dealings of the Crown.

Unlike Stafford, Frederick Weld was widely considered a man of honour and integrity and his fall from power caused great consternation in Parliament. Although Prendergast was a member of his ministry, he owed his position to Sewell's influence. Stafford was treated with

48 Hon J Prendergast (3 October 1866) 1864-66 NZPD 1030.

49 Hon H Tancred (26 October) 1864-66 NZPD 720.

50 Hon J Prendergast (26 October 1866) 1864-66 NZPD 721.

51 (1877) 3 NZ Jur (NS) 72 (SC).

suspicion by many of his parliamentary colleagues and was often the subject of controversy. The Weldites were convinced that Stafford:⁵²

... had done a deal with Grey. The two Machiavellis had outwitted the virtuous men ... The Legislative Council, restrained in tone but committed in its corporate hostility to Stafford, asked Grey, firmly but politely, for a reconciliation between Stafford's denial that he had asked for a dissolution and Pharazyn's statement. Grey replied that it was up to the Government to make whatever statement it thought fit.

F Legislation

The 1866 session of parliament (first session of the fourth Parliament) began on 30 June 1866 and ended on 8 October 1866. This was to be Prendergast's second and last year as a colonial politician. On 4 July, Prendergast was appointed to the Select Committee for Standing Orders, along with leading Councillors such as Alfred Domett.⁵³ Prendergast's central role in the Council during his two years of service was to introduce and give advice upon new legislation. For example, during the first month of the 1866 session, Prendergast introduced the Legislative Council Limitation Bill and amended the Offences Against the Person Bill.⁵⁴ The Bill to limit the number of councillors could have been proposed to retain the select and elite nature of the Upper House.

Prendergast's key contribution to New Zealand statute law was his introduction, improvement and codification of criminal law. The Offences Against the Person Act 1867 was one example of a range of criminal statutes introduced while Prendergast was "political" Attorney-General. Others included the Accessories Act 1867, Affirmation in Lieu of Oaths in Criminal Proceedings Act 1866, Coinage Offences Act 1867, Criminal Law Procedure Act 1866, Forgery Act 1867, Indictable Offences Trials Act 1866, Indictable Offences Repeal Act 1867, Introduction of Convicts Prevention Act 1867, Larceny Act 1867, Malicious Injury to Property Act 1867, Neglected and Criminal Children Act 1867 and the Vagrancy Act 1866.

G Jurors

Certain legal issues that dominated discussion in 19th century New Zealand have remained contentious issues to this day. An apposite example is the payment of jurors. In 1866, common jurymen (as opposed to special jurors) received no compensation for their services and, as Colonel Peacocke explained:⁵⁵

52 Bohan, above n 5, 207, 213.

53 Hon J Prendergast (4 July 1866) 1864-66 NZPD 753.

54 Hon J Prendergast (19 July 1866) 1864-66 NZPD 786.

55 Hon Colonel Peacocke (7 September 1866) 1864-66 NZPD 930.

He had been induced to bring the matter forward from personal observation of the hardships which poor men and their families were subjected to through being compelled to attend the Supreme Court at the sacrifice of their time, which was their daily bread.

Peacocke cited Victoria as a colonial example where this issue had been addressed. Robert Stokes countered the Victorian example with a more binding precedent, that of English law:⁵⁶

Certainly common jurymen were not paid in England; and, as the New Zealand Legislature took the laws of that country for their model, they should be cautious, particularly when they were told on every hand that peculiar economy was required. It appeared to him that citizens owed to their country a duty which they were bound to discharge.

The opportunity cost for common jurors was much higher in 1865 than the present day, for employers would not continue paying wages. Prendergast showed interest in the plight of the common jurymen: "For his own part, he did not see why special jurors should be paid a guinea a day while common jurymen received nothing."⁵⁷

H The Legal Profession

Prendergast also looked out for the interests of the legal profession, both advocates and adjudicators, while Attorney-General. In a Council debate on 15 August 1866, Prendergast disagreed with John Acland's motion to have private Bills first brought before the Supreme Court and then to the Legislature. Colonel Whitmore asked the Attorney-General for advice and Prendergast stated that he:⁵⁸

... was not in favour of this course. The Council should consider the matter thoroughly before they referred to the Judges a work which had generally been performed by the Legislature ... [T]here was no power in the Council to insist upon an answer from the Judges, but he could not conceive that any of the Judges would refuse to give their opinion when asked.

One of Prendergast's most important pieces of legislation was the Law Practitioners Amendment Act. The Act, passed on 8 October 1866, ensured that:⁵⁹

No person who has or shall have been convicted in any part of the British dominions of forgery or perjury or subornation of perjury shall be enrolled or admitted to practice or shall practice as a Barrister or Solicitor in New Zealand.

56 Hon R Stokes (7 September 1866) 1864-66 NZPD 931.

57 Hon J Prendergast (7 September 1866) 1864-66 NZPD 931.

58 Hon J Prendergast (15 August 1866) 1864-66 NZPD 883.

59 Law Practitioners Amendment Act 1866, s 3.

The regulation of the legal profession was vital to protect the public and the integrity of the profession. In a Council debate on 7 September 1866, Prendergast successfully argued that the words "or any felony" should be left out of Section 3 of the Act. By rejecting a wider net, Prendergast was able to regulate the profession while reducing parliamentary control over admission of lawyers in New Zealand.

Prendergast's approach in the Legislative Council was pragmatic, formal and logical. His arguments, like his judgments, reflected a commitment to justice and law rather than to mercy and emotion. In the debate over the Crown Lands Sales Extortion Prevention Bill, Prendergast took a typically hard-line attitude: "[H]e thought the person paying the money ought to be equally liable with the extortioner. The object of the Legislature was not in this matter to protect individuals, but to prevent frauds on the revenue."⁶⁰ Prendergast showed little patience with colleagues who did not devote themselves entirely to their public duties. On 20 September 1866, Prendergast successfully argued against a leave of absence for George Lee on the basis that there were already fifteen members of the thirty-five strong Council absent.⁶¹ It is clear that Prendergast believed the role of the Legislative Council was of great importance in the New Zealand constitutional framework.

V CONCLUSION

While Prendergast's performance as a Legislative Councillor (1865–66) was sound, his main achievement in this role was providing helpful legal advice, rather than political leadership. Prendergast knew the importance of good connections, but did not owe his rise to power to any one man. Sewell, Stafford and Vogel all supported Prendergast at key moments in his career. Essentially, it was Prendergast's skills and support of the governing elite that guaranteed his success. While Prendergast did speak out on unpopular issues, for example, Stafford's accommodation in 1869, his support was often with the powerful majority. With the exception of Maori issues, Prendergast was a patient and reasoned Councillor and Attorney-General.

While often following English developments, Prendergast was occasionally willing to argue for an independent path, for example, during the debate on paying common jurors. Prendergast played many roles as "political" Attorney-General including being a member of the executive, councillor, legal advisor and leader of the legal profession. During Council debates (such as the debate on regulating the legal profession), Prendergast was sometimes forced to play several roles simultaneously.

60 Hon J Prendergast (18 September 1866) 1864–66 NZPD 974–975.

61 Hon J Prendergast (20 September 1866) 1864–66 NZPD 984.

The period 1865 to 1875 was pivotal in New Zealand's history. These ten years were vital in forming Prendergast's political perspective in relation to New Zealand issues. Prendergast's views on leading issues can be gauged by his actions as Attorney-General and Legislative Councillor. Prendergast was a centralist, supporting the concentration of power in Wellington. He was also outspoken in his views on the New Zealand Wars. The key issues of the late 1860s were argued in the Legislative Council and by studying the New Zealand Parliamentary Debates the diverse range of views held by councillors can be seen. When the Legislative Council was abolished in 1950, it was a shadow of its former self, but during the 1860s it was an integral part of the colonial constitutional structure. While the Legislative Councillors were an elite group of men, they echoed the concerns of important sectors of colonial New Zealand, for example, farming and business interests.

James Prendergast achieved success as Attorney-General. This success enabled Prendergast to take the position of Chief Justice in 1875. Through legal talent, good connections and sheer hard work, Prendergast rose to the pinnacle of the New Zealand legal profession. By 1875, he had successfully cemented his place amongst the New Zealand elite. Prendergast's efforts in the Legislative Council contributed to this success.

