

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

O.A. NO. 1/13

IN THE MATTER of Article 64(1) of the Cook Islands
Constitution (Bill of Rights); and
the Electoral Amendment Act 2007; and the
Incorporated Societies Act 1994; and the
Declaratory Judgments Act 1994

AND

IN THE MATTER of an Application for a declaratory judgment
on the validity of the Cook Islands Electoral
Amendment 2007 against the Bill of Rights
provisions of the Constitution; and

an Application for a declaratory judgment
against the unfair withholding of resignation
from the Cook Islands Party Inc.

BETWEEN

NORMAN GEORGE, Member of
Parliament for the Teenui-Mapumai
Constituency, Atiu

Applicant

AND

ATTORNEY-GENERAL Government of
the Cook Islands, Avarua, Rarotonga

First Respondent

AND

RAU NGA as President and **TEMU
OKOTAI** as General Secretary of the Cook
Islands Party Incorporated

Second Respondents

Hearing: 22 July 2013

Counsel: Mr N George, Applicant, in person
Ms C Evans for First Respondent
Mrs T Browne for Second Respondents

Judgment: August 2013

RESERVED JUDGMENT OF HUGH WILLIAMS J¹

- A. The Court holds that, in the abstract, there appears to be room for declarations of incompatibility or inconsistency between the terms of the Electoral Amendment Act 2007 and the freedom of speech and expression in Article 64(1)(e) of the Constitution or, alternatively, there is a basis for a declaration that the Electoral Amendment Act 2007 is inoperative but,**

¹ At the commencement of the hearing the Judge advised counsel that he chairs the New Zealand Electoral Commission. No counsel objected to Hugh Williams J hearing the matter.

other than that, the application for declaratory judgments is dismissed for lack of a factual matrix to which those declarations might apply.

B. Costs are to be dealt with in accordance with [119]- [121] of this Judgment.

PRELIMINARY

[1] The intituling to this Judgment is taken from the Application for Declaratory Judgments filed on 8 February 2013², by Mr George, a member of the Cook Islands Parliament.

[2] The intituling remains erroneous because:

- a) this case involves the Constitution and the Electoral Amendment Act 2007 (“2007 Amendment”) and should always have only been between Mr George and the Attorney-General.
- b) No relief was sought – or, in this case, could be sought – against the Cook Islands Party Inc (“CIP”) or its officials; the proceeding should have been discontinued against them. That would have relieved the CIP and the Second Respondents from being put to the cost of defending the proceedings.
- c) The reference to the Incorporated Societies Act 1908 – not 1994³ – and the Applicant’s claimed resignation from the CIP should similarly have been omitted: that Act and that purported resignation were not engaged in this case.
- d) Mr George also suggested in a memorandum filed with his Originating Application - apparently triggered by the proximity of a budget debate - that the entire proceeding could be determined on the papers. This matter is complex and important. It was wholly

² amended by Minute of this Court dated 19 March 2013 to substitute references to this Court on all documents filed after that date for references to the Court of Appeal on all documents filed before that date

³ the Declaratory Judgments Act is also 1908, not 1994

unrealistic to suggest it could be determined on the papers without the assistance of oral argument.

[3] However, as the intituling indicates and as will be discussed later in this judgment, the thrust of the application is for a declaration that the 2007 Amendment is invalid.

[4] Details of the 2007 Amendment are considered later in this judgment but, for these preliminary purposes, it needs to be noted that it came into force on 15 August 2007; the occasion for the implementation of the procedure it prescribes has not yet been triggered and, for the reasons later discussed, may never be triggered⁴, whether in relation to the Applicant or any other Member of Parliament (“MP”). Thus, as remarked during the hearing, the application is for a declaratory judgment in a vacuum. That, as will appear, is an important caveat.

[5] The role of Courts, both generally and in relation to proceedings under the Declaratory Judgments Act 1908, is to adjudicate on legal questions and apply the law as so found to existing, pleaded disputes as to facts. Courts’ roles do not include the giving of legal opinions in the abstract and in the absence of a factual dispute to which the law can be applied.

[6] It would therefore have been open to the Court to decline to hear this application as there was no evidence of any factual dispute to which the law, as found, could be applied. But, as no party sought that result, the Court proceeds to deal with the application as best it can. However, given the wide spectrum of factual disputes which might, one day, trigger the operation of the 2007 Amendment, there can be no guarantee that the findings in this Judgment will necessarily apply to whatever future dispute may arise.

ELECTORAL AMENDMENT ACT 2007

[7] The 2007 Amendment inserted a new Part 9A into the Electoral Act 2004. Under the heading “Party Integrity”, it consists of sections 105A-D.

⁴ other than possibly because Parliament debates the budget annually

[8] Section 105A first defines “issue of confidence” in the following terms:

- “(a) an expression of no confidence in Cabinet under Article 14(3)(b) of the Constitution;
- (b) an issue which the Prime Minister has declared to be an issue of confidence under Article 14(3)(b) of the Constitution;
- (c) the provision of supply by way of appropriation;”

and “political party for which the member of Parliament was elected” as the “political party appearing as required by section 45(7) [of the principal Act] against the name of the member in the nomination paper” nominating the member as a candidate at his or her election.”

[9] Sections 105B and C then read:

105B. Consequence of member ceasing to support political party - The seat of a member, other than a member elected as independent, shall become vacant if

- (a) upon a vote in Parliament on an issue of confidence, the member fails to support the majority of the parliamentary members of the political party for which the member was elected; and
- (b) the parliamentary leader of that political party delivers to the Speaker a written notice that complies with section 105C.

105C. Notice from parliamentary leader of party - A written notice under section 105B(b) must -

- (a) be signed by the parliamentary leader of the political party for which the member who is the subject of the notice was elected and by not less than two-thirds of the parliamentary members (inclusive of the leader) of that political party; and
- (b) be addressed to the Speaker; and
- (c) be accompanied by a statement that complies with section 105D.

[10] Section 105D states:

105D. Form of statement to be made by parliamentary leader - The statement referred to in section 105C(c) must be in writing and signed by the parliamentary leader concerned and by not less than two-thirds of the parliamentary members of that political party, and must -

- (a) state that the member concerned has failed upon a vote in Parliament on an issue of confidence, to support the majority view of the parliamentary members of the political party for which the member was elected and that the parliamentary leader has delivered to the member concerned, written notice -

- (i) informing the member that the parliamentary leader considers that section 105B(a) applies to the member and the reasons for that opinion; and
- (ii) advising the member that he or she has 7 working days from the date of receiving the notice to respond to the matters raised in the notice by notice in writing addressed to the parliamentary leader; and
- (b) state that, after consideration of the conduct of the member and his or her response (if any) by the parliamentary members of the political party for which the member was elected, the parliamentary leader of that party confirms that not less than two-thirds of the parliamentary members (inclusive of the leader) of the party have agreed that notice should be given by the parliamentary leader under section 105B(b).

[11] The wording, operation and reach of those provisions is considered later in this judgment.

PLEADINGS

[12] In his application Mr George sought a “declaration that the Electoral Amendment Act 2007 is invalid” and, in what appeared to be a second application, a declaration that:

“the Applicant will not, by voting against the members of Parliament who are members of the Cook Islands Party Incorporated on an issue of confidence, be a member who has failed to support the majority of the parliamentary members of the political party for which the member was elected pursuant to section 105B of the Electoral Act 2004.”

[13] After setting out the factual grounds for the application (including that the ballot paper for his candidacy for the Teenui-Mapumai Constituency on Atiu had the CIP logo alongside his name) Mr George pleaded that the 2007 Amendment was unworkable, contradictory and unconstitutional.

[14] Mr George argued that the pleas of unworkability and contradictoriness were supported by the fact that although MPs are free to vote as they see fit on any issue and thus may not all vote the same way, MPs cannot know whether they have voted with the majority of the members of their party until the results of the vote are known, by which time it may be too late for the Member to rectify exposure to the 2007 Amendment.

[15] There is little in that submission since, as Mr George acknowledged during argument, any MP is entitled to call for a division on any vote. In any event, although Mr George claims never to have participated in CIP caucuses since the last general election, participation in caucus discussions would normally be a prelude to a vote in the House so all that party's MPs would be aware of their party's stance on the particular "issue of confidence".

[16] The plea of unconstitutionality was said to arise because it was argued the 2007 Amendment deprived MPs of their right to choose which way they will vote on an issue and could bring about a forced vacancy in seats in Parliament in the event of disagreements within a political party. The 2007 Amendment was also said to be unconstitutional as breaching or infringing Article 13 of the Constitution by giving the Prime Minister of the day power to declare seats in Parliament vacant even if he or she no longer commands the support of a majority of MPs⁵.

[17] Mr George also pleaded that the 2007 Amendment transgressed the plenipotentiary power of Parliament appearing in Article 39(1)(3) of the Constitution because it is not for the "peace, order and good government" of the Cook Islands. Because, Mr George argued, the 2007 Amendment does not amend or extend the Constitution, it is invalid because it is inconsistent with and contrary to that document. Though the Constitution was argued to be consistent with the Westminster Parliamentary system, the 2007 Amendment was pleaded to be inconsistent with that system because, under the First Past the Post ("FPP") voting system used in the Cook Islands "the electorate votes for the member".

[18] Mr George's synopsis⁶ then asserted that he has avoided the impact of the 2007 Amendment ever since the 2010 general election by debating issues but being absent from the Chamber – where he would be required to vote on any issue before the House – whenever a vote is called for, especially on budgetary matters. That, Mr George asserted, was a means of proceeding which deprived the electors of the

⁵ the plea is incorrect. The 2007 Amendment applies to all parties in Parliament, not merely the Government and it is for the Speaker, not the Prime Minister, to declare seats vacant under the Amendment.

⁶ ie. the assertion was in his pleadings and submissions, not in his sworn affidavit. There was no oral evidence at the hearing.

Teenui-Mapumai electorate of representation in the sense of his voting on their behalf.

[19] The Attorney-General's defence acknowledged the correctness of many of the factual assertions in Mr George's application but added that he had asked Parliament to recognise him as an independent MP. The Speaker had advised the House that deciding on such an application needs to await the outcome of this litigation.

[20] Any possible conflict with the fundamental rights and freedoms listed in Article 64 of the Constitution were, the defence pleaded, avoided because the 2007 Amendment was enacted by the procedure for constitutional amendment under Article 41(1). The Attorney-General then pleaded:

"The promotion of views through public debate and participation in free and fair elections are activities that may be subject to reasonable regulation compatible with an open and democratic society.

Anti-defection laws enable a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party.

Where a law prohibits defection that is a lawful prohibition, which must be enforced in the Courts.

The Electoral Amendment Act 2007 was Parliament's response to a 'pressing and substantial concern in a democratic society'.

There is a 'rational connection' between the objective and the Act, and the Act is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process'.

The regime enacted impairs the fundamental freedoms affected as little as possible in achieving its purpose.

The proportion of good and bad effects is in favour of the good effects."

[21] Mr George's response, though largely a pejorative reiteration of his position, did contain an admission that the 2007 Amendment was passed according to the

procedural requirements in Article 41(1) for amending the Constitution⁷. That notwithstanding, the Amendment does not, it was said, “address party hopping, it just restricts the right of MPs to vote against the budget or to support a vote of no confidence in the Prime Minister by MPs whose political party is in government”. He concluded:

“The Electoral Amendment Act 2007 does not lawfully abridge a members rights to freedom of speech and association, it prohibits and restricts it completely when it comes to the exercise of voting in relation to the budget or confidence in the Prime Minister, if it is to be a vote against those two subjects.

The penalty of having a member's seat being declared vacant as a result of voting against the budget or confidence in the Prime Minister is totally against the Westminster Parliamentary system which our Parliament is modelled on and the Bill of Rights under Articles 64(1) and 65 of the Constitution.”

[22] Though Mr George initially pleaded the 2007 Amendment breached Articles 64(1)(a)(b)(d) and (e) and Article 65(1) of the Constitution, pressed, during the hearing, he accepted that the only provisions of Article 64 potentially engaged in this litigation were Article 64(1)(d) as far as it vouchsafes freedom of thought and conscience and Article 64(1)(e) which guarantees freedom of religion, speech and expression. He also accepted that the provisions of Article 64(2) were potentially applicable. That Article reads:

“(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.”

[23] Of the provisions of Article 65, Mr George ultimately agreed that the only provisions potentially applicable to this litigation were the introductory words of Article 65(1) and Article 65(2) which read:

“(1) Subject to subclause (2) of this Article and to subclause (2) of Article 64 hereof, every enactment shall be so construed and applied as not to abrogate,

⁷ pleaded and conceded by Mr George. The concession obviates the need to discuss implied entrenchment. The final vote was 16-5 in favour of the Amendment, Mr George voting in the minority.

abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof, ...”

“(2) Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the enactment or provision thereof according to its true intent, meaning and spirit.”

SUBMISSIONS

[24] In addition to his pleadings, Mr George submitted that the independence of MPs is an important aspect of democracy under the Westminster system and all MPs should have the right to exercise independence of conscience.

[25] He submitted that the matters at issue in this proceeding were not matters of Parliamentary privilege. Drawing on *McGee’s Parliamentary Practice in New Zealand*⁸ he submitted that Cook Islands’ political parties are governed only by the requirements of the Incorporated Societies Act 1908. It is the Speaker who monitors Parliamentary membership. That may change during a term by death, disqualification, resignation or expulsion from a Members’ initial political party. He submitted that, in the absence of an Electoral Commission in the Cook Islands, only the Courts could provide a reviewing role of the activities and conduct of political parties and MPs.

[26] Ms Browne for the CIP – to the extent it was impleaded – adopted Ms Evans’ submissions for the Attorney-General and the Court accordingly turns to those.

[27] Ms Evans commenced her submissions by suggesting the 2007 Amendment was passed in response to concerns in the community about MPs resigning from the parties for which they had stood in general elections and either becoming independents or joining rival political parties.

⁸ 3rd Ed (2009), p88-89

[28] Relying on authorities later discussed⁹, Ms Evans submitted that whether the anti-defection regime of the 2007 Amendment might so profoundly affect the political system embodied in the Constitution as to bring into play the doctrine of implied entrenchment was a matter for assessment in accordance with international precedent. Democratic rights, she submitted, were to be judged according to whether they amounted to reasonable regulation compatible with an open and democratic society. Anti-defection laws were designed to ensure continuing support by MPs for the political party for which they were elected and to prevent enticements to defection by other parties.

[29] Echoing the Attorney-General's pleading, she submitted the 2007 Amendment was Parliament's response to public concerns and there was a rational connection between the objective and the Act. Thus the 2007 Amendment was reasonably capable of being viewed as appropriate to the furthering of the democratic process, particularly as its regime impaired fundamental freedoms as minimally as possible. The necessary balancing exercise of good versus bad effects fell in favour of the former.

[30] Both Mr George and Ms Evans drew heavily on the New Zealand response to public concerns over MPs defecting from the party for which they were elected, as expressed in the Electoral (Integrity) Amendment Act 2001 (NZ)¹⁰ (the "Integrity Act") and the views of the New Zealand Court of Appeal and Supreme Court on that Act as respectively formulated in *Huata v Prebble*¹¹ and *Awatere Huata v Prebble*¹². In his response, Mr George suggested that New Zealand precedent, being under that country's Mixed Member Proportional ("MMP") voting system, was inapplicable to the Cook Islands FPP system since in the latter the "candidate has to do his own campaigning in order to get elected".

⁹ discussed in detail in the next section of this Judgment

¹⁰ 11 out of 120 MPs defected between the 1996 and 1999 general elections in New Zealand. The Integrity Act expired on the date of New Zealand's 2005 general election. Possible re-enactment is being considered by NZ's Constitutional Review Group

¹¹ [2004] 3 NZLR 359

¹² [2005] 1 NZLR 289

[31] He submitted, though without authority, that “when it comes to alleged breaches of human rights, the Court is duty-bound to take a stricter interpretation of the law”, and concluded:

“There is no good effect in this amendment, all MPs are frightened of it, it is regularly used by succeeding Prime Minister and party leaders to threaten members of Parliament and particularly those with limited education of which 80 percent of Cook Islands MPs are. The threat is very effective and used regularly by political parties to enforce party discipline within the ranks.”

BILLS OF RIGHTS AND WRITTEN CONSTITUTIONS: THE INTERPRETATIVE APPROACH

[32] As Ms Evans submitted, Courts’ approach to interpreting written Constitutions in relation to Bills of Rights is as set down by the Privy Council in *Hinds v The Queen*¹³.

[33] In that case the Jamaican Parliament passed a Gun Court Act as an ordinary Act of Parliament, not pursuant to the special procedure prescribed by the Constitution for Acts altering the Constitution. The Act established a new Court, the Gun Court, with power to sit in three divisions presided over by different levels of judicial officers. The Act also set out special procedures to be used in the Gun Court and particular punishments on conviction for certain offences. Five persons convicted in the Gun Court challenge their convictions and sentences on the basis that the Gun Court Act was inconsistent with the Constitution and therefore void.

[34] Lord Diplock¹⁴ held that “a written Constitution, like any other written instrument affecting legal rights or obligations falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made”.

[35] After referring to the evolution of Constitutions given to former Crown colonies and dependencies, his Lordship observed¹⁵:

¹³ [1976] 1 All ER 353. In full, *Hinds & Others v The Queen; Director of Public Prosecutions v Jackson, Attorney-General of Jamaica (Intervener)*

¹⁴ at 359 speaking for the majority of the Privy Council

¹⁵ at 361

“where, under a Constitution on the Westminster model, a law is made by the Parliament which purports to confer jurisdiction on a Court described by a new name, the question whether the law conflicts with the provisions of the Constitution dealing with the exercise of the judicial power does not depend on the label ... which the Parliament attaches to ... the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose the Court to which the new label is attached?”

[36] And then, considering the purposes of the Gun Court Act as expressed in its Preamble, Lord Diplock held¹⁶:

“By s 48(1) of the Constitution the power to make laws for the peace, order and good government of Jamaica is vested in Parliament; and prima facie it is for Parliament to decide what is or is not reasonably required in the interests of public safety or public order. Such a decision involves considerations of public policy which lie outside the field of the judicial power and may have to be made in the light of information available to a government of a kind that cannot effectively be adduced in evidence by means of the judicial process.

In considering the constitutionality of the provisions of s 13(1) of the 1974 Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of ‘public safety, public order or the protection of the private lives of persons concerned in the proceedings’. The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device (*Ladore v Bennett*¹⁷). But in order to rebut the presumption, their Lordships would have to be satisfied that no reasonable member of Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of s 20(4) of the Constitution under which it purported to act.

No evidence has been adduced by the appellants in the instant case to rebut the presumption as respects the interests of public safety and public order. Unlike the judges of the Court of Appeal, their Lordships have no personal knowledge of public safety and public order. Unlike the judges of the Court of Appeal, their Lordships have no personal knowledge of the circumstances in Jamaica which gave rise to the passing of the 1974 Act. They have noted, however, the account contained in the judgment of Luckhoo P in the Court of Appeal of matters of common knowledge of which he felt able to take judicial notice. These plainly negative any suggestion that Parliament was acting in bad faith in declaring that s 13 was in the interests of public safety and public order.”

¹⁶ at 368-9

¹⁷ [1939] 3 All ER 98 at 105, [1939] AC 468 at 482

[37] Ms Evans also relied on the decision of the Privy Council in *Attorney-General of Trinidad and Tobago v McLeod*¹⁸ where the point in issue was whether an amendment to the Constitution of Trinidad and Tobago was valid because it had not been passed by the special majority of Parliament required by the Constitution. Mr McLeod had been elected to Parliament but fell out of favour with his party leadership which threatened him with disciplinary proceedings. He sought a declaration from the High Court restraining the Speaker from making a declaration that he had resigned from or been expelled by the party for which he had been a candidate but, after losing at first instance and succeeding on appeal, ironically, Parliament was dissolved, he did not stand for re-election and ceased to have any further interest in the litigation. That notwithstanding, the Attorney-General for Trinidad and Tobago and the Speaker pursued an appeal, but, as their Lordships observed¹⁹ without the advantage of contrary argument. Of the validity of the anti-defection provisions which underpinned Mr McLeod's litigation, their Lordships held²⁰:

"Broadly speaking it is those provisions of the Constitution that deal with the institution or characteristics of Parliament, as the organ of the State in which by s 53 is vested the plenitude of the legislative power of the sovereign Republic of Trinidad and Tobago, that are protected by entrenchment; those provisions that deal with the qualifications of individuals for membership of either House and with the internal procedure of either House are not".

[38] And, with regard to amendments to the Constitution, their Lordships held²¹:

"although supreme the Constitution is not immutable. As was pointed out in the majority judgment of the Judicial Committee in *Hinds* ... Constitutions on the Westminster model, of which the Constitution of the Republic of Trinidad and Tobago is an example, provide for their future alteration by the people acting through their representatives in the Parliament of the State. In Constitutions on the Westminster model, this is the institution in which the plenitude of the State's legislative power is vested."

[39] Ms Evans third authority was the 2002 decision of the Constitutional Court of South Africa in *United Democratic Movement v The President of the Republic of*

¹⁸ PC Appeal 24/1982 11 January 1984 [1985] LRC (Const) 81

¹⁹ p3

²⁰ p7

²¹ p3

*South Africa and Others*²². The case concerned the validity of an anti-defection provision which allowed defection at both national and provincial levels for brief periods during the term of the relevant body. While the measure was obviously one which reflected the situation in a nation emerging from the repressive regime of apartheid where democracy, let alone political party allegiance, was in its infancy, the judgment nonetheless contains instructive observations on the legitimacy of anti-defection regimes and reviews anti-defection provisions in other nations.

[40] The Constitution of the Republic states that its founding values include “regular elections and a multi-party system of democratic government”²³ and a proportional representation voting system but, despite the presence of the latter, Ms Evans relied on the observation²⁴:

“that a multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and to participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid.”

[41] Citing from its *First Certification Judgment*²⁵, the Court in *UDM* held²⁶:

33 “... Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.

... An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a

²² case CCT 23/02, 4 October 2002; [2003] 4 LRC 98

²³ s 1

²⁴ para 26

²⁵ *Ex parte Chairperson of the Constitutional Assembly, In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA744 (CC); 1996 (10) BCLR 1253 (CC) para 182

²⁶ paras 33 and 34

special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate. This objection cannot be sustained.”²⁷

- 34 It does not follow from this, however, that a proportional representation system without an anti-defection clause is inconsistent with democracy. It may be that there is a closer link between voter and party in proportional representation electoral systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency-based elections, there is a close link between party membership and election to a legislature and a member who defects to another party during the life of a legislature is equally open to the accusation that he or she has betrayed the voters.

[42] Closer to home, Ms Evans relied on decisions in the *Awatere Huata* litigation. The Integrity Act set up an anti-defection regime which, despite being based on New Zealand’s MMP system, was the obvious model for the 2007 Amendment. However, the criterion for initiation of the expulsion regime, instead of being failing to “support the majority of the Parliamentary members of the political party for which the member was elected”, was acting “in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election.”²⁸

[43] Mrs Awatere Huata was elected on the party list for the Association of Citizens and Taxpayers (“ACT”) in 1999 but was suspended from its caucus in February 2003 and in November that year the leader of ACT gave notice to the Speaker that she was no longer a member of the ACT caucus. From November that year the ACT caucus took the steps required by the Integrity Act including advising Mrs Awatere Huata of the reasons why the ACT caucus took the view that she had distorted and was likely to continue to distort Parliament’s proportionality. Details appear in the judgments but do not require rehearsal in this judgment. On 16 December 2003 ACT’s leader notified the Speaker that the leader had a reasonable belief that Mrs Awatere Huata had acted in a way that distorted and was likely to continue to distort to proportionality of political party representation in Parliament. Mrs Awatere Huata obtained an Interim Injunction restraining ACT from delivering

²⁷ paras 186-7

²⁸ s 55D(a) Electoral Act 1993

the required notice to the Speaker and the injunction led to the litigation under review. Mrs Awatere Huata was unsuccessful in the High Court but succeeded²⁹ in the Court of Appeal. She was, however, unsuccessful in the Supreme Court and an order was made dissolving the injunction against delivering ACT's leader's letter to the Speaker.

[44] Because of the ultimate result, it is unnecessary to detail the judgments in the Court of Appeal, save to note that:

- a) the Court of Appeal held that litigation such as this did not infringe Parliamentary privilege. The majority judgment contains a helpful review of Pacific legislation dealing with this topic³⁰ though the discussion centres around proceedings in caucus, not part of the evidence in this case. Ms Evans adopted the New Zealand Court of Appeal's reasoning and conclusion. Mr George, while citing some of the standard authorities on the topic, accepted that this Court has the power to review the constitutionality of the 2007 Amendment and that such review does not infringe Article 36 dealing with the privileges of Parliament.
- b) Much of the remainder of the judgments is concerned with what acts can amount to distortion of proportionality and whether Mrs Awatere Huata's acts qualified and are thus of no assistance in resolving this case.

[45] In the Supreme Court, the Judgment of Elias CJ contains a perceptive analysis of the distinction between membership of a Parliamentary party and vacancies in Parliamentary seats. She said³¹:

The creation of a vacancy in a parliamentary seat is distinct from the way in which membership of a parliamentary party is brought to an end. The first is a statutory procedure with consequences provided for in the statute. Those consequences affect the composition of Parliament and important electoral interests. Subject to any question of privilege, judicial review is available to

²⁹ by a majority of 4 to 1

³⁰ at paras 54-58

ensure that the procedure is lawfully invoked and applied. The question of membership of a parliamentary party is essentially governed by the rules of association of the party. The rules constitute a contract between the members and can be enforced through application to a court. The legal basis of a challenge to the validity of an expulsion from the parliamentary party differs from the legal basis of challenge to use of the procedures under s55A. Although the Electoral Act procedures were loosely referred to as effecting the expulsion of a member from the political party by both the Speaker³² and the ACT caucus,³³ the grounds for expulsion under the rules of the parliamentary party will usually be wider than the distortion of political party proportionality which is the only ground for invoking the statutory procedure.

[46] Then, after assessing the terms of the Integrity Act and the different notices for which it provided, the Chief Justice observed that the notice to the member and the opportunity to respond³⁴ “set up political safeguards through public and formal statements against which the electorate can measure the party invoking the procedures” and then, speaking of a Member ceasing to be a member of the political party for which they were elected, the Chief Justice noted that the Integrity Act - unlike the 2007 Amendment - contained a statement of its purpose. She held that a member does not cease to “belong to the party only where he has resigned formally or by unequivocal conduct”, going on to hold³⁵:

[50] ... Reciprocity in freedom of association is of the nature of voluntary groups, and is secured for ACT New Zealand and its parliamentary caucus by their rules. Just as members are free to move on from the party, the party is free to leave members behind, if it acts in accordance with its rules of association and if it is willing to wear the political risk of such action with the electorate. Whether the change in affiliation is as a result of the party acting to exclude the member of Parliament from its caucus or whether it is a result of the member of Parliament resigning or becoming independent, distortion of the proportionality of political party representation in Parliament as determined by electors equally results if the member continues to remain as a member of Parliament.

³¹ at 309, para 36

³² In his ruling under Standing Order 35(1)(c), (2003) 613 NZPD 9837, 11 November, set out at para 5.

³³ Minutes of ACT caucus, 16 December 2003

³⁴ p312, para 48

³⁵ p313, para 50

[47] Keith J noted that³⁶ “because of the contemporary and dominant role of party, [MPs] freedom of expression is for the most part to be exercised within the caucus and other party processes.”

[48] Even closer to home, both parties relied on the decision of a strong Cook Islands Court of Appeal³⁷ in *Clarke v Karika*³⁸. In that case Parliament had enacted the Rehearing of Tupuna Lands Act in 1980 in an endeavour to provide a procedure for the resolution of a land dispute³⁹ but the Act was challenged as an infringement of fundamental human rights and freedoms, particularly the right not to be deprived of property except in accordance with law. Its validity was also challenged in light of an amendment to the Constitution which came into effect on 5 June 1981. It was that amendment which inserted Part IV A, the fundamental human rights and freedoms, into the Constitution and which, it was argued, took away the rehearing rights given by the 1980 statute.

[49] This Court upheld the latter argument but the Court of Appeal found those affected by the 1980 Act retained their right to a rehearing. Construing the 1980 Act, the Court of Appeal held⁴⁰:

“At first sight interpretation is logically prior to the question of constitutional validity. Until any dispute about the meaning of the challenged legislation is resolved, it may not be possible to measure the legislation against any relevant constitutional restraints on Parliament's power. In some cases, however, the interpretation itself will be affected by those restraints, as Courts dealing with issues of constitutional validity are reluctant to place on an Act an interpretation which would mean that Parliament has exceeded its powers.”

[50] Turning to the validity of the 1980 Act in the face of Part IV A, the Court of Appeal carefully analysed it and overseas authorities and commented⁴¹:

“...counsel in this case were in substantial agreement that the two major matters for scrutiny are the object of the 1980 Act and the means chosen to pursue it. Is the object constitutionally legitimate and do the means bear a reasonable relation to it? This involves considering on what evidence or other

³⁶ p320, para 85

³⁷ Sir Robin Cooke P, Sir Graham Speight CJ and Keith J

³⁸ [1983] CKCA 5

³⁹ then 72 years old and over a century old before resolved by settlement in the Court of Appeal

⁴⁰ p5 of 17 in PacLII version

⁴¹ p11 of 17

material the questions are to be resolved; on whom the burden lies; and how far the Court should go in reviewing the legislative judgment.”

[51] Beginning with the statement of intention in the Preamble to the 1980 Act and after reviewing affidavits filed in the Court of Appeal, the Court said the 1980 Act was “intended to serve legitimate and important social objectives”⁴² and bore a “reasonable relation to those objectives”. The Act had a “wider social significance” than a private dispute and those opposing it had not shown it to be arbitrary⁴³. Holding that the 1980 Act was not inconsistent with the rights in Article 64(1)(b)(c) the Court of Appeal concluded⁴⁴:

“In summary, we consider that it has not been shown that there is anything arbitrary or unreasonable in a constitutional sense about the decision that the legislature has made, in the exercise of its wide responsibilities, to provide for the rehearing of this matter. In reaching this view we are conscious of the distinct functions of the legislature and the Courts in terms of the judgments to be made, the material to be weighed, the procedures to be followed, and responsibilities under the constitutional system. We would require a much stronger case, convincingly made out by those attacking the legislation, before we were willing to upset legislation such as the 1980 Act by reference to the broad principles in Article 64(1)(b).”

[52] Though acknowledging its remarks to be obiter dicta, the Court went on to discuss the effect of Articles 64 and 65 on existing legislation noting the Articles were “uniquely unclear as to their effect on earlier legislation,”⁴⁵ unusual for such constitutional provisions. After noting that Article 64(1) contained both a recognition of, and an explicit declaration that, the rights and freedoms existed in the Cook Islands and would continue to exist, the Court noted that there was ample authority within Constitutions such as those of the Cook Islands to the effect that existing legislation is not to be superseded by enactment of human rights provisions in a Constitution. Though irrelevant in the present context given the 2007 Amendment was enacted well after Part IV A came into force, the Court of Appeal recorded “the usual reluctance to find the legislation has been impliedly repealed⁴⁶ and noted that for legislation passed later than 1981 and arguably affecting fundamental rights and freedoms, its existence should be “weighed by the

⁴² p13 of 17

⁴³ p14 of 17

⁴⁴ p15 of 17

⁴⁵ p15 of 17

legislators” and “if they wish to proceed in the face of the declared rights they can seek to employ the special procedure laid down in Article 41 for Constitutional amendment”⁴⁷. However, the Court of Appeal went on to observe:

“On the other hand, as regards enactments passed after the Constitution Amendment (No.9) Act [Part IV A] came into force, we prefer a different view, although the present case does not call for a decision. We would be disposed to hold that Article 64 should be treated, from the time when it came into force, as establishing rights that are truly fundamental. As has been shown, there are ample reasons, both in the wording of the Articles concerning fundamental rights and in their very subject-matter, for concluding that they were not meant to invalidate existing legislation. As for the future effect of the Amendment, however, to adopt the words of Ritchie J. in the *Drybones* case at p. 481, we would be reluctant 'to convert it from its apparent character as a statutory declaration of fundamental human rights and freedoms which it recognises, into being little more than a rule for the construction of ... statutes'. Indeed this approach may have even more to be said for it as regards the Cook Islands provisions. They are contained in a Constitution Amendment Act made by the special procedure required for such Acts; whereas the Canadian Bill of Rights considered in *Drybones* was passed by an ordinary Act of Parliament.

Accordingly we would be disposed to hold that if an enactment passed after 5 June 1981 can be shown to violate any of the constitutional human rights and freedoms set out in Article 64 the Court will have jurisdiction to declare it to that extent inoperative. The approach to interpretation enjoined by Article 65 would apply equally to enactments passed after that date; but if inconsistency with a fundamental right could not be avoided by that approach, the right would prevail and could be preserved by an appropriate Court order.”

[53] Mr George particularly relied on that last paragraph.

DISCUSSION AND DECISION ON THE IMPACT OF THE 2007 AMENDMENT ON ARTICLES 64 AND 65: THE CONSTITUTIONALITY OF THE 2007 AMENDMENT

Approach

[54] As earlier noted, Mr George’s final position on the fundamental rights and freedoms which he claimed were abridged, abrogated or infringed by the 2007 Amendment rested on it being contrary to dissentient MPs’ freedom of thought and

⁴⁶ p17 of 17

⁴⁷ p17 of 17

conscience, freedom of speech and freedom of expression, all expressed in Article 64.

[55] As the Court of Appeal observed in *Clarke v Karika* provisions and statutes enacted after Article 64 came into force should be approached on the basis that the Article confirmed or established rights that are “truly fundamental” and that it is not just a rule for the construction of statutes.

General Issues

[56] Although but lightly touched upon in argument, the terms of the 2007 Amendment require dissection and consideration before any impact on the fundamental rights and freedoms in Part IV A can be considered. As the Court of Appeal in *Clarke v Karika* held “interpretation is logically prior to the question of constitutional validity”.

[57] However, it is pertinent to consider a number of matters of general importance prior to considering the effect and reach of the provisions of the 2007 Amendment itself.

[58] The first is that the 2007 Amendment was passed by use of the special procedure for constitutional amendment contained in Article 41. Since Parliament was amending the Electoral Act 2004, not the Constitution, Parliament must have considered the provisions of the 2007 Amendment might have been inconsistent with the Constitution⁴⁸. That can only have been as a result of concerns about the impact of the 2007 Amendment on the fundamental rights and freedoms in Part IV A.

[59] The second point is to note the lessening over time in the predominance of individual MPs as contrasted with the rise in power of political parties.

[60] Mr George argued that in an FPP system the electorate “votes for the member” not members’ parties and, in the Teenui-Mapumai electorate, with a roll of only about 150 voters, it is conceivable he could be correct, but, if so, that would now be unusual in parliamentary democracies. The reality is likely to be that

⁴⁸ Article 41(2)

electors have mixed allegiances and give varying weight to the candidate and the candidate's party with, in most parliamentary democracies, the emphasis now on the latter.

[61] That great parliamentarian, Edmund Burke, asserted the then importance of the individual MP when he addressed the electors of Bristol on 3 November 1774. He said:

“parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of *parliament*.

[62] However, the primacy of the individual member in Parliament, as emphasised by Burke, rapidly changed with the rise in strength of political parties. The change was highlighted by Keith J⁴⁹ in his Judgment in *Awatere Huata*. He said⁵⁰:

[74] For Walter Bagehot, writing in 1867 just before the enactment of the Reform Act of that year and before the establishment of a strong party system in Britain, the main function of the House of Commons was to be an electoral college.⁵¹

[75] In the middle of the next century, Sir Ivor Jennings stated the primary function of the House of Commons in this single sentence: “While for the most part the House appears to be legislating, what it is really doing is defending and criticising the government.”⁵²

[76] In his 1963 introductory essay to Bagehot's hugely influential book, that most experienced Parliamentarian Richard Crossman MP put the matter in a rather brutal way:

⁴⁹ a distinguished constitutional lawyer and academic, then a member of New Zealand's Royal Commission on the Electoral System, formerly of, amongst others, the Cook Islands Court of Appeal and the New Zealand Supreme Court and currently a Judge of the International Court of Justice

⁵⁰ at p316-319, paras 74-78

⁵¹ *The English Constitution* (1967) ch IV.

⁵² Sir Ivor Jennings, *Parliament* (2nd Ed, 1957) at p519, see also chs V, VI and X, for more recent United Kingdom writings see to the same effect eg. Professor S A de Smith, *Constitutional and Administrative Law* (2nd Ed, 1973) at p237 and Professor Rodney Brazier, *Constitutional Practice* (2nd Ed, 1994) at p204.

“Now the prime responsibility of the member is no longer to his conscience or to the elector, but to his party. Without accepting the discipline of the party he cannot be elected; and, if he defies that discipline, he risks political death. Even forty years ago it was still possible to cross the floor and survive. But today the member who loses the whip may win the next election, but after that the party machine will destroy him. Party loyalty has become the prime political virtue required of an MP, and the test of that loyalty is his willingness to support the official leadership when he knows it to be wrong.

One result of the virtual disappearance of the MP's independence is that the point of decision has now been removed from the division lobby to the party meeting upstairs. The debate on the floor of the House becomes a formality, and the division which follows it a foregone conclusion. It is what is said and done in the secrecy of the party meeting which is now really important – though the public can only hear about it through leaks to the press.”⁵³

[77] That emphasis on the electoral function of the House and the central role of party appeared in New Zealand at least as long ago as 1940. In that year Leicester Webb in *Government in New Zealand* said:

“Representative and responsible government is party government; since it is the party system which enables the electors to decide, not merely who shall speak for them in Parliament, but who shall govern them. ... [I]n the great majority of constituencies elections are fought mainly and increasingly on party issues. The great majority of electors, that is, vote not for the candidate himself but for his party and do so on the assumption that he is not free, if elected, to change or abandon his party allegiance and that, during sessions, he will vote not according to the dictates of conscience or reason, but according to the instructions of the party whips.”⁵⁴

[78] Nearly 40 years on, another New Zealand scholar, Dr Alan Robinson, strongly echoed those positions when he spoke of one function of the House as:

“a consequence of the competition of groups of politicians for the powers of the Crown combined with the advent of universal suffrage and frequent elections. The competition in Parliament has become one between two alternate governments, the Government of the day and the Opposition, who carry their competition to the public in order to gain a majority of seats at the next general election. Parliament has become a forum for party debate and a means of influencing electors by means of what is virtually a continuous election campaign. The

⁵³ Bagehot *The English Constitution* (Fontana Ed, 1963) 43

⁵⁴ Webb *Government in New Zealand* (1940) see similarly F A Simpson *Parliament in New Zealand* (1947) 29-30

underlying assumption of this activity is that the public is watching and will be influenced in its judgment at the next election.”⁵⁵

[63] After noting that one of the New Zealand Royal Commission’s ten criteria for judging voting systems was the “essential role political parties play in modern representative democracies in, for example, formulating and articulating policies and providing representatives for the people”⁵⁶ Keith J observed⁵⁷:

... In the introductory essay to the latest edition of the Cabinet Manual,⁵⁸ in a passage unchanged since the original 1991 version, I identify the role of party in the present day House of Representatives in this way:

“Political parties provide a vital link between the people, Parliament and the government. The competition for the power of the state, exercised through the House of Representatives and the ministry, is a competition organised by and through political parties. It is party strength in the House after elections that decides who is to govern. It is the Parliamentary party or parties with the support of the House (and the ability to ensure supply - the money to fund the state's functions) that provides the government.”

[64] The third general observation to be made is that the fundamental rights and freedoms vouchsafed by Articles 64 and 65 of the Constitution apply to any persons within the Cook Islands, irrespective of whether they are voters.

[65] By contrast, the Cook Islands Parliament consists of 24 Members. Though there was no evidence on the topic, it is likely that, as in other Parliaments, most of those would be content to vote along party lines on most issues. While the 2007 Amendment applies to all MPs whether in Government or in Opposition (other than those elected as independents) in effect it can apply only to those MPs elected on party tickets who wish to dissent from their Government or Opposition party line on one or more “issues of confidence”.

[66] Therefore, while the Article 64 and 65 rights and freedoms are fundamental to all persons within the Cook Islands, the 2007 Amendment can never apply to

⁵⁵ “Parliamentary Democracy in New Zealand ...” in Sir John Marshall (Ed) *The Reform of Parliament: Papers presented in memory of Dr Alan Robinson* (1978) 96-97

⁵⁶ at p318, para 80

⁵⁷ p319, para 84

⁵⁸ *Cabinet Office Manual* (2001) 4

anybody more than that handful of MPs elected on party tickets who wish to dissent from their party on one or a handful of issues.

[67] While the impact on those MPs of the 2007 Amendment is potentially considerable, it remains a fact that the Act can never apply to more than a tiny proportion of the populace of the Cook Islands. That is a factor of importance in construing the constitutionality of the 2007 Amendment.

Terms and Reach of the 2007 Amendment

[68] A number of observations must be made concerning the terms of the 2007 Amendment itself as aids to its interpretation.

[69] The first is that, unlike the Integrity Act and the Rehearing of Tupuna Lands Act, the 2007 Amendment contains no statement as to its purpose or objectives, so no indication can be gleaned from the terms of the statute as to Parliament's intention when passing it.

[70] However, with Mr George's consent, Ms Evans handed in a copy of the Parliamentary debates on the 2007 Amendment. There the reason for it was said to be widespread disquiet at MPs defecting from parties for which they were elected and joining other parties⁵⁹. The Minister in charge also said that Crown Law had been consulted and "told us that since our Constitution embraces the Bill of Rights it was impossible for them to go further than ... the Bill that is before the House today".⁶⁰ That was the only evidence as to the problem the 2007 Amendment was designed to solve. The debates say nothing about the scale of the problem.

[71] The next point concerns the definition of "issue of confidence" earlier cited.

[72] What is noteworthy concerning that definition is that it applies only to express "no confidence" motions in Cabinet, motions where the Government has been defeated on an issue declared by the Prime Minister to be an issue of

⁵⁹ and Mr George forecast a challenge to the legislation under Part IV A of the Constitution (Second Reading, 13 April 2007, p238)

⁶⁰ Second Reading, 13 April 2007, p233. Crown Law's doubts may explain the paucity of detailed analysis of the 2007 Amendment in Ms Evan's submissions

confidence, plus supply. In other words, the definition of “issue of confidence” loosely approximates the “confidence and supply” agreements which are the foundation of most coalition Governments. They are the mechanism which makes government under a coalition work. In relation to the 2007 Amendment, in issue is whether the reduction in dissent it effects and the consequent easing of the passage of votes on issues of confidence amounts to reasonable regulation of dissent which remains compatible with an open and democratic society.

[73] Two further facets are important in relation to the construction of the 2007 Amendment. The first is that the triggering of the vacancy procedure is retrospective; it only follows the passing of votes of no confidence or questions declared to be such or appropriation motions. That may lessen the practical impact of the 2007 Amendment since, however trenchantly dissent may be expressed, including on matters coming within the definition of issues of confidence, unless that expression of dissent is followed by the successful passing of a qualifying vote on the issue of confidence, the 2007 Amendment cannot come into play.

[74] The second is that, by definition, not all votes in Parliament are “issues of confidence”. Prime Ministers and Governments with comfortable majorities or loyal MPs would have little need to declare votes to be issues of confidence although votes on supply, which are defined to be issues of confidence, are part of the annual diet of a Westminster-style parliament. That and the restricted nature of the definition of an “issue of confidence” further reduce the occasions when the 2007 Amendment might apply.

[75] The next point to be noted is that the 2007 Amendment does not apply to a “member elected as independent”, but it continues to apply for the balance of that Parliamentary term to those who were elected on party tickets but who, for whatever reason, have become independent or joined another party. That further reduces the applicability of the Act. But, against that, the 2007 Amendment extends the possible time of operation of the vacancy procedure to all dissentients who were not ‘elected’ as independents and to the whole of a Parliamentary term. On its face, the 2007 Amendment could be triggered at any stage during a Parliamentary term against an MP who has defected or been expelled from the party on whose ticket he or she was

elected, including if the dissentient MP has joined another party. Although the defecting MP's party is under no compulsion to initiate the 2007 Amendment's procedures, an MP's original party could continue to hold the 2007 Amendment's procedures over the head of one of its MPs who had defected, been expelled or joined a rival party for the whole of the balance of the Parliamentary term, even though that expulsion or defection might be well in the past.

[76] The next – and one of the most important – points to be noted is that the consequence of the operation of the 2007 Amendment's procedures is to declare the seat of a dissenting MP vacant. It is not to recognise that member as henceforth independent⁶¹. It is not to recognise that member as a member of another party he or she may have joined. The member loses his or her seat. This triggers a by-election and although there is nothing to prevent the member so unseated standing as an independent or for another party in the by-election, if Keith J's judgment in *Awatere Huata* applies in the Cook Islands - despite Mr George's view that Cook Islands' voters vote for members not parties - the lack of party support could mean the chances of the MP's return to Parliament could be diminished depending on the factual circumstances.

[77] The next point of construction is that the vacancy procedure can be triggered at any time after an MP elected for a party "fails to support" the majority of his or her party on an "issue of confidence". What was intended by the use of the phrase "fails to support" is unclear. The factual matrix may define it. Obviously it would include casting any MP's vote on the "issue of confidence" in a way different from the majority of the members of his or her party. As representation connotes more than merely voting⁶² it may be likely that, depending on the circumstances, the Court would construe a failure to support as encompassing more than a dissenting vote.

[78] Whether the phrase "fails to support" would include abstention from voting by a dissentient MP is unclear. Section 105B(a) requires a "vote in Parliament on an issue of confidence" but a "vote in Parliament" is a vote by Parliament, not necessarily a vote by the dissentient MP on a "vote in Parliament". On that view, abstention would appear to be comprehended within the phrase "fails to support" if

⁶¹ if so accepted by the Speaker and Parliament

that phrase is construed as requiring positive action, including votes in favour on issues of confidence, at all times. But while an abstention may be critical on a close vote, if “fails to support” were construed in a neutral, possibly negative, way as obliging the parties’ MPs not to vote against the majority of the party, abstention may well not amount to a failure to support⁶³.

[79] While a contrary vote in Parliament is a necessary ingredient of a failure to support the MP’s elected party, whether views contrary to the party line in caucus discussions or speeches in or outside the House contradicting the MP’s party line would qualify is debatable. Keith J in *Awatere Huata*⁶⁴ thought MPs’ freedom of expression could be principally exercised within the privacy of caucus discussions so dissension in that form may not amount to a failure to support the MP’s party. The situation is less clear for speeches, press releases or the like followed by a contrary “vote in Parliament”.

[80] It may be the case that what amounts to a failure to support would be defined, at least for the MP’s party, by the reasons the Parliamentary leader must give the MP in the s 105D notice, but whether the party’s views on what amounts to a failure to support would be regarded by the Courts as definitive is less certain and, in any case, would appear to be influenced by whatever facts give rise to the implementation of the 2007 Amendment’s ejection procedures.

[81] The next point to be made is that the right to initiate the expulsion procedure is triggered by “a vote in Parliament on an issue of confidence” which otherwise qualifies, that is to say a single failure by an MP to support the stance taken by the majority of his or her party colleagues on an “issue of confidence” is enough to entitle the leader of the party to initiate the procedure. Multiple failures to support the majority are not required.

[82] The next point is to note that the 2007 Amendment provides for two different notices; one to the dissenting member from the parliamentary leader of the party for

⁶² *Awatere Huata* in the Supreme Court, para 43, p311

⁶³ the readability of this judgment would suffer if, at all stages of the discussion, abstention were to be included alongside the casting of a contrary vote by an MP on an issue of confidence against his or her party line. Therefore, where the discussion a contrary vote, the possibility of abstention also needs to be borne in mind.

which he or she was elected and two-thirds of their colleagues, under s 105D(a), and the second is the notice to the Speaker by the parliamentary leader of the MP's party and two-thirds of their colleagues for which ss 105B(b) and 105C(a) provide. The requirements for the notice to the dissenting member under s 105D(a) include not just that the member has failed to support the majority of the party on an "issue of confidence" but also a statement that the parliamentary leader considers that s 105B(a) applies and "the reasons for that opinion". It appears that the "reasons" may go well beyond an allegation that the MP has failed to support the majority of his or her party on a vote on an "issue of confidence" but, other than that, the 2007 Amendment is silent on what the content of the "reasons" may be although, as mentioned previously, they would define the party's views on what amounts to the member's failure to support beyond the dissenting vote. The reasons could be extensive yet the member has only the short period of 7 working days to respond⁶⁵.

[83] Then, the Parliamentary leader of the party and at least two-thirds of his or her colleagues are required by s 105D(b) to consider not just any response from the dissenting MP but also the "conduct of the member". That clearly suggests the party's MPs must consider issues beyond the dissenting MP's response to the "reasons" even though the 2007 Amendment does not explicitly require the dissenting MP to have prior knowledge of what aspects of his or her conduct are to be considered.

[84] It is only when the Parliamentary leader and at least two-thirds of the party's MPs have considered the contents of the leader's notice to the dissenting MP and the reasons for concluding s 105B(a) applies and considered both any response from the MP and his or her conduct, that the leader and at least two-thirds of the party's MPs are entitled to sign the statement or notice to the Speaker under ss 105D, 105B(b) and 105C.

[85] It would appear that the Speaker is given no discretion in the matter. Once he or she receives a notice or statement complying with s 105C, the seat of the dissenting member is automatically vacated. The Speaker is required to declare in writing that the seat has become vacant and the cause of that occurring and is obliged

⁶⁴ in the Supreme Court, p320, para 85, see footnotes 35

to notify the Chief Electoral Officer and cause the declaration of vacancy to be published in the Cook Islands Gazette⁶⁶.

General Approach to Constitutionality

[86] The authorities demonstrate that what generically needs to be taken into account in deciding on constitutionality is:

- a) Constitutions, and statutory amendments which comply with the procedures required to amend the Constitution, must be construed in the light of their subject matter and the surrounding circumstances with reference to which they are made⁶⁷.
- b) the substance of the challenged law must be considered, not the form, label or title given to it, so the challenged legislation must first be interpreted against Parliament's plenipotentiary power⁶⁸.
- c) there is a rebuttable presumption that Parliament has acted constitutionally in enacting the challenged legislation with the presumption being rebutted if a Court is satisfied no reasonable MP could suppose the provisions were reasonably required for the peace, order and good government of the Cook Islands⁶⁹ or that the measure was enacted for the constitutional purposes it describes. The test becomes: "is the object constitutionally legitimate and do the means adopted bear a reasonable relation to it?"⁷⁰ The question is whether the challenged legislation amounts to reasonable regulation of freedom of speech and expression which remains compatible with an open and democratic society⁷¹.

⁶⁵ which contrasts with the 21 days allowed in the Integrity Act

⁶⁶ s 9(4) of the Electoral Act 2004

⁶⁷ *Hinds* at 359, footnote 13, *Clarke v Karika*, p11 of 17, footnote 40

⁶⁸ *Hinds* at 361, footnote 14, *Clarke v Karika*, p5 of 17, footnote 39

⁶⁹ *Hinds* at 368-9, *McLeod* p7

⁷⁰ *Clarke v Karika*, p11 of 17, footnote 40

⁷¹ *UDM* para 26, footnote 23

- d) Courts should recognise that Parliament is the principal arbiter of what is required “in the interests of public safety order or morals, the general welfare or security of the Cook Islands”⁷² and should be most cautious about approving measures which trench across those “fundamental” rights and freedoms.

[87] With more specific reference to the 2007 Amendment the Court of Appeal in *Clarke v Karika* set out the correct approach to construing the constitutionality of legislation argued as infringing the fundamental human rights and freedoms. They are “truly” fundamental and, so far as subsequent legislation is concerned they are a “statutory declaration of fundamental human rights and freedoms [and not] little more than a rule for the construction of statutes” especially when made in accordance with the constitutional amendment procedures⁷³.

[88] The 2007 Amendment being an anti-defection statute, such legislation is to be construed with the observations in *UDM* and *Awatere Huata* in mind⁷⁴. Such legislation is not per se unconstitutional or undemocratic because MPs remain able to vote in accordance with their personal conscience. Such legislation fulfils legitimate aims of discouraging defection or enticements to defection and enabling Governments to function. However, MPs who defect and political parties which set the defection provisions in operation need to recognise both the political risk and voters’ reaction in deciding whether to take action.

[89] How do those observations square with international norms and authorities and academic comment on issues of freedom of thought and conscience and freedom of speech and expression?

FREEDOM OF THOUGHT AND CONSCIENCE

[90] Dealing first with Mr George’s submission that the 2007 Amendment was unconstitutional as abridging MPs freedom of thought, conscience and religion under

⁷² Article 64(2)

⁷³ p17 of 17, footnote 46 above

⁷⁴ *UDM* paras 186-7, footnote 25, *Awatere Huata* in the Supreme Court at 50, p313, footnote 44

Article 64(1)(d), the conclusion must be that Mr George has failed to make out a case in that regard.

[91] The New Zealand Bill of Rights Act 1990, s 13, recognises rights similar to those in Article 64(1)(d) and commentators and precedent all make the point that the three freedoms in the Article are allied.

[92] So far as “thought” is concerned “the absence of case law on freedom of thought is explicable because thought is not routinely threatened by governmental action”⁷⁵.

[93] “Thought is ... the building block of any belief or religion”⁷⁶. As to conscience, “conscience is generally thought of as a person’s moral sense of right or wrong. As evidenced by the possibility of a conscience vote in Parliament, freedom of conscience protects deeply held moral convictions which are often not part of a belief or a religion.”⁷⁷

[94] There is nothing in the 2007 Amendment which limits Mr George or any other MP’s right of freedom of thought or conscience within those discussions. What it limits is their right to express thoughts arising out of their conscience. That is a matter which Article 64(1)(e) not Article 64(1)(d) addresses and the argument based on Article 64(1)(d) accordingly fails. Freedom of thought and conscience in the context of the 2007 Amendment is a facet of freedom of speech and expression and the Court accordingly turns to those concepts.

FREEDOM OF SPEECH AND EXPRESSION

[95] The first point to be made is that the Article 64 Bill of Rights appears in Part IV A termed “Fundamental Human Rights and Freedoms”. Though Article 64(1) is economically expressed, it follows that the International Covenant on Civil and Political Rights (“ICCPR”) provides guidelines to the way it should be regarded. Article 19 states:

⁷⁵ Rishworth et al *The New Zealand Bill of Rights Act (2003)* p292

⁷⁶ Butler & Butler *The New Zealand Bill of Rights Act: A Commentary (2005)* para 14.6.12, p406

⁷⁷ Butler & Butler para 14.6.14, p407, see also Rishworth 292-3

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression; the right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his or her choice.
- (3) The exercise of the right to freedom of expression carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these must be provided by law and be necessary:
 - For respect of the rights and reputations of others; and
 - For the protection of national security of public order (ordre public), or of public health and morals.⁷⁸

[96] Beyond the ICCPR it is not difficult to find ringing declarations as to the fundamental, even pivotal, importance of the right of freedom of speech and expression. One judicial and one non-judicial quotation will suffice.

[97] Most of the early jurisprudence on freedom of expression is derived from the First Amendment to the US Constitution and many judgments cite the theoretical basis of the right derived from Justice Oliver Wendell Holmes⁷⁹ speaking of the ‘marketplace of ideas’ but, perhaps more pertinent to the matters in issue in this litigation are, first, the observation of Frankfurter J⁸⁰ that “liberty of thought soon shrivels without freedom of expression” and the judgment of Brandeis J⁸¹ that:

“Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

⁷⁸ see also Article 10 of European Convention on Human Rights and Fundamental Freedoms (1950)

⁷⁹ dissenting in *Abrams v United States* 250US 616 at 630 (1919)

⁸⁰ in *Dennis v United States* 341US 494 at 550 (1951)

⁸¹ in *Whitney v California* 274US 357 at 375 (1927)

...Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.”

[98] And, to take merely one of a host of available quotations from John Stuart Mill⁸²,

“... speaking generally it is not, in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public. Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”

[99] The observation of the New Zealand Court of Appeal⁸³ sums it up:

“The right to freedom of expression is ‘as wide as human thought and imagination’.”

[100] In relation to restrictions on the right, Rishworth, in the context of what amounts to a reasonable limitation on the exercise of the right, comments⁸⁴ that:

“political expression usually enjoys the greatest protection and is often described as being at the core of the right”

[101] Transferring those observations to the present case, what the effect of the 2007 Amendment is argued to be is that Mr George or other MPs cannot state facts or opinions which they hold or in which they believe because of the consequences

⁸² The Six Great Humanistic Essays of John Stuart Mill on Liberty, Washington Square Press, 1969 reprint, chapter II, p141-2

⁸³ In *Mooney v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA)

⁸⁴ p312

for them and their seat should they do so and their party move against them. In the necessary balance between “good” and “bad” effects, the question is whether the 2007 Amendment is legitimate as allowing important activities – debates and votes in Parliament, even Government – to proceed, as against MPs’ right to express views dissentient from those held by the party for which they were elected or to vote against the majority of their party on issues of confidence⁸⁵ being subject to significant sanctions.

[102] Has Mr George shown that the terms of the possible operation of the 2007 Amendment so severely cramp his ability as an MP that his failure to support the majority of the party for which he was elected amounts to an unreasonable hindrance or abrogation of his right to freedom of speech and expression or may the terms of the 2007 Amendment be a reasonable regulation of those fundamental freedoms which remain compatible with an open and democratic society?

[103] Factors inclining towards a finding that the 2007 Amendment is constitutional include:

- a) Parliament is charged with making laws for the peace, order and good government of the Cook Islands and *prima facie* it is for Parliament to decide what is reasonably required in that regard. There is a rebuttable presumption to that effect. In dealing with issues of constitutional validity, Courts are reluctant to interpret statutes in a way which will lead to conclusions that Parliament has exceeded its powers.
- b) Anti-defection legislation is legitimately aimed at preventing defections of MPs elected on party tickets from the party for which they stood. It also prevents enticements to defection from and to other parties. The Parliamentary speeches on the 2007 Amendment show that stemming the number of defections was seen as a mischief and was very much in the minds of Parliament at the time when the 2007 Amendment was in passage through the House. If that was the motivation, it may be argued

⁸⁵ voting in relation to the 2007 Amendment can be regarded as the means of expression, of the freedom of speech

that, to date, Parliament would seem to have achieved what it set out to achieve.

- c) The 2007 Amendment certainly gives primacy to the power of political parties in Parliament and provides a major disincentive for MPs elected under a party banner to dissent and “fail to support” the view of that party’s majority on the proportion of issues defined as issues of confidence. That is consistent with the rise in importance of political parties in Westminster democracies generally.
- d) The 2007 Amendment was passed by the special majority and procedure required for constitutional amendments. To that extent it is possible to argue that it was passed with more than the usual level of parliamentary support.
- e) The rights and freedoms vouchsafed by Articles 64 and 65 are “fundamental”. Limitations on fundamental rights and freedoms should not be decided as mere matters of statutory construction.
- f) Although the sanction for failing to support the majority of his or her political party on a single vote on an “issue of confidence” is severe, it is not obligatory for the parliamentary party to initiate vacancy procedures for failure to honour the party line on what may be no more than a single vote, and the 2007 Amendment only applies to a minority of MPs voting on a minority of issues.
- g) Though neither party argued the matter in this way, proponents of the constitutionality of the 2007 Amendment might well argue that not only is dissent, at least on issues of confidence, to be constricted in order to enable the passage of parliamentary business, but that vacation of an MP’s seat is the appropriate remedy for dissent on issues of confidence rather than the MP remaining in Parliament. This is because allowing the MP to remain in the House risks distorting the majority/minority balance in the House for which the electors voted. That argument gains additional force if the MP expelled by his or her party joins another

party, or the House is nearly evenly split. On that argument, expulsion from the House is appropriate in order that the dissentient MPs' former party has the opportunity at the subsequent by-election to retain the seat.

- h) That said, when every MP in the 24-member Cook Islands Parliament commands approximately 4 percent of the vote on any issue, individual votes have much greater weight than votes of individual MPs in the much larger legislatures which are a feature of many other countries. Literally, every vote counts in the Cook Islands, especially on an issue of confidence or when a vote is close or the majority in the House is slight. That arguably makes the right to dissent a weightier right and vacation of a seat for dissent a harsher remedy.

[104] Factors in favour of a finding that the 2007 Amendment is unconstitutional include:

- a) though its operation is confined to votes in Parliament and only a few votes at that, the severe sanction for as much as a single vote on an "issue of confidence" against the votes of the majority of the MP's party can readily be seen as a significant crimp on that MP's right to dissent. It is a significant limitation and impairment on his or her fundamental right of freedom of expression, a right which is hallowed both generally and especially in Parliament.
- b) if an MP elected on a party ticket so much as votes against the majority of his or her party on a single "issue of confidence", that vote entitles the leader and members of that party, without more, to initiate a process highly likely to result in the dissenting Member's seat being declared vacant. The power the 2007 Amendment confers on the leaders of Parliamentary parties and their MPs for a single dissenting vote can, again, be readily seen as having a major dampening effect on the member's right to freedom of speech and expression by way of dissent, a fundamental right in general and Parliamentary terms. Additionally it can be held over the dissenting Member for the balance of the Parliamentary term and, if exercised, deprives the voters of that

electorate, possibly only temporarily, of representation in Parliament by an MP they have previously supported⁸⁶.

- c) It is also material that the vacancy procedure can be triggered by no more than a single vote on an “issue of confidence” contrary to the party’s line but that vote may only be part of an MP failing to support the majority of his or her party. The failure to support the majority may be no more than that single vote but equally it may encompass a much larger party dissatisfaction with the member, including any reason considered by the Parliamentary leader as bearing on the failure to support the majority plus the conduct of the member. The point was made in *Awatere Huata*⁸⁷ that distortion of proportionality was more than merely voting in the House. That observation would equally apply to what might constitute failure to support the majority of a Cook Islands’ MP’s party.
- d) The issues described in the last subparagraph would also appear to provide an opportunity for the leader and majority of the members of the Parliamentary party to penalise a dissenting Member in a way which is disproportionate to what may be no more than a single opposing vote on an “issue of confidence”. Once the qualifying dissenting vote is cast, all power under the 2007 Amendment, including power to force the MP from his or her seat, passes to the dissenting MP’s political party, the Speaker having no discretion on receipt of a s 105B(b) notice. Beyond giving the dissenting MP a statement of the reasons for the leader’s view that s 105B(a) applies and a limited opportunity to respond (and only in writing) the 2007 Amendment requires, first, no adherence by the MP’s political party to the rules of natural justice, in the sense of a hearing before the party decides to give the s 105B(b) notice nor, secondly, any limitation on the party’s deliberations following the MP’s vote on the “issue of confidence”, the reasons for the Parliamentary leader reaching an opinion that s 105B(a)

⁸⁶ though that observation may only apply to voters who voted for the dissentient MP

⁸⁷ para 43, p311

applies and the MP's response. In requiring the party caucus to consider the MP's conduct without necessarily requiring the party to advise the dissenting MP what aspects of his or her conduct will be considered, or give him or her a hearing⁸⁸, the 2007 Amendment sets in place a method of acting which could be procedurally unfair to the MP even though it may lead to what is for an MP a very significant sanction, namely the loss of their seat and their ejection from Parliament.

- e) If the ICCPR and Justice Brandeis are to be taken as giving guidance as to the way the right should be exercised or limited, the 2007 Amendment could not be seen as enacted for national security, public order, public health or morals or for fear of serious injury or to combat serious and imminent evil.
- f) Further, arguably, there may be little rational connection in visiting an electoral result – overturning the will of the voters in a particular electorate – on a parliamentary action – voting and failing to support a Member's party on an issue of confidence

[105] Even though the 2007 Amendment applies to so few people and in only a handful of situations, there is therefore considerable force in Mr George's submission that the sanctions, enormous for an MP and, albeit possibly temporary, for the voters of his or her electorate, are so significant that they effectively all but close off dissent in Parliament on issues of confidence by MPs elected on Government or Opposition party tickets. Again, even though the 2007 Amendment applies to so few people and in so few situations, the sanctions which can possibly be inflicted for what may be no more than one dissent in an arena where dissent and differences of opinion are traditionally part of the lifeblood of the assembly, place such major hurdles in the way of dissent that it is not difficult to conclude, however tentatively and in the abstract, that they effectively still an MP's right to freedom of speech and expression in that arena and by that means.

⁸⁸ even though he or she does not appear to be debarred from attending the caucus deliberations

[106] The statutory and other factors tending in favour of a conclusion that the unconstitutionality of the 2007 Amendment as been made out, have been carefully listed. They appear to outweigh by a significant margin the arguments that the regime set out in the 2007 Amendment is necessary to ensure the passage of parliamentary business on “issues of confidence”. They make dissent, or an MP’s failure to support his or her party line on an issue of confidence, extremely hazardous. Can that said to be no more than reasonable regulation of parliamentary business on issues of confidence which is compatible with the open and democratic society of the Cook Islands?

[107] Put bluntly, if an MP elected on a party ticket fails to support the majority of his or her party on any one “issue of confidence” they put themselves at the mercy of that party for the balance of that parliamentary term. It can take measures at any time which, if initiated, are highly likely to result in that MP losing his or her seat. That is a very severe consequence for what might be no more than one act of dissent in an arena where vigorous debate and dissent are of the essence. That possible consequence is likely to be so severe that it may well result in the MP refraining from expressing a dissentient opinion and voting against his or her party.

[108] True, party discipline and unity, as distinct from individual MP’s rights from early days to vote according to their conscience, is now at the heart of politics. And it is important that party unity and discipline be maintained on budgetary and other issues of confidence to ensure the passage of important legislation and to ensure Governments achieve the purposes for which electors voted.

[109] But while all the terms of the 2007 Amendment have been carefully examined, the issues which would weigh most heavily on an MP elected on a party ticket but who proposes to fail to support that party by voting with it on an issue of confidence are:

- a) that he or she puts themselves at the mercy of their party if they once fail to support the majority, though what amounts to a failure to support is not defined in the 2007 Amendment and may only be defined by the party’s “reasons” in the s 105D(a)(i) notice.

- b) that the result of their dissenting from the party line will, if their political party activates the statutory mechanism, results, not just in their being ejected from the party and having to remain in Parliament as an independent MP or a member of a rival party for the balance of that parliamentary term, but loss of their seat. If the effect of the operation of the 2007 Amendment's procedures was anything but ejection of the dissentient MP from Parliament - the ejection of a duly elected Member - the objections to the 2007 Amendment's terms would carry much less weight. But ejection is the only result permitted and the right to stand in a subsequent by-election is little palliative. A possible argument to the contrary was explored in para [103](g).
- c) the MP's party's deliberations on the s 105D(a) notice are not limited to the MP's failure to support the majority of his or her party. The party is obliged to consider the MP's conduct even though that conduct is not required to be included in the notice. And while the MP may be able to attend the caucus which considers the s 105D(a) notice, the 2007 Amendment makes no provision for any form of hearing. Thus, the member's ejection from parliament, given the Speaker has no discretion on receipt of a s 105B(b) notice, results from a process that is not required to adhere to the rules of natural justice.

[110] Having regard to all those factors, the Court concludes that, in the abstract at least, there is a strong case for ruling the 2007 Amendment unconstitutional as breaching the freedom of speech and expression of MPs elected on a party ticket who wish to deviate from the party line and fail to support the majority of their party, including to vote with it on an "issue of confidence".

[111] The difficulty that arises, however, is that, as commented at the commencement of this Judgment, this case was brought and argued in a vacuum. Apart from Mr George saying – though not in evidence – that he has not participated in CIP caucuses since the 2011 general election and absents himself from the chamber when budgetary and other confidence issues are up for a vote, there are no factual circumstances on which the Court can rule. Indeed, the measures Mr George

says he chooses to adopt he specifically designs to ensure that a situation will never arise which might give his party the right to set the statutory procedures in motion. There is no evidence any other MP wants to follow his dissentient line. Thus, the 2007 Amendment procedure may never be put into operation although it may affect dissentient MPs' votes on budgetary issues. Even if it does, the workings of the 2007 Amendment need to be seen against whatever factual situation has triggered its operation. There is a wide spectrum of factual possibilities which might arise. A small selection of those could include:

- a) the number of MPs who have failed to support the majority,
- b) how the failure to support has been expressed,
- c) the point in the parliamentary term when the failure to support has occurred,
- d) whether the initiation of the 2007 Amendment procedures has been by a government or an opposition party,
- e) the number of votes in the House a party can command before and after the failure to support and whether the failure to support has been on a routine budgetary measure or on an Opposition vote of no confidence in Cabinet or some issue which the Prime Minister considers to be sufficiently important to declare it to be an issue of confidence.

[112] In light of all that, the Court's conclusion is that, for lack of a factual foundation, Mr George has made out no case for a declaration that the 2007 Amendment is unconstitutional as being in breach of MPs' freedom of speech and expression.

[113] It is also impossible to hold in his favour on the second application he sought⁸⁹, mainly because of the lack of any factual matrix which might give rise to Mr George voting against the CIP on an issue of confidence. That means the Court is

⁸⁹ cited in [12] of this Judgment

unable to rule on what circumstances might amount to his failure to support the majority of his party. Voting against it on an issue of confidence would seem to be a necessary ingredient of that failure, but what other components might be part of the failure need to be assessed when action is taken against him. Further, the form of the declaration Mr George sought fails to recognise that if he votes against the majority of the CIP on an issue of confidence, the right to act in accordance with the 2007 Amendment then passes to the CIP. Thus, even if – for whatever reason, including breach of Mr George’s fundamental freedom of speech and expression or for any other cause – he fails to support the majority of the CIP, that failure to support is currently in a vacuum. The CIP may do nothing about it. But the CIP retains the power to activate the ejection mechanism in the 2007 Amendment. The better course to testing the constitutionality of the 2007 Amendment would have been, if Mr George failed to support the majority of the CIP on an issue of confidence and it commenced ejection proceedings under the statute, to seek an injunction, set against a factual background, to prevent the delivery or either or both of the statutory notices. This was the course followed in *Awatere Huata*.

REMEDIES

[114] Although, in light of the Court’s findings, a remedy is unneeded, in New Zealand, the Court’s remedies “against the casual abrogation of common law rights and [to] monitor rights derogations under the New Zealand Bill of Rights Act 1990 albeit without the sanction of invalidating Parliament’s law”⁹⁰ include a declaration of incompatibility or inconsistency⁹¹ to highlight rights departures. As Professor Joseph says⁹²:

“a declaration sets up a dynamic between the institutions without raising issues of *res judicata*. A declaration of incompatibility is a remedy *to inform* not to define rights between parties *inter-se*. A declaration throws responsibility onto Parliament to make a *deliberate transparent* and *informed* decision – whether or not to remedy a legislative derogation from the Bill of Rights. Parliament rather than the Courts retains the final responsibility over rights derogations under the Bill of Rights. The Courts are quick to acknowledge that the debate over whether Parliament can override

⁹⁰ Joseph *Constitutional and Administrative Law in New Zealand, 3rd Ed (2007)* para 1.4, p8

⁹¹ often forecast but never yet made

⁹² *op.cit.* p9

fundamental rights remains theoretical and extrajudicial. They commend the comity that joins the political and judicial branches and counsel observance of the conventions that maintain the constitutional balance.”

[115] In the Cook Islands, as the citations from *Clarke v Karika* show⁹³ the Courts have power, in appropriate cases, to declare measures “inoperative” if they are held unconstitutional.

[116] In *Hinds*, the Privy Council spoke of the possibility of the Courts exercising a power of severance of the objectionable provisions but, as Ms Evans accepted, severance is not a practical remedy which could be applied to the 2007 Amendment.

[117] There must also be the possibility that Parliament, having considered the observations in this judgment on the 2007 Amendment, may repeal it or, probably more appropriately, legislate to modify its more draconian provisions

[118] Declarations of incompatibility or inconsistency or ruling that the 2007 Amendment is inoperative would appear to be the relevant remedies in this case if a remedy were to be granted. So, if, or when, some factual situation arises which triggers the operation of the 2007 Amendment, its procedures are set in motion and the constitutionality of the 2007 Amendment is directly challenged against whatever may then be the factual matrix, it is to be hoped that the observations in this Judgment concerning the terms, reach, operation and constitutionality of the 2007 Amendment may prove helpful.

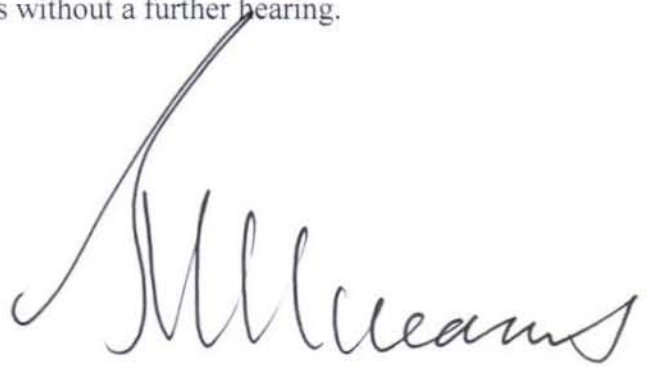
COSTS

[119] Given the circumstances and outcome of this litigation, the Court’s inclination is that the costs of the proceeding should lie where they fall. However, if, despite that, the parties wish to pursue issues of costs, memoranda may be filed (maximum 5 pages) with that from the Attorney-General being filed and served within 28 days of delivery of this Judgment and that from Mr George within 35 days of that date.

⁹³ p17 of 17 in PacLII version, cited in para [52]

[120] Mrs Browne for the CIP took almost no part in the hearing of this matter but if CIP wishes to seek an order for costs the timetable applying to the Attorney-General is also to apply.

[121] In such memoranda the parties are to certify, if they agree with this course, that the Court can determine all issues of costs without a further hearing.

A handwritten signature in cursive script, appearing to read 'H Williams', written in black ink. The signature is positioned above a horizontal line.

Hugh Williams, J