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JUDGING THE POLITICIANS: A CASE FOR JUDICIAL DETERMINATION OF DISPUTES OVER THE MEMBERSHIP OF THE HOUSE OF REPRESENTATIVES

*Claudia Geiringer**

This paper critically examines the process for the resolution of disputes that arise during the course of the parliamentary term as to whether a member of Parliament has become disqualified. The author concludes that there are sound policy reasons for considering that determination of such disputes by the House of Representatives or its presiding officer is undesirable, and suggests that legislative change should be promoted in order to surrender such decisions to the courts.

In 1897, the member of Parliament for Awarua and future Prime Minister of New Zealand, Joseph Ward MP, resigned from Parliament and filed a petition in bankruptcy. A by-election was held for the Awarua seat and Mr Ward stood. Though still an undischarged bankrupt, he was re-elected to Parliament with a greatly increased majority.¹

Mr Ward's re-election to the seat of Awarua gave rise to a question as to the interpretation of the Electoral Act 1893. Section 130(4) of that Act provided that the seat of a member "shall become vacant ... if he is a bankrupt within the meaning of the laws relating to bankruptcy". Did section 130(4) apply to an undischarged bankrupt who had, like Mr Ward, been declared bankrupt *before* he was elected? Or did it apply only to those who were declared bankrupt while in Parliament? Was Mr Ward, or was he not, thus qualified to resume his seat in the House of Representatives?

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1 Michael Bassett "Ward, Joseph George" in *The Dictionary of New Zealand Biography: Volume 2 1870-1900* (Bridget Williams Books and Department of Internal Affairs, Wellington, 1993) 566-567.

According to orthodox theory, this issue was a question of parliamentary privilege to be resolved by the House of Representatives rather than the courts. The power to determine whether any of its members have become disqualified is part of the historic privileges of the British House of Commons,² inherited by the New Zealand House of Representatives in 1865.³ In the course of debate over Mr Ward's case, however, many members of the Parliament of 1897 expressed grave doubts about the House's aptitude for such a task. Their concern was that the imperatives of party politics made it impossible for members to put aside their factional interests and to resolve the question of Mr Ward's disqualification in a spirit of impartiality.⁴ As one member put it: "[t]o talk of eliminating party feeling from [parliamentary committees] is all moonshine. It has never been done, and never will be done."⁵

As a result of such concerns, the parliamentary committee that was set up to consider Mr Ward's case recommended unanimously that Parliament enact urgent legislation to refer the case to the Court of Appeal for a binding determination.⁶ Parliament duly enacted the Awarua Seat Inquiry Act 1897 and the matter was taken out of Parliament's hands to the satisfaction of members on both sides of the House.⁷

For 100 years, the tale of *In re Awarua Seat Inquiry* was relegated to the dusty annals of constitutional history. One hundred years to the month after Mr Ward's resignation from Parliament, however, his case was dusted off by Jim Anderton MP, then leader of the Alliance Party, as part of his attempt to secure the removal of Manu Alamein Kopu MP from Parliament. Mrs Kopu had been elected to Parliament on the Alliance Party list but had resigned from the party only eight months later.⁸ Mr Anderton claimed that Mrs Kopu's seat in Parliament had thereby become vacant. He invoked the Ward precedent

2 William McKay and others (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23 ed, Butterworths, London, 2004) [*Erskine May*] 90-91; David McGee *Parliamentary Practice in New Zealand* (2 ed, GP Publications, Wellington, 1994) 486-487.

3 Parliamentary Privileges Act 1865. See, now, Legislature Act 1908, s 242(1).

4 (30 September 1897) 98 NZPD 122-140.

5 Mr Fraser (30 September 1897) 98 NZPD 138.

6 "Report of the Privilege Committee" [1897] AJHR I 6.

7 See (8 October 1897) 98 NZPD 377-380; (12 October 1897) 98 NZPD 465-468 and 487-489. The Court of Appeal duly considered the matter and held that section 130(4) referred only to bankruptcy commencing *after* a member's election to Parliament and that, accordingly, Mr Ward was qualified to remain in Parliament: *In re "the Awarua Seat Inquiry Act, 1897"* (1898) 16 NZLR 353.

8 See below Part I, The Case of Manu Alamein Kopu MP.

before the Privileges Committee to support a submission that the matter should be referred to the courts.⁹

In stark contrast to the almost universal support within Parliament for this course of action in 1897,¹⁰ the Privileges Committee roundly and unanimously rejected Mr Anderton's submission that the Kopu case should be referred to the courts. Neither the Committee nor the House of Representatives in its subsequent debate on the Committee's report had the slightest qualms about the House maintaining its exclusive control over the question of whether Mrs Kopu's seat had become vacant.¹¹

Against that unpromising background, this paper seeks to revive discussion as to a role for the judiciary in determining whether the seat of a member of Parliament has become vacant. It suggests that the Parliament of 1897 was right to have serious misgivings about the capacity of the House and its committees to make impartial determinations as to the status of its members – that this task is far better suited to the courts.

The issue is far from theoretical. The statutory provisions governing disqualification of members of Parliament attracted little or no controversy in the 100 years between the Ward and the Kopu affairs. Since then, however, their correct interpretation has been put at issue on three further occasions: with respect to the membership of Hon Harry Duynhoven MP (in 2003), of Nick Smith MP (in 2004) and of Donna Awatere Huata MP (in 2003–2004). Accordingly, the question of who should make such determinations is ripe for examination.

I take as my point of departure the report of the Privileges Committee on the status of Manu Alamein Kopu in which the Privileges Committee cursorily dismissed the suggestion that the courts rather than the House should decide whether Mrs Kopu's seat had become vacant (Part I).¹² A discussion of the statutory scheme follows (Part II). In Part

9 Privileges Committee "Report of the Privileges Committee on the Question of Privilege Referred on 22 July 1997 Relating to the Status of Manu Alamein Kopu as a Member of Parliament" [1996–99] LX AJHR I 15B ["Privileges Committee Report Relating to the Status of Manu Alamein Kopu"] 3.

10 See (8 October 1897) 98 NZPD 377–380; (12 October 1897) 98 NZPD 465–468 and 487–489. The vote on the Bill is not recorded but only one member expressed his outright disapproval of this course of action in the debates: Mr Monk (12 October 1897) 98 NZPD 487.

11 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 3–5; Hon Paul East (14 October 1997) 564 NZPD 4680–4681; Rt Hon Jonathan Hunt (15 October 1997) 564 NZPD 4727. The notable exception (apart from the expected opposition from the Alliance Party) was Hon Wyatt Creech MP, who expressed the view that it would be preferable for the courts rather than Parliament to determine the matter: (15 October 1997) 564 NZPD 4718.

12 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9.

III, I suggest that the Privileges Committee's rejection of a role for the courts in determining Mrs Kopu's status was regrettable. There are sound policy reasons, stemming in particular from the nature of the interests that are at stake, for concluding that judicial involvement in the resolution of disputes over membership of the House is to be preferred to their resolution by the House itself.

In the light of these concerns, Part IV considers the impact of a 2002 amendment to the Electoral Act 1993 which has entrusted the formal power to determine whether the seat of a member has become vacant to the Speaker of the House. I conclude that this amendment does not adequately address the policy concerns identified in Part III. The Speaker is not well placed to resolve the complex and politically charged controversies that can arise over the status of a member of Parliament and the expectation that the Speaker will do so is likely to undermine his or her perceived impartiality. Indeed, I would suggest that it has already done so on one occasion.¹³ Further, in order to protect against such allegations of partiality, the Speaker is likely to want to rely on the advice of the House or its committees when resolving controversies over the status of a member of Parliament. The impression that the 2002 reform has removed disqualification disputes from the purview of the House is thus more apparent than real.

This paper, therefore, concludes that legislative reform is needed to provide for greater judicial input into disqualification disputes. Such a reform, far from being radical, would be consistent with developments elsewhere in the Commonwealth, in particular, the United Kingdom and Australia. I offer some brief thoughts in Part V as to the direction such legislative reform might take.

The central tenets of this paper, then, are that the involvement of the House of Representatives or its Speaker in decisions as to the qualification of members of the House is undesirable and that legislative change should be promoted to surrender such decisions to the courts.

I THE CASE OF MANU ALAMEIN KOPU MP

The controversy surrounding Manu Alamein Kopu MP's qualification to remain in Parliament arose in July 1997 in the first year of government under New Zealand's new mixed-member proportional voting system (MMP). In November 1996 at the first MMP election, Mrs Kopu was returned to Parliament on the Alliance Party list. Eight months later, she wrote to the Alliance Party leadership and to the Speaker of the House of Representatives, resigning from the Alliance Party but signalling her intention to remain in

¹³ Below Part IV C, Adequacy of the New Process.

Parliament as an independent member.¹⁴ The leader of the Alliance Party, Jim Anderton MP, raised the matter with the Speaker. He claimed that when Mrs Kopu resigned from the Alliance Party her seat in Parliament became vacant.¹⁵ The Speaker ruled that a question of privilege was involved and the matter stood referred to the Privileges Committee.¹⁶

Underlying Mr Anderton's claim was a concern about the effect of Mrs Kopu's defection on the Alliance Party's representation in Parliament. In accordance with the principle of proportionality, the Alliance Party had received a share of the seats in Parliament at the general election in rough proportion to its share of the party vote. If Mrs Kopu were to stay in Parliament as an independent member, that proportionality would be disrupted to the detriment of the Alliance Party. Conversely, if Mrs Kopu were to lose her seat, she would be replaced by another candidate from the Alliance Party list.¹⁷

The difficulty that Mr Anderton faced, however, was that a change in political allegiance was not listed in the Electoral Act 1993 as one of the circumstances in which the seat of a member of Parliament was to become vacant.¹⁸ Mr Anderton's counsel therefore relied on section 55(1)(f) of the Electoral Act 1993, which provided that the seat of a member "shall become vacant ... if he or she resigns his or her seat by writing under his or her hand addressed and delivered to the Speaker of the House".¹⁹ In order to support the argument that section 55(1)(f) applied, counsel pointed to certain pledges and agreements that Mrs Kopu had signed in which she promised to resign from Parliament should she

14 Letter of 16 July 1997, Appendix B to "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 9; see also "Alliance submission to the Privileges Committee on the legal construction placed by the Alliance on the pledge, the agreement of 12 July, and Mrs Kopu's letter to the Speaker of 16 July" received by the Privileges Committee 15 August 1997 ["Alliance submission to the Privileges Committee on the Status of Manu Alamein Kopu"].

15 Speaker's ruling of 22 July 1997, Appendix A to "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 8; "Alliance submission to the Privileges Committee on the Status of Manu Alamein Kopu", above n 14.

16 Speaker's ruling of 22 July 1997, Appendix A to "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 8.

17 Electoral Act 1993, s 137. See "Alliance submission to the Privileges Committee on the Status of Manu Alamein Kopu", above n 14.

18 This point was conceded by counsel for the Alliance: see "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 4. For the current circumstances in which a change in political allegiance gives rise to a vacancy, see Electoral Act 1993, ss 55A-55E (inserted by the Electoral (Integrity) Amendment Act 2001).

19 Section 55(1)(f) has been simplified by the Electoral Amendment Act 2002. It now reads: "The seat of any member of Parliament shall become vacant ... if he or she resigns his or her seat by signing a written notice that is addressed and delivered to the Speaker".

leave the Alliance Party. In essence, counsel argued that these pledges had the effect of transforming Mrs Kopu's resignation from the Alliance Party into a resignation from Parliament under section 55(1)(f).²⁰

Having heard evidence and submissions over the course of five days and sought the advice of the Solicitor-General,²¹ the Privileges Committee concluded unanimously that Mrs Kopu's seat had not become vacant.²² Resignation from the House, the Committee said, is probably the most serious step that a member can take and accordingly, for resignation to be effective, there must be clear compliance with the statutory conditions set out in section 55(1)(f). In particular, the member's desire to resign from his or her seat must be conveyed by the member in writing to the Speaker. It was not, in the Committee's view, possible to construe a resignation from a series of documents, some of which were not addressed to the Speaker.²³ The Committee's report was subsequently adopted by the House by a vote of 100 to 12.²⁴

The conclusion reached by the Privileges Committee as to the substantive merits of Mr Anderton's case against Mrs Kopu was probably correct. The requirements of section 55(1)(f) were clear and the argument of Mr Anderton's counsel, though ingenious, destined for failure.²⁵ For the purposes of this paper, however, the real interest is in what the Committee had to say about the *process* by which such matters should be determined, and in particular, the respective roles of Parliament and the courts.

The orthodox view was that the question of whether Mrs Kopu's seat had become vacant fell squarely within the ambit of parliamentary privilege and, therefore, within the exclusive control of the House of Representatives. This position was bolstered by sections 129 and 134 of the Electoral Act 1993 which said that if Parliament was in session (and not adjourned for more than 14 days) the Speaker could take steps to fill a vacancy only if ordered to do so by the House.

20 "Alliance submission to the Privileges Committee on the Status of Manu Alamein Kopu", above n 14.

21 A copy of the Solicitor-General's advice was appended to the Committee's report as Appendix C.

22 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 5-6. The Committee was comprised of three National Party MPs, four Labour Party MPs and one New Zealand First MP.

23 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 5-6.

24 *Parliamentary Bulletin* (13-17 October 1997) 25.

25 I should own in this regard some bias as the Committee's decision was largely consistent with the (appended) advice of the Solicitor-General in the preparation of which I had assisted.

At the outset of the Privileges Committee's inquiry, however, counsel for Mr Anderton posited a different view. Counsel argued that the matter raised substantial legal, electoral and constitutional issues that were better dealt with by a court than by the House. The appropriate course of action, counsel suggested, was to follow the lead of the 1897 Parliament in Mr Ward's case and to refer the matter to the courts for a binding determination.²⁶

The Privileges Committee rejected this suggestion out of hand. In its view, the Ward case could be distinguished because there had been "real doubt as to whether, as a matter of law, bankruptcy was a condition disqualifying a member from the House."²⁷ In comparison in the Kopu case, the Committee said, there was "no doubt that resignation does disqualify a member." Rather, the question was "whether the member had actually resigned in the circumstances that occurred." The Committee considered that it was competent, with the assistance of the Solicitor-General, to determine that question.²⁸

If this somewhat elliptical passage was intended to suggest that the Kopu case turned on questions of fact rather than law then it was, with respect, disingenuous. There were factual controversies at the periphery of the Kopu case but the Committee did not ultimately consider it necessary to resolve them.²⁹ The heart of the Committee's decision was, rather, a question of statutory interpretation as to the meaning of section 55(1)(f) of the Electoral Act 1993. The Alliance Party contended that a resignation from Parliament under section 55(1)(f) could be construed from a series of documents, some of them contingent (that is, expressing a future intention to resign) and not all of them addressed by the member to the Speaker.³⁰ The Committee rejected this contention and held that section 55(1)(f) required the member's resignation to be conveyed by the member him or herself in writing to the Speaker.³¹ Given that finding as to the law, it was not necessary for the Committee to resolve the disputed facts (which principally concerned the circumstances in which Mrs Kopu had signed the various pledges and agreements).

26 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 3, 5. See also Peter Luke "Kopu Case Remains in Parliament" (31 July 1997) *The Press* Christchurch 3; "Alliance's court bid rejected" (31 July 1997) *The Evening Post* Wellington 2. The Alliance Party's submission in this regard is not on the public record.

27 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 3.

28 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 3-4.

29 See, for example, Brief of evidence of Mrs Manu Alamein Kopu MP, tabled 13/8/97.

30 "Alliance submission to the Privileges Committee on the Status of Manu Alamein Kopu", above n 14.

31 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 5-6.

Thus, the Kopu case turned on an interpretative question as to the precise scope of section 55(1)(f) of the Electoral Act 1993 in much the same way as the Ward case had turned on an interpretative question as to the precise scope of section 130(4) of the Electoral Act 1893. Perhaps the best light that can be shed on the Privileges Committee's attempt to distinguish the two cases is that the Committee seems to have considered that the question of interpretation in the Kopu case was open and shut whereas in the Ward case, there was substantial doubt as to the meaning of the relevant provision. The Privileges Committee may well have considered that in the face of its own unanimity, the delay and expense of referring the matter to the courts could not be justified.

The Privileges Committee did not exclude the possibility of following the Ward precedent in a future case.³² It was, however, adamant that as a matter of privilege it was for the House to decide when that might or might not occur. In this respect, the Committee roundly rejected a suggestion made by Mr Anderton's counsel that Parliament might not object to certain questions of privilege being determined by the courts:³³

When a question is raised as to the qualification of a person to sit in the House, it is for the House to determine the matter. This is a long established duty of the House recognised by law. In a case of some legal complexity, as in 1897, the House may wish to enlist the assistance of the court. But it does this by special legislation. In the absence of such legislation, the resolution of the matter is solely for the House.

Although thus signalling an intention to jealously guard its privileges against intrusion from the courts, the Committee was careful not to overreach itself as to the scope of those privileges. In particular, the Committee declined to examine an argument made by Mr Anderton's counsel that Mrs Kopu had contracted to resign from Parliament should she leave the Alliance Party and was accordingly estopped from remaining in Parliament. This was, the Committee said, a question of private law that did not fall within the privileges of the House.³⁴ As far as the Committee was concerned, it would have been open to Mr Anderton to bring this aspect of his case before the courts for a determination. As a matter of public policy it is, however, unlikely that the courts would have enforced a contractual undertaking to resign from Parliament and even less likely that they would have been prepared to grant specific performance.³⁵ In practical terms, therefore, this concession was an empty one.

32 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 3-4.

33 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 5.

34 "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 5.

35 See, for example, *Peters v Collinge* [1993] 2 NZLR 554 (HC); *Amalgamated Society of Railway Servants v Osborne* [1909] 1 Ch 163 (CA), [1910] AC 87 (HL); *Te Runanga o Wharekauri Rekohu v Attorney-*

In summary, although the Privileges Committee did not discount the possibility that the Ward precedent might be followed in a future case, its members were largely indifferent to the key concern that underlay the actions of the 1897 Parliament: that the partisan environment of the House of Representatives might be inherently unsuitable for the impartial determination of controversies surrounding the qualification of its members. This paper suggests that this was regrettable and that when doubt arises over the qualification of a member of Parliament it should be resolved by an impartial adjudicator, removed from the partisan environment of the House. Before turning to examine the policy considerations that support this view it is, however, necessary to introduce the statutory regime governing the creation of parliamentary vacancies.

II THE STATUTORY SCHEME

The circumstances in which the seat of a member of the House of Representatives "shall become vacant" are set out in section 55 and sections 55A–55E of the Electoral Act 1993.

Section 55 of the Electoral Act 1993 is the contemporary articulation of a provision that dates back through various incarnations to the New Zealand Constitution Act 1852 (UK).³⁶ The precise circumstances of disqualification have varied over time. They include such matters as death, resignation, extended absence from the House, allegiance to a foreign power, conviction of a serious crime and mental disorder.³⁷ Since 2001, section 55 has been supplemented by sections 55A–55E, which provide for the circumstances in which a member of Parliament may lose his or her seat as a result of a change in the member's political allegiance.³⁸ Sections 55A–55E are, however, subject to a sunset clause and will expire at the next general election.³⁹

General [1993] 2 NZLR 301 (CA). See, also, Advice from Solicitor-General to Chairperson of the Privileges Committee dated 10 September 1997, Appendix C to "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9.

36 New Zealand Constitution Act 1852 (UK), s 51.

37 See Gerard Carney *Members of Parliament: Law and Ethics* (Prospect Media Pty Ltd, St Leonards, NSW, 2000) 15, dividing the grounds of disqualification into two categories: "conflict of interest" and "personal integrity".

38 These provisions were inserted by the Electoral (Integrity) Amendment Act 2001. In essence, the seat of a member will become vacant *either* if the member notifies the Speaker that he or she has resigned from his or her party (or wishes to be recognised as an independent) *or* if, following a prescribed hearing process, the parliamentary leader of the member's party notifies the Speaker that the leader reasonably believes that the member has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament.

39 Electoral (Integrity) Amendment Act 2001, s 3.

For the purposes of sections 55–55E, constituency members of Parliament and list members of Parliament are treated identically: the grounds on which a member of Parliament can lose his or her seat during the course of the parliamentary term do not vary depending on how that member was elected. There is, however, a difference in consequence. If a constituency member of Parliament loses his or her seat, he or she will have the opportunity to regain it at a by-election.⁴⁰ A list member of Parliament, on the other hand, will have no opportunity to regain his or her seat until the next general election.⁴¹

If a seat becomes vacant, the Speaker must take certain steps to initiate the process by which the vacancy is to be filled.⁴² The position before 2002 (and therefore at the time Mrs Kopu's case came before the Privileges Committee) was that if the House was in session and was not adjourned for more than 14 days, the Speaker could not take steps to fill the vacancy until ordered to do so by the House.⁴³ The Electoral Amendment Act 2002 has since modified this position and the Speaker can now act on his or her own initiative. The significance of that amendment is discussed in detail in Part IV.

Before the Speaker can take steps to fill a vacancy, however, he or she must be "satisfied" that the seat has become vacant.⁴⁴ The Electoral Act 1993 envisages two circumstances in which the key decision in this regard will be made by someone other than the Speaker. First, section 56 of the Electoral Act 1993 sets out an extended process by which the mental capacity of a member of Parliament is to be determined for the purposes of establishing a vacancy on grounds of mental disorder under section 55(1)(i). Ultimately, section 56 provides that a report by the Director-General of Health together with a registered medical practitioner selected by the Speaker concluding that a member is mentally disordered is determinative for the purposes of establishing that the member's seat has become vacant.

Similarly, sections 55A–55E set out an extended process by which the parliamentary leaders of political parties can establish that one of their members has "ceased to be a parliamentary member of the political party for which the member of Parliament was

40 Electoral Act 1993, ss 129–133.

41 List seats are filled by the next able and willing candidate on the relevant party list: Electoral Act 1993, ss 134–138.

42 Electoral Act 1993, ss 129 and 134.

43 Electoral Act 1993, ss 129 and 134.

44 Electoral Act 1993, ss 129 and 134.

elected."⁴⁵ That process culminates in the provision of written notice from the parliamentary leader to the Speaker. Receipt of this written notice by the Speaker is determinative of the member's seat having become vacant and there is no need for any independent decision by the Speaker in that regard.

Additionally, the Electoral Act 1993 sets out two circumstances in which public officials have a duty to provide the Speaker with information relevant to the creation of a vacancy. Section 57 of the Electoral Act 1993 requires court registrars to notify the Speaker if a member of Parliament is convicted of a crime that would trigger his or her disqualification under section 55(1)(d). Section 58 similarly requires the Registrar of Births, Deaths and Marriages to notify the Speaker if a member has died.⁴⁶ These notifications will no doubt usually be sufficient to "satisfy" the Speaker that a vacancy has been created under subsections 55(1)(d) or 55(1)(h).

With these exceptions, no statutory guidance is given to the Speaker as to the process he or she is to follow in establishing whether the seat of a member has become vacant. As discussed below,⁴⁷ the assumption behind the legislation in this regard is that whether or not a member's seat has become vacant will be self evident upon a straightforward application of the criteria laid down in sections 55–55E. Controversies over the meaning of those criteria are not envisaged.

The Kopu, Duynhoven and Smith cases illustrate that this assumption is unfounded. Disputes can and do arise over the meaning and scope of sections 55–55E and when they do, someone must resolve them. The central thesis of this paper is that that someone is more appropriately the courts than the House. The policy reasons in support of this view are now explored.

III THE CASE FOR JUDICIAL DETERMINATION OF DISQUALIFICATION DISPUTES

Central to the Privileges Committee's conclusion that Mrs Kopu's status should be resolved by the House of Representatives was the premise that the question of whether a member of Parliament has become disqualified to sit is a matter of parliamentary privilege. It is suggested below that this privilege has since been abrogated as the Speaker now exercises a statutory power to determine whether a seat has become vacant.⁴⁸ From a

⁴⁵ As described above, the key question in this regard is whether the parliamentary leader reasonably believes that the member has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament.

⁴⁶ See Electoral Act 1993, s 55(1)(h).

⁴⁷ Below Part IVA, The Genesis of the 2002 Reform.

⁴⁸ Below Part IV B, The Effect of the 2002 Reform.

policy perspective, however, the key issue is not whether the House's privilege has survived but rather whether it is desirable for the House, or indeed the House's presiding officer, to exercise jurisdiction over disqualification disputes.⁴⁹

This paper suggests that the House's retention of jurisdiction over disqualification disputes is no longer necessary, nor desirable. I develop that case as follows. First, I suggest that given the extent to which the House has ceded control over other aspects of its composition, the House's retention of jurisdiction over disqualification disputes is anomalous. Secondly, I suggest that the nature of the interests at stake when membership of the House is questioned makes the determination of such issues by the House constitutionally undesirable. Finally, I say something about the question of relevant expertise.

A It is Anomalous for the House to Exercise Control over Disqualification Disputes

The privilege asserted by the Privileges Committee in the Kopu case was a remnant of the historic privilege claimed by the British House of Commons to regulate its own composition.⁵⁰ In accordance with that privilege, the British House of Commons claimed the right to decide when and how elections were to be held, to adjudicate upon election disputes and to determine and police the qualifications of its members.⁵¹

This privilege has, however, been whittled away over the course of the last two centuries and along the way the House has ceded control over a number of aspects of its composition to other bodies.⁵²

For example, the New Zealand House of Representatives no longer claims jurisdiction over election disputes. That jurisdiction was granted to the House by statute in 1852 but was subsequently surrendered to the High Court in 1880.⁵³ Amongst the matters that can thereby be determined by the courts on an election petition is the question of whether a successful candidate was properly qualified to stand for Parliament.⁵⁴

49 See John McGrath QC "The Harkness Henry Lecture: the Crown, the Parliament and the Government" (1997) 7 Waikato LR 1, 10.

50 *Erskine May*, above n 2, 90–91; McGee, above n 2, 486–487; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 421–422.

51 McGee, above n 2, 486; see also *Erskine May*, above n 2, 90–91.

52 McGee, above n 2, 486.

53 New Zealand Constitution Act 1852 (UK), s 45; Election Petitions Act 1880.

54 See, for example, *Taumarunui Election Petition* (1915) 34 NZLR 562 (Election Court); *Re Hunua Election Petition* [1979] 1 NZLR 251 (SC). The qualifications of prospective candidates were

As discussed above, the circumstances in which a sitting member might lose his or her qualification to remain in Parliament were committed to statute at the beginning of representative government in New Zealand.⁵⁵ There is outstanding scholarly debate as to whether the House of Representatives retains a general power, over and above any statutory articulation of the circumstances of disqualification, to expel members whom it considers are unfit to serve.⁵⁶ Such a power has, however, never been exercised in New Zealand and is, in my view, unlikely ever to be exercised.⁵⁷

It is not disputed that at the time the Kopu case came before the Privileges Committee, the New Zealand House of Representatives retained a privilege to determine whether, in the light of the statutory criteria contained in section 55 of the Electoral Act 1993, one of its seats had become vacant. It is this remnant of the privilege over composition that was claimed but consciously waived by the House in Mr Ward's case and that was claimed and vigorously asserted by the Privileges Committee in Mrs Kopu's. It is, however, clear from the above that the House's retention of control over parliamentary vacancies had by then become something of an anomaly.

This gradual move away from the House self-regulating its own composition was not without rhyme or reason. It was prompted by changes to the institutional nature of Parliament and the courts during 17th, 18th and 19th centuries that made it constitutionally undesirable for the House to retain control over its own make-up. This point can be explored by reference to the House's privilege to determine election disputes. This privilege evolved during the late 16th and early 17th centuries as a response to the manipulation of election results by the forces of the King and Lords and at a time when Chancery (which asserted a jurisdiction over such disputes) was still in the pocket of the King.⁵⁸ Against that background, Graeme Orr and George Williams write that the transfer

committed to statute in 1852: New Zealand Constitution Act 1852 (UK), s 42. See, now, Electoral Act 1993, s 47.

55 New Zealand Constitution Act 1852 (UK), s 51. See above Part II, The Statutory Scheme.

56 See McGee, above n 2, 509-510; Joseph, above n 50, 422; *Awatere Huata v Prebble* [2004] 3 NZLR 382, 392 (CA); Law Commission *The Law of Parliamentary Privilege in New Zealand* (NZLC MP5, Wellington, 1996) para 65.

57 See, for example, "Privileges Committee Report Relating to the Status of Manu Alamein Kopu", above n 9, 5, stressing the need for clear compliance with the statutory conditions. The Standing Orders Committee has recommended that any residual power to expel be abolished: Standing Orders Committee "Report of the Standing Orders Committee on the Law of Privilege and Related Matters" (1987-90) XVIII AJHR I 18B 13.

58 Graeme Orr and George Williams "Electoral Challenges: Judicial Review of Parliamentary Elections in Australia" (2001) 23 Syd LR 53, 55-58; Carl Wittke *The History of English Parliamentary Privilege* (Da Capo Press, New York, 1970) 55-73.

of power over disputed elections from Chancery to Commons "represented a significant step in democratic evolution."⁵⁹

Control by the Commons of election disputes, however, carried with it dangers of its own. In essence, it required the Commons to act as judge in its own cause. This defect was exacerbated by the rise of Cabinet government during the 18th century which brought with it executive control of the floor of the House. In this more disciplined parliamentary environment, disputed election returns began to be uniformly resolved along party lines on the basis of shows of numerical dominance.⁶⁰ Thus, a development that had initially been democratising came to represent a subversion of democratic values. Meanwhile, the parallel evolution of independent law courts provided, for the first time, a viable alternative for the impartial adjudication of election disputes.

In 1868, in the face of these concerns, the United Kingdom Parliament finally transferred jurisdiction over disputed election returns to the courts.⁶¹ In New Zealand, as discussed above, the House of Representatives was initially given a statutory power over election disputes.⁶² In 1880, the New Zealand Parliament followed the lead of the United Kingdom and transferred this jurisdiction to the courts.⁶³ This reform was spurred by an incident in which two, essentially identical, election petitions had generated different outcomes as a result of an intervening change in the make-up of Parliament.⁶⁴ The incident highlighted the dangers of political involvement in the adjudication of election disputes and provided the immediate trigger for legislative reform.⁶⁵

In short, a consensus had been reached by the late 19th century that parliamentary adjudication of election disputes was undesirable because of the spectre (and indeed reality) of political interference. In a related development during the 1880s, Parliament also transferred jurisdiction over boundary adjustments from the House of Representatives to an independent commission.⁶⁶

59 Orr and Williams, above n 58, 58.

60 Orr and Williams, above n 58, 59–60; Wittke, above n 58, 73–74.

61 Parliamentary Elections Act 1868 (UK). For the current regime, see *Erskine May*, above n 2, 45–46.

62 New Zealand Constitution Act 1852 (UK), s 45.

63 Elections Petitions Act 1880.

64 "Report of the Select Committee on Thames Election" [1876] AJHR I 1; "Report of the Select Committee on City of Christchurch Election" [1879] AJHR I 10.

65 See (28 October 1879) 34 NZPD 560–564.

66 Royal Commission on the Electoral System "Towards a Better Democracy" [1986–87] IX AJHR 133.

It is, I would suggest, surprising given the emergence of this consensus as to the desirability of non-parliamentary control of election disputes that the House has continued to assert control over the determination of disqualification disputes for so long. After all, election disputes and disqualification disputes are essentially two sides of the same coin: one concerns the circumstances in which members are elected to Parliament; the other concerns the circumstances in which they are required to leave. The danger of political interference is present in each case. This parallel was not lost on the members of the 1897 Parliament and influenced their conclusion that the question of Mr Ward's qualification would be better dealt with by the courts than by the House.⁶⁷ At the very least, the parallel suggests the need to consider carefully the case for transferring control over disqualification disputes to the courts.

B The Interests at Stake

Turning to the reasons why it would be constitutionally desirable for the House to cede control over disqualification disputes, it is helpful to explore that question by thinking about the interests that are at stake when the qualification of a member of Parliament is put in issue. The question of a member's qualification has implications on at least three levels: for the individual member, for the voters of New Zealand and for the political parties that make up Parliament.

As to the first, the implications for the individual of the loss of a seat in Parliament have changed substantially since the 16th and 17th centuries when this privilege evolved. Membership of Parliament is now a full time and fully remunerated occupation. The loss of a member's seat in Parliament may well represent the loss of his or her primary income. More importantly perhaps, a member of Parliament is exercising a right of political participation that is protected both at international law and in the New Zealand Bill of Rights Act 1990.⁶⁸ The existence of a rights dimension weighs strongly in favour of an impartial and fair procedure by which a member's qualification to sit in the House can be determined.

Clearly, far more is at stake than the rights of individual members of Parliament. A decision as to whether a member of Parliament has become disqualified impacts on the right of the voters of New Zealand, exercised individually and collectively, to elect their representatives democratically.⁶⁹ At the heart of the proper functioning of the democratic

67 Mr Seddon (30 September 1897) 98 NZPD 128; Mr Montgomery (12 October 1897) 98 NZPD 467.

68 See for example International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, art 25(b); New Zealand Bill of Rights Act 1990, s 12(b).

69 See New Zealand Bill of Rights Act 1990, s 12(a).

system lies surely the imperative that the make-up of Parliament must be free from manipulation, whether from within or without.⁷⁰

Considering the important consequences both to individual members and for the integrity of the democratic system, one would expect determinations as to the qualification of members to be made in an environment of fair and impartial deliberation. As long as the House makes those decisions it is, I suggest, difficult if not impossible for such an environment to prevail and to be seen to prevail. This is because of what is at stake for the political parties that make up Parliament. The question of a member's continued qualification to sit in the House has potentially significant implications for the make-up of the House and for the interests of the political parties that comprise it. For that reason, the power to decide whether members remain qualified to sit in the House places the House in the awkward position of acting as judge in its own cause.⁷¹

Mrs Kopu's case was a case in point. If Mrs Kopu remained in Parliament the Alliance Party would lose one of its seats, with consequences for parliamentary funding and a reduction in political clout. Correspondingly, other parties had something to gain. The Kopu saga unfolded against the background of the first MMP parliamentary term at a time of new and fragile political alliances. Mrs Kopu's defection gave the rather unstable National–New Zealand First coalition government the chance to secure one more potential vote. In the event, this vote was pivotal to the National Party's ability to maintain the confidence of the House once the coalition began to fracture. Whether or not these considerations actually impacted on the members of the Privileges Committee in their deliberations over Mrs Kopu's case, they certainly impacted on the media's portrayal of events and led to implications of political expediency being laid at the doors of the parties involved.⁷²

Similar charges of expediency were laid at the Labour Party's door following the deliberations of the Privileges Committee in 2003 over the fate of Labour member of Parliament and Associate Minister for Transport and Energy, the Hon Harry Duynhoven.⁷³ Mr Duynhoven's case came before the Privileges Committee after he reactivated his Dutch citizenship and thereby unwittingly disqualified himself from

70 Jeremy Waldron "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 Otago LR 631.

71 Orr and Williams, above n 58, 59.

72 For example, Sarah Boyd "National 'morally bankrupt'" (4 August 1997) *The Evening Post* Wellington 2.

73 For example, Nick Venter "Looking after their own" (11 August 2003) *The Dominion Post* Wellington 5.

Parliament under section 55(1)(c) of the Electoral Act 1993.⁷⁴ Counsel for Mr Duynhoven argued that Mr Duynhoven's actions had not, in fact, triggered a vacancy because under Dutch law his reacquisition of Dutch nationality was deemed to have retrospective effect. Counsel argued that Mr Duynhoven had therefore not done an act whereby he might "become" the citizen of a foreign state, as required by section 55(1)(c).

The Privileges Committee was unable to reach a unanimous decision as to whether Mr Duynhoven's actions had triggered his disqualification from Parliament. Significantly, it split along party lines. The three Labour Party members all concluded that Mr Duynhoven's actions had not triggered the disqualification provision; all other members of the Committee concluded, in the majority, that Mr Duynhoven's actions had done so.⁷⁵

I do not mean to suggest that the decision reached by the Privileges Committee in either Mrs Kopu's or Mr Duynhoven's case was incorrect. In fact, my view is that the Privileges Committee was right to conclude that Mrs Kopu had not disqualified herself and that Mr Duynhoven had.⁷⁶ Rather, my concern is twofold.

First, regardless of the result that is reached, the public perception that political expediency has played a role in the deliberations on, and the outcome of, such disputes should be enough by itself to justify serious consideration being given to their removal to the courts. The perception that the House is acting as judge in its own cause in relation to a question of such overriding public interest has the potential to damage public confidence in Parliament as an institution. In that sense, the process is as important as the outcome.

Secondly, assuming for present purposes that political expediency did not dictate the result in either the Kopu or the Duynhoven case, there is no reason to think that it might not do so in a future case if the stakes are high enough and the political allegiances fall the right way. There is every reason to think, for example, that the Duynhoven case would have been decided differently had Labour been a single party majority Government and thus had a majority on the Privileges Committee.

74 Section 55(1)(c) of the Electoral Act 1993, which has since been amended, provided that the seat of a member shall become vacant "if he or she does or concurs in or adopts any act whereby he or she may become a subject or citizen of any foreign State or Power, or entitled to the rights, privileges or immunities of a subject or citizen of any foreign State or Power".

75 Report of the Privileges Committee "Question of privilege relating to the application of s 55(1)(c) of the Electoral Act 1993 to Hon Harry Duynhoven" [2003] AJHR I 17C.

76 Like others, I am less convinced as to the legitimacy of the Committee's majority view in Duynhoven that retrospective legislation should be enacted to remedy Mr Duynhoven's situation, but that is not the focus of this paper. On that see Caroline Morris "On Becoming (and Remaining) a Member of Parliament" [2004] PL 11; Waldron, above n 70.

This concern about political expediency lay behind Parliament's decision in 1880 to hand over to the courts the power to determine disputed elections.⁷⁷ It also lay behind the decision of the 1897 Parliament to refer Mr Ward's case to the Court of Appeal. The view of members of the 1897 Parliament was that the environment of the House and its committees was not conducive to non-partisan decision-making.⁷⁸ While some members bemoaned this situation as involving the "degeneration" of Parliament to "a place where faction exists",⁷⁹ others were more sanguine.⁸⁰

Party has got many advantages - solid advantages - which are not always recognised, but there is one thing which it is absolutely fatal to - namely, to the judicial spirit. It is not the slightest use for honourable members to endeavour to impose upon the House by expressions of moderation, no matter from which side of the House such expressions emanate. The fact is that since parliamentary Government was first introduced every Committee, I believe, ever set up has been more or less influenced by party feeling when the matter was of the nature to arouse it.

There is every reason to believe that this is still the case.⁸¹ Indeed, if anything, the hold of party allegiance on Parliament has tightened over the last century. And although there are some relevant differences between the political milieu of 1897 and 2004, none are such as to overcome the tendency towards partisanship identified by members of the Ward Parliament. Two contenders in this regard might be the existence of a standing Privileges Committee with a tradition of non-partisan decision-making and the advent of MMP with its tendency toward minority or coalition government. As to the first, the members of the Privileges Committee are politicians first and foremost. It would be naïve to suggest that the risk of partisan interests intruding into its deliberations, whether consciously or unconsciously, can be eliminated where a matter of such political significance as the qualification of a member is at issue. As to the second, MMP has certainly made it more difficult for any one party to advance its own interests in the Privileges Committee or in

77 See III A It is Anomalous for the House to Exercise Control over Disqualification Disputes.

78 For example, Captain Russell (8 October 1897) 98 NZPD 378; Mr Seddon (8 October 1897) 98 NZPD 379; Mr Montgomery (12 October 1897) 98 NZPD 466-467; Mr MJS MacKenzie (12 October 1897) 98 NZPD 488; Mr Taylor (12 October 1897) 98 NZPD 488. See though Mr Monk (12 October 1897) 98 NZPD 487.

79 Mr Taylor (12 October 1897) 98 NZPD 488.

80 Mr MJS MacKenzie (30 September 1897) 98 NZPD 129.

81 For an Australian view, see Enid Campbell "Case Note: *Ellis v Atkinson*" (1997) 21 MULR 693, 699, noting that when the Houses of Parliament exercise their own jurisdiction to try qualification disputes there is always a danger that the questions will be decided (or be seen to have been decided) along party political lines.

the House.⁸² It has, however, by no means eliminated the possibility that one party may command a majority in the House or that a coalition of interests might act to the detriment of a minority party.

In summary, the nature of the interests at stake when a member's qualification to remain in Parliament is put in issue weigh heavily against parliamentary determination of disqualification disputes and support such determinations being entrusted to an impartial adjudicator such as the courts.

C The Question of Expertise

Finally, it should be noted that the experience to date suggests that resolution of disputes over a member's status will often turn on points of statutory interpretation.⁸³ In our constitutional structure the interpretation of statutes and their application to particular facts is pre-eminently the function of the courts. As others have suggested, this is itself a reason for preferring that judges rather than politicians determine disqualification disputes.⁸⁴

D Conclusion

In conclusion, there are compelling reasons to support the view that the determination of disqualification disputes should be entrusted to the courts rather than to parliamentary institutions. The retention of parliamentary control over disqualification disputes is anomalous in that over the last two centuries, the House has ceded most other aspects of control over its composition. The nature of the interests at stake when the qualification of a member of Parliament is put in issue make it inappropriate for such matters to be dealt with by the House. Finally, it is the courts rather than the House that have the expertise and constitutional responsibility for the interpretation of statutes.

IV THE SIGNIFICANCE OF THE ELECTORAL AMENDMENT ACT 2002

Given these concerns, it is significant that in 2002 Parliament amended the Electoral Act 1993 to remove direct control over disqualification disputes from the House itself and entrust it to the House's presiding officer, the Speaker. In the light of that reform, it might be argued that the case set out above for the undesirability of the House determining

82 This was illustrated in the Duynhoven inquiry when the Labour Party's allies deserted it when faced with expert advice as to the interpretation of the vacancies provision: Report of the Privileges Committee "Question of privilege relating to the application of s 55(1)(c) of the Electoral Act 1993 to Hon Harry Duynhoven" [2003] AJHR I 17C.

83 This was true in all the cases referred to in this paper: Joseph Ward's, Manu Alamein Kopu's, Harry Duynhoven's, Nick Smith's and Donna Awatere Huata's.

84 McGrath, above n 49, 10. See also Orr and Williams above n 58, 59.

disqualification disputes is redundant. In a formal sense, the House no longer makes such determinations.

To the contrary, I suggest that the 2002 reform has not assuaged concerns as to the House's involvement in disqualification disputes. The Speaker is not well placed to resolve the politically controversial and legally and factually complex issues that may arise in a dispute over membership of the House and is vulnerable to allegations of partisanship when he or she does so. Accordingly, in controversial cases, the Speaker is likely to want to seek the advice of the House, as he did in the Duynhoven case. Far from successfully removing disqualification disputes from the purview of the House, the 2002 reform has thus simply added a host of further problems relating to the involvement of the Speaker. The case for judicial involvement in the resolution of disqualification disputes is, I would suggest, as strong as ever.

A The Genesis of the 2002 Reform

The genesis of the 2002 reform can be traced to the parliamentary debates that followed the resignation of National Party list MP Jim Gerard in March 1997. Mr Gerard resigned from Parliament to take up the position of High Commissioner to Canada. There was no controversy whatsoever surrounding his resignation. As Parliament was in session, however, section 134 of the Electoral Act 1993 dictated that the Speaker could only fill the vacancy if "ordered to by the House" and accordingly, a motion to direct the Speaker to do so was sought.⁸⁵

In the course of debating this motion several members of Parliament from both sides of the House expressed unease about the House's involvement in the matter. They suggested that the requirement that the Speaker act on the order of the House ought to be expunged from the Electoral Act 1993. In essence, these members were motivated by the same kind of concerns about inappropriate political interference that had compelled the 1880 Parliament to transfer jurisdiction over election disputes to the courts and that had compelled the 1897 Parliament to likewise cede jurisdiction over Mr Ward's case. Specifically, members raised the spectre of an errant majority of the House of Representatives cynically refusing to direct the Speaker to fill a vacancy and thus leaving a minority political party short of one member.⁸⁶

85 (22 April 1997) 559 NZPD 1157-1163.

86 (22 April 1997) 559 NZPD 1157-1163, see especially Hon Wyatt Creech 1157-1158; Hon Dr Michael Cullen 1159; Hon Peter Dunne 1161-1162. The Hon Dr Michael Cullen, at 1159, referred colourfully to the 18th century case of John Wilkes, who was thrice elected for the county of Middlesex but on each occasion barred by the Parliament of the day.

The Clerk of the House promptly followed up on this concern in his submission to the Electoral Law Committee on its inquiry into the 1996 election. Referring to the debate over the Gerard resignation, he suggested that the requirement that the Speaker act on the order of the House was "unduly restrictive" and an "unnecessary formality". He recommended that sections 129 and 134 should be amended to enable the Speaker to act of his or her own volition in all cases of parliamentary vacancy.⁸⁷

The timing of these events is instructive. The debate over Mr Gerard's resignation occurred in March 1997; Mr McGee's submission is dated two months later. At that time, the mischief in everyone's mind was that of an obstructive House refusing to supply an uncontroverted vacancy. What was not, it seems, in anyone's mind at the time was the possibility that a genuine doubt might need to be resolved as to whether a member was or was not qualified to remain in Parliament. This is hardly surprising. To my knowledge, the last case of real doubt over the potential disqualification of a member of the New Zealand Parliament had been Mr Ward's case in 1897. Against that background, the Clerk's proposal was not so much that the Speaker should be given jurisdiction to determine whether a vacancy had arisen – it was assumed that this would be self-evident. Rather, the proposal was to remove from the House any power to interfere in a process that, it was thought, should be automatic. In short, no power of decision whatsoever was contemplated because it was assumed that none was required.

Ironically, two months after Mr McGee made his submission to the Electoral Law Committee, the case of Manu Alamein Kopu MP arose and highlighted the possibility that genuine controversies can arise over the interpretation and application of the Electoral Act 1993's vacancies provision. By that stage, however, a series of legislative steps that were to culminate in the 2002 reform had been set in train. The substance of Mr McGee's submission with respect to sections 129 and 134 formed the basis of one of the Electoral Law Committee's recommendations to the Government,⁸⁸ and this recommendation was revived in 2001 by the Justice and Electoral Committee. Sections 49 and 51 of the Electoral Amendment Act 2002, added at the instigation of the Committee, amended sections 129 and 134 along the lines suggested by the Clerk of the House.⁸⁹ These clauses passed through Parliament with no controversy and little comment. The only mention they

87 Clerk of the House "Submission Concerning Administrative Procedures and Law Relating to the Conduct of the Parliamentary Elections" Submission 28W to the Electoral Law Committee Inquiry into the 1996 General Election, May 1997, 4.

88 Electoral Law Committee, "Interim report on the Inquiry into the 1996 General Election" [1996–99] LXI AJHR I 17A 38. See also "Government Response to the interim report of the Electoral Committee on it is Inquiry into the 1996 General Election" [1996–99] LXI AJHR A 5 5–6.

89 See below Part IV B, The Effect of the 2002 Reform.

received in the parliamentary debates was from Mr Wayne Mapp MP, who adverted to Mr Gerard's case and said that the amendments were designed to "confirm the constitutional issue that when a list member retires *the vacancy is automatically filled by statute*, not by resolution of the House."⁹⁰

B The Effect of the 2002 Reform

As amended, sections 129 and 134 now provide that if the Speaker is "satisfied" that the seat of a member has become vacant, the Speaker must, "without delay", take the first steps to initiate the process by which the vacancy will be filled.⁹¹ This alters the previous position in two key respects.

First, the formal power to determine disputes over whether members have become disqualified now resides with the Speaker rather than the House. Admittedly, the background assumption of those responsible for drafting and enacting the 2002 reform was that the Speaker would not so much be exercising a power of decision as facilitating the process by which vacant seats were to be filled. Nevertheless, the language of the amended sections 129 and 134 is clear. The Speaker must act if he or she is "satisfied" that a vacancy exists. Accordingly, if a doubt arises as to whether a member's seat has become vacant, the Speaker has a statutory duty to satisfy him or herself as to the correct position. The Speaker must reach his or her own view, although there is nothing to stop him or her from seeking guidance from other sources. Thus, in the Duynhoven case, the Rt Hon Jonathan Hunt MP correctly took the view that he could seek guidance from but was not bound by the views of the House.⁹²

The second (and consequent) way in which the 2002 reform has altered the previous position is that it would seem that the 2002 reform has abrogated the House's privilege to determine whether its members remain qualified to sit. Consistent with the *raison d'être* of the 2002 reform (which was to remove the question of a member's disqualification from the purview of the House), the Speaker now carries out his or her responsibilities under sections 129 and 134 in the exercise of an independent statutory duty and not, it would

90 (15 November 2001) 596 NZPD 13163 (emphasis added).

91 The nature of that process varies depending on whether the seat is a list seat or a constituency seat but, in each case, the first step is to publish a notice of the vacancy in the *Gazette*.

92 (6 August 2003) 610 NZPD 7749.

seem, on behalf of or at the behest of the House.⁹³ This is certainly the view taken by the current Clerk of the House, Mr David McGee QC.⁹⁴

C Adequacy of the New Process

The decision as to whether the seat of a member of the House has become vacant under sections 55–55E of the Electoral Act 1993 thus now resides with the Speaker.⁹⁵ The question of interest to this paper is whether that modification to the process by which disqualification disputes are to be determined is sufficient to meet the concerns set out in Part III of this paper and thereby circumvent the need for further legislative change. In my view it is not, for the following reasons.

If a controversy arises over whether the seat of a member of Parliament has become vacant, the Speaker essentially has two options: to resolve the matter himself or herself or to fall back on the guidance of the House. Both options are fundamentally unsatisfactory.

As to the first option, the tradition of impartiality surrounding the office of Speaker might at first glance suggest that he or she is better placed to make decisions as to the qualification of members than is the House itself. This, however, places a great burden on the institution of the Speaker that I am not convinced it is well placed to bear.

First, there is the question of process and the related issue of transparency. The resolution of a dispute over a member's qualification may involve complex evidential issues and will almost certainly involve the weighing of competing submissions. The Privileges Committee at least has well established procedures for the taking of evidence and the determination of disputed questions of fact and law in accordance with the rules of natural justice.⁹⁶ Although its hearings are not open to the public as a matter of right,⁹⁷ they can be made so if the public interest is thought to require it.⁹⁸ While there is no reason why the Speaker could not receive and consider written submissions from the competing parties it would, I suggest, be difficult for the Speaker to establish a public hearing process independent of the House and its committees.

93 An analogy might be the Speaker's powers and duties under, for example, the Parliamentary Services Act 2000.

94 Advice of D G McGee, Clerk of the House of Representatives dated 6 April 2004, 8–9.

95 See, though, above Part II, The Statutory Scheme, for the limited circumstances in which the legislation provides for key decisions in this respect to be taken by someone other than the Speaker.

96 Standing Orders of the House of Representatives, ch IV; see McGee, above n 2, 499–500.

97 Standing Orders of the House of Representatives, SO 210.

98 Standing Orders of the House of Representatives, ch IV; see McGee, above n 2, 499–500.

The Speaker does have access to high quality, expert legal advice from the Clerk of the House. Where such an important matter as the membership of the House is at stake, however, that is no substitute for a public hearing.

Perhaps more importantly, there is the real potential for damage to the Speaker's perceived impartiality if he or she is placed in the unenviable position of being required to resolve politically heated decisions over a matter at the very heart of the democratic system: the make-up of the House itself. That matter is, I would suggest, of a different character to the many questions surrounding control of the chamber that are quite properly the province of the Speaker as its presiding officer.

It is worth recalling in this respect the debate surrounding Mr Duynhoven's case and the damage that was sustained to the Speaker's perceived impartiality as a result of the controversy that raged over the process the Speaker followed in deciding whether Mr Duynhoven's seat was vacant. In that case, claims of impropriety were levelled at the Speaker, the Rt Hon Jonathan Hunt MP, because he delayed his decision as to whether Mr Duynhoven's seat had become vacant for long enough for the Government to introduce retroactive legislation that validated Mr Duynhoven's actions.⁹⁹ I make no comment as to whether the Speaker's actions were justified in that regard.¹⁰⁰ My point is, rather, that in making politically charged decisions as to a member's status, the Speaker will almost inevitably face allegations of political partisanship. This is an undesirable position for the Speaker to be placed in.

In the light of these concerns, it is almost inevitable that the Speaker will want to fall back on the guidance of the House in cases of doubt. That was the approach taken by the Rt Hon Jonathan Hunt MP in the Duynhoven case.¹⁰¹ He ruled that as a "question of privilege" was involved the matter stood referred to the Privileges Committee and that he would be "guided" by the Committee's report and the House's conclusion on it. In subsequent justification of this decision, he observed quite fairly that:¹⁰²

I do not think for one moment that members would feel that any Speaker should act without consulting them, if there was a real doubt about whether a vacancy actually existed. I ask members to reflect on whether they would be comfortable about a Speaker doing that.

99 Hon Roger Sowry MP (6 August 2003) 610 NZPD 7709-7710, 7805; Hon Richard Prebble MP (6 August 2003) 610 NZPD 7731, 7809.

100 The Speaker's explanation was that he was following the process he had signalled at the outset of the inquiry, which was to delay his decision until the matter had been debated by the House: (6 August 2003) 610 NZPD 7749.

101 Mr Speaker (23 July 2003) 610 NZPD 7211.

102 (6 August 2003) 610 NZPD 7749.

In fact, for the reasons given above,¹⁰³ it is doubtful that a question of privilege was involved and accordingly, the matter did not strictly fall within the jurisdiction of the Privileges Committee as set out in the Standing Orders.¹⁰⁴ Putting that technical point to one side, the referral of disqualification disputes to the House for its guidance is, I would suggest, troubling for all of the reasons set out in Part III. After all, the very *raison d'être* of the 2002 reform was to remove disqualification disputes from the politically charged environment of the House and its committees.¹⁰⁵ Although there is, on the face of it, a difference between the House itself having jurisdiction over disqualification disputes and the Speaker merely taking "guidance" from the House, that difference is, I would suggest, more apparent than real. Consider the potential damage that might be sustained to the reputation of the Speaker were the Privileges Committee and the House to reach one conclusion and the Speaker to disregard it. The reality is that having sought "guidance", the Speaker has little real option but to reach a decision in conformity with the House.

In any event, the practice of referring cases of "doubt" to the House for its guidance still leaves the Speaker in the position of having to make decisions as to whether sufficient "doubt" exists in a particular case. The making of such decisions may in itself expose the Speaker to some of the risks identified above. I note in this respect that in the two cases that the Speaker has considered since the 2002 reform (Mr Duynhoven's and Mr Smith's) there has been a lack of consistency in the degree of doubt that the Speaker has required before seeking the guidance of the House. In the Duynhoven case, the matter *was* referred to the Privileges Committee even though, on a straightforward reading of section 55(1)(c) of the Electoral Act 1993, Mr Duynhoven's actions had clearly triggered a vacancy.¹⁰⁶ Any doubt that may have existed rested upon the energetic and creative attempts of Mr Duynhoven's lawyers to manufacture a viable, alternative interpretation of the relevant provision, an attempt that ultimately failed to attract the support of any but the three Labour members of the Committee.

103 Above Part IV B, The Effect of the 2002 Reform.

104 Standing Orders of the House of Representatives, SO 386. The Speaker could, of course, have sought the leave of the House to refer the matter to that or any other committee.

105 Hon Richard Prebble MP (6 August 2003) 610 NZPD 7730; Hon Roger Sowry MP (6 August 2003) 610 NZPD 7750.

106 See above Part III B, The Interests at Stake. The view that Mr Duynhoven was clearly disqualified was confirmed by the advice of both the Solicitor-General and the Clerk of the House Privileges Committee: "Question of privilege relating to the application of section 55(1)(c) of the Electoral Act 1993 to Hon Harry Duynhoven" [2003] AJHR I 17C 8.

The question in Mr Smith's case, on the other hand, was whether his conviction for contempt of court, a common law offence with no limit as to potential penalty,¹⁰⁷ disqualified him from membership of Parliament under section 55(1)(d). That section applies to a member convicted of a crime punishable by imprisonment for a term of two years or more and accordingly, on the plain and ordinary meaning of section 55(1)(d), Mr Smith appeared to be covered. The Speaker ruled, however, that Mr Smith's seat had not become vacant and that there was no need to refer the matter to the Privileges Committee.¹⁰⁸ He based his ruling on a detailed, nine-page opinion that he had received from the Clerk of the House in which the Clerk argued that the ordinary meaning of the word "crime" in section 55(1)(d) was displaced by the specialised meaning given in the Crimes Act 1961 - a meaning that did not embrace contempt of court.¹⁰⁹ This advice was thorough, comprehensive, even compelling. But the matter was surely open to at least as much "doubt" as existed in Mr Duynhoven's case. In reality, what the Speaker was doing in Mr Smith's case was resolving that doubt to his own satisfaction on the basis of expert advice - a very different course of action from the one adopted with respect to Mr Duynhoven.

The real difference between Mr Duynhoven's and Mr Smith's cases lies not in the degree of doubt involved but rather in the fact that the question of Mr Duynhoven's qualification was clearly contested within the House whereas the question of Mr Smith's was not. No political party had anything to gain (and most had much to lose) from being seen to assert that Mr Smith should lose his seat. Indeed, the only person who had sought clarification from the Speaker as to Mr Smith's qualification was Mr Smith himself. This suggests that the manner in which a vacancy question is dealt with may well depend not on an objective assessment of whether "doubt" exists as to its proper resolution but rather on the extent to which a parliamentary faction perceives a benefit in contesting the matter.

This last point highlights another deficiency of the current procedures, which is that there is currently no mechanism by which interested members of the public might seek to have the question of a member's qualification addressed in the absence of support from within the House. In short, the resolution of controversies as to a member's qualification is still, in whole or in part, at the behest of politicians.

107 John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 270-271. See also *Solicitor-General v Van der Kaap* (30 May 1997) HC Hamilton M 155/97, in which a sentence of imprisonment was imposed for contempt of court.

108 (6 April 2004) 616 NZPD 12,365.

109 D G McGee, Clerk of the House of Representatives, Advice to the Speaker (6 April 2004).

V OPTIONS FOR GREATER JUDICIAL INVOLVEMENT

Accordingly, the 2002 reform has, if anything, underlined the need for jurisdiction over controversies surrounding the qualification of members of Parliament to reside with the courts. It remains to consider how that might occur. This Part begins with a brief discussion of the scope of the High Court's existing review jurisdiction. Some precedents for greater judicial involvement in disqualification disputes are then explored. Finally, some brief remarks are made as to the options for legislative reform.

A *The Supervisory Jurisdiction of the High Court*

It should be acknowledged that the High Court already has a limited ability to supervise the disqualification process through its review jurisdiction.

First, as discussed above,¹¹⁰ the legislation provides for some key decisions relevant to whether a member has lost his or her seat to be made outside of, and entirely removed from, the House. Such decisions are amenable to review regardless of any question as to the continuing scope of the House's privilege to determine whether a seat has become vacant. Thus, a decision by the Director-General of Health together with a registered medical practitioner that a member of Parliament is mentally disordered is doubtless amenable to judicial review.¹¹¹ Similarly, there is no reason why the activities of parliamentary leaders under sections 55A–55E should not be amenable to review.¹¹²

Secondly, it is suggested above that the 2002 reform has in any event abrogated the House's privilege to determine whether a seat has become vacant.¹¹³ The Speaker now exercises that function not on behalf of or at the behest of the House but in the exercise of an independent statutory duty. The corollary of this is that the Speaker's decision is also amenable to review.

Assuming that this view is accepted, it would seem that the High Court now has some limited ability to supervise the process by which the Speaker determines whether the seat

110 Above Part II, The Statutory Scheme.

111 See *Awatere Huata v Prebble*, above n 56, 397 McGrath J.

112 *Awatere Huata v Prebble*, above n 56, 372 Gendall J, 397–398 McGrath J. Note, though, that the Supreme Court preferred to leave this point open: *Awatere Huata v Prebble* [2005] 1 NZLR 289, 305 (SC) Elias CJ, 314–315 Gault J. For commentary on the Huata decision, see Andrew Geddis "Membership of the House" [2004] NZLJ 30; Andrew Geddis "Privilege, Parliament and the Courts" [2004] NZLJ 302; Andrew Geddis "All Power to the Party" [2005] NZLJ 13.

113 Above Part IV B, The Effect of the 2002 Reform.

of a member of the House has become vacant.¹¹⁴ That said, there is a further and important question as to the scope of such review. In the light of the political context in which such decisions are made, the High Court is likely to exercise considerable restraint in reviewing the Speaker's decision and indeed may even refuse to do so.¹¹⁵ The courts are likely to be very wary indeed about intruding on a decision made in such circumstances, regardless of whether the decision is protected by privilege. This is particularly so given the ongoing involvement of the House and its committees in "guiding" the Speaker in the exercise of his or her decision.

The High Court's review jurisdiction is, therefore, unlikely to be sufficient to address the concerns identified in Part III and IV. Rather, legislative reform is needed to provide for enhanced judicial involvement in the determination of disputes over membership of the House.

B Precedents for Judicial Determination

While not determinative, it is comforting to note that precedents for greater judicial involvement in disqualification disputes can be found both in New Zealand's historical practice and in contemporary practice elsewhere in the Commonwealth.

The Ward case is, of course, one such precedent, albeit that referral to the court in that case was on a one-off basis. Another precedent for judicial involvement in the determination of disqualification disputes can be found in the statutory regime governing New Zealand's now defunct Upper House, the Legislative Council. Section 37 of the New Zealand Constitution Act 1852 (UK) provided that the question of whether a seat in the Legislative Council had become vacant was to be determined by the Legislative Council itself at first instance but could be appealed to the Privy Council. Such an appeal could be brought either by the person whose seat was in question or by the Attorney-General.¹¹⁶

In addition to these indigenous precedents, a survey of other Commonwealth jurisdictions indicates that judicial involvement in the determination of disqualification disputes is by no means uncommon. I take the United Kingdom and Australia as my two examples in this respect.

114 It is relevant in this respect that the current Clerk of the House holds the view that the House's privilege to determine vacancies has been abrogated. This makes it unlikely that the Speaker would seek to rely on the privilege in litigation.

115 See for example *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741, 757-760 (HC) Hammond J.

116 New Zealand Constitution Act 1852 (UK), s 51.

There are three methods by which the United Kingdom Parliament has, over time, provided for a degree of judicial involvement in determining whether the seat of a member of the House of Commons has become vacant. First, section 4 of the Judicial Committee Act 1833 (UK)¹¹⁷ gives the Crown a power to refer any matter whatsoever to the Judicial Committee of the Privy Council for its determination. This power has been used on occasion to resolve questions of electoral disqualification.¹¹⁸

Secondly, from the late 17th century until the middle of the 20th century, the courts had jurisdiction to entertain proceedings by common informers (that is, members of the public) for recovery of monetary penalties from persons who sat and voted in the House whilst disqualified.¹¹⁹ Thus, the court could not declare the seat vacant but could exact a monetary penalty from a person it considered was not qualified to sit.

Thirdly, in 1957, the United Kingdom Parliament enacted the House of Commons Disqualification Act 1957 (UK).¹²⁰ This Act consolidated one subset of the grounds of disqualification: those relating to conflicts of interest arising from the holding of a public office. The Act made provision for any interested member of the public to seek a determination from the Judicial Committee of the Privy Council as to whether a member of the House was disqualified on such grounds.¹²¹ Thus, with respect to one subset of the grounds of disqualification, a court, at the behest of a member of the public, now has ultimate power to determine whether a seat in the House of Commons has become vacant.¹²²

A similar array of methods by which disqualification disputes can be aired before the courts is found in Australia. First, section 376 of the Commonwealth Electoral Act 1918 (Cth) enables the High Court of Australia, sitting as a Court of Disputed Returns, to

117 Judicial Committee Act 1833 (UK), 3 & 4 Will 4, c 41.

118 For example, *Re Samuel* [1913] AC 514; *Re MacManaway, Re House of Commons (Clergy Disqualification) Act 1801* [1951] AC 161. See also *Erskine May*, above n 2, 60.

119 For example, House of Commons (Disqualification) Act 1782 (UK), 22 Geo 3, c 45; House of Commons (Disqualification) Act 1801 (UK), 41 Geo 3, c 63. See Campbell, above n 81, 696–698; John Vickers "Reviving old remedies" (1988) 85 Law Society's Gazette 28. For the limited classes of cases with respect to which this remedy is still available, see *Halsbury's Laws of England* (4 ed Reissue, Butterworths, London, 1997) vol 34, Parliament, 383, para 616.

120 Since re-enacted with amendments as the House of Commons Disqualification Act 1975 (UK).

121 House of Commons Disqualification Act 1957 (UK), especially s 7. Now House of Commons Disqualification Act 1975 (UK), s 7.

122 Note though that the House of Commons retains a limited power to override a member's disqualification if the grounds of disqualification have since been removed and it is otherwise proper to do so: House of Commons Disqualification Act 1975 (UK), s 6.

determine disputes over the qualification of members of the federal Parliament on referral by resolution of the relevant House.¹²³ A similar power of referral exists in almost all the state jurisdictions.¹²⁴

Secondly, a number of the Australian jurisdictions have common informers provisions. So, for example, the Common Informers (Parliamentary Disqualification) Act 1975 (Cth) entitles ordinary citizens to sue a disqualified member for a civil penalty and to claim AU\$200 for every day the member invalidly sits after the suit is filed.¹²⁵

Thirdly, one Australian jurisdiction (Western Australia) has enacted legislation enabling electors to seek a declaration from the state's Supreme Court that the seat of a member of Parliament has become vacant, although the grounds on which such a declaration can be sought are limited.¹²⁶ The federal Parliament and the other state Parliaments have not enacted similar legislation,¹²⁷ an omission that has attracted judicial rebuke. In *Ellis v Atkinson*, Vincent J opined that it was:¹²⁸

... to put it mildly, unfortunate that the entitlement of a member of the Legislature of this State to sit and vote on matters of great public importance cannot be determined through some independent and impartial process and may ultimately depend upon the balance of political power within the House itself.

If New Zealand were to move toward greater judicial involvement in the determination of disqualification disputes, it would not, therefore, be breaking new ground. Indeed if anything, it would simply be bringing itself into line with developments elsewhere in the Commonwealth.

123 This provision was first enacted as the Commonwealth Electoral Act 1902 (Cth). See also section 47 of the Australian Constitution. The Houses of Parliament apparently retain a right to determine questions of qualification themselves should they so wish: see Campbell, above n 81, 700 but compare with Orr and Williams, above n 58, 63–64.

124 Orr and Williams, above n 58, 65 ; Campbell, above n 81, 697.

125 See also Australian Constitution, s 46; Orr and Williams, above n 58, 67; Campbell, above n 81, 698–699.

126 Campbell, above n 81, 701.

127 See, though, *Sue v Hill* (1999) 163 ALR 648 (HCA) in which the High Court of Australia held that a member's qualifications could be questioned by a member of the public in an election petition.

128 *Ellis v Atkinson* [1998] 3 VR 175, 186 (SC).

C Options for Legislative Reform

The question of exactly what form legislative reform should take in New Zealand requires more detailed consideration than can be offered in the remainder of this paper. Some initial thoughts are, however, as follows.

First, although the Ward case illustrates that it is possible to enact one-off legislation referring a single disqualification dispute to the courts, some form of standing legislation is surely preferable. That was certainly the view of the Select Committee that considered Mr Ward's case in 1897. In addition to its specific recommendation of an urgent referral of Mr Ward's case to the Court of Appeal, the Committee recommended the enactment of standing legislation to enable any such issues that arose in the future to be referred to the courts.¹²⁹

Taking this as the starting point and putting to one side the rather arcane notion of a common informers provision, there would seem to be two, broad options for legislative reform. The first is to provide for a referral power; the second is to enable challenges to the qualification of members of Parliament to be brought directly to the courts by members of the public.

The Select Committee that considered Mr Ward's case preferred the first option. The Committee's recommendation was for legislation to be introduced "enabling the Governor in Council to order that any questions of law or fact be referred to the Judges of the Supreme Court for their decision."¹³⁰ A preliminary question that would need to be addressed with respect to such a referral power is who should have control over the decision whether to refer? In the Australian jurisdictions, the answer to that question is the relevant House. In New Zealand, in the light of the 2002 reform, another option presents itself: the power to decide whether a question as to a member's qualification should be referred to the courts might be reposed in the Speaker.

A referral power would serve a useful purpose in that it would give the Speaker a meaningful alternative to seeking guidance from the House in cases of doubt. It does, however, have its limitations. It is relevant in this respect that the Australian referral powers have attracted judicial and academic criticism because they are thought to leave too much discretion in the hands of the parliamentary majority.¹³¹ That criticism would have less "bite" if the referral power were entrusted to the Speaker rather than the House.

129 (8 October 1897) 98 NZPD 377. Needless to say, this recommendation was never acted upon by Parliament.

130 (8 October 1897) 98 NZPD 377.

131 Orr and Williams, above n 58, 66; Campbell, above n 81, 699; *Ellis v Atkinson*, above n 128, 186.

Nevertheless, for the reasons already explored above with respect to the Speaker's role in deciding when to refer cases of "doubt" to the House,¹³² it is not altogether desirable that the Speaker be required to fulfil this gate-keeping function.

On the other hand, one potential drawback of allowing members of the public to themselves initiate a challenge to a member's status is that it might expose members of Parliament to the possibility of frivolous or vexatious claims. There is, I should say, no evidence that the British courts have been flooded with challenges to the status of members of Parliament in the 50 years since the public were given the power to initiate claims under the House of Commons Disqualification Act 1957 (UK). Indeed, it appears that no such claim has ever been brought.¹³³ Nevertheless, the possibility of vexatious claims should not be discounted, particularly in the light of the serious personal and financial consequences for a hapless member of Parliament who might be forced to defend such a claim.

This is no doubt a reason for caution in the design of an appropriate mechanism for judicial involvement. There are, however, ways of addressing this concern. For example, legislation could require the leave of the court for a challenge to be brought and/or could make provision for the public funding of a member's defence. The spectre of vexatious claims is not sufficient on its own to outweigh the advantages of allowing members of the public direct recourse to the courts to challenge a member's right to remain in the House. Legislation enabling members of the public to do so would bring the matter onto the same footing as election petitions and, consistent with the interests of democracy, would leave ultimate control over the composition of the House where it should be: in the hands of the electors.

VI CONCLUSION

Faced with a question over Joseph Ward's status in 1897, members of the New Zealand House of Representatives expressed serious misgivings about the propriety of the House making its own determination as to whether one of its members was qualified to sit. They considered that members of Parliament were insufficiently impartial to make such a determination and that it would be preferable for the matter to be determined by the courts.

Little has happened in the succeeding century to mitigate the concerns identified by the 1897 Parliament. To the contrary, there continue to be substantial objections to the House retaining control over questions of parliamentary disqualification. In particular, the nature

¹³² Above Part IV C, Adequacy of the Process.

¹³³ See *Erskine May*, above n 2, 59.

of the interests at stake when a member's status is put at issue makes such a question peculiarly inappropriate for determination by the House itself.

Concerns of this kind informed the Electoral Amendment Act 2002, which removes the formal power to determine whether a seat is vacant from the House and reposes it in the Speaker. The problem with the 2002 reform, however, is that from an institutional perspective the Speaker is not well placed to resolve the complex and politically controversial issues that may arise in the context of a disqualification dispute. Accordingly, the Speaker is likely to want to seek the advice of the House in controversial cases. Far from removing qualification disputes from the purview of the House, the 2002 reform has thus simply muddied the procedure by which such disputes are to be resolved and laid the office of the Speaker open to claims of political partisanship.

In conclusion, legislative reform is needed to provide for judicial involvement in the determination of disqualification disputes. While some tentative remarks as to the precise shape of such reform have been offered above, that is a question requiring a more thoroughgoing analysis. When considering the shape that such reform should take, however, guidance can be sought from other jurisdictions, such as the United Kingdom and Australia, where legislation already provides for a degree of judicial involvement in the determination of qualification disputes.

