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**MEMBER'S ELECTION DECLARED VOID BY HIGH COURT -
AUSTRALIAN COMMONWEALTH CONSTITUTIONAL REQUIREMENTS
FOR MEMBERS OF PARLIAMENT**

Paper by the Speaker of the House of Representatives

Introduction

The recent decision of the High Court of Australia in the *Cleary* case drew public attention to the sections of the Constitution setting out the qualifications of Members of Parliament.

Mr Phil Cleary was 'elected' the Member for Wills at a by-election held on 11 April 1992. Standing as an independent with 21 other candidates, he received 21 391 primary votes and 41 708 votes (65.7 per cent) after distribution of preferences. His nearest rivals were the Australian Labor Party candidate, Mr Bill Kardamitsis (18 784 primary votes) and the Liberal Party candidate, Mr John Delacretaz (17 582 primary votes). The man who was successfully to challenge all three of them, Ian Sykes, had 364 primary votes.

Office of profit under the Crown

When he nominated for the federal seat of Wills and on the day of the election, Mr Cleary was employed in the Victorian Teaching Service (a State public service body). He was on leave without pay. He resigned from the service on 16 April 1992, after the election but before the formal declaration of the poll on 22 April.

The challenge to his election was based on section 44 of the Commonwealth Constitution which sets out five circumstances which disqualify a person from 'being chosen or... sitting' as a Member of the Commonwealth Parliament. The part which affected Mr Cleary is paragraph (iv):

44. Any person who
....
(iv.) Holds any office of profit under the Crown
....
shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives.

This particular disqualification can be traced back to the early 18th century. Its original purpose was to support the independence of Members of Parliament from the King or Queen. While that problem has long since gone, the High Court identified two other purposes for the provision. One was to limit the influence of the executive government over individual Members of Parliament. The other assumed that the two positions were incompatible - a person could not be a Member of Parliament and a public servant at the same time and perform both jobs adequately.

All seven justices of the High Court found that Mr Cleary held an 'office of profit under the Crown' within the meaning of the Constitution. He was a permanent officer in the teaching service. The fact that he was on leave without pay was irrelevant. A specific exception for State ministers showed that the section otherwise applied to State, as well as to Commonwealth officers.

It is perhaps unlikely that Mr Cleary would in fact have been influenced by his public service allegiances but the principle may be as much designed around possibility and potential as provable demonstration.

Incapable of being chosen

The most difficult question was whether he still held such an office at the critical time. When the Constitution says that a person with a disqualification is 'incapable of being chosen', does it refer to the date of the nomination, the election or declaration of the poll?

Six justices held that the disqualification applied to the whole process of 'being chosen' which begins on the day of nomination. The submission that a Member of Parliament is chosen only upon declaration of the poll was rejected.

The narrower reading was preferred by the seventh member of the court in the interests of giving as many persons as possible the 'democratic right to seek to participate directly in the deliberations and decisions of the national Parliament.'

Comment

The decision reinforces a long-held convention that candidates who are possible holders of offices of profit under the Crown should err on the side of caution and resign before nominating.

The Senate Standing Committee on Constitutional and Legal Affairs, in its 1981 report entitled 'The Constitutional Qualifications of Members of Parliament', stated:

To comply with s.44 (iv) and in line with the prevailing interpretation of the word 'chosen' in s.44, all persons who hold an office of profit under the Crown must resign before contesting a Commonwealth election.

The problem that this convention could exclude public servants from standing for office has been addressed. Commonwealth law provides a solution for public servants who wish to seek election, by allowing them to be automatically reinstated without loss of privileges after they have unsuccessfully contested an election. Under Victorian law reinstatement is discretionary.

In its final 1988 report the Constitutional Commission recommended an amendment to the Constitution to solve the problem confronted by Mr Cleary. It said that a person holding an office of profit under the Crown should be 'deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of the Parliament and so would be qualified as a member'. Action has not been taken towards implementation of this recommendation.

Dual citizenship and foreign allegiance

The issue of when a person is 'chosen' was of equal relevance in determining the second matter raised in Mr Sykes' challenge to the by election results. When should disqualification operate in relation to those holding foreign citizenship, rights or allegiance?

The other two candidates, Mr Kardamitsis and Mr Delacretaz, were affected by part (i) of section 44:

44. Any person who
....
(i.) Is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power:

....

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Throughout the election period, both were found to be citizens of another country as well as Australia: Greece, in the case of Mr Kardamitsis, and Switzerland, in the case of Mr Delacretaz. Each had become naturalised after arrival in Australia and taken an oath in which they renounced other allegiances. Nevertheless there were further steps under Greek or Swiss law which each could have taken to renounce his original citizenship, by application to the government concerned.

Taken literally, this section of the Constitution would disqualify people with dual nationality from standing for the Commonwealth Parliament even where it was impossible, under foreign law, to renounce their other nationality. The High Court rejected this interpretation, in favour of a requirement that holders of dual nationality take 'all reasonable steps' to divest themselves of their foreign nationality and the rights and privileges of such citizenship. Failing to do this meant that such persons remained under an allegiance to a foreign power, contrary to section 44(i) of the Constitution. The High Court differed, however, on what these steps might be. A majority of five justices held that both candidates would have been disqualified, while two justices found that, in these circumstances, the oath of allegiance to Australia which each had taken was sufficient.

In her dissenting judgment, Justice Gaudron stated that by acquiring Australian nationality, swearing allegiance to Australia and renouncing other allegiances, both candidates had done as much as was necessary to remove themselves from this section. Both candidates had for many years considered themselves, and had been considered, as active Australian citizens, and they had not held the passports of their countries of birth, Switzerland and Greece.

The majority applied the principle of international law that citizenship is determined by the law of the country concerned, not that of another country. Both Switzerland and Greece provide for mechanisms of renouncing citizenship, and the majority held that both candidates should have followed these laws and renounced their rights to passports and other privileges.

Comment

The principle that no Member should pay any allegiance to a foreign power is clear enough. However, as the majority of justices found, effective renunciation of allegiance to another country depends on the laws and customs of that country, not of Australia. The court has said, in effect, that one must do more than take up

Australian nationality, which includes renouncing other allegiances: one must go through the process of renunciation according to the laws of the nation or nations to which former allegiance has been given.

Some countries do not recognise a right of renunciation. In these circumstances it would seem that a person must draw his or her renunciation of allegiance to the attention of the former nation or nations involved and it seems that such renunciation would be accepted by Australian courts.

Mr Delacretaz and Mr Kardamitsis had been Australian citizens since 1960 and 1975 respectively. Both had 'renounced all other allegiance' at the time. Their dual citizenship was the result of the law of the other country.

Should people in this position be disqualified from standing for Parliament in Australia? More broadly, does dual citizenship matter, as long as the candidate is a citizen of Australia? The Constitutional Commission thought not. In its 1988 report it argued for the deletion of this provision altogether. It recommended that the Constitution be altered to make Australian citizenship a necessary qualification for membership of the Parliament, and that Parliament should have the power to make laws requiring parliamentarians to comply with reasonable residency requirements.

The Senate Standing Committee addressed the issue in its 1981 report. The Committee recognised that the problem of unsought dual nationality was a bar to membership of the Parliament, that it was an internationally accepted principle that each country had the right to determine for itself whom it would regard as its nationals, and under what conditions its nationality could be acquired or lost, and that appropriate steps must be taken to relinquish the non-Australian nationality so far as the candidate was able. The Committee also stated:

The fact that an Australian citizen is also a national of another country ought not itself to be a bar to entry into the Commonwealth Parliament...

Conclusion

The question of eligibility of Members of Parliament goes to the heart of any democracy - so much so that section 46 of the Constitution empowers 'any person' to sue any Senator or Member disqualified under section 44. It is the only matter in the Constitution in respect of which individuals are given a constitutional right to take action to ensure compliance of their representatives with the Constitution.

The rules regulating eligibility must reflect the equality and freedom of persons to participate in the fullest expression of political life. This must be balanced against the

needs of the community to have competent, disinterested and loyal service to Australia. Examining the eligibility requirements for parliamentary representatives is an important task in ensuring that our parliamentary institutions function effectively and fairly in modern, multicultural societies.