DEPARTMENT
OF THE SENATE

Procedural Information Bulletin

18 August 2017 • No. 317

For the sitting period 8–17 August 2017

Qualification of senators

The sitting fortnight was bookended with matters connected to the qualification of senators. Section 44 of the Constitution disqualifies people from being elected or sitting in either House on a number of grounds (see Bulletin 309). Its purpose is to ensure that people elected to Parliament are beholden to no-one but the electors as a whole and may therefore perform their duties free from undue external influence, including from the executive government, foreign governments and commercial pressures.

Section 44(i) broadly prohibits 'foreign allegiances', and disqualifies any person who 'is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power'. The relevant authorities — principally the 1992 case Sykes v Cleary [No 2] [1992] HCA 60 — hold the provision to mean that dual citizens must take 'reasonable steps to renounce' their foreign citizenship before nominating for election, and that what is reasonable turns on individual circumstances. Two of the five justices hearing the case took a more purposive approach, with Deane J suggesting that it should apply 'only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned' so that 'an Australian-born citizen is not disqualified by reason of the second limb of s. 44(i) unless he or she has established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power'. The five cases now referred to the High Court (with one pending) will give the court the opportunity to further develop or clarify the operation of the provision. The circumstances of those cases are set out below.

On the first sitting day, the President tabled letters from Australian Greens Senators Ludlam and Waters, resigning their places after receiving advice they were dual citizens having each been born overseas: Ludlam in New Zealand, naturalised as an Australian in his teens; Waters born to Australian parents in Canada, returning to Australia when she was a baby. As they had not taken steps to renounce their foreign citizenship, they may have breached section 44(i). Government minister Senator Canavan also adverted to advice about his circumstances, involving Italian citizenship by descent, and advice he had received suggesting that he had not contravened section 44. Questions relating to each senator were referred to the High Court, on the initiative of their respective leaders. On the following sitting day, the President tabled documents supplied by the Australian Greens (previously published by online media) raising questions about the citizenship status of One Nation Senator Roberts, and that party's leader initiated a reference to the court. The House referred a member – former senator and now Deputy Prime Minister Joyce – to the court in similar circumstances on 15 August. On the adjournment debate on the final Senate sitting day another government minister, Senator Nash, revealed advice she had received that day about her apparent British citizenship, by descent, and indicated that she expected her case would also be referred when the Senate returns.

There were several debates and questions raised concerning the threshold of evidence which the Senate might expect before contemplating a motion to refer questions about the qualifications of a senator under section 44 to the Court of Disputed Returns. The Senate's approach has generally been to ask the court determine any genuine case where evidence has been put before the Senate indicating that a breach of the constitutional provisions may have occurred. Calls from the cross-benches for an audit of the citizenship status of all senators were resisted by the Senate, principally on the basis that this involved an inappropriate reversal of the onus of proof.

Questions respecting qualifications or vacancies

As was the case with former Senator Day, Senators Ludlam and Waters each resigned their places before related questions were referred to the court. One issue raised is how questions respecting the qualifications of senators may be referred to the court notwithstanding their resignation.

The questions in each of these cases are referred under section 376 of the *Commonwealth Electoral Act 1918*, which provides that the Senate may refer to the court any question respecting the qualifications of a Senator or a vacancy in the Senate. Questions are not confined to whether or not a vacancy has occurred, but may also encompass the nature of a vacancy and how it may be filled. If a person returned as a senator is subsequently found to be incapable of being chosen, then there is not a casual vacancy (ie, a vacancy to be filled under section 15 of the Constitution); rather, there is an invalid election which must be completed. This position is not altered by the resignation (or purported resignation) of the senator concerned: see *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208-9.

As the court found in Re Wood (1988) 167 CLR 145 and in *Sue v Hill* (1999) 199 CLR 462, if a candidate has not been validly elected the cure is a recount of the ballot papers (a 'special count') to determine the candidate who was validly elected to the place in question. This is the approach that was followed recently in *Re Culleton [No 2]* [2017] HCA 4 and *Re Day [No 2]* [2017] HCA 14, with the Day case providing a direct precedent for the court's capacity to deal with vacancies in this way.

'final and conclusive and without appeal'

On 8 August 2017 – coincidentally the anniversary of the annulment of former Senator Culleton's larceny conviction – the President tabled a letter from Mr Culleton's representatives asking that the Senate refer his case back to the High Court. The court ruled in February that Mr Culleton was incapable of being chosen as a senator at last year's election, finding that he was subject to be sentenced for a disqualifying conviction throughout the whole period of the election (see Bulletin 311). A 'petition' asking that the Senate overturn the court's finding and reinstate Mr Culleton as a senator, using its powers under section 47 of the Constitution, was tabled on 11 May (see Bulletin 314). The latest missive similarly asserted that the Senate had the power under section 47 to refer matters back to the court. The Senate cannot do these things.

Section 47 is largely a spent provision, giving each House of the Parliament the power to determine questions respecting qualifications, vacancies or disputed election '[u]ntil the Parliament otherwise provides…'. The Parliament has 'otherwise provided' by establishing the Court of Disputed Returns in 1902 and, in 1907, giving that court the responsibility of determining questions about qualifications and vacancies. Whatever residual operation section 47 may have, it doesn't include overturning the orders of the court. As indicated in advice from the Clerk tabled with the most recent letter, decisions of

the Court of Disputed Returns are final, so the High Court has no power to review them. This is specified in s. 368 of the Commonwealth Electoral Act:

> **368. Decisions to be final**
> All decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way.

This provision explicitly legislates what is otherwise a traditional presumption about the finality of the determinations of courts of disputed returns. The last phrase in the provision – *shall not be questioned in any way* – is the language of privilege and the separation of powers. In the same way as parliamentary proceedings may not be questioned or impeached in the courts, the Senate has no power to question the decisions of the court.

Legislation

Early in the fortnight the government proposed reviving the Plebiscite (Same-Sex Marriage) Bill 2016, which was defeated at the second reading stage in November last year. As noted in *Odgers' Australian Senate Practice*, a bill can be revived and its consideration resumed by the Senate even if it has been negatived at any stage (14th edition, p. 347 under *Revival of bills*). While this is not common, Odgers lists a number of precedents. The government moved, on notice, for the second reading of the bill to be restored to the *Notice Paper*. This would have initiated a fresh second reading debate; however, the proposal was defeated on 9 August on an equally divided vote. The government subsequently implemented a substitute arrangement – described variously as a postal plebiscite, survey or statistical exercise – to seek the views of voters on approving same-sex marriage. That arrangement is subject to challenge in the High Court.

Several government bills were amended during the fortnight. The Fair Work Amendment (Corrupting Benefits) Bill 2017 passed with amendments initiated by opposition and cross-bench senators, and accepted by the government. The government proposed amendments to the Telecommunications and Other Legislation Amendment Bill 2017 recommended by the Parliamentary Joint Committee on Intelligence and Security. The Competition and Consumer Amendment (Misuse of Market Power) Bill 2017 was amended on the initiative of the Australian Greens, with the government again accepting the amendments. That bill was the result of a long campaign to strengthen prohibitions on the misuse of market power by reference to the intended or likely effect of the conduct of corporations with a substantial degree of market power (the so-called 'effects test'). A somewhat related opposition private senator's bill – the Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017 – was passed by the Senate in the first sitting week, and transmitted to the House for concurrence. Amendments proposed by Senator Xenophon to incorporate similar provisions in the Misuse of Market Power bill did not find support in the Senate.

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 was debated over several sitting days, with numerous amendments pending in committee at the end of the fortnight. The Interactive Gambling Amendment Bill 2016 was passed by the Senate with amendments in March this year. On 9 August the Senate agreed to substitute amendments proposed by the House of Representatives. A dozen or so other government bills were passed without amendment.

Disallowance

On 15 August the Chair of the Regulations and Ordinances Committee withdrew a protective disallowance notice given by the committee in respect of a 'Sunsetting Exemption' regulation. The committee set out its views about exemptions from sunsetting arrangements more broadly in its Delegated Legislation Monitor No. 9, emphasising the importance of sunsetting arrangements in ensuring that legislative instruments are kept up to date and only remain in force for so long as they are needed.

A proposal to disallow the Code for the Tendering and Performance of Building Work, an instrument made as part of the Building Code under the *Australian Building and Construction Commission Act 2016*, failed to receive majority support.

Privileges Committee

On 9 August the Privileges Committee tabled its 166th report, on the possible improper influence of a witness before the Environment and Communications References Committee. More than a year after the References Committee's inquiry into fin-fish aquaculture, allegations of an attempt to improperly influence a witness were sparked by an ABC Four Corners program in October 2016. For the circumstances of the referral to the Privileges Committee see Bulletin 311.

It was alleged that a witness to the inquiry, who withdrew citing health reasons, had in fact been coerced into withdrawing. Parliamentary privilege provides measures to protect witnesses and safeguard the integrity of their evidence. However, provided with two similar but conflicting accounts by those involved, the Privileges Committee was unable to conclude with any certainty that any improper interference had occurred. The Senate adopted the committee's recommendation that no contempt be found.

The committee was critical of the fact that discussions between those involved about the evidence they might give appeared to be treated as currency in commercial negotiations. The committee also observed the inherent difficulty of dealing with such allegations so long after the events giving rise to them.

Committees

Committees more generally presented 15 reports and received 8 new bill inquiries and 7 new references during the sitting fortnight. Notable among the new inquiries was a reference to the Finance and Public Administration References Committee to inquire into the postal survey concerning same-sex marriage and to report in February 2018. Other substantial inquiries include the reference of matters relating to the law of contempt (Legal and Constitutional Affairs References Committee) and the digital delivery of government services (Finance and Public Administration References Committee). In addition, while the Select Committee on Strengthening Multiculturalism concluded after presenting its report, a new select committee was established to inquire into the influence that political donations exert over the public policy decisions of political parties, members of Parliament and Government administration.

There was significant media attention in relation to the report on Australian veterans, tabled by the Foreign Affairs, Defence and Trade References Committee. Titled 'The Constant Battle – Suicide by Veterans', the report represented the conclusion of a 12-month inquiry into why Australian veterans are committing suicide at such high rates, and made 24 recommendations. The confronting nature of the inquiry is perhaps best revealed in the fact that, 'for modern veterans, it is likely that suicide and self-harm will cause more deaths and injuries for their contemporaries than overseas operational service.'

On 9 August, the Senate conducted two ballots for the cross-bench position on a legislation committee and a references committee, as agreement between cross-bench senators under standing order 25(6)(a) had apparently not been possible.

Orders for production of documents

Several orders were agreed to during the fortnight, including in relation to:

- the legality of the postal survey on same-sex marriage (agreed to 9 August),
- the Solicitor-General's advice about the citizenship of the Member for New England (16 August)
- water licences in the Murray-Darling Basin (16 August)
- the government response the Economics References Committee Report on the automotive industry (15 August, repeating an order made in September last year).

The details of those orders, and responses more generally, may now be found online.

Attire in the Senate

There were dramatic scenes and disquiet during Senate Question Time on the last sitting day, due to a senator appearing in the Senate in a burqa, which she removed as she got to her feet to ask a question of the Attorney-General as to whether such garb should be banned in public places. The Attorney emphatically rejected that proposition.

Odgers succinctly outlines the contemporary Senate's attitude to attire in the Senate. It says:

> There are no rules laid down by the Senate concerning the dress of senators. The matter of dress is left to the judgment of senators, individually and collectively, subject to any ruling by the President. Officers attending on the Senate, such as ministerial advisers, are also expected to maintain appropriate standards of dress.

These statements are based on rulings of Presidents and Chairs of Committees (in other words, Deputy Presidents) from the 1960s and 1970s, and on a report of the House Committee, adopted by the Senate in 1972. The House Committee concluded that, 'rules relating to dress in the Chamber should not be necessary and that the choice of appropriate clothing should be left to Senators' discretion'. This remains the current practice.

The rules of the Senate are directed at creating an appropriate framework for debate, and the conduct of senators is regulated only in so far as it is relevant to the maintenance of order. The question of appropriate dress is a matter that has been left to custom and the judgement of senators, except where a question of order arises. Despite the drama, no question of order arose until the senator rose to ask her questions, and that disorder was managed in accordance with the standing orders.

It is a matter for senators whether they see a need to change these practices.

RELATED RESOURCES

Dynamic Red – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

Senate Daily Summary – a convenient summary of each day's proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: www.senate.gov.au

Inquiries: **Clerk's Office (02) 6277 3364**