

RE CULLETON [NO 2] (2017) 341 ALR 1

I INTRODUCTION

In *Re Culleton [No 2]*,¹ the High Court of Australia, sitting as the Court of Disputed Returns, considered whether a vacancy existed in the representation of Western Australia in the Senate for the place held by Senator Rodney Culleton. The Court found that, by virtue of s 44(ii) of the *Australian Constitution*, Culleton was ‘incapable of being chosen’ as a senator as he was subject to be sentenced, and that a Senate vacancy consequently existed.² This case note explains the Court’s reasoning and considers the effects of this decision.

II THE FACTS

In April 2014, a tow truck driver visited a New South Wales property owned by Mr Culleton to repossess a truck. During a confrontation with the driver, Mr Culleton removed the truck key from the ignition. The key was subsequently lost, and Mr Culleton was reported for stealing it and charged with larceny.³

Mr Culleton did not appear when the charge was heard in the Armidale Local Court on 2 March 2016. He had appeared the day before at a hearing for a similar charge in Western Australia, and claimed it was ‘logistically and geographically impossible’ to travel to New South Wales in time.⁴ In his absence, Mr Culleton was convicted of larceny under s 117 of the *Crimes Act 1900* (NSW)⁵ and thus was liable to imprisonment for up to two years.⁶ As the Local Court was prohibited from imposing a sentence of imprisonment on an ‘absent offender’,⁷ the Court instead

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¹ *Re Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Senator Rodney Norman Culleton [No 2]* (2017) 341 ALR 1 (‘*Culleton [No 2]*’).

² *Ibid* 3 [4] (Kiefel, Bell, Gageler and Keane JJ).

³ ‘High Court Challenge a Farce’ on *Senator (in Exile) Rodney Culleton for Western Australia* (20 November 2016) <<http://www.senatorculleton.com.au/single-post/2016/11/20/High-Court-Challenge-a-farce>>.

⁴ *Ibid*.

⁵ *Culleton [No 2]* (2017) 341 ALR 1, 3 [2] (Kiefel, Bell, Gageler and Keane JJ).

⁶ *Criminal Procedure Act 1986* (NSW) ss 268(1), 268(1A), sch 1 table 2 item 3.

⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25(1)(a) (‘*Sentencing Procedure Act*’).

issued a warrant for Mr Culleton's arrest so he could be brought before the Court for sentencing.⁸ Mr Culleton lodged an appeal against his conviction three weeks later.⁹

In the months that followed, Mr Culleton was endorsed by Pauline Hanson's One Nation party as a candidate in the 2016 Federal Election, and was declared elected to the Senate on 2 August 2016.¹⁰ Throughout the election period, Mr Culleton did not respond to the arrest warrant and his appeal remained pending.

On 8 August 2016, Mr Culleton appeared at the Armidale Local Court where the warrant was executed and an annulment of his conviction was granted under s 8 of the *Crimes (Appeal and Review Act) 2001* (NSW) ('*Appeal and Review Act*').¹¹ At a fresh hearing on 25 October 2016, the Local Court found Mr Culleton guilty of larceny on his own plea. However, the charge was dismissed without proceeding to a conviction.¹²

On 8 November 2016, the President of the Senate referred a number of questions regarding Mr Culleton's election to the Court of Disputed Returns — including whether, by reason of s 44(ii) of the *Australian Constitution*, there was a vacancy for Mr Culleton's place in the Senate.¹³

III 'INCAPABLE OF BEING CHOSEN'

Section 44(ii) of the *Australian Constitution* provides that any person who 'has been convicted and is under sentence, or subject to be sentenced' for an offence punishable under Commonwealth or state law 'by imprisonment for one year or longer' will be 'incapable of being chosen' as a senator. The High Court recalled that the words 'shall be incapable of being chosen' refer to 'the process of being chosen', a process which constitutes the period of time from the date of nominations until the return of the electoral writs.¹⁴ It was not contentious that, if Mr Culleton was found to be incapable of being chosen, this 'disability' existed throughout the 2016 electoral process.¹⁵

⁸ *Culleton [No 2]* (2017) 341 ALR 1, 4 [6] (Kiefel, Bell, Gageler and Keane JJ).

⁹ 'High Court Challenge a Farce', above n 3.

¹⁰ *Culleton [No 2]* (2017) 341 ALR 1, 4 [8] (Kiefel, Bell, Gageler and Keane JJ), citing Australian Electoral Officer for Western Australia, *Writ for the Election of Senators for Western Australia*, 2 August 2016.

¹¹ *Culleton [No 2]* (2017) 341 ALR 1, 4 [9] (Kiefel, Bell, Gageler and Keane JJ).

¹² *Ibid.*

¹³ *Culleton [No 2]* (2017) 341 ALR 1, 4 [10], (Kiefel, Bell, Gageler and Keane JJ), citing Letter from the President of the Senate to the Chief Executive and Principal Registrar of the High Court, 8 November 2016.

¹⁴ *Culleton [No 2]* (2017) 341 ALR 1, 5 [13] (Kiefel, Bell, Gageler and Keane JJ), 12 [53] (Nettle J), quoting *Sykes v Cleary [No 2]* (1992) 176 CLR 77, 100, 108, 130, 132.

¹⁵ *Culleton [No 2]* (2017) 341 ALR 1, 5 [13] (Kiefel, Bell, Gageler and Keane JJ).

IV THE HIGH COURT CHALLENGE

Mr Culleton's primary argument against disqualification was that even if, as a matter of fact, he had been convicted and was subject to be sentenced throughout the electoral process, he was not 'incapable of being chosen' as a matter of law.¹⁶ He advanced three submissions in support of this argument:¹⁷

1. although he had been convicted, he had not been sentenced at any time during the electoral process;
2. his conviction did not exist throughout the electoral process due to its annulment with retrospective effect; and
3. he was not, at any time throughout the electoral process, subject to be sentenced for any offence punishable by imprisonment.

In a catch-all argument, Mr Culleton sought to rely on s 364 of the *Commonwealth Electoral Act 1918* (Cth) ('*Commonwealth Electoral Act*') to require the Court to decline to answer the questions referred by the President of the Senate.¹⁸

Two judgments were delivered: the majority of Kiefel, Bell, Gageler and Keane JJ, and a concurring judgment of Nettle J.

A Not 'Subject to be Sentenced'

In his primary argument, Mr Culleton submitted that he was not 'subject to be sentenced' because a sentence of imprisonment had not been imposed at the date of his nomination.¹⁹ Mr Culleton contended that the absence of the phrase 'or subject to be sentenced' in a paragraph of *Nile v Wood*²⁰ and in *The Annotated Constitution of the Australian Commonwealth*,²¹ to which their Honours in *Nile v Wood* referred, indicated it was a mere reiteration of the words 'under sentence'.²²

Whilst the majority conceded that references to s 44(ii) in the quotations employed by Mr Culleton were not complete, they noted that this was because *Nile v Wood* had not turned on whether Senator Wood was 'subject to be sentenced'.²³ Furthermore, the Court noted that their Honours in *Nile v Wood* had expressly stated that

¹⁶ Ibid 5 [15].

¹⁷ Ibid.

¹⁸ Ibid 9 [37] (Kiefel, Bell, Gageler and Keane JJ).

¹⁹ Ibid 5–6 [16].

²⁰ (1988) 167 CLR 133, 139.

²¹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 492.

²² *Culleton [No 2]* (2017) 341 ALR 1, 6 [16], [19] (Kiefel, Bell, Gageler and Keane JJ).

²³ Ibid 6 [20] (Kiefel, Bell, Gageler and Keane JJ).

‘[t]he disqualification operates on a person who ... is under sentence *or subject to be sentenced*’.²⁴ The majority held it was apparent that their Honours in *Nile v Wood* did not view the phrase as a mere repetition of ‘is under sentence’, remarking that s 44(ii) ‘cannot sensibly be read in that way’.²⁵

Justice Nettle referred to a passage from *The Annotated Constitution of the Australian Commonwealth*, which his Honour considered to make plain that ‘the purpose of s 44(ii) was to disqualify a person convicted of any offence ... if the person either has been sentenced and is still to complete the sentence, and so is “under sentence”, or remains to be sentenced, and so is “subject to be sentenced”’.²⁶ In agreement with the majority, Nettle J characterised Mr Culleton’s argument as ‘unsound’.²⁷

B Annulment of the Conviction

In his second submission, Mr Culleton contended that the annulment on 8 August 2016 had rendered his conviction void *ab initio*, and therefore his conviction did not legally exist throughout the electoral process.²⁸

In addressing this submission, the majority recalled Windeyer J’s remarks in *Cobiac v Liddy*,²⁹ where his Honour stated that, by setting aside a conviction, ‘the court holds that the accused was not lawfully convicted and that the conviction ought not to stand, *not that there never was in fact a conviction*’.³⁰ The majority held that a combined reading of the provisions of the *Appeal and Review Act*³¹ indicates that the effect of an annulment under that Act ‘does not purport retrospectively to treat the conviction as if it had never occurred’.³²

Justice Nettle reached a similar conclusion. However, in his view, the annulment had retrospective operation to the extent that, for the purpose of a person’s convict status *after* annulment, the person is to be regarded as never having been convicted.³³ Hence, if Mr Culleton’s conviction had been annulled *before* the election period, Mr Culleton would have been eligible to nominate — even if the larceny charge

²⁴ *Nile v Wood* (1988) 167 CLR 133, 139, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 6 [17] (Kiefel, Bell, Gageler and Keane JJ), 16 [65] (Nettle J) (emphasis added).

²⁵ *Culleton [No 2]* (2017) 341 ALR 1, 6 [21] (Kiefel, Bell, Gageler and Keane JJ).

²⁶ *Ibid* 16 [65]–[66] (Nettle J), citing Quick and Garran, above n 21, 490.

²⁷ *Ibid* 16 [65] (Nettle J).

²⁸ *Ibid* 7 [23] (Kiefel, Bell, Gageler and Keane JJ).

²⁹ (1969) 119 CLR 257.

³⁰ *Ibid* 272, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 8 [29] (Kiefel, Bell, Gageler and Keane JJ) (emphasis added).

³¹ *Appeal and Review Act* ss 4(1), 8(2)(c), 9(2)(a), 9(3), 10(1), discussed in *Culleton [No 2]* (2017) 341 ALR 1, 7–8 [26]–[29] (Kiefel, Bell, Gageler and Keane JJ).

³² *Culleton [No 2]* (2017) 341 ALR 1, 8 [29] (Kiefel, Bell, Gageler and Keane JJ).

³³ *Ibid* 15 [61] (Kiefel, Bell, Gageler and Keane JJ).

remained pending.³⁴ In reaching this conclusion, his Honour considered the need for ‘order and certainty’ in the electoral process, in light of the principles of representative and responsible government.³⁵ Furthermore, his Honour noted that limited mechanisms for annulment had existed at the time the *Australian Constitution* was written — according with his view that s 44(ii) is ‘directed to a conviction in fact’, regardless of whether it is annulled.³⁶

C ‘For Any Offence ... Punishable by Imprisonment’

Mr Culleton’s third argument was that even if the annulment operated only prospectively, he was not subject to be sentenced as his status as an ‘absent offender’³⁷ precluded the Local Court from imposing a sentence of imprisonment on him.³⁸

The majority held that, although Mr Culleton was not liable to sentencing on his conviction date, the processes of the law that might lead to his lawful imprisonment had been ‘set in train’.³⁹ The majority opined that, had these processes taken their course, Mr Culleton would have been present when sentenced and therefore been able to be sentenced pursuant to s 25(1)(a) of the *Sentencing Procedure Act*.⁴⁰ Thus, despite being an absent offender, Mr Culleton remained subject to be sentenced.

D Section 364 and the ‘Good Conscience’ of the Court

The Court also considered Mr Culleton’s catch-all argument regarding s 364 of the *Commonwealth Electoral Act*, which provides that the Court of Disputed Returns ‘shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities’.⁴¹ Mr Culleton argued that ‘good conscience’ required the Court to decline to answer the President of the Senate’s questions due to a delay in attending the reference and his conviction being a matter of public record.⁴² The Court swiftly rejected this argument, noting that s 364 does not provide any basis for avoiding the Court’s obligation under s 376 to determine matters referred to it.⁴³

³⁴ Ibid.

³⁵ Ibid 14 [59] (Kiefel, Bell, Gageler and Keane JJ).

³⁶ Ibid 13 [57] (Kiefel, Bell, Gageler and Keane JJ).

³⁷ *Sentencing Procedure Act* s 25(1)(a).

³⁸ *Culleton [No 2]* (2017) 341 ALR 1, 9 [32], [33] (Kiefel, Bell, Gageler and Keane JJ).

³⁹ Ibid 9 [36] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁰ Ibid.

⁴¹ *Commonwealth Electoral Act* s 364.

⁴² *Culleton [No 2]* (2017) 341 ALR 1, 9 [37] (Kiefel, Bell, Gageler and Keane JJ).

⁴³ Ibid 10 [38] (Kiefel, Bell, Gageler and Keane JJ), 17 [67] (Nettle J).

V FILLING THE VACANCY

Having found that Mr Culleton was incapable of being chosen, the Court considered how the resulting Senate vacancy should be filled. The Attorney-General submitted that a special count of the ballot papers would be appropriate, and that any necessary directions to give effect to the count should be made by a single justice.⁴⁴ Mr Culleton did not contest these submissions.⁴⁵

In determining how to fill the vacancy, the Court considered whether a special count would ‘result in a distortion of the voters’ real intentions’,⁴⁶ rather than reflecting ‘the true legal intent of the voters’ as consistent with the *Australian Constitution* and the *Commonwealth Electoral Act*.⁴⁷ The Court noted that 96.04 per cent of Mr Culleton’s votes had been ‘above the line’ votes in favour of Pauline Hanson’s One Nation party, and therefore concluded that a special count would not distort the intent of the voters.⁴⁸ Thus, the Court endorsed the Attorney-General’s submissions.⁴⁹

VI COMMENT

The decision in *Culleton [No 2]* was not of practical significance to Mr Culleton, given a separate finding his ineligibility to be chosen as a senator by the Full Court of the Federal Court.⁵⁰ Nevertheless, the High Court’s opinion should not be overlooked.

The majority’s conclusion that the annulment of a conviction under the *Appeal and Review Act* operates only prospectively may have effects far beyond election eligibility. Depending on the statutory context of the term ‘annulment’, this decision may impact determinations of disqualification in New South Wales from public office, holding a statutory licence, or working with children — regardless of whether a conviction has been annulled.⁵¹ Furthermore, this conclusion stands at odds with the fact that a successful appeal of a conviction would produce an entirely different outcome. By endorsing the decision in *Commissioner for Railways (NSW) v*

⁴⁴ Ibid 10 [40] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁵ Ibid 10 [42].

⁴⁶ *Sykes v Cleary [No 2]* (1992) 176 CLR 77, 102; *Free v Kelly* (1996) 185 CLR 296, 302–4, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 10 [43] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁷ *Re Wood* (1988) 167 CLR 145, 166, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 10 [43] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁸ *Culleton [No 2]* (2017) 341 ALR 1, 10–11 [44] (Kiefel, Bell, Gageler and Keane JJ).

⁴⁹ Ibid 11 [46] (Kiefel, Bell, Gageler and Keane JJ), 17 [67] (Nettle J).

⁵⁰ See *Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8 (3 February 2017).

⁵¹ For further discussion see Jeremy Gans, ‘Catch-22 in the Court of Disputed Returns: *Re Culleton (No 2)*’ on Melbourne Law School, *Opinions on High* (8 February 2017) <<https://blogs.unimelb.edu.au/opinionsonhigh/2017/02/08/gans-culleton/>>.

Cavanough,⁵² the majority acknowledged that, had Mr Culleton's conviction been quashed on appeal, he would be considered to have never been convicted.⁵³ The logic for distinguishing between the effects of an annulment and an appeal for the purposes of s 44(ii) is unclear. If certainty of eligibility for election is paramount, as suggested by Nettle J,⁵⁴ it is surely equally compromised by the possibility of a successful appeal.

Also of note is the Court's conclusion that s 44(ii) applies strictly to offences for which the maximum penalty is one year of imprisonment or more, regardless of the seriousness of the offence in fact. Curiously, the Court stated that the s 44(ii) disqualification exists to protect against those who 'might not be able to sit' for one year or more.⁵⁵ The Court did not address the possibility that the disqualification is a measure of unacceptable criminal history for elected representatives. Whilst Mr Culleton was technically liable to up to two years of imprisonment,⁵⁶ the Local Court ultimately considered the offence to be trivial — evidenced by its decision not to record a conviction. Bearing in mind the Local Court's obligation to consider appropriate alternative punishments to imprisonment,⁵⁷ it is unlikely that Mr Culleton was ever liable to be imprisoned for his offence. Thus, regardless of whether s 44(ii) was intended to bar from election those who might not be able to sit or those with an unacceptable criminal history, the facts of Mr Culleton's case should not have been captured by the provision. Nevertheless, the High Court implicitly concluded that s 44(ii) was framed with regard to the worst form of a class of offence, irrespective of the offence *actually* committed. Although far from a radical interpretation of s 44(ii), when combined with the Court's conclusion that Mr Culleton was, at the time of the election, 'subject to be sentenced', Mr Culleton's disqualification is surely an unintended outcome of s 44(ii) — a provision considered to have been clearly designed to apply only to serious offences such as a 'felony or any infamous crime'.⁵⁸ The Court missed an opportunity in *Culleton [No 2]* to read some sense into s 44(ii) by concluding that trivial offences do not fall within its ambit.

VII CONCLUSION

Though irrelevant for Mr Culleton's political career, *Culleton [No 2]* raises a number of noteworthy issues. The ramifications in New South Wales of the High Court's decision on the prospective operation of annulments remain to be seen. If the Court

⁵² (1935) 53 CLR 220, 224.

⁵³ *Culleton [No 2]* (2017) 341 ALR 1, 8 [30] (Kiefel, Bell, Gageler and Keane JJ).

⁵⁴ *Ibid* 13 [57], 14 [59] (Nettle J).

⁵⁵ *Ibid* 6–7 [22] (Kiefel, Bell, Gageler and Keane JJ).

⁵⁶ *Criminal Procedure Act 1986* (NSW) ss 268(1), 268(1A), sch 1 table 2 item 3.

⁵⁷ *Sentencing Procedure Act* s 5(1).

⁵⁸ Quick and Garran, above n 21, 490, quoted in *Culleton [No 2]* (2017) 341 ALR 1, 16 [66] (Nettle J); See also Tony Blackshield, 'Incapable of Being Chosen' on *AUSPUBLAW* (6 February 2017) <<https://auspublaw.org/2017/02/incapable-of-being-chosen/>>.

considers the issue of retrospectivity again, the justification for a distinction between the effects of an appeal and an annulment may also be brought into question. Finally, the Court's hesitancy to expand the interpretation of s 44(ii) highlights the potentially nonsensical results of the lack of discretion afforded by the provision, as well as, perhaps more notably, the Court's reluctance to read certainty into a provision concerning the election of our parliamentary representatives.