SENATOR THE HON GEORGE BRANDIS, QC

Attorney-General
Leader of the Government in the Senate
Vice-President of the Executive Council

29 October 2016

Senator Rodney Culleton
Parliament House
CANBERRA ACT 2600

By email

Dear Senator Culleton Rod

On 13 October 2016, I referred to the Solicitor-General certain questions of law relating to the proceedings *Bell v Culleton*, commenced in the High Court on 7 September 2016, concerning your election to the Commonwealth Parliament as a senator for Western Australia.

Late yesterday, I received the Opinion of the Solicitor-General on these questions. The Solicitor-General is of the opinion that, for reasons which he sets out in paragraphs 18-33 and which arise from section 44(ii) of the Constitution, you were "not duly elected as a senator" (paragraph 2).

I thought it was important to draw the advice to your attention as soon as possible; a copy is attached.

Of course, this is legal advice on an issue which is by no means certain. You may wish to seek your own advice on the matter, including legal advice and advice from the Clerk of the Senate.

I have also today forwarded this advice to the President of the Senate, the Hon. Stephen Parry, for his consideration since it potentially affects the composition of the Senate and I thought the President was entitled to be made aware of it.

Where the matter goes from here is largely in the hands of the President of the Senate, and I suggest you speak to him about it.

Yours faithfully

[redacted]

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SG No. 23 of 2016

IN THE MATTER OF *BELL v CULLETON*

OPINION

Introduction

1. On 18 October 2016 I was briefed to advise on four questions referred by the Attorney-General. Those questions relate to two proceedings concerning the election of Senator Rodney Culleton to the Commonwealth Parliament as a senator for Western Australia. The first proceeding, *Bell v Culleton* (High

Court Proceeding P43 of 2016), was commenced by way of an election petition in the High Court sitting as the Court of Disputed Returns (**Election Petition Proceeding**). The second proceeding, *Bell v Culleton* (High Court Proceeding P44 of 2016), is a claim brought in the High Court under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) (**Common Informers Act**) (**Common Informers Proceeding**). Both the election petition and the writ of summons in the Common Informers Proceeding were filed on 7 September 2016.

Questions and Short Answers

2. The particular questions upon which my advice is sought, and my short answers to them, are as follows:

Question (1): What are the prospects of the Court of Disputed Returns holding in the Election Petition Proceeding that Senator Culleton was not duly elected as a senator?

Answer (1): For reasons of form, the petition should be held to be deficient and incurable and as such should not be considered by the Court of Disputed Returns.

However, if the petition could be cured, the better view is that Senator Culleton was not duly elected as a senator.

Question (2): In the event that Senator Culleton is found not to have been duly elected as senator, what relief is the Court of Disputed Returns likely to grant in the Election Petition Proceeding? For instance, is the Court likely to declare the whole of the Senate election for Western Australia void such that a fresh election must be held? Alternatively, is the Court likely to order that there be some form of special count of the ballot papers?

Answer (2): If Senator Culleton were found not to have been duly elected as a senator, the most likely outcome is that the Court would order that there be a special count of the ballot papers.

Question (3): Aside from the petitioner, the respondent, and any person who becomes a party to the proceedings under r 31.01 of the *High Court Rules 2004* (Cth), who (if anyone) would be the appropriate Commonwealth person or entity to intervene or be joined as a party to put submissions with respect to the appropriate form of relief in the Election Petition Proceeding? In answering this question, please have regard to (without being confined to) s 359 of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**) and s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

Answer (3): The Attorney-General of the Commonwealth would be an appropriate party to intervene to make submissions on the validity of the election petition, the operation of s 44(ii) of the Constitution and relief. Alternatively, it would be possible, but not strictly necessary, for the Electoral Commissioner to intervene on the issue of the validity of the petition and relief (and the Attorney-General of the Commonwealth to intervene and focus solely on the constitutional questions).

Question (4): Can a collateral challenge to the validity of a candidate's election be brought and authoritatively decided in the course of a proceeding under the Common Informers Act? Or (alternatively), must a candidate have first been found in some other appropriate forum (for example, the Court of Disputed Returns) to have been incapable of being elected before a claim under the Common Informers Act can be

determined by the High Court? (See *Sue v Hill* (1999) 199 CLR 462 (***Sue v Hill***) at 555-557 [241]-[245] (McHugh J)).

Answer (4): It is unlikely a collateral challenge to Senator Culleton's election could be successfully brought under the Common Informers Act. The High Court will only have jurisdiction to hear a suit under s 3 of the Common Informers Act after a candidate has first been found in some other forum (for example, the Court of Disputed Returns) to have been "incapable of sitting".

3. I deal with certain practical considerations on the way forward at paragraphs [67]-[68] below.

Consideration

The Election Petition Proceeding: the form of the petition

4. It is first necessary to identify the underlying facts on which the constitutional questions arise and set out the key constitutional provisions.

5. The petition states broadly that Senator Culleton completed and lodged a nomination which was false in a material particular, being that he was eligible to nominate when pursuant to s 44(ii) of the Constitution he was not.

6. Section 44(ii) of the Constitution relevantly provides that:

> [a]ny person who … is attained of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; … shall be incapable of being chosen or of sitting as a senator.

7. The petition does not particularise the reason for Senator Culleton's purported disqualification under s 44(ii). It does not identify the relevant facts. Based on what can be gleaned publicly, the facts may well be:

   (a) on 2 March 2016 Senator Culleton was convicted of larceny pursuant to s 117 of the *Crimes Act 1900* (NSW), which carries a maximum sentence of five years' imprisonment, in his absence in the NSW Local Court;

   (b) on 10 June 2016 Senator Culleton nominated as a Senate candidate in the Commonwealth Parliament for the State of Western Australia;

   (c) The polling day for the election was 2 July 2016;

   (d) on 2 August 2016 the poll for the Senate in the Commonwealth Parliament for the State of Western Australia was declared and the writ returned. Senator Culleton was certified as duly elected as the eleventh out of twelve senators for Western Australia;

   (e) on 8 August 2016 Senator Culleton's conviction for larceny was "annulled" under the *Crimes (Appeal and Review) Act 2001* (NSW) (**NSW Appeal and Review Act**); and

   (f) on 30 August 2016 the Forty-Fifth Parliament sat for the first time.

8. The election petition and writ of summons in both proceedings allude to possible bankruptcy of Senator Culleton and I understand that there may also be separate pending charges against Senator Culleton. However there is not sufficient information to advise in relation to those matters.

Prospects in the Election Petition Proceeding

9. The challenge is brought under s 353(1) of the CEA, which provides that "[t]he validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise".

10. Section 358(1) of the CEA provides that "no proceedings shall be had on [a] petition unless the requirements of ss 355, 356 and 357 are complied with". Sections 356 and 357 are not relevant to this proceeding.

11. Section 355 of the CEA sets out the requirements of a petition disputing an election or return. Specifically, the petition must:

(a) set out the facts relied on to invalidate the election or return;

(aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;

(b) contain a prayer asking for the relief the petitioner claims to be entitled to;

(c) be signed by a candidate at the election in dispute or by a person who was qualified to vote thereat, or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the Constitution or section 44 of this Act, by a person qualified to vote at Senate elections in the relevant State or Territory at the date of the choice or appointment;

(d) be attested by 2 witnesses whose occupations and addresses are stated;

(e) be filed in the Registry of the High Court within 40 days after;

(i) if the polling day for the election in dispute is not the polling day for any other election--the return of the writ for the election; …

12. In my opinion, the election petition fails in at least two key respects.

13. *First*, it fails to set out the facts relied on to invalidate the election or return and so does not satisfy s 355(a) of the CEA. The petition is similar to the petition in *In re Berrill's Petition* (1978) 19 ALR 254 (***In re Berrill's Petition***) which merely identified relevant provisions that had purportedly been breached, but did not set out the facts relied upon to invalidate the election. If this view were adopted by the Court of Disputed Returns, it would be fatal to the election petition.

14. *Second*, it fails to set out those facts with sufficient particularity to identify the specific matters on which the petitioner relies and so does not satisfy s 355(aa) of the CEA. This, by itself, is not fatal. That is because s 358(2) provides that the Court may relieve the petitioner wholly or in part from compliance with s 355(aa). However, s 358(3) provides that it may only do so if it is satisfied that:

(a) in spite of the failure of the petition to comply with s 355(aa), the petition sufficiently identifies the specific matters on which the petitioner relies; and

(b) the grant of relief would not unreasonably prejudice the interests of another party to the petition.

15. On the basis of the petition as filed, it seems unlikely that the Court would be satisfied that the petition sufficiently identifies the specific matters on which the petitioner relies so as to relieve the petitioner of compliance with s 355(aa).

16. For completeness, I note that at the time the petition was filed on 7 September 2016, it was less than 40 days since the return of the writ. At the time of providing this Opinion, it has been more than 40 days. In these

circumstances, it is unlikely that the Court of Disputed Returns would grant leave to the petitioner to amend the petition so that it might meet the requirements of ss 355(a) and 355(aa) (see *Cameron v Fysh* (1904) 1 CLR 314 at 316 (Griffith CJ); *In re Berrill's Petition*).

The substantive argument

17. If, contrary to my preferred view, the Court granted leave to the petitioner to amend the petition, then the Court would need to consider the substantive arguments the petition seeks to raise. I have already noted above (at paragraph [8]) that the current facts do not enable me to advise on the substantive argument concerning the possible bankruptcy of Senator Culleton or separate pending charges against Senator Culleton.

18. That leaves the question of whether Senator Culleton is "incapable of being chosen or of sitting as a senator" by virtue of s 44(ii) because he "has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of … a State by imprisonment for one year or longer".

19. On the basis of the publicly available facts (as set out at paragraph [7] above), Senator Culleton may argue that his conviction has been annulled under Pt 2 of the NSW Appeal and Review Act and is therefore of no effect. This raises an anterior question of the effect of the annulment of Senator Culleton's conviction. There are two competing interpretations of the effect of an annulment under the NSW Appeal and Review Act.

20. The *first* interpretation is that the annulment means that in law there was never a conviction. This is supported by s 9(3) of the NSW Appeal and Review Act, which provides that following an annulment the relevant Court is to deal with the matter afresh as if no conviction or sentence had been imposed. This is consistent with the concept that a judgment reversed on appeal is usually treated as no judgment at all (see, for example, *R v Drury* (1849) 175 ER 516

at 520; *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225 (Rich, Dixon, Evatt and McTiernan JJ)).

21. The *second* interpretation is that the conviction or sentence only "ceases to have effect" following the annulment (see s 10(1) of the NSW Appeal and Review Act), and so the effect of the annulment is purely prospective.

22. If the Court adopts the first interpretation (which I consider to be the better interpretation), consistent with the ordinary operation of the criminal law, then the key question for the Court will be whether s 44(ii) of the Constitution requires a person to have been convicted as a matter of historical fact at a given date (**reading one**), or whether it refers to the position as it ultimately appears correctly at law (**reading two**).

23. The question in truth arises not just for convictions under s 44(ii) but for a number of disqualifying provisions in s 44. For example, a person disqualified in fact on the grounds of bankruptcy under s 44(iii) of the Constitution may later seek and obtain an order from a Court annulling that bankruptcy (see s 153B of the *Bankruptcy Act 1966* (Cth)).

24. Accordingly, the question turns on the construction of s 44(ii) of the Constitution, and its intersection with the order annulling Senator Culleton's conviction.

25. There is no authority directly on the question.

26. In favour of reading one is that it would promote certainty and speed in the ascertainment of the result of an election. These are factors that members of the High Court have previously considered in their approach to s 44 of the Constitution (albeit in different circumstances). In *Sykes v Cleary (No 2)* (1992) 176 CLR 77 (***Sykes v Cleary***), for example, the Court considered whether a candidate for the House of Representatives, who at the time of lodging his nomination and at the date of the poll was a public servant on

leave without pay, but who resigned his position before the declaration of the poll, was incapable of being chosen by operation of s 44(iv) of the Constitution. That section provides that any person who "[h]olds any office of profit under the Crown ... shall be incapable of being chosen or of sitting as … a member of the House of Representatives". A 6:1 majority of the High Court held that the candidate held an "office of profit under the Crown" within s 44(iv) and hence was incapable of being chosen as a member of the House of Representatives. In reaching their conclusion, Mason CJ, Toohey and McHugh JJ reasoned that the inclusion on the list of candidates on polling day of a candidate who may opt for disqualification was "an additional and unnecessary complication in the making by the electors of their choice" and was "hardly conducive to certainty and speed in the ascertainment of the result of the election" (at 100).

27. Also in favour of reading one is that the electoral scheme generally favours certainty in the identification of whether a person is eligible for election at the point of nomination. For example, s 170 of the CEA requires a candidate, at nomination, to declare that they are qualified under the Constitution to be elected.

28. On the other hand, if reading two were adopted, a candidate may not necessarily know, at the point of nomination, whether they are ineligible by reason of s 44(ii). If s 44(ii) does not operate upon a conviction that is later quashed or set aside, the practical consequence may be that an election petition may need to be deferred until a challenge to the conviction has been finally determined. This would result in a period of uncertainty in which the person's election remains in doubt.

29. If reading one is preferred, then Senator Culleton, who at all dates during the election process (that is, the nomination date, the date of polling and the date of the declaration of the writ) was "convicted", was incapable of being chosen or of sitting as a senator.

30. I should note that there are three possible arguments in favour of reading two even though I find them ultimately unpersuasive. The first is that it is arguably inconsistent with direct choice by the people, as mandated by s 7 of the Constitution, for a person who has otherwise been duly elected, to be disqualified on the basis of a conviction that has no effect in law. This argument can be readily disposed of: s 7 must be read together with other provisions of the Constitution, including s 44, which sets parameters on who can be chosen by the people.

31. The second is that it is inconsistent with the notion that an annulled conviction has no effect in law to give it an effect as significant as disqualifying a Senator from Parliamentary office. However, reading two tends towards uncertainty in the make-up of the Parliament, in that a person may be "conditionally" disqualified for a significant period before seeking to have their disqualification cured or the outcome of that challenge judicially determined.

32. The third is that considerations of fairness to the individual candidate would tend to favour the second construction. For the purposes of the criminal law, when a conviction is annulled, it is generally treated as if it had never existed. The criminal process recommences and proceeds in the same way as if the conviction had never been made. In light of this general effect as a matter of criminal law, considerations of fairness to the candidate may tend to favour a construction of s 44(ii) that would not disqualify a person whose conviction is subsequently annulled. Considerations of fairness, however, cannot displace the language of the Constitution nor displace the need for certainty.

33. Overall, I prefer reading one. The better view is that an annulment under the NSW Appeal and Review Act means that there is not, and have never been, any conviction for the purposes of the criminal law, but not for the purposes of s 44(ii) of the Constitution. In determining whether someone is convicted for the purposes of s 44(ii), I consider that the Court of Disputed Returns would be guided by the certainty of make-up of the Parliament which is offered by reading one.

Relief in the Election Petition Proceeding

34. There are at least three possible forms of relief which the Court of Disputed Returns could grant if it found that Senator Culleton had been "incapable of being chosen" as a senator.

35. *First*, the Court could order a special count of ballot papers disregarding primary or preferential votes for Senator Culleton. *Second*, the Court could order that the election for the Commonwealth Parliament for senators for Western Australia was absolutely void and order a new election. *Third*, the Court could order a supplementary election for the unfilled place in the Senate.

36. It is most likely that a Court will order a special count of ballot papers for three reasons.

37. The *first* reason is that a Court is likely to regard the reasoning and conclusion in *In re Wood* (1988) 167 CLR 145 (***In re Wood***) as binding or highly persuasive. In that case Mr Wood was declared elected as a senator for the Commonwealth Parliament for New South Wales. However, Mr Wood was not an Australian citizen at the time he nominated. As such, the Full Court of the Court of Disputed Returns found that Mr Wood was disqualified, a vacancy had arisen and that the vacancy could be filled by the further counting and recounting of ballot papers cast at the relevant election.

38. The Full Court reasoned that a valid result of the polling could be ascertained by scrutiny of the ballot powers under Pt XVIII of the CEA. It said (at 166):

> The provision which applies when a deceased candidate's name is on the ballot paper is s. 273(27): a vote indicated on a ballot paper opposite the name of a deceased candidate is counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences are treated as altered accordingly. For the purposes of the scrutiny which may now be conducted, a vote for an unqualified candidate is in the same position as a vote for a candidate

> who has died, and the votes should be treated accordingly. By construing Pt XVIII in this way, the true result of the polling - that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the Act - can be ascertained.

39. It relevantly continued (at 166):

> in the present case, there is no blemish affecting the taking of the poll and the ballot papers are available to be recounted if the valid choice of the electors can lawfully be ascertained by recounting. It is unnecessary to take a further poll. The full number of qualified senators required can be returned in accordance with the Act after a recount of the ballot papers. There will be no partial failure of the election and therefore no need to issue a new writ for a supplementary election: see s. 181 of the Act.

40. In *Sue v Hill*, the Court followed *In re Wood* without reservation in finding that the election should not be held to be absolutely void (see, for example, 530 [178] (Gaudron J)). In *Sue v Hill*, a majority of the Court held that Ms Hill had not been duly elected as the third Senator for Queensland to serve in the Commonwealth Parliament. It determined that the election was not absolutely void but held that it was inappropriate to decide whether there should be a recount of the ballot papers. Rather it considered that the matter was better left to determination by a single Justice after receiving submissions from the persons elected in the fourth, fifth and sixth positions. Sitting as a single justice, Gleeson CJ ordered a recount and, after receiving evidence from the Electoral Commissioner of the outcome of that recount, ordered that a Mr Harris be declared elected (see *Sue v Hill* [1999] HCA Trans 225 (2 July 1999)).

41. The *second* reason that the Court of Disputed Returns is likely to order a fresh count is that it would be pragmatic to do so. While concerns about pragmatism cannot displace the language of the Constitution, they are likely to

influence the Court's approach. A new election should be avoided unless absolutely compelled by the Constitutional text, object and history.

42. The *third* reason is that the circumstances of the current matter can be distinguished from matters in which a new election has been ordered, such as *Sykes v Cleary* and *Australian Electoral Commission v Johnston* (2014) 251 CLR 463 (**Western Australian Senate Case**) and from *Vardon v O'Loghlin* (1907) 5 CLR 201 (***Vardon v O'Loghlin***) in which a supplementary election for a vacancy was ordered.

43. In *Sykes v Cleary*, the Court ordered a new election for the candidacy of a member of the House of Representatives in circumstances where the candidate was incapable of sitting by reason of s 44(iv). The Court considered that the different considerations that arose in relation to the House of Representatives meant that the reasoning in *In re Wood* did not apply. In their joint judgment, Mason CJ, Toohey and McHugh JJ explained that this was for two key reasons.

44. The *first* reason concerned the differences between the methods of voting for a candidate in the House of Representatives and a candidate for the Senate. Their Honours said (at 102):

> [f]urthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr. Wood would have voted for another member of his group, had the voter known that Mr. Wood was ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

45. The *second* reason was that the reasoning in *In re Wood* rested on analogies the Court had drawn between the disqualification of a Senator and the death of

candidate for the Senate after the nominations have been declared but before polling day. Their Honours said (at 101-102):

> [t]he Court (in *In re Wood*) likened the position to that which arises when the candidate dies. Then, pursuant to s. 273(27) of the [CEA], a vote indicated on the ballot paper for the deceased candidate is counted to the candidate next in the voter's indicated order of preference and the numbers indicating subsequent preferences are treated as altered accordingly. In these circumstances, the situation in *In re Wood* was such as to warrant the conclusion that the special count would reflect the voters' "true legal intent".
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> ...
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> [T]he [CEA] draws a distinction between House of Representatives and Senate elections in the case of the death of a candidate. Section 180(2) provides that, if a candidate in a House of Representatives election dies between the declaration of the nominations and polling day, the election wholly fails, whereas, in the case of the death of a candidate in a Senate election between those days, s. 273(27) provides that the votes should be counted with the preferences adjusted accordingly. The reasons which lie behind the drawing of that distinction have equal application to the drawing of a like distinction between the election to the House of Representatives and to the Senate of candidates who are disqualified under s. 44.

46. In the *Western Australian Senate Case*, Hayne J, sitting as a single member of the Court Disputed Returns, ordered the election of six senators for the Commonwealth Parliament for the State of Western Australia was absolutely void and ordered a new election. In that case, 1,370 of the ballot papers cast at an election for the six senators had been lost in circumstances where the election for the fifth and sixth places was very close and a recount of ballot papers had been directed. Justice Hayne held that the electors who had submitted the lost ballot papers had been prevented from voting for the purposes of s 365 of the CEA and that the number of lost ballot papers far exceeded the margin between the relevant candidates at a point in the count

determinative of who were the successful candidates for the fifth and sixth Senate places. It inevitably followed that the loss of the ballot papers had been likely to have affected the declared result and that a new election was necessary. In contrast, in this case, there has not been a loss of ballot papers such that a valid result could be ascertained by scrutiny of the ballot papers.

47. In *Vardon v O'Loghlin*, the Court of Disputed Returns determined that the Parliament of South Australia had wrongly assumed it had the power to fill a casual vacancy under s 15 of the Constitution, such that its choice of a senator to fill a vacancy was void. The Parliament had sought to exercise the power under s 15 following a previous declaration by the Court that the election of a Senator was void owing to defects in the electoral process. In the unique circumstances of that case, the Court held that there was no alternative but for there to be a fresh election.

48. Further instructions would be required from the Electoral Commissioner before one could advise on the precise form of order for the special count. Specifically, the Electoral Commissioner should be able to ascertain from the retained ballot paper whether there is any prospect that disregarding the primary or preferential votes for Senator Culleton could affect the preceding ten elected candidates or subsequent one elected candidate so as to require a recount for any other, and if so which other, positions.

49. For completeness, I note that the 2016 changes to the method of Senate voting by the *Commonwealth Electoral Amendment Act 2016* (Cth) should not alter the applicability of the *In re Wood* approach to the present case.

The appropriate Commonwealth person to be joined as a party

50. In the context of the circumstances of the Election Petition Proceeding, it is highly likely that the Court of Disputed Returns would grant the Attorney-General leave to intervene under s 78A of the Judiciary Act to make submissions in relation to each and all of the questions on the construction of

s 44(ii) of the Constitution, the question of relief and the issue of the competency of the petition. This is partly because those issues are inseparably bound up. It is also because the concept in s 7 of the Constitution of "directly chosen by the people of the State" may be relevant to the form of relief that is ordered. Indeed in the *Western Australian Senate Case* Hayne J considered it was important to interpret the key provisions of the CEA through the prism of s 7 of the Constitution (see, for example, at [82] 490).

51. It is also possible that the Electoral Commissioner could seek to intervene under s 359 of the CEA and make submissions on the relief and the competency of the election petition to complement the Attorney-General's submissions (if those submissions were) confined solely to Constitutional matters. I do not regard this as strictly necessary, but it is an available alternative. If this alternative approach were taken, it would be appropriate to have a single representation of the Attorney-General and the Electoral Commission by the Solicitor-General and junior counsel and the Australian Government Solicitor.

Collateral challenge to the validity of the election of Senator Culleton

52. Whether a person may challenge the validity of a candidate's election by a collateral challenge under the Common Informers Act raises questions concerning the Constitution and relating to statutory interpretation.

<u>The Common Informers Act and the Court of Disputed Returns</u>

53. Sections 46 and 47 of the Constitution deal with the qualification and the validity of the election of members of Parliament.

54. Section 46 of the Constitution relevantly provides:

Penalty for sitting when disqualified

> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator … shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

55. The circumstances in which a person shall be incapable of sitting as a senator is set out in s 44 of the Constitution. It is notable that s 46 of the Constitution refers to a person being "*declared* by this Constitution to be incapable of sitting as a senator" but does not set out how a determination of incapability is to be made. Indeed, it may not always be clear, or it may open to dispute, (such as in this case) when a person's circumstances come within s 44 of the Constitution.

56. One way in which that determination may be sought is set out in s 47 of the Constitution. Section 47 allows the Senate to determine a question concerning the qualification of a senator and relevantly provides:

Disputed elections

> Until the Parliament otherwise provides, any question respecting the qualification of a senator … and any question of a disputed election to either House, shall be determined by the House in which the question arises.

57. Section 47 (together with s 51(xxxvi) of the Constitution) also gives the Parliament power to provide for another means for determining a question respecting the qualification of a senator. The Parliament has done that through the CEA in at least two ways.

58. It has done that, *first*, by enacting s 376, which is in Div 2 of Pt XXII of the CEA. That section provides that:

> ... any question respecting the qualification of a Senator ... may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

59. It has done that, *second*, through s 353(1) of the CEA, which provides that "[t]he validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise". In *Sue v Hill*, a (4:3) majority of the Court of Disputed Returns accepted that the validity of an election or return could be disputed by petition under s 353(1) on the ground of incapacity of the senator returned to be elected.

60. The Parliament has also enacted the Common Informers Act. That Act contains only five provisions. Section 3 picks up the language in s 46 of the Constitution and relevantly provides:

> **Penalty for sitting when disqualified**
>
> (1) Any person who, whether before or after the commencement of this Act, has sat as a senator or as a member of the House of Representatives while he or she was a person declared by the Constitution to be incapable of so sitting shall be liable to pay to any person who sues for it in the High Court a sum equal to the total of:
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> (a) $200 in respect of his or her having so sat on or before the day on which the originating process in the suit is served on him or her; and
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> (b) $200 for every day, subsequent to that day, on which he or she is proved in the suit to have so sat.

61. There has never been a successful suit under either s 46 of the Constitution or the Common Informers Act.

Issue with the challenge to Senator Culleton under the Common Informers Act

62. The issue of whether a collateral challenge to the validity of a candidate's election could be brought and authoritatively decided in the course of a proceeding under s 3 of the Common Informers Act was considered, in obiter, by McHugh J in *Sue v Hill*. His Honour put forward two competing views.

63. The *first* was that, by s 3 of the Common Informers Act, "Parliament has otherwise provided within the meaning of s 47 of the Constitution so that, notwithstanding the restrictive terms of Div 2 of Pt XXII of the [CEA], the High Court can determine at any time the eligibility of a member of Parliament" (at 555 [242]).

64. The *second* was that s 3 does not otherwise provide for the determination of a "question respecting the qualification of a senator or of a member of the House of Representatives". Rather, a determination must first be made by the relevant House of Parliament or by a reference to the Court of Disputed Returns under Div 2 of Pt XXII of the CEA, and the function of s 3 is to authorise a suit for the recovery of a penalty once a declaration of incapacity has been made (at 555-556 [243]). His Honour noted that in favour of this construction is that it "avoids potential and unseemly conflicts between the Court and a House of Parliament over the qualifications of a member of that House" (at 556 [243]). His Honour added that it "might also seem surprising that Parliament, in enacting the Common Informers Act, had intended, so to speak, to allow a person to bypass the restrictively worded provisions of Div 2 of Pt XXII of the [CEA]" (at 556 [243]).

65. Justice McHugh noted that the Second Reading speech to the Common Informers (Parliamentary Disqualifications) Bill 1975 provided support for both constructions. That is because it assumed that the High Court could deal with the question of qualification by suit brought under s 3, but it also proceeded on the basis that the Bill was otherwise providing for the purpose of

s 46 of the Constitution (at 556 [244]). Ultimately his Honour did not consider it necessary to state which of the two competing views he preferred.

66. I favour the second construction advanced by McHugh J for the reasons his Honour gives. Of great significance is that s 353 of the CEA provides that "[t]he validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise". By this provision, the Parliament sought to give exclusive jurisdiction to the Court of Disputed Returns to determine the validity of an election or return on petition. It would be inconsistent with s 353 of the CEA if an implication were read into s 3 allowing a person to bring a suit in the High Court to determine the validity of the election of a candidate. Indeed, the making of a collateral attack under the Common Informers Act would enable a person to bypass the detailed scheme that the CEA has established to enable persons to challenge disputes relating to disqualification. Such a significant step would require an express legislative statement from the Parliament that was what it was intending to do.

Concluding observations

67. The current pleadings in the Election Petition Proceeding are deficient and in my view should be incurable. The Court of Disputed Returns may be prepared, via a single Justice as occurred in the *Western Australian Senate Case*, to determine separately and in advance the question of whether the petition is deficient and incurable. Subject to any appeal to the Full Court, this may bring the matter to the earliest possible conclusion. Against the possibility that the Court allows the challenge to proceed, the Electoral Commissioner should be preserving all ballot papers and carrying out the factual enquiries listed at paragraph [48] above.

68. The Commonwealth has a strong interest in having both the Election Petition Proceeding and the Common Informers Proceeding determined as expeditiously as possible. If the Commonwealth is to intervene in any guise in either proceeding, it should do so as soon as possible, preferably before the

first directions hearing. The Commonwealth of necessity will probably need to take a leading role in case management leading to an early hearing.

69. I am indebted to Counsels Assisting Jonathon Hutton and Megan Caristo for substantial assistance in the preparation of this Opinion.

70. I advise accordingly.

Dated: 28 October 2016

[redacted]

JUSTIN GLEESON SC

Solicitor-General

IN THE MATTER OF *BELL v*

CULLETON

OPINION

Attention:
Gavin Loughton
Australian Government Solicitor

SG No. 23 of 2016