IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C15 of 2016

10

RE SENATOR RODNEY NORMAN CULLETON
Reference under s 376 *Commonwealth Electoral Act* 1918 (Cth)

SUBMISSIONS ON BEHALF OF SENATOR RODNEY NORMAN CULLETON

Filed on behalf of
Senator Rodney Norman Culleton by

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IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS

Matter No. C15/2016

IN THE MATTER of questions referred to the **Court of Disputed Returns** pursuant to section 376 of the *Commonwealth Electoral Act* 1918 (Cth) concerning **Senator Rodney Norman Culleton.**

SUBMISSION ON BEHALF OF SENATOR CULLETON

Part I

This Submission is in a form suitable for publication on the internet.

Part II – Issues

1. On 7 November 2016, after debate on a motion of the Attorney-General, the Senate resolved to refer to the Court of Disputed Returns ("CDR") the following questions[1]:

> *"(a) whether, by reason of s 44(ii) of the Constitution, or for any other reason[2], there is a vacancy in the representation of Western Australian in the Senate for the place for which Senator Rodney Norman Culleton was returned;*
>
> *(b) if the answer to Question (a) is 'yes', by what means and what manner that vacancy should be filled:*
>
> *(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and*
>
> *(d) what, if any, orders should be made as to the costs of these proceedings."*

2. Question (a) was modified to delete "… or for any other reason…" by Order of French CJ made 21 November 2016.

3. The questions should be answered as follows:

> *"(a) No;*

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[1] Letter dd 8 11 2016 from Senator Parry to Mr Phelan Registrar of High Court of Australia paragraph (4). The referral by the Senate was described as *'fairly late in the piece'* by the Chief Justice at Tr 21/11/16 line 641.
[2] No Submission has been made by the Attorney-General on this possible ground: see also the direction at Tr 21/11/16 at lines 700-705.

(b) Not necessary to answer;

(c) None;

(d) The Commonwealth should pay Senator Culleton's costs of and incidental to this proceeding."

4. As to specific issues:

(a) At no time has Senator Culleton been under sentence under a law of the Commonwealth or of a State and accordingly no disability under *Constitution* section 44(ii) has arisen.

(b) The conviction in absentia of 2 March 2016 has been annulled restoring the parties and Senator Culleton in particular to his legal *status ante quo* such that no disability has arisen on this ground.

(c) Further even assuming that the Attorney-General's case as to the effect of an annulment of orders of an inferior court be correct, at all material times prior to the annulment order Senator Culleton was not punishable by a term of imprisonment at all, let alone a term exceeding twelve months, such that no disability has arisen upon this ground as well.

(d) For these reasons, no vacancy has arisen and each question should be answered as proposed by Senator Culleton.

Part III – Section 75B *Judiciary Act*

5. By Order of His Honour Chief Justice French made 21 November 2016 the Attorney-General of the Commonwealth was ordered to serve notice under s 78B of the *Judiciary Act* 1903 (Cth).

Part IV – Material Facts

6. A chronology of the material facts may be summarised as:

(a) on 2 March 2016 Senator Culleton was found guilty and convicted in his absence in the Local Court of New South Wales at Armidale for an offence of larceny (s 117 *Crimes Act* 1900 (NSW)); no penalty was imposed, however a warrant was issued under *Crimes (Sentencing Procedure) Act* 1999 (NSW) section 25(2)(a) which warrant remained unexecuted until 8 August 2016;

(b) on 16 May 2016 a Writ was issued for the election of Senators for Western Australia;

(c) on 7 June 2016 Senator Culleton nominated as a candidate for the Senate election;

(d) the general election was held on 2 July 2016 with the facts referred to above being on the public record known or available to the electors and other candidates;

(e) upon the declaration of the poll on 2 August 2016 Senator Culleton was declared duly elected as a Senator for Western Australia;

(f) on 8 August 2016 Senator Culleton attended at the Armidale Local Court of his own volition on which date the NSW Police with his full cooperation executed the Bench Warrant at the Police Station adjacent to the Courthouse and shortly thereafter on the same day the 2 March 2016 conviction of Senator Culleton for larceny was annulled by the Court pursuant to s 8 of the *Crimes (Appeal & Review) Act* 2001 (NSW);

(g) on 30 August 2016 Senator Culleton commenced sitting in the Senate as a Senator for Western Australia;

(h) on 25 October 2016, upon the trial of the matter in Armidale Local Court Senator Culleton pleaded guilty to the charge of larceny, and without proceeding to conviction, the whole matter was dismissed with no conviction recorded against Senator Culleton under *Crimes (Sentencing Procedure) Act* 1999 (NSW) section 10(1)(a).

(i) As consequence, no conviction apart from that recorded in his absence on 2 March 2016 and annulled on 8 August 2016 has ever been recorded against Senator Culleton in respect of the indictment in the CAN ("Court Attendance Notice") a copy of which is annexed hereto and marked document 1 in Attachment "A". A copy of s 10 of the *Crimes (Sentencing Procedure) Act* 1999 is document 2 in Attachment "A"; and

(j) on 7 November 2016 on a resolution proposed by the Attorney-General the Senate referred the questions set out in paragraph 1 hereof to the Court of Disputed Returns.

Part V – Constitutional & Legislative Provisions

1. *Constitution (Commonwealth of Australia Constitution Act)* – Chapter 1

2. *Crimes Act* 1990 (NSW) – Sections 117 and 418

3. *Crimes (Sentencing Procedure) Act* 1999 (NSW) – Sections 10 and 25

4. *Crimes (Appeal & Review) Act* 2001 (NSW) – Sections 8 & 10

5. *Commonwealth Electoral Act* 1918 (Cth) – Chapter 22 Divisions 1 and 2; esp sections 364, 377 & 381

6. *Criminal Procedure Act* 1986 (NSW) Table A

Part VI – Submissions on behalf of Senator Culleton

"Substantial merits and good conscience"

7. This proceeding arises by way of reference from the President of the Senate under section 377 of the *Commonwealth Electoral Act* 1918. Section 381 of that Act provides that, inter alia, s 364 applies so far as applicable to a proceeding on a reference to this Court under s 377 of the *Commonwealth Electoral Act*.

8. Section 364 of the *Commonwealth Electoral Act* provides:

> "The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not."

9. To disqualify Senator Culleton in the circumstances before this Court[3] would require an elected Senator to be disqualified on the basis of an offence for which he has never been sentenced and even when convicted (in his absence on 2 March 2016) Senator Culleton:

(a) could not have faced any term of imprisonment by virtue of the operation of s 25 of the *Crimes (Sentencing Procedure) Act*;

(b) absent any restrictions on the sentencing disposition was only in the circumstances of Senator Culleton's particular case ever likely to receive a nominal punishment, if any; and

(c) in fact when the matter charged was addressed in his presence, no conviction was recorded under *Crimes (Sentencing Procedure) Act* 1999 s 10.

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[3] Further, the wider disqualification argued for by the Attorney at paragraph 20 of their submission is not supported by either the text or structure of Chapter I of the *Constitution* – see *Apla Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at [240]

"Under Sentence"

10. As to Question (a), a vacancy before the expiration of a term of office under the *Constitution* may arise in respect of the office of Senator as set out in Chapter 1 in one of three ways, first by a sitting Senator being absent from the Senate for two consecutive months (s 20), second by resignation under section 19 or death, and third upon a Senator becoming "subject to any of the disabilities" as set out in s 44 and upon one of these criteria being established a casual vacancy under section 45 of the *Constitution* arises.

11. Section 44 of the *Constitution* provides for the disqualification of a person from being "chosen" or "sitting" as a senator in certain circumstances. It does not provide that should such disqualification arise a vacancy arises. On the contrary it provides that the persons shall be "incapable of being chosen or sitting". The incapacity depends on the nature and timing of the conviction and sentence. Section 45 of the *Constitution* provides that if a Senator "becomes subject to any of the disabilities" in s 44 his or her "place becomes vacant".

12. An example of incapacity for a temporary period arose in the case of Senator Wood of the Nuclear Disarmament Party in the 1987 general election who it was alleged has been convicted of an offence which disqualified him by virtue of s 44(ii) of the *Constitution*. Brennan, Deane and Toohey JJ in *Nile v Wood* (1988) 167 CLR 133 at 139 said of disqualification under s 44(ii):

> "*It is not a conviction per se of which s 44(ii) speaks. The disqualification operates on a person who has been convicted of an offence punishable by a term of imprisonment for one year or more and is under sentence or is subject to be sentenced for that offence. The references to conviction and sentence are clearly conjunctive, although counsel for the petitioner argued otherwise. This is so as a matter of construction of the language used in s 44(ii). And it is apparent that it was the intention of the framers of the Constitution that the disqualification under the paragraph should operate only while the person was under sentence: see Quick & Garran,* The Annotated Constitution of the Australian Commonwealth *[1901] pages 490, 492.*"

13. The Attorney-General in his submissions takes issue with the observations of Quick & Garran in *The Annotated Constitution of the Australian Commonwealth* at the passages just referred to at Submissions par. 52ff, and contends that the provision operates "regardless of what the actual sentence is". It appears to be argued contrary to the first and fifth sentences of the passage cited, that the only relevant integer of disqualification is the conviction, a view which is rejected by the justices in *Nile v*

Wood, supra. The point of the conclusion of the Justices of this Court in *Nile v Wood*, consistently with the views expressed in Quick & Garran, is that the disability, namely "being under sentence" must in fact occur whilst the Senator is being chosen or sitting.

14. To interpret s 44(ii) of the *Constitution* otherwise would enable the disability may drag on for years, or be not known to the Senate candidate, or be the subject of misuse in obtaining convictions or be abused by opponents in positing possible sentences. This is of particular importance in the contemporary world with many more layers of potential criminal liability at both State and Federal levels (and local government levels as well), and many more crimes punishable by a term of imprisonment of 12 months or more, than was the case in 1901.

15. The Statement of Agreed Facts filed herein makes it clear that Senator Culleton has never been "under sentence".

16. The mere issue of an indictment in a CAN or of a conviction in his absence or of the issue of a Bench Warrant does not render Senator Culleton "under sentence" within the meaning of s 44(ii) of the *Constitution*.

17. Accordingly, upon the authority of this Court, which is not plainly wrong, s 44(ii) had no application to Senator Culleton and no vacancy has arisen, assuming a disqualification by operation of s 44(ii) gives rise to such a vacancy.

18. The answer to the first question must be no.

Annulment – "subject to be sentenced"

19. The order of annulment of the conviction of 2 March 2016 on 8 August 2016 had the consequence of the restoration of the *status quo ante*, meaning the non-deprivation of former rights of any party, or as discussed at the return of the Petitions of Mr Bell and Mr Bertola and of this reference by the Chief Justice "as though it never was" [Tr 21/11/16 line 510].

20. This result is consistent with the text and structure of the provision and Chapter 1. The argument of the Attorney that annulment must always operate in a legal and constitutional sense prospectively pays no attention to precedent or to reason.

21. A regulation which is disallowed is legally treated as annulled and avoided *ab initio* as if it had never been, even though it was laid on the Floor of the Parliament for a part of the relevant qualifying period: see *Dignan v Australian Steamships Pty Ltd* [1935]

45 CLR 188 per Dixon J and at 203 – 209 per Evatt J at 209 – 223. Also see *Penton v. Australian Journalists' Association* (1947) 73 CLR 549; *R v Spicer; ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277.

22. Similarly in divorce law the difference between the dissolution and annulment of a marriage was and still is the difference between setting aside the marriage prospectively or rendering it as if it had never been or had never happened, like the Pope's annulment of the marriages of Henry VIII or of the Habsbergs: see *Fountain v Alexander* (1982) 150 CLR 615 per Gibbs J; *Dowal v Murray* (1978) 143 CLR 410 per Gibbs ACJ at 3 (drawing the distinction between the two). Thus, the *Oxford Companion to Law* comments as follows in relation to "*annulment*" being prospective or retrospective:

> *"... Annulment of the marriage is legislative or judicial invalidation of it, as in law never having existed as distinct from dissolution, which terminates a valid marriage. To justify annulment there must be a radical defect, such as preexisting marriage of one party, insanity at the time or sexual impotence."*

23. Similarly the annulment of a consent decree of insolvency made in 1915 by a Court in 1919 under former *Bankruptcy Act* (Qld) s 163 restored the bankrupt to his former property and position even though 4 years after the decree – thus restoring his right to claim an equity of contribution from his co-surety: *Walker v Bowry* [1924] 35 CLR 48 per Isaacs ACJ. That was a relevant analysis because if the appellant was not restored to his former position – subject to the operation of the Act on transactions in the meantime - then he would have no basis for enforcing his equity of contribution from the co-surety. Also see *Marek v Tregenza* [1963] 109 CLR 1 at 4 where a distinction between a discharge from bankruptcy and an annulment is drawn – see per Kitto and Menzies JJ – so as to restore the bankrupt to his former condition. In that case this Court said that annulment and not discharge should have been granted; also *Clyne v DCT* (1984) 154 CLR 589 –because the adjudication order was an abuse of process so that annulment was appropriate to put the parties back into position as if a decree had never been made. Intervening acts are all treated as avoided by the annulment unless by specific order some other result is decreed.

24. These cases demonstrate that the distinction between annulment and discharge, and other prospective orders such as dissolution, or rescission of contract.

25. So here, by virtue of the statutory power of annulment[4] of the conviction by an inferior court under s 8 of the *Crimes (Appeal & Review) Act* 2001 (NSW) on 8 August 2016 the "historic" 2 March 2016 conviction is not merely gone, but rendered *void ab initio*, as if it had never been. Senator Culleton was entitled to be restored to his *status ante quo*, that is of having no conviction recorded against him immediately prior to the conviction in his absence on 2 March 2016 by the Local Court of NSW. Both the context and structure of the Constitutional provision, and the relevant State laws read in the light of precedent, lead to this conclusion,

(a) Section 10 of the *Crimes (Appeal & Review) Act* 2001 (NSW) provides:

"(1) *On being annulled, a conviction or sentence ceases to have effect and any enforcement action previously taken is to be reversed.*" This includes such matters as contempt of the Local Court in respect of the finding of guilt in *absentia* and the recording of the conviction in his absence, or even breach of the Bench Warrant assuming it had been served or attempted to be served occurring the interim period between 2 March 2016 and the date of its voluntary execution and the appearance of Senator Culleton at Armidale on 8 August 2016.

(b) While some of the language of s 10 of the *Crimes (Appeal & Review) Act* is arguably prospective, there is a clear legislative determination to act retrospectively and to reverse for example"... *any enforcement action previously taken...*". This is consistent with the legal proposition that the orders of an inferior court such as the Local Court at Armidale if made without jurisdiction, or if annulled, have no operation and may be attacked collaterally (e.g. in answer to a contempt motion, or for refusing to comply with a void order). Accordingly, it is possible to undo the "fact" of a conviction from a legal perspective because the conviction is to be taken as of no effect and void from its commencement, and the party is freed as it were of the conviction and restored to his or her *status ante quo*.

26. (a) The Macquarie Dictionary defines "annulment" as "(1) an invalidation, as of marriage, (2) act of annulling." "Annul" is defined as "(1) to make void or null,

[4] That power of annulment in this case was given to the very court making the order on grounds of absence; however the same argument would apply if that power were given to a superior court in relation to the annulment of orders of an inferior court.

abolish (used especially of laws and other established rules, usages and the like), (2) to reduce to nothing; obliterate".

(b) The Shorter Oxford English Dictionary likewise defines "annulment" as "the act of reducing to nothing, or declaring void", and "annul as (1) to reduce to nothing, extinguish, (2) to put an end to, to abolish, cancel, (3) to destroy the force of: to render void in law".

(c) Finally, as noted by Gageler J in State of *New South Wales v Kable (Kable No 2)* (2013) 252 CLR 118, the authority of a judicial order varies between superior and inferior courts (at paragraphs [54] – [58]). By analogy, just as a judicial order of an inferior court made without jurisdiction has no legal force, so an order (in this case the conviction of 2 March 2016) that is annulled also has no legal force. The position after annulment ought be that the conviction at law is void and the legal position of Senator Culleton is untarnished – the "*status ante quo*" is restored.

(d) Thus in the ordinary and natural meaning of the word the intention of the legislature is upon "annulment" to place the person wrongly convicted, in this case Senator Culleton, in the position as if the conviction had never happened (i.e as if the conviction were obliterated).

27. The issue raised then by the Attorney-General's submission on this question is whether by virtue of a conviction for larceny in his absence on 2 March 2016 (prior to the nomination and election of Senator Culleton), which conviction was annulled on 8 August 2016 (after Senator Culleton's election), Senator Culleton was disqualified from being chosen or sitting as a Senator by application of s 44(ii) of the *Constitution.*

28. The only question on this topic then is was he disqualified from being chosen? In this regard as a practical matter no objection was taken at the time by any person. The relevant facts were on the public record and Senator Culleton was declared "duly elected" by the Governor of Western Australia.

29. The nature of representative democracy does not favour the broad disqualification of candidates for election of elected members of Parliament. Any criteria limiting or narrowing eligibility for election or to remain a member of Parliament should be construed strictly. Breadth of opportunity to participate in the democratic process and

diversity in the Parliament ought not be curtailed by a technical or broad interpretation of the disqualification provisions of the *Constitution.*

30. While historically it is the fact that Senator Culleton was convicted, on 2 March 2016 in absentia, that conviction by reason of the annulment is ineffective at law.

31. The Court should conclude that by reason of the later annulment of the conviction of Senator Culleton by a court of inferior jurisdiction he was not convicted and not under sentence nor "...subject to be sentenced..." as a matter of law at any relevant time so as to disqualify his being "chosen" or "sitting" as a senator.

Absent offender – "subject to be sentenced"

32. Assuming the annulment does not operate retrospectively, there is in any event no basis at law to support the proposition that Senator Culleton was "... subject to be sentenced, for any offence punishable under the law... by imprisonment for one year or longer":

(a) the offence of larceny (s 117 of the *Crimes Act*) is punishable by a maximum penalty in excess of one year, however;

(b) the matter was heard in the local court in the absence of Senator Culleton and the proceeding including any disposition upon a finding of guilt was subject to the *Crimes (Sentencing Procedure) Act* 1999 (NSW) and the *Criminal Procedure Act* 1986 (NSW). Senator Culleton was an "absent offender" within the meaning of s 25(4) of the *Crimes (Sentencing Procedure) Act*;

(c) by s 25(1)(a) of the *Crimes (Sentencing Procedure) Act* no sentence of imprisonment can be imposed on an "absent offender".

33. As a consequence, under the law of the State of New South Wales as constituted by the interaction of the *Crimes Act* 1900 (NSW) and the *Crimes (Sentencing Procedure) Act* at no relevant time was Senator Culleton "... subject to be sentenced, for any offence punishable under the law... by imprisonment for one year or longer".

34. As at each of the dates identified in the Attorney-General's Submissions – June 2016; July 2016 and 4 August 2016 – Senator Culleton was not convicted of an offence under the law of a State (in this case, New South Wales) or of the Commonwealth punishable by a term of imprisonment of more than twelve months. That is because

the nominal punishment under *Crimes Act* 1900 (NSW) for the offence of larceny of five years was attenuated by two considerations:

(a) first, Senator Culleton was charged in the Local Court with an offence falling with in Table 2 as stated in the CAN reducing the possible imprisonment term from five to two years; and

(b) second, as he was convicted as an "absent offender" the consequence was that section 25(1)(a) of the *Crimes (Sentencing Procedure) Act* prevented the Court from imposing any term of imprisonment at all, unless and until his status as an "absent offender" was removed.

35. Until then the Bench Warrant was finally executed (by agreement of the NSW Police and Senator Culleton) Senator Culleton was an "absent offender".

36. Upon the warrant being executed, the Court "annulled" the 2 March 2016 conviction. Consequently, Senator Culleton was neither convicted or under sentence on 8 August 2016 or subsequently.

"Incapable of sitting... as a Senator"

37. Both these questions are determined by:

(a) the legal effect of the annulment of the "historic" conviction of 2 March 2016 on 8 August 2016; or

(b) the consequence of the "historic" conviction being subject to the law (in the broad sense and not limited to consideration solely of the offence of larceny under s 117 of the *Crimes Act* 1900 (NSW)) of the State of New South Wales which precluded any sentence of imprisonment at all being imposed on Senator Culleton during the relevant period commencing on Senator Culleton's nomination and ending upon 8 August 2016 when the Bench Warrant was executed and the "historic" conviction was annulled.

38. If the annulment is retrospective, then regardless of the "historical" fact, the legal effect is that the conviction of 2 March 2016 is annulled, and is and has never been of any legal effect. Section 44(ii) of the *Constitution* should not be interpreted and applied so as to require the disqualification of a person from "being chosen" or "sitting" if elected on the basis of a legal nullity, that is in this case the "historic" fact of a conviction for an offence identified by reference to Constitutional s 44(ii) criteria.

39. If the annulment is not retrospective then within the broader meaning of the phrase "...under the law..." Senator Culleton was not "... subject to be sentenced, for any offence punishable under the law... by imprisonment for one year or longer" at any relevant time.

Consequences of being found guilty on 25 October 2016

40. The consequences of Senator Culleton pleading guilty and having a Court find the charge proven on 25 October 2016 and the Court then proceeding to dismiss the charge does not have any consequences under s 44(ii) of the *Constitution*. The determination of the Court on 25 October 2016 is not a "conviction" and the dismissal of the charge means that Senator Culleton was "not under sentence" or "subject to be sentenced" within the meaning of s 44(ii) of the *Constitution*.

41. Senator Culleton should not be found to "... *be incapable of being chosen or sitting as a senator*... " by any reason of any breach of s 44(ii) of the *Constitution*.

Conclusion

42. The questions the subject of the reference from the President of the Senate should be answered as set forth above in paragraph 3 hereof.

Dated the 2nd day of December 2016

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Attachment A
Document 1

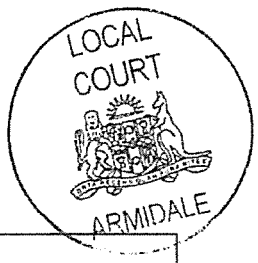
LOCAL COURT ARMIDALE

COURT ORDER NOTICE

Local Court of NSW
at Armidale
2015/00207643

D0000ROY03

Details	Case title	R v RODNEY NORMAN CULLETON
	Accused DOB	5 June 1964
	Accused CNI	
	H Number	58561419
Court	Order date	8 August 2016
	Place of order	Armidale
	Judicial officer	Local Court Magistrate M Holmes
Order	2015/00207643-001 / Larceny value <=$2000-T2 Annulment Granted	
Additional Information	OFFENCE DETAILS: Crimes Act 1900 Section 117 Larceny between 8.00am and 10.00am on 11th April, 2014 at Guyra did steal certain property of the value of $322.85, to wit, Keys for Peterbilt Heavy haulage tow truck the property of John Charles DUNN . LOCAL COURT REVIEW OF LOCAL COURT DECISIONS: . Applications are made pursuant to: Crimes (Appeal and Review) Act 2001 No 120, Part 2, Section 4. Annulments are granted pursuant to: Crimes (Appeal and Review) Act 2001 No 120 Part 2, Section 8 . I, Rhonda Breneger, Registrar, Armidale Local Court, being the person who normally has control of the records of this court hereby certify this order to be a true copy of the order made at the Armidale Local Court on the 8th August, 2016.	



Signed	R.M.Breneger Registrar
Date	15 November 2016

Copy to	Australian Government Solicitor 4 National Circuit BARTON ACT 2600

Attachment A Document 2

New South Wales Consolidated Acts

CRIMES (SENTENCING PROCEDURE) ACT 1999 - SECT 10

Dismissal of charges and conditional discharge of offender

10 Dismissal of charges and conditional discharge of offender

(1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:

(a) an order directing that the relevant charge be dismissed,

(b) an order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years,

(c) an order discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.

(2) An order referred to in subsection (1) (b) may be made if the court is satisfied:

(a) that it is inexpedient to inflict any punishment (other than nominal punishment) on the person, or

(b) that it is expedient to release the person on a good behaviour bond.

(2A) An order referred to in subsection (1) (c) may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.

(2B) Subsection (1) (c) is subject to Part 8C.

(3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:

(a) the person's character, antecedents, age, health and mental condition,

(b) the trivial nature of the offence,

(c) the extenuating circumstances in which the offence was committed,

(d) any other matter that the court thinks proper to consider.

(4) An order under this section has the same effect as a conviction:

(a) for the purposes of any law with respect to the revesting or restoring of stolen property, and

(b) for the purpose of enabling a court to give directions for compensation under Part 4 of the *Victims Compensation Act 1996* , and

(c) for the purpose of enabling a court to give orders with respect to the restitution or delivery of property or the payment of money in connection with the restitution or delivery of property.

(5) A person with respect to whom an order under this section is made has the same right to appeal on the ground that the person is not guilty of the offence as the person would have had if the person had been convicted of the offence.