

*Sue Milne**

THE SECOND OR SUBSEQUENT CRIMINAL APPEAL, THE PREROGATIVE OF MERCY AND THE JUDICIAL INQUIRY: THE CONTINUING ADVANCE OF POST-CONVICTION REVIEW

ABSTRACT

When all rights of judicial appeal are exhausted, post-appeal review of a criminal conviction is commonly removed into the executive sphere by way of the prerogative of mercy, or judicial inquiry. As a particular class of administrative decision, these forms of post-conviction review are substantially immune from judicial review, and notably with respect to the mercy prerogative, invoke discretionary powers and lack transparency. In order to provide a public and more transparent approach to post-conviction review, the South Australian Parliament has created a judicial pathway for criminal review, post-conviction. The *Statutes Amendment (Appeals) Act 2013* (SA) is the first enactment in Australia to create a second or subsequent right of criminal appeal where an appeal court is satisfied that there is fresh and compelling evidence which should, in the interests of justice, be considered on an appeal. Appeals may be allowed if the court considers there was a substantial miscarriage of justice. This paper examines the likely efficacy of these reforms and argues that the creation of a right to a second or subsequent appeal provides a public and pragmatic solution, by way of a judicial approach to revisiting a conviction, outside the executive or political sphere. This ultimately provides a simpler, direct and more transparent process than the mercy prerogative and judicial inquiry.

I INTRODUCTION

The review of a criminal conviction post the exercise of the usual single right of appeal in Australia is an administrative act, where the executive considers a petition for the prerogative of mercy or initiates a judicial inquiry, and is a topic of much interest today. Grounds for review of a conviction usually concern evidence raising doubt as to guilt upon the consideration of material not available at trial or on appeal. Yet the discretionary nature of the mercy prerogative, absent

* BA, LLB, Lecturer, School of Law, University of South Australia. The author is grateful for the comments of Dr David Plater and Dr Steven Churches on earlier drafts of this paper, and to Rolf for believing.

statutory direction, means that the rationale for the application of mercy is not necessarily limited to evidential matters and is circumscribed only by convention. Uniquely, post-conviction review, which is available only where all rights of appeal have been exhausted, juxtaposes the finality of judicial appeals with the engagement of the executive, or the judiciary in an administrative role, with wider considerations unconstrained by rules of court procedure, in order to ensure that no miscarriage of justice has been done. As a ‘constitutional safeguard against mistakes’,¹ the mercy prerogative in particular, has for centuries occupied a distinctive role in the administration of criminal justice.

In South Australia, legislation has recently been enacted to provide a purely judicial approach to post-conviction review through application to the courts for a second or subsequent appeal upon consideration of fresh and compelling evidence.² The reforms seek to ‘de-politicise’ post-conviction review by removing the process into a public forum, the courts, where, as was colourfully argued by the Attorney-General when introducing the associated Bill into Parliament, the convicted person may benefit from ‘that marvellous disinfectant of sunshine just covering the whole circumstance’.³

Inherent in the Attorney-General’s claim is an invocation of the rule of law as it manifests in the courts, to principles of fairness, impartiality and open justice. In contrast, the operation of the prerogative of mercy, as an executive power removed from public oversight, is open to criticism for lack of transparency and accountability, and, not least, enjoys immunity from curial review.⁴ The judicial inquiry similarly holds a unique place in the administration of criminal justice which lends it some immunity from appeal or review, but is saved from accusations of a lack of transparency or accountability due the comparatively open nature of the inquiry process itself.⁵

¹ *Burt v Governor-General* [1992] 3 NZLR 672, 678, 681 (*‘Burt’*), cited with approval in *R v Home Secretary; Ex parte Bentley* [1994] QB 349, 365 (*‘Bentley’*).

² *Statutes Amendment (Appeals) Act 2013* (SA) received assent on 28 March 2013 and pt 2 & sch 1 commenced on 5 May 2013. The new amendments apply to appeals instituted after commencement of the Act, regardless of the date of the offence: *Statutes Amendment (Appeals) Act 2013* (SA) sch 1.

³ South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, 4315 (John Rau, Attorney-General).

⁴ Bibi Sangha and Robert Moles, ‘Mercy or Right? Post-Appeal Petitions in Australia’ (2012) 14 *Flinders Law Journal* 293; Bibi Sangha and Robert Moles, ‘Post-Appeal Review Rights: Australia, Britain and Canada’ (2012) 36 *Criminal Law Journal* 300; South Australia, *Parliamentary Debates*, Legislative Council, 10 November 2010, 1420 (Ann Bressington); ‘The present process [of the operation of the pardon] appears to work effectively but it is open to criticism as lacking transparency, accountability and independence. The criticisms of the present system were thoroughly ventilated before the [Legislative Review] Committee’: South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

⁵ *Crimes (Appeal and Review) Act 2001* (NSW) pt 7; *Crimes Act 1900* (ACT) pt 20. The report of the inquiry might however not necessarily be available for publication.

This paper seeks to examine the likely efficacy of the South Australian reforms in the context of the post-conviction review landscape in Australia. This also requires an assessment of the operation and effectiveness of both the prerogative of mercy, once considered ‘an integral element in the criminal justice system,’⁶ and the judicial inquiry, as remedial mechanisms to correct possible miscarriages of justice where the appellate system has failed.

The present reforms follow the 2012 Report of the Legislative Council Review Committee on the Criminal Cases Review Commission Bill 2010 (SA),⁷ and directly address the criminal appellate process and post-conviction review through the operation of the mercy prerogative in South Australia. The emergence of the Criminal Cases Review Commission (‘CCRC’) in the United Kingdom, as an independent public body established to investigate possible miscarriages of justice, is indicative of a move away from executive discretionary justice to greater public scrutiny in the administration of criminal justice.⁸ Although the Committee did not recommend the creation of a similar body in Australia, the work of the CCRC testifies to the significance of the problem of miscarriages of justice more generally.

In Australia, the extent of the problem of possible miscarriages of justice which result in wrongful convictions is difficult to establish.⁹ In debate on the passage of the reform Bill, it was argued that ‘South Australia is not Texas’ and that the significance of the problem in respect of ‘substantial miscarriage of justice’ cases,¹⁰

⁶ *Burt* [1992] 3 NZLR 672, 678, 681; *Bentley* [1994] QB 349, 362–3.

⁷ A Private Member’s Bill introduced into the Legislative Council by the Hon Ann Bressington on 10 November 2010. The Bill sought to establish a Criminal Cases Review Commission (‘CCRC’) modelled on the CCRC in the United Kingdom, as an independent body with powers to investigate claims of wrongful convictions, and to refer substantiated claims to the Full Court for appeal.

⁸ The efficacy of the Commission is demonstrated by statistics of the work of the CCRC to date, with over 15 000 cases referred to the CCRC since its inception in 1997, with 543 referrals to the UK Court of Appeal, resulting in 353 quashed convictions and 147 convictions upheld. See CCRC, *About Us* <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>.

⁹ A wrongful conviction is necessarily only established by a court in a successful appeal. See Juliette Langdon and Paul Wilson, ‘When Justice Fails: a Follow Up Examination of Serious Criminal Cases Since 1985’ (2005) 17 *Current Issues in Criminal Justice* 179.

¹⁰ South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3953 (John Rau, Attorney-General):

The Bill may not satisfy everybody. Some may claim that it goes too far, others that it does go not far enough. My response is simple. The Bill strikes a careful balance. South Australia is not Texas. This State is not awash with wrongful convictions and the falsely imprisoned. Equally no system of criminal justice is infallible and there needs to be some means for convicted defendants to bring fresh and compelling evidence that questions the safety of their original conviction before a court. The Bill is a fair and balanced measure to reconcile the conflicting interests in this area.

comparable with some jurisdictions,¹¹ is relatively limited. But such arguments should not deny the injustice done to those who are wrongfully convicted, or the significant legal obstacles to challenge a conviction, particularly if new evidence favourable to the convicted person comes to light after all judicial avenues for appeal have been exhausted.¹² Yet the rights and interests of victims of crime must also be considered in any reform of criminal appeals and review. Although this integral aspect of the administration of criminal justice is beyond the scope of this paper, it is worth noting that in drafting the South Australian reforms heed was taken of the balance required in advancing the rights of the convicted with the rights of the victims of crime.

The present reforms are also a legislative response to the controversial case of Henry Keogh, convicted and sentenced to life imprisonment for the murder of his fiancée.¹³ Keogh's appeal to the High Court was refused,¹⁴ which is unsurprising as the threshold considerations by which special leave to appeal might be granted¹⁵ render criminal appeal applications difficult.¹⁶ Furthermore, the High Court is not a court

¹¹ Since the 1980s post-conviction DNA testing in the United States has exposed a series of miscarriages of justice, with over 250 cases of wrongful convictions uncovered in the following two decades. See, eg, Simon A Cole, 'Forensic Science and Wrongful Convictions: from Exposer to Contributor to Corrector' (2012) 46 *New England Law Review* 711.

¹² Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17 *Current Issues in Criminal Justice* 203.

¹³ South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013 (Vicki Chapman, Deputy Leader of the Opposition). Keogh was convicted on 23 August 1995 and sentenced to life imprisonment with a non-parole period of 25 years. His appeal against conviction was dismissed on 22 December 1995: *R v Keogh* [1995] SASC 5397 (22 December 1995). There have been a number of other applications to reopen the original appeal, the particulars are set out in the decision of *R v Keogh* [2014] SASFC 20 (11 March 2014). Notably, Keogh was granted leave for a second appeal in *R v Keogh [No 2]* (2014) 121 SASR 307. As this case was decided at the time of publication of this article, only brief reference is made to this decision. See below nn 19, 138.

¹⁴ His application to the High Court for special leave to appeal was dismissed: Transcript of Proceedings, *Keogh v The Queen* [1997] HCATrans 313 (3 October 1997). *Davies v The King* (1937) 57 CLR 170, 172 (Latham CJ): 'The only power of the [High] court as a court of appeal is to consider and determine whether the judgment of the court appealed from was right upon the materials before that court.' *Ratten v The Queen* (1974) 131 CLR 510; *R v LK* (2010) 241 CLR 177.

¹⁵ *Judiciary Act 1903* (Cth) s 35A.

¹⁶ *Morris v The Queen* (1987) 163 CLR 454, 475–6 (Dawson J).

of criminal appeal¹⁷ and is unable to consider fresh evidence.¹⁸ After four petitions for mercy which sought to cast doubt upon the validity of expert forensic evidence presented at trial, Henry Keogh was granted leave for a second appeal under the new South Australian legislation, the appeal was subsequently allowed and his conviction quashed with an order for a retrial.¹⁹

The passage of the *Statutes Amendment (Appeals) Act 2013* (SA) with all-party support through the South Australian Parliament, is the first enactment in Australia to enshrine a second or subsequent right of criminal appeal where the court is satisfied that there is fresh and compelling evidence which should, in the interests of justice, be considered on an appeal.²⁰ The court has considerable discretion in granting the appeal with the onus upon the appellant to satisfy the court of the single ground of appeal, a finding that a substantial miscarriage of justice had occurred. This is a reversal of the usual criminal appeal where the onus lies upon the prosecution to establish that *no* substantial miscarriage of justice has occurred upon the founding of a ground of appeal. The Attorney-General considered this was necessary to prevent vexatious or untenable applications:

The new procedure in the Bill should not preclude or deter genuine applications from convicted defendants. There is a strong public interest in closure and finality of criminal cases. ... It is important to guard against the potential for misuse of any new model of vexatious applicants. The spectre of endless untenable efforts to reopen old convictions should be avoided. A robust threshold is necessary to deter or deny untenable applications.²¹

¹⁷ *Liberato v The Queen* (1985) 159 CLR 507, 509 (Mason ACJ, Wilson and Dawson JJ); *Warner v The Queen* (1995) 69 ALJR 557 (Brennan, Deane and Dawson JJ), where the High Court in refusing special leave held that as the Court was not a court of criminal appeal, special leave to appeal on the ground that a verdict was unsafe or unsatisfactory (on the evidence before the jury) was unlikely to succeed. The Court finished: '[t]his Court cannot and should not wish to undertake a general supervisory role of courts of criminal appeal on questions of fact.'

¹⁸ With respect to appeals from state courts exercising state jurisdiction: *Mickelberg v The Queen* (1989) 167 CLR 259 ('*Mickelberg*'), and federal courts or other courts exercising federal jurisdiction: *Eastman v The Queen* (2000) 203 CLR 1.

¹⁹ *R v Keogh* [2014] SASFC 20 (11 March 2014); *R v Keogh [No 2]* (2014) 121 SASR 307. The trial is to be listed in early 2016.

²⁰ Legislation in New South Wales and the Australian Capital Territory provides for post-conviction review by way of judicial inquiry through application to the executive or Supreme Court. Notably under s 79(1)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW), an application to the Supreme Court for an inquiry may be referred to the Court of Criminal Appeal, 'to be dealt with as an appeal under the *Criminal Appeal Act 1912*' (which effectively acts as a second or subsequent appeal). See Part V below.

²¹ South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

Given that the judicial inquiry is not available in South Australia, the Keogh case demonstrates that post-appeal practice might be for a defendant to petition the executive for exercise of the mercy prerogative. The petition need have no obvious merit nor be limited in number, with the only statutory threshold being that all other avenues of appeal were exhausted.

II POST-CONVICTION REVIEW: THE PREROGATIVE OF MERCY

As ‘powers accorded to the Crown by the common law’,²² and capable of limitation by both common law and statute,²³ the prerogative powers are that ‘residue of discretionary or arbitrary authority, which at any time is legally left in the hands of the Crown.’²⁴ The common law prerogative powers were received upon settlement,²⁵ and are recognised today as referred from the Crown under the *Australia Act 1986* (Cth)²⁶ and by Letters Patent, to the Governors of the states. The Commonwealth prerogative powers are vested in the Governor-General by virtue of s 61 of the *Constitution*.²⁷ However, by convention, the exercise of these powers is done on the advice of the executive body politic in right of the Crown.²⁸

The constitutional structure in Australia finds the criminal law within the ambit of the states and, to a lesser extent, the Commonwealth. The prerogative of mercy, as

²² *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

²³ *A-G (UK) v De Keyser's Royal Hotel Ltd* [1920] AC 508, 575 (Lord Parmoor); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.

²⁴ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 424.

²⁵ Under the *Jurisdiction in Liberties Act 1535*, 27 Hen 8, c 24, s 1 the prerogative power to pardon was considered delegable to the Governors of the British colonies.

²⁶ Section 7(2) of the *Australia Act 1986* (Cth) provides that ‘all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.’ See Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 259–64; Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) chs 3, 7.

²⁷ *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 304 (Dixon J); *Williams v Commonwealth* (2012) 248 CLR 156, 185 (French CJ).

²⁸ *FAI Insurances Ltd v Winnecke* (1982) 151 CLR 342, 364–6 (Mason J); *Lange v Commonwealth* (1997) 189 CLR 520; Arthur Berriedale Keith, *Responsible Government in the Dominions* (Oxford University Press, 2nd ed, 1928) 107–8; George Winterton, *Parliament, the Executive and the Governor-General: a Constitutional Analysis* (Melbourne University Press, 1983).

an ancient right of the Crown to pardon, partially or fully,²⁹ those who have been convicted of a public offence, must be examined within this context.³⁰ Although no longer viewed as ‘an arbitrary monarchical right of grace and favour’,³¹ the mercy prerogative has been described as the exemplar of a pure, common law discretionary power,³² with statutory recognition in most jurisdictions in Australia.³³ While frequently aligned with ‘miscarriage of justice’ cases, the rationale of the discretion to administer a pardon, in reference to the instrument granted under the prerogative, remains elusive.

A full pardon serves to remove ‘all pains penalties and punishments’ arising from a conviction, but not the conviction itself.³⁴ This modern view developed from the Supreme Court of Tasmania decision in *R v Cosgrove*,³⁵ that the pardon ‘is in no sense equivalent to an acquittal’, operating merely to give new credit and capacity from the date of the pardon.³⁶ There is no common law right to have a conviction quashed, post-pardon. The commutation of the sentence is a partial,³⁷ or conditional

²⁹ A T H Smith, ‘The Prerogative of Mercy, the Power of Pardon and Criminal Justice’ [1983] *Public Law* 398.

³⁰ Section 61 of the *Constitution* has been found to confer on the Commonwealth, ‘all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution’: *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437–9.

³¹ *Burt* [1992] 3 NZLR 672, 678, 681, cited with approval in *Bentley* [1994] QB 349, 365.

³² *De Freitas v Benny* [1976] AC 239, 247 (Lord Diplock) (*‘De Freitas’*); *Von Einem v Griffin* (1998) 72 SASR 110, 130 (Lander J) (*‘Von Einem’*), who describes the power as an ‘unconfined and uncontrolled’ personal, discretionary power.

³³ *Crimes Act 1914* (Cth) ss 16–22A; *Crimes (Appeal and Review) Act 2001* (NSW) ss 76–7; *Crimes Act 1958* (Vic) s 584; *Criminal Code Act 1899* (Qld) sch 1 (*‘Criminal Code (Qld)’*) s 672A; *Sentencing Act 1995* (WA) pt 19; *Criminal Code Act 1924* (Tas) sch 1 (*‘Criminal Code (Tas)’*) s 419; *Criminal Code Act* (NT) sch 1 (*‘Criminal Code (NT)’*) s 431; *Crimes (Sentence Administration) Act 2005* (ACT) pt 13.2. See generally David Caruso and Nicholas Crawford, ‘The Executive Institution of Mercy in Australia: The Case and Model for Reform’ (2014) 37 *University of New South Wales Law Journal* 312.

³⁴ *R v Foster* [1985] QB 115, 130, approving *R v Cosgrove* [1948] Tas SR 99. See *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 371 (Wilson J); *Eastman v DPP (ACT)* (2003) 214 CLR 318, 350–1 (Heydon J).

³⁵ [1948] Tas SR 99; *R v Foster* [1985] QB 115.

³⁶ *R v Cosgrove* [1948] Tas SR 99, 105–6.

³⁷ See generally Peter Brett, ‘Conditional Pardons and the Commutation of Death Sentences’ (1957) 20 *Modern Law Review* 131.

pardon,³⁸ with the remission of sentence a part of, but not limited to, the pardon's canon, which operates to cancel or reduce the sentence.³⁹

The most high profile miscarriage of justice case in Australia concerned the conviction of Lindy Chamberlain for the murder of her baby daughter, and her husband's conviction for being an accessory after the fact.⁴⁰ The defence argued that a dingo had taken the baby from a camp near Ayers Rock. A Royal Commission (another much rarer form of post-conviction review)⁴¹ convened in 1986,⁴² found that the evidence was insufficient to sustain a guilty verdict and that the jury should have been directed to acquit.⁴³ The lack of any formal avenue in which to quash the Chamberlains' convictions subsequent to the grant of a pardon led to the amendment of the *Criminal Code* (NT) to provide the Attorney-General with the discretion to refer a case to the Northern Territory Supreme Court to consider quashing a conviction and entering a verdict of acquittal.⁴⁴ This the Supreme Court did with

³⁸ In colonial Australia the conditional pardon frequently operated to commute the death penalty to a penal sentence. See David Plater and Sue Milne, "The Quality of Mercy is not Strained": The Norfolk Island Mutineers and the Exercise of the Death Penalty in Colonial Australia 1824–1860' [2012] *Australian and New Zealand Law and History E-Journal* 1 <http://www.anzlhsejournal.auckland.ac.nz/pdfs_2012/Plater-Milne-Piracy-and-mercy.pdf>.

³⁹ In *Re an Arbitration between the Standard Insurance Co Ltd and Macfarlan* [1940] VLR 74, 81–4, a statutory entitlement to remission was determined not to be granted under the prerogative. However it has been argued that the principles underlying such statutory entitlements as parole are founded upon the same basis as is the operation of the pardon. See *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 368 (Mason J); Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1.

⁴⁰ *Chamberlain v The Queen* (1983) 72 FLR 1; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521.

⁴¹ A Royal Commission might constitute another form of post-conviction review but they are infrequent occurrences, for example the Stuart and Splatt Royal Commissions were only convened in South Australia after extensive media and political agitation: see South Australia, Royal Commission in Regard to Max Rupert Stuart, *Report* (1959); South Australia, Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt, *Report* (1984).

⁴² Northern Territory, Royal Commission of Inquiry into Chamberlain Convictions, *Report of the Commissioner* (1987).

⁴³ It has been noted elsewhere that, 'Morling J described much of the evidence at the Royal Commission as new. However, it might be equally apt to describe much of the allegedly new evidence as similar to the evidence which was discounted at the trial or in the appeals': Gary Edmond, 'Azaria's Accessories: The Social (Legal-Scientific) Construction of the Chamberlains' Guilt and Innocence' (1998) 22 *Melbourne University Law Review* 396, 436. However, in the application to quash the convictions, the Court found that the Royal Commission had received 'fresh evidence' in its findings: *Re Conviction of Chamberlain* (1988) 93 FLR 239.

⁴⁴ *Criminal Code* (NT) s 433A.

respect to the Chamberlains' convictions, after itself considering all of the material available including the findings of the Royal Commission.⁴⁵

The South Australian reforms similarly amend the administration of mercy to allow application to the courts to have a conviction quashed post-pardon.⁴⁶ The conviction will only be quashed as the court 'thinks fit' in that the court believes that the evidence does not support the conviction.⁴⁷ This replicates the statutory position in other states⁴⁸ and territories, and in part the position in the UK, where a 'free' pardon, granted by the Sovereign following a recommendation by the Home Secretary, relieves the convicted of the consequences of the conviction but does not amount to an acquittal.⁴⁹ A conviction might be quashed, but only by a court,⁵⁰ and only where certain conditions are met,⁵¹ including that the convicted is found to be both morally and technically innocent of the crime.⁵² It is of course more than a moot question to evaluate 'moral innocence', and to this extent the UK position might be considered far more stringent than it is in Australia.

A The Pardon and the Statutory Referral and Opinion Powers

By convention, the operation of the prerogative of mercy in most Australian jurisdictions is triggered by a petition to the Governor. The Governor may respond to the petition in a number of ways.⁵³ Acting on the advice of the Governor in Council, the Governor might exercise the prerogative of mercy so as to pardon the petitioner

⁴⁵ *Re Conviction of Chamberlain* (1988) 93 FLR 239, 255 (Kearney J), citing *Ratten v The Queen* (1974) 131 CLR 510, 520 (Barwick CJ).

⁴⁶ The amendment is made to s 369 of the *Criminal Law Consolidation Act 1935* (SA) ('CLCA'), which statutorily enshrines the prerogative of mercy (see Part II(A) *The Pardon and the Statutory Referral and Opinion Powers* below). Interestingly, the only previous amendments to this provision concerned striking out a reference to sentence of death, with the *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA), and the replacement of the reference to the 'Chief Secretary' with the 'Attorney-General' in 1991 with passage of the *Director of Public Prosecutions Act 1991* (SA).

⁴⁷ CLCA s 369(2).

⁴⁸ See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s 84(2).

⁴⁹ *Halsbury's Laws of England* (Butterworths, 4th ed reissue, 1996) vol 8(2), 485 [826]; *R v Peace* [1976] Crim LR 119.

⁵⁰ See G R Rubin, 'Posthumous Pardons, the Home Office and the Timothy Evans Case' (2007) *Criminal Law Review* 41, 47, who notes that the executive lost the power to eliminate a conviction following the abolition of the royal prerogative of justice as part of the 17th century constitutional settlement.

⁵¹ *DPP (UK) v Shannon* [1975] AC 717.

⁵² *Bentley* [1994] QB 349, 355–6 (Watkins LJ), citing statements of previous Home Secretaries on the policy of the free pardon.

⁵³ South Australia, *Parliamentary Debates*, Legislative Council, 6 March 2013, 3309–10 (Gail Gago). See, eg, the Victorian position described in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 282–6 [7]–[14] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

or commute the sentence. Alternatively, the Governor might advise the petitioner that it is not proposed to take any further action in respect of the petition. The other remaining forms for the operation of mercy are enlivened in South Australia by s 369 of the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'). It is this statutory operation of the prerogative power which has triggered the present reforms.

As s 369 provides:

Division 5 — References on petitions for mercy

369 — References by Attorney-General

(1) Nothing in this Part affects the prerogative of mercy but the Attorney-General, on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on information or to the sentence passed on a person so convicted, may, if he thinks fit, at any time, either —

- (a) refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or
- (b) if he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly.

Section 369 of the *CLCA* and its analogues in other states and territories,⁵⁴ empower the Attorney-General, or other relevant Minister, to review a petition for mercy with respect to a conviction or sentence, referred from the Governor. This statutory power expressly does not abrogate the common law prerogative.⁵⁵ These provisions give the Attorney-General the discretion to consider the application for review of conviction or sentence, and either refer the matter to the Full Court for a new appeal hearing under the 'reference power' or refer any issue arising from the case to the judges of the Supreme Court for an opinion on the issue, under the 'opinion power'.⁵⁶

The reference power by which 'the whole case' is referred to the appeal court, allows 'a full review of all the admissible evidence available in the case, whether new,

⁵⁴ *Crimes (Appeal and Review) Act 2001* (NSW) ss 76–7; *Crimes Act 1958* (Vic) s 584; *Criminal Code* (Qld) s 672A, *Sentencing Act 1995* (WA) pt 19; *Criminal Code* (Tas) s 419; *Crimes (Sentence Administration) Act 2005* (ACT) pt 13.2; *Criminal Code* (NT) s 431.

⁵⁵ *A-G (UK) v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ).

⁵⁶ See Martin Hinton and David Caruso, 'The Institution of Mercy' in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519.

fresh or already considered in earlier proceedings'.⁵⁷ The court must apply the legal principles appropriate to criminal appeals.⁵⁸ In effect, as a 'second'⁵⁹ or 'further'⁶⁰ appeal, the issue for the appellate court is the same as that falling for resolution on appeal, 'namely whether there has been a miscarriage of justice.'⁶¹

In contrast, the opinion power enables the Attorney-General to request an opinion on any point arising from the case from judges of the Supreme Court, in order to determine further if the matter should be referred to the Court as an appeal. Non-judicial power, such as that exercised in an opinion reference, may validly be bestowed on the Supreme Court of a state provided it is incidental to the exercise of judicial power or is not incompatible or inconsistent with the exercise of federal judicial power.⁶² The validity of the operation of the opinion power with respect to a state court determining a federal offence has a lower threshold test of incompatibility,⁶³ due to the separation of powers doctrine.⁶⁴ The constitutional validity of the opinion reference has yet to be tested for either a state,⁶⁵ or a federal matter.⁶⁶

The discretion granted the Attorney-General to consider a petition is an administrative act, 'unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions.'⁶⁷ It enables consideration of wider issues in respect of a conviction, unavailable to a court,⁶⁸ possibly including public concern as to

⁵⁷ *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ) ('*Mallard*') in respect of the equivalent provision in s 140(1)(a) of the *Sentencing Act 1995* (WA), followed in *R v Moyle* (2007) 96 SASR 287. This construction is consistent with the approach of the majority in *Mickelberg* (1989) 167 CLR 259, 312 (Toohey and Gaudron JJ), and that adopted by Lord Diplock (Lords Scarman, Roskill, Brandon of Oakbrook and Templeman agreeing) in *R v Chard* [1984] AC 279 with respect to a similarly worded provision in the *Criminal Appeal Act 1968* (UK).

⁵⁸ *Mickelberg* (1986) 167 CLR 259, 312 (Toohey and Gaudron JJ).

⁵⁹ *Mallard* (2005) 224 CLR 125, 143 [48]–[49] (Kirby J).

⁶⁰ *Pepper v A-G (Qld) [No 2]* [2008] 2 Qd R 353, 360 [11] (Muir JA), 358 [1] (de Jersey CJ), 364 [34] (Fraser JA) ('*Pepper [No 2]*'), with respect to the equivalent provision in s 672A(a) of the *Criminal Code* (Qld).

⁶¹ *Pepper [No 2]* [2008] 2 Qd R 353, 360 [12]; *R v Daley; Ex parte A-G (Qld)* [2005] QCA 162 (12 May 2005).

⁶² *Kable v DPP (NSW)* (1996) 189 CLR 51.

⁶³ *Fardon v A-G (Qld)* (2004) 223 CLR 575.

⁶⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁶⁵ *Re Ross* [2007] VSC 572 (20 December 2007).

⁶⁶ *Martens v Commonwealth* (2009) 174 FCR 114, 121 [25] (Logan J) ('*Martens*').

⁶⁷ *Mallard* (2005) 224 CLR 125, 129 [6]. In *Martens* (2009) 174 FCR 114, 128–9 [54] Logan J held that upon a petition for a reference under s 672A of the *Criminal Code* (Qld) (a provision analogous to s 369 of the *CLCA*), the Minister might take into account material that would not be admissible on a reference to the Court of Appeal, but was not obliged to take account of such material.

⁶⁸ *Martens* (2009) 174 FCR 114, 128 [53]–[54] (Logan J).

the propriety of a conviction.⁶⁹ There is merit in the provision of a wider discretion to consider a petition for mercy, which allows the decision-maker to consider the individual circumstances of a case. This approach finds some support in one common rationale for the administration of mercy, as a form of individuation of justice, whereby those who did not deserve punishment could be distinguished from those for whom punishment was justified.⁷⁰ However, in practice, given the nature of the consideration of a petition for pardon as a process removed from the public gaze, we can only surmise on the approach taken, which no doubt also attracts both policy and public interest considerations. Mercy as an exercise in forgiveness is a jurisprudential question beyond the scope of this paper, but appears counterintuitive to the ‘individuation of justice’ approach which seeks merit in a petition for a pardon.

The administration of the pardon appears to be commonly approached on the grounds of a ‘miscarriage of justice’, and adopts the judicial prism of the criminal appeal, albeit with regard to be had to material which would not be admissible as evidence in a court. In practice, this bears some similarity to the matters available for consideration in a Royal Commission or judicial inquiry.⁷¹ But given the lack of investigative powers, if the information presented by the petitioner is incomplete, the Attorney-General might have limited material to consider, which could compromise the process significantly. Ultimately, where a pardon is not immediately forthcoming, if the case is referred to the court it must withstand the legal requirements of an appeal. Thus the role of the executive has been described as that of a ‘gatekeeper’,⁷² ‘ensuring that the public interest in the administration of justice as furthered by the efficient allocation of judicial resources is not subverted by the referring of cases to the Court of Appeal which must inevitably fail.’⁷³

B *Prerogative of Mercy and Judicial Review*

In order to distinguish the public and transparent nature of the judicial appeal, it is necessary to briefly consider the amenability of the exercise of the mercy prerogative and the judicial inquiry, to judicial review. Although the prerogative powers are no longer immune from judicial review by virtue of their classification as prerogatives of the Crown,⁷⁴ the prerogative of mercy is still considered to concern subject

⁶⁹ *Mickelberg* (1989) 167 CLR 259, 272 (Mason CJ).

⁷⁰ See, eg. Daniel Kobil, ‘The Quality of Mercy Strained: Wrestling the Pardoning Power from the King’ (1991) 69 *Texas Law Review* 569; Carla Johnson, ‘Entitled to Clemency: Mercy in the Criminal Law’ (1991) 10 *Law and Philosophy* 109.

⁷¹ See Part III below.

⁷² *Martens* (2009) 174 FCR 114, 128 [53].

⁷³ *Ibid.*

⁷⁴ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. See generally Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013).

matter not amenable to review.⁷⁵ The statutory form of the mercy prerogative, such as s 369 of the *CLCA*, is also viewed as an executive power ‘not properly severed from but indeed referable to the [common law] prerogative of mercy.’⁷⁶ Additionally, the policy characterisation of the pardon as concerned with the ‘administration of criminal justice’, serves to substantially preserve its immunity from review,⁷⁷ despite statutory judicial review safeguards.⁷⁸

However, in England, the 1993 decision in *R v Secretary of State for the Home Department; Ex parte Bentley*⁷⁹ signalled that the prerogative of mercy might be susceptible to judicial review. In *Bentley*, the sister of a man executed in controversial circumstances for the murder of a police officer successfully challenged the refusal of the Home Secretary to grant a posthumous pardon. The Divisional Court distinguished the full, unconditional pardon, which required that the convicted person was morally and technically innocent of the crime, as concerning criteria of a policy nature which were not justiciable.⁸⁰ The error of the Home Secretary lay instead in the failure to consider other forms of the pardon, an error of process considered reviewable. *Bentley* refined the test for reviewability of the mercy prerogative, by looking not to the nature and subject matter of the *power*, but to the nature and subject matter of the particular *decision* in question.

A series of Caribbean decisions involving the mercy prerogative demonstrates the continuing difficulties facing judicial review of this prerogative power, albeit in a different constitutional context and concerning capital sentences. The Privy Council in *De Freitas v Benny*,⁸¹ a case on appeal from the Court of Appeal of Trinidad and Tobago, determined that the exercise of the prerogative of mercy was inherently extra-legal in nature and therefore not justiciable.⁸² The Privy Council some 20 years later in *Reckley v Minister of Public Safety and Immigration [No 2]*,⁸³ on appeal from

⁷⁵ *Horwitz v Connor* (1908) 6 CLR 38. However, the disqualification of the exercise of the prerogative from review was made in the context of s 540 of the *Crimes Act 1890* (Vic), in denying a right of action in mandamus against the Governor in Council to consider a petitioner’s entitlement to remission of sentence in accordance with general regulations made under the Act. It did not directly concern the exercise of the prerogative of mercy. See also W M C Gummow, ‘Administrative Law and the Criminal Justice System’ (2008) 31 *Australian Bar Review* 137, 141.

⁷⁶ *Von Einem* (1998) 72 SASR 110, 114 (Prior J), 152 (Wicks J).

⁷⁷ *Ibid*; *Dohrmann v A-G (Vic)* [1995] 1 VR 274.

⁷⁸ In *Carter v A-G (Qld)* [2012] QSC 234 (29 August 2012) [11]–[12] Wilson J questioned the reviewability of the mercy prerogative on any grounds. *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; *Pepper [No 2]* [2008] 2 Qd R 353, where despite the statutory entitlement to reasons for refusal, the Court of Appeal found the reasons for refusal of a petition for pardon were protected from review.

⁷⁹ [1994] QB 349; *R (Shields) v Secretary of State for Justice* [2010] QB 150.

⁸⁰ *Bentley* [1994] QB 349, 363.

⁸¹ [1976] AC 239.

⁸² *Ibid* 247–8.

⁸³ [1996] 1 AC 527 (*Reckley [No 2]*).

the Bahamas with facts similar to *De Freitas*, followed its earlier view in *De Freitas* and determined that *Bentley* had no bearing on the case before them, reasoning, inexplicably, that it was not ‘directly concerned with the possibility of judicial review of the exercise of the prerogative of mercy in a death sentence case.’⁸⁴ But this is ‘precisely what *Bentley* was about.’⁸⁵

Despite the anomaly of the *Reckley [No 2]* decision, the English courts have recognised that where an individual’s rights are affected by a decision involving the prerogative power,⁸⁶ the immunity of the decision-making process from curial review is lost,⁸⁷ but immunity is regained where ‘high policy’ considerations are present.⁸⁸

In Australia the question of the justiciability of the exercise of the mercy prerogative has not developed as far as in England. A policy characterisation attached to the exercise of executive power, prima facie indicates that decisions made under its exercise are not amenable to judicial review. However, decisions determinative of individual rights and interests are much more likely to attract questions respecting natural justice and judicial review.⁸⁹ The mercy prerogative awkwardly straddles this distinction because by definition the process is triggered when such rights are exhausted and is extra-legal in effect. There is no place to talk of rights in a legal sense.⁹⁰ Although the statutory enactment of the power challenges these presump-

⁸⁴ Ibid 541. In *Lewis v A-G (Jamaica)* [2001] 2 AC 50, another Caribbean appeal, the Privy Council declined to follow both *De Freitas* and *Reckley [No 2]*, and considered that the prerogative should be exercised in consideration of a state’s international obligation requiring procedures which were fair and proper and amenable to judicial review.

⁸⁵ Christopher Gelber, ‘*Reckley (No 2)* and the Prerogative of Mercy: Act of Grace or Constitutional Safeguard?’ (1997) 60 *Modern Law Review* 572, 575.

⁸⁶ *R v Secretary of State for Foreign Affairs; Ex parte Everett* [1989] QB 811, 820 (Taylor LJ).

⁸⁷ *R (On the Application of B) v Secretary of State for the Home Department* [2002] EWHC 587 (Admin) (22 February 2002) [55] where the High Court held that a decision concerning remission of a prisoner’s sentence was a decision in exercise of the prerogative of mercy, but as it concerned matters upon which courts were well qualified to deal, it was a decision amenable to judicial review.

⁸⁸ Ibid [13]–[23] (Keene LJ).

⁸⁹ Sir Anthony Mason, ‘Administrative Review: The Experience of the First Twelve Years’ (1989) 18 *Federal Law Review* 122, 124, citing *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 198; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.

⁹⁰ ‘Mercy is not the subject of legal rights. It begins where legal rights end’: *De Freitas* [1976] AC 239, 247 (Lord Diplock).

tions,⁹¹ the focus is still very much upon the nature rather than the exercise of the power. In this sense, the judicial inquiry might be distinguished as questions of reviewability frequently look to the nature and subject matter of the decision in question, not of the power, much as decided in *Bentley*.

III POST-CONVICTION REVIEW: THE JUDICIAL INQUIRY

Legislation in New South Wales⁹² and the Australian Capital Territory⁹³ provides further opportunities for review of conviction by way of judicial inquiry, where evidence or material fact, or as further provided in New South Wales ‘any mitigating circumstances’,⁹⁴ raise a ‘doubt or question’ as to the convicted person’s guilt. This view may be formed where the material causes the person considering the matter unease or a sense of disquiet in allowing the conviction to stand.⁹⁵ The judicial inquiry provisions have their genesis in late 19th century legislative efforts,⁹⁶ in the absence of any common form appeal statutes,⁹⁷ to ‘authorise the Executive government to inform itself of possible miscarriages of justice resulting from deficiencies in the evidence adduced at trial.’⁹⁸ As remedial legislation designed to overcome injustices

⁹¹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 407 (Lord Scarman); *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170, 220–1 (Mason J); *Coutts v Commonwealth* (1985) 157 CLR 91, 100 (Wilson J); *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277–8 (Bowen CJ).

⁹² *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 ‘Review of convictions and sentences’.

⁹³ *Crimes Act 1900* (ACT) pt 20 ‘Inquiries into convictions’. The latest inquiry into the conviction of David Harold Eastman for the murder of Australian Federal Police Assistant Commissioner Colin Winchester was ordered on 3 September 2012, and hearings were completed on 15 May 2014, with the report of the Inquiry released on 22 May 2014, recommending that Eastman’s conviction be quashed. The Supreme Court quashed the conviction but have ordered a retrial. In *DPP (ACT) v Martin* [2014] ACTSC 104 (22 May 2014) a challenge by the Director of Public Prosecutions to the validity of this second inquiry into Eastman’s conviction was dismissed.

⁹⁴ Although the relevant provision (s 79(2) of the *Crimes (Appeal and Review) Act 2001* (NSW)) is open to interpretation: see, eg, *Sinkovich v A-G (NSW)* (2013) 85 NSWLR 783, 790–2 [27]–[32] (Basten JA) (*‘Sinkovich’*).

⁹⁵ *Varley v A-G (NSW)* (1987) 8 NSWLR 30, 48; *Application of Pedrana* (2000) 117 A Crim R 459, 463 [28]; *Application of Suey* [2001] NSWSC 543 (28 June 2001) [18].

⁹⁶ *Criminal Law Amendment Act 1883* (46 Vic No 17) ss 383–4. See the analysis of the history of these provisions by Hope JA in *Varley v A-G (NSW)* (1987) 8 NSWLR 30.

⁹⁷ See Part V below.

⁹⁸ *Eastman v DPP (ACT)* (2003) 214 CLR 318, 324 [8]–[9] (McHugh J); see particularly the historical analysis by Heydon J of the precursor legislation to s 475 of the *Crimes Act 1900* (ACT) in this decision.

that sometimes arise in the course of the administration of criminal justice,⁹⁹ the judicial inquiry seeks, like the South Australian reforms, to limit vexatious applications.¹⁰⁰

The judicial inquiry can however be distinguished from the South Australian reforms. It is not an appeal, but is firstly an application for an inquiry triggered either by executive action,¹⁰¹ or by application to the Supreme Court.¹⁰² It does not involve judicial proceedings¹⁰³ and, as an administrative decision, is not subject to appeal.¹⁰⁴ In practice, it is not uncommon for the applicant to be unrepresented and successful applications are rare. In New South Wales, an alternative pathway provides that the executive or Supreme Court may consider the application and then refer the case to the Court of Criminal Appeal to be dealt with as an appeal, in the manner of the reference power, although such instances are again rare.¹⁰⁵ If an inquiry is ordered,¹⁰⁶ the inquiry is then conducted by a judicial officer in accordance with inquiry procedures,¹⁰⁷ subject to limitations in the exercise of an executive or administrative, rather than judicial power.¹⁰⁸ Paradoxically, the report of the inquiry has been considered to

⁹⁹ *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151, 154 [5], 155 [8].

¹⁰⁰ ‘It is expected that the inquiries power would be used only in exceptional cases ... It is not intended that the inquiries power be used as an alternative to the appeals process or as a means of endlessly challenging a conviction’: Explanatory Statement, Crimes Legislation Amendment Bill 2001 (ACT) 12. With respect to the New South Wales legislation, see, eg, *Application of Patsalis* [2012] NSWSC 1597 (20 November 2012).

¹⁰¹ *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 2; *Crimes Act 1900* (ACT) s 423.

¹⁰² *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 3; *Crimes Act 1900* (ACT) s 424.

¹⁰³ *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4); *Crimes Act 1900* (ACT) s 424(4); *Varley v A-G (NSW)* (1987) 8 NSWLR 30; *Patsalis v A-G (NSW)* (2013) 85 NSWLR 463 (‘*Patsalis*’).

¹⁰⁴ See *Crimes Act 1900* (ACT) s 425; *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4). The NSW legislation has been found to be ambiguous in the extent of the effect of the relevant provisions: *Patsalis* (2013) 85 NSWLR 463, 469–70 [23]–[24]; *Lodhi v A-G (NSW)* [2013] NSWCA 433 (18 December 2013) (‘*Lodhi*’).

¹⁰⁵ *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(b), 79(1)(b). See *Re McDermott* (2013) 231 A Crim R 183 where the conviction was set aside and a verdict of acquittal entered.

¹⁰⁶ An inquiry is, however, not available for a matter concerning federal offences: *Application of El Hani* [2007] NSWSC 330 (12 April 2007) [23]; *Application of Toro-Martinez* [2008] NSWSC 34 (1 February 2008) [8].

¹⁰⁷ *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 4 and *Royal Commissions Act 1923* (NSW); *Crimes Act 1900* (ACT) pt 20 div 20.3 and *Inquiries Act 1991* (ACT).

¹⁰⁸ *Lodhi* [2013] NSWCA 433 (18 December 2013) [50]; *Patsalis* (2013) 85 NSWLR 463, 469 [22] (Basten JA), 465 [2] (Bathurst CJ), 465 [7] (Beazley P) found it unnecessary to decide the matter; *Sinkovich* (2013) 85 NSWLR 783, 787 [12] (Basten JA).

carry no legal consequences and so the outcome of the inquiry cannot be appealed.¹⁰⁹ The report of the inquiry is then presented to the originating body for further consideration with respect to the quashing of a conviction or review of sentence, with determinations on granting a pardon or remission of sentence remitted back to the executive. The limited remedies available upon completion of the judicial inquiry are not insignificant in an analysis of the utility of this process.

A Judicial Inquiry and Judicial Review: The Eastman Cases

The lack of a right of appeal from a decision on an application for an inquiry, and possibly from the inquiry itself,¹¹⁰ does not deny a right of review of these decisions. Although the supervisory jurisdiction of the Supreme Court is not capable of reviewing the decision of a superior court judge acting in their judicial capacity, this immunity might not be available where that judge is acting in a non-judicial capacity, as with an application for inquiry.¹¹¹ Furthermore, it has been suggested that a decision on a judicial inquiry application might be susceptible to review for jurisdictional error.¹¹²

A complex series of decisions concerning the conviction of David Eastman for the murder of Australian Federal Police Assistant Commissioner Colin Winchester,¹¹³

¹⁰⁹ The 2014 inquiry into the conviction of David Eastman for the murder of Assistant Federal Police Commissioner, Colin Winchester, concluded that his conviction be quashed. An earlier inquiry was completed at the end of 2005, to determine whether Mr Eastman had been unfit to plead at any stage of his trial. The inquiry concluded that unfitness had not been established and a report furnished to the Attorney-General advised no further action be taken. Eastman sought to challenge the conclusions of the inquiry, but Lander J at first instance concluded that the report had no legal effect and carried no legal consequences: see *Eastman v Miles* (2007) 210 FLR 417; *Eastman v Australian Capital Territory* (2008) 227 FLR 279. There has been academic criticism of this decision: Aronson and Groves, above n 74, 795–7 [12.230].

¹¹⁰ *Eastman v Miles* (2007) 210 FLR 417; *Eastman v Australian Capital Territory* (2008) 227 FLR 279.

¹¹¹ *Patsalis* (2013) 85 NSWLR 463, 473 [35].

¹¹² *Ibid.* *DPP (ACT) v Martin* [2014] ACTSC 104 (22 May 2014). In this matter the Supreme Court determined that the decision to order an inquiry into Eastman's conviction was infected by jurisdictional error, but that on account of matters that had been uncovered by the inquiry it was in the interests of justice that the inquiry be completed. See also the comments of French CJ in *Likiardopoulos v The Queen* (2012) 247 CLR 265, 268–70 [1]–[4], with respect to the immunity that the prosecutorial discretion exercised by the Director of Public Prosecutions may have from judicial review, absent jurisdictional error.

¹¹³ After numerous applications for an inquiry into his conviction (subsequent to the inquiry completed in 2005), a judicial inquiry was ordered by the Australian Capital Territory Supreme Court on 3 September 2012 under s 424(1) of the *Crimes Act 1900* (ACT). The inquiry was in relation to matters including Eastman's fitness to plead or stand trial; the conduct of the prosecution; misconduct by investigating police; and the failure of the trial judge to oversee the interests of the applicant when he

has tested both the integrity of the judicial inquiry process and the amenability of the judicial inquiry process to review. The threshold test for judicial review requires a finding that the decision directly affects the legal rights of the applicant, or constitutes a step in a process which may result in legal consequences.¹¹⁴ A decision to grant an inquiry gives rise to such rights,¹¹⁵ but a decision not to grant an inquiry does not, for it fails to directly affect any right or entitlement of the applicant, as it is still open for the applicant to make further application.¹¹⁶ A decision of the executive not to take any further action with respect to a petition for an inquiry after considering a report of a Supreme Court judge to whom the matter was initially referred, is also not amenable to judicial review, except insofar as the rules of procedural fairness require,¹¹⁷ as the decision is done in the exercise of the prerogative.¹¹⁸

The 2014 Eastman judicial inquiry concluded that although there was evidence upon which a jury could convict, it would be dangerous to allow the guilty verdict to stand. Eastman had not received a fair trial, was denied a fair chance of acquittal and as a consequence a substantial miscarriage of justice had occurred. Given that Eastman had been in custody for almost 19 years and that a retrial was conceivably not feasible, the inquiry recommended that his conviction for murder be quashed.¹¹⁹ The Supreme Court in an exercise of judicial power,¹²⁰ subsequently quashed his conviction and despite the recommendation of the inquiry, ordered a retrial.¹²¹ In finding that a retrial was in the interests of justice, the Supreme Court reasoned that as an alternative verdict of acquittal was not available under the Act, a failure to order

was not legally represented. On 29 May 2014 the report of the inquiry was delivered, recommending that Eastman's conviction be quashed and that a retrial was not recommended. The Supreme Court quashed the conviction and ordered a retrial, despite the recommendations of the inquiry.

¹¹⁴ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 161–2 (Brennan CJ, Gaudron and Gummow JJ).

¹¹⁵ *Griffith University v Tang* (2005) 221 CLR 99; see also *DPP (ACT) v Martin* [2014] ACTSC 104 (22 May 2014).

¹¹⁶ *Eastman v Besanko* (2010) 244 FLR 262. Special leave to appeal to the High Court was refused on 7 April 2011: *Eastman v Besanko* [2011] HCASL 79 (7 April 2011); *Patsalis* (2013) 85 NSWLR 463.

¹¹⁷ *Eastman v A-G (ACT)* (2007) 210 FLR 440, 458 [78]. In doing so, his Honour distinguished *Von Einem* where the majority, insofar as they addressed the question of the reviewability of the Attorney-General's decision under s 369 of the *CLCA*, were addressing the decision itself, not the process.

¹¹⁸ *Eastman v A-G (ACT)* (2007) 210 FLR 440. For New South Wales, see *Crimes (Appeal and Review) Act 2001* (NSW) s 82.

¹¹⁹ Australian Capital Territory, Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester, *Report* (2014).

¹²⁰ As an exercise of judicial power under s 430(2) of the *Crimes Act 1900* (ACT): *Eastman v DPP (ACT)* [2014] ACTSCFC 1 (23 June 2014).

¹²¹ *Eastman v DPP (ACT) [No 2]* [2014] ACTSCFC 2 (22 August 2014).

a retrial would leave the guilt or innocence of Eastman undetermined. This decision demonstrates a dominance of the judicial remedy over an administrative finding.

IV BACKGROUND TO THE CRIMINAL APPEAL REFORMS

Prima facie, reforms to allow a second and subsequent right of appeal against conviction or sentence challenge the principle of finality of proceedings. This principle recognises, inter alia, that the findings of a tribunal of fact as to the guilt or innocence of the accused should stand, and that any perceived injustices or imperfections in the trial and appeal process must submit to the public interest in a matter being finalised.¹²² The finality of the appellate process, in the words of Dixon J in *Grierson v The King*,¹²³ means that the ‘determination of an appeal is evidently definitive, and a conviction un-appealed is equally final’,¹²⁴ with the only remaining avenue for appeal usually residing with executive review in the form of a petition for mercy, or judicial inquiry.¹²⁵ The rationale for the principle of finality is to avoid the spectre of repeated efforts at re-litigation.

¹²² The principle is often referred to in general terms, see, eg, *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson CJ and Hayne J), quoting *The Amphill Peerage* [1977] AC 647, 569 (Lord Wilberforce):

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps leads to a different result, but, in the interests of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality.

¹²³ (1938) 60 CLR 431 (‘*Grierson*’); *R v Keogh* (2007) 175 A Crim R 153. In *R v Keogh* [2014] SASFC 20 (11 March 2014), the applicant was successful in applying for permission to bring a second appeal against his 1994 conviction for the murder, under s 353A of the *CLCA* (the South Australian reforms the subject of this paper).

¹²⁴ *Grierson* (1938) 60 CLR 431, 436 (Dixon J), affirming *R v Edwards [No 2]* [1931] SASR 376. In *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ opined, quoting *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34]:

‘A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.’ ... The principal qualification to the general principle of finality is provided by the appellate system.

¹²⁵ The role of post-conviction review in the appeal process was also prominent in Rich J’s construction of the statutory limitations on the appellate jurisdiction of the Court of Criminal Appeal: *Grierson* (1938) 60 CLR 431, 434 (Rich J), cited in *R v Keogh* (2007) 175 A Crim R 153, 165 (Doyle CJ).

The usual single right of appeal (whether against conviction or sentence), however, is not a common law remedy and the jurisdiction of the appellate criminal courts is statutory.¹²⁶ The definitive nature of the appeal has now been ameliorated through statutory reform in South Australia where appeals against conviction may be reopened. Similar reforms to reopen acquittals were enacted more widely in recent years in Australia to allow a retrial after an acquittal for a serious offence,¹²⁷ where fresh and compelling evidence which came to light post-acquittal should, in the ‘interests of justice’,¹²⁸ be reconsidered by the Court.¹²⁹ The High Court has also recognised the right of appeal from directed acquittals for federal offences, despite the guarantees of s 80 of the *Constitution*,¹³⁰ and therefore, presumably, the attendant powers of an appellate court to affirm or quash the acquittal appealed against, and to order a new trial. These reforms recognise that ‘no system of criminal justice is infallible’¹³¹ and reflect a legal and policy response to developments in forensic science, particularly

¹²⁶ *Grierson* (1938) 60 CLR 431, 435–6 (Dixon J), citing *A-G (UK) v Sillem* (1864) 2 H & C 581, 608; 159 ER 242, 253; *Eastman v The Queen* (2000) 203 CLR 1, 11 [14] (Gleeson CJ). See *Federal Court of Australia Act 1976* (Cth) s 30AA; *Supreme Court Act 1933* (ACT) s 37E; *Criminal Appeal Act 1912* (NSW) s 5; *Criminal Code* (NT) s 410; *Criminal Code* (Qld) s 668D; *Criminal Law Consolidation Act 1935* (SA) s 352; *Criminal Code* (Tas) s 401; *Criminal Procedure Act 2009* (Vic) s 274; *Criminal Appeals Act 2004* (WA).

¹²⁷ The wider reforms emanated from recommendations of the Council of Australian Governments (COAG) Double Jeopardy Law Reform COAG Working Group, on 13 April 2007. *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2; *Criminal Code* (Qld) ch 68; *Criminal Law Consolidation Act 1935* (SA) pt 10; *Criminal Code* (Tas) ch XLIV; *Criminal Procedure Act 209* (Vic) ch 7A; *Criminal Appeals Act 2004* (WA) pt 5A. In the UK the operation of the double jeopardy rule was abrogated with respect to acquittals for serious offences by the *Criminal Justice Act 2003* (UK) c 44, pt 10 (entered into force 4 April 2005), following recommendations of The Inquiry into Matters Arising From the Death of Stephen Lawrence, *Report* (1999), concerning the racially motivated murder of Stephen Lawrence in 1993. The first conviction under the new laws was *R v Dunlop* [2007] 1 WLR 1657. One of the suspects in the Stephen Lawrence case had his acquittal quashed: *R v Dobson* [2011] 1 WLR 3230; and together with another suspect, Dobson, the two men were ordered for retrial, and both were convicted and sentenced on 4 January 2012. Dobson’s appeal against conviction was refused, with reasons provided: *Norris v The Queen* [2013] EWCA Crim 712 (15 May 2013).

¹²⁸ Or, alternatively, where it is ‘fair in the circumstances’, see *CLCA* pt 10.

¹²⁹ The reforms also allow prosecution appeals against acquittals and sentence, and retrials on tainted acquittals: *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2; *Criminal Code* (Qld) ch 68; *CLCA* pt 10; *Criminal Code* (Tas) ch XLIV; *Criminal Procedure Act 2009* (Vic) ch 7A; *Criminal Appeals Act 2004* (WA) pt 5A.

¹³⁰ *R v LK* (2010) 241 CLR 177.

¹³¹ South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3953 (John Rau, Attorney-General). For an analysis of the place of criminal appeals, see J R Spencer, ‘Criminal Law and Criminal Appeals — the Tail that Wags the Dog’ [1982] *Criminal Law Review* 260.

DNA evidence,¹³² but are also to be balanced by recognition of the interests of the victims of crime in a holistic approach to criminal review.

The *Statutes Amendment (Appeals) Act 2013* (SA) amends the *CLCA*, *Magistrates Court Act 1991* (SA) and the *Supreme Court Act 1935* (SA). It introduces four new measures with respect to appeals in South Australia. The *Statutes Amendment (Appeals) Act 2013* (SA) enables renewed defence appeals against conviction where there is fresh and compelling evidence which comes to light after all avenues of appeal have been exhausted. The qualification that evidence be ‘fresh and compelling’ replicates pt 10 of the *CLCA*¹³³ which provides for renewed prosecution appeals against an acquittal for a serious offence. Secondly, the *Statutes Amendment (Appeals) Act 2013* (SA) enables the quashing of a conviction where a full pardon is granted on the basis that the evidence does not support such a conviction. The remaining provisions concern court efficiencies and include the right of the prosecution to cross-appeal on the application for an appeal against sentence, without need to obtain permission to appeal. Finally, the Chief Justice has the discretion to constitute a Full Court comprising two judges, rather than the usual three justices, for appeals against both sentence and conviction in South Australian courts.¹³⁴ In respect of post-conviction review, the focus of this paper is therefore upon the first and second reforms.

The threshold test for permission to appeal under the new second appeal provision in s 353A of the *CLCA* requires the establishment of three criteria: ‘fresh’ and ‘compelling’ evidence, which ‘in the interests of justice’ is required to be considered, to found the single ground of appeal, that of a ‘substantial miscarriage of justice’. These will be examined (in reverse order) in the context of the existing appeal process.

V CRIMINAL APPEALS

To the extent that the legislation provides for a second or subsequent right of appeal against conviction in the Magistrates, District and Supreme Courts, on the basis of ‘fresh and compelling evidence that should, in the interests of justice, be considered

¹³² *R v Button* [2001] QCA 133 (10 April 2001); see Lynne Weathered and Robyn Blewer, ‘Righting Wrongful Convictions With DNA Innocence Testing: Proposals for Legislative Reform in Australia’ (2009) 11 *Flinders Journal of Law Reform* 43; Gregor Urbas, ‘DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are New Forms of Review Required?’ (2002) 2 *Macquarie Law Journal* 141.

¹³³ Part 10 ‘Limitations on rules relating to double jeopardy’ and pt 10A ‘Appeal against sentence’ were inserted by the *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA) and commenced on 3 August 2008.

¹³⁴ The *Statutes Amendment (Appeals) Act 2013* (SA) also extends the range of orders granted to the Full Court with respect to appeals brought against any decision on an issue antecedent to trial. In addition to the powers of the court to confirm, vary or reverse the decision, and to make consequential or ancillary orders, the court may also revoke any permission to appeal granted by the trial court.

on an appeal’,¹³⁵ the reforms advance the statutory referral for appeal beyond that commonly available in any Australian jurisdiction. The single ground of appeal is that of a substantial miscarriage of justice, with no time constraints on such appeals.

The right of appeal to the Full Court is only available upon permission being granted by a single judge of the Supreme Court; the basis of that permission has been articulated in substantially different approaches in the two applications so far heard under the new provisions. In *R v Drummond*¹³⁶ that permission was found to require satisfaction of the first two criteria for an appeal under s 353A(1): that the evidence was fresh and compelling. And this, Stanley J argued, would necessarily inform the findings of the remaining two criteria. In *R v Keogh*¹³⁷ Nicholson J considered that the threshold considerations outlined in s 353A(1) of the *CLCA* were properly left to the appeal court to decide, being preconditions for the conferral of jurisdiction upon which the court had a discretion to hear a second and subsequent appeal. His Honour reasoned that ‘should a judge refuse permission on the basis of non-satisfaction of s 353A(1) the question will arise as to whether this is strictly a refusal of permission or a finding that the appeal is incompetent.’¹³⁸ Justice Nicholson’s approach is sound as it conforms to the usual test for permission to appeal where an appeal does not lie as of right, and that is to determine whether the proposed ground of appeal has a sufficient prospect of success to warrant the grant of permission. Justice Nicholson then found that s 353A required the applicant at the permission stage to satisfy the court that it was reasonably arguable that there had been a substantial miscarriage of justice, adopting the test applied by an appeal court when deciding whether to set aside a conviction based upon fresh evidence. That is, that ‘the proper question is whether the Court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial.’¹³⁹

In comparison, the New South Wales judicial inquiry legislation, which also enables application to the Supreme Court for a referral of the ‘whole case’ on appeal, occurs ‘indirectly’ in that it is a judicial inquiry application which grants a discretion to the

¹³⁵ See s 353A(1) of the *CLCA* in respect of the District and Supreme Courts, and s 43A(1) of the *Magistrates Court Act 1991* (SA) in respect of the Magistrates Court.

¹³⁶ (2013) 118 SASR 244, 254–5 [26]–[28] (Stanley J) (*‘Drummond’*), citing *R v Parenzee* (2007) 101 SASR 456, 461 [22]–[24] (Doyle CJ), 468 [63] (Anderson J), 468 [64] (Kelly J).

¹³⁷ [2014] SASCFC 20 (11 March 2014) [63], citing *R v Milton* [2009] SASC 44 (26 February 2009).

¹³⁸ *R v Keogh* [2014] SASCFC 20 (11 March 2014) [34]. The Appeal Court upheld this interpretation but also considered that the threshold considerations of fresh and compelling evidence, which in the interests of justice should be considered on an appeal, was a jurisdictional fact that was also to be found to be reasonably arguable at the permission stage: *R v Keogh [No 2]* (2014) 121 SASR 307, 330–2, particularly at [80], [85] and [88].

¹³⁹ *R v Keogh* [2014] SASCFC 20 (11 March 2014) [70] (Nicholson J), quoting *Mickelberg* (1989) 167 CLR 259, 273 (Mason CJ), and adopting this test at [72].

Supreme Court,¹⁴⁰ either to direct an inquiry be conducted, or refer the whole case to the Court of Criminal Appeal to be dealt with ‘as an appeal’.¹⁴¹ The discretion is then of wider application than the South Australian reforms, not being limited to matters raised by fresh evidence, but also with respect to a doubt or question as to the convicted person’s guilt, mitigating circumstances or as to any part of the evidence in the case.¹⁴² The s 353A discretion in the South Australian legislation might suggest that given the textual omission of the requirement that ‘the whole case’ is referred on appeal, the appeal court might be limited to consideration of the fresh and compelling evidence in the context of the records of trial and appeal, in order to determine whether there has been a substantial miscarriage of justice.¹⁴³

The common form appeal provisions, originally derived from the *Criminal Appeal Act 1907* (UK) and largely replicated in each of the Australian states and territories,¹⁴⁴ require an appellate court to decide an appeal against conviction from a verdict of a jury in criminal cases or from decisions of a single judge. The grounds upon which a conviction may be set aside by the appeal court are constituted in three broad forms, fundamentally investigative of the trial process, and concern: (a) a jury verdict considered by the court to be unreasonable or unsupportable on the evidence;¹⁴⁵ (b) a wrong decision on any question of law;¹⁴⁶ or (c) any ground where there has been a miscarriage of justice.¹⁴⁷ In any other case the court is directed to dismiss the appeal. If the appeal court is satisfied that the conviction should be quashed the remedies available are a retrial or an acquittal.

¹⁴⁰ The discretion to order an inquiry is also granted to the Governor: *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(a), (3), 79(3).

¹⁴¹ The discretion to refer the case to the Court of Appeal is also granted to the Minister: *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(b), (3), 79(1)(b).

¹⁴² *Ibid* ss 77(2), 79(2).

¹⁴³ *R v Keogh* [2014] SASFC 20 (11 March 2014) [60]–[62].

¹⁴⁴ *Criminal Appeal Act 1912* (NSW) s 6(1); *CLCA* s 353(1); *Criminal Code* (Qld) ss 668E(1)–(1A); *Criminal Appeals Act 2004* (WA) ss 30(3)–(4); *Criminal Code* (Tas) ss 402(1)–(2); *Criminal Code* (NT) ss 411(1)–(2); *Supreme Court Act 1933* (ACT) s 370. Section 568(1) of the *Crimes Act 1958* (Vic) was a common form appeal provision which has been replaced by s 276 of the *Criminal Procedure Act 2009* (Vic), recently considered by the High Court in *Baini v The Queen* (2012) 246 CLR 469 (*‘Baini’*).

¹⁴⁵ This criterion includes ‘unsafe or unsatisfactory’ verdicts: *Whitehorn v The Queen* (1983) 152 CLR 657, 688 (Dawson J).

¹⁴⁶ This is the most common ground for appeal against conviction and is seen to encompass wrong decisions of mixed law and fact, and so might include procedural errors, the admission of inadmissible material or failure to admit relevant evidence.

¹⁴⁷ A catch-all category, considered by Isaacs J in *Hargan v The King* (1919) 27 CLR 13, 23 to be ‘the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.’ See also the decision of Gleeson CJ in *Nudd v The Queen* (2006) 80 ALJR 614, 616–22, who examines the concept of ‘miscarriage of justice’ as requiring a determination of both outcome and process, akin to considerations of the concept of ‘justice’.

A proviso to these common form appeal provisions requires that if the court considers no *substantial* miscarriage of justice has *actually* occurred, despite an appeal point being decided in favour of the appellant, then the appeal may be dismissed. The onus is on the appellant to establish the initial grounds of appeal and, if successful, the onus then shifts to the Crown to satisfy the court that the proviso should be applied.

A Substantial Miscarriage of Justice

A precise definition of what constitutes ‘no substantial miscarriage of justice’ has been rejected by the High Court,¹⁴⁸ as has a definition of its positive form ‘[w]hether there has been a “substantial miscarriage of justice”’.¹⁴⁹ The High Court in *Weiss v The Queen*, in a determination on the proviso, found:

It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused’s guilt of the offence on which the jury returned its verdict of guilty.¹⁵⁰

The decision appears to conflate the first ground of appeal, that is, that a jury verdict is unreasonable or cannot be supported on the evidence, with the determination of the appellate court as to the application of the proviso.¹⁵¹ There has been both

¹⁴⁸ *Weiss v The Queen* (2005) 224 CLR 300 (‘*Weiss*’).

¹⁴⁹ *Baini* (2012) 246 CLR 469, 479 [26], in the context of s 276 of the *Criminal Procedure Act 2009* (Vic). See also *R v Gallagher* [1998] 2 VR 671, 675–9 (Brooking JA); *TKWJ v The Queen* (2002) 212 CLR 124, 145 [71] (McHugh J).

¹⁵⁰ *Weiss* (2005) 224 CLR 300, 317 [44]; *AK v Western Australia* (2008) 232 CLR 438, 455 [53] (Gummow and Hayne JJ). Articulated again by Kirby J in *Gassy v The Queen* (2008) 236 CLR 293, 314 [59]–[60]; *Evans v The Queen* (2007) 235 CLR 521, 552 [116] (emphasis in original) as:

The central holding in *Weiss* ... was that the appellate function must, in every case, be discharged by the intermediate court for itself. It must be done by reference to principles derived from the statutory language. It is not to be discharged by incantations involving speculation concerning what the jury or judge at trial (or a future jury or judge) would, or might, or should have done ... It has emphasised the very substantial role and duty of appellate courts to review the evidence and to reach conclusions *for themselves* by the application of the statutory tests.

¹⁵¹ *Weiss* (2005) 224 CLR 300, 312 [30]. This approach in *Weiss* argues that the jury trial has always been subject to the direction, control and correction both of the trial judge and the appellate courts. Once it is acknowledged that an appellate court may set aside a jury’s verdict ‘on the ground that it is unreasonable or cannot be supported having regard to the evidence’, it follows inevitably that the so-called ‘right’ to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention. The question becomes, when is that intervention justified? And that, in turn, requires examination of when a court should conclude that ‘no substantial miscarriage of justice has actually occurred’.

curial and extra-curial criticism of this decision,¹⁵² which requires that the role of the appellate court is both distinctive and interventionist. The operation of the remaining two grounds of appeal are now also less certain, with, for example, the observation that the operation of the third ground of appeal, as to a finding of a miscarriage of justice, refers to any departure from trial according to law, regardless of the significance of that departure.¹⁵³ This is a return to a more orthodox application of the rule. Thus, ‘when the term “miscarriage of justice” is so understood, the word “substantial” in the proviso has work to do.’¹⁵⁴

There has been both criticism¹⁵⁵ and calls for reform of the proviso,¹⁵⁶ but the South Australian reforms do not address the problems of the proviso, nor do the second and subsequent appeal provisions provide any substantial departure from the proviso test. The appeal court is granted the discretion to allow an appeal against conviction, and quash the conviction and acquit, or direct a new trial,¹⁵⁷ ‘if it thinks that there was a substantial miscarriage of justice.’¹⁵⁸ Insofar as the requirement is a positive finding of a substantial miscarriage of justice, the onus is on the appellant to satisfy the court, and given the statutory framework in which the provision lies, arguably, this onus is likely to be significant to the outcome of an appeal. However, the question remains as to the nature of the test the court would adopt in determining what amounts to a substantial miscarriage of justice. In *Drummond*, Stanley J took from the Victorian legislation providing for a positive finding of a substantial miscarriage of justice

¹⁵² See, eg, *R v Tofilau* (2006) 13 VR 28, 35–6 (Vincent JA); Stephen J Odgers, ‘The Criminal Proviso: a Case for Reform?’ (2008) 26 *Law in Context* 103; Philip Priest, ‘The Problematic Proviso: the Vice of *Weiss*’ (2007) 140 (Autumn) *Victorian Bar News* 32.

¹⁵³ The construction of ‘miscarriage of justice’ by the High Court in *Weiss*, was placed in its historical context in examining the *Exchequer Rule* where any and every departure from trial according to law, would require a new trial, regardless of whether the error affected the jury verdict. The proviso was the device subsequently created to qualify the operation of the *Exchequer Rule*. A history of the Rule is set out in *Weiss* (2005) 224 CLR 300, 306–9 [12]–[20].

¹⁵⁴ *King v The Queen* (2012) 245 CLR 588, 611 [53] (French CJ, Crennan and Kiefel JJ).

¹⁵⁵ Catherine Penhallurick, ‘The Proviso in Criminal Trials’ (2003) 27 *Melbourne University Law Review* 800; *Baini* (2012) 246 CLR 469, 486 [47] (Gageler J). See, eg, the discussion of proviso case law in the decision of Brooking JA in *Gallagher* [1998] 2 VR 671, who begins his judgment: ‘Plutarch tells us that Homer died of chagrin because he was unable to solve a riddle. Ever since I encountered s 568(1) of the *Crimes Act 1958* (Vic) [the Victorian common form provision and proviso] I have wondered what it means.’

¹⁵⁶ In 2011 a proposal before the Standing Committee of Attorneys-General concerned a proposal to amend the common form proviso to reflect the text of s 276 of the *Criminal Procedure Act 2009* (Vic). In 2014 the New South Wales Law Reform Commission completed an inquiry into all avenues of criminal appeals.

¹⁵⁷ *CLCA* s 353A(4); *Magistrates Court Act 1991* (SA) s 43A(4).

¹⁵⁸ *CLCA* s 353A(3); *Magistrates Court Act 1991* (SA) s 43A(3).

and considered recently by the High Court in *Baini v The Queen*,¹⁵⁹ ‘some guidance to ascertaining the meaning of the same expression in s 353A’.¹⁶⁰ His suggested approach was that ‘the Full Court will allow an appeal pursuant to s 353A if it concludes a guilty verdict cannot be supported on the evidence that was adduced at trial in the light of the fresh and compelling evidence it has heard.’¹⁶¹

A further requirement for the founding of a grant of appeal requires consideration of the matter being in the ‘interests of justice’.

B *In the Interests of Justice*

The ‘interests of justice’ qualification is a requirement of fairness which is not, ordinarily, narrowly defined.¹⁶² It is common to criminal appeal and review statutes and is possibly subject to wide interpretation that might leave open for consideration other matters, including the interests of victims.

C *Fresh and Compelling Evidence*

The relevant provisions of s 353A (which refers to the District and Supreme Courts) of the *CLCA*¹⁶³ read:

- (6) For the purposes of subsection (1), evidence relating to an offence is—
- (a) **fresh** if—
 - (i) it was not adduced at the trial of the offence; and
 - (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
 - (b) **compelling** if—
 - (i) it is reliable; and
 - (ii) it is substantial; and
 - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.
- (7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

¹⁵⁹ (2012) 246 CLR 469.

¹⁶⁰ *Drummond* (2013) 118 SASR 244, 254 [25]; *Baini* (2012) 246 CLR 469, 478–9 [22]–[23].

¹⁶¹ *Drummond* (2013) 118 SASR 244, 254 [25]. In *R v Keogh* [2014] SASFC 20 (11 March 2014) Nicholson J confined his analysis to the permission ‘filter’ requirement and left it open for the Appeal Court to determine the test on appeal.

¹⁶² *Chapman v Jansen* (1990) 100 FLR 66, 74 (Nicholson CJ).

¹⁶³ Equivalent provisions for the Magistrates Court lie in s 43A(6) of the *Magistrates Court Act 1991* (SA).

The requirement of ‘fresh and compelling evidence’ replicates s 332 of the *CLCA*, as applied to s 337, which concerns the reception of fresh and compelling evidence in an appeal subsequent to an acquittal for a serious offence. The high standard for the admission of fresh evidence indicates the cautious approach of the *Statutes Amendment (Appeals) Act 2013* (SA), presumably to avoid vexatious applications.¹⁶⁴ The admission of fresh and compelling evidence is available on all criminal appeals and has a wider application than the operation of the existing acquittal appeal provisions with respect to fresh and compelling evidence,¹⁶⁵ and wider application than that recommended by the Legislative Review Committee, which had suggested appeals be limited to serious offences only.¹⁶⁶ A recommendation that a second or subsequent right of appeal be available on the basis of a tainted conviction was rejected as superfluous in light of the opportunity to raise fresh and compelling evidence.¹⁶⁷

The contextual qualification of compelling evidence limited to issues in dispute at trial might be considered too narrow and to not allow ‘fresh evidence that would open up an entirely new and substantial line of defence’.¹⁶⁸ The qualification acknowledges the distinctive roles of the trial and appeal courts, the choice of arguments and evidence presented at trial, and in this context, whether it is in the interests of justice that the appeal court hears fresh argument or receives fresh evidence. In the civil context at least, fresh arguments on appeal are *prima facie*

¹⁶⁴ South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

¹⁶⁵ Section 337 of the *CLCA* allows a retrial of a person acquitted of a Category A offence (defined in s 311, which includes, murder, manslaughter aggravated rape, aggravated robbery, and trafficking in, manufacturing or selling commercial quantities of a controlled drug), where there is fresh and compelling evidence and the retrial is fair in the circumstance, having regard to the length of time since the offence was alleged to occur, and the reasonable diligence of the police and prosecution in making an application.

¹⁶⁶ Recommendation 4 of the Report concerned the right of second appeal on the basis of fresh and compelling evidence, limited to serious offences only, (defined as Category A offences (see footnote above) and offences with penalties of 15 years or more): Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (2012) 81–3.

¹⁶⁷ A tainted conviction is one where a person is found guilty, in respect of the trial, of an administration of justice offence (for example, perjury or harassing jurors): *CLCA* s 333; South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

¹⁶⁸ South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3166 (Gail Gago). This interpretation was referred to and dismissed by the Hon Gail Gago in Parliament as an ‘unduly narrow’ view, and she argued that one ‘would think that one issue in dispute at the trial will always be whether or not the defendant committed the alleged crime’.

regarded to be against the interests of justice,¹⁶⁹ and if considered, ‘ought to be most jealously scrutinised’.¹⁷⁰

There is no question that an intermediate appellate court may already have supplemental powers to receive evidence not given at trial in its inquiry as to whether there has been a miscarriage of justice.¹⁷¹ These powers involve the exercise of an original rather than a strictly appellate jurisdiction,¹⁷² which might allow new and fresh evidence,¹⁷³ when that evidence is relevant, credible, cogent, and likely to have produced a different verdict.¹⁷⁴ A determination must be made with respect to whether the absence of the new or fresh evidence from the trial amounted to a miscarriage of justice, in order for an acquittal to be granted.¹⁷⁵ If a miscarriage of justice is not established, fresh evidence might still go to the question of a retrial.¹⁷⁶ The High Court in *Weiss* determined that on an appeal against conviction, the appellate court is required to make its own independent assessment of the evidence, which exists wholly or substantially on the record.¹⁷⁷ Inevitably, such determinations on the admission of evidence require consideration of the important role of the jury in criminal trials, including the recognition that the jury is the constitutional body with the primary responsibility to determine guilt or innocence, and that they have the benefit of having seen and heard the witnesses.¹⁷⁸

¹⁶⁹ *Water Board v Moustakas* (1998) 180 CLR 491, 497 (Mason CJ, Wilson, Brennan and Dawson JJ) and the authorities cited therein; see also *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598, 1608 [51] (Gleeson CJ, McHugh and Gummow JJ).

¹⁷⁰ *Owners of the Ship Tasmania v Smith* (1890) 15 App Cas 223, 225, quoted in *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1, 35 (Starke J).

¹⁷¹ See, eg, *Criminal Appeal Act 1912* (NSW) s 12; *Criminal Code* (Qld) s 671B(1); *CLCA* s 359; *Magistrates Court Act 1991* (SA) s 42; *Criminal Code* (Tas) s 409. No such power exists with respect to the High Court, due to the constitutional nature of its position as a final appellate court: *Mickelberg* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

¹⁷² *Eastman v The Queen* (2000) 203 CLR 1; *R v Keogh* (2007) 175 A Crim R 153, 164 (Doyle CJ).

¹⁷³ “‘New evidence’ is evidence that was available and not adduced at the trial. “Fresh evidence” is evidence which either did not exist at the time of the trial or, if it did, could not then have been discovered by an accused exercising due diligence’: *Wood v The Queen* (2012) 84 NSWLR 581, 615 [707] (McClelland CJ at CL).

¹⁷⁴ *Ratten v The Queen* (1974) 131 CLR 510, 518–19 (Barwick CJ); *Gallagher v The Queen* (1986) 160 CLR 392, 398–9 (Gibbs CJ).

¹⁷⁵ *Mickelberg* (1989) 167 CLR 259, 301.

¹⁷⁶ See the principles summarised in *R v Abou-Chabake* (2004) 149 A Crim R 417, 427–8 (Kirby J).

¹⁷⁷ This has been expressed as the court ‘is obliged to act on the record, but ordinarily does not hear or see witnesses, and typically decides appeals based substantially on selected extracts of the record emphasised by the parties or their representatives’: *Gassy v The Queen* (2008) 236 CLR 293, 314 [60] (Kirby J).

¹⁷⁸ *M v The Queen* (1994) 181 CLR 487.

The ‘fresh and compelling evidence’ provision is a threshold consideration for permission to appeal under s 353A,¹⁷⁹ and is a narrower test to that required by the common law. The robust threshold by which fresh evidence is admitted will limit applications to those with genuine merit. If an appeal is allowed, the remedies then available are an acquittal or a new trial, with ancillary powers attendant on the ordering of a new trial.¹⁸⁰

VI CONCLUSION

The modern approach to post-conviction review, as exemplified by both the judicial inquiry process and the South Australian reforms providing for a second and subsequent appeal against conviction, displace the role of the prerogative of mercy and promote an emphasis on evidential matters by which to substantiate a review of, or appeal against, conviction.

The New South Wales judicial inquiry legislation, outside the executive petition process, provides the Supreme Court with the opportunity to conduct a preliminary examination of the evidence and arguments advanced on an inquiry application, in order to: determine the robustness of the application in satisfying an appeal; conclude that there is a doubt or question which requires further investigation through the inquiry process; or refuse the application. Although this provides more avenues by which to have a conviction scrutinised, in practice the extremely high threshold and the discretions available to the Supreme Court in considering an application,¹⁸¹ find that successful applications are rare.¹⁸²

The *Statutes Amendment (Appeals) Act 2013* (SA) challenges the principle of finality, as ‘finality is a good thing, but justice is better’.¹⁸³ In seeking justice, the Act sets a high threshold, narrower than the common law approach to the admission of evidence on appeal, by which evidence must be established to allow an appeal. But a strong filter on a second and subsequent appeal is necessary in order to both distinguish it from ordinary appeals and to ‘deter or deny untenable applications.’¹⁸⁴ The remaining hurdle is the requirement of a positive finding of a substantial miscarriage of justice and what that means in its statutory context outside the common form appeal provisions and the application of the proviso. It is arguable that the South Australian courts will not take heed of proviso jurisprudence, and ultimately,

¹⁷⁹ *Drummond* (2013) 118 SASR 244, 249 [13], 250 [16].

¹⁸⁰ Including that the court may not direct the trial court with respect to conviction or sentence: *CLCA* s 353A(5); *Magistrates Court Act 1991* (SA) s 43A(5).

¹⁸¹ *Crimes (Appeal and Review) Act 2001* (NSW) s 79(3).

¹⁸² See generally *Application of Holland* [2008] NSWSC 251 (28 March 2008) [9].

¹⁸³ *Sinkovich* (2013) 85 NSWLR 783 [47] (Basten JA), citing *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1, 2 (Lord Atkin).

¹⁸⁴ South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General).

the proof as to the effectiveness of the appeal provisions will be revealed in its future operation.

The *Statutes Amendment (Appeals) Act 2013* (SA) is cautious in its approach. It avoids the uncertainties of post-conviction review by way of the mercy prerogative and judicial inquiry, where courts have been reluctant to scrutinise too closely the operation of a discretionary power. However, the mercy prerogative and judicial inquiry allow consideration of matters unavailable to a court and outside the purview of evidential concerns. Arguably, if policy, public interest and the particular circumstances of the case, although not relevant to the judicial inquiry, are still significant in the administration of criminal justice, then the mercy prerogative still has a role to play. These matters uniquely identify the fundamental place of the prerogative of mercy and its exercise as residing entirely within the province of the Crown, distinguished from normal administrative decision-making.¹⁸⁵ If, as Lord Diplock observed, '[m]ercy is not the subject of legal rights. It begins where legal rights end',¹⁸⁶ its place is rightly removed from curial intervention.

Unlike the judicial inquiry, the South Australian second appeal does not straddle the breach between the judicial approach to post-conviction review by way of right of application to the courts, with the availability to the presiding judicial officer under the judicial inquiry process, of material which might not necessarily be available to a court. Ultimately, however, outside the administration of mercy, if the convicted seeks an appeal, the matter must meet the appellate standard of a 'substantial miscarriage of justice'. To this extent, the South Australian reforms provide a simpler, more transparent, and perhaps more achievable pathway than the New South Wales process,¹⁸⁷ and directly address the concerns of a lack of transparency and accountability in decision-making in post-conviction review.

¹⁸⁵ *Secretary, Department of Justice v Osland* [2007] VSCA 96 (17 May 2007) [126]–[130] (Bongiorno AJA), cited in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 295 [43] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

¹⁸⁶ *De Freitas* [1976] AC 239, 247 (Lord Diplock).

¹⁸⁷ Of the two applications heard thus far under the new South Australian appeal process, one application has been granted.