
Post-appeal review rights: Australia, Britain and Canada

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There are significant differences in the legal rights to post-appeal reviews between the jurisdictions of Britain, Canada and Australia. This article will examine the British and Canadian procedures and contrast them with the current Australian position on re-opening appeals. The Australian Human Rights Commission has stated that the Australian post-appeal review procedures may fail to comply with international human rights obligations. The question arises as to whether legislative reforms are required.

OVERVIEW

There is a significant divergence in the area of post-appeal reviews amongst the three jurisdictions of Australia, Britain and Canada. The right of appeal in each is based upon statute. The statutory rules in Australia reflect the earlier version of those in Britain, yet its jurisprudence diverges to a significant extent. As will be seen, there are various appeal rights in Britain and Canada which are not available in Australia.

The most significant development in this area has been the introduction of a Criminal Cases Review Commission (CCRC) in Britain.¹ It has revealed systemic defects in areas of investigations, prosecutions and the use of expert witnesses.² In Canada, despite having had six judicial inquiries which have recommended the adoption of a CCRC model,³ the Canadians still rely upon a petition procedure for post-appeal reviews. However, the Canadian procedure has significant advantages over that which is available in Australia. In South Australia, a Bill to establish a CCRC was introduced into the South Australian Parliament. A subsequent report from a parliamentary committee led to the withdrawal of that Bill, and its possible replacement with other statutory changes.

The article will commence by looking to the British and Canadian positions as background to a consideration of the Australian position.

BRITISH POST-APPEAL REVIEWS

The British position in earlier years was rather similar to that which is current in Australia. Indeed, in a number of Australian cases, there has been significant discussion of the earlier British cases.

The Court of Appeal

The earlier cases on the re-opening of appeals tended to focus on procedural or technical errors. A common issue was whether a notice of abandonment of an appeal can be withdrawn. It has been said that the abandonment of an appeal amounts to a refusal of the appeal; therefore, the withdrawal of a notice of abandonment is equivalent to instituting a fresh or new appeal. In 1917, in *R v Pitman*,

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¹ This refers to the CCRC based in Birmingham which considers applications from England, Wales and Northern Ireland. There is a separate CCRC for Scotland based in Edinburgh.

² Sangha B, Roach K and Moles R, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, Toronto 2010).

³ *The Royal Commission on the Donald Marshall Jr Prosecution* (Halifax, 1989); *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Ministry of the Attorney-General, Toronto, 1998); *The Inquiry Regarding Thomas Sophonow* (Manitoba Justice, Winnipeg, 2001); *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (The Commission, Winnipeg, 2007); *Report of the Inquiry into the Wrongful Conviction of David Milgaard* (The Commission, Saskatoon, 2008); *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Ministry of the Attorney-General, Toronto, 2008). The additional inquiry which did not make a recommendation in respect of a CCRC was *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken* (2006).

Mr Pitman felt that he could not afford to continue with his appeal and withdrew it, but later wished to continue. The Lord Chief Justice said “there is no doubt that this Court has power either to allow the notice of abandonment to be withdrawn *or to re-open an appeal which has been dismissed*”.⁴

Some years later in *R v Grantham*, the Courts Martial Appeal Tribunal (exercising equivalent powers to the Court of Criminal Appeal) took the view that there was no authority on this question and that whilst occasionally a matter may have been re-listed when some procedural defect had come to light, the scope for doing so was very limited.⁵ In *R v Cross* in 1973, the court stated a position that has become the standard in Australia: once the judgment of the appeal court has been finally recorded (or “perfected” as it is often called) then the inherent power to vary it is lost.⁶

In 1977 there were two cases where the court showed some willingness to be flexible. In *DPP v Majewski* an appeal had been rejected by a single judge without authority to do so. It was held on the further application to appeal that the previous decision was a “nullity” and therefore the matter could be reheard.⁷ In *R v Daniel*, the court recognised that Daniel had not been properly represented in his earlier appeal, but acknowledged the effect of the decision in *R v Cross*.⁸ Being mindful that “an injustice might have been done to the defendant” the court asked the Registrar to tell the Secretary of State what had occurred, so that the case might be referred back to the court.⁹ That was done and Lawton LJ said “this court clearly has jurisdiction ... to see that no injustice is done to any defendant in the course of any application or appeal”.¹⁰ It was of note that the court initiated the process of executive review which resulted in the referral.¹¹ It was also interesting to see the court referring to some broad power to ensure that injustice is avoided – which essentially has become the basis upon which the court has subsequently claimed the right to re-open an appeal. If there is a single issue which can be identified as a point of departure between the British and the Australian position, this is it.

In *R v Pegg*, the court set out a series of propositions which have been re-stated in subsequent cases. It said it had an “inherent jurisdiction” to withdraw or alter a decision before it had been properly recorded. It also stated that there was a general power to re-list for re-hearing where the previous hearing was a nullity or there was a likelihood of injustice being done because of a failure by the court to follow rules of well-established practice *or where it was misinformed*.¹² In *Pegg*, the cases of *Cross*, *Grantham*, and *Daniel* were applied, and that of *Majewski* was discussed.

Terence Pinfold’s case in 1988 is interesting because it was eventually referred to the Court of Appeal by the CCRC and the conviction was overturned.¹³ However, in *Pinfold* the court said that it had no jurisdiction to entertain a second application for leave to appeal even where fresh evidence had emerged since the dismissal of the earlier appeal.¹⁴ In referring to the appeal provisions under the legislation it said “there is nothing there ... which says in terms that one appeal is all that an appellant

⁴ *R v Pitman* (1917) 12 Cr App R 14 at 14-15 (emphasis added).

⁵ *R v Grantham* (1969) 2 QB 574 at 578. This was discussed at some length in the Australian case of *R v GAM (No 2)* (2004) 9 VR 640; 146 A Crim R 57.

⁶ *R v Cross* (1973) 1 QB 937 at 942.

⁷ *DPP v Majewski* [1977] AC 443 at 449.

⁸ *R v Daniel* [1977] 1 QB 364. The report states that “no cases were cited in argument”, yet the cases of *Cross*, *Grantham* and *Majewski* were referred to in the judgment.

⁹ *R v Daniel* [1977] 1 QB 364 at 368.

¹⁰ *R v Daniel* [1977] 1 QB 364 at 369.

¹¹ See below for a discussion *Von Einem v Griffin* (1998) 72 SASR 110 which says that the courts should not become involved in issues regarding referrals to the court.

¹² *R v Pegg* [1988] Crim LR 370.

¹³ *R v Pinfold* [2003] EWCA Crim 3643.

¹⁴ *R v Pinfold* [1988] 1 QB 462.

is allowed".¹⁵ It went on to say that it could only consider such a case if the Home Secretary used the power to refer it to the Court of Appeal. The only case referred to in this judgment was *Grantham* and the court explicitly stated that it was not aware of any other cases on this point.¹⁶

Three more recent cases from Northern Ireland have taken a bolder approach. In *R v Maughan*, Kerr LCJ said that traditionally a judgment of the Court of Appeal could not be altered once it had been pronounced and formally recorded.¹⁷ However, he added, in recent decisions the Court of Appeal had displayed a more flexible approach to the re-opening of appeals, either on the basis of its "inherent power"¹⁸ or "within the ambit" of the legislation governing appeals.¹⁹ He concluded "in order to ensure that no injustice was done to the applicant we have decided that the appeal must be re-opened".²⁰

In *R v Walsh*, Kerr LCJ again noted the traditional position²¹ and the view about re-listing as set out in *Pegg*.²² He again stated that the court had jurisdiction to see that no injustice was done.²³ In the earlier cases the obligation to ensure that justice was done was thought to have been given by Parliament to the Secretary of State or the Home Secretary. In more recent times it is a task which has been undertaken by the CCRC. In *Walsh*, the Chief Justice said that the power to re-list had not been removed by the Act setting up the CCRC, and that the re-listing power would still be available in the terms set out in *Pegg* and *Maughan*.²⁴ Kerr LCJ re-iterated this view in *R v Brown* in 2007.²⁵

So, whilst the British cases started from a fairly restrictive position regarding the right to re-open appeals, the more recent cases have demonstrated a greater degree of flexibility. It has to be said that where an inherent power or a desire to avoid injustice has been referred to, it has not been accompanied by any significant jurisprudential analysis.

The Supreme Court

The Supreme Court will only entertain appeals where they involve issues of public importance. One significant factor is that the appeal court can grant leave to appeal to the Supreme Court or it can certify that the case involves a point of law of public importance.²⁶

The Supreme Court will receive fresh evidence where it meets certain tests as to cogency and significance. However, most of the reported cases are civil appeals. A possible reason for the scarcity of criminal appeals on this point is the fact that the CCRC can refer the fresh evidence cases to the court of appeal, and if it fails to do so an application may be made directly to the appeal court. There may therefore be less need or opportunity for fresh evidence cases to surface in the Supreme Court.

In *Murphy v Stone-Wallwork*, the court pointed to the tension between the prospect of endless litigation and the need to get things right:

¹⁵ *R v Pinfold* [1988] 1 QB 462 at 464.

¹⁶ *R v Pinfold* [1988] 1 QB 462 at 465.

¹⁷ *R v Maughan* [2004] NICA 21, in reference to *Cross*.

¹⁸ *R v Maughan* [2004] NICA 21, citing *R v Berry (No 2)* [1991] 1 WLR 125.

¹⁹ *R v Maughan* [2004] NICA 21 for which no citation was provided.

²⁰ *R v Maughan* [2004] NICA 21 at 22.

²¹ *R v Walsh* [2007] NICA 4 at [26] citing *Cross*.

²² *R v Walsh* [2007] NICA 4 at [26] citing *Pegg*.

²³ *R v Walsh* [2007] NICA 4 at [26] citing *Daniel*.

²⁴ *R v Walsh* [2007] NICA 4 at [31].

²⁵ *R v Brown* [2007] NICA 30.

²⁶ *Criminal Appeal Act 1968* (UK), s 33(2). The appeal lies only with the leave of the Court of Appeal or the Supreme Court; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court. In Australia, the High Court has complete control of the cases it hears and only the High Court can grant "special leave" to appeal.

So here your Lordships are confronted with a conflict of two principles of law. First, it is a very fundamental and important principle of law established in the public interest that there should be an end to litigation between parties ... On the other hand, ... the court does in proper cases look at the facts that have happened since judgment.²⁷

Shortly after, it was said that “the question whether fresh evidence is admitted or not is to be decided by an exercise of discretion ... the question is largely a matter of degree and there is no precise formula which gives a ready answer”.²⁸ The general consideration seems to be the need to avoid injustice:

In appeals from the High Court to the Court of Appeal and from the Court of Appeal to your Lordships’ House, there is a discretion to admit evidence relating to supervening events where refusal to admit it would cause serious injustice.²⁹

After the formal appellate process has been concluded, Britain has established a further right of referral through the CCRC.

The Criminal Cases Review Commission

Prior to 1995 the Home Secretary had the power to refer cases to the Court of Appeal.³⁰ The problems associated with these powers are well documented.³¹ The *Criminal Appeal Act 1995* (UK) provided for the establishment of the CCRC as an Independent Non-Departmental Public Body on 1 January 1997.³² It has its own administrative and investigative staff and commissioners.³³ It has a right of access to information held by public officials such as police, forensic and prosecution authorities. It can also appoint senior police officers and independent forensic experts to conduct inquiries. Since 1997, 72 murder convictions, 37 rape convictions and 320 convictions of all types have been overturned.³⁴

The procedures allow for systematic assessment and evaluation of cases, filtering out those which appear to be without merit. Draft reasons are made available to the applicant and legal advisors prior to any decision being made and these are followed by formal written reasons after the final decision. Only 4% of applications are referred to the Court of Appeal by the Commission. Of those, around 70% have been successful in the subsequent appeal.³⁵

The Commission takes no role in the appeal hearing. It investigates and reports its findings. When it formally refers a case to the appeal court, the court is then obliged to hear the appeal. It has access to the Commission’s report and reasons for referral, but the conduct of the appeal is undertaken entirely by the appellant and their legal advisors.

When the Runciman Royal Commission was considering the desirability of an independent authority to conduct the investigations, it said that the authority should be independent of both

²⁷ *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 2 All ER 949 at 955 (Upjohn LJ).

²⁸ *Mulholland v Mitchell* [1971] AC 666 at 676-677 (Hodson LJ).

²⁹ *Barder v Caluori* (1988) AC 20 at 1 (Bradon LJ). In civil matters, see r 22(i)(a) of the *Directions as to Procedure Applicable to Civil Appeals to House of Lords*, “Application for leave to introduce fresh evidence”.

³⁰ *Criminal Appeal Act 1968* (UK), s 17.

³¹ See Lord Runciman, *Report of the Royal Commission on Criminal Justice* (1993) (Runciman Report) Ch 11; Malleon K, “Appeals Against Conviction and the Principle of Finality” (1994) 21 *J Law and Society* 151.

³² There is a growing literature on the CCRC; see Kyle D, “Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission” (2004) 52 *Drake L Rev* 657; Zellick G, “Facing Up to Miscarriages of Justice” (2006) 31 *Manitoba LJ* 556; Elks L, *Ten Years of the Criminal Cases Review Commission* (2009).

³³ For a detailed discussion of the CCRC in England and Wales and in Scotland, see Sangha et al, n 2, Ch 10.

³⁴ Updated figures are available from the CCRC website at <http://www.ccr.gov.uk> viewed 10 May 2012.

³⁵ It should be noted that the Scottish CCRC refers a slightly higher percentage of cases, but has a slightly lower success rate: see Sangha et al, n 2, Ch 10.



government and the Court of Appeal. As to the Court of Appeal, it said “their roles are different and, ... we do not think that the Court of Appeal is either the most suitable or best qualified body to supervise investigations of this kind”.³⁶

It should be noted that *The Guardian* newspaper in Britain has been the focus for a vigorous debate about the role and function of the CCRC and whether or not it is being too parsimonious in exercising its powers of referral.³⁷

CANADIAN POST-APPEAL REVIEWS

At the level of intermediate appeals, the Canadian position is similar to that of Australia – it will not re-open appeals, although the Canadian Supreme Court will admit fresh evidence. The Canadian petition procedure is more advanced than that of Australia, but arguably less so than that of the CCRC. This is no doubt why six judicial inquiries in Canada have recommended the adoption of a CCRC model for Canada.³⁸

The Court of Appeal

The intermediate appeal courts in Canada do not have the power to re-open appeals. In *R v H(E)*, the Ontario Court of Appeal refused the application to re-open the appeal on the ground that the appellate process “cannot become or even appear to become a never-closing revolving door through which appellants come and go whenever they propose to argue a new ground of appeal”.³⁹ That position was in accordance with the Supreme Court in *R v Sarson* which noted that “finality in criminal proceedings is of utmost importance”.⁴⁰

The Supreme Court

The Canadian Supreme Court can receive fresh evidence.⁴¹ *R v Trotta* involved a successful appeal to the Supreme Court by parents who had been convicted of culpable homicide and other related offences involving the death of their infant son. Fresh evidence was adduced before the Supreme Court of Canada which was not available at the time of trial, or when their convictions were upheld by the Ontario Court of Appeal.⁴² More recently, fresh evidence was also admitted in *R v Hurley*.⁴³

The petition procedure

From an Australian perspective, the Canadian petition procedure has a series of interesting options and powers. In Canada, once a person’s appeal rights have been exhausted, the only means of re-opening a case is by petition under s 696.3 of the Canadian *Criminal Code* to the federal Minister of Justice who has responsibility for the administration of criminal justice.

The Minister can directly re-open cases under s 696.3(3) by ordering new trials or appeals, where “there is a reasonable basis to conclude that a miscarriage of justice likely occurred”. The Minister has the power to refer cases directly to the Supreme Court of Canada, something that has been done in at least three cases of suspected miscarriages of justice.⁴⁴ No equivalent powers exist in Australia or Britain. The Minister will provide draft and final reasons for decisions and the process is subject to judicial review.

³⁶ See Runciman Report, n 31 at [15]. Whilst it is beyond the scope of this article to explore the detailed reasoning behind this view, it is relevant to any consideration of the role of the Court of Appeal in Australia, especially in the context of powers currently available to the court in New South Wales, discussed below.

³⁷ Laville S, “Criminal Cases Review Commission Must be Reformed, say Campaigners”, *The Guardian* (27 March 2012). See also Naughton M (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009).

³⁸ Sangha et al, n 2, p 92.

³⁹ *R v H(E)* (1997) 33 OR (3d) 202 at 214.

⁴⁰ *R v Sarson* [1996] 2 SCR 223 at [54].

⁴¹ *Supreme Court Act 1985* (Can), s 62(3).

⁴² *R v Trotta* [2007] 3 SCR 453.

⁴³ *R v Hurley* [2010] 1 SCR 637.

⁴⁴ The three cases were *Re Coffin* (1955) 116 CCC 215; *Re Truscott* [1967] SCR 309; *Reference re Milgaard* [1992] 1 SCR 866.

In deciding whether to re-open a conviction by ordering a new trial or a new appeal, the Minister is required to take all relevant matters into account including:

- (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction;
- (b) the relevance and reliability of information that is presented in connection with the application; and
- (c) the fact that an application under this part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.⁴⁵

Under this procedure, the Minister can appoint individuals (such as retired judges, members of the bar, or those with similar qualifications) to investigate claims of wrongful convictions. They have the power to take evidence, issues subpoenas and compel people to give evidence. These broad powers include the power to compel the production of documents from private individuals.⁴⁶ In Britain, the CCRC can only exercise such powers in relation to documents held by public officials.

AUSTRALIAN POST-APPEAL REVIEWS

The Australian courts have taken the view that there is a legal right to a single appeal. There is an acknowledgment that there may be exceptional cases where some further procedure is required and it is said that such matters can be dealt with through the executive discretion to refer such cases – the petition procedure which will be discussed below.

The Court of Appeal

The starting point for the appeal courts is that the right to an appeal is based upon statute.⁴⁷ The statutory provisions, which are similar in all jurisdictions, state that an appeal against conviction will be allowed if the verdict of the jury was unreasonable, or cannot be supported having regard to the evidence, or there was a wrong decision on any question of law, or where on any other ground there was a miscarriage of justice. The Australian statutory provisions are based upon the British *Criminal Appeal Act 1907*. As *R v Edwards (No 2)* explained, before the statutory provisions there was no right of appeal, and a person aggrieved by a possible wrongful conviction had to apply for clemency under the Royal prerogative of mercy.⁴⁸ Since the introduction of the statutory right of appeal, the intermediate courts and the High Court have maintained a consistent position. They take the view that there are no appeal rights beyond those granted by the relevant statute and a proper examination of the statutory provision makes it clear that there is a right to only one appeal.⁴⁹ The appeal court “should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give”.⁵⁰ Once the right to appeal has been exercised, there is no express power to entertain a second appeal. The standard position, expressed throughout the cases, is that, after an appeal, one could rely upon the executive

⁴⁵ Canadian *Criminal Code*, s 696.4

⁴⁶ Canadian *Criminal Code*, s 696.2. See Braiden P and Brockman J, “Remediating Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code” (1997) 17 Windsor Y B Access Just 3.

⁴⁷ *Criminal Law Consolidation Act 1935* (SA), s 353(1); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 2009* (Vic), s 276(1); *Criminal Code 1899* (Qld), s 668E(1); *Criminal Appeal Act 2004* (WA), s 30(3); *Criminal Code Act 1924* (Tas), s 402(1)-(2); *Criminal Code of Northern Territory of Australia* (NT), s 411.

⁴⁸ *R v Edwards (No 2)* [1931] SASR 376. See also the discussion of the “writ of error” and “case stated” procedures in Britain prior to 1907 in Sangha et al, n 2, p 57, and in Pattenden R, *English Criminal Appeals 1844-1994* (Clarendon Press, Oxford, 1996) p 5.

⁴⁹ See, for example, *Burrell v The Queen* (2008) 238 CLR 218; 186 A Crim R 354; *R v GAM (No 2)* (2004) 9 VR 640; 146 A Crim R 57. As is pointed out in relation to the British cases, the legislation does not state in terms that there is to be only one appeal. The reference in the legislation to “an appeal” could as easily be interpreted to mean “an effective appeal”. This is particularly relevant where the defect in the trial, such as a significant non-disclosure, is not revealed until after the appeal has been heard and rejected.

⁵⁰ *R v Edwards (No 2)* [1931] SASR 376 at 380 (Angus Parsons J).

power of referral by the Attorney-General. As the court said in *R v Edwards (No 2)*, to otherwise allow the re-opening of appeals would lead to “manifest inconvenience and possibly great absurdity”.⁵¹

The leading Australian authority goes back to 1932. Paul Grierson was found guilty of serious criminal offences. His appeal was dismissed,⁵² special leave to appeal to the High Court was refused, and an application for an inquiry was also refused.⁵³ In 1937 he made a further application to appeal to the Court of Appeal. That was dismissed on the basis that the court had no jurisdiction to entertain the appeal, the previous appeal having been dismissed on the merits. The court said that the point raised was the same as that in *Edwards*. Once an appeal has been determined, that is the end of the matter, and the person cannot appeal again from time to time thereafter whenever a new fact is alleged to have come to light. The court added:

This does not mean that injustice must necessarily occur when new substantial evidence pointing to a prisoner’s innocence is discovered, after his appeal has been finally disposed of. In such a case recourse may be had to [the petition procedure] ... There is no reason to suppose that the procedure provided ... is not adequate for the consideration of any matter which it may now be sought to raise on behalf of the prisoner.⁵⁴

The High Court endorsed the view in *Edwards* by stating “there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal entertained. The other powers mentioned [the petition procedure] remain exercisable at the instance of the executive”.⁵⁵

In *R v GAM (No 2)*, the Victorian Court of Appeal comprehensively re-stated the position by usefully re-affirming the following propositions which are consistent with similar cases in other Australian jurisdictions.⁵⁶ Because the right to an appeal is statute-based, it does not take its colour from common law principles or from principles which govern appellate processes in the civil arena. A proper examination of the statutory provision indicates that there is a right to only one appeal. This means that once an appeal has been heard and determined on the merits and the decision “perfected” (properly recorded on the relevant court documents or computer system), there is no further jurisdiction to re-open the appeal or to hear a second appeal. There is a limited scope to correct errors which are discovered prior to the perfecting of the appeal.

Similarly, *GAM* said, there is a limited scope for further hearing where it is sought to withdraw a notice of abandonment of an appeal, so long as the abandonment amounted to a mistake or misunderstanding on the part of the applicant, and for which the applicant was not responsible. If fraud was involved then the notice of abandonment might be a “nullity”. Fraud has not been applied to cases where it is sought to re-open an appeal after a hearing on the merits. *GAM* said that in *R v Saxon*, Smart J reserved for future consideration the question whether the court could re-open an appeal determined on its merits in the event that it was revealed that the conviction was obtained by fraud.⁵⁷

An important point which *GAM* emphasised was that any hearing which goes to the merits of the case rules out any further consideration of merits-based issues which are sought to be raised subsequently. It cannot be said that a previous hearing was not a hearing “on the merits” because some

⁵¹ *R v Edwards (No 2)* [1931] SASR 376 at 380.

⁵² *R v Grierson* (1933) 50 WN (NSW) 71.

⁵³ As explained in *Grierson v The King* (1938) 60 CLR 431.

⁵⁴ *R v Grierson* (1937) 54 WN (NSW) 144a.

⁵⁵ *Grierson v The King* (1938) 60 CLR 431 at 437 (Dixon J). Although as noted earlier, in *Pitman* in 1917, the British Court of Appeal asserted that it did have the right to reopen an appeal. Further, this observation from *Grierson* no longer holds as there have been several recent cases in Britain where appeals have been re-opened. In addition, there is no suggestion here that the exercise of the executive power might be the subject of an unfettered discretion as is suggested in *Von Einem*.

⁵⁶ *R v GAM (No 2)* (2004) 9 VR 640; 146 A Crim R 57 (Winneke P). See also *R v Parenzee* (2008) 101 SASR 469; 188 A Crim R 47; *R v Elliot and Blessington* (2006) 68 NSWLR 1; 164 A Crim R 208; *R v A* [2003] QCA 445; *Vella v The Queen* (1991) 4 WAR 278; 52 A Crim R 298.

⁵⁷ *R v GAM (No 2)* (2004) 9 VR 640 at [21]; 146 A Crim R 57 citing *R v Saxon* (1998) 101 A Crim R 71. For a more detailed discussion of this point, see Sangha et al, n 2, Ch 6.

merits-based issue was either ignored or overlooked on the earlier appeal. The “fresh evidence” provisions do not imply a right to re-open an appeal – they imply the existence of a valid appeal.

Equally important, according to *GAM*, was the statement that any claim that these exceptions rest upon a more general discretion to intervene, in the interests of justice, is not borne out by an examination of previous decisions which cannot be seen to cast doubt on the authority of *Grierson*.⁵⁸

The ultimate justification for this seeming rigidity in *GAM* and the other cases is that the petition procedure is available for deserving cases and indicates the need for only one appeal. As *GAM* said, if it were otherwise possible to re-open appeals the petition procedure would not be necessary. As far as the normal appeal process is concerned, finality is important and Parliament must be presumed to be mindful of the need to make an end to proceedings.

One technical point not raised in *GAM* or the other cases is that *Grierson* was an application for leave to appeal which was unsuccessful. In 2004 in *Milat v The Queen*, the High Court stated:

Until the grant of leave or special leave, there are no proceedings inter partes before the Court. This is so even in a case in which the application for leave or special leave is opposed ... In *Eastman v Director of Public Prosecutions ACT* (2002), I pointed out, consistently with this passage in *Collins*, that before the grant of leave there is no matter engaging the Court’s jurisdiction.⁵⁹

It could therefore be argued that *Grierson* is not a High Court “authority” because it had not “engaged its jurisdiction”. However, it could also be said that the *Milat* proposition relates to the more recent practice of the High Court on applications for leave. At the time of *Grierson* the practice was to give greater consideration to leave applications and in effect to consider the merits of the case on the application for leave.⁶⁰ *Grierson* has been cited with approval on many occasions over the years. Indeed, in the recent case of *Burrell v The Queen*, the High Court was keen to affirm the authority of *Grierson* and was dismissive of the suggestion that it had been modified in any way by claims about lack of procedural fairness:

It is not necessary to consider whether some forms of denial of procedural fairness could warrant grafting some exception upon the general rule stated in *Grierson*. Nor is it necessary to examine what was said in either *Pantorno* or *Postiglione* about these matters. Neither case decided that the general rule in *Grierson* should be qualified according to whether there had been a denial of procedural fairness. It is therefore not necessary to consider what root could be found in the *Criminal Appeal Act* for such a proposition, and as both *Grierson* and *DJL* make abundantly plain, it is there that the source of any such exception must be found.⁶¹

The dilemma for the Australian appellate system is that any modifications to the issue of finality must be left to the court of final resort. As was said in *Burrell*:

The principal qualification to the general principle of finality is provided by the appellate system. But in courts *other than the court of final resort*, the tenet also finds reflection in the restrictions upon reopening of final orders after they have been formally recorded.⁶²

So, whilst the High Court may not be so constrained by the principle of finality, it is constrained by the rule governing the admissibility of fresh evidence which is often crucial in cases of alleged miscarriages of justice.

⁵⁸ As noted in *GAM*, in *R v A* [2003] QCA 445, Davies JA referred to 10 decisions given by the court in the period between 2001 and 2003 in which the Queensland Court of Appeal had applied the principle stated in *Grierson*.

⁵⁹ *Milat v The Queen* (2004) 78 ALJR 672 at [26] (McHugh J) citing Barwick CJ, Stephen, Mason and Jacobs JJ in *Collins v The Queen* (1975) 133 CLR 120. See also *Burrell v The Queen* (2008) 238 CLR 218; 186 A Crim R 354.

⁶⁰ This was still the practice of the Court of Appeal in New South Wales on applications for leave to appeal as explained in *GAM*.

⁶¹ *Burrell v The Queen* (2008) 238 CLR 218 at [26] (Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ); 186 A Crim R 354. In *R v Reardon* (2004) 60 NSWLR 454; 146 A Crim R 475 there had been significant discussion as to whether *Pantorno v The Queen* (1989) 166 CLR 466; 38 A Crim R 258 and *Postiglione v The Queen* (1997) 189 CLR 295; 94 A Crim R 397 had achieved such modifications of the *Grierson* principle. Clearly the High Court in this authoritative determination sought to put an end to such discussions.

⁶² *Burrell v The Queen* (2008) 238 CLR 218 at [15] (emphasis added); 186 A Crim R 354.

As discussed above, the British appeal courts (at least in more recent times) have asserted the right to re-open an appeal based upon their “inherent jurisdiction”.⁶³ In *Burrell*, Kirby J stated that it was unfortunate that the inherent jurisdiction of the High Court does not extend to varying its own orders when the interests of justice require it.⁶⁴

The High Court

In Australia, the High Court has taken the view that it cannot accept fresh evidence in an appeal. In opening his judgment in *Mickelberg v The Queen*, Mason CJ stated:

The applicants sought to place before this Court additional evidence which was not before the Court of Criminal Appeal. Over the years this Court has consistently maintained that it has no power to receive fresh evidence in the exercise of its appellate jurisdiction. The applicants argued that the relevant decisions are wrong and should not be followed.⁶⁵

The appellate jurisdiction of the High Court is conferred by s 73 of the *Constitution*. The administration of criminal justice in Australia is a matter for State jurisdiction. There are “common form” statutes which established the State courts of appeal. If the High Court was to admit fresh evidence, it would be required to make “an independent and original decision”, based on its assessment of the evidence resulting in it exercising an *original* rather than truly *appellate* jurisdiction. The suggestion is that this amounts to investing the High Court with original jurisdiction over matters falling within State judicial power.⁶⁶

Mason CJ in *Mickelberg* went on to point out that the powers of the court “are of the widest character which true appellate jurisdiction may possess”, and that s 73 of the *Constitution* “contains no express fetter preventing the court from considering fresh evidence”.⁶⁷ It has been pointed out elsewhere:

In regard to the interpretation of the legislation, the High Court has stated:

It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.⁶⁸

This means it might only be a matter of custom and convention which has inhibited the High Court exercising this power. The Chief Justice summarised the position in *Mickelberg*:

The authorities in this Court stand clearly for the proposition that the reception of fresh evidence is not a part of the appellate jurisdiction of the Court. The applicants challenged the reasoning on which these authorities are based on the ground that the reasoning depended on old English authorities which have been overtaken by more recent decisions. The applicants made the point that, at a time when an appeal lay from this Court to the Privy Council, the Court was influenced by the circumstance that the Court of Appeal and the House of Lords did not receive fresh evidence. As it is now clearly established that both the Court of Appeal and the House of Lords receive fresh evidence, there has been a material development which justifies reconsideration of the existing authorities.⁶⁹

⁶³ See Sangha et al, n 2, p 185, citing Lacey W, “Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution” (2003) *Fed Law Rev* 2 and Jacob IH, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 23 at 27-28.

⁶⁴ *Burrell v The Queen* (2008) 238 CLR 218 at [37]; 186 A Crim R 354. In *R v Brain* (1999) 74 SASR 92; 107 A Crim R 129, the court applied the concept of inherent jurisdiction to allow for the re-opening of the appeal in the *interest of justice*, where the order dismissing the previous appeal had been perfected although the appeal had not been heard (at all) on the merits.

⁶⁵ *Mickelberg v The Queen* (1989) 167 CLR 259 at 264 (Mason CJ); 43 A Crim R 182.

⁶⁶ *Mickelberg v The Queen* (1989) 167 CLR 259 at 298 (Toohey and Gaudron JJ); 43 A Crim R 182, citing *Werribee v Kerr* (1928) 42 CLR 1 at [20] (Isaacs J). See also the important dissenting judgment of Kirby J in *Eastman v The Queen* (2000) 203 CLR 1 at [240]-[243].

⁶⁷ *Mickelberg v The Queen* (1989) 167 CLR 259 at 298; 43 A Crim R 182 citing *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 87.

⁶⁸ *Shin Kobe Maru v Shipping Co Inc* (1994) 68 ALJR 311 discussed in Sangha B, “Extending the Scope of Post-conviction Reviews” (2007) 30 *Australian Bar Review* 90 at 97.

⁶⁹ *Mickelberg v The Queen* (1989) 167 CLR 259 at 266; 43 A Crim R 182.



Whilst the invitation to extend the powers of the High Court to receive fresh evidence was not taken up in *Mickelberg*, it may require further consideration in the light of the human rights issues discussed later.

Another possibility is that the High Court could adapt its procedures to achieve compliance with international obligations whilst maintaining its current position with regard to the inadmissibility of fresh evidence. This could be done by exercising its power to remit certain matters (in this case the reception of the fresh evidence) to the Court of Appeal. The power of the High Court to remit matters to other courts for hearing is found in s 44 of the *Judiciary Act 1903* (Cth).

Indeed, a more liberal interpretation of the term “appeal” was urged by Kirby J in his strong dissenting judgment in *Eastman v The Queen* where he said that there were many instances where the *Constitution* had been approached in the way that he favoured. He thought that a jury trial to which s 80 of the *Constitution* referred would in 1900 undoubtedly have meant a jury comprising only men, chosen by reference to their property qualifications. Yet, he pointed out, the High Court rejected those requirements as inherent in that feature of legal procedure inherited from England. So why, he asked, is the notion of “appeal” stamped indelibly with certain limitations yet the notion of a “jury” is not?⁷⁰ As he said:

The rule [prohibiting the High Court from receiving fresh evidence] means that where new evidence turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases, is truly blind. The only relief available is from the Executive Government or the media – not from the Australian judiciary.⁷¹

Perhaps mindful of the difficulties here, the High Court in *Irving v The Queen* appears to have “worked around” the problem.⁷² The issues involved the way in which evidence of identification had been led at trial. It was suggested that there were problems with the way in which the identification evidence had been led by the prosecution, and that the evidence relating to those difficulties had not been before the Court of Appeal. As Brennan CJ said:

Evidence relating to the way in which the case was conducted emerges by affidavit which was not before the Court of Criminal Appeal. Now, as you know, this Court is a court of appeal only. How do we cope with problems of the inadequacy of representation or error in the conduct of the prosecution when that evidence emerges only after the Court of Appeal has dealt with it?

Counsel for the applicant dealt with the issue somewhat tactfully by stating:

Naturally, your Honour, we are clearly not seeking to adduce evidence in this Court. The thrust of our submission is that the applicant sought to bring that evidence before the Court of Appeal and that the Court of Appeal were in error in that they did not sufficiently or at all consider the nature of the new evidence which the applicant sought to adduce before them. In that respect, in our submission, it is proper that your Honours have regard to the evidence he sought to adduce in order to decide whether the Court of Appeal, with respect, fell into error by not considering it, fully, or at all.

It appears that the High Court can “have regard to the evidence” without it being adduced as evidence in court. One might have thought that having “had regard” to it, if the High Court thought it to be significant, it would remit the matter to the appeal court to consider it. After all, how could the High Court act upon it – if “it” was not before the court?

Some assistance was given by counsel for the Director of Public Prosecutions (DPP) who said, “we have a lot of difficulty, with respect, contending that what occurred ... was a fair trial”. Brennan CJ asked what should be the response of the Crown to that situation. Counsel replied that the matter could be remitted to the Court of Appeal to consider the material, or “the other is for this Court simply to deal with it on the basis that there has been an error”.

⁷⁰ *Eastman v The Queen* (2000) 203 CLR 1 at [240]-[243].

⁷¹ Justice Michael Kirby, “Black and White Lessons for the Australian Judiciary” (2002) 23 *Adelaide Law Review* 195 at 206. See also *Re Sinanovic’s Application* (2001) 180 ALR 448 at 451 (Kirby J): “By authority of [the High Court of Australia] such fresh evidence, even if it were to show a grave factual error, indeed, even punishment of an innocent person, cannot be received by this court exercising its appellate jurisdiction ... [the prisoner] would be compelled to seek relief from the Executive.”

⁷² *Irving v The Queen* [1997] HCA Trans 404.

Brennan CJ then went on to refer to “the affidavit evidence” – “the admissibility of which may be in doubt” – before listing the catalogue of errors which were said to have occurred. He then asked the prosecutor “having regard to the concession that has been made, if I understood the concession correctly, is there any reason why this Court should not proceed to make orders that would be appropriate to achieve a new trial?” There were no such reasons, the court granted leave, heard the appeal “instanter”; it was allowed, as was the appeal to the appeal court, the conviction was quashed and a new trial was ordered. A sensible and pragmatic outcome, but arguably inconsistent with the rule in *Mickelberg*.

The petition procedure

The final avenue for review of an alleged miscarriage of justice in Australia is the petition procedure. In all states, there is a statutory provision which allows for a petition to be submitted to the Governor for the exercise of the Governor’s power to grant a pardon – sometimes called a petition for mercy.⁷³ On consideration of the petition, the Minister or Attorney-General has the power to refer the matter to the Court of Appeal to be heard as an appeal or to ask the court to provide an opinion on any point arising in the case.

The New South Wales provision has a number of ancillary powers not available in other States or Territories.⁷⁴ It allows for the Governor to direct that an inquiry be conducted by a judicial officer into a conviction or sentence. In addition, the Act allows for a person to apply directly to the Supreme Court for an inquiry into a conviction or sentence. The court can then direct that a judicial officer (appointed by the Chief Justice) conduct the inquiry. The judicial officer will have the powers of a Royal Commission. At the conclusion of the inquiry, the judicial officer will then report either to the Governor or to the Chief Justice, or refer the matter directly to the court to review the conviction or sentence. A report to the Chief Justice will result in a report by the Chief Justice to the Governor for the exercise of any appropriate powers by the Governor. A recent report by the Judicial Commission of New South Wales provides helpful illustrations of the types of cases which have resulted in successful referrals to the court following such an inquiry.⁷⁵ The 12 cases referred to all resulted from inappropriate police behaviour such as the giving of false evidence, planting of evidence on a suspect or coercive behaviour resulting in false or unreliable confessional statements. The deficient behaviour on the part of the police was revealed during other inquiries into police misconduct and explains why that evidence was not available at the time of the previous appeals.

The statutory provisions in jurisdictions other than New South Wales are substantially similar. The sections are variously headed “pardoning power preserved” and “references by the Attorney-General”. They then state that, “nothing in this Part affects the prerogative of mercy”. The operative parts are to the effect that the Attorney-General,⁷⁶ where a petition for mercy is being considered (relating to the conviction or sentence of a person on information) may, “if he thinks fit”, refer the whole case to the appeal court to be heard as an appeal.

In considering the South Australian provision in *Von Einem v Griffin*, Lander J stated:

Section 369 does not create legal rights. A petition for mercy directed to the Governor does not give rise to any legal rights in favour of the petitioner. The petition assumes all legal rights have been exhausted. A petitioner seeks mercy and no more than that.⁷⁷

He also added:

Section 369 does not require the Attorney General to exercise his discretion. The statutory power given to the Attorney General is entirely discretionary. It is in the nature of a personal power. The power is

⁷³ *Criminal Law Consolidation Act 1935* (SA), s 369; *Crimes (Appeal and Review) Act 2001* (NSW), ss 76-82; *Criminal Procedure Act 2009* (Vic), s 327; *Criminal Code 1899* (Qld), s 672A; *Sentencing Act 1995* (WA), ss 137-140; *Criminal Code Act 1924* (Tas), s 419; *Criminal Code of the Northern Territory of Australia* (NT), s 431.

⁷⁴ Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW), ss 76-82.

⁷⁵ Donnelly H, Johns R and Poletti P, *Conviction Appeals in New South Wales*, Judicial Commission of New South Wales, Monograph No 35 (June 2011) Ch 11.

⁷⁶ The designated official is the “Crown Law Officer” in Queensland and the Northern Territory.

⁷⁷ *Von Einem v Griffin* (1998) 72 SASR 110 at [120].

exercisable, as the section says, if the Attorney General “thinks fit”. The discretion is granted without qualification. The discretion is entirely unconfined.⁷⁸

In an application for special leave to appeal to the High Court, Gummow J appeared to be surprised at the proposition that there may be no review of an Attorney-General’s decision on this issue:

Gleeson CJ: But you say there is no capacity for judicial review of the decision in that regard?

Mr Hinton: I can put it no higher on my feet than *Von Einem* stands as an obstacle to that.

Gummow J: Not even for *Wednesbury* unreasonableness?⁷⁹

Interestingly, in the context of federal crimes, the same statutory provision is judicially reviewable as it is in those States which have judicial review legislation.⁸⁰ In *Martens v Commonwealth*, the decision whether to exercise the discretion in relation to a prisoner convicted with an offence under the *Crimes Act 1914* (Cth) was found to be made pursuant to s 68 of the *Judiciary Act 1903* (Cth) and as such was amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁸¹

It is also worth noting that in 2007 in *Eastman v Attorney-General (ACT)* Lander J said that whilst the exercise of the discretion in respect of the prerogative of mercy was not amenable to judicial review, he was “[not] prevented however from concluding that the processes which must be observed either by the statute which empowers the exercise of the prerogative (or statutory power) or by the law generally are subject to judicial review”.⁸²

It might also be suggested that an “entirely unconfined” discretion would be contrary to the rule of law principles.⁸³ In *The Rule of Law*, Tom Bingham (described in the book as Britain’s “most senior judge”) devoted a chapter to “Law Not Discretion”. He said:

The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.⁸⁴

In *Lacey v Attorney-General of Queensland*⁸⁵ the High Court was considering a legislative provision which expressly provided for an “unfettered discretion” granted to the appellate court to vary a sentence.⁸⁶ In explaining the power the court said that it:

represents a departure from traditional standards of what is proper in the administration of criminal justice in that, in a practical sense, it is contrary to the deep-rooted notions of fairness and decency which underlie the common law principle ... [in that case against double jeopardy].⁸⁷

⁷⁸ *Von Einem v Griffin* (1998) 72 SASR 110 at [121].

⁷⁹ *Keogh v The Queen* [2007] HCA Trans 693 referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁸⁰ Queensland, Victoria, Tasmania and the ACT; see *Pepper v Attorney-General (Qld) (No 2)* [2008] 2 Qd R 353.

⁸¹ *Martens v Commonwealth* (2009) 174 FCR 114.

⁸² Lander J, sitting as an additional judge of the ACT Supreme Court, giving further consideration to his decision in *Von Einem* in *Eastman v Attorney-General (ACT)* (2007) 210 FLR 440 at [78]. Logan J in *Martens v Commonwealth* (2009) 174 FCR 114 at [22] observed: “On appeal, it proved unnecessary for the Court of Appeal to explore the correctness of this aspect of his Honour’s reasons: *Eastman v Australian Capital Territory* (2008) 163 ACTR 29 at [41]”.

⁸³ “It is generally accepted that the rule of law is inconsistent with the application of arbitrary power”: Allan TRS, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2005) p 47.

⁸⁴ Bingham T, *The Rule of Law* (Penguin, 2011) p 54. The book states: “Tom Bingham, ‘the most eminent of our judges’ (Guardian), held office successively as Master of the Rolls, Lord Chief Justice of England and Wales and Senior Law Lord of the United Kingdom, the only person ever to hold all three offices.” See also McCormick N, *Rhetoric and the Rule of Law* (Oxford University Press, 2005) to similar effect.

⁸⁵ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573; 207 A Crim R 91.

⁸⁶ *Criminal Code* (Qld), s 669A(1).

⁸⁷ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [19]; 207 A Crim R 91 citing *Malvaso v The Queen* (1989) 168 CLR 227 at 234 (Deane and McHugh JJ).

It noted that in *Byrnes v The Queen* it had been said that:

[t]his is not “procedural due process” as understood in United States constitutional jurisprudence; rather it is the process of the due administration of justice governed by the strictures of the rule of law. These strictures have been developed by the courts with respect to power and its exercise in appropriately constituted forums.⁸⁸

The court said that the “principle of legality” is in favour of proper criteria upon which action should be based. It is reflected in, and reinforced by, the decisions of the High Court. It would be against a construction which effectively confers a discretion on the Attorney-General to act, “without the constraint of any threshold criterion for such action”, because such a construction tips the scales of criminal justice in a way that offends “deep-rooted notions of fairness and decency”,⁸⁹ such an approach “is not therefore a construction lightly to be taken as reflecting the intention of the legislature”.⁹⁰ In *South Australia v Totani*, the Chief Justice of the High Court stated:

There must be the universal application throughout the Commonwealth of the rule of law; an assumption “upon which the Constitution depends for its efficacy”.⁹¹

In *Von Einem*, Lander J stated that, “the discretion is to be exercised in the circumstances where the Attorney-General has to advise the Governor in respect of the petition *for mercy*”.⁹² The “mercy” power is based upon a prerogative of the Crown to temper justice with mercy, and allows for the amelioration of punishments imposed by the courts. This is why it is said that a pardon relieves from the consequences of a conviction, but does not do away with the conviction itself.⁹³

However, where a person claims to have been wrongly convicted, they are not pursuing an application for mercy, but an application to the Attorney-General to exercise a discretion and to consider whether they have grounds to have the case referred to the Court of Appeal for review.⁹⁴ In those circumstances, the Attorney-General can act directly and without the need to advise the Governor to take action.

Lander J said that decisions by the Attorney-General, without reasons, on such matters are not subject to judicial review.⁹⁵ He said that the prerogative power vested in the Governor was potentially judicially reviewable, but that the statutory power vested in the Attorney-General was not:

The modern approach does not deny that a prerogative power can be judicially examined because it is a prerogative power, but rather considers the nature or subject matter of the power which is sought to be reviewed.⁹⁶

⁸⁸ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [19]; 207 A Crim R 91 citing *Byrnes v The Queen* (1999) 199 CLR 1 at [54] (Gaudron, McHugh, Gummow and Callinan JJ).

⁸⁹ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [20]; 207 A Crim R 91 citing *Malvaso v The Queen* (1989) 168 CLR 227 at 234.

⁹⁰ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [20]; 207 A Crim R 91.

⁹¹ *South Australia v Totani* (2010) 242 CLR 1 at [6]; 201 A Crim R 11. *Totani* made it clear that in certain circumstances, it would be inappropriate for administrative decision-making to impinge upon the proper role and functions of the courts. It is an interesting question to consider whether this might occur where the Attorney-General, through an administrative process (the petition procedure) refuses to allow the courts to consider the correction of a miscarriage of justice.

⁹² *Von Einem v Griffin* (1998) 72 SASR 110 at [121] (emphasis added).

⁹³ *R v Cosgrove* [1948] Tas SR 99 at 105-106 (Morris CJ); *R v Foster* [1985] QB 115; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at [98] (Kirby J); 140 A Crim R 472, discussed in Sangha et al, n 2, p 145. See also the *Sentencing Act 1995* (WA), s 138 to similar effect.

⁹⁴ The historical basis to this has been discussed: see *Von Einem v Griffin* (1998) 72 SASR 110 at [14] (Prior J). However, a simple legislative amendment could help to resolve this confusion by requiring petitions for mercy to be directed to the Governor and petitions (applications) for leave to appeal to be directed to the Attorney-General.

⁹⁵ *Von Einem v Griffin* (1998) 72 SASR 110 at [136].

⁹⁶ *Von Einem v Griffin* (1998) 72 SASR 110 at [126].

The reasoning is that “it is not the source of the power which is determinative, but the nature or subject matter of the power”.⁹⁷ In these circumstances, is it not the very nature of the subject matter of the power which *requires* it to be judicially reviewable? It is the final opportunity for a wrongly convicted person to have the circumstances of their conviction re-examined, often in the light of fresh or new evidence and for justice to be done.

Lander J also discussed at length the inappropriateness of judicial review of decisions of the Home Secretary in Britain in relation to petitions. He thought there was much said about the courts being in an invidious position if they were seen to be reviewing decisions about access to the courts. As we have seen, the CCRC in Britain and the Canadian petition review procedures now both explicitly incorporate judicial review procedures.⁹⁸

It is clear that Lander J did not think there was any merit in the substance of the application before him. He stated that the petitioner had no “legitimate expectations”, and he had in any event “not clearly articulated what those legitimate expectations were”.

The expression “legitimate expectation” is frequently used in the modern discussions relating to obligations arising from international treaties. It is said that when member states sign or ratify such treaties, it gives rise to a “legitimate expectation” upon the part of its citizens that its terms will be adhered to. There was no discussion in *Von Einem* of the applicability of the provisions of the *International Covenant on Civil and Political Rights* (ICCPR) or the related case law which states that statutory provisions should be interpreted so as to be in conformity with the Covenant. *Von Einem* was decided in 1998 and Australia ratified the ICCPR in 1980. It is important to consider the possible interaction between the international human rights obligations and the need for change in the law of post-appeal reviews.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The Canadians have a Charter of Rights and the British have the right to appeal to the European Court of Human Rights. In Australia, the main provision is the ICCPR which was signed 18 December 1972, ratified by Australia on 13 August 1980 and entered into force for Australia on 13 November 1980.⁹⁹ The preamble states that all citizens have a duty to promote and observe the rights in the Covenant. Article 2 provides that each State Party will ensure that all individuals within its territory can avail of the rights, and that they will adopt such legislative or other measures as may be necessary to give effect to them.

The right to a fair trial is set out in Arts 9¹⁰⁰ and 14¹⁰¹ and Art 2.3 states that any person whose rights are violated shall have an effective remedy.

In a preliminary statement on this issue, Danielle Noble of the Australian Human Rights Commission took the view that the failure to provide written reasons for the rejection of a petition might well constitute a breach of the treaty provisions:

The procedural aspects of the criminal review process in Australia could amount to a violation of the requirements of Art 14 (5). The individual, discretionary power given to the Attorney-General to consider or dismiss a petition for review of conviction or sentence may potentially be a violation of the requirement to provide the same level of procedural rights at all stages of appeal. This potential

⁹⁷ *Von Einem v Griffin* (1998) 72 SASR 110 at [129].

⁹⁸ In Britain, for example, see *Boyle v CCRC* [2007] EWHC 8 (Admin); *Dowsett v CCRC* [2007] EWHC 1923 (Admin); *The Queen on the application of Martin Boston and Warren Boston v Criminal Cases Review Commission* [2006] EWHC 1966 (Admin); *Westlake v CCRC* [2004] EWHC 2779 (Admin) (the Timothy Evans case).

⁹⁹ See Gans J, Henning T, Hunter J and Warner K, *Criminal Process and Human Rights* (Federation Press, 2011) who noted that the provisions of the ICCPR have been translated into the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic). The ICCPR is available at <http://www2.ohchr.org/english/law/ccpr.htm> viewed 10 May 2012.

¹⁰⁰ A person shall be “entitled to trial within a reasonable time”.

¹⁰¹ A person shall be entitled to a “fair and public hearing by a competent, independent and impartial tribunal established by law”. The following sentence uses the word “trial”.

violation could, however, be remedied if the decision maker, most often the Attorney-General, were required to provide written reasons for their decision to dismiss or refer the petition.¹⁰²

Later, the Human Rights Commission issued a statement in which it said:

The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.¹⁰³

The reasoning behind the Commission's position appears to be that whilst the right to a fair trial is contained in the treaty, what amounts to a fair trial is set out in the provisions of the domestic law of Australia.¹⁰⁴ The Australian Human Rights Commission makes it clear that Australian law has held that "[i]t has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law".¹⁰⁵ It adds that "the content of Australia's international obligations will therefore be relevant in determining the meaning of these provisions".¹⁰⁶

According to the principles laid down by the High Court, where there have been significant non-disclosures at trial, or where significant evidence led at trial has subsequently proved to be non-probative, or where there have been significant procedural irregularities, the person convicted may be entitled to have the conviction set aside.¹⁰⁷ Yet, if the defect is only made apparent after the convicted person has completed their unsuccessful appeal, then, as explained above, under the law as it stands, (apart from New South Wales) they have no further legal *right* to any review of their case.

It is a necessary implication that if the appeal system in Australia is deficient in respect of these issues, then it must have been so for at least 30 years – since the ICCPR was ratified. Given the fact that this issue has not been raised in the cases examined in this article, it might be appropriate to raise it in future cases.

In South Australia, the establishment of a CCRC has been proposed. In November 2010, an Independent member of the Legislative Assembly (Ann Bressington) introduced a Bill to establish a CCRC.¹⁰⁸ The Bill was referred to the Legislative Review Committee for public inquiry. The South Australian Law Society said it publicly supported the establishment of such a body in South Australia¹⁰⁹ as did the Australian Lawyers Alliance.¹¹⁰

Former High Court Justice Michael Kirby stated in a recent interview:

¹⁰² Noble D, "The Right to a Fair Trial and Avenues for Criminal Appeal in Australia" (2011) 8(9) *Direct Link* 105. See also *Wainohu v New South Wales* (2011) 243 CLR 181; 210 A Crim R 45.

¹⁰³ Australian Human Rights Commission, *Submission to Legislative Review Committee of South Australia, Inquiry Into Criminal Cases Review Commission Bill 2010* (2011) at [2.6], http://www.hreoc.gov.au/legal/submissions/2011/20111125_criminal_case_review.html viewed 10 May 2012.

¹⁰⁴ Sangha B and Moles R, "The Right to a Fair Trial in the Context Of International Human Rights Obligations" (2011) 8(10) *Direct Link* 112.

¹⁰⁵ *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [97] (Gummow and Hayne JJ) citing *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

¹⁰⁶ Citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 264-265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70 at 124 (Brennan J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231 (Brennan CJ), 239-240 (Dawson J), 250-251 (McHugh J), 294 (Gummow J).

¹⁰⁷ Sangha and Moles, n 104 at 112. The law here is set out in greater detail in Sangha et al, n 2, Ch 5, and subject to the application of "the proviso" discussed at p 147. See also Odgers S, "Appeals Against Conviction" (2011) 35 Crim LJ 131.

¹⁰⁸ A copy of the Bill together with parliamentary speeches and media comments are available at <http://www.netk.net.au/CCRCHome.asp> viewed 10 May 2012.

¹⁰⁹ Channel 7, *Today Tonight* (Adelaide) (28 March 2012).

¹¹⁰ Kerin A, Australian Lawyers Alliance, *The Advertiser* (7 March 2012), Letters to the Editor: "System is Archaic".

My own belief is that we in Australia should move, throughout the country, federal and state and territory, to have a Commission that has the time and the skill and the expertise and the DNA evidence where its available to look into these matters so that we don't have on our conscience as a society, people in prison who are innocent and people who have been pardoned but still have the stain of conviction on their names.¹¹¹

In the report¹¹² the six members of the South Australian Legislative Review Committee stated that whilst they did not favour the establishment of a CCRC, "the Committee considers that current mechanisms for the consideration of potential wrongful convictions are in need of reform".¹¹³

It unanimously recommended the establishment of new criminal appeal rights, and new mechanisms to review flawed forensic evidence in criminal cases. It recognised the limitations on the current system of criminal appeals and pointed out that the petition (or mercy) procedure involving a petition to Governor is rarely used, and lacks timeframes, structure and transparency.

It referred to the submission from the Human Rights Commission¹¹⁴ and said it was keen to ensure that as far as possible the law complies with Australia's international obligations.¹¹⁵ It said that it was mindful that there were provisions (reflected in other States) to allow for a retrial where there had been a tainted acquittal – the "double jeopardy" provisions. It said that similar provisions should apply where there had been a tainted conviction.

The Committee recommended that the current appeal provisions be extended to include a further statutory right of appeal by a convicted person at any time (with the leave of the court) on the basis of a tainted conviction, or where there is fresh or compelling evidence which may cast reasonable doubt on a person's guilt.¹¹⁶ The provision should also include the right of the court to order a new trial where appropriate. The new right of appeal should only apply to serious offences with penalties of 15 years or more imprisonment.

It noted that it had received a great many submissions concerning the extent to which flawed scientific evidence may have led to wrongful convictions. It also referred to the way in which complex scientific issues get confused at trials because of the question and answer mode of eliciting evidence in the adversarial system. The Committee said that if "the process by which scientific and forensic evidence were more rigorously controlled, the propensity for wrongful convictions would be greatly reduced".¹¹⁷ It therefore recommended there be a review of all current rules and procedures for the admission of expert evidence in criminal trials.¹¹⁸ In particular it recommended that the portions of scientific evidence which were agreed between the relevant experts be presented more clearly as such to the juries. It also said there should be more clearly defined opportunities for jurors to ask questions and seek clarifications from expert witnesses during the course of the trial.

The Committee noted that there were changing opinions about the reliability of science and the new technologies involved. It said the Attorney-General should consider the establishment of a new Forensic Science Review Panel for a person to have evidence tested where it might reveal new

¹¹¹ *Today Tonight*, n 109. "Federal, state and territory" refers to a number of discrete jurisdictions within Australian law. It is possible for each of them to provide appropriate powers to a common CCRC which could exercise those powers on their behalf.

¹¹² South Australian Legislative Review Committee, *On its Inquiry into the Criminal Cases Review Commission Bill* (18 July 2012) (South Australian Report). There were three ALP members (Hon Gerry Kandelaars, Presiding Member; Ms Gay Thompson MP; Mr Alan Sibbons MP), two Liberal members (Hon Stephen Wade MLC, Shadow Attorney-General; Mr John Gardner MP), and one Independent member (Hon John Darley MLC). The Report is available at <http://www.netk.net.au/CCRC/CCRCReport.pdf> viewed 8 August 2012.

¹¹³ South Australian Report, n 112, Recommendation 1, p 81.

¹¹⁴ South Australian Report, n 112, p 24: "The Law Society of SA, in a supplementary submission to the Committee, agreed with the view expressed by the Australian Human Rights Commission in that our current appeal system does not meet Australia's obligations under the International Covenant on Civil and Political Rights."

¹¹⁵ South Australian Report, n 112, p 82.

¹¹⁶ South Australian Report, n 112, Recommendation 3, p 81.

¹¹⁷ South Australian Report, n 112, p 83.

¹¹⁸ South Australian Report, n 112, Recommendation 4, discussed at pp 83-84.

information which might cast a reasonable doubt about the guilt of a convicted person.¹¹⁹ It noted that the New South Wales DNA Panel can only look at convictions occurring after 2006 and to the testing of DNA evidence, and that the new forensic review body in South Australia should not be subject to such limitations. It should include toxicology, pathology and the testing of other chemicals or materials.

The new Forensic Review Panel should be comprised of two legal practitioners with not less than 10 years standing and one representative from each of victims rights, the forensic science centre, the DPP and the police. The proposed Panel would not be a permanent body, “but meet regularly as required”.¹²⁰ It should have the power to engage persons to provide expert assistance and to obtain information and documents which are in the possession of public authorities. It should also have the power to search for and arrange for the testing of any materials which might be of assistance.

Most importantly, the Committee said that the Forensic Review Panel should be able to refer a case to the Court of Appeal for review of a conviction following upon the receipt of the forensic test results. It should also be able to make reports and recommendations to the Attorney-General regarding changes to legislation, policies and strategies as a result of its findings.

It recommended that the Commissioner for Victims’ Rights and victims of crime should be kept informed and be able to make appropriate submissions.¹²¹

Finally, the Committee said that where a person had been granted a pardon in respect of any offence, there should be a legislative right for them to apply to have their convictions quashed.¹²²

Whilst the recommendations did not support the establishment of a CCRC, they have recommended a body be established with similar powers of inquiry and referral to the Court of Appeal (albeit limited to “forensic” issues), the establishment of a new statutory right of appeal, and an inquiry into the use of expert evidence in criminal trials. Hopefully, this report will stimulate further discussions on these issues in the other jurisdictions around Australia.

¹¹⁹ South Australian Report, n 112, Recommendation 5, discussed at pp 84-86.

¹²⁰ South Australian Report, n 112, p 85.

¹²¹ South Australian Report, n 112, Recommendation 6, p 87.

¹²² South Australian Report, n 112, p 88.