
Post-conviction reviews — Strategies for change

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As explained in the article “The law on non-disclosure in Australia: All rights — no remedies?” in the May edition of *Direct Link*,¹ the Australian judiciary has burdened itself with a series of self-imposed limitations in dealing with post-conviction reviews. The Court of Appeal says it cannot hear a further appeal once an appeal has been rejected. The High Court says that it is unable to receive fresh evidence which indicates a possible miscarriage of justice. The statutory petition procedure is said to be entirely a matter of discretion and not subject to judicial review. Similar restrictions are not found in the jurisprudence of similar common law countries such as Britain and Canada.

These rules are not consistent with the United Nations International Covenant on Civil and Political Rights (ICCPR); in particular the right to a fair trial and the right to an effective review of an alleged wrongful detention.

This was not an issue which was raised in any of the cases referred to. As a result, each of them is an appropriate candidate for review and change.

The United Nations Covenant provisions

The preamble states:

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant...

Article 2 states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ... and to ... take the necessary steps in accordance with its constitutional processes and ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 50 states:

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

The Australian Human Rights Commission states that the United Nations Human Rights Committee has made it clear that prisoners enjoy all the rights in the ICCPR and that Australian law has held that:

It 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.²

It adds, “the content of Australia’s international obligations will therefore be relevant in determining the meaning of these provisions”.³

This makes it clear that all of us, (whether private individuals, lawyers, judges or politicians, in either state or federal jurisdictions) must do what we can “to give effect to the rights” referred to. What follows are some suggestions as to how this may be done.

Intermediate appeals

The legislative appeal provisions in Australia have been interpreted as allowing the intermediate appellate courts the jurisdiction to hear one appeal only, providing no right to re-open an appeal.⁴ However, the foundation for that view is based upon flimsy ground. It goes back to the 1938 decision of *Grierson v R (Grierson)* in which an application for leave to appeal to the High Court was dismissed.⁵

When this matter was raised in the application to re-open the appeal in *R v Keogh* the court said:

Mr Game submits that the decision in *Grierson* does not bind this Court because the High Court was considering and refused an application for special leave to appeal. He cited no authority to support the submission that this Court may depart from the considered views of the High Court when dealing with an application for special leave to appeal.⁶

At the time of hearing that appeal (2007), reference could have been made to the earlier decision of the High Court in *Milat v R (2004)*:

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.⁷

It is hard to see how *Grierson* could be a High Court authority without having engaged its jurisdiction.

Additionally, it could be regarded as a matter of “inherent jurisdiction” of which has been said:

[it is] ... the essential character of a superior court of law [which] necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute.⁸

In *Burrell v R (Burrell)*, Kirby J stated that it was unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it.⁹

The High Court

It says it has no power to receive fresh evidence in a criminal appeal. In opening his judgment in *Mickelberg v R (Mickelberg)*, 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.¹⁰

The appellate jurisdiction of the High Court is conferred by s 73 of the Constitution. Under the “common form” statutes establishing the state courts of appeal, if the High Court was to admit fresh evidence that would require it to make “an independent and original decision”, based on its assessment of the evidence resulting in its 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.¹¹

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”. He added, interestingly, that s 73 of the Constitution “contains no express fetter preventing the court from considering fresh evidence”.¹² 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.¹³

This means it might only be a matter of custom and convention which has inhibited the High Court exercising this power. As 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.¹⁴

Whilst the invitation to extend the powers of the High Court to receive fresh evidence was not taken up in *Mickelberg*, we say that it is still a promising prospect for reconsideration.

Another possibility is that the Australian 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 to the Court of Appeal. In effect the High Court would open the appeal, remit the matter to the Court of Appeal to hear the fresh evidence, and then continue its hearing of the appeal once it receives the finding of the appeal court in relation to that evidence.¹⁵

Indeed, a more liberal interpretation of the term “appeal” was urged by Kirby J in his strong dissenting judgment in *Eastman v R* where he said that there were many instances where the Constitution had been approached in the way that he favoured. So, he thought that a jury trial to which s 80 of the Constitution referred would in 1900 undoubtedly have meant a jury comprising men only, and then, 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.¹⁶

As he has pointed out:

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.¹⁷

That is precisely the point. The international obligations require the *courts* to respond in such situations. The argument based upon our non-compliance with our international obligations, and the need to interpret relevant statutory provisions so as to be consistent with them should lead to the reconsideration of this issue.

The statutory petition procedure

The remaining avenue for review of an alleged miscarriage of justice is the petition procedure which initially involves an application to the state Governor for

the exercise of “Her Majesty’s mercy”.¹⁸ There is then a statutory power (common to all states) which provides that on such an application, the Attorney-General:

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;¹⁹

What appears initially as an application for mercy (the exercise of a prerogative power) is in effect a statutory power to be exercised by the Attorney-General.

Von Einem v Griffin (Von Einem) is the best Australian authority on the subject, but it is very unsatisfactory.²⁰ At the commencement of his discussion of the statutory right, Lander J asserted rather than argued:

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.²¹

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 exercisable, as the section says, if the Attorney General “thinks fit”. The discretion is granted without qualification. The discretion is entirely unconfined.²²

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.²³

We can see that Lander J has couched his discussion within the context of some claim for “mercy” and then suggests that the statutory power must be construed within that context.

However, 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.²⁴

Curiously, in *Von Einem*, Lander J thought that the prerogative power was potentially judicially reviewable, but that the statutory power was not:

The modern approach does not deny that a prerogative [mercy] 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.²⁵

His reasoning in either case was that it was not the source of the power which was determinative, but the nature or subject matter of the power.²⁶ We would say that it is 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. But Lander J took the view that the nature of the statutory referral

power in this case was a matter entirely for the personal and complete discretion of the Attorney-General. However, the argument that the statutory provision is meant to confer *legal rights*, especially when viewed as an opportunity of last resort for an improperly convicted person to have their case reviewed, is compelling.

It is clear from the rest of the judgment that Lander J did not think there was any merit in the substance of the application before him. He said that although it was not necessary to do so, he would look to the substance of the claims. He then found each to be without merit. He also stated that the petitioner had no “legitimate expectations”, as claimed, adding, “It was not clearly articulated what those legitimate expectations were.”²⁷

The use of the expression “legitimate expectation” is interesting in this context, because it 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 ICCPR provisions and without that it may be said that the decision was *per incuriam* — in ignorance of relevant law or rights.²⁸

Von Einem also discussed at length the inappropriateness of judicial review of decisions of the Home Secretary in relation to petitions. 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. Since then the Criminal Cases Review Commission in Britain and the Canadian petition review procedures have both been subject to judicial reviews. There has been no discussion there about the inappropriateness of them.

Fraud in post conviction reviews

It has been argued by Sangha, Roach and Moles that where fraud can be established, it might give rise to an independent right of review in such cases.²⁹ It is said that this can occur even in situations where there is no right of appeal such as where (in the UK) a person had entered a guilty plea to a charge of driving under the influence.³⁰ In a series of influential cases in the UK and adopted by reference in Australian High Court cases, the courts have said that “fraud unravels everything” and that no judgment or decision of a court can stand where it has, in effect, been obtained by fraud, deceit or manifest error.³¹

The High Court in *SZFDE v Minister for Immigration and Citizenship* drew attention to the comment of Denning LJ:

No court in this land will allow a person to keep an advantage which he has obtained by fraud. *No judgment of a court, no order of a Minister, can be allowed to stand if*

it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once proved, *it vitiates judgments*, contracts and all transactions whatsoever.³²

The underlying rationale is that any purported decision obtained by fraud is in effect no decision at all and that the court upon being informed of the true situation will correct the record by declaring the earlier purported decision a nullity.

The Criminal Cases Review Commission

The clearest and most decisive way to tackle this issue would be to establish a Criminal Cases Review Commission (CCRC) for Australia.³³ It would ensure that access to the courts is maintained in appropriate cases, thus ensuring compliance with our international obligations. At the same time it would de-politicise the current petition process which has proved to be a serious obstacle to the consideration of such cases in Australia, and prior to the introduction of the CCRC in Britain.

The CCRC is a non-departmental statutory authority with its own administrative and investigative staff and commissioners.³⁴ Its real value has been in its ability to access information held by public officials such as police, forensic and prosecution authorities. It has been able to identify many cases where non-disclosure of relevant information had been a significant issue.

The current CCRC procedures in Britain 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. It is worth bearing in mind that only some 4% of cases are referred to the Court of Appeal by the Commission. Of those, around 70% have been upheld in the subsequent appeal.

The Commission takes no role in the appeal hearing. Its job is to investigate and report its findings. Its only real power is that when it formally refers a case to the appeal court to be heard, the court is then obliged to proceed to hear the case. The court has access to the Commission's report and reasons for referral, but the conduct of the appeal is undertaken entirely by the applicant and the applicant's legal advisors.

The criminal law in Australia is a matter for state rather than federal jurisdiction. This means that the states would need to act individually or perhaps collectively to establish a Commission for each state or perhaps for a number of states. There is no reason in principle why a single national criminal review Commission could not be established. Such a Commission

would bring certain economies of scale and would also counteract any parochial tendencies which tend to arise when local officials are designated to review local cases.

Conclusion

It can be seen that the current provisions relating to the hearing of criminal appeals in the appeal courts and the High Court, as well as the state-based petition procedures require adjustment to bring them into conformity with Australia's international obligations. This can be achieved by the presentation of suitable cases to each of the respective courts in the way we have suggested. At the same time, it might be appropriate to consider the establishment of a Criminal Cases Review Commission and whether significant gains, strategically and economically, can be achieved by collective action.



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Footnotes

1. Dr B Moles "The law on non-disclosure in Australia: All rights — no remedies?" (2011) 8(8) *DL* 85.
2. *Kartinyeri v Commonwealth* (1998) 195 CLR 337; 152 ALR 540; [1998] HCA 22; BC9800961 per Gummow and Hayne JJ. At [97] citing *Polites & Kandilotes v Commonwealth* (1945) 70 CLR 60 at 68–9, 77, 80 81; [1945] ALR 113; (1945) 19 ALJR 92; BC4500041; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 39 ALD 206; 183 CLR 273 at 287; [1995] HCA 20; BC9506417. The website of the Australian Human Rights Commission is at www.hreoc.gov.au.
3. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 264–65; 39 ALR 417; 56 ALJR 625; BC8200052 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70 at 124; 57 ALR 472; 59 ALJR 311; BC8501115 (Brennan J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230–31; 142 ALR 331; 71 ALJR 381; BC9700274 (Brennan CJ), at 239–40 (Dawson J), at 250–51 (McHugh J), at 294 (Gummow J).

4. *R v Keogh* (2007) 249 LSJS 315; 175 A Crim R 153; [2007] SASC 226; BC200704818 citing *Grierson v R* [1938] HCA 45 based upon *R v Edwards (No 2)* [1931] SASR 376; *Grierson v R* (1938) NSW CCA.
5. *Grierson v R* [1938] HCA 45.
6. *R v Keogh* (2004) 205 ALR 338; 78 ALJR 672; [2004] HCA 17; BC200401968 at [57].
7. *Milat v R* (2004) 205 ALR 338; 78 ALJR 672; [2004] HCA 17; BC200401968 at [26] per McHugh J citing Barwick CJ, Stephen, Mason and Jacobs JJ in *Collins v R* (1975). See also, *Burrell v R* (2008) 238 CLR 218; 248 ALR 428; [2008] HCA 34; BC200806864.
8. See Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice: the Rhetoric Meets the Reality*, (2010) Irwin Law, Toronto and Federation Press, Australia at 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 I H, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23, 27–8 (citations omitted).
9. *Burrell v R* (2008) 238 CLR 218; 248 ALR 428; [2008] HCA 34; BC200806864.
10. *Mickelberg v R* (1989) 167 CLR 259; 86 ALR 321; 43 A Crim R 182; 63 ALJR 481 at [2].
11. *Mickelberg v R* (1989) 167 CLR 259; 86 ALR 321; 43 A Crim R 182; 63 ALJR 481 at [298]; Toohey and Gaudron JJ citing Isaacs J in *Werribee v R* (1928) 42 CLR 1; 2 ALJR 329 at [20]. See also the important dissenting judgment of Kirby J in *Eastman v R* (2000) 203 CLR 1; 172 ALR 39; [2000] HCA 29; BC200002716 at [240]–[243].
12. *Mickelberg v R* (1989) 167 CLR 259 at 265–6; 86 ALR 321; 43 A Crim R 182; 63 ALJR 481 citing *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 87; [1932] ALR 22; (1931) 5 ALJR 241; BC3200041.
13. *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.
14. Above n 10 at [7].
15. The power of the High Court to remit matters to other courts for hearing is found in the Judiciary Act 1903 s 44.
16. *Eastman v R* (2000) 203 CLR 1; 172 ALR 39; [2000] HCA 29; BC200002716 at [240]–[243].
17. Justice Michael Kirby, "Black and White Lessons for the Australian Judiciary" (2002) 23 *Adelaide Law Review*, 195-213 at 206. See also *Sinanovic's Application* (2001) 180 ALR 448 at 451; [2001] HCA 40; BC200103740 per Kirby J "By authority of this court [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."
18. There is an exception in NSW where there is statutory provision for an application to be made to the Chief Justice. However, we are principally concerned with a South Australian case here.
19. Criminal Law Consolidation Act (SA) s 369.
20. *Von Einem v Griffin* (1998) 72 SASR 110; 201 LSJS 111; [1998] SASC 6858; BC9806968.
21. As above at 20 (emphasis added).
22. As above at 21.
23. As above (emphasis added).
24. See Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice: the Rhetoric Meets the Reality*, (2010) Irwin Law, Toronto and Federation Press, Australia, p 145.
25. Above n 22 at 126.
26. Above at 129.
27. It was interesting to see that in NSW a case was referred back to the Court of Appeal after 70 years, when all participants in the case were long since deceased. "Murder appeal a shot at justice for shearer [Fred McDermott] 74 years on". "A hearing begins today in the Court of Criminal Appeal, against a murder conviction, in which the victim has been dead for 74 years — and the accused for 33", 2 December 2010 Imre Salusinszky *The Australian*. www.theaustralian.com.au/news/nation/murder-appeal-a-shot-at-justice-for-shearer-74-years-on/story-e6frg6nf-1225964153784.
28. For example, the cases referred to earlier which stated that statutory provisions should be construed so as to be in conformity with international obligations.
29. See Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice: the Rhetoric Meets the Reality*, (2010) Irwin Law, Toronto and Federation Press, Australia, Ch 6.
30. *R v Bolton Justices; Ex parte Scally* [1991] 1 QB 537; [1991] 2 All ER 619; [1991] 2 WLR 239; [1991] Crim LR 550, discussed in *Forensic Investigations*, Ch 6. "Fraud in Criminal Proceedings", pp 172, 182.
31. See for example *SZFDE v Minister for Immigration and Citizenship* (2007) 96 ALD 510; 232 CLR 189; [2007] HCA 35; BC200706045, as discussed in *Forensic Investigations* Ch 6 "Fraud in Criminal Proceedings: at p 172, "Links from Australian to British Cases".
32. *SZFDE v Minister for Immigration and Citizenship* (2007) 96 ALD 510; 232 CLR 189; [2007] HCA 35; BC200706045, as discussed in *Forensic Investigations* Ch 6 p 173, citing *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712–13; [1956] 1 All ER 341 per Denning LJ (emphasis added).
33. A Bill to establish such a Commission was introduced into the parliament of South Australia in November 2010, see <http://netk.net.au/CCRCHome.asp>.
34. For a detailed discussion of the CCRC in England and Wales and in Scotland see Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice: the Rhetoric Meets the Reality*, (2010) Irwin Law, Toronto and Federation Press, Australia, p 145 Ch 10.