

# MERCY OR RIGHT? POST-APPEAL PETITIONS IN AUSTRALIA

BIBI SANGHA AND ROBERT MOLES<sup>†1</sup>

In Australia, following a criminal conviction and an unsuccessful appeal, there is generally no *legal right* to any further review of the case, even where there is evidence that a miscarriage of justice has occurred. The Court of Criminal Appeal cannot re-open an appeal or hear a second appeal. The High Court cannot admit fresh evidence which shows that there has been a miscarriage of justice. The only avenue for review<sup>2</sup> is through a petition invoking a statutory power which allows the Attorney-General to refer the case to the Court of Criminal Appeal to be heard as an appeal. *Von Einem v Griffin* (1998)<sup>3</sup> is authority for the proposition that in South Australia (and possibly other states which depend upon common law powers of judicial review) a decision to refuse a statutory referral is not judicially reviewable. It states that the petitioner has no ‘legal rights’ and that the Attorney-General has an ‘unfettered’ discretion in the matter. This article explains that the *Von Einem* position is unsatisfactory and should be reviewed. It is not consistent with contemporary principles of administrative law, international human rights obligations and the rule of law. In addition, the view is emerging that there should be a new statutory right of appeal in such cases.

## I INTRODUCTION

Under the Australian Constitution, each state and territory has jurisdiction over the enactment and enforcement of its own criminal

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<sup>†</sup> Bibi Sangha BA (Hons) (Law), LLM, Barrister-at-Law Lincoln’s Inn, Senior Lecturer in Law, Flinders University of South Australia. Robert Moles, ACII (UK), LLB (Hons), PhD, Networked Knowledge.

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<sup>2</sup> In New South Wales and the Australian Capital Territory, there are statutory provisions for an inquiry which we will explain shortly: see below n 17.

<sup>3</sup> 72 SASR 110 (‘*Von Einem*’).

law.<sup>4</sup> After a conviction, there is a right of appeal (without leave) on an issue of law, or a right of appeal (with leave) on an issue of law and fact.<sup>5</sup> A further appeal to the High Court of Australia can take place only with the leave of that court.<sup>6</sup> It has been determined that after a criminal conviction before state or territory courts and an unsuccessful appeal, there is no right to re-open the appeal or to have a further appeal.<sup>7</sup> The High Court has stated that in any such matter coming before it, it cannot admit fresh evidence.<sup>8</sup> The only further procedure is to apply for the Attorney-General to refer the matter to the court to be heard as an appeal using the petition and statutory referral power.<sup>9</sup> However, the South Australian case of *Von Einem* is problematic. It contains propositions to the effect that:

- the petition and statutory referral powers provide no legal rights to the applicant;
- the Attorney-General has a complete discretion and may ignore the petition or reject it without having to give reasons for doing so;
- the decision-making process of the Attorney-General is not subject to

<sup>4</sup> *Commonwealth of Australia Constitution Act 1900* s 51, read in conjunction with s 108.

<sup>5</sup> *Criminal Law Consolidation Act 1935* (SA) s 352:

Right of appeal in criminal cases:

(1) Appeals lie to the Full Court as follows:

(a) if a person is convicted on information—

(i) the convicted person may appeal against the conviction as of right on any ground that involves a question of law alone;

(ii) the convicted person may appeal against the conviction on any other ground with the permission of the Full Court or on the certificate of the court of trial that it is a fit case for appeal.

[The ‘Full Court’ is the Supreme Court sitting as an appeal court with three judges].

<sup>6</sup> *Judiciary Act 1903* (Cth) s 35A.

<sup>7</sup> *Burrell v The Queen* [2008] HCA 34. There are minor exceptions to the rule which allow for the correction of error which comes to light before the result of the appeal is recorded upon the court files, where it is sought to withdraw a notice of abandonment of an appeal and where it can be said that an appeal has not been heard on the merits; *R v Edwards (No 2)* [1931] SASR 376; *R v Brain* [1999] SASC 358; *The Queen v GAM (No 2)* [2004] VSCA 117. This is discussed in greater detail in Bibi Sangha and Robert Moles, ‘Post-appeal review rights: Australia, Britain and Canada’ (2012) 36 *CRIM LJ* 300.

<sup>8</sup> *Mickelberg v The Queen* [1989] 167 CLR 259 (‘*Mickelberg*’).

<sup>9</sup> There is a similar provision in all jurisdictions: see below n 18.

judicial review.

That position presents particular difficulties for those cases where the fresh evidence relating to defects which have occurred at trial only comes to light after an appeal has been heard. As Kirby J has stated, in such circumstances, '[t]he only relief available is from the Executive Government or the media – not from the Australian judiciary.'<sup>10</sup>

We now provide an overview of our discussion and explain that this is a situation peculiar to Australia and does not arise in Britain or Canada, for example. We begin by setting out the problematic propositions in *Von Einem*. Our purpose is to compare them with the more recent case of *Martens v Commonwealth of Australia*,<sup>11</sup> a Queensland case which deals with the same issue in the federal jurisdiction. We look in some detail at *Martens* which interprets and applies the administrative law in the context of the state statutory referral power which is utilised for Commonwealth offences. It says that the provision is judicially reviewable (because of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'Judicial Review Act') and, importantly for our purposes, sets out the basis upon which such a review should proceed. However, the state statutory referral power in the context of state offences, where there is no Judicial Review Act (such as South Australia) is said to be not judicially reviewable (*Von Einem*). We say that this inconsistency is better avoided. The main reason for utilising the state referral power in the context of Commonwealth offences is to maintain harmony and congruence between the state and Commonwealth systems. Clearly, this is lost if the *Von Einem* position is maintained.

Later in this article, we widen the critique by explaining that the

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<sup>10</sup> Justice Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195, 206. See also *Sinanovic's Application* (2001) 180 ALR 448, [5] (Kirby J) 'By the authority of this Court [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.'

<sup>11</sup> (2009) 174 FCR 114 (*Martens*).

*Von Einem* propositions are not consistent with international human rights principles (particularly the *International Covenant on Civil and Political Rights*) nor with the principles of legality and the rule of law. We note that the Legislative Review Committee of the South Australian Parliament has recently issued a report which recommends the establishment of a further statutory right of appeal. If that were to eventuate, then it would provide an effective alternative to the common law remedy to the ‘*Von Einem* problem’ advocated in this article.

Our conclusion is that where the principles of legality, the rule of law, compliance with international human rights and the overall coherence and consistency of the criminal appeal system favour a result, the courts should adopt it. We say that the state jurisdictions which do not have a Judicial Review Act should determine that the Attorney-General’s statutory referral power is judicially reviewable at common law<sup>12</sup> – and that the *Martens* principles should be the guiding principles to be applied in the state jurisdiction as well as in the federal jurisdiction. In addition, if the proposed legislated right of appeal were to apply the test set out in *Martens*, it would provide congruence between common law interpretations and legislated appeal rights. It is worth noting that the Australian position is out of step with other comparable jurisdictions such as the United Kingdom and Canada. In the UK since 1997, Criminal Cases Review Commissions (CCRCs) have been established in Birmingham and Edinburgh. They are independent statutory bodies set up specifically to review alleged miscarriages of justice where there have already been unsuccessful appeals.<sup>13</sup> If a referral is made to the appeal court by the CCRC that court is obliged to hear the appeal. Where a CCRC declines to refer the matter, it will provide draft reasons prior

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<sup>12</sup> In *Watson v The State of South Australia* [2010] SASCF 69 a determination by the Governor in respect of a prerogative power to affirm or reject a Parole Board recommendation was found to be judicially reviewable.

<sup>13</sup> A detailed discussion of the role and function of the CCRCs is set out in Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law Inc, 2010) 325-67.

to making the decision and formal written reasons after doing so. A determination of the CCRC is judicially reviewable.<sup>14</sup> In the Birmingham CCRC's first 12 years, referrals to the Court of Appeal have led to some 325 convictions being overturned, including 72 murder convictions and 37 rape convictions.<sup>15</sup> In Canada, post-appeal review petitions are submitted to the federal Attorney-General.<sup>16</sup> Here too, draft reasons are provided prior to the making of any determination and final written reasons are provided after the making of a determination. A decision not to refer a petition to the court is judicially reviewable.

## II THE CASE OF *VON EINEM* AND THE SOUTH AUSTRALIAN PETITION PROCEDURE

All of the Australian states and territories have a similar statutory power which allows for the executive to refer suitable cases to the Court of Appeal to be heard as a further appeal.<sup>17</sup> The South Australian provision provides:<sup>18</sup>

369—References by Attorney-General

<sup>14</sup> See, eg, *Boyle v CCRC* [2007] EWHC 8.

<sup>15</sup> Current figures are available at <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>.

<sup>16</sup> A discussion of the Canadian petition procedure is set out in Sangha, Roach and Moles, above n 13, 114-22.

<sup>17</sup> New South Wales also has a provision which has a number of ancillary powers not available in other states or territories. It is contained in Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) ss 76-82 and 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 Australian Capital Territory also has a provision to enable the executive or the Supreme Court to order an inquiry, see *Crimes Act 1900* (ACT) ss 422-5; *Eastman v Marshall* [2012] ACTSC 134, judicial review of failure to order an inquiry. Such inquiries are regarded as administrative rather than judicial proceedings.

<sup>18</sup> *Criminal Law Consolidation Act 1935* s 369 (SA). Corresponding provisions in the other states and territories are contained in *Crimes (Appeal and Review) Act 2001* (NSW) s 77; *Crimes Act 1958* (Vic) s 584; *Criminal Code 1899* (Qld) s 672A; *Sentencing Act 1995* (WA) s 140; *Criminal Code 1924* (Tas) s 419; *Criminal Code 1983* (NT) s 431; *Crimes Act 1900* (ACT) s 475.

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

(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; ...

Bevan Von Einem had been found guilty of murder in November 1984. His appeal was dismissed. An application for leave to appeal to the High Court was refused. Subsequently, Von Einem's solicitors claimed that there was material information which had been in the possession of the police at the time of the trial and not disclosed to the defence. The non-disclosure was said to have been prejudicial to a fair trial. A petition was submitted requesting the matter be referred to the Full Court. The Attorney-General determined that no further action would be taken. Von Einem sought to have the decision not to refer the petition quashed. He said he had been denied natural justice and that the Attorney-General had wrongfully failed to exercise his discretion to refer the matter to the Full Court.

On the application for judicial review, Prior and Lander JJ delivered judgments which contained different reasons. Wicks J stated that he agreed with the reasons given by Prior J. All three judgments agreed that the determination of an Attorney-General on a petition was not judicially reviewable.<sup>19</sup> Lander J said:

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

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<sup>19</sup> The view might be taken that the reasoning of Lander J lacked authority because it was not part of a majority judgment. However, it formed an important part of the discussion in *Martens* (as we will see) and it has been extensively quoted by the current Solicitor-General for South Australia (Martin Hinton QC), who is responsible for providing advice in relation to a number of petitions, see Martin Hinton and David Caruso, 'The Institution of Mercy' in Hon Justice Tom Gray, Marin Hinton QC and David Caruso (eds) *Essays in Advocacy*, (Barr Smith Press, 2012).

petitioner. The petition assumes all legal rights have been exhausted. A petitioner seeks mercy and no more than that.<sup>20</sup>

He went on to say:

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. 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.<sup>21</sup>

This means that where totally compelling evidence emerges (after an unsuccessful appeal) that a person has been wrongly convicted, there is no *legal right* to any further hearing of the matter. The Attorney-General has a *power* to refer the matter to the Court of Appeal, but if the Attorney were to exercise the power capriciously, or not at all, then the courts will not intervene.

### III ADMINISTRATIVE LAW PRINCIPLES

The principles of administrative law make it clear that the court cannot compel a decision-maker, vested with a discretion, to exercise it in a particular manner.<sup>22</sup> The most that can be done is to require the decision-maker to make a decision. Where there has been an unreasonable delay, that might constitute a successful ground for judicial review, it being said that, '[a] refusal or failure to do an act or make a decision is reviewable if the person concerned was under a duty to act or decide'.<sup>23</sup> Yet, as we have just seen, Lander J has made it clear that his view is that the Attorney-General has a 'power' to refer the matter to the court, unaccompanied by any corresponding duty. If that is the case, then there is authority to the effect that

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<sup>20</sup> *Von Einem*, above n 3, [120].

<sup>21</sup> *Ibid* [121].

<sup>22</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action*, (Thomson Reuters, 4<sup>th</sup> ed, 2009) [13.40].

<sup>23</sup> *Ibid* [6.150].

‘[f]ailure to act or decide where the Act in question creates a mere power not coupled with a duty cannot amount to a breach of duty.’<sup>24</sup> It is important to consider the context in which this discretion arises. In *R v Grierson* (1937) Jordan CJ in the New South Wales Court of Criminal Appeal said:

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.<sup>25</sup>

Similar comments have been made in a number of appeal cases considering this issue.<sup>26</sup> Yet, as a matter of statutory interpretation:

If the court is satisfied that the purpose or object of the Act (or the provision in question) would be defeated if a task were not carried out by a person or body, it will rule that the provision is obligatory and the possessor of the power has no discretion to refuse to exercise it.<sup>27</sup>

The authors cited *Cooper Brookes (Wollongong) Pty Ltd v TCT* (1981)<sup>28</sup> for the proposition that one must look to the consequences of competing interpretations and consider the rules of construction more as rules of common sense (as opposed to rules of law) and seek that interpretation which accords more with ‘the fairer and more convenient operation’.<sup>29</sup>

Throughout the discussion in *Von Einem*, the judges clearly

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<sup>24</sup> Ibid n 196, citing *Brownsville Nominees Pty Ltd v Federal Commissioner of Taxation* (1988) 19 FCR 169.

<sup>25</sup> (1937) 54 WN (NSW) 144.

<sup>26</sup> See, eg, *The Queen v GAM (No 2)* [2004] VSCA 117; *R v Andrews* [2012] SASC 78.

<sup>27</sup> Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7<sup>th</sup> ed, 2011) 347-8.

<sup>28</sup> 147 CLR 297 (Mason and Wilson JJ) 320-1, 169-70.

<sup>29</sup> Pearce and Geddes, above n 27, [2.38].



contemplated that the statutory referral power was *ancillary* to the mercy power.<sup>30</sup> However, as a matter of statutory construction, the better view is that it should be seen as distinct. The Australian appeal provisions were taken from the *Criminal Appeal Act 1907* (UK), which introduced a right of appeal in criminal cases. Before that there was no general right of appeal. There were some procedures for dealing with error at trial,<sup>31</sup> but they often led to the overturning of convictions for merely technical error such as typographical errors in the indictment.<sup>32</sup> The prerogative of mercy was at that time used to provide a remedy against a miscarriage of justice where people had been wrongly convicted. It was also used to relieve from the strict application of the criminal law in cases where people had been rightly convicted but were deserving of ‘mercy’ – such as a terminally ill person being released from prison before the expiration of the sentence.

The executive referral process to the court was subsequently enacted as a new statutory power which would lead to a new appeal. However, it can be seen from the South Australian provision, that the drafters of the legislation were content to continue to use a petition for mercy as a trigger for the exercise of the statutory appeal reference. If we consider the wording of the provision it starts off by stating that it is dealing with: ‘References by Attorney-General’. It states: ‘Nothing in this Part affects the prerogative of mercy’ - indicating that the statutory appeal reference and the mercy power are separate and distinct. It continues, ‘on the consideration of any petition for the exercise of Her Majesty’s mercy’ - indicating that the statutory appeal reference can only be triggered by a petition for mercy, which procedurally has to be addressed to the Governor. It then explains that in those circumstances, the Attorney-General may then decide to refer the matter to the Full Court as an alternative to advising the Governor to exercise the mercy power. It is important to appreciate that a petition to the Governor for the exercise of the mercy power will in any event end up for consideration by the

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<sup>30</sup> A point mentioned with approval by Hinton and Caruso, above n 19, 538-9.

<sup>31</sup> See Sangha, Roach and Moles, above n 13, 56.

<sup>32</sup> Roger Traynor, *The Riddle of Harmless Error* (Ohio State University Press, 1970).

Attorney-General. As is explained in *Von Einem*, on the receipt of a petition, the Governor will be constitutionally required to seek the advice of the government's ministers. The Governor will refer it to the Premier who will then refer it to the government's chief law officer (the Attorney-General) for advice. This means that when the Attorney-General is considering a petition for mercy, if it is thought that it raises a legal question about the adequacy of the conviction, it can be referred to the court for consideration.

It is clear that the discretion to be exercised in the context of the prerogative-mercy power is quite distinct from the statutory-appeal discretion in terms of:

- the officials exercising the power (the Governor or the Attorney-General);
- the considerations which are relevant to the exercise of it (compassion or legal principles);
- the consequences which flow from it (forgiveness or 'justice according to law').

The mercy power is concerned to temper justice with mercy in order to allow for specific moral issues which go *beyond* the requirements of the law. The executive discretion to allow a further appeal is a means by which the court can make a determination as to whether the conviction was correct *within* the requirements of the law. The distinction is borne out by the fact that when hearing an appeal after such a referral, the court sits judicially and not as an adjunct of the Executive.<sup>33</sup> The consequences which flow in relation to the exercise of the relevant powers were explained by Heydon J in *Eastman v*

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<sup>33</sup> It is noted in the Wilson Advice, above n 1, 17: *R v Young (No 2)* [1969] Qd R 566; *Aylett v R* [1956] Tas SR 74, 81 (Crisp J) noting also that the matter is removed by action of the executive into the 'judicial sphere'. 'It does not return. The royal prerogative of mercy of course remains and is unaffected by these proceedings ...'. As we will see, it is also a point which was made in *Martens*, above n 11. This contrasts with a judicial inquiry, see *Crimes Act 1900* (ACT) s 424: 'Proceedings on an application are not judicial proceedings'.

*DPP*:

At common law the pardon “is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.” In England it has been held that at common law, “the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, ‘all pains penalties and punishments whatsoever that from the said conviction may ensue,’ but not to eliminate the conviction itself.” This type of outcome is not the outcome which a person convicted of a crime and claiming to be innocent of it would desire.<sup>34</sup>

He went on to say that:

The common law conception of a conviction is that, by it, the convicted person receives justice; the common law conception of a pardon is that, by it, the convicted person receives mercy, notwithstanding the demands of justice. Once it is apparent that the conviction is unjust, the convicted person should receive something different from a pardon, which grants mercy but assumes the validity of the conviction. Only a court can quash a conviction. “At the heart of the pardoning power there is a paradox. To pardon implies to forgive: if the convicted person is innocent there is nothing to forgive.”<sup>35</sup>

As Wilson notes, in Australia, the reference power has been referred to as a mechanism ‘discrete from the prerogative’ and as a ‘substitute for’, and an ‘alternative to’, the invocation, and the exercise of the Crown prerogative.<sup>36</sup> The court in *Von Einem* determined that the discretion to be exercised by the Attorney-General was not subject to judicial review. However, Lander J went on to consider the merits of the case, and found them to be wanting. In the application for special leave in *Keogh v The Queen*, a member

<sup>34</sup> (2003) 214 CLR 318, 350-1 (footnotes omitted), citing *R v Cosgrove* [1948] Tas SR 99, 106, approved by the English Court of Appeal in *R v Foster* [1985] QB 115, which was referred to without disapproval by Wilson J in *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364.

<sup>35</sup> *Eastmann v DPP* (2003) 214 CLR 318, quoting Rosemary Pattenden, *English Criminal Appeals 1844-1994* (Oxford University Press, 1996) 383.

<sup>36</sup> Wilson Advice, above n 1, 9, citing *Martens*, above note 11, [44-5]; *Mallard v The Queen* (2005) 224 CLR 125 [6]; *Eastman v R* (2000) 203 CLR 1 [238] (Kirby J).

of the High Court expressed surprise on hearing that judicial review of the discretion may be unavailable:

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?<sup>37</sup>

Since then Mr Hinton (in a jointly written article) has answered the question by stating that:

Lander J also holds that a decision by the Attorney-General under s 369(a) is not reviewable for any error within power save and *unless* it can be shown to be *Wednesbury* unreasonable.<sup>38</sup>

As we point out shortly, in a situation where a decision is given without reasons, *Wednesbury* unreasonableness is in practical terms the only basis upon which a challenge can be made. The purpose of this article is to say that is what the situation *ought* to be. If Mr Hinton's comment was an accurate statement of what Lander J had said (and by implication of the current legal position) then clearly we would be pushing at an open door. However, it appears that Hinton and Caruso have conflated two propositions put forward by Lander J which we think he meant to keep distinct. The first is as follows:

In my opinion, it is the result that if the Attorney-General exercises the powers given to him under s 369 within the purpose and character of the powers and within its terms *the decision at which he arrives cannot be subject to judicial review*.<sup>39</sup>

That was an unqualified statement by Lander J. He did not add 'except for *Wednesbury* unreasonableness' as Hinton and Caruso suggest. Lander J went on to explain, as Hinton and Caruso note in

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<sup>37</sup> *Keogh v The Queen* [2007] HCA Trans 693, [520].

<sup>38</sup> Hinton and Caruso, above n 19, 540, citing *Von Einem* above n 3, 143-4 (Lander J) (emphasis added).

<sup>39</sup> *Ibid* (emphasis added).

their article, that were it otherwise, every petition for mercy would potentially end up in court. Either the Attorney-General would refer it to the court, or in the event of a refusal to refer it the petitioner could seek judicial review of the refusal to refer it. Lander J then went on to say:

Judicial review is not about the review of a decision made within power except in one set of circumstances and that is in the circumstances adverted to in *Associated Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; (1948) 1 KB 223.<sup>40</sup>

That was a general statement by His Honour about the nature of judicial review. It does not suggest that it was intended to controvert his prior statement that a decision by the Attorney-General, within power, *in the context of s 369*, ‘cannot be subject to judicial review’. Taking that to be his position, we continue with our discussion that it should be and could be otherwise.

The general principle is that legislation confers two types of authority upon a decision-maker. Some legislative powers are conferred by the use of expressions such as ‘shall’ or ‘must’ and these are usually described as ‘mandatory’ powers. Others are conferred with words such as ‘may’ or as in this case, if the Attorney-General ‘thinks fit’. This confers a ‘discretionary’ power. The principles of administrative law make it clear that judicial review cannot be used to compel the exercise of discretion in favour of one outcome rather than another. What it does require is that there is a real exercise of the discretion. This means that the decision-maker will be found at fault if it is evident that the discretion was exercised by taking into account irrelevant matters, or by failing to take into account relevant matters. The decision-maker must exercise the authority granted consistently with the terms and purpose of the legislative provisions.<sup>41</sup> The *Wednesbury* principle says that, ‘... if a decision ... is so unreasonable that no reasonable [person] could

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<sup>40</sup> Hinton and Caruso, above n 19, 540, citing *Von Einem* above n 3, 143-4 (Lander J) (emphasis added).

<sup>41</sup> See Aronson, Dyer and Groves, above n 22, ch 6 and the discussion of the *Wednesbury* principle [6.175-6.245].

ever have come to it, then the courts can interfere...'.<sup>42</sup> Logan J in *Martens* provides us with a step-by-step guide to this key issue. Although formulated in the context of a statutory judicial review power, it is an analysis which will also prove to be crucial in the interpretation of the common law judicial review power.

#### IV AN ALTERNATIVE APPROACH IN MARTENS

Although *Martens* is an important case dealing with a Commonwealth criminal offence, there are, as we will see, special reasons making it particularly applicable to the statutory referral power in South Australia. In October 2006 Frederick Arthur Martens was convicted in the Supreme Court of Queensland of one count of having sexual intercourse with a person under the age of 16 years whilst in Papua New Guinea contrary to s 50BA of the *Crimes Act 1914* (Cth). He was sentenced to a term of imprisonment of 5½ years. In April 2007, the Court of Appeal dismissed his appeal against conviction and refused his application for leave to appeal against sentence. He subsequently submitted a request that the Governor-General should grant a pardon or, alternatively, that the case be referred to the Court of Appeal under the Queensland statutory referral power which is substantially similar to the equivalent power in South Australia. In September 2008, the Minister declined each of those requests. The following month, Mr Martens brought proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) seeking an order of judicial review of that decision.

It is worth noting that there had been some confusion in the way the case had been presented, and counsel for the Minister sought not to take any advantage of that by way of objection or adjournment. Importantly, the court noted that, 'given that, at least indirectly, the

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<sup>42</sup> *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 230-1 (Greene LJ).

case touches upon issues which may go to the liberty of the subject, this was the stance one might expect of a model litigant.<sup>43</sup>

#### A *Congruence Between Commonwealth and State Provisions*

The *Judiciary Act 1903* (Cth) s 68 provides that in relation to Commonwealth offences, the procedural law to be applied is that which is laid down by each of the states and territories. This includes ‘the hearing and determination of appeals’. The term ‘appeal’ is then defined by the *Judiciary Act* s 2 to include ‘an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or judge’.<sup>44</sup>

*Martens* notes that the High Court has said that this provision is a ‘central provision in the administration and enforcement of federal criminal law’ which ‘fulfils an important role in ensuring that federal criminal law is administered in each State upon the same footing as State law and avoids the establishment of two independent systems of justice.’<sup>45</sup> This goes to the very heart of our discussion about the relationship between the case of *Von Einem* and that of *Martens*. If things remain as they are then the exercise of the s 369 referral power in South Australia in relation to a state criminal offence *would not* be reviewable, but the exercise of the same statutory referral power in relation to a Commonwealth offence *would* be reviewable. The two diametrically opposed conclusions in relation to the same statutory provision appears to be the very thing the legislative scheme under the *Judiciary Act* was designed to avoid.

In *Martens*, it was said that in *Pepper v Attorney-General (Qld) (No 2)*<sup>46</sup> there was an assumption that a decision by the Queensland Attorney-General not to refer a case to the Court of Appeal under the statutory referral power was also amenable to judicial review.<sup>47</sup> This

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<sup>43</sup> *Martens* above n 11, 117.

<sup>44</sup> *Ibid* 119.

<sup>45</sup> *Ibid* citing *R v Murphy* (1985) 158 CLR 596, 617.

<sup>46</sup> [2008] QCA 207.

<sup>47</sup> *Martens*, above n 11, 120

was so by virtue of the *Judicial Review Act 1991* (Qld) which was the equivalent of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Victoria, Tasmania and the ACT also have a legislated basis for judicial review. Aronson et al suggest that these legislative provisions provide ‘procedural advantages’ over the pre-existing common law powers based upon the court’s inherent jurisdiction.<sup>48</sup> South Australia does not have an equivalent *Judicial Review Act*, so the question of the reviewability of such a decision would have to be determined by considering the common law in relation to this issue. Our view is that there is much to be said for more closely aligning the substantive common law with the provisions which apply in other states and in the federal jurisdiction. We suggest that the analysis by Logan J in *Martens* should be adopted in preference to that of *Von Einem*.

#### B *The Error of Excluding Common Law Judicial Review*

This is an issue which is of importance to each of those jurisdictions which depend upon a common law power for judicial review. In *Martens*, Logan J said early in his judgment that in *Eastman v Attorney-General (ACT)*,<sup>49</sup> Lander J (sitting as an additional judge of the ACT Supreme Court) said 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.’<sup>50</sup> A possible indication that Lander J might have moved away from the position he expressed earlier in *Von Einem*. In the following paragraph, Logan J explained that the statutory referral power is ‘a statutory adjunct to a prerogative of mercy.’ He then added:

It is consistent with the views expressed by Lander J in *Eastman v A-G (ACT)* to regard a Ministerial decision as to whether to engage that

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<sup>48</sup> Aronson, Dyer and Groves, above n 22, [2:20].

<sup>49</sup> (2007) 210 FLR 440.

<sup>50</sup> *Martens*, above n 11, 120, citing *Eastman v Attorney-General (ACT)* (2007) 210 FLR 440 [78]; adding, that 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 [41].



statutory adjunct as amenable to judicial review even if, as *Horwitz v Connor* (1908) 6 CLR 38 would bind me to hold, a decision to refuse a pardon is not itself reviewable.<sup>51</sup>

This is an important distinction, because in *Von Einem*, Lander J had perhaps overstated the close relationship between the mercy power and the statutory referral power, and hence the influence of *Horwitz* on both. This part of the judgment in *Martens* might provide support to the view that any effect that *Horwitz* had on the non-reviewability of the mercy power, should not necessarily be seen to influence views on the reviewability of the statutory referral power. In fact, Logan J continued to make this very point. He said that *Von Einem* involved

a conception that the feature that the referral power was an adjunct to the prerogative of mercy led a Full Court of the South Australian Supreme Court to hold that a Minister's decision not to refer a case to the Full Court pursuant to that State's analogue of s 672A, s 369(a) of the *Criminal Law Consolidation Act 1935* (SA), was not amenable to judicial review. Given that conception, *Horwitz v Connor* was considered to dictate that result.<sup>52</sup>

He went on to distinguish *Martens* from *Von Einem* in that the former was utilising a statutory power of judicial review, whilst the latter was considering the common law position. However, there is enough in what he said to indicate that *Horwitz* (as authority on the mercy power) may have been inappropriately extended to the issue of judicial review of the statutory referral power.

### C *Interpreting the Statutory Referral Power*

The factors in this section are important to all jurisdictions because state and federal jurisdictions have similar statutory referral powers to deal with possible miscarriages of justice. They are also important to any of the jurisdictions depending upon the common law judicial review power, because if a challenge is to be mounted on the basis of unreasonableness, it is imperative to determine what is

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<sup>51</sup> *Martens*, above n 11, 120.

<sup>52</sup> *Ibid.*

*reasonable*. The exposition by Logan J of the statutory referral power provides important guidance to any Attorney-General or Solicitor-General who has to give consideration to these issues. He commenced by discussing the importance of relevant considerations. He said that where a statute confers on an official a discretionary power to make a decision, a consideration will be a 'relevant consideration' in relation to the making of that decision if it is one which by that statute the official is bound to take into account either expressly or by necessary implication from its subject matter, scope and purpose.<sup>53</sup> He referred to *Mallard v The Queen*<sup>54</sup> and the discussion there contained about the historical development of the similar provision in West Australia. The mercy power was originally used to circumvent the excessive use of capital punishment in the 19th century and earlier. It developed into using the same procedure to deal with miscarriages of justice, 'despite the anomaly to which a successful petition might give rise, that a person who has in fact come to be considered to have been wrongly convicted or innocent, is pardoned, and not acquitted of the crime.'<sup>55</sup> The point we made earlier.

The use of that procedure became less necessary after the introduction of the *Criminal Appeal Act 1907* (UK) which allowed for appeals in criminal cases for the first time. However, as Logan J pointed out, in *Mallard*, it was fortunate that the procedure was not abandoned altogether, because there was initially a reluctance to allow appeals because of the desire to avoid interfering with jury verdicts, and he added, 'and less desirably, to the legal conservatism of some of the judiciary of the day.'<sup>56</sup> Logan J referred to *Pepper*'s case which referred to the statutory referral power as 'a mechanism which the Crown may employ so that the exercise of the pardoning power may be properly informed or so as to grant the petitioner, in

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<sup>53</sup> *Martens*, above n 11, 125, citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 1, 39-40.

<sup>54</sup> *Ibid* 126, citing *Mallard v The Queen* (2005) 224 CLR 125, [4].

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*.

effect, a further appeal.’<sup>57</sup> As it was said there, ‘[t]he issue to be determined by the Court of Appeal in considering a matter ... is the same as that falling for resolution on an appeal, namely whether there has been a miscarriage of justice.’<sup>58</sup> In referring to *R v Daley; Ex parte Attorney-General (Qld)*<sup>59</sup> Logan J noted that on such an appeal the court is not just concerned with the ‘fresh evidence’ issue, but has a broader discretion to ensure that justice is done and is seen to be done, adding that the real issue is whether a miscarriage of justice has occurred.<sup>60</sup>

Logan J in referring to *The Queen v. Young (No 2)*<sup>61</sup> also made the important point that on a reference the appeal court sits judicially and not as an extension of the executive. This means that the appeal court can only receive *admissible* evidence. However, because the Attorney-General acts *administratively*, that would allow the taking into account by the Attorney of material which would not be admissible on the consideration of a reference by the Court of Appeal:

His sources of information in this regard might, for example, be reports in the media, a petition presented to Parliament, a representation from a parliamentary colleague, or perhaps hearsay evidence as to the reliability of a complainant or other information in an application for a pardon which did not constitute admissible evidence which could be considered by an appellate court on a reference. None of these would though be considerations that he was obliged to take into account, ie “relevant considerations”.<sup>62</sup>

Logan J also referred to the observations by Mason CJ in *Mickelberg* where he referred to ‘the existence of public concern about the propriety of the convictions.’<sup>63</sup> He also emphasised the point from

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<sup>57</sup> Ibid citing *Pepper v Attorney-General (Qld) (No 2)* [2008] QCA 207, [11].

<sup>58</sup> Ibid [12].

<sup>59</sup> Ibid citing *R v Daley; Ex parte Attorney-General (Qld)* [2005] QCA 162.

<sup>60</sup> In *Daley* the court also cited *TKWJ v The Queen* (2002) 202 CLR 124; *Ali v. The Queen* (2005) 214 ALR 1.

<sup>61</sup> *Martens*, above n 11, 127, citing *The Queen v Young (No 2)* [1969] Qd R 566, 571.

<sup>62</sup> Ibid 128.

<sup>63</sup> Ibid 127, citing *Mickelberg*, above n 8, 272.

*Mallard* that the statutory provision says that the ‘whole case’ may be referred to the appeal court. On such a reference:

[The] explicit reference to “the whole case” conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words “the whole case” embrace the whole of the evidence properly admissible, whether “new”, “fresh” or previously adduced, in the case against, and the case for the appellant.<sup>64</sup>

Logan J referred to *Mickelberg v The Queen*<sup>65</sup> in stating that the test to be applied on a reference based on fresh evidence is whether the court considers that there is a *significant possibility* that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial. That does not mean that the court should form the view that such a result is either *likely* or *probable*.<sup>66</sup> Summing up, Logan J said that the task of evaluating a submission for a reference was to consider if there was evidence which might, ‘arguably’, in considering the ‘whole case’, raise a ‘significant possibility’ that the jury, acting reasonably, would have acquitted the applicant:

Not to consider such evidence at all or to fail to evaluate it by reference to such a test would, in my opinion, be to fail to take into account considerations made relevant by the subject matter, scope and purpose of [the reference power]. Were the evidence presented not, strictly speaking, “fresh”, as opposed to “new”, that circumstance would not, in itself, warrant a Minister to refuse a reference, for the Court of Appeal is not bound in such a proceeding to act only upon fresh evidence.<sup>67</sup>

Logan J then added a further important observation:

Further, it seems to me to follow from the role consigned to the Court of Appeal on a reference ... that it is no part of the role of the Minister, in deciding as a matter of discretion whether to refer a case himself, to

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<sup>64</sup> Ibid citing *Mallard*, above n 54, [10].

<sup>65</sup> Ibid citing *Mickelberg*, above n 8, 273 (Mason CJ).

<sup>66</sup> Ibid citing *Gallagher v The Queen* (1986) 160 CLR 392, 399 (Gibbs CJ).

<sup>67</sup> Ibid 128.

apply a test to the whole of the case, including the new evidence, higher than that which the court would itself apply in evaluating the case were it to be referred.<sup>68</sup>

As Logan J explained, the existence of a ‘discretion’ means that there is no ‘right’ to a referral. Obviously, some form of judgment is required by a ‘gatekeeper’ to ensure that valuable court time is not wasted by the referral of hopeless cases. However, ‘care would need to be taken not to treat as frivolous a reasonable argument with which the Minister happened to disagree.’<sup>69</sup> Logan J said that the views he had expressed on this matter were consistent with those expressed by Lander J in *Von Einem v Griffin*<sup>70</sup> which included the assumption that ‘the Petitioner has exhausted all of his or her legal rights and that all appeals have been exhausted...’. Logan J continued the exposition by Lander J as follows:

The policy, purpose and object of s 369 is to ensure, so far as practicable, that no person is the victim of a miscarriage of justice. ... even if a person has exhausted all that person's rights of appeal, that person will not be the victim of a miscarriage of justice, if later circumstances show that the conviction should not stand for any reason including that it is unsafe and unsatisfactory. It is within that policy and purpose that the Attorney General *must* act.<sup>71</sup>

The obvious question to ask is what can be done in a situation if an Attorney-General fails to do what Lander J thought ‘must’ be done? If all legal rights have been exhausted, then the ‘must’ would appear to be some sort of moral imperative without the backing of any corresponding legal imperative, especially if the Attorney-General’s failure to act is not judicially reviewable?

Logan J observed that Lander J went on to compare the discretion which arises under the statutory referral power with that which arises on an application for leave to appeal. His conclusion was:

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid 129.

<sup>70</sup> Ibid citing *Von Einem*, above n 3, 138-140.

<sup>71</sup> Ibid (emphasis added).

In any event, it is not self evident to me that the test that it is arguable that there was a miscarriage of justice [on a leave to appeal application] is any less onerous than the test asked by the Attorney General of himself, i.e. whether there was a reasonable possibility of a miscarriage of justice [in considering the statutory referral power]. *It seems to me that the tests, in a sense, ask the same question.* A point will not arguably show that there has been a miscarriage of justice unless there is a possibility that there has been a miscarriage of justice and, of course, that possibility must be reasonable.<sup>72</sup>

Clearly Lander J thought that there were close parallels between an application for leave to appeal and a petition for a statutory referral, and Logan J in *Martens* referred to all of that with approval. In *Martens*, the Ministerial statement rejecting the application was quoted by Logan J:

*As the further evidence provided in the application was not fresh or compelling* it does not warrant further consideration of this case by the Court of Appeal.<sup>73</sup>

Logan J described this as an ‘overly rigorous test in deciding whether or not to refer the case to the Court of Appeal.’<sup>74</sup> In his view, the proper test was

to secure the setting aside of a conviction, it is enough that the appellate court, considering the case as a whole, concludes that there is a *significant possibility* that the jury, acting reasonably, would have acquitted the appellant.<sup>75</sup>

He added that the question as to whether the evidence ‘raises a doubt or question about the conviction or sentence’<sup>76</sup> might have been

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<sup>72</sup> Ibid (emphasis added).

<sup>73</sup> Ibid 135 (emphasis in original). As we will see in the final section of the article, this issue assumes importance in the context of the recommendations by the parliamentary committee in South Australia.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid (emphasis added).

<sup>76</sup> Ibid.

closer to the tests referred to in *Mickelberg and Gallagher*.<sup>77</sup> Importantly, as Logan J noted

the Minister is not performing the function of an appellate court, only exercising a discretion as to whether or not there is a case which warrants referral to such a court. His role is to determine whether the applicant has presented a case in which it is *reasonably arguable* that an appellate court, applying the test in those cases and upon a consideration of the whole of the case, would set aside the conviction. That is a lesser threshold.<sup>78</sup>

Logan J also noted in *Martens*, that the Minister had said that the majority of the claims raised in the application were considered at trial or on appeal and, even without the material in the application, the jury seems to have been aware that some of the evidence was questionable. As Logan J noted, that may well have been so, but that ‘the additional background of the further evidence’<sup>79</sup> might well have made a difference to all of that, however

it does not follow that because, having regard to the then state of the evidence, an appeal against conviction was dismissed, like claims made against a broader evidentiary background must necessarily meet the same fate.<sup>80</sup>

Logan J thought the reasons which were given indicated a misunderstanding of the role of the Court of Appeal upon a reference:

What the Minister has not considered is whether on the whole of the evidence, *as it now stands*, the Applicant has presented an arguable case on the authorities for the setting aside of the conviction.<sup>81</sup>

There are particular problems where a petition is rejected and formal reasons for the rejection are not provided. As we have seen, the standard view (according to *Pepper’s* case) is that the decision-maker in determining a petition request cannot be compelled to give

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<sup>77</sup> *Gallagher*, above n 66, cited at *Martens*, above n 11, 135.

<sup>78</sup> *Martens*, above n 11, 135 (emphasis added).

<sup>79</sup> *Ibid* 135-6.

<sup>80</sup> *Ibid* 136.

<sup>81</sup> *Ibid* 137-8 (emphasis added).

reasons for such refusal. We will see shortly that this position can raise an interesting human rights issue. However, where reasons are not given for a refusal, then it can give rise to a particular problem when trying to determine if the statutory discretion has been exercised according to the required legal principles.

Most probably, any adverse inferences will have to be drawn on the basis of the material contained in the petition. It might have to be shown that the evidence in the petition, construed according to principles determining what amounts to a miscarriage of justice laid down by the High Court, provided a compelling case for a referral.<sup>82</sup> As we can see, while the issue of a *compelling* case might be relevant to the existence of *Wednesbury* unreasonableness in judicial review of a failure to exercise the statutory discretion, that factor is not appropriate to utilise as a test for making the referral. However, the fundamental question is whether or not judicial review is available at all in this situation. We suggest that the issues canvassed in the following section might well have a bearing on the development of the common law power to allow for judicial review following upon a refusal to exercise the statutory referral power.

## V INTERNATIONAL HUMAN RIGHTS, THE PRINCIPLE OF LEGALITY AND THE RULE OF LAW

In view of the points mentioned earlier about the unavailability of a further appeal, or a right to bring fresh evidence to the High Court, if judicial review of the statutory referral power were unavailable, it would mean that Australian law would offend against international human rights obligations to ensure that adequate appeal processes are in place. It would also fail to safeguard the right to a fair trial.

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<sup>82</sup> Such a view has been expressed in relation to some of the petitions which have been refused in South Australia; see, eg, Robert Moles, 'The Law on Non-Disclosure in Australia: All Rights – No Remedies?' (2011) 8 *Direct Link* 8, 86-90.



The existence of those factors could well be used to persuade the court upon an appropriate application to entertain judicial review of the discretion.<sup>83</sup> Wilson says that if judicial review of this executive discretion is unavailable, a potential option for remedy is to seek recourse under the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR). Such an avenue requires all domestic avenues to be exhausted first. In a particular case this would require an application for judicial review to be made and for review jurisdiction to be declined by the court (and upheld on appeal).<sup>84</sup>

The ICCPR was signed on 18 December 1972, ratified by Australia on 13 August 1980 and entered into force for Australia on 13 November 1980.<sup>85</sup> The preamble states that all citizens have a duty to promote and observe the rights in the Covenant. Article 2 states 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 Articles 9<sup>86</sup> and 14<sup>87</sup> and Article 2.3 states that any person whose rights are violated shall have an effective remedy.<sup>88</sup> Without any right of appeal, and without any right to judicial review of a refusal to exercise the statutory referral

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<sup>83</sup> This is the view taken in the Wilson Advice, above n 1, 54, citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J) referring to the influence of the *International Covenant on Civil and Political Rights* to the development of the common law.

<sup>84</sup> Wilson Advice, above n 1, 53.

<sup>85</sup> See Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) who note that the provisions of the ICCPR are translated into the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic).

<sup>86</sup> A person shall be 'entitled to trial within a reasonable time'.

<sup>87</sup> 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'.

<sup>88</sup> Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

power, it may be said that there is no ‘effective remedy’.<sup>89</sup>

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. She said:

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 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.<sup>90</sup>

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.<sup>91</sup>

The Australian Human Rights Commission states that the United

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<sup>89</sup> See the discussion of these points in Bibi Sangha and Bob Moles ‘Post-conviction reviews – Strategies for change’, (2011) 8 *Direct Link* 9, 98-102; Bibi Sangha and Bob Moles ‘The Right to a Fair Trial in the Context of International Human Rights Obligations’ 8 *Direct Link* 10, 112-5.

<sup>90</sup> Danielle Noble ‘The right to a fair trial and avenues for criminal appeal in Australia’ (2011) 8 *Direct Link* 9, 105. See also *Wainohu v New South Wales* [2011] HCA 24.

<sup>91</sup> Australian Human Rights Commission, Submission to Legislative Review Committee of South Australia, Inquiry Into *Criminal Cases Review Commission Bill* 2010, 25 November 2011, [2.6.]

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.<sup>92</sup>

It adds, ‘the content of Australia’s international obligations will therefore be relevant in determining the meaning of these provisions.’<sup>93</sup> We note that this issue of international human rights obligations and the obligations arising from the rule of law principles were not raised in *Von Einem*. If a further case were to be brought raising these issues in this context, it is probable that it would be determined that the statutory referral power is in fact judicially reviewable. The principle of ‘legality’ is a specific principle of statutory construction which former Chief Justice Murray Gleeson, delivering an oration, defined in the following way:

courts will decline to impute to Parliament an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language, which indicates that Parliament has directed its attention to the rights and freedoms in question, and had consciously decided upon abrogation and curtailment.<sup>94</sup>

As he pointed out, there is nothing revolutionary about the principle of legality. He explained that in 1908 the High Court in *Potter v Minahan*, had adopted a passage from *Maxwell on Statutes* which

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<sup>92</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [97] (Gummow and Hayne JJ), citing *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287. This and the following point were made in Sangha and Moles ‘Post-conviction reviews’, above n 89.

<sup>93</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264-265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

<sup>94</sup> Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (Victorian Law Foundation Oration, Melbourne, 31 July 2008) 23.

said that ‘[it] is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.’<sup>95</sup> As he concluded, ‘[i]t is the working hypothesis of a liberal democracy.’<sup>96</sup>

As we noted earlier, in speaking of the statutory discretion in s 369 Lander J stated, ‘[t]he discretion is entirely unconfined.’ It might be suggested that such discretion would also be contrary to the principles of the rule of law.<sup>97</sup> As Neil MacCormick stated:

A concern for the rule of law is one mark of a civilised society. The independence and dignity of each person is predicated on the existence of a “governance of laws, not men”.<sup>98</sup>

In *The Rule of Law*, Tom Bingham devoted a chapter to ‘Law Not Discretion’. He said that where an official claims to have a discretion, but will not explain the basis for its exercise, ‘such a regime would plainly violate the rule of law’ adding, the exercise of discretion should be governed by law, not the arbitrary whim of an official.<sup>99</sup> ‘What matters is that decisions should be based on stated criteria and that they should be amenable to legal challenge.’<sup>100</sup> Judicially, this is expressed in the form, ‘[i]t must be law, not discretion which is in command.’<sup>101</sup> Gleeson CJ, writing extra-judicially, also said:

As an idea about government, the essence of the rule of law is that all

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<sup>95</sup> Ibid citing *Potter v Minahan* (1908) 7 CLR 277; PB Maxwell, (*Maxwell*) *On the Interpretation of Statutes*, (Sweet & Maxwell, 4th ed, 1905) 122.

<sup>96</sup> Ibid 24, citing *Al-Kateb v Goodwin* (2004) 219 CLR 562, 577.

<sup>97</sup> ‘It is generally accepted that the rule of law is inconsistent with the application of arbitrary power’ T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2005) 47.

<sup>98</sup> Neil MacCormick ‘Rhetoric and the Rule of Law’ in David Dyzenhaus, *Recrafting the Rule of Law* (Hart Publishing, 1999) 163.

<sup>99</sup> Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 50.

<sup>100</sup> Ibid.

<sup>101</sup> *D v NSPCC* [1978] AC 171, 239.

authority is subject to, and constrained by, law. The opposing idea is of a state of affairs in which the will of an individual, or a group, (such as a Party), is the governing force in a society. The contrasting concepts are legitimacy and arbitrariness. The word “legitimacy” implies an external legal rule or principle by reference to which authority is constituted, identified, and controlled.<sup>102</sup>

He refers to ‘arbitrariness’, ‘ad-hoc’ decision-making, and ‘unconfined discretion’ as exemplars of conduct repugnant to the rule of law. Interestingly, he added, ‘[i]n Australian legal and political discourse, a governing authority could not satisfy the requirements of the rule of law merely by being able to point to a fundamental law which empowered it to act in an arbitrary manner.’ He referred to ‘a minimum capacity for judicial review of administrative action’<sup>103</sup>, the ‘right to a fair trial’<sup>104</sup> and ‘access to the courts ... to citizens who seek to prevent the law from being ignored or violated’<sup>105</sup> as examples of practical conclusions said to be required by the rule of law. Indeed, in discussing the basic principles of judicial review, Aronson, Dyer and Groves state that

it assumes that all public power has its limits. Parliament might appear to have granted an unfettered power to an official, but the very thought of it will induce a rash in a traditional administrative lawyer. Indeed the High Court has hinted darkly that unlimited executive discretions might be unconstitutional.<sup>106</sup> Similarly, judicial discretions said to be “unfettered” generally end up having to be exercised according to established principles.<sup>107</sup>

As MacCormick points out, the essential aspects of the rule of law

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<sup>102</sup> Murray Gleeson, ‘Courts and the Rule of Law’ in *The Rule of Law Series*, Melbourne University, 7 November, 2001 (footnotes omitted), <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_ruleoflaw.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm)>.

<sup>103</sup> Ibid citing *Church of Scientology v Woodward* (1982) 154 CLR 25, 70-71 (Brennan J).

<sup>104</sup> Ibid citing *Kingswell v The Queen* (1985) 159 CLR 264, 300 (Deane J); *Krakover v The Queen* (1998) 194 CLR 202, 224 (McHugh J).

<sup>105</sup> Ibid citing *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35 (Gibbs CJ).

<sup>106</sup> Aronson, Dyer and Groves, above n 22, [3:10], citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512-513.

<sup>107</sup> Ibid citing *York v R* (2005) 221 ALR 541, which the authors say ‘read down an explicit conferral of “unfettered discretion” upon the Queensland Court of Criminal Appeal’.

are that people should have some degree of certainty in advance about the rules and standards by which their conduct will be judged. They can also have some degree of security in their understanding of the conduct of others, particularly those holding official positions under the law. This means that they can challenge governmental actions that affect their interest, 'by demanding a clear legal warrant for official action.'<sup>108</sup> The institutional order of law links the warrant (rule or principle) in the individual case with the systemic justification of the legal system by the requirement that the individual norm must be linked to the wider systemic norms. As MacCormick puts it, the rules of decision and conduct must belong to the wider body of rules in a way which is internally consistent and which is characterised by a degree of overall coherence:

A solution offered must ground itself in some proposition that can be at least colourably presented as a proposition of law, and such a proposition must be shown to cohere in some way with law as already determined.<sup>109</sup>

As Gleeson CJ aptly put it, '[j]udges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles.'<sup>110</sup> The seriousness of the problem which this leads to has been set out by MacCormick:

Here, the demand for rational justifiability of governmental actions is an urgent one *if government is not to be the mere mask of tyranny*. Hence it has to be generally understood as legitimate to demand that any governmental act be warranted by explicit provisions mandating, permitting or authorising decisions in specific terms (or involving some bounded discretion) only when certain quite clearly specified circumstances obtain.<sup>111</sup>

As discussed earlier, there are legitimate areas where governmental

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<sup>108</sup> MacCormick, above n 98, 165.

<sup>109</sup> Ibid 171.

<sup>110</sup> Gleeson, above n 102, citing *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

<sup>111</sup> MacCormick, above n 98, 172 (emphasis added). He also states, '[a]t the heart of the liberal idea of free government is the idea that when governments act towards citizens, their action must be warrantable under a rule ...': at 173.

officials are provided with discretionary powers and while acting within the scope of those powers will not be subject to judicial review. This is what MacCormick refers to as a ‘bounded discretion’. This is to be contrasted with the idea of an ‘unfettered discretion’ which is said to be contrary to the rule of law:

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.<sup>112</sup>

This link between the rule of law and judicial review as a tool to avoid ‘unfettered discretions’ was seen by Aronson, Dyer and Groves to be a guiding force in the thinking of Professor Wade, when they referred to his, ‘... consistent opposition to “uncontrollable power” or “unfettered discretions”, an opposition he believed justifiable on the basis of a substantive view of the rule of law.’<sup>113</sup>

Justice French, before becoming Chief Justice of the High Court of Australia stated in his extra-curial review of this issue that:

It is fundamental to the rule of law that there is no such thing as an unfettered discretion. .. A statute conferring unfettered power upon an official would be unconstitutional, for an unfettered power would know not even constitutional limits.<sup>114</sup>

As he explained, the Commonwealth Constitution provides limits within which the legislative competence of the states and territories must be exercised.

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<sup>112</sup> Bingham, above n 99, 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 Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press, 2005).

<sup>113</sup> Aronson, Dyer and Groves, above n 22, [3:120].

<sup>114</sup> Robert French, ‘Administrative Law in Australia: Themes and Values’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 18.

The rule of law is constitutionally guaranteed, in respect of official decision-making, by s 75(v) of the Constitution which directly confers upon the High Court original jurisdiction in all matters: 'In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.' The subject is thus provided with a mechanism to challenge the lawfulness of the exercise of official power.<sup>115</sup>

And if judicial authority were required, he cited Kirby J for the proposition that, '[n]o Parliament of Australia could confer absolute power on anyone.'<sup>116</sup> He cited Denning MR for the observation that, '[t]he discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law.'<sup>117</sup>

All laws, Commonwealth and state, are affected by interpretive principles which prevent, as a matter of their internal logic, the creation of unfettered discretions.<sup>118</sup>

In *Lacey v Attorney-General of Queensland*,<sup>119</sup> the High Court was considering a legislative provision which expressly provided for an 'unfettered discretion' granted to the appellate court to vary a sentence.<sup>120</sup> 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].<sup>121</sup>

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid 19, citing *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, [69-70].

<sup>117</sup> Ibid citing *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, 190.

<sup>118</sup> Ibid.

<sup>119</sup> *Lacey v Attorney-General of Queensland* [2011] HCA 10.

<sup>120</sup> *Criminal Code* (Q) s 669A (1).

<sup>121</sup> *Lacey*, above n 119, [19], citing *Malvaso v The Queen* (1989) 168 CLR 227, 234 (Deane, McHugh JJ).



In *Byrnes v The Queen*<sup>122</sup> 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’,<sup>123</sup> such an approach, ‘is not therefore a construction lightly to be taken as reflecting the intention of the legislature.’<sup>124</sup> More recently, in *South Australia v Totani*, the Chief Justice of the High Court stated that, ‘[t]here must be the universal application throughout the Commonwealth of the rule of law; an assumption “upon which the Constitution depends for its efficacy”.’<sup>125</sup> As we have seen, it is also an assumption which distinguishes us as citizens of a lawful and legitimate community from those who would otherwise be subjected to arbitrary governmental power, which MacCormick referred to as ‘the mere mask of tyranny’.

## VI CONCLUSION - A NEW LEGISLATED RIGHT OF APPEAL

One further possibility for resolving this issue has been proposed in South Australia. In November 2010, an Independent member of the Legislative Assembly (Ann Bressington) introduced a Bill to establish a CCRC. 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

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<sup>122</sup> Ibid citing *Byrnes v The Queen* (1999) 199 CLR 1, [54] (Gaudron, McHugh, Gummow, Callinan JJ).

<sup>123</sup> Ibid [20], citing *Malvaso*, above n 119.

<sup>124</sup> Ibid.

<sup>125</sup> *South Australia v Totani* (2010) 242 CLR 1, [6]. *Totani* made it clear that it would be inappropriate for administrative decision-making to impinge upon the proper role and functions of the courts. Perhaps 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.

Australia<sup>126</sup> as did the Australian Lawyers Alliance.<sup>127</sup> When it reported,<sup>128</sup> the Committee stated that while it 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.’<sup>129</sup> It recommended the establishment of new criminal appeal rights, new mechanisms to review flawed forensic evidence, and a review of the way in which expert evidence is used in criminal cases. It recognised the limitations on the current system of criminal appeals and pointed out that the petition procedure, is rarely used, lacks timeframes, structure and transparency.<sup>130</sup> A principle recommendation of the Committee was that the legislation:

be amended to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that:

- the conviction is tainted;
- where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person.<sup>131</sup>

It is important to point out that the recommendation is seeking to establish the test by which deserving cases are to be assessed for referral to the Court of Criminal Appeal. It is not seeking to alter the substantive law to be applied by the Court upon the hearing of such an appeal. That law and those principles have been laid down by the High Court of Australia in a number of cases in recent years.<sup>132</sup>

As we noted earlier, in *Martens* the Federal Minister had refused

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<sup>126</sup> Channel 7, *Today Tonight* (Adelaide), 28 March 2012.

<sup>127</sup> Tony Kerin, Letters to the Editor – ‘System is Archaic’, *The Advertiser*, Adelaide, 7 March 2012.

<sup>128</sup> Legislative Review Committee *On Its Inquiry Into The Criminal Cases Review Commission Bill* tabled in the Legislative Council 18 July 2012.

<sup>129</sup> Recommendation 1, 81.

<sup>130</sup> *Ibid* 82.

<sup>131</sup> Recommendation 3.

<sup>132</sup> They have been discussed in some detail in Sangha, Roach and Moles, above n 13, ch 5.

to refer a case under the petition procedure precisely because the evidence in that case was not thought to be ‘fresh or compelling’.<sup>133</sup> Logan J in *Martens* had described this as an ‘overly rigorous test in deciding whether or not to refer the case to the Court of Appeal’.<sup>134</sup> He explained that the proper test on an appeal was whether there was a ‘significant possibility’ that the jury, acting reasonably, would have acquitted the appellant.<sup>135</sup> The applicant for a statutory referral only had to raise an arguable case, and it was not for the Minister to apply a higher test than that which the court on hearing an appeal would apply.<sup>136</sup> It follows that the proper question to be asked in evaluating a petition or on a leave to appeal application is: ‘Is it *reasonably arguable* that there is a *significant possibility* that there has been a miscarriage of justice?’<sup>137</sup> Where that has occurred, the court is *bound* to act – it *must* set aside the guilty verdict.<sup>138</sup>

As we saw, the Human Rights Commission in its submission to the Parliamentary Inquiry stated, ‘a convicted person is entitled to have *effective access* to each level of appeal with the procedural protections of article 14 applying *equally* at each level of appeal’.<sup>139</sup> If the test for a referral for a second or subsequent appeal is more demanding than that for the first appeal, it might be thought that the procedural protections are not being *equally* applied. Therefore, we suggest, the statutory wording in the Bill should not use the words whether there is ‘fresh or compelling’ evidence that there has been a miscarriage of justice. It should apply the test ‘whether it is *reasonably arguable* that there is a *significant possibility* that the jury, acting reasonably, would have acquitted the appellant?’ If that is done, and the common law and statutory powers are amended as we suggest:

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<sup>133</sup> *Martens*, above n 11, [66] (emphasis added). For this and the following points see text and nn 72-77.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid* [67] (emphasis added).

<sup>136</sup> *Ibid* [52] (emphasis added).

<sup>137</sup> *Martens*, above n 11, [55], citing *Von Einem*, above n 3, 138-140 (emphasis added).

<sup>138</sup> *M v R* (1994) 181 CLR 487, [9]. This is discussed by Sangha, Roach and Moles, above n 13, 153.

<sup>139</sup> Australian Human Rights Commission, *Inquiry Into Criminal Cases Review Commission Bill 2010 Submission*, [13].

- The test for leave to appeal upon a first or subsequent appeal; and
- The test for a referral of a petition in both state and federal jurisdictions; will be the same.

As we said earlier, where the principles of legality, the rule of law, compliance with international human rights and the overall coherence and consistency of the criminal appeal system favour a result, the courts should adopt it. We have suggested that the common law should evolve to ensure that the *Martens* principles are the guiding principles in the state jurisdictions as well as in the federal jurisdiction. In addition, if a new legislated right of appeal were to apply the *Martens* standard, it would provide congruence between common law interpretations and legislated appeal rights.